

D.R. NO. 2015-4

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

In the Matter of

MERCER COUNTY SHERIFF'S OFFICE,

Public Employer,

-and-

Docket No. RO-2015-025

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL 187A (SOA),

Petitioner,

-and-

FRATERNAL ORDER OF POLICE
LODGE 140 (SUPERIORS),

Intervenor.

SYNOPSIS

The Director of Representation denies a request by a incumbent majority representative to block the processing of a representation petition and orders a secret mail-ballot election be conducted among a petitioned-for unit of sergeants and lieutenants in the Mercer County Sheriff's Office. The Director found that the evidence submitted in support of the blocking request was insufficient since it was not based on personal knowledge, but was instead based on hearsay statements about alleged negotiations meetings between the petitioner and employer and alleged improper communication between the petitioner and unit members. Specifically, the incumbent alleged that the petitioner advised unit members that if they voted in favor of them in a mail ballot election, the employer would award the unit a lucrative contract in an expeditious manner. The incumbent also alleged that meetings took place between the employer and petitioner to negotiate terms and conditions of employment for unit members and that the employer refused to negotiate with the incumbent for a successor agreement. Since the incumbent did not present affidavits or other documentary evidence from unit members or other individuals with personal knowledge of the alleged negotiations meetings and alleged conversations between the petitioner and unit members, the Director found the evidence was inadequate to support a blocking request.

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Appearances:

For the Respondent,
Arthur R. Sypek, Jr., County Counsel
(Kristina E. Chubenko, of counsel)

For the Petitioner,
Pellettieri Rabstein and Altman, attorneys
(Frank M. Crivelli, of counsel)

For the Intervenor,
Markowitz and Richman, attorneys
(Matthew D. Areman, of counsel)

DECISION

On December 24, 2014, New Jersey State Policemen's Benevolent Association, Local 187A (SOA) ("PBA") filed a representation petition seeking to represent, for purposes of collective negotiations, a unit of sergeants and lieutenants

employed by the Mercer County Sheriff's Department (MCSD). The petition is timely filed and accompanied by an adequate showing of interest. The unit of about nineteen (19) sergeants and lieutenants is currently represented by Fraternal Order of Police, Lodge 140 (FOP). FOP intervened in this matter based upon its recently expired collective negotiations agreement (CNA)^{1/} with the County of Mercer (County). N.J.A.C. 19:11-2.7.

The parties do not dispute the appropriateness of the petitioned-for unit. The MCSD and County have taken no position on the petition. FOP opposes the petition and will not consent to an election.

On December 31, 2014, FOP filed an unfair practice charge against the MCSD and PBA (Docket No. CO-2015-156). The charge alleges principally that the MCSD refused to negotiate in good faith regarding a successor CNA; that the MCSD and PBA, ". . . engaged in negotiations;" and that FOP representatives have been disproportionately disciplined by the MCSD. These actions allegedly violate 5.4a(1), (2), (4) and (5)^{2/} of the New

^{1/} The CNA between the FOP and County extended from January 1, 2009 through December 31, 2014. Under N.J.A.C. 19:11-2.8(d), five year agreements are treated as three year agreements to determine the timeliness of a representation petition. PBA's petition is timely filed because it was filed after December 31, 2012, the date the CNA reached three years duration.

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). On January 21, 2015, FOP filed a letter requesting that its charge block further processing of PBA's representation petition.

The charge more specifically alleges that the MCSD advised PBA members that it would "make sure they would get a good contract at no cost to PBA" if PBA filed a representation petition to displace FOP as the majority representative. FOP also alleges the MCSD has engaged in negotiations with the PBA over unit employees' terms and conditions of employment, including assignments and hours of work. FOP also alleges the MCSD disproportionately disciplined FOP officials and has created a work environment where ". . .no one wants to be an officer in the Lodge [FOP] for fear of being targeted by the employer." The alleged disciplinary actions include the termination of one FOP official for complaining about a manager's alleged harassment of

2/ (...continued)
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. (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."

co-workers and the transfer of FOP's Acting President in retaliation for filing a grievance. In addition to these disciplinary actions, FOP alleges the County filed criminal charges against the FOP President for actions taken in his capacity as a law enforcement officer that were not the subject of a complaint by the public.

