

H.E. NO. 2017-7

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GOVERNMENT WORKERS UNION,
Respondent,

-and-

Docket No. CO-2017-074

AFSCME DISTRICT COUNCIL 71,
LOCAL 3408,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that an employee organization (Government Workers Union) violated section 5.4b(1) of the Act by dissipating or removing \$20,000 from the majority representative's bank account in order to distribute "gift cards" valued up to \$325 to individual unit employees at or around the time that organization filed a representation petition seeking to become the majority representative of employees in that unit. The employee organization had engaged in the same conduct in an earlier representation proceeding.

Among remedies ordered, the Hearing Examiner effectively barred the filing of a representation petition by GWU seeking to represent the specific unit until the "open period" for an agreement that expires on December 31, 2022. The Hearing Examiner also ordered the Respondent to post a link on its website referring County employees to a Commission Notice to Public Employees of Atlantic County.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
David L. Tucker, President, GWU

For the Charging Party
David B. Beckett, attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 5, 2016, AFSCME District Council 71, Local 3408 (Local 3408) filed an unfair practice charge against Government Workers Union (GWU), and its agents and against the County of Atlantic (County). The charge alleges that GWU filed a representation petition [Docket No. RO-2017-007, filed September 6, 2016], together with "signed [showing of interest] cards . . . obtained under false pretense" seeking to represent Local 3408's collective negotiations unit employed at the County's Meadowview nursing facility. Specifically, the charge alleges that on or

about August 20, 2016, Local 3408 President Eric McGlone and Treasurer India Cooper diverted \$20,000 from Local 3408's bank account to a personal account they controlled, ". . . so that the money could be available for gift cards [ranging from \$20 to \$300] that GWU was promising to members if they signed cards for GWU."

The charge alleges that AFSCME International President Lee Saunders suspended Local 3408's board members, including McGlone and Cooper, and placed Local 3408 under "administratorship," resulting in an AFSCME "judicial panel" hearing authorized by AFSCME's Constitution. The panel determined that McGlone and Cooper "flagrantly violated" the AFSCME constitution and financial standards code by opening a personal account with Local 3408's funds. The charge alleges that GWU has continued to tell members to vote against Local 3408 if they want to receive gift cards. The charge alleges that GWU's actions are consistent with its behavior toward AFSCME Local 2783, from which a diversion of close to \$10,000 in funds was distributed among the Local's members. GWU's conduct allegedly violates section 5.4b(1), (2)

and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The charge also alleges that the County has taken no action to stop GWU from intimidating voters (unit members) and that it favors GWU in the representation process, violating section 5.4a(1), (2), (3), (4), (5) and (7)^{2/} of the Act. On November 1, 2016, Local 3408 filed an amendment, withdrawing its charge against the County.

1/ These provisions prohibit employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (5) Violating any of the rules and regulations established by the commission."

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. (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."

On November 3, 2016, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the allegation that GWU's conduct violated section 5.4b(1) of the Act. On November 10, 2016, GWU filed an Answer denying the allegations and seeking dismissal of the Complaint.

On November 28 and 30, 2016, I conducted a Hearing at which the parties examined witnesses and presented exhibits. A post-hearing brief was filed on January 30, 2017. Replies were due by February 3, 2017.

Upon the record, I make the following:

FINDINGS OF FACT

1. Local 3408 of AFSCME District Council 71 is the exclusive representative of a collective negotiations unit of about 170 employees of Atlantic County at the Meadowview Nursing Home and the Kitchen/Warehouse (see D.R. No. 2017-9, 43 NJPER 213 (¶65 2016); 2T102).^{3/} Its most recent collective negotiations agreement with the County extended from January 1, 2014 through December 31, 2016 (C-3). The unit includes food service workers, certified and non-certified institutional attendants, cooks, laborers, licensed practical nurses, building maintenance workers

^{3/} "C" represents Commission exhibits; "CP" represents Charging Party exhibits; and "R" represents Respondent exhibits. "T" represents the transcript, preceded by a "1" or "2", signifying the first or second day of hearing, followed by the page number(s).

and others. Salaries in 2016 ranged between \$24,150 and \$40,000 (C-3).

2. AFSCME International Constitution is binding on AFSCME Councils and Locals, alike (1T25). Section 36 provides:

The funds or property of a subordinate body, whether chartered or not, shall not be divided among the members but shall remain intact for the use of such subordinate body for its legitimate purposes while such subordinate body exists. When any such subordinate body secedes or discontinues its affiliation, all monies, books, collective bargaining agreements and any other memoranda of understanding or other agreements concerning wages, hours or terms and conditions of employment of members of such subordinate body and other properties shall be transmitted to the International Secretary-Treasurer and assigned to the International Union. . . . [CP-1]

Section 37 empowers the AFSCME International President to place a "subordinate body" [or Local] under "administratorship pending notice and hearing" if "the dissipation or loss of the funds or assets of a subordinate body is threatened" or if the subordinate body ". . . is acting in violation of this Constitution." The section also commands the International President to "immediately refer the matter to the Judicial Panel for hearing . . ." (CP-1).

