

D.R. NO. 81-10

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

In the Matter of

BOROUGH OF HILLSDALE,

Public Employer,

-and-

Docket No. RO-80-199

LOCAL 804, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Petitioner.

SYNOPSIS

The Director of Representation sets aside the results of a Commission election, finding that the Borough impermissibly utilized its attorneys as election observers. The Director acts consistent with National Labor Relations Board policy, which prevents persons closely identified with the employer from acting as election observers. A new election is ordered within 30 days.

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Appearances:

For the Public Employer
Richard J. Donohue, Attorney

For the Petitioner
Cohen, Weiss & Simon, Attorneys
(Peter Herman of Counsel)

DECISION AND DIRECTION OF ELECTION

Pursuant to an agreement for consent election, dated June 12, 1980, executed by the Borough of Hillsdale (the "Borough") and Local 804, International Brotherhood of Teamsters ("Local 804") a secret ballot election was conducted by the Public Employment Relations Commission (the "Commission") on July 11, 1980, in a unit comprised of all non-supervisory blue collar employees of the Borough's Department of Public Works.

On July 17, 1980, Local 804 filed timely post-election objections. Simultaneously, Local 804 filed supporting evidence in the form of affidavits from Local 804's observer and a union official. On July 21, 1980, Local 804 was advised by the undersigned of its obligation to bear the burden of proof in this matter.

The Borough of Hillsdale (the "Borough") has submitted a response to the objections presented by Local 804.

Local 804 objects to the presence of Richard J. Donohue and David J. Hughes, both attorneys for the Borough of Hillsdale, as observers for the Borough at the election from 6 a.m. to 8 a.m. on July 11, 1980, in alleged violation of N.J.A.C. 19:11-9.2 (d). 1/

In accordance with the rules of the Commission, the undersigned has conducted an administrative investigation into this matter. On August 15, 1980, the undersigned advised the parties of the results of the administrative investigation which revealed the following facts:

1. The Borough of Hillsdale is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees involved herein and is subject to the provisions of the Act.

2. International Brotherhood of Teamsters, Local 804 is an employee representative within the meaning of the Act and is subject to its provisions.

3. On June 12, 1980, David Hughes, Esq., as the attorney for the Borough of Hillsdale, and Pat Pagnanella, as business agent for Local 804, entered into an Agreement for Consent Election with respect to a negotiations unit comprised of all blue collar employees in the Department of Public Works of

1/ This section states in part: "Unless otherwise approved by the director of representation or by the election agent, all observers shall be non-supervisory employees of the public employer."

the Borough excluding supervisors, craft, professional, confidential and managerial employees and police within the meaning of the Act. The Agreement was approved by the undersigned on June 18, 1980. The Agreement provided, in relevant part, that each party would be allowed to station an equal number of authorized observers, selected from among the non-supervisory employees of the Borough, to be at the polling places during the election to assist in its conduct, to challenge for good cause the eligibility of voters and to verify the tally.

4. On July 11, 1980, shortly before the opening of the polls, Richard J. Donohue, also an attorney for the Borough, advised the Commission Election Agent that he intended to be the observer for the Borough. Pagnanella, on behalf of Local 804, objected to the presence of Donohue as an observer. The Commission Election Agent advised Donohue that his presence as an observer might be the basis for objections to the conduct of an election. Nevertheless, Donohue insisted that he remain as the observer for the Borough. Donohue acted as the Borough's observer between 6 a.m. and 7 a.m., and Hughes replaced Donohue from 7 a.m. until the conclusion of the election at 8 a.m.

5. After the election, the Commission Election Agent provided the parties with a Tally of Ballots which revealed that out of approximately 22 eligible voters, 9 votes were cast for Local 804, 11 votes were cast against any employee representative and 1 vote was challenged. Accordingly, a majority of the votes counted was cast against representation by Local 804.

6. On July 17, 1980, Local 804 objected to the conduct of the election. First, Local 804 objects to the presence of the Borough's attorneys as official observers. Second, Local 804 alleges that the Superintendent of Public Works promised benefits to voters as an incentive to vote against the union and made threats of reprisals.

Local 804 states that Donohue is well known to voters as the Borough's attorney and as a figure of supervisory and disciplinary authority. In support of its assertion, Local 804 states that Donohue conducted an investigation of the conduct of the Public Works Superintendent in March through April 1980, which investigation eventually resulted in disciplinary sanctions against the Superintendent. Local 804 asserts that during the course of the investigation Donohue took depositions from all public works employees, including all the voters in the election. Local 804's statement is supported by copies of newspaper articles relating to the investigation and reporting that, during the course of the investigation, Donohue took depositions from 29 Department of Public Works Employees.

7. The Borough's response, which was filed July 22, 1980, does not dispute the assertions of Local 804 with respect to the objections involving the utilization of the Borough's attorneys as observers, with the exception that the Borough "asserts that the investigation was not of the Public Works Superintendent] but was in fact an investigation of all the practices and procedures surrounding the Department of Public Works, including the unauthorized use of gasoline and unauthorized use of Borough

vehicles." The Borough further states that neither Donohue nor Hughes imposed any objection and "never attempted to discuss with any potential voter the reasons for their presence (Donohue and Hughes)."

In the undersigned's August 15, 1980 correspondence, the parties were also apprised of an analysis of the issue presented i.e. whether the public employer's attorneys may be utilized as official election observers in a Commission conducted election.

