P.E.R.C. NO. 2021-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAPE MAY,

Public Employer,

-and-

Docket Nos. RO-2021-035
RO-2021-037
CO-2021-148

CWA LOCAL 1036,

Petitioner,

-and-

GOVERNMENT WORKERS UNION,

Intervenor.

Appearances:

For the Public Employer, Brown & Connery, LLC, attorneys (Michael J. Watson, of counsel)

For the Petitioner, Beckett and Paris, LLC, attorneys (David B. Beckett, of counsel)

For the Intervenor (David L. Tucker, President GWU)

SYNOPSIS

The Public Employment Relations Commission grants the request of Communication Workers of America Local 1036 (CWA) for review of D.R. No. 2021-2, __ NJPER __ (¶__ 2021), wherein the Commission's Director of Representation granted the request of the incumbent and intervening union, Government Workers Union (GWU), to block the processing of CWA's petitions seeking to represent units of blue and white collar employees of the City of Cape May. The Director concluded that a free and fair representation election could not be conducted during the pendency of unfair practice proceedings initiated by GWU, based upon the timing of a purported admission by the City's then-City Manager that he dealt directly with GWU unit members; this admission occurred around the same time CWA was sought out by

City blue and white collar employees, and when authorization cards were being distributed by CWA. The Commission finds, absent competent evidence in the record of specific dates that the alleged direct dealing incidents actually occurred and unit members' actual awareness of them, the timing of the purported admission of direct dealing, standing alone, does not conclusively establish the requisite nexus between the alleged direct dealing and the conduct of a free and fair election, to the degree necessary to support a blocking charge. The Commission reverses the block and orders a resumption of the processing of CWA's representation petitions.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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For the Intervenor (David L. Tucker, President GWU)

DECISION

On March 22, 2021, Communication Workers of America Local 1036 (CWA) filed, pursuant to N.J.A.C. 19:11-8.1 et seq., a request for review of D.R. No. 2021-2, __ NJPER __ (¶__ 2021). In that decision, the Commission's Director of Representation blocked the processing of two representation petitions filed by CWA on December 18 and 29, 2020, in which CWA seeks to represent, respectively, a collective negotiations unit of all non-

supervisory blue collar employees of the City of Cape May (City) (Dkt. No. RO-2021-035), and a unit of all non-supervisory white collar employees of the City (Dkt. No. RO-2021-037). According to the petitions, the blue collar unit has 32 employees and was supported by 24 showings of interest. The white collar unit has 13 employees and was supported by 13 showings of interest. Both petitioned-for units are currently represented for collective negotiations purposes by Government Workers Union (GWU). GWU did not file a statement in opposition to CWA's request for review, as permitted by N.J.A.C. 19:11-8.4.

On January 8, 2021, GWU filed a request to intervene in both petitions. Intervention was approved, based on GWU's most recent collective negotiations agreements (CNAs) with the City. N.J.A.C. 19:11-2.7(b)(2). At that time, GWU also advised that it would consent to secret ballot elections in both matters. On January 21, GWU filed an unfair practice charge (Dkt. No. CO-2021-148) against the City, alleging that it engaged in bad faith negotiations and dealt directly with unit employees. On January 25, GWU requested a halt to the processing of the representation petitions and a block of any elections, pending resolution of the unfair practice charge.

Following briefing by the parties and the City on the blocking request and an administrative investigation by the Director's office, the Director concluded that a free and fair

election could not be conducted at this time, and ordered that further processing of CWA's representation petitions be blocked pending adjudication of the unfair practice charge. The Director's decision was premised on GWU's certification, which the Director found to be unrebutted, that the City's then-City Manager, Jerry Inderwies, admitted to direct dealing with unit members, resulting in salary increases or promotions. The Director found that Inderwies' "purported admission occurred around the same time that CWA was sought out by a City blue collar employee and a white collar employee, and when authorization cards were admittedly distributed by CWA." D.R. NO. 2021-2, at 20.

A request for review will be granted only for one or more of these compelling reasons:

> 1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
>
> 2. 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. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
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> 4. An important Commission rule or policy should be reconsidered.
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> [N.J.A.C. 19:11-8.2(a).]

The Commission determines that pursuant to N.J.A.C. 19:11-8.2(a)(1), (2) and (3), the request for review is granted. A substantial question of law involving the Director's decision on a substantial factual issue, which may have resulted in prejudicial error, has been raised by CWA, warranting Commission consideration.

