

The County Insider

It's all in the Cards-Not the Votes:

Amendments to the Employer-Employee

Relations Act Permit Card Check Union Recognition

By: Brian Kronick, Esq., Genova, Burns & Vernoia, Attorneys at Law

Assembly Bill No. 1820 (A-1820) was signed into law by Governor Richard Codey on or about July 19, 2005. The law amends the Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.3, to allow for the organization of public employees if a majority of employees sign authorization cards indicating a preference for union representation. On or about July 19, 2005, the Commission implemented amendments to its regulations corresponding to the Act.

Prior to the amendments, in order for a labor organization to be recognized as the representative of an employee bargaining unit, the employer had to agree to representation by the organization or the majority of employees in the bargaining unit must have voted for representation by the organization in a secret ballot election conducted by the Public Employment Relations Commission (PERC). PERC has detailed procedures that ensure a free and fair election

where employees may cast their vote confidentially without peer pressure or coercion from unions or employers. Essentially, the new law eliminates the need for representation elections in certain cases.

Statutory Amendments

The designation of the representative organization for public employees is governed by N.J.S.A. 34:13A-5.3, which, as amended, reads in pertinent part: Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes, by the majority of the employees voting in an election conducted by the commission as authorized by this act or, at the option of the representative in a case in which the commission finds that only one representative is seeking to be the majority representative, by a majority of the employees in the unit signing authorization cards indicating their preference for that representative, shall be the exclusive representatives for collective

negotiation concerning the terms and conditions of employment of the employees in such unit.

Regulatory Amendments

In light of the amended statute, the Commission implemented amendments to 19:11-1.2; 19:11-2.4; N.J.A.C. 19:11-1.2 addresses the contents of a petition for certification and requires a petition for certification state whether the petitioner seeks certification on the basis of its having submitted authorization cards signed by a majority of the employees in the unit alleged to be appropriate and there is no other employee organization seeking to be the majority representative. The regulations require the petitioner to submit the authorization cards upon which it is relying. N.J.A.C. 19:11-2.4 governs the notice requirements and requires a notice posting informing employees that a representation petition has been filed and that the petitioner is seeking to become the majority representative without an election on the basis

that a majority of employees in the unit have signed authorization cards.

N.J.A.C. 19:11-2.6 governs the Director of Representation's investigation and disposition concerning the representation petition. The amended regulation added the following language:

Where the petitioner is seeking to be certified as the majority representative of an appropriate unit on the basis of authorization cards and no other employee organization is seeking to be the majority representative, the Director of Representation shall determine whether a majority of employees in the unit have signed valid authorization cards.

N.J.A.C. 19:11-2.6(b). The regulation was further amended to provide that after the investigation of the representation petition, the Director of Representation is authorized to "[c]ertify the petitioner as the majority representative based on its submission of valid authorization cards signed by a majority of the employees in the
(Cont. pg. 15)

(From Pg. 14) appropriate unit ...” N.J.A.C. 19:11-2.6(d)

(6). Unfortunately, the legislative history relating to the amendments does not. The amendments fail to provide the employer or employees with any grounds for challenging the card check method for union recognition. The Assembly Labor Committee’s statement regarding the bill simply stated:

The bill ... requires that the Public Employment Relations Commission recognize a labor organization as the majority representative of public employees in a unit if a majority of the employees in the unit sign authorization cards indicating their preference for that organization and if the commission finds that there is only one labor organization seeking to be the majority representative.

Aside from the Committee statement, the legislative history simply offers reprints of the bill in question.

In essence, the amendments allow the Commission to recognize a labor union as the bargaining representative for public employees without a union election in cases where the majority of the employees

in the unit sign authorization cards indicating their preference for that organization and a finding by the Commission that there is only one labor organization seeking to be the majority representative. Labor law annals are full of examples where the use of card checks have been challenged on coercion, misrepresentation, forgery, fraud, peer pressure, and promised benefits. The amendments do not address these issues. While the regulations still allow for the Director to conduct an investigation into the petition, the regulations limit the investigation to whether a majority of the employees in the units signed valid authorization cards.

