

D.R. NO. 2020-10

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

In the Matter of

LAWRENCE TOWNSHIP,

Public Employer,

-and-

Docket No. RO-2020-026

FRATERNAL ORDER OF POLICE,
LODGE 209,

Petitioner,

-and-

POLICE BENEVOLENT ASSOCIATION,
LOCAL 119,

Intervenor.

SYNOPSIS

The Director of Representation orders that a secret ballot election be conducted among an extant collective negotiations unit of non-supervisory patrol officers and detectives employed by the Township of Lawrence. The incumbent exclusive representative refused to sign a consent agreement for an election (despite a timely filed petition accompanied by an adequate showing of interest) because it had filed a Petition to Initiate Compulsory Interest Arbitration (about one week before the rival organization had filed its representation petition) and the Interest Arbitrator had scheduled "an initial meeting as a mediation session," pursuant to N.J.S.A. 34:13A-16 b(3).

The Director acknowledged a pressure created by a timely representation petition filed while an exclusive representative and public employer were engaged in interest arbitration ("rocket docket"). The Director found however, that employees' statutory right to select their representative must be vindicated, and that the interest arbitration process must be pended for the duration of a secret ballot election.

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Appearances:

For the Public Employer,
Armando V. Riccio, LLC, attorneys
(Armando V. Riccio, of counsel)

For the Petitioner,
Markowitz & Richman, attorneys
(Matthew D. Areman, of counsel)

For the Intervenor,
Sciarra & Catrambone, LLC, attorneys
(Christopher A. Gray, of counsel)

DECISION

On November 27, 2019, Lawrence Township FOP Lodge 209 (FOP) filed a timely representation petition seeking to represent a collective negotiations unit of all sworn police officers and detectives employed by Lawrence Township (Township). N.J.A.C.

19:11-2.8. The petition was accompanied by signed and dated authorization cards of not less than 30% of the petitioned-for unit employees. N.J.A.C. 19:11-1.2 (a)9. On November 29, 2019, the petitioned-for employees' current majority representative, Police Benevolent Association Local 119 (PBA), filed a request to intervene, based on its Certification of Representative. The request was approved by our letter dated December 3, 2019.

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

The Township and FOP have consented to an election. The PBA refuses to consent to an election, claiming that the petition is untimely because it was filed after it (PBA) filed a Petition to Initiate Compulsory Interest Arbitration on November 19, 2019, and because the PBA and Township reached an agreement prior to the filing of the petition.

We have conducted an administrative investigation to determine the facts. The disposition of the petition is properly based upon our administrative investigation. No substantial and disputed material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. I find the following facts.

On November 26, 2018, a Certification of Representative was issued to the PBA, following an election, for a unit of "all regularly employed non-supervisory patrol officer and detectives" of the Township (Dkt. No. 2019-010).

On November 19, 2019, PBA filed a Petition to Initiate Compulsory Interest Arbitration (Dkt. No. IA-2020-006) with the Commission.

On November 27, 2019, upon the filing of the FOP's petition, we provided the Township a Notice to Employees, advising that the FOP had submitted a petition for certification by election. Later the same day, the Township certified that it posted the Notice for the required ten-day period. On December 3, 2019, at our request, the Township filed a list of the employees sought by the FOP. We have compared the names submitted on authorization cards with those provided on the Township's list and determined that not less than 30% of the petitioned-for employees have signed authorization cards for the FOP.

Also on December 3, 2019, the assigned Commission staff agent forwarded to each party an Agreement for Consent Election setting forth the petitioned-for unit description, the date the ballots would be sent to the petitioned-for employees, and the date and time the ballots were to be received and counted. The Township and FOP each executed the Agreement for Consent Election and promptly returned it to the assigned staff agent.

On December 10, 2019, PBA Counsel filed a letter urging that the FOP's representation petition is ". . . untimely and must be dismissed." Counsel argues that the Police and Fire Public Interest Arbitration Reform Act sets forth no provision,

“. . . to suspend the [interest arbitration] proceedings or to interfere with the 90-day timeline;” that the “Commission’s rules for representation cannot supercede legislatively-created timelines and authority to proceed with interest arbitration;” and that “. . . completing the election process interferes with the obligation of the recently elected majority representative to complete the arbitration process in good faith under tight timeline constraints” (letter at 1-4).