3. In May, 2013, AFSCME promulgated a "secretary-treasurer workbook" setting forth a "financial standards code" applicable to each of its "affiliates," the ascribed purpose of which is

". . . to establish minimum standards to be met by affiliates in the handling of their funds and other assets and in their maintenance of their financial records" (CP-7).

Article VI, "Expenditures - Procedures" provides at section 7:

Checks may not be made out to 'cash.' Checks must be payable to either an individual, who is responsible for providing a complete and proper accounting as to how those funds were spent, or to a vendor, who must submit receipts, invoices or other appropriate documentation. [CP-7]

4. Eric McGlone has been employed by the County at Meadowview for more than 13 years. In August, 2016, he was serving his third or fourth year as Local 3408 President and member of its executive board (2T86, 201). McGlone admitted attending AFSCME conventions and receiving training in AFSCME constitutional requirements. He admitted his duty to act in accordance with that constitution, including his duty to produce "records," and Local meeting minutes upon demand of AFSCME Council 71 (2T99-102).

India Cooper is a "certified nursing assistant" employed by the County at the Meadowview facility for about 12 years. In August, 2016, Cooper was serving her sixth consecutive year as secretary-treasurer of Local 3408 (2T165, 201). Her duties for Local 3408 included participating and voting in its "executive board" meetings, writing checks on behalf of Local 3408,

balancing its checkbook and maintaining its financial records (2T166). Cooper admitted knowing of and being obligated to follow the AFSCME International Constitution and the "financial standards code" (2T203, 204).

Kay Austin is a "certified nursing assistant/restorative aide" employed by the County at the Meadowview facility for about 4 years. In August, 2016, she was secretary of Local 3408 and a member of its executive Board (2T136-137). She admitted knowing about AFSCME's International Constitution but denied knowing in August, 2016 that any AFSCME local is prohibited from "dividing" or dissipating its funds (2T149). She admitted her (uninformed) belief that distribution of 85% of Local 3408's treasury was not "dissipating funds," testifying:

We took a vote. It's our body's money. They took a vote. The majority won. And that's how everything works. If I disagree, it still worked. The majority rules. [2T149]

5. Mattie R. Harrell is Executive Director of AFSCME District Council 71 that is comprised of all principal locals, including Locals 3408 and 2783 (2T35-37). Joseph Waite is Associate Director of AFSCME District Council 71 and was appointed deputy administrator of Local 3408 on or about August 31, 2016 (1T18, 25-26). Cleodis Mobley, Jr. is President of AFSCME Local 2218 (under the auspices of District Council 71) that represents employees at Ancora Psychiatric Hospital (2T7-8).

They each testified that the Locals are and have authorized the allocation and distribution of \$25 or \$50 gift cards among the membership(s) at or around the "holiday season," following a majority vote of both a local's executive board and its general membership, at the next regular monthly meeting (1T50, 2T9-10). I infer that the "holiday season" is sometime in the month of December. Mobley testified credibly and without contradiction that he and his local's executive board authorized the distribution of \$25 gift cards at or around a holiday season, followed by a concurring vote of the membership and recorded in that meeting's minutes (2T9-10). Harrell admitted that in her experience, the highest gift card amount given to unit employees was \$100 (2T68). She credibly elaborated that gift cards totaling more than 5-10% of a local's treasury ill-advisedly depletes funds needed for training, conventions, arbitrations and emergencies (such as an announced plan to privatize certain governmental services, implicating layoffs of unit personnel) (2T38-39).

6. (Now former) Local 3408 President McGlone testified that about two years ago [2014], Harrell stated to County representatives an intention to file an unfair practice charge against the County contesting involuntary deductions from unit employee paychecks for alleged infractions of sick leave verification requirements and failed to do so (2T103-104). He

testified that the membership ". . . was just upset in an uproar and they wanted a change [in representative]" (2T87). Harrell did not rebut or contextualize McGlone's testimony about her or Council 71's omission; I credit his testimony. In the absence of other facts or circumstances, I do not find that that omission, standing alone, caused "everybody to be in an uproar" and desirous of seeking another majority representative.

7. On April 18, 2016, David Tucker, President of GWU, filed a representation petition on behalf of GWU (Docket No. RO-2016-043), seeking to represent a collective negotiations unit of about 70 blue collar employees and white collar employees of Pemberton Township, then-represented by AFSCME Local 2783. The now-closed Commission file regarding that petition includes copies of letters dated May 3, 2016 from AFSCME International President Lee Saunders to the Pemberton Township Administrator, a Bank of America branch office in Browns Mills, N.J. and, under separate covers, all officers of AFSCME Local 2783, including its President, Dennis Lalumiere, advising that the Local has been placed under administratorship; that Joseph Waite is appointed as deputy administrator of the local; that all officers are "immediately suspended" and have "no authority" to transact any business regarding the local's funds.

