

D.R. NO. 87-31

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

In the Matter of

BOROUGH OF MT. EPHRAIM,

Public Employer,

-and-

Docket No. RO-87-18

I.B.F.O., LOCAL 473, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation certifies the I.B.F.O., Local 473 (Union) as the majority representative of a unit of Highway and Water/Sewer Department employees of the Borough of Mt. Ephraim. There was an election among the employees of a unit of Highway and Water/Sewer Department employees of the Borough of Mt. Ephraim to determine if they wish to be represented by the I.B.F.O. Local 473. Although the vote was three to one in favor of Local 473, there were two additional employees voting subject to challenge. Since these challenges were determinative, a hearing was convened to determine if challenged ballots should be counted.

The Director of Representation upholds a Hearing Officer's recommended decision to void a ballot which was cast in a manner which was both subject to employer interference and was delivered in a manner which materially and substantially departed from proper Commission procedure. Accordingly, the remaining challenged ballot was not determinative.

D.R. NO. 87-31

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

In the Matter of

BOROUGH OF MT. EPHRAIM,

Public Employer,

-and-

Docket No. RO-87-18

I.B.F.O., LOCAL 473, AFL-CIO,

Petitioner.

Appearances:

For the Public Employer
Laskin and Botcheos
(George T. Botcheos, of counsel)

For the Petitioner
Freedman and Lorry
(Mark P. Muller, of counsel)

DECISION AND CERTIFICATION OF REPRESENTATIVE

On August 18, 1986, the I.B.F.O., Local 473, ("Union" or "Local 473"), filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission"). Local 473 seeks to represent all Highway and Water/Sewer Department employees of the Borough of Mt. Ephraim ("Borough"). The Union and the Borough entered into a Consent Agreement for an election among these employees. We conducted a secret mail ballot election which concluded on October 22, 1986.

The results of the election were as follows: three (3) votes cast for Local 473; one (1) vote cast against the Union, and

there were two (2) challenged ballots.

Local 473 challenged the ballots of Eugene Sheridan and Joseph Seltzer contending that their ballots should not be counted. The Union maintained that Sheridan is a supervisory employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and not appropriate for inclusion in a non-supervisory unit. It also maintained that Seltzer delivered his ballot in a manner inconsistent with the Commission's rules. The Borough disputes both contentions and argued that the ballots should be counted.

Since the challenged ballots were sufficient in number to affect the results of the election, a hearing was convened to resolve the status of the challenged ballots. Hearing Officer Susan Weinberg conducted the hearing on January 22, 1987. The parties examined and cross-examined witnesses, presented evidence, and submitted post-hearing briefs, the last of which was filed by March 27, 1987.

On May 28, 1987, the Hearing Officer recommended that (1) the challenge to Joseph Seltzer's ballot be upheld and the ballot not be counted and (2) the challenge to Eugene Sheridan's ballot be dismissed and the ballot be counted.

The Hearing Officer informed the parties that exceptions were due by June 10, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. Hearing Officer Weinberg's

findings of fact (paragraphs 1 through 17) are comprehensive and accurate. I adopt and incorporate them here.

The Hearing Officer found Joseph Seltzer was eligible to vote in the mail ballot election. Seltzer received his ballot by mail but intentionally destroyed the ballot. Robert Choate, the Superintendent of Public Works, and an agent of the Board, asked Seltzer how he voted. Upon learning that Seltzer had destroyed his ballot, Choate convinced Seltzer that his refusal to vote was not a vote for the Borough and urged Seltzer to get another ballot from the Commission so that he could vote.

Seltzer received another ballot from the Commission. On the day before the ballots were due, Seltzer was driven by Choate in a Borough vehicle, and on Borough time, to the Commission's offices in Trenton where he hand-delivered his ballot. The instruction which accompanied the ballot stated that the ballot should be "drop(ped) in the United States Mail before discussing it with anyone....Deposit this envelope, which requires no postage, in the United States mail..."

I also adopt the Hearing Officer's conclusions of law that the Borough's conduct was coercive and that Seltzer materially and substantially departed from the clear directions which accompanied his ballot. The totality of this conduct so departed from proper Commission procedure, that the challenge to Joseph Seltzer's ballot must be upheld. Accordingly, his ballot is void and will not be counted.

The Hearing Officer also properly found that Eugene Sheridan was not a supervisor within the meaning of the Act and was a working foreman. Ewing Tp. Bd. of Ed., D.R. 87-22, 13 NJPER 195 (¶18083 1987). However, since Seltzer's ballot is void, Sheridan's ballot is no longer determinative (the vote was 3 for the Union and 1 for No Union). Opening and counting Sheridan's ballot would serve no purpose. Rather, it would only compromise the confidentiality of Sheridan's vote. Therefore, Sheridan's ballot will not be opened and counted.

Accordingly, IT IS HEREBY CERTIFIED that

I.B.F.O., LOCAL 473, AFL-CIO

has been designated and selected by a majority of the employees of the above-named Public Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the said representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. Pursuant to the Act, the said representative shall be responsible for representing the interest of all unit employees without discrimination and without regard to employee organization membership; the said representative and the above-named Public Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment; when an agreement is reached it shall be embodied in writing and

signed by the parties; and written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: Included: All members of the highway and water/sewer departments including the general foreman--public works employed by the Borough of Mt. Ephraim.

Excluded: All office clerical, guards and supervisors as defined by the Act and all confidential employees and managerial executives employed by the Borough of Mt. Ephraim and all police, fire and craft employees.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Edmund G. Gerber
Director

DATED: June 11, 1987
Trenton, New Jersey

H.O. NO. 87-20

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MT. EPHRAIM,

Public Employer,

-and-

Docket No. RO-87-18

I.B.F.O., LOCAL 473, AFL-CIO,

Petitioner.

SYNOPSIS

A Hearing Officer recommends that the challenge to the ballot of the General