

D.R. NO. 95-16

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

In the Matter of

NORTH BERGEN HOUSING AUTHORITY,

Public Employer,

-and-

Docket No. RO-95-61

LOCAL 560, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,

Petitioner.

SYNOPSIS

The Director of Representation orders an election among North Bergen Housing Authority's maintenance employees. The petitioner requested that its pending unfair practice charges against the Authority not block an election and agrees to waive its right to file post-election objections based upon the employer's conduct occurring prior to the filing of the petition.

The Director rejects the employer's argument that the union's charges, alleging employee interrogations, threats to subcontract the maintenance work and an employee's discharge, should be litigated before a fair election could be held.

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Appearances:

For the Public Employer  
Giblin and Giblin, attorneys  
(Paul J. Giblin, of counsel)

For the Petitioner  
Schneider, Goldberger, Cohen, Finn, Solomon, Leder &  
Montalbano, attorneys  
(James M. Mets, of counsel)

DECISION AND DIRECTION OF ELECTION

On October 12, 1994, Teamsters Local 560 filed a Petition for Certification seeking to represent the maintenance employees of the North Bergen Housing Authority. On October 20, 1994, Local 560 also filed an unfair practice charge alleging the Authority violated the New Jersey Employer-Employee Relations Act; specifically, N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) when, between September 30 and October 6, 1994, the Authority interrogated and threatened employees about their support for Local 560. On November 14, 1994, Local 560 amended its charge to also allege that the Authority violated the Act by (a) threatening maintenance employee David Lista

and subsequently discharging him on October 26, 1994 in retaliation for his support of Local 560's organizing activities; and (b) soliciting bids on November 9, 1994 to subcontract the Authority's maintenance services to a private contractor.

Local 560 has requested that, notwithstanding the employer's alleged conduct, a secret ballot election be promptly conducted among the petitioned-for employees. Local 560 expressed its desire that its pending charges not block the processing of the petition and its willingness to waive its right to file post-election objections based upon the employer's pre-petition conduct as alleged in the charge.

The Authority will not consent to a secret ballot election. It argues that a fair election cannot be conducted until the allegations in the charge are litigated. It also objects to Local 560's non-waiver of its right to file post-election objections over the conduct raised in the charge. It wants the representation petition held in abeyance until the charges are fully heard.

The parties agree that the appropriate unit consists of all regularly employed maintenance employees of the Authority. The parties further agree that the Maintenance Superintendent is a supervisor and should be excluded from this unit since he has the authority to hire, fire, discipline, or effectively recommend the same. N.J.S.A. 34:13A-5.3. However, Local 560 objects to the inclusion of Grace Danchise, who is paid on a part-time status. It asserts that Ms. Danchise does not work regularly. In addition, the

parties disagree about whether David Lista, the employee the Authority allegedly terminated, should be eligible to vote in the election.

### Blocking Charges

The filing of an unfair practice charge will not automatically block the processing of a representation petition. A blocking charge procedure is not required by the Act or the Commission's Rules. The decision on whether an unfair practice charge should block a representation petition is a matter within our discretion. State of New Jersey, D.R. No. 81-34, 7 NJPER 209 (¶12093 1981), req. for rev. den. P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981). State of New Jersey sets forth the legal standards for determining when we would permit an unfair practice charge to block a representation petition. Procedurally, the charging party must first request that the charge block the representation proceedings. Second, the party seeking a block must submit documentary evidence that the conduct underlying the alleged unfair practice prevents a free and fair election. So. Jersey Port Corp., P.E.R.C. No. 90-45, 16 NJPER 3 (¶21001 1989); Matawan-Aberdeen Reg. Sch. Dist., P.E.R.C. No. 89-69, 15 NJPER 68 (¶20025 1988). Where the charging party proffers such evidence, the Director will exercise his discretion to block if, under all of the circumstances presented, the employees could not exercise their free choice in an election. So Jersey Port Corp.; Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶11300 1980).

In State of New Jersey, the Commission adopted the following factors in evaluating whether a fair election can be conducted during the pendency of the unfair practice charge:

The character and the scope of the charge(s) and its tendency to impair the employee's free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interests of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; a showing of interest, if any, presented in the Representation case by the charging party; and the timing of the charge.

I have determined not to accord blocking effect to Local 560's charges. First Local 560 has not requested that its charge block an election. That is, Local 560 believes that, notwithstanding the alleged conduct as stated in its charges, it is possible to conduct a fair election among the unit employees.