On May 5, 2016, the Director of Representation issued a letter advising that AFSCME Council 71 properly intervened in the

petition, pursuant to N.J.A.C. 19:11-2.7. All parties subsequently signed a consent agreement for a secret mail ballot election conducted under Commission regulations between June 3 and June 27, 2016. The Commission's June 27th tally of ballots document shows that GWU received 54 votes and AFSCME Council 71 received 0 votes. I take further administrative notice that the attending observer and signator on the tally sheet on behalf of GWU was Dennis Lalumiere. On July 6, 2016, the Director issued a Certification of Representative on behalf of GWU. On July 11, 2016, the showing of interest that accompanied GWU's petition was returned to the organization.

Waite testified that Local 2783 had been "served" by former AFSCME Council 71 representative Rafael Valentin until he was fired in November, 2015 (1T73-74). He credibly testified that Valentin knows the memberships of the principal locals of AFSCME Council 71 (1T74). Waite and Mobley testified without contradiction that Valentin was subsequently employed by GWU (1T74, 2T16). Waite opined credibly and without contradiction:

A normal, ordinary person cannot just walk into a labor organization and say, 'I'm here to sign you up for my group.' That doesn't happen . . . [The membership] would kick them out. So you have to have an [entrée] into that labor organization. That's what Valentin provides. [1T75]

Mobley testified that in September 2016, Valentin called him, expressing "disappointment" that he was helping to "educate"

AFSCME members at the Meadowview facility during the administratorship of Local 3408. Mobley asked Valentin to explain. Mobley testified of Valentin's reply:

He said: 'We're going to take that Local [3408] and we're going to take every local in Atlantic County and there's nothing AFSCME can do to stop it.' [2T16]

Mobley testified that Valentin also said: "I never wanted to be the Director [of AFSCME Council 71]; I just wanted more money" (2T17). I credit Mobley's unrebutted testimony.

8. A copy of a Bank of America New Lisbon, New Jersey branch statement for April 2016 setting forth AFSCME Local 2783's account shows a "beginning balance" of about \$10,500 and an "ending balance" of about \$860, owing to pre-printed "AFSCME No. 2783 c/o Pemberton Township" checks handwritten and cashed totaling about \$9,700 (CP-5). The statement more specifically lists and sets forth photocopies of 67 consecutively enumerated checks with one omission. One check for \$435, dated March 7, 2016, was payable to a specified food caterer. Another check for \$547.50, dated March 5, 2016, was payable to and co-signed by Dennis Lalumiere. A handwritten notation on the lower left corner of that check provides: "gift card" (CP-5). Almost all of the checks are dated between April 5 and 29, 2016, with an overwhelming majority dated April 19 and 20, 2016. The uniformly rounded-out dollar amounts of those checks vary, with the vast majority payable (in order of frequency) for \$175, \$125, and \$150

to Local 2783 unit employees, individually. (Persons are identifiable as unit employees by comparing names of payees on those AFSCME Local 2783 checks with the voter eligibility list in the Pemberton Township representation file - Docket No. RO-2016-043). The photocopied checks show that Lalumiere co-signed all of them with the handwritten notation in the lower left corners, "union rebate" (CP-5).

9. Waite testified that at the time GWU's Pemberton Township representation petition was filed, Dennis Lalumiere was AFSCME Local 2783 President and simultaneously supported GWU by advocating on its behalf, working with GWU President Tucker and soliciting unit members (1T80, 82). In the absence of any conflicting or rebuttal evidence; in view of AFSCME Constitution requirements (finding no. 2); and corroborated by both Lalumiere's distribution of about \$9,000 to all unit employees within one to two days of the date that GWU filed its Pemberton Township representation petition and his signature on behalf of GWU on the June 27, 2016 Commission tally sheet, I credit Waite's testimony.^{4/} Considering the close timing of the filing date on

^{4/} Lalumiere's signature on the tally sheet is an admission of his allegiance to GWU and a rebuttable presumption of that allegiance and of agency dating to April, 2016, the latter relationship based principally on the timing of Local 2783 checks Lalumiere wrote to individual unit employees and to himself in connection with the filing date of that GWU petition. In the absence of any rebuttal, I find that allegiance and agency as a fact.

the petition and the distribution of AFSCME Local 2783 funds to individual unit employees on Local 2783 checks issued and signed by Lalumiere (including the \$547.50 AFSCME Local 2783 check payable to himself for a "gift card"), I infer that Lalumiere "worked with" GWU President Tucker on all aspects of that (self-described) "union rebate." Also considering that Local 3804 President McGlone admitted attending AFSCME conventions and training in AFSCME constitutional requirements, I infer that AFSCME Local 2783 President Lalumiere also attended AFSCME conventions and received the same or similar constitutional training. I infer that Lalumiere knowingly violated at least one of those requirements by "dividing" his Local's funds among the unit members, disingenuously describing it as a "union rebate."^{5/} I infer that the "gift card" notation on the (\$547.50) check

^{5/} When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. Int. Automated Machines, Inc., 285 NLRB No. 139, 129 LRRM 1265, 1266 (1987). GWU President Tucker represented GWU throughout both days of hearing in this matter and omitted to testify in the proceeding. I draw a negative inference from his failure to deny under oath that he "worked with" Lalumiere to solicit Pemberton Township unit employees to become GWU members and/or vote for GWU in the contested election while Lalumiere was AFSCME Local 2783 President. I also draw a negative inference from Tucker's failure to deny under oath that he solicited or encouraged Lalumiere to "divide" Local 2783 funds under the pretext of labeling it as "union rebates" and a "gift card."