We are cautious about permitting an unfair practice charge to block a representation petition, in light of our policy to expedite the processing of representation disputes so that the question of whether employees wish to be or not to be represented by an employee organization for purposes of collective negotiations can be promptly resolved in a secret ballot election. See Ridgefield Bd. of Ed., D.R. No. 2012-6, 38 NJPER 246 (¶82 2012), LEAP Academy Univ. Charter Sch. Bd. of Trustees, D.R. No. 2006-17, 32 NJPER 142 (¶65 2006). Further, because the charging party before PERC prosecutes its own unfair practice complaint, N.J.S.A. 34:13A-5.4(c), there is a potential for abuse of the blocking policy, since a party who desires to hold up an election could file a frivolous but serious-sounding charge. State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105, n20 (¶12044 1981), recon. den., P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981). Therefore, unless competent documentary evidence is submitted to establish the basis for the claim that the conduct underlying the alleged unfair practices prevents a free and fair

election, the Director should decline to exercise his discretion to block an election. State of New Jersey, D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), recon. den., P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981).

In evaluating whether a fair election can be conducted during the pendency of an unfair practice charge, the following factors must be considered:

> 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.
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> [State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), recon. den. P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981)(emphases added).]

In determining to grant the blocking request at issue, the Director examined the following three contentions of GWU:

- The City Manager "bad mouthed" GWU and encouraged unit employees to leave the union. D.R. at 15-17.
- The City, in bad faith, refused to negotiate with GWU. D.R. at 17-18.
- The City's direct dealing with unit employees immediately before the filing

> of the petitions, prevents free and fair elections. D.R. at 18-20.

The Director rejected the first two of the above contentions. He found the evidence submitted by GWU in support of the "bad mouthing" allegation to be "insufficient to support a blocking request," D.R. at 16, because it consisted only of Tucker's certification of hearsay statements about events of which he had no personal knowledge, unsupported by "any certifications from unit employees or others with personal knowledge" of the claimed bad-mouthing, and an email to GWU's business manager from the City Manager stating: "I think your priority should be spent on the outstanding issues with other union members that the GWU fails [to] address." D.R. at 15-16. The Director found the email did not appear to exceed "the parameters of legitimate employer speech," and that even if it did, "no facts indicate that unit employees received or had access to that communication." Id., at 16.

The Director also found no indication, under the circumstances presented, "that any delay in negotiations was solely caused by the City or was otherwise indicative of bad faith." D.R. at 18. In reaching that conclusion, the Director found the City's alleged refusal to negotiate was unsupported by "any certifications or authenticated documents that tend to support the allegation that the City refused to engage in good faith negotiations." Id. at 17. The Director observed that the

documents submitted showed that the parties corresponded about the subject of negotiations by email on June 25, 2020, and that Tucker certified that they met on December 10, 2020 for collective negotiations. Id. The Director found that GWU proffered no "facts indicating that GWU requested the City to negotiate between June 26, 2020 and the December 10, 2020 meeting," while noting that GWU's unfair practice charge alleged that GWU requested negotiations in November 2020, resulting in the December 10, 2020 negotiations session. Id.

We agree with and adopt the Director's findings with respect to GWU's "bad mouthing" and refusal-to-negotiate allegations.

However, we do not concur with the Director that GWU's third contention, regarding the timing of Inderwies' purported admission of direct dealing, standing alone, establishes the requisite nexus between the alleged unfair practice and the conduct of a free and fair election, to the degree necessary to support a blocking charge.

With respect to the purported admission of direct dealing, the certification of GWU's President, David Tucker, states:

> On December 10, I met with Mr. Inderwies his labor counsel and others in a contract negotiation meeting. During the meeting I asserted Mr. Inderwies had engaged in direct-dealing with several employees and undermined the Union's effectiveness in the eyes of the employees. Mr. Inderwies and counsel Nicole Curio admitted the direct-dealing with employees that resulted, in two of the several instances, that two (2) Public Works

> employees received ten thousand ($10,000.) dollar salary increases, each. No agreement was reached on terms in that meeting.
>
> [(Tucker Cert., ¶6.)]

GWU's Statement of Charges states:

> The GWU President Tucker met with Mr. Inderwies and Ms. Curio on December 10, 2020. At that meeting, Mr. Inderwies admitted meeting and bargaining individually with: [R.M.; L.B.; D.S.; J.D.; J.M.] and others, suspected but unconfirmed. Mr. Inderwies admitted to increasing employee salaries, pursuant to those meetings, without notice or consultation with the GWU.
>
> [(UPC, Statement of Charges, ¶8.)]

CWA filed its representation petitions on December 18 and 29, 2020,[1/] after Tucker's meeting with Inderwies.