Attached to PBA Counsel’s letter is a memorandum dated November 25, 2019 from Township Municipal Manager Kevin Newinski, Esq. to patrol officers Sudol, Girard and Corado regarding “PBA Local #119 successor negotiations contract.” A prefatory paragraph acknowledges the PBA’s filing of the Petition to Initiate Compulsory Interest Arbitration. It also provides that despite that filing, the identified PBA representatives met with Newinski on November 22nd, “. . . in an attempt to reach a settlement and forego interest arbitration.” The paragraph concludes; “. . . should no settlement be reached during this process, it shall be as if no discussions (including any agreements) took place at all.” This paragraph was followed by nineteen enumerated and varied terms and conditions of employment, including wage increases. Those were followed by this caveat:

Signatures ONLY accept the preamble and NOT the terms as set forth above.

The copy of the memorandum appears to bear the signatures of patrol officer Girard and Municipal Manager Newinski.

PBA Counsel writes that the memorandum is a "tentative settlement agreement that has been ratified by the PBA on an offer from the municipality. Due to the stay imposed on the municipality, they cannot meet and ratify the agreement" (brief at 4).

Also on December 10, FOP filed a letter arguing that the timing of the PBA's petition suggests an effort to undermine "the will of the employees" by seeking to disrupt the representation process. The FOP disputes that the filing of an interest arbitration petition bars the processing of a representation petition; such a bar would invite "gamesmanship" among employers and incumbent majority representatives and undermine the statutory right (in N.J.S.A. 34:13A-5.3) of employees to choose their representative. The FOP also disputes that the Police and Fire Public Interest Arbitration Reform Act (N.J.S.A. 34:13A-14a, et seq.), while establishing timeframes for decisions, provides the Commission discretion not to impose penalties against arbitrators (i.e., N.J.S.A. 34:13A-16(f)(5); "Any arbitrator violating the provisions of this paragraph may be subject to the Commission's powers . . . (emphasis added)). The FOP also contends that N.J.S.A. 34:13A-21 ". . . presumes the possibility that a majority representative may change during the pendency of

interest arbitration proceedings." FOP also disputes that the PBA and Township reached an agreement on terms and conditions of employment before its representation petition was filed.

Also on December 10, Township Counsel sent a letter to the assigned Interest Arbitrator with copies to PBA Counsel, FOP Counsel and the Commission staff agent. I regard the letter as the Township's position on the pending representation petition. Counsel essentially seeks a rescheduling of a December 19, 2019 mediation session before the Arbitrator, pursuant to N.J.S.A. 34:13A-16b.(3), to a date in January, 2020, following a secret ballot election conducted by the Commission in this case. Township Counsel disputes the PBA's contention that the arbitration process forecloses an election, citing Borough of Fairlawn, D.R. No. 79-30, 5 NJPER 165 (¶10091 1979.) Township Counsel also avers that the memorandum (of November 25, 2019), ". . . makes clear that there is no agreement between the parties" (letter at 3).

ANALYSIS

I disagree with PBA Counsel that only Commission "rules for representation" are implicated in this matter. N.J.S.A. 34:13A-5.3 provides that, ". . . public employees shall have and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join or assist any employee organization in or to refrain from such activity." Section 5.2

demands the Commission, “. . . [to] make policy and establish rules and regulations concerning employer-employee relations in public employment relating to . . . enforcement of statutory provisions concerning representative elections and related matters.” The Commission,

. . . is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. [N.J.S.A. 34:13A-6(d)]

One such regulation provides one calendar year from the date a Certification of Representative issues for the exclusive employee representative and public employer to negotiate a collective negotiations agreement. N.J.A.C. 19:11-2.8(b). That period was fully discharged by the date that the FOP filed its petition with an adequate showing of interest in an extant negotiations unit. These filings demonstrate that the FOP successfully raised a question concerning representation.