Lalumiere handwrote to himself is a thinly-veiled effort to disguise that "division" of AFSCME Local 2783 funds.

10. McGlone testified that on an unspecified date in August, 2016, and before August 17th, GWU President Tucker attended a Local 3408 executive board meeting and provided executive board members - Cooper, Austin, Otis Dorsey, Satrina Chambers and he - GWU authorization and designation cards for unit employees to sign (2T118, 119, 121). Austin corroborated that on an unspecified date, she and other executive board members met with Tucker and questioned him about, ". . . [GWU] procedures and how they do things" (2T137-138). I infer from Austin's testimony that the meeting of Local 3408 executive board members and Tucker was not a regular, monthly Local 3408 executive board meeting (2T137-139). I credit her testimony. McGlone testified of a consequential "deadlock" of interest among executive board members in being represented for purposes of collective negotiations by GWU (2T89, 120). Austin elaborated that two executive board members wanted to be represented by GWU; two were undecided; and two wanted to continue to be represented by Local 3408 (2T138-139). I credit that testimony. Cooper admitted in her testimony that after meeting Tucker, she was "all in for GWU," believing that, ". . . the move would be a good switch" (2T171).

Austin testified of a second meeting on an unspecified date in August, 2016 that she didn't attend at which "a group of people" (comprising neither an executive board meeting nor a general membership meeting) met with Tucker (2T140). McGlone testified that on an unspecified date, he attended a meeting with Tucker and about 18 to 20 unit employees/Local 3408 members (2T105-106). I infer that McGlone's and Austin's testimonies are mutually corroborative, referencing the same meeting.

Austin testified that on an unspecified date in advance of the August 17, 2016 general membership meeting, Local 3408's officers conducted their "regular" executive board meeting at which they approved both Tucker's in-person presentation about GWU to the membership and recommending to it "gift card" rebates or "dues reimbursements" derived from Local 3408's account (2T140-141, 174). I credit that testimony. The regular executive board meeting was conducted immediately before the August 17, 2016 general membership meeting (2T175).

11. The record is not clear about when GWU authorization and designation cards were given to the Local 3408 membership for their signatures. McGlone admitted that the only Local 3408 "membership meeting" occurred on August 17, 2016, which Tucker attended and answered questions of the membership (2T120). On cross-examination, McGlone was asked if the membership on that date supported going to GWU. This colloquy ensued:

- A. They had cards to sign.
Q. Cards Tucker gave out?
A. He didn't give [them] to all the people.
He gave [them] to us at the executive
board meeting . . . if anybody wanted to
[sign them].
[2T121]

Cooper admitted that the membership in the meeting, ". . . said 'yes,' they wanted to vote AFSCME out" and ". . . we also voted to put the vote out for the GWU" (2T176, 201). I find that McGlone's and Cooper's testimonies are partially true and equivocal, in light of all the circumstances in the meeting, as set forth in this finding of fact. I infer from McGlone's latter response that Tucker distributed GWU authorization and designation cards to Local 3408 officers at both his first meeting with Local 3408 executive board members and at the "second meeting." Austin testified that GWU authorization and designation cards were not distributed or signed at the August 17, 2016 general membership meeting (2T150). McGlone admitted that Local 3408 members were signing authorization and designation cards on or around August 18, 2016 (2T94). I credit that testimony. Finding that unit employees were signing GWU authorization and designation cards on August 18, 2016, I have little reason to doubt that they were also signing them on August 17, 2016, during the general membership meeting, contrary to Austin's testimony and more logically consistent with McGlone's and Cooper's admissions. I also infer that cards were signed

sometime before August 17 and before September 6, 2016 (the filing date of GWU's representation petition seeking to represent the negotiations unit that is a primary subject of the Complaint). Austin corroborated that on August 17, 2016, Tucker appeared and spoke to the membership at the meeting (2T141, 149-150).

The membership also voted its approval of "gift cards" or "dues reimbursements" (2T91, 176, 201). President McGlone's intention was to distribute them "immediately." He testified:

Like I said, everybody was in an uproar about Council 71, and our only thing was to try to calm them down to let them try to fix some things . . . [2T91]

Austin was asked on direct examination of her "intention" regarding gift cards. She testified:

We were giving out gift cards. No one was promised anything with the gift cards. The gift cards actually were 'in motion' before the whole GWU thing took place because people were unhappy and we were just giving them gift cards because they were unhappy. So I was, like, give them gift cards. Like, everybody was very unhappy and we [were] giving them gift cards. [2T142]

Cooper testified that the "dues reimbursement" was intended ". . . to boost the morale of the members to try to get them back in the swing of things" (2T175). Cooper admitted that in addition to the membership expressing its desire to oust Local 3408 in the August 17, 2016 general membership meeting, ". . . we discussed moving the money for dues reimbursement" (2T176). I

infer that executive board members explained to the membership its plan for "tiered" reimbursement (finding no. 15).

