P.E.R.C. NO. 83-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

UNITED PUBLIC EMPLOYEES,

Petitioner, Docket No. RO-83-103

-and-

CWA SUPERVISORS (HIGHER LEVEL),
AFL-CIO,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission declines a Request for Review and Stay of Election which CWA Supervisors (Higher Level), AFL-CIO sought. The United Public Employees filed a Petition for Certification of Public Employee Representative with the Commission in which it sought to represent approximately 1600 higher level supervisors employed by the State of New Jersey. CWA, the incumbent representative of these employees, intervened and sought to block an election until an unfair practice charge it had filed against the State was fully litigated and resolved. The Director of Representation determined that CWA had not shown that the State's alleged conduct could impair the free choice of employees in an election. Accordingly, he scheduled a mail ballot election to commence February 28 and conclude March 21. D.R. No. 83-20, 9 NJPER ___ (¶_____ 1983). CWA filed a Request for Review and Stay of Election with the Commission, but the Commission, determining that the Director of Representation appropriately applied established Commission policies on the relationship between representation petitions and unfair practice charges and agreeing that employee free choice in the upcoming election would not be impaired, declined the request and refused to stay the election.

P.E.R.C. NO. 83-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

UNITED PUBLIC EMPLOYEES,

Petitioner, Docket No. RO-83-103

-and-

CWA SUPERVISORS (HIGHER LEVEL),
AFL-CIO,

Intervenor.

Appearances:
For the Public Employer,
Irwin Kimmelman, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Petitioner,
Fox and Fox, Esqs.
(David I. Fox, of Counsel)

For the Intervenor,
Steven P. Weissman, Associate Counsel

DECISION ON REQUEST FOR REVIEW AND STAY OF ELECTION

On November 1, 1982, United Public Employees ("UPE") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. UPE seeks to represent approximately 1600 higher level supervisors employed by the State of New Jersey ("State"). An adequate showing of interest accompanied the petition.

On November 3, 1982, the Director of Representation notified CWA Supervisors (Higher Level), AFL-CIO ("CWA"), the

incumbent employee representative of the State's higher level supervisors, of UPE's petition. CWA then intervened in the representation proceeding on the basis of its current written agreement (expiring June 30, 1983) with the State covering the terms and conditions of employment of unit members. N.J.A.C. 19:11-2.7.

On November 8, 1982, a Commission staff member conducted a conference on the petition to ascertain the parties' positions. UPE and the State consented to an election, but CWA declined to do so. CWA instead asserted that an election should not be held because the State had allegedly engaged in certain conduct which favored UPE, enabled that organization to gain the employee support necessary to raise a question of representation, and impaired the free choice of unit members. CWA specifically requested that an unfair practice charge it had filed on July 27, 1982, and amended on September 1 and December 3, 1982, block the holding of any Commission-directed election.

The original charge alleged, in pertinent part, that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically N.J.S.A. 34:13A-5.4(a) (1),(2),(3), and (5), [1/] by allegedly engaging in a pattern of

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, 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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; and (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."

illegal activity designed to discourage CWA membership and undermine CWA's majority representative status. The charge specified three allegedly illegal acts: a January 25, 1982 meeting between the Director of the Office of Employee Relations ("OER") and UPE representatives, a July 15, 1982 letter from the Governor to all State employees represented by CWA concerning the beginning of deductions from their paychecks for CWA representation fees,[2/] and a July 20, 1982 meeting between the Governor and UPE representatives. The December 3, 1982 amendment alleged that the State violated subsections 5.4(a)(1),(2), and (3) of the Act when it allegedly provided UPE with the names, addresses, and work locations of all State employees represented by CWA and with CWA membership statistics.[3/]

The Director then investigated the petition and CWA's request to block the election. N.J.A.C. 19:11-2.6. He required CWA to submit any evidence, documents, or affidavits showing how or why the free choice of the higher level supervisors would be affected by what had allegedly occurred.