The primary need to establish the employees' choice of representative is also rooted in decades-old decisional law. In a case noted by Township Counsel, Borough of Fairlawn, the Director agreed with a Hearing Officer's decision to reject an interest arbitration bar theory advanced by the incumbent majority representative (another PBA local). The Hearing Officer found that interest arbitration is but an aspect of the

negotiations process, noting an earlier Commission decision rejecting a claim that the mediation process imposed a bar to our processing of an otherwise timely representation petition.

Franklin Tp., P.E.R.C. No. 64, NJPER Supp. 257 (¶64 1971.)

Later, in Middlesex Cty. (Roosevelt Hosp.), P.E.R.C. No. 81-129, 7 NJPER 266, 267 (¶12118 1981), the Commission explained a public employer's obligation to remain neutral during the pendency of a representation petition:

The proper action to be taken by an employer who is faced with and has knowledge of a pending question concerning representation to avoid committing an unfair practice, pursuant to N.J.S.A. 34:13A-5.4a (1) and (2), is not to begin or if begun, to cease negotiations with the incumbent unit until the representation issue has been properly determined.

The holding and rationale of Middlesex Cty. were reaffirmed in Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 457-458, (¶14196 1983).

In City of Passaic, D.R. No. 91-12, 17 NJPER 7, 8 (¶22005 1990), the Director of Representation rejected an argument by an incumbent representative that a rival's representation petition should be barred because it and the public employer were awaiting an interest arbitration award. The Director wrote, ". . . [s]uch a bar would effectively thwart the legitimate aspirations of employees who have petitioned the Commission to conduct an

election to determine the negotiations representative of their choice.”

PBA Counsel has conceded that the memorandum attached to his December 10, 2019 letter wasn't ratified by the Township. The memorandum's caveat provision immediately preceding the parties' signatures eschews any notion that the document is a memorandum of agreement capable of acting as a bar to the FOP's petition. N.J.A.C. 19:11-2.8; Middlesex Cty., D.R. No 81-1, 6 NJPER 355 (¶11179 1980), req. for rev. den. P.E.R.C. No. 81-29, 6 NJPER 439 (¶11224 1980).

One must acknowledge a legitimate tension and pressure created by the filing of a timely police or fire “raid” representation petition while the incumbent exclusive representative and public employer are engaged in the seemingly remorseless time constraints imposed by the Interest Arbitration Statute - N.J.S.A. 34:13A-14a, et seq. But the statute, in a section that remains enforceable, contemplates the possibility of changing an employee representative during interest arbitration:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding, but a party may so consent without prejudice to his rights or position under this supplementary act (emphasis added). [N.J.S.A. 34:13A-21]

The decision to direct an election in this matter shall result only in a postponement of a scheduled mediation session among the Arbitrator and representatives of the Township and PBA, provided that the PBA prevails in the secret ballot election. The results of that election may be known in early January, 2020, leaving those parties several weeks to reconvene and complete the initiated process. Meanwhile, unit employees shall exercise their statutory right to determine their representative for purposes of collective negotiations. Accordingly, I issue the following:

ORDER

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

Included: All regularly employed non-supervisory patrol officers and detectives employed by the Township of Lawrence.

Excluded: Managerial executives, confidential employees, and supervisors within the meaning of the Act; professional employees, craft employees, non-police employees, casual employees, sergeants, lieutenants, captains, deputy chief, chief of police, and all others employed by the Township of Lawrence.

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 119, No Representative, or the Fraternal Order of Police Lodge 209.

Ballots will be mailed by the Commission to eligible voters in the unit on December 13, 2019. Any employee who believes he or she is eligible to vote in this election and does not receive a ballot in the mail by **December 20, 2019** 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 **January 7, 2020**. The ballots will be counted at 10:00 a.m. on **January 7, 2020** 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.

By Order of the
Director of Representation

/s/Jonathan Roth
Jonathan Roth
Director of Representation

DATED: December 11, 2019
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 December 23, 2019.