I do not credit McGlone's, Austin's and Cooper's testimonies because they ignore the simultaneity of Tucker's two appearances before unit employees comprising the general membership and the distribution of GWU authorization and designation cards to them while they were "unhappy," needing to be "calmed down" or having their "morale boosted." If Local 3408's executive board believed that "gift cards" could be curative or ameliorative of "unhappiness" among the membership, why didn't that distribution unequivocally precede the invited solicitation by and for GWU? In the absence of any evidence that Local 3408's executive board intended to reassess the membership's "unhappiness" and "morale" after providing it "gift cards," I infer that the gift cards were intended to positively reinforce, if not, purchase, loyalty to GWU. This inference is corroborated and bolstered by the coincidence that the August 17, 2016 membership meeting was attended by Tucker and catered with food, as evidenced by an "AFSCME Local 3408" check for \$435.11, dated August 17th, payable to Cooper and co-signed by her and McGlone with the ascribed notation, "food @ meeting" (CP-2, 1T151). Cooper admitted that the check she wrote paid for food served at the general membership meeting (2T198). Austin characterized the occasion as a "party" (2T152).

12. Austin admitted that as Secretary for Local 3408 at the August 17, 2016 membership meeting, she recorded the notes (2T151). No minutes of that meeting were ever produced. She admitted possessing the "notes" and never having been ordered to produce them (2T146). Austin admitted not possessing notes of an August 17, 2016 general membership vote approving the dissipation of or distribution to the membership of \$20,000 of Local 3408 funds (2T149). I do not credit her testimony that she recorded the minutes of the August 17, 2016 general membership meeting and did not record (as though it did not occur) the membership vote approving the distribution of Local 3408 funds as "gift cards." I find that Austin did not record or recorded and destroyed the minutes of the August 17, 2016 Local 3408 membership meeting. McGlone admitted that he did not possess the minutes of the August 17 general membership meeting and did not possess them on August 19, 2016, nor had he ever produced them (2T131-133).

McGlone, Austin and Cooper have an interest (as former Local 3408 officers) in producing notes or minutes that corroborate their attested versions of events at the August 17, 2016 executive board and general membership meetings. I draw a negative inference from their failure to produce written notes or minutes of the August 17, 2016 general membership meeting. I infer that those notes -- if accurately recorded -- would have revealed, by ironic virtue of the trio's leadership positions in

Local 3408, their individual or combined articulated encouragement of unit employees to sign GWU authorization cards and simultaneously "reimburse" themselves by voting in favor of "gift cards" sourced from Local 3408's funds.

13. In the August 17, 2016 Local 3408 executive board meeting, the officers determined that the "gift card" amounts to be "reimbursed" to unit employees would be "tiered," depending on an employee's length of service with the County (2T143, 177). Cooper and other executive board members determined that each five years of employment up to twenty-five years warranted an increase in reimbursement ("People who had been there longer, who paid more union dues get a little more back compared to somebody who just walked in the door") (2T177, 178).

14. On August 18, 2016, McGlone and Cooper wrote a pre-printed "AFSCME Local 3408" check payable to "cash" in the amount of \$20,000 and opened an account in their names for that amount at a local TD Bank branch (CP-2, 2T109, 180). Their goal was to distribute that amount in gift cards to the membership, " . . . as soon as possible" (2T181, 197). About \$3,200 remained in Local 3408's Bank of America Franklinville, NJ branch account (CP-2).

Cooper admitted that her training in AFSCME procedures prohibited her from writing a check payable to "cash" (2T199). She testified: "I made a mistake" (2T199). I do not credit Cooper's testimony to mean that she forgot her training; her

statements on August 19, 2016 show no personal recognition of error (see finding no. 15).

15. On August 19, 2016, a TD Bank fraud department employee phoned AFSCME Council 71 and spoke with Executive Director Harrell, advising that India Cooper had written and deposited a \$20,000 Local 3408 check (payable to "cash") into a personal account at a nearby branch office (1T44-45, 2T40-41). Harrell promptly investigated the circumstances, writing letters to Local 3408 officials that demanded an accounting and explanations and she visited the Meadowview facility that day with Associate Director Waite (1T45-48, 2T42-43, 50-51).

On their arrival at Meadowview, Harrell and Waite spoke with McGlone, who admitted the diversion of funds, explaining its purpose of ". . . giv[ing] dues back to the members" by providing them with "gift cards" (1T48). Harrell phoned Cooper (who was not present on a scheduled day-off) and demanded to know why and under whose authority the money was "removed" (2T181). Cooper refused to discuss the subject on the phone and drove to the facility to meet Harrell. Cooper refused to provide Harrell with the executive board or membership meeting minutes or "notes," telling her, "I don't have to give you nothing" (2T182). She admitted: "I basically was silent because I didn't like the way she was treating me" (2T182). Cooper also refused Harrell's demand to return the money to AFSCME, to which Harrell replied:

"If we can't work this out, I'm going to have to call the authorities." Cooper answered: "Go ahead. When they get here, I'll tell them the same thing" (2T58).

The local police department was called and an investigating officer asked McGlone and Cooper for their version(s) of the contested events. They refused to provide "statements" (2T183).