The Authority contends that the union should be forced to either litigate its charge allegations now or be foreclosed from using the allegations as objections should it not prevail in the election. In Atlantic Cty. Utilities Authority, P.E.R.C. No. 94-6, 19 NJPER 416 (¶24185 1993), the Commission rejected the concept that a petitioner is forced to choose between litigating its unfair practice claims first or abandoning them in order to proceed with an election. In that matter, the union executed a request to proceed form, waiving its right to use allegations over conduct which occurred prior to the petition filing as election objections. It

did not waive its right to convert charge allegations concerning the employer's conduct after the petition filing date to post-election objections. In Atlantic, the Commission looked to the policy of the National Labor Relations Board<sup>1/</sup> concerning waivers of charge allegations as post-election objections:

In Great Atlantic & Pacific Tea Co., 101 NLRB 1118, 31 LRRM 1189 (1952), the National Labor Relations Board held that whether or not unfair labor practice charges have been filed, it would consider on the merits any alleged interference with an election that occurs after either the execution of a consent for an election or a notice of hearing. The Board later revised the cutoff date holding that the date of filing of the representation petition should be the cutoff time in considering alleged objectionable conduct. Ideal Electric & Mfg. Co., 134 NLRB 1275, 49 LRRM 1316 (1961). More recently, the Board indicated the continuing viability of this policy. In Ed Chandler Ford, Inc., 241 NLRB 1201, 101 LRRM 1056 (1979), the Board rejected the employer's argument that the petitioning union, by filing a request to proceed, waived its right to file objections to the election based on the same conduct as was alleged in an unfair practice charge. The Board has held that a party may effectively waive its right to object to an election on the basis of unremedied unlawful conduct by executing an express statement to that effect. Connecticut Foundry Co., 247 NLRB 1514, 103 LRRM 1496 (1980), rev'd on other gnds 688 F.2d 871, 110 LRRM 3307 (2d Cir. 1982). The employer in Connecticut Foundry had filed a document stating that unremedied union unfair labor practices "may not constitute grounds upon which the Board may set aside the election."

I agree with Local 560's position that it may still be possible to conduct a fair election among the Authority's

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1/ See Lullo v. IAFF Local 1066, at 55 N.J. 409 (1970)

maintenance employees notwithstanding the employer's alleged conduct.<sup>2/</sup> Conducting a representation election promptly will permit the employees an opportunity to choose whether they wish representation by Local 560 while there still are employees to poll. If the representation matter is pended and the employer subcontracts the maintenance work, the workforce may be eliminated before a vote could be taken. Further, the termination of David Lista does not necessarily have a pervasive effect on the ability of the whole unit to have a fair election about whether it wishes union representation.

The Authority argues that we should force the union to choose whether it wishes to litigate its charges or abandon them before an election. It maintains that, if the union retains its right to convert its post-petition charge allegations -- those involving Lista's termination and the subcontracting announcement -- to post-election objections, should it not prevail in the election, it would unfairly give the union "two bites at the apple." It also argues that it would be "paralyzed to act" (presumably in implementing its decision to subcontract) until the charges are resolved.

The employer seemingly desires the petition to choose between having an election or litigating its charges. Local 560's

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<sup>2/</sup> The Authority does not dispute that it terminated David Lista, although it asserts that it did so for cause. It does not dispute that it is exploring the possibility of subcontracting the maintenance operations.

rights spring from two different sources. The first is whether "laboratory conditions" exist or may be said to exist to allow for a free and fair election. In this case the petitioner's request to proceed merely asks to hold in abeyance the processing of a charge which alleges violations of other protected rights subsumed in 5.4(a)(3) and (a)(1) of the Act. The union's option here is not to litigate the charges or abandon them in favor of an election. The union retains the right to litigate its charge in the unfair practice forum regardless of the outcome of the election. What the union has requested is the right to preserve its charge allegations until an election can be conducted. Consistent with Atlantic Cty., I see no basis to deny Local 560 the right to proceed with a prompt election or its right to preserve the unfair practice allegations until after the election.

Accordingly, based upon the circumstances presented here, I order that a secret ballot election be promptly conducted among the unit of:

All regularly employed maintenance employees of the North Bergen Housing Authority, excluding supervisors within the meaning of the Act (Maintenance Superintendent), managerial executives, police, craft and professional employees, confidential employees, and all other employees.

Employees will vote on whether they wish to be represented for purposes of collective negotiations by International Brotherhood of Teamsters Local 560. The election shall be conducted no later than thirty (30) days from the date of this decision. 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. Employees must appear in person in order to be eligible to vote. 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.

Pursuant to N.J.A.C. 19:11-9.6, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to Local 560 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.

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

  
Edmund G. Gerber, Director

DATED: December 30, 1994  
Trenton, New Jersey