On January 21, 2015, FOP filed a letter brief and a certification of Sean Lavin, FOP President, in support of its blocking request. The County filed a position statement opposing FOP's blocking request, accompanied by certifications from Brian D. Amantia, Chief Warrant Officer in the MCSD; and County Administrator Andrew A. Mair. The PBA also filed a position statement opposing FOP's blocking request, accompanied by a certification from Christopher Drew, a sergeant in the FOP bargaining unit and a PBA representative.

Lavin's certification mirrors the allegations in FOP's charge. In addition, Lavin certifies that in or around September, 2014, FOP requested to meet with the County to commence collective negotiations for a successor agreement. On October 10, 2014, the parties met to discuss non-economic issues related to the CNA, but the County had refused to meet with the FOP again and had cancelled a meeting scheduled for January 6, 2015. Lavin certifies that the County, by and through County Administrator Andrew Mair, conducted meetings with PBA

representatives between December 9 and December 22, 2014. During those meetings, Lavin certifies that the County negotiated terms and conditions of employment for FOP unit employees and ". . . advised the PBA that if the PBA were to file a representation petition for the bargaining unit currently represented by Lodge 140 and successfully replace Lodge 140, the County would agree to a lucrative contract in an expeditious manner that would cost the PBA very little."

According to Lavin, on or about January 6, 2015, PBA representatives contacted FOP unit members by phone and in person and explained that the County would award a lucrative contract in an expeditious manner if PBA became their majority representative. Since January 6, Lavin certifies that "several members" have expressed to FOP representatives, including Lavin, that they are concerned about supporting the FOP, due to ". . . the seemingly strained relationship between it and the County, their fear of retaliation for supporting a union which is not endorsed by the County, and because the County has promised a quick and lucrative contract."

In support of the County's opposition to FOP's blocking request, County Administrator Andrew A. Mair and Chief Warrant Officer Brian D. Amantia filed certifications denying the allegations in FOP's charge and asserting that the statements in Lavin's certification are inaccurate. Mair certifies that he has

served as County Administrator since 2004 and is a member of the County's collective negotiations team, which also includes the County's Directors of Personnel and Finance, the Sheriff and/or designee, and a representative from the County Counsel's Office. According to Mair, the County forwarded correspondence dated September 5, 2014, to FOP expressing its desire to commence collective negotiations with FOP over a successor agreement. Mair certifies that on November 12, 2014, Danny D. Schick, FOP field representative, forwarded correspondence to Sheriff Jack Kemler and requested to commence negotiations for a successor agreement. Kemler forwarded that correspondence to Mair and Assistant County Counsel Kristina Chubenko. Mair certifies that for purposes of collective negotiations, the Sheriff has delegated authority to the County to negotiate CNAs covering the terms and conditions of employment for negotiations unit employees working in MCSD.

Mair asserts that neither he, nor other members of the County's collective bargaining team, ever discussed or negotiated terms and conditions of employment for a successor agreement with the PBA or FOP. Mair certifies that he did not meet with FOP on October 10, 2014 to discuss non-economic terms of employment and did not refuse to meet with FOP after October 10. Mair also certifies he has not seen Lavin since December 12, 2013, because Lavin has been suspended without pay since then due to the

pendency of criminal charges against him. Mair also certifies that he did not meet with any PBA representative(s) between December 9 and 22, 2014, and is not aware of any members of the County's collective bargaining team who are participating in meetings with the PBA or FOP. Although Mair acknowledges that a negotiations meeting was scheduled with FOP for January 6, 2015, that meeting was cancelled after Mair received notice of PBA's representation petition. Mair also denies Lavin's claim that he advised PBA to file a representation petition to replace FOP or promised PBA they would receive a "lucrative contract" if PBA became the majority representative.

Brian D. Amantia has been the County Sheriff's Chief Warrant Officer since December, 2011. Since 2012, he has also served as the Sheriff's designee on the County's collective negotiations team and attended collective negotiations meetings on behalf of the Sheriff. Amantia certifies he is also familiar with disciplinary matters in the MCSO.