Between 2:30 p.m. and 2:45 p.m. that day and immediately after the police questioned her, Cooper entered the "day room" on the "garden floor" at the Meadowview facility, where she was observed by building maintenance worker and unit employee, Lannavia Wright and another unit employee, Eileen Davis (2T150, 152, 154, 155). Wright testified:

[Cooper] was all like kind of flustered. She came in with her hand on her hip and she said, 'You ain't gonna believe what they tried to do to me. They trying to get me locked up. [AFSCME Council 71] called the cops on me.' [1T152]

Wright continued:

She said that she took the money out and put it in her account. And I told her that she should put the money in an escrow account. And she said, 'No, I'm not doing that. That money is going in my account.' You know, she has a lot of body movement. . . . She's twerking and jerking her neck and her body, that's how she talks when she gets revved up . . . She said that Mr. Tucker had her covered. And that he told her how to go about doing this, that she took out \$20,000 and left \$3,000 and some odd dollars in the account, she left in there, to make it seem like it wasn't stealing the money. [1T153]

Wright also testified that Davis asked Cooper if she was intending to give cash or gift cards. Wright testified that Cooper replied:

She said she was going to give out gift cards. And the senior people, like [Wright] was going to get \$325 and she would break it down into tiers. [1T154]

In the absence of Cooper's rebuttal or denial (and Tucker's, also), I credit Wright's testimony. I also find that Cooper's admissions are excited utterances, rendering them especially reliable.

16. On or about August 23, 2016, Local 3408's executive board was removed and an administratorship imposed, pending an AFSCME "administratorship hearing," conducted on August 31, 2016 (1T87, 2T123, CP-3, CP-4). On September 14, 2016, the AFSCME judicial panel chairperson issued a six-page decision setting forth factual findings and concluding that McGlone's and Cooper's conduct "flagrantly violated" the AFSCME International Constitution and financial standards code. The decision characterizes their opening of a personal checking account with \$20,000 of Local 3408's funds as a "raid" on the local's treasury. The decision sustained the administratorship of Local 3408 (CP-3).

17. On or around September 14, 2016, AFSCME representatives from other locations, Patricia George and Cleodis Mobley, Jr., were assigned to Meadowview to assist, inform and train the

membership about grievances, by-laws and stewardship, among other things (1T125, 2T12). They both testified that members repeatedly inquired of them whether they would receive "gift cards" as long as Local 3408 remained their majority representative (1T126-128, 2T20). They replied that Local 3408's funds could not be depleted and that \$25 gift cards might be available around the "holidays" (1T129). Employees remained under an impression that if they voted for GWU, they would receive "gift cards" (1T138-139, 2T21).

George testified that on September 22, 2016, she attended a meeting at which Cooper advocated on behalf of GWU to unit employees and engaged in a verbal altercation with Lavannia Wright, accusing the unit employee of being a "traitor" to GWU (1T133). She testified that McGlone and Cooper continued their advocacy of GWU to unit employees, reiterating that "gift cards" would be a "benefit of membership" (1T133, 140). I credit her testimony.

Waite testified that on an unspecified date (during the administratorship) while visiting members at the Meadowview facility, he observed Cooper carrying a "stack" of "fliers" and distributing them to employees as they walked by her (2T32). One such flier was marked in evidence (2T24, 30, CP-6). The one-page document reproduces three photographs -- one of a police car, another of a police car rooftop's flashing lights and one of

Harrell -- and a cartoonish drawing of a partially disguised, stubble-faced "thief," haughtily upraising a bag of money and derisively mocking, "HA HA." The text of the document provides: "Council 71 tries to use Police against its own Members! . . . And AFSCME took your money! Isn't it time for a change? It is time for the GWU!" (CP-6). In the absence of Cooper's denial, I credit Waite's testimony. I also infer that Cooper distributed copies of the "fliers" sometime in September, 2016.

George testified that on an unspecified date, McGlone asked her in front of other unit employees (who supported GWU), "Why are you here?" to which she replied, "I'm here to build strong unions." McGlone retorted: "No, you're not. You're here to get the money. Mattie wants the money" (1T135). I credit George's testimony and infer that their exchange occurred in September or October, 2016.

ANALYSIS

On January 27, 2017, GWU filed a letter seeking to withdraw its representation petition, the processing of which had been "blocked" by the Director of Representation, pending litigation of the Complaint in this case. Atlantic Cty., D.R. No. 2017-9, 43 NJPER 213, 216 (¶65 2016). The approved withdrawal obviates the need for a determination on the permanency of that "block," (i.e., the dismissal of the representation petition), notwithstanding whether the alleged conduct was proved by a

preponderance of evidence to have upended the "laboratory conditions" needed for a free and fair election. See, e.g., Passaic Valley Sewerage Comm., P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1980). "Indeed, if laboratory conditions have been destroyed, an election can be set aside even if the alleged misconduct does not rise to the level of an unfair labor practice under the Labor Management Relations Act." NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 1242, 92 LRRM 3282 (4th Cir. 1976) (cited in Jersey City Med. Ctr., D.R. No. 83-37, 9 NJPER 411, 414 (f/n 10) (¶14188 1983)).