The Commission's policies with respect to the conduct of elections are guided by the practices and policies of the National Labor Relations Board. ^{2/} The Board has determined that its elections should be held under "laboratory conditions." General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948). Accordingly, Board policy provides that observers for the employer must be selected from among its non-supervisory employees. See NLRB Field Manual, Section 11310. Further, the Board has held "that in the interest of free elections, persons closely identified with the employer may not act as observers," even though they may be non-supervisory employees. See Peabody Engineering Co., 95 NLRB 952, 28 LRRM 1391 (1951); International Stamping Co., 97 NLRB No. 101, 29 LRRM 1158 (1951). The NLRB, in applying this rule, has prevented an employer's attorney from functioning as an election observer. Union Switch & Signal Co., 76 NLRB 206, 21 LRRM 1169 (1948). The Board has also set aside elections where the employer's observer has been its attorney. Peabody Engineering Co., supra.

^{2/} The New Jersey Supreme Court stated in Lullo v. IAFF, 55 N.J. 409 (1970) that the Commission should utilize NLRB decisions and policies as a guide in its own decisions. See In re Tp. of East Windsor, D.R. No. 79-13, 4 NJPER 445 (Para. 4202 1978).

The Supreme Court has approved the NLRB's policy of excluding employer representatives from its elections as "wholly reasonable to remove any possibility of intimidation..." Southern Steamship Co. v. NLRB, 316 U.S. 31, 10 LRRM (1942). 3/ The NLRB has set aside an election because of the use of observers who were closely identified with the employer, although there was "no showing of actual interference with the free choice of any voter." 4/ The NLRB's decisions prohibit the use of these classes of persons as observers in order to avoid the possibility that their mere presence may influence the employees to vote against the union. See Wilkinson Mfg. Co. v. NLRB, 456 F.2d 298, 79 LRRM 2682 (1972).

Based upon the foregoing, the undersigned advised the parties that the issue to be examined herein is the status of the observer and not necessarily the conduct of the observer during the election.

3/ The NLRB found: "The choice of representatives by employees should be made free from any interference or coercion by employers. The presence of an employer's representative at an election may prevent such a free choice, although no interference or coercion is intended by the employer." Southern Steamship Co. 4 NLRB1140, 1-A LRRM 190 (1938)

4/ International Stamping Co., supra. The undersigned notes the close identification of Hughes with the Borough as evidenced by his appearance on behalf of the Borough at the pre-election conference on June 12, 1980, and his execution of the Agreement for Consent Election as the Borough's authorized representative. Donohue was closely identified with the Borough as the result of his investigation and deposition taking in a disciplinary context. Although Donohue states that he receives a payroll check from the Borough, thus distinguishing his status from the "independent professional person" who was the attorney in Union Switch, supra., the significant factor herein is his close identification with the employer.

On August 28, 1980, the Borough filed a response to the undersigned's correspondence. The Borough states that the investigation does not reveal any evidence indicating that an employee vote was affected by the presence of the attorneys observing on behalf of the Borough at the election. The Borough refers to AFSCME v. PERC, 114 N.J. Super 463 (App Div 1971), wherein the Appellate Division stated:

The Commission has by its decision in this case adopted a policy based upon a subjective standard; mainly, that elections will not be set aside unless the objector carries the burden proving that there was conduct which interfered with or which reasonably tended to interfere with the employee's freedom of choice.

In AFSCME v. PERC, the court confirmed the Commission's adoption of a two tier standard for reviewing election objections. As restated by the court, the Commission will set aside an election where there is evidence of conduct which has actually interfered with freedom of choice or where there is evidence of conduct which reasonably tends to interfere with freedom of choice. More specifically, the Commission stated in its decision, sub nom In re Jersey City Department of Public Works, P.E.R.C. No. 43 (1970):

The Commission presumes that an election under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct, seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

Thus, following the experience of the NLRB, the Commission has adopted the subjective approach incorporated in the first part of the standard and the objective approach embodied in the latter part of the standard. 5/ Accordingly, "objectionable conduct can be based on either direct evidence of employer interference or reasonable inferences of interference which may be drawn from the facts." 6/ The NLRB's decisions reflect its application of the objective standard in reviewing objections based upon the use of the employer's attorneys as observers.

Accordingly, based upon the foregoing, the undersigned determines that the instant election should be set aside due to the presence of attorneys for the Borough as official election observers. 7/ Accordingly, the undersigned hereby sets aside the election and pursuant to N.J.A.C. 19:11-9.2(j), directs a second election among the employees herein. The election shall be conducted no later than thirty (30) days from the date set forth below.

Those eligible to vote are non-supervisory blue collar employees of the Department of Public Works who were employed during the payroll period ending May 30, 1980 including employees

5/ The court's reference to the standard as subjective has caused some confusion.

6/ See In re Passaic Valley Sewerage Commission, D.R. No. 81-2, NJPER (Para. 1980), wherein the undersigned extensively analyzed the applicability of the objective standard to the Commission's post-election objections proceedings.

7/ Since the election is set aside, the undersigned need not address Local 804's other objections. Additionally, the Borough has urged that the Commission consider the signing of the Tally of Ballots by a Local 804 representative as a factor in reviewing the objections. The signing of a Tally of Ballots, however, merely confirms the party's agreement that the tallying procedure has been conducted fairly.

who did not work during that period because they were ill, on vacation or temporarily laid-off, including those in military service. Employees must appear in person at the polls 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. 8/

Those eligible to vote shall vote whether or not they desire to be represented for the purpose of collective negotiations by Local 804, International Brotherhood of Teamsters.

A majority of valid ballots cast shall determine the results of the election. The election directed herein shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: September 9, 1980
Trenton, New Jersey

8/ The election eligibility list provided to the Commission for utilization during the prior election shall be utilized as the election eligibility list for the election directed herein, as modified by any submissions provided by the Borough amending such eligibility list in accordance with the above and reflecting the names of those people who have resigned or were discharged for cause since the designated period. Such list shall be provided within ten (10) days prior to the election in accordance with the procedure set forth in N.J.A.C. 19:11-9.6.