

P.E.R.C. NO. 92-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Public Employer,

-and-

POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL 3,

Docket No. RO-92-27

Petitioner,

-and-

FRATERNAL ORDER OF POLICE,
LODGE NO. 12,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission denies a request for review filed by the Fraternal Order of Police, Lodge No. 12. The FOP sought review of a Director of Representation's decision dismissing its objections to conduct affecting the results of an election among police officers employed by the City of Newark.

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Appearances:

For the Public Employer, Oliver Cato, Assistant Corporation
Counsel (Gregory Franklin, of counsel)

For the Petitioner, Zazzali, Zazzali, Fagella & Nowak,
attorneys (Paul Kleinbaum, of counsel)

For the Intervenor, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION AND ORDER

On October 11, 1991, pursuant to a petition filed by the
Policemen's Benevolent Association, Local 3, a representation
election was conducted among police officers employed by the City of
Newark. Of the 880 eligible voters, 397 voted for the incumbent
Fraternal Order of Police, Lodge No. 12, 420 voted for the PBA and 3
voted for no representation. The Director of Representation
dismissed the FOP's objections to conduct affecting the results of

the election and certified the PBA as the majority representative. D.R. No. 92-14, 18 NJPER 113 (¶23054 1992). On January 28, 1992, the FOP requested review of the Director's determination and a stay of the certification pending review. On February 6, the PBA filed a reply opposing review. On March 17, after considerable delay, we received a copy of the transcript of the hearing before the Director so we could evaluate the FOP's claim that the Director erred in one factual finding.

The grounds for granting a request for review are narrow.

N.J.A.C. 19:11-8.2 provides:

(a) The commission will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

1. That a substantial question of law is raised concerning the interpretation or administration of the act or these rules;

2. That the director of representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;

3. That the conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or

4. That there are compelling reasons for reconsideration of an important commission rule or policy.

The FOP's objections were recited in the Director's decision. Most concerned allegations that the City or its agents

expressed a bias for the PBA over the FOP in this election. The standard for reviewing such allegations is well established.

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. [Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd 114 N.J. Super. 463 (App. Div. 1971)]

The FOP concedes that there is no direct evidence of threats or promises by City officials, but argues that the City's clear preference for the PBA rose to the level of promises or threats by implication. The Director considered each objection and we find no basis for granting review. In Fabriko, Inc., 227 NLRB No. 45, 94 LRRM 1528 (1976),^{1/} a case relied on by the FOP, the National Labor Relations Board recognized that an employer's statements of preference for one union over another can exceed the limits of permissibility when viewed in the context of the employer's entire campaign. The Board found that the employer's campaign statements included the rampant vilification of the petitioner and constant praise of the intervenor. The Board concluded that such conduct

^{1/} See Lullo v. IAFF, 55 N.J. 409 (1970) (experience and adjudication under the federal act may guide the Act's interpretation).

constituted an implied but nonetheless clear promise that the employer would bargain in a more favorable and prompt manner with the intervenor; or a threat that not only would negotiations be protracted but that the employer would take a much harder bargaining approach with the petitioner. We have examined all the evidence presented concerning the conduct of the City's agents. The type of situation present in Fabriko is not present here. There was no vilification of the FOP or praise of the PBA and no proof that any of the employer's agents interfered with employees' freedom of choice.

Another objection concerned the City's failure to make available in a timely manner the room in which the election was to be conducted. The FOP has not shown how this event tended to interfere with employee free choice. Employees were permitted to vote in the hallway until the room became available.

Another objection concerned allegations that the PBA distributed a facsimile of an official ballot altered to indicate a preference for the PBA. N.J.A.C. 19:11-9.1(b) provides:

The reproduction of any document purporting to be a copy of the commission's official ballot which suggests either directly or indirectly to employees that the commission endorses a particular choice may constitute grounds for setting aside an election upon objections properly filed.

The Director conducted a hearing about this issue. He found that the facsimile which the PBA claims to have distributed was sufficiently different from the official ballot so as not to suggest

a Commission preference. He further found that the FOP did not prove that a facsimile closer in likeness to the official ballot was distributed. We agree with the FOP that the facsimile it claims was distributed by the PBA is similar to the official ballot. The Director, however, found that the FOP did not prove that such facsimiles were distributed. The Director based his conclusion on a number of factors. The FOP argues that he erred on one. One FOP witness testified that he walked over to the PBA's president and obtained one of the facsimile ballots that the FOP claims was distributed by the PBA. Nevertheless, based on all the testimony and the remainder of the Director's findings, we find that the Director's finding, made without the benefit of a transcript, did not prejudice the FOP's rights. There is therefore no basis for granting review on this issue.

Finally, the FOP claims that an automobile bearing a PBA decal, driven by a Commission staff agent and parked in front of the election site, compromised the appearance of the Commission's neutrality and requires granting review. The FOP does not dispute the Director's factual findings on this issue. Nor are there any other allegations that the appearance of impartiality was compromised.

The National Labor Relations Board's lead case governing the appearance of impartiality is Athbro Precision Engineering

Corp., 166 NLRB No. 116, 65 LRRM 1699 (1967).^{2/} The Board stated that it:

must maintain and protect the integrity and neutrality of its procedures in conducting elections. The commission of an act by a board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election. [65 LRRM at 1699]

Based on the undisputed facts relating to this single incident, we do not believe that there is a sufficient basis for granting review on this issue.

Since 1970, we have conducted nine representation elections between the FOP and the PBA for this negotiations unit. The PBA won four elections. The FOP won five. These elections are part of the longstanding relationship between the City, these two police organizations, these employees, and this agency. While it is unfortunate that this incident occurred, we are convinced that it did not destroy the voters' confidence in our election process or compromise the standards we seek to maintain. If we had any doubt about the appearance of our neutrality, we would exercise our discretion to rerun the election.

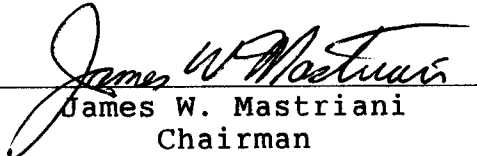
^{2/} The District Court for the District of Columbia ordered the Board to certify the union. 67 LRRM 2361 (D. D.C. 1968). The Board complied. 171 NLRB No. 4, 68 LRRM 1001 (1968). The Board ordered the employer to bargain. 173 NLRB No. 152, 69 LRRM 1512 (1968). The Court of Appeals enforced. 423 F.2d 573, 73 LRRM 2355 (1st Cir. 1970).

Having carefully reviewed all arguments raised by the FOP,
we deny its request for review.

ORDER

The request for review is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo,
Regan, Smith and Wenzler voted in favor of this decision. None
opposed.

DATED: March 30, 1992
Trenton, New Jersey
ISSUED: March 31, 1992