Similarly, in "election" cases, third party statements and actions do not have the institutional force of statements and actions by an employer or a union. "Less weight is accorded the comments and conduct of third parties than to those of the employer or the union." NLRB v. Herbert Halperin Distr. Corp., 826 F.2d 287, 290, 126 LRRM 2152 (4th Cir. 1987); see also, Georgetown Dress at 92 LRRM 3284; Jersey City Med. Ctr. (Director dismisses objection to election filed by incumbent representative alleging that petitioning organization mailed altered copies of Commission election notices to some unit employees. Director determined that incumbent had not demonstrated that the individual (i.e., the "third party") responsible for the mailing was an agent of the petitioner or that petitioner supported, encouraged or knew of the individual's mailing).

"Coercive conduct must be attributable to an employer or labor organization before an unfair practice may be found." In such settings, ". . . considerations of agency status are more significant." Higgins, The Developing Labor Law at 527 (5th ed. 2006).

The burden of proving an agency relationship is on the party asserting its existence. Millard Processing Services, 304 NLRB 770, 771, 138 LRRM 1094 (1991), enf'd. 2F.3d 258, 143 LRRM 3025 (8th Cir. 1993), cert denied 510 U.S. 1092, 145 LRRM 2320 (1994). Restatement (Third) of Agency (Am. Law Inst. 2006) provides several useful definitions:

§1.01 - Agency Defined

Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to the act.

§1.02 - Parties' Labeling and Popular Usage Not Controlling

An agency relationship arises only when the elements stated in §1.01 are present. Whether a relationship is characterized as agency in an agreement between the parties or in the context of industry or popular usage is not controlling.

§1.03 - Manifestation

A person manifests assent or intention through written or spoken words or other conduct.

§2.01 - Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

§2.02 - Scope of Actual Authority

(1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.

(2) An agent's interpretation of the principal's manifestations is reasonable if it reflects any meaning known by the agent to be ascribed by the principal, and in the absence of any meaning known to the agent, as a reasonable person in the agent's position would interpret the manifestations in light of the context. . . .

§2.03 - Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

I find that McGlone and Cooper were agents of GWU (personified in its President, Tucker) in August and September, 2016. As "principal," Tucker "manifested assent" to McGlone and Cooper ("agents") by instructing Cooper on "dissipating" Local 3408's account, simultaneously leaving a fraction of it intact to

avoid an untoward appearance (finding no. 15). Each dollar "dissipated" would have inured to GWU's benefit, in light of the scheduled (but involuntarily aborted) "gift card" distribution and timing of GWU's petition (finding nos. 11, 15). Cooper and McGlone acted on Tucker's behalf ("assenting" and "acting with actual authority") by writing and co-signing a \$20,000 Local 3408 check to "cash" and depositing it into a personal account at another bank, leaving \$3,000 in Local 3408's account (finding no. 14). McGlone's and Cooper's then-current status as Local 3408 representatives and actions in derogation of duties to AFSCME merely carve in higher relief their status as GWU agents.

The record is slightly less clear whether McGlone and Cooper acted with "apparent authority" on behalf of GWU. Their power to withdraw money from Local 3408's account and reallocate it as conceived was intended to induce the membership (the third party) to establish or assist in establishing GWU as majority representative. I must infer that McGlone, Cooper and Tucker articulated mutually supportive statements to the membership on August 17, 2016. For the membership to have reasonably believed that McGlone and Cooper were not acting on behalf of GWU hinges on whether the "dues reimbursement" or "gift card" plan was perceived as merely coincidental with GWU's timely presence as an alternative employee organization. To the extent that the membership reasonably believed that GWU's presence was not merely

coincidental, their belief was traceable to (even if not openly apparent from) Tucker's earlier instruction to Cooper about diverting Local 3408's funds.

Beyond an application of agency principles to the facts of this case, one must assess the overall relationship between GWU and its principal "organizers" at the Meadowview facility - McGlone and Cooper. In NLRB v. Kentucky Tennessee Clay Co., 295 F.3d 436, 170 LRRM 2522, 2526-27 (4th Cir. 2002), the Court explained:

In determining whether an agency relationship exists between the employees and the union under the [LMRA], we apply the general common law of agency as developed by the [LMRA]. 'The question is not so much one of 'agency,' in its purest sense as it is of whether the union should be held accountable' for the employee's conduct. PPG Indus., Inc. v. NLRB, 671 F.2d 817, 821, 109 LRRM 2721 (4th Cir. 1982). Thus, we have explained that, 'in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' Georgetown Dress, 537 F.2d at 1244. Rather, 'the final inquiry is always whether the amount of association between the union and the employee organizers is significant enough to justify charging the union with the conduct.' PPG Indus., 671 F.2d at 822-23 (other citation omitted).