Amantia denies Lavin's assertion that the Sheriff imposed "disproportionate" discipline on FOP officials in an effort to target FOP officials and undermine FOP's status as majority representative. Amantia certifies that criminal charges were brought against Lavin at the direction of the County Prosecutor and that Lavin was subsequently indicted for official misconduct and for tampering with public records. Amantia certifies that

Lavin has been suspended without pay since December 12, 2013 due to the pendency of those criminal charges. In response to Lavin's statements regarding an FOP official's termination, Amantia asserts the Sheriff sought the FOP official's removal because that official made "untruthful" statements during the course of an internal affairs investigation. Further, Amantia certifies that the "acting president" to whom Lavin refers was neither reassigned nor transferred to a new post or shift. Amantia certifies that he has not met with FOP or PBA representatives to negotiate a successor CNA and denies having made any promises to PBA that it would receive a lucrative contract if it replaced FOP as majority representative.

The PBA also opposes FOP's blocking request and has submitted a supporting certification from Christopher Drew, a sergeant in the MCSD and a PBA representative. Drew denies the allegations in Lavin's certification and FOP's charge and certifies that no meeting between the County and PBA ever took place to discuss unit employees' terms and condition of employment. He recalls only one meeting taking place within the time frames referenced in Lavin's certification. That meeting was held at the request of the Sheriff and its purpose was to resolve staffing issues and operational concerns at Mercer County Airport. Attendees of the meeting included the Sheriff,

Undersheriffs Ellison and Medina^{3/}, County Chief of Staff Kelly Ganges, and County Chief Financial Officer David Miller. Drew certifies that terms and conditions of employment of unit employees were never discussed at the meeting, nor was a successor collective negotiations agreement mentioned. Drew certifies that he and the PBA were never promised a lucrative contract by the County or Sheriff in exchange for filing a representation petition. He certifies that the PBA filed a representation petition in response to Drew's and other unit employees' unhappiness with FOP and its leadership.

ANALYSIS

The Commission's policy is to expedite the processing of representation disputes so that the question of whether employees will be represented by either competing organizations (or none) can be resolved by the Commission's secret ballot election mechanism. River Vale Bd. of Ed., D.R. No. 2014-3, 40 NJPER 133 (¶50 2013); Berkeley Tp., D.R. No. 2009-6, 34 NJPER 422, 423 (¶131 2008).

The filing of an unfair practice charge or issuance of an unfair practice complaint will not automatically block the processing of a representation petition. The decision whether an unfair practice charge will block the processing of a

^{3/} The first names of the undersheriffs were not set forth in the certification.

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

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

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

The character and the scope of the charge(s) and its tendency to impair the employee's free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interests of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; a showing of interest, if any, presented in the [representation] case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5]
[7 NJPER at 109]

In applying these factors to a blocking request, we carefully evaluate the certifications and documentary evidence presented in support of a blocking request to determine whether the evidence is competent and based on the affiant's personal knowledge.

River Vale Bd. of Ed.; County of Monmouth, D.R. No. 92-11, 18 NJPER 79 (¶23034 1992); Leap Academy Charter School, D.R. No. 2006-17, 32 NJPER 142 (¶65 2006); Atlantic City Convention and Visitors Auth.

In River Vale, the Director of Representation held that hearsay and double-hearsay statements in a certification, ". . . cannot form a basis to block a representation election." 40 NJPER at 135; cf. Monmouth County, D.R. No. 92-11, 18 NJPER 79 (¶23034 1992). The incumbent majority representative in River Vale submitted a certification from its business agent in support of a blocking request. The business agent's certification alleged that the employer had actively recruited unit members to

"decertify" the incumbent as a majority representative and communicated with unit members about plans to decertify the incumbent. No unit members were named in the certification and no members came forward with evidence or certifications attesting to the facts alleged by the business agent. The Director denied the incumbent's blocking request, noting that the agent's allegations, ". . . were not supported by any facts certified by individuals with personal knowledge of those facts." Id.

In contrast to River Vale, the Director in Atlantic City Convention and Visitors Auth. granted a blocking request supported by affidavits from unit members with personal knowledge of conduct by the employer that could prevent a free and fair election. Id., 28 NJPER at 171. There, the incumbent alleged that its unfair practice charge against the employer should have blocking effect on a decertification petition because the employer allegedly threatened unit employees with the loss of health benefits and other fringe benefits if employees voted to retain their union. The employer was also alleged to have made statements to unit employees that it was prepared to grant bonuses and salary increases to employees if the union was decertified. In support of its blocking request, the incumbent organization submitted affidavits from unit members with personal knowledge of the meeting times and locations where employer representatives had threatened the loss of health benefits and

promised salary increases in exchange for their voting to decertify the union. In granting the blocking request, the Director noted that the supporting affidavits supplied by the incumbent "speak specifically" to the allegations regarding these meetings and were based on personal knowledge. Id.

