

D.R. NO. 96-17

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

In the Matter of

PASSAIC COUNTY BOARD OF SOCIAL SERVICES,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA,

Docket No. RO-96-85

Petitioner,

-and-

EMPLOYEES OF PASSAIC COUNTY
WELFARE ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation dismisses objections to an election and certifies CWA as the employees' representative.

Dismissing the first objection, the Director found that CWA's campaign leaflets explaining its benefits available to union members did not constitute an illegal promise of benefits. Concerning the second objection, the Director found that CWA's complementary meals to eligible voters as part of its campaign did not interfere with employees' free choice. The Director also dismissed the third objection, alleging that a CWA leaflet appealed to "employee greed" by suggesting that voting out the independent Association would allow members to recover its treasury. The Director found that CWA's leaflet did not misrepresent the facts about the Association's treasury.

The Director dismissed the final objection alleging CWA supporters misrepresented the Association's position about recent and proposed layoffs. The Director determined that CWA supporters' statements were based upon opinion and rumor, not first-hand knowledge, and would be perceived as suspect by a reasonable voter. Additionally, the Association had at least six days before the election to effectively rebut the campaign statements.

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Appearances:

For the Public Employer
Ken Kovalcik, attorney

For the Petitioner
Edward Sabol, Organizing Coordinator

For the Intervenor
David Tykulsker, attorney

DECISION

Pursuant to an Agreement for Consent Election, the Public Employment Relations Commission conducted a representation election on March 27, 1996, in a collective negotiations unit of 428 non-supervisory employees of the Passaic County Board of Social

Services. Two-hundred twenty-one votes were cast for CWA, 168 votes were cast for the Employees of Passaic County Welfare Association, and there was 1 unresolved challenged ballot. Therefore, a majority of the valid votes were cast for CWA.

Pursuant to N.J.A.C. 19:11-9.2(h), the Association filed timely post-election objections on April 2, 1996. The Association alleges that CWA's pre-election campaign included certain promises of benefits and misrepresentations to voters as follows:

1. The Association asserts that CWA mailed two leaflets to voters enumerating a "broad array of tangible benefits to be gained by the bargaining unit by voting in the CWA."

2. The Association alleges that CWA furnished complementary meals to employees.

3. The Association alleges CWA circulated a leaflet appealing to employees' personal greed by "suggesting that voting in CWA as the representative will allow members...to recover a pro rata share of the [Association's] treasury...."

4. The Association further alleges that CWA misrepresented the Association's position concerning pre-election layoffs, repeatedly stated that the Association agreed to permit an additional 150 layoffs after the election, and that Association President Jesse Hinton-Jones accompanied Board Personnel Director DeSimone around the main facility to target individuals for an additional layoff.

* * * *

N.J.A.C. 19:11-9.2(h) sets forth the standard for reviewing election objections:

A party filing objections must furnish evidence such as affidavits or other documentation, that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process. (emphasis added)

This Rule sets up two separate and distinct components for evaluating election objections. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present for the objecting party to make its prima facie case. Under N.J.A.C. 19:11-9.2(i), if the objecting party presents a prima facie case, I initiate an investigation; if the objecting party fails to proffer sufficient evidence to support a prima facie case, I may immediately dismiss the objections. State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd App. Div. Dkt. Nos. A-3275-80T2 & A-4164-80T3.

In Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 43 (1970), aff'd sub. nom. AFSCME Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971), the Commission articulated the following policy:

The Commission presumes that an election conducted 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.

I have reviewed the objections and the supporting documents submitted by the Association. I find that the Association has not established a prima facie case as required by N.J.A.C. 19:11-9.1(h). A review of the Association's objections and supporting documentation shows the following:

CWA Promise of Benefits

1. The Association asserts that CWA distributed two leaflets to voters enumerating a "broad array of tangible benefits to be gained by the bargaining unit by voting in the CWA." Both leaflets explain benefits of CWA membership, including credit cards, mortgage and real estate program, loan program, mail-in prescription

service, legal services, life insurance, travel club, and discount buying services.