But neither Tucker's Certification nor the Statement of Charges specify the date(s) when Inderwies purportedly dealt directly with any of the affected individuals, who are identified only in the Statement of Charges, not Tucker's certification. Neither document alleges facts establishing whether and/or when other unit members knew about the alleged direct dealing, or that it influenced any member to sign a card. In Tucker's December 10, 2020 contract negotiations meeting with Inderwies, according to Tucker's certification, two things happened: Inderwies purportedly admitted to direct dealings affecting two City

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1/ CWA dated both petitions December 18, 2020, but the white collar petition was submitted by regular mail in the form of hard copies, and was docketed December 29, 2020.

employees; and the meeting resulted in no progress in negotiations. Twelve of the 24 cards establishing a showing of interest in support of CWA's blue collar petition were dated December 9, 2020, the day before Tucker's contract negotiations meeting with Inderwies. Of the rest, all but one card (which was undated) bear dates ranging from December 10 to December 15, 2020. With respect to CWA's white collar petition, nine of the 13 cards submitted in support of same were signed on December 10, 2020. The rest bear dates ranging from December 11 through December 14, 2020. On balance, in the absence of specific dates that the alleged direct dealing incidents actually occurred and unit members' actual awareness of them, this record does not conclusively establish the requisite nexus between the alleged direct dealing and the signing of the cards. While it is possible that some members' decisions to sign cards may have been influenced by Inderwies' purported admission of direct dealing, it is at least equally plausible, on this record, that a majority of the card signings were motivated by unit members' dissatisfaction with Tuckers' lack of progress in contract negotiations, as CWA contends.

Moreover, the City Manager's alleged statement within the Tucker Certification is hearsay. As the Director noted in his decision, in rejecting evidence proffered by GWU to support its contention that Inderwies had "bad mouthed" GWU, "hearsay and

double hearsay statements in a certification, '. . . cannot form a basis to block a representation election.'" D.R. NO. 2021-2, at 13, quoting River Vale Bd. of Ed., D.R. No. 2014-3, 40 NJPER 133, 135 (¶50 2013). We add that in representation proceedings, the relevant standard of admissibility is that all relevant evidence is admissible, but hearing officers may "exclude any evidence or offer of proof if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion." N.J.A.C. 19:11-6.6(b) and (c).

We question the probative value of Inderwies' statement about salary increases, contained within the Tucker certification, because it is not supported by affidavits or certifications from unit members with personal knowledge of meeting times and locations where Inderwies (or any other employer representative) disclosed the alleged salary increases, either to their recipients or to other unit members. Nor does the record contain affidavits or certifications from unit members with personal knowledge of where or when any alleged recipient of a salary increase revealed that fact to any other unit member. See Atlantic City Convention and Visitors Auth., D.R. No. 2002-9, 28 NJPER 170 (¶33061 2002). In light of these shortcomings, the probative value of Tucker's certification in support of granting

the blocking request is substantially outweighed by the risk that its admission will create undue prejudice.

Further, the fact that the statements of Inderwies contained within Tucker's certification were not specifically rebutted by the City in its opposition to the charge does not necessarily render that evidence as being more competent than other evidence presented by CWA, in the certification of Adam Liebtag, President of CWA Local 1036. Liebtag certified that in December of 2020, CWA was approached by City employees asking for information about CWA possibly representing their respective units due to dissatisfaction with the representation from GWU over the past three years. (Liebtag Cert., ¶¶ 4-8.) In support of that claim, Liebtag attached exhibits to his certification which are purported to be statements in the form of text messages between a blue collar unit member and Tucker, evidencing that dissatisfaction. (Liebtag Cert., ¶¶ 27-38, Exh. 1.)

As CWA points out, GWU did not dispute the facts presented in the Liebtag certification, which offer a competing and, if true, legitimate explanation as to the genesis of the representation petitions at issue.

The Director's decision also discusses an unsolicited printout of a news article supplementally submitted by GWU on March 4, 2020. Dated March 4, the article details payments purportedly made by Inderwies to himself and other City employees

in September and December of 2020. In a letter accompanying the news article, GWU alleges that two white-collar City employees named in the article, D.S. (also named in GWU's Statement of Charges but not in Tucker's certification) and N.M. (not named in Tucker's certification or the Statement of Charges) withdrew their support for GWU after receiving the alleged salary increases, and after N.M. received a subsequent transfer and promotion.