Based on these legal standards and the evidence presented by all parties, I find that the parties' certifications do not support FOP's request to block the processing of PBA's representation petition. I therefore deny FOP's blocking request.

Lavin's certification consists of hearsay statements about events of which he has no personal knowledge. He asserts that PBA representatives approached FOP unit members in person and contacted unit employees by phone about receiving a lucrative contract from the County if the PBA were to replace FOP as majority representative. The only proffered basis for Lavin's knowledge is that "several members" expressed concerns to him about supporting FOP. Unlike the quality of certifications proffered in Atlantic City Convention and Visitors Auth., the FOP has not presented certifications from unit members or others with personal knowledge of the alleged communications between the PBA and FOP unit employees. No unit employee has come forward with evidence or submitted a certification based upon personal knowledge which supports Lavin's claim that they were promised a

lucrative contract by the County in exchange for voting in favor of the PBA. As explained in River Vale, Lavin's hearsay statements are not sufficient to support a blocking request.

Lavin also lacks personal knowledge of the alleged negotiations sessions that took place among the PBA and County between December 9 and December 22, 2014. Although he certifies that negotiations sessions occurred in that period, he does not certify he attended those meetings or how he learned of them. That he was ostensibly suspended without pay during that period may indicate that he doesn't have personal knowledge of such meetings. Regardless, his certification does not explain how he knew of the meetings and what took place at them, if one assumes that they occurred.

Also, unlike the incumbent in Atlantic City Convention Auth., the FOP does not set forth specific information about the alleged improper communications between the County and PBA and between the PBA and FOP unit members. Lavin's certification does not identify who was approached by the PBA. It asserts only that several unidentified members were contacted by phone or approached personally ". . . on or about January 6, 2015" regarding the County's alleged promise of a lucrative contract. The lack of specificity in Lavin's certification dilutes its probative value.

The FOP's submissions do not indicate that the scope and character of its charge would tend to interfere with a free and fair election. FOP asserts that "several members" expressed concerns to the leadership about endorsing FOP in an election. It is unclear how many of the nineteen (19) sergeants and lieutenants in FOP's bargaining unit were contacted or involved in the conduct alleged in FOP's charge. Absent a showing by FOP that more than a few unit employees would not be able to participate in a free and fair election, I will not order that a representation election be blocked and so delay the ability of unit employees to elect a majority representative of their choosing (or no representative at all) .

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

ORDER

An election is hereby directed among the employees in the following unit:

Included: All Superior Officers including sergeants and lieutenants employed by the Mercer County Sheriff and County of Mercer.

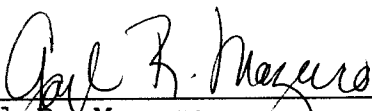
Excluded: Managerial executives, confidential employees, and non-supervisory employees, sheriff, undersheriff(s), non-police employees and all other employees employed by the Mercer County Sheriff and County of Mercer.

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 who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date are ineligible to vote. Employees in the unit described above shall vote to determine the collective negotiations representative, if any, for the unit which they are employed and will have the option to vote for the Policemen's Benevolent Association, Local 187A(SOA), No Representative, or the Fraternal Order of Police, Lodge 140(Superiors).

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the name and address of each eligible voter and his or her job title. The eligibility list must be received by us **no later than February 19, 2015**. A copy of the eligibility list shall be simultaneously provided to both employee organizations with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Ballots will be mailed by the Commission to eligible voters in the unit on **March 4, 2015**. Any employee who believes he or

she is eligible to vote in this election and does not receive a ballot in the mail by **March 11, 2015** should contact the Commission at (609) 292-6780 immediately, if they wish to participate in this election. Ballots must be returned to the Commission's Post Office Box by 9:00 a.m. on **April 2, 2015**. The ballots will be counted at 10:00 a.m. on **April 2, 2015** at the Commission's Trenton Office, 495 West State Street, Trenton, New Jersey. The election shall be conducted in accordance with the Commission's rules.



Gayl R. Mazuco
Director of Representation

DATED: February 12, 2015
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by February 27, 2015.