In the short period of time that the amended statute and regulations have been in place, a small number of cases have been processed by the Commission. Of those cases, none have challenged the validity of the amended statute and corresponding regulations.

While there are no reported New Jersey cases dealing with the use of authorization cards under the new card check method of union recognition, there are several cases addressing the

validity of authorization cards used by unions as a means for establishing a “showing of interest” in a petition for certification. In “showing of interest” cases, the Commission has determined that holding an election is the best means for establishing the employees’ true desires with respect to union representation.

In Borough of Paramus, 21 NJPER 26015 (1994), the Commission concluded:

It is inappropriate in a representation forum to permit parties to litigate allegations that authorization cards have been procured by fraud, misrepresentation, or coercion or that they have been revoked or that they are stale. Rather ... the best method to discover employees’ true choice as to which organization, if any, they wish to designate as their negotiations representative is by providing employees a secret ballot election.

Id. (citing Essex Cty., 11 NJPER 433 (¶ 16149 1985)).

Borough of Red Bank, 25 NJPER 30001 (1998), also involved a challenge regarding the validity of authorization cards used by the union as a showing of interest in its petition for certification. In that case, the

Commission determined:

The object of an investigation [into a challenge of the showing of interest] is not to ascertain whether the petitioning party still has the same support it did when it filed, or even to resolve each challenge to the showing of interest raised by the objecting party. The true desires of the employees involved, which is the essential question to be resolved, will best be ascertained by the holding of an election, not by drawn out evidentiary hearings.

Id. (citing City of Jersey City, 2 NJPER 30 (1976)).

Based on Paramus and Jersey City, an employer may be successful in challenging union representation under the amended statute/regulations if the employer is able to challenge the validity of the employees’ signatures on the authorization cards. If the Commission considers a challenge to the authorization cards under the amended statute and / regulations in the same manner as it has handled challenges regarding showing of interest authorization cards, it is plausible that PERC would order an election to determine the true desires (Cont. page 16)

The County Insider

(from pg. 15) of the employees.

The New Jersey Supreme Court has recognized that employees have the constitutional right to organize and engage in collective negotiation on the terms and conditions of employment. See Bowman v. Hackensack Hospital Association, 116 N.J. Super. 260, 266 (1971); see also Council of New Jersey State College Locals v. State Bd. of Higher Educ., 91 N.J. 18, 25 (1982). That right is derived from Art. I, par. 19 of the New Jersey Constitution (1947), which states:

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

Although the language of the Constitution limited the right of public employees to present grievances and proposals, the New Jersey Employer-Employee Relations Act made clear that public employees, like private employees, have the right to engage in collective negotiation

on the terms and conditions of employment. N.J.S.A. 34:13A-1 et seq.; See also Council of New Jersey State College Locals, 91 N.J. at 27.

The Act provides in pertinent part: Public employees shall have ... the right ... to form, join and assist any employee organization.

Representatives designated or selected by public employees for the purposes of collective negotiation ... shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment.

N.J.S.A. 34:13A-5.3.

The extent of the rights conferred to employees under the act was explored in New Jersey Turnpike Employees' Union v. New Jersey Turnpike Authority, 123 N.J. Super. 461 (1973) *aff'd* 64 N.J. 579 (1974). In that case, the Court noted that the Act not only granted employees the right "to form, join and assist any employee organization," but it also conferred to employees the right "to refrain from any such activity." Id. at 467. Based on this provision, the Court concluded that a proposed agency shop provision was invalid because it had the effect of compelling union participation and assistance

on the part of non union employees contrary to N.J.S.A. 34:13A-5.3. Id. at 470.