On December 20, 1982, CWA filed a statement of position and certain documentation, including newspaper articles and affidavits, in support of its request to block the election. The

2/ Other affiliates of CWA represent three other units of State employees: (1) administrative and clerical employees, (2) professional employees, and (3) primary level supervisors. CWA filed the unfair practice charge as majority representative of these three units as well as the unit involved in the instant petition.

3/ The original charge and the September 1, 1982 amendment contain other allegations which are not material to this proceeding since CWA has not relied upon them as a basis for blocking an election.

affidavits generally described employee reaction to the two meetings and the Governor's letter among all the State units CWA represents.

The Director served UPE and the State with this material and required any response to be submitted by January 5, 1983.[4/] UPE and the State filed timely submissions opposing any delay in the elections.

On January 31, 1983, the Director of Representation issued a decision directing a mail ballot election to start February 28 and end March 21, 1983. D.R. No. 83-20, 9 NJPER ___ (¶_____ 1983). The Director, citing established case law including In re 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), mot. for recon. den. P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981), aff'd sub nom New Jersey State Employees Assn., Local 4089 a/w AFT, AFL-CIO v. State of New Jersey, App. Div. Docket No. A-3275-80/A-4164-80T2 (November 10, 1982) ("State of New Jersey"), concluded that the evidence CWA presented did not substantiate its claim that the alleged unfair practices, whether considered individually or in their entirety, had so tainted either UPE's showing of interest or the election atmosphere of free choice as to prevent a fair election and to require either dismissing the petition or blocking a representation election until the charge had been resolved (Slip Opinion at p. 17).[5/] With respect to the January 25

4/ The Director also advised the parties that CWA's submission was insufficient to overcome the presumption of validity accorded to UPE's showing of interest.

5/ The Director properly noted (Slip Opinion at p. 9) that his task was not to determine whether unfair practice charges might result in a Complaint pursuant to N.J.A.C. 19:14-2.1 and an unfair practice finding; instead, he focused his attention on whether there was a sufficiently substantial (continued)

and July 20, 1982 meetings between State officials and UPE representatives, the Director found that CWA had presented no evidence that either the Governor or the Director of OER negotiated with UPE or processed particular grievances,[6/] that the State had endorsed UPE or its positions, or that the State had failed to meet with CWA, upon request, concerning the topics discussed at these meetings. In the absence of such evidence, the Director concluded that two meetings occurring six months apart and long before either an election or the filing of UPE's petition could not have tainted the question of representation before this Commission or impaired employee free choice in an election. With respect to the Governor's July 15, 1982 letter concerning the commencement of deductions of representation fees from employee paychecks, the Director found that CWA had submitted no evidence that the letter confused employees or that it contained threats, promises, or

5/ (continued)
connection between, on the one hand, the charge and CWA's supporting material and, on the other hand, the validity of UPE's showing of interest and the prospects for a fair election to require either dismissing the petition or blocking the election.

6/ N.J.S.A. 34:13A-5.3 provides, in part:

> Nothing herein shall be construed to prevent any official from meeting with an employee representative for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances.

The Director observed that, if CWA's allegations were true, the State might have violated subsection (a) by failing to inform CWA of the meeting, but concluded that the absence of notification, standing alone, could not have influenced employees in either voting or signing authorization cards.

coercive or intimidating statements which would negate the Governor's apparent constitutional right to communicate with unit members. In the absence of such evidence, and given the letter's contemporaneity with the implementation of the representation fee deduction, the Director concluded that one noncoercive letter by itself could not taint an election held at least seven months later. With respect to CWA's allegations that the State provided UPE with lists of names, addresses, and work locations of all employees and with CWA membership statistics, the Director concluded that the Commission had already sanctioned minority organization access to names and addresses of employees during the insulated period in In re Union County Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976) ("Union County"), that, in any event, UPE would have been entitled to names and addresses during the open period, that CWA had not submitted any evidence that UPE would not have been able to raise a question concerning representation without the additional information the State allegedly supplied, and that there was no reason to believe that the purported transmission of such information could taint the atmosphere of free choice at an election held many months later. After reviewing each of the alleged unfair practices and CWA's accompanying submissions, the Director finally concluded that CWA's claims were neither individually nor collectively cause to block an election and that a prompt election would effectuate the policies of the Act.

