

D.R. NO. 2017-9

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

In the Matter of

COUNTY OF ATLANTIC,

Public Employer,

-and-

Docket No. RO-2017-007

GOVERNMENT WORKERS UNION,

Petitioner,

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 71, LOCAL 3408,

Intervenor.

SYNOPSIS

The Director of Representation finds that the majority representative's unfair practice charge should block further processing of a representation petition filed by a rival organization. The Director determines that the alleged conduct by the rival organization, if proven in hearing, has a chilling effect on employees' rights to support an organization of their choice, and therefore, creates an atmosphere in which a free and fair election cannot be conducted. Accordingly, the Director halts further processing of the petition for representation by election until the unfair practice charge is adjudicated.

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Appearances:

For the Public Employer,
Atlantic City Law Department
(James Ferguson, of counsel)

For the Petition,
Government Workers Union
(David Tucker, President)

For the Intervenor,
Law Office of David Beckett
(David Beckett, of counsel)

DECISION

On September 6, 2016, the Government Workers Union (GWU) filed a Petition for Certification by election (RO-2017-007) with the Public Employment Relations Commission. GWU seeks to represent the negotiations unit of approximately 170 employees employed at the Meadowview Nursing Home and the County

Kitchen/Warehouse by the Atlantic County Department of Human Services (County). The Petition is supported by an adequate showing of interest. The American Federation of State, County and Municipal Employees District Council 71, Local 3408 (AFSCME) intervened based upon its status as the current certified representative of the employees in the petitioned-for unit.

N.J.A.C. 19:11-2.7.

The Petitioner seeks a secret ballot election among the unit employees. AFSCME will not consent to an election, and asserts that its pending unfair practice charge against GWU (CO-2017-074) should block further processing of the petition.

On October 6, 2016, we advised all parties that AFSCME seeks to block processing of the Petition until its charge can be fully litigated. GWU objects to any blocking effect of the charge, and asks that the petition move forward to a secret ballot election. The County has taken no position regarding AFSCME's blocking request.

AFSCME's unfair practice charge was filed on October 5, 2016. On November 1, 2016, AFSCME amended the charge to remove the County as a respondent, and deleted all allegations against the County.

The charge, as amended, alleges that GWU violated N.J.S.A. 34:13A-5.4b(1), (2), and (5)^{1/} of the Act by attempting to intimidate negotiations unit members, and "buy votes" in order to obtain signed authorization cards for their Petition for Certification by election. Specifically, it is alleged that on or around August 20, 2016, then AFSCME Local 3408 treasurer, India Cooper, and then AFSCME Local 3408 president Eric McGlone, drafted a check made out to "cash" for \$20,000 from Local 3408's bank account and deposited it into a personal account controlled by Cooper and McGlone. There was allegedly no authorization to withdraw these funds from Local 3408's bank account, which only had a balance of \$23,000 at the time. AFSCME District Council 71 learned of the withdrawal from Local 3408 when notified by the fraud department of the bank where Cooper and McGlone sought to deposit the \$20,000 check. Council 71 then referred the matter to AFSCME International. Subsequently, Cooper and McGlone were suspended by ASFCME. Local 3408 was placed under an administratorship by AFSCME International, and the matter was referred to the AFSCME Judicial Panel. The Panel found that the

^{1/} These provisions prohibit employee organizations, their representatives or agents from "(1) [i]nterfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this Act[;] (2) [i]nterfering 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."

actions taken by McGlone and Cooper violated their duties as officers, and upheld the administratorship of Local 3408.

AFSCME claims that the \$20,000 was withdrawn at the direction of GWU as part of a scheme to bribe unit members with gift cards in exchange for votes to elect GWU as majority representative. AFSCME further alleges that after unit employee signatures were obtained for the authorization cards in support of GWU, GWU enticed members to vote against AFSCME in order to receive the promised gift cards. AFSCME also alleges that this behavior is consistent with similar behavior during a different representation election with GWU, where subsequent to the election AFSCME discovered the diversion of close to \$10,000 from another local's account.

It appearing that the allegations in the amended charge, if true, may constitute a violation of N.J.S.A. 34:13A-5.4 (b)1, I issued a complaint on November 2, 2016. I declined to issue a complaint on subsections 5.4b(2) and (5). The assigned hearing examiner has scheduled hearings to commence November 28, 2016.

AFSCME alleges that the totality of GWU's conduct has had a chilling effect on the rights of employees to a free and fair representation election. It argues that multiple employees have certified that GWU has attempted to undermine the fairness of the election by offering gift cards in exchange for votes, and requests that we permit its charge to be litigated so that any

violation of the Act can be remedied before conducting an election on GWU's petition. In support of its request for blocking effect of its charge, AFSCME relies on documents appended to its request, and certifications from AFSCME members Venus Blocker, Flora Henderson and Daniel Murphy, AFSCME staff representative Patricia George, and AFSCME deputy administrator Joseph Waite Jr.

GWU opposes the blocking request and disputes that it promised any benefit to AFSCME members in exchange for their vote in the representation election. GWU, through its reply and certifications of AFSCME members India Cooper, Kay Austin and Eric McGlone, contest many of the allegations made by AFSCME. It also submits a petition signed by eighty-five (85) employees of Atlantic County stating that they were "never promised money to sign an authorization card or to influence [their] vote in the upcoming election of GWU versus AFSCME."

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 on whether an unfair practice charge or charges should block a representation petition is a matter 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 charge 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 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 R case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5].
[7 NJPER 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. Mercer County Sheriff's Office, D.R. No. 2015-4, 41 NJPER 501 (¶156 2015) citing 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., supra.