Tucker provided Local 3408 executive board members with GWU authorization and designation cards intended for distribution to the membership. McGlone hosted Tucker's initial appearance

before the membership in advance of the August 17, 2016 regular membership meeting -- which Tucker also attended. The latter occasion was a catered "party," owing to Cooper's \$435 payment for food, drawn on Local 3408's account. It is difficult to overestimate the significance of the planned "association" among McGlone, Cooper and Tucker to facilitate the projected "gift card" distribution of Local 3408 funds at or around the time GWU's representation petition was filed. McGlone and Cooper would have also financially benefitted from that (aborted) transaction. Tucker's omission to testify indicates his reliance on McGlone's and Cooper's leadership roles in projecting to the membership a pairing of GWU with financial remuneration. Under all of these circumstances, I recommend that GWU is accountable for McGlone's and Cooper's conduct.

I must next determine whether GWU violated 5.4b(1) of the Act. An employee organization violates this section when its conduct tends to interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Act. FOP Lodge 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1990). The Commission has found a violation of 5.4b(1) based on unfair practice charges filed by a majority representative against another employee organization. North Bergen Bd. of Ed., P.E.R.C. No. 90-15, 15 NJPER 522 (¶20215 1989); Cliffside Park Bd. of Ed., P.E.R.C. No. 87-61, 13 NJPER 2 (¶18001 1986) (Minority

organizations falsely claimed to represent employees in other units represented by majority representatives. Such conduct interfered with section 5.3 right of all unit members to be represented exclusively by a majority organization. In both cases, the respective public employers were found to have violated 5.4a(1) for the same reason).

In Hillside Tp., H.E. No. 77-8, 3 NJPER 1, 9 (1976), aff'd P.E.R.C. No. 77-47, 3 NJPER 98 (1977), the hearing examiner determined that the public employer's offer of a promotional opportunity to the majority representative's president during collective negotiations to influence that representative's negotiating position interfered with, restrained and coerced its employees in the exercise of rights guaranteed them by the Act in violation of section 5.4a(1).

As an analogue, I find that GWU's ultimately failed effort to dissipate 85% of Local 3408's funds for the purpose of remunerating unit employees for their support of GWU in acquiring an adequate showing of interest and (presumably) majority representative status following an election, interferes with, restrains and coerces employees in the exercise of rights guaranteed them by the Act in violation of section 5.4b(1). In this case's forerunner, GWU displayed in Pemberton Township the same brazen conduct (including "tiered refunds" and a \$435 catered "party"), effectuated to dramatic results that must be

considered repugnant to the Act. Here, even after GWU's "gift card" plan was stopped, GWU representatives McGlone and Cooper continued to propagandize against Local 3408's "harboring" of unit employees' money.

RECOMMENDATION

I recommend that the Commission find that Government Workers Union (GWU) and its agents violated 5.4b(1) of the Act when it dissipated or removed \$20,000 of AFSCME Local 3408's funds for the purpose of financially remunerating unit employees for their support in acquiring an adequate showing of interest in its effort to succeed Local 3408 as majority representative of certain employees at Atlantic County's Meadowview Nursing Home.

RECOMMENDED REMEDY

1. I recommend that AFSCME Local 3408 shall receive the benefit of an election bar of one year from the date of this decision in order to negotiate a successor collective negotiations agreement with Atlantic County. See N.J.A.C. 19:11-2.8(b).

2. In light of GWU's demonstrated and continuing effort to garner and/or retain unit employee support for its candidacy as a successor majority representative at Meadowview Nursing Home, based on a dissipation of Local 3408 funds, I recommend that the Commission refuse to process any representation petition filed by GWU and its agents for a time extending to the open period (see

N.J.A.C. 19:11-2.8(c)2) in a second successor collective negotiations agreement signed by Atlantic County and Local 3408, provided that no agreement, including a second successor agreement, exceeds an expiration date of December 31, 2022.^{6/}

3. Government Workers Union shall maintain a URL (hyperlink) for sixty (60) consecutive days that is immediately visible when the GWU's homepage (<http://governmentunion.org/index.html>) loads. The URL text shall be 20% larger than the homepage's average text size and shall be in bold type. The text of the URL shall be: NOTICE TO PUBLIC EMPLOYEES OF ATLANTIC COUNTY. The URL shall redirect the user to the Notice, hosted on the Commission's website, that is attached to H.E. No. 2017-7. The GWU shall contact the Commission within five (5) business days of receipt of H.E. No. 2017-7 to obtain the appropriate Commission URL.

4. Local 3408 may wish to post on its bulletin board and post in all places where notices to employees may be customarily posted, (with County assent) copies of the attached notice marked as Appendix A. Copies of such notice shall be signed by the Respondent's authorized representative and may then be posted

^{6/} Timely representation petitions following the election bar period filed by an employee organization that is neither affiliated with nor an agency of GWU may be duly processed. Timely representation petitions following the election bar period filed by unit employee(s) who are not agents of GWU may be duly processed.

immediately and be maintained for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: March 10, 2017
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 20, 2017.



RECOMMENDED



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify certain employees of Atlantic County that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by dissipating or removing \$20,000 from the bank account of AFSCME Local 3408 for the purpose of financially remunerating unit employees for supporting GWU in acquiring an adequate showing of interest in its effort to succeed AFSCME Local 3408 as majority representative of certain employees at Atlantic County's Meadowview Nursing Home.

Docket No. RO-2017-074

Atlantic County Meadowview Nursing Home
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372