On February 9, 1983, CWA filed a Request for Review and Stay of Election and an accompanying brief. N.J.A.C. 19:11-8.1. It also requested oral argument. CWA generally contends that the

Director misapplied Commission and NLRB blocking charge standards and failed to consider the State's alleged pattern of illegal activity. More specifically, CWA argues that the Director should have considered whether the alleged unfair practices resulted in a transfer of allegiance among employees during the period UPE gathered the majority of its authorization cards, that the Director neglected to consider the atmosphere at the time UPE authorization cards were collected, that the Director unreasonably required CWA to meet the burden of showing that the alleged unfair practices could have impaired the free choice of the voters, that it met this burden in any event, that the Director did not consider the combined effect of the two meetings, the letter, and the lists, that the Director misanalyzed the effect of each of these alleged incidents, and that the Director erroneously relied on Union County in considering allegations concerning the lists the State allegedly supplied UPE.

On February 17 and 18, 1983, UPE and the State, respectively, filed statements of position reasserting their opposition to blocking an election during the processing of the unfair practice charge. UPE contends that the Director correctly applied the blocking charge policy the Commission and the Superior Court, Appellate Division approved in In re State of New Jersey. The State, while asserting its neutrality between UPE and CWA in the representation proceeding, denies the commission of any unfair practices, concurs that the previous State of New Jersey decision compels rejection of CWA's claims, and adds that an

immediate election is vital so that negotiations can be concluded before the expiration of the current contract on June 30, 1983.

On February 18, 1983, the Chairman of the Commission, acting pursuant to authority delegated by the full Commission, heard oral argument. The parties had originally been scheduled to argue before the full Commission at its regular monthly meeting on February 16, 1983, but CWA's attorney requested a postponement. A transcript of the argument was delivered to all Commissioners by February 22, 1983.

N.J.A.C. 19:11-8.2 provides the grounds for granting a request for review in a representation case. That rule states:

> (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.

We are satisfied that there are no such compelling reasons or specific grounds for granting review in this case.

Just three months ago the Appellate Division approved the policy concerning the effect of pending unfair practice

charges on representation proceedings which the Commission set forth in State of New Jersey. In that case, CWA filed the representation petitions which ultimately led to Commission-directed elections and certifications of CWA as majority representative of four units of State employees including higher level supervisors. The incumbent, New Jersey Civil Service Association/New Jersey State Employees Association ("NJCSA/NJSEA"), filed a series of unfair practice charges alleging that the State had refused to negotiate with it, had regularly met with, communicated with, and unlawfully assisted its competitors, had filed a representation petition which enabled competing labor organizations to participate in representation proceedings,[7/] and had improperly prompted and processed approximately 2,500 dues deduction withdrawal cards. First NJCSA/NJSEA and then NJSEA/AFT[8/] sought to have any elections blocked while the unfair practice charges were processed; CWA and the State opposed this request.

The Director of Representation, consistent with prior practice and N.J.A.C. 19:11-2.6, required NJSEA/AFT, the party

7/ In the instant representation dispute, the State has not filed any representation petitions seeking the direction of an election. It has, however, consented to an election.

8/ NJCSA withdrew from the representation proceedings while NJSEA, having affiliated with AFT, continued to participate.

seeking to block elections, to submit evidence in the representation forum to establish the basis for its claim that the conduct underlying the alleged unfair practice prevented fair and free elections. He then assessed this evidence in order to make a judgment whether the employees in the four units could, under all the circumstances, exercise their free choice in an election, despite the alleged unfair practices. He answered this question affirmatively. D.R. No. 81-20, supra at pp. 45-47.