In Atlantic City Convention and Visitors Auth., the Director 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 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.

The Commission has determined that the promise of a benefit prior to a union election is improper as it interferes with employees free choice. Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1980); Borough of Wildwood Crest, H.E. No. 88-20, 13 NJPER 828 (¶18319 1987); Leap

Academy Charter School. In Passaic Valley Sewerage Commission, the Commission found that pre-election conferral of benefits by the employer “. . . had such a strong tendency to interfere with the free choice of the employees that the election must be set aside even in the absence of direct evidence [of interference].”

The impact of a pre-election promise of a benefit in return for a vote upon the laboratory conditions necessary for a free and fair election is the same whether the offer comes from the employer or a union. The National Labor Relations Board has found that a “union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election.” Go Ahead North America, LLC, 357 NLRB 18 (2011). See Mailing Services, 293 NLRB 565, 565 (1989) (election results set aside because prior to the election the prevailing union provided free medical screenings to unit employees); Owens-Illinois, Inc., 271 NLRB 1235, 1235-1236 (1984) (election results set aside because prior to the election the prevailing union distributed union jackets worth \$16 to unit employees); General Cable Corp., 170 NLRB 1682, 1682-1683 (1968) (election results set aside because union gave \$5 gift certificates to voters not conditioned on outcome of the election); Wagner Electric Corp., 167 NLRB 532, 533 (1967) (election results set aside because union promised free life insurance policy to those who signed with the union prior to the

election). Unions are "like an employer, barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled." Go Ahead North America, LLC, quoting, Mailing Services, supra.

AFSCME alleges that GWU violated 5.4 b(1) of the Act by undermining the laboratory condition of a representation election by promising the benefit of a gift card to employees who signed a GWU authorization card and voted for GWU in the election. It further alleges that individuals acting on behalf of the GWU intimidated members of AFSCME with physical threats and threats to their jobs if they did not support GWU.

It is undisputed that on or around August 20, 2016 India Cooper and Eric McGlone withdrew \$20,000 from AFSCME's bank account and deposited the money into a personal account. Cooper certified that the money was put into a personal account because the bank in which the funds are deposited provides free gift cards to its account holders. She also states that she intended to use the money to purchase gift cards to distribute to the members as a "dues reimbursement". She certifies that in August 2016 the executive board of ASFCME Local 3408 voted to propose a dues reimbursement to the membership, and at a subsequent membership meeting the employees voted to approve a dues reimbursement through gift cards.

AFSCME member Venus Blocker certified that "we were told by India that if we joined them [GWU] and voted AFSCME out we would receive gift cards that would be tiered based upon how many years we had worked at Meadowview. She asked me to sign a petition and explained she moved the money so AFSCME couldn't take it. She said we couldn't get the gift cards if we stayed with AFSCME." She also certified that she "witnessed India tell members that they must bring their ballots into work so that they can see them vote for the GWU because they don't trust them and must be sure they check the GWU box." AFSCME member Daniel Murphy certified to a similar occurrence, wherein he "heard India and Kay tell members that they must bring their ballots into work so that they can see them vote for the GWU because they don't trust them and must be sure they check the GWU box." He also certified that "[m]embers are being intimidated by India Cooper and others supporting GWU and pressured to vote for the GWU by physical threats and threats to their jobs. She said loud to make sure I heard, 'that anyone had her name in their mouth about the gift card would be sorry.'"

AFSCME member Flora Henderson certified that India Cooper told her "not to go down and talk to AFSCME because [they were] leaving the union." India also told her that "she was being charged with moving the money to a personal account and she did

it because she was going to divide the money between members because [they] were leaving AFSCME.”

AFSCME Local 3408 administrator Patricia George certified that she has been on the Meadowview site regularly assisting Local 3408 members. As a result, she certified that she has been able to observe and witness events, such as “personally see[ing] India Cooper as well as Kay Austin acting on behalf of the Government Workers Union pushing employees to vote for GWU. . . .” She certified that she “know[s] personally that gift cards are being mentioned as a benefit for members if they decertify AFSCME. . . .”

GWU denies that it had any role in the alleged inducements and threats. It asserts that even if the allegations against India Cooper, Kay Austin and Eric McGlone were true, they were independent of GWU’s petition for representation by election. GWU further states that since the \$20,000 was seized by AFSCME and is no longer under the control of Cooper and McGlone, the purported financial inducement no longer exists, thus the election should proceed.

For purposes of deciding blocking effect of the charge, we assume the veracity of the statements within the certifications submitted by both parties. Queen City Academy Charter School, D.R. No. 2017-5, ___ NJPER ___ (¶___). Ridgefield Board of Education, D.R. No. 2012-6, 38 NJPER 246 (¶82 2012). As required

by State of New Jersey, AFSCME has submitted multiple certifications based upon personal knowledge and documentary evidence in support of its blocking request. I determine that the alleged conduct by GWU, if proven in hearing, has a chilling affect on employees' rights to support an organization of their choice, and therefore, creates an atmosphere in which a free and fair election cannot be conducted. Based upon the totality of the conduct alleged in the charge, together with AFSCME's supporting certifications and documents as outlined herein, I find that a free and fair election cannot be conducted at this time. Accordingly, I am pending further processing of the petition for representation by election until the unfair practice charge can be adjudicated.

ORDER

Further processing of the Petition(RO-2017-007), is blocked pending litigation of the Complaint issued in CO-2017-074.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/Gayl R. Mazuco
Gayl R. Mazuco, Esq.
Director of Representation

DATED: November 16, 2016
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 November 28, 2016.