The leaflets are insufficient to prove that CWA illegally promised employees benefits. First, as a procedural matter, there was no proof submitted that the leaflets were actually distributed. Second, there is nothing inherently illegal about the statements made in the leaflets. They appear to simply inform employees about the benefits of union membership. The Association asks us to draw a parallel between the representations made in these leaflets and an employer's illegal promise of benefits to employees if they decertify the union. See Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980). The union benefits stated in the leaflets are benefits offered as part of CWA membership, not a promise of a tangible benefit for voting for CWA. In the public sector, union membership and selection of a majority representative are not the same -- an employee can choose membership in an organization without selecting it as a negotiations representative and conversely, an employee may choose to be represented by a labor organization and refrain from membership in that organization. N.J.S.A. 34:13A-5.3. Based upon these facts, I find that nothing in these leaflets constituted an illegal promise of benefit that would have interfered with employees' free choice in the election.

Complementary Meals

2. The Association's second objection alleges that CWA furnished complementary meals to unit employees. The Association submitted an affidavit from employee Cathy Smith, stating that (1) she saw another employee have lunch with CWA's Organizer Lorenzo Capeles; (2) other employees told her that Capeles had bought them lunch; and (3) she had heard from another employee that the owner of the Europa Restaurant said that Capeles regularly paid for lunches for Board employees. The second affidavit is from employee Linda Hyndman, and states that Capeles bought her and other Board employees lunch in February 1996.

The Association argues that the Commission should set aside an election where an organization furnishes complementary meals to members of the bargaining unit as part of its campaign. Nothing in this allegation indicates coercion or interference with the employees' free choice in the election process. It is not uncommon for labor organizations engaged in an election campaign to give away complementary hats and similar paraphernalia, meals, drinks and engage in other token gestures to create good will and promote their message. As long as the value of such tokens is relatively de minimus, they do not interfere with the employees exercise of their legitimate, free choice in a secret ballot election. In this context, a complementary lunch is de minimus and is not an impermissible granting of a benefit. I find that the Association has not shown that CWA's complementary meals interfered with the

employees' free choice.

The Association Treasury Issue

3. In its third objection, the Association alleges that CWA circulated a leaflet "appealing to employees' personal greed by suggesting that voting in CWA as the representative will allow members...to recover a pro rata share of the [Association's] treasury...." The Association submitted the leaflet, which is entitled "CWA Dues Fact Sheet." In it, the CWA explains its dues structure and states in part,

Once CWA is voted in we can cancel our dues deduction for EPCWA. Any money left in the EPCWA Treasury can be returned to us or be used for any other legitimate purpose as approved by the EPCWA members.

I do not find that the CWA leaflet misrepresented the facts with regard to the Association's treasury. Rather, it explicitly stated that the return of monies from the Association treasury to its members was one possible alternative, if the Association lost the election.

The Misrepresentations Issue

4. In its fourth objection, the Association alleges that CWA misrepresented the Association's position concerning the layoff of unit members just prior to the election. Further, the Association asserts that CWA supporters repeatedly stated that

Association President Jesse Hinton-Jones had agreed to permit the layoff of an additional 150 employees after the election, and that Hinton-Jones had toured the main facility with the Board's personnel director identifying those individuals to be targeted for such a layoff.

In support of this objection, the Association submitted four certifications from Board employees. In her certification, Juanita Rollins states that on February 25, March 20 and March 21, 1996, employees Linda Wilson, Robin McDuffie and Cynthia McDuffie told her that they had heard from other employees who were known to be CWA supporters that the Association had "approved" additional layoffs and that Association President Hinton-Jones walked around the Board's main facility with the Board's personnel director to identify additional employees to be laid off. Further, Rollins states that Larnette Anderson, a CWA supporter, told her on March 21, 1996, that Hinton-Jones had been walking around the main building with the Board personnel director. Rollins states that Anderson explained that the purpose of this walk was to identify an additional 150 employees to be laid off.

The Association also submitted a certification from Linda Wilson affirming Rollins statements that on February 25, a CWA supporter told Wilson that the Association had approved the layoff of an additional 150 employees.

The Association submitted a certification from employee Dorothy McKinney which states that employee Bob Longo, "a public and

vigorous supporter of CWA", told her that a list of 150 Board workers who would be laid off had been prepared, but that he had not seen it. Ms. McKinney's statement makes no assertion about the Association.