Subsequent to the New Jersey Turnpike Employees' Union case, however, the Legislature amended the Act requiring public employers to negotiate an agency fee system for all public employees. N.J.S.A. 34:13A-5.5 to -5.9; see also CWA Local 1044 v. Hon. Chief Justice of the Supreme Court, 118 N.J. 495, 501-02 (1990). As amended, the Act requires public employers, if requested by the employees' union, to negotiate in good faith whether agency fees shall be paid, through payroll deductions, by non-union members who form part of the negotiating unit. In CWA Local 1044, the Court recognized that the statute overturned its prior ruling in New Jersey Turnpike Employees' Union, which declared that compulsory agency fees were prohibited by an employee's right to refrain from union participation under Act. CWA Local 1044, 118 N.J. at 501-02.

Thus, while the Act confers to employees the right to refrain from union participation, it appears that under CWA Local 1044 it may be difficult to challenge the recent amendments,

which permit union organization through authorization cards, on that basis that the new amendments violate an employee's right to refrain from union participation. As in the cases dealing with agency shop provisions, courts may defer to the legislature.

The recent statutory and regulatory amendments allow the Commission to recognize a labor organization as the majority representative of public employees without a union election in cases where the majority of the employees in the unit sign authorization cards indicating their preference for that organization and a finding by the Commission that there is only one labor organization seeking to be the majority representative. The employer may be successful in forcing an election under the new law, by challenging the validity of the authorization cards in question. An employer may also be successful in questioning the appropriateness of the unit, which may impact whether the union has enough authorization cards for card check recognition. In that instance, the employer might be successful in its request that PERC conduct an election.

The (Cont. page 17)

The County Insider

Pg. 17

(From Page 12) a unique radio frequency enabling the Project Lifesaver team to positively locate and identify a person who has wandered away from home using a specially designed radio receiver..

When the transmitter is issued, the Caregiver is trained by a member of the Project Lifesaver team on how the unit and the Program work. Project Lifesaver then develops a schedule for routine maintenance for the wristband. This close contact with our Project Lifesaver team enables the Participant and the Project Life-

saver team member to become more familiar with each other and their families. If a Project Lifesaver participant should become missing, the Caregiver places a call immediately to 911 to notify the proper authorities. The Project Lifesaver team is then deployed.

The Morris County Sheriff's Office works closely with civic groups, corporations, and charitable foundations on local, regional and national levels providing donations and contributions in order to allow participants to benefit from the Pro-

gram. Most recently, the Morris County Sheriff's Office expanded Project Lifesaver to include children suffering from autism and Down Syndrome.

As 1st Vice President of the New Jersey State Sheriff's Association, it is our goal for all the State's counties to offer citizens the Project Lifesaver program so as to encourage and allow those affected by dementia and their families to travel more freely and more securely. Therefore, should a Participant in the Project Lifesaver program wander while in a county

other than their own, the Sheriff's Office in the county where the Participant is registered need only forward the unique code to the county where the Participant was located when they became missing and that county's Sheriff's Office will be able to utilize their Project Lifesaver equipment to locate the missing Participant. Once the remaining two counties begin to participate in the Program, New Jersey will be the first state in the United States to offer total voluntary coverage statewide.



**The New Jersey Association
of Counties**

Golf Outing

Tuesday, September 19th, 2006

Galloway National Country Club



(From page 16) amendments regarding card check recognition reflect what unions in the private sector have been trying to achieve through federal legislation. At the federal level, a proposed Secret Ballot Protection Act (S. 1173, H.R. 874), would make it illegal for employers to recognize or bargain with unions that

have not been selected by a majority of employees through a secret ballot election. Meanwhile, organized labor is continuing its effort to lobby support for The Employee Free Choice Act (S.842, H.R. 1696) which would require employers to recognize a union through a card check procedure, among other things.

This new card check procedure raises questions about its coercive nature and the tremendous pressure that these employees will face from their peers. The card check procedure has been used to target and intimidate workers into supporting unions by using threats and misrepresentation. In the past, if the authori-

zation cards were questioned a secret ballot election resolved that concern. In eliminating the secret ballot election for union representation, the amendments restrict public employers from engaging in union avoidance campaigns.