Both the City and CWA opposed the Director's consideration of the news article and GWU's accompanying letter. CWA argued that it was unsupported by a certification, it was "late, legally irrelevant, and violates PERC procedure," and that even if such compensation was paid out, GWU submitted no proof that it was a proximate cause of employees seeking a representation election. The City similarly argued that GWU's submission was untimely and procedurally improper,[2/] and further that the information it

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2/ Specifically, the City objected that the news article was submitted after the GWU's blocking charge was fully briefed by the parties under N.J.A.C. 19:14-1.6; it was submitted without leave of the Commission to file a supplemental brief; and GWU submitted it without seeking to amend its charge as required by N.J.A.C. 19:14-1.5(a). N.J.A.C. 19:14-1.6(b) provides: "The assigned [PERC] staff member may request the parties to submit briefs setting forth detailed arguments concerning all relevant legal issues." N.J.A.C. 19:14-1.5(a) provides: "Before a complaint issues, the Director of Unfair Practices may permit the charging party to amend a charge upon such terms as may be deemed just. After a complaint issues, any proposed amendment shall be filed with the hearing examiner."

contained was "demonstrably false." As examples, the City contends that D.S. withdrew from the GWU in June 2020, three months before he allegedly received any of the payments referenced in the article; and that GWU was aware of and consented to N.M.'s transfer and pay increase. As proofs, the City submitted a copy of a June 8, 2020 letter to Tucker from D.M., advising of D.M.'s decision to resign from his GWU membership and directing GWU to immediately cease deductions of union dues or fees from his paycheck, pursuant to the U.S. Supreme Court's decision in Janus v. AFSCME; and a copy of a February 23, 2021 email from Tucker to the City, advising that he "received confirmation from [N.M.] that she desires the position and accepts that salary. In that regard, the GWU has no objection to the transfer." GWU filed no response to CWA and the City's opposition to CWA's supplemental submission, nor did GWU request leave to do so.

The Director's decision did not make specific findings as to the credibility of the news article, whether he accepted it as corroborating Tucker's certification, or why it should be considered over the objections of CWA and the City. We find that, like Tucker's certification, the news article, and GWU's accompanying letter, are unsupported by certification(s) based on personal knowledge; and otherwise contain no facts establishing that unit employees were aware of such payments and, if so, when

they became aware; or that the payments were made as an inducement to any of the recipients to pursue a representation election, or to vote against GWU in such an election. We thus find that the news article's probative value is substantially outweighed by the risk that its admission will create undue prejudice.

In short, we find that the evidence presented by GWU in support of its direct-dealing claim has many of the same deficiencies that resulted in the Director's proper rejection of GWU's claims of "bad mouthing" and a refusal to negotiate by the City. Given that those deficiencies permeate the evidence presented by GWU in support of all three of its contentions underlying the blocking request, we do not find the direct-dealing evidence to be any more competent than the rest. Nor do we find CWA's evidence presented in opposition to the charge, which was supported by a certification that was not rebutted by GWU, to be less competent.

Finally, we find that a consideration of the size of the working force and the number of employees involved in the events upon which the charge is based does not lead to a different conclusion. State of New Jersey, supra. Even if Inderwies' alleged payments actually induced three white collar employees to oppose GWU in a representation election, a possibility perhaps afforded significance in the Director's footnote 5, the record

shows that CWA's white collar petition was supported by 13 showings of interest, that is, every employee in the unit. A petition for representation need only be supported by at least 30 percent of the employees in the unit alleged to be appropriate. N.J.A.C. 19:11-1.2. CWA's showing far surpasses that requirement, even if three showings of interest were discounted due to Inderwies' alleged improper payments. Absent competent evidence in the record establishing that a significant number of other unit employees also had knowledge of the payments or were similarly induced, the record does not support the grant of a blocking request. In short, the relatively large number of employees who have demonstrated a showing of support on behalf of CWA is evidence of the "entitlement and interest of the employees in an expeditious expressing of their preference for representation." See, State of New Jersey, D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), recon. den., P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981).

In sum, we find that a "balanced examination" of the evidence presented, which administrative discretion requires in the consideration of a blocking request, State of New Jersey, supra, does not support the issuance of a blocking order. We therefore find the grant of the blocking request was clearly erroneous on substantial questions of law and fact, and that such

error may prejudicially affect the rights of the party seeking review. N.J.A.C. 19:11-8.2(a)(1), (2) and (3).

ORDER

The Director's order granting a blocking request in D.R. No. 2021-2, __ NJPER __ (¶__ 2021) is reversed, and the Director is ordered to resume the processing of CWA's representation petitions.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: April 29, 2021

Trenton, New Jersey