The Association also submitted a statement from employee Cathy Smith. Smith states that Longo told her he could produce a list of the 150 employees slated for layoff, although he never did.

The Association argues that this campaign of alleged misrepresentations "caused apprehension, confusion or otherwise interfered with, or tended to interfere with, employee exercise of free choice."

* * *

In Passaic Valley Sewerage Commission, the Commission articulated its standard for reviewing statements made during a representation election campaign. It held that a representation election will be set aside where there has been a misrepresentation or similar campaign trickery which involves a "substantial departure from the truth," made at a time which prevents parties from making an effective reply. The misrepresentations, whether deliberate or not, must reasonably be expected to have a significant impact on the election. See also, Bergen Community College, D.R. No. 90-19, 16 NJPER 170 (¶21069 1990), adopting H.E. No. 90-3, 16 NJPER 93 (¶21035 1990); Middlesex County Utilities Auth., D.R. No. 90-2, 15 NJPER 501 (¶20207 1989).

Where an objecting party alleges that material factual

misrepresentations interfered with employee free choice, that party must show either an inability to effectively reply or provide direct evidence of interference. Passaic Valley; Bergen Community College; City of Atlantic City, D. R. No. 82-54, 8 NJPER 344 (¶13158 1982). Absent a showing that the alleged misstatement is a "substantial departure from the truth", the objection will be dismissed. Camden County Judiciary, D.R. No. 92-9, 18 NJPER 30 (¶23009 1992), req. for rev. denied P.E.R.C. No. 92-86, 18 NJPER 103 (¶23048 1992); Passaic Valley.

Here, the Association has failed to demonstrate that the statements, allegedly made by CWA supporters concerning the Association's position on layoffs, interfered with employee free choice in the election. First, while the Association argues that the statements are untrue, it has not submitted evidence to support that assertion.

Second, the Association has not demonstrated that the timing of the statements prevented it from making an effective reply. The election took place on March 27, 1996. According to the Rollins affidavit, the CWA supporters' statements were allegedly made between February 25 and March 21; thus, the alleged statements were made over a month before the election and up until about one week before the election.

Third, the character of the alleged CWA supporters' statements is suspect: they are based upon rumor and speculation. In summary, the Association's affidavits assert: (a) employee Longo

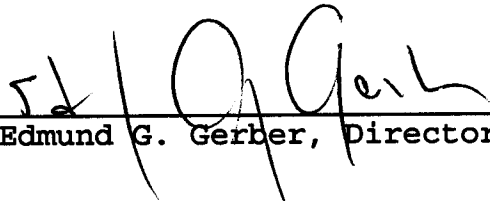
told people a layoff list existed although he never saw it and, when challenged, claimed he could produce such a list, but never did; (b) certain employees told other employees they had heard from CWA supporters that Hinton-Jones was permitting additional layoffs; and (c) CWA supporter Anderson told Rollins that Hinton-Jones was walking around the building with the personnel director purportedly targeting employees for layoff.

None of the Association's affidavits indicate that any CWA supporter claimed direct knowledge of the Jones/DeSimone layoff tour. No CWA supporter offered more than an opinion and/or rumor to other employees. Absent an Association assertion that CWA supporters had claimed first-hand knowledge about new layoffs, these alleged statements can be seen as campaign statements made about campaign issues during a representation election. The various layoff assertions cited by the Association do not come from persons who would be considered to have any special knowledge or inside information about the layoffs; rather, the alleged statements came from fellow workers and are the type of assertions and rumors that would be perceived as suspect by a reasonable voter. Finally, these alleged statements are the type of campaign rhetoric which the Association could have effectively rebutted, particularly since it had from at least six days to as much as a month before the election to do so. Accordingly, I find that the Association has not demonstrated an inability to effectively reply to the statements made by CWA supporters, nor has it demonstrated direct evidence of

interference with employee free choice.

Based upon all of the argument and documents presented in this matter, I find that the Association has not established a prima facie case as required by N.J.A.C. 19:11-9.1(h) and I dismiss the objections. In accordance with the Rules of the Commission, I am issuing the appropriate Certification of Representative to the CWA.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: May 9, 1996
Trenton, New Jersey