We affirmed this exercise of the Director's administrative discretion. We specifically rejected NJSEA/AFT's assertion that the mere existence of unfair practice charges filed by a party to a representation proceeding will cause the NLRB to hold an election in abeyance. We stated:

> While the NLRB will frequently block an election in the face of unresolved unfair labor practices, the policy is far from a per se one. The policy is a discretionary one which must be applied as the facts warrant. For example, in American Metal Products Company, 139 NLRB No. 60, 51 LRRM 1338, 1340 (1962), the NLRB decided to direct an election despite pending unfair labor practice charges filed by the union. The Board stated:
>
> > We are cognizant of our usual practice of declining to direct an election in the face of unresolved unfair labor practice charges affecting the units involved in the representation proceeding, especially where violations of section 8(a)(5) are alleged. Nevertheless, it is well settled that this practice is a matter which lies within the discretion of the Board as part of its function of determining whether an election will effectuate the policies of the Act.
>
> See also, Columbia Pictures Corporation, 81 NLRB No. 207, 23 LRRM 1504 (1949). In fact, in those cases where the NLRB has blocked an election without evaluating the specific facts of a case, it has been criticized by the federal Appellate Courts:

> ...the Board should not be allowed to apply its "blocking charge practice" as a per se rule without exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the alleged petition ought to be delayed or dismissed. Surrat v. NLRB, 463 F.2d 378, 80 LRRM 2804, 2806 (5th Cir. 1972).

In the instant case, the Director was aware of all the facts set forth in this opinion as to the opposite positions of the two entities making up the Charging Party. Additionally, he analyzed in detail the nature of the charges and their potential for interfering with the free choice of the employees in the elections. Moreover, he specifically made reference to and was guided by the factors set forth in the NLRB's own policy, which [lists the following considerations]:

> 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.

We agree with the Director's conclusion that the charges should not block and that an election should be directed for the reasons stated in his decision. We note that the Director's inquiry into the particular facts of this matter is precisely the kind of balanced examination which administrative discretion requires. It is also consistent with the application of his policy in previously decided matters. [9/] See, e.g., In re Matawan Reg. School Dist. Bd of Ed, D.R. No. 78-11, 4 NJPER 37 (¶4019 1977). P.E.R.C. No. 81-94, supra at p. 109

CWA won the elections and NJSEA/AFT appealed. On November 10, 1982, the Superior Court, Appellate Division summarily

[9/] While we agree with the Director's analysis and application of NLRB policy, we note that there are differences in the unfair

affirmed the Director's and Commission's determination that "...the character and scope of the unfair practice charges would not have the tendency to impair the employees' free choice and, therefore, should not be accorded blocking effect." (Slip Opinion at pp. 10-11) The Court also stated:

> Local 4089 advocated a per se rule effectively blocking any election where unfair labor practice charges have been filed, but PERC chose instead to follow the practice of the National Labor Relations Board (NLRB) to decide each case on its own facts. Local 4089 advances no sound reason for deviating from this practice. (Slip Opinion at p. 11)

In the instant case, we do not believe that CWA has raised a substantial question of law concerning the Commission's blocking charge policy or has set forth compelling reasons for reconsideration of the policy so shortly after the Superior Court, Appellate Division has endorsed it. In particular, we do not agree with CWA that requiring some evidence that alleged unfair

[9/] (continued)
practice procedures under this Act and federal law which may require that even more discretion be applied herein. The NLRB investigates and prosecutes the charges filed with it, whereas PERC assumes the truth of the allegations of charges filed with it and issues a complaint if those allegations might constitute an unfair practice. See N.J.A.C. 19:14-2.1(a). Additionally, the Charging Party before PERC prosecutes its own complaint. N.J.S.A. 34:13A-5.4(c). Under these circumstances, the potential for abuse of the blocking policy is greater since a party who desires to hold up an election could file a frivolous but serious sounding charge. Under the NLRB practice, such a charge would be investigated by Board staff and dismissed. Under PERC practice a complaint might issue and a Charging Party could drag out the hearing just to delay the election. Thus the need for careful scrutiny in the representation proceeding before the charge is given blocking effect is greater before PERC. (Footnote in original)

practices would, in our judgment, impair employee free choice imposes an unreasonable burden on a party seeking to delay an election. Representation elections must ordinarily be held very quickly in order to dispel confusion over who represents whom and to insure orderly negotiations over successor contracts; unnecessary delay in elections breeds possible labor instability and hampers government budgeting and planning.[10/] Since we, unlike the NLRB, do not investigate the merits of unfair practice charges before deciding whether to issue a Complaint, it is reasonable and necessary that the Director, pursuant to N.J.A.C. 19:11-2.6(b), investigate in the representation forum the nature of an unfair practice charge and its possible effect, if any, on the employees' free choice if an election is held. Requiring the party seeking to block an election which would otherwise be held promptly to submit specific evidence showing why the election should not be held is equally reasonable and necessary. The Director then must have broad discretion to judge whether there is sufficient evidence that employee free choice will be imperiled to outweigh the strong presumption in favor of having as expeditious an election as possible.

We also believe that the Director has acted well within his discretion in applying our policy on the relationship between

10/ N.J.A.C. 19:11-2.8(c), the rule setting the time for filing a representation petition when a current written agreement exists, is designed to insure that questions of representation will be resolved in sufficient time to allow completion of successor contract negotiations before the expiration of the current contract.

unfair practice charges and representation petitions and declining to delay the instant election until CWA's unfair practice charge has been fully litigated and resolved. We disagree with CWA's assertion that the Director ignored a "pattern" of allegedly illegal activity. The Director carefully analyzed each allegation CWA relied upon in its attempt to delay the election and concluded that these allegations were neither individually nor in their entirety cause to block the election (Slip opinion at p. 17). We agree with his assessment of the individual allegations, together with CWA's accompanying submissions, and his judgment that they collectively failed to establish any threat to the free choice of the higher level supervisors, either at the time the upcoming election will be held or at the time UPE collected its authorization cards. 11/ This is a matter committed to his and our expertise and discretion. Accordingly, we decline to review the Director's reasonable exercise of his discretion in this case or to stay the election.

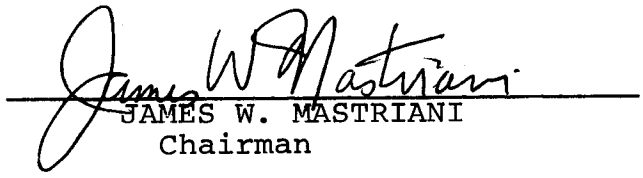
11/ We also reject CWA's contentions that the Director failed to consider whether the alleged unfair practices resulted in a transfer of allegiance among employees or otherwise poisoned the atmosphere during the period UPE gathered the majority of its authorization cards. CWA has submitted no evidence suggesting that it has lost members who have instead joined UPE as a result of the alleged unfair practices; thus the predicate for a claimed transfer of allegiance has not been established. In addition, the Director repeatedly analyzed

(continued)

ORDER

CWA's Request for Review and Stay of Election is denied.

BY ORDER OF THE COMMISSION



JAMES W. MASTRIANI
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, Hartnett and Newbaker voted for this decision. Commissioners Graves and Hipp voted against this decision.

DATED: Trenton, New Jersey
February 23, 1983

11/ (continued)
the validity of the showing of interest in light of the alleged unfair practices and determined that those alleged occurrences had not tainted that showing (Slip opinion at pp. 9, 11-12, 16-17). We agree. Moreover, we are not persuaded that the Director misinterpreted Union County. Finally, we note that a case reargued in October 1982 before the United States Supreme Court, Perry Local Educators' Assn v. Hohlt, 652 F.2d 1286 (7th Cir. 1981), cert. granted, ___ U.S. ___ (1982), may shed further light on the rights of competing employee organizations and the validity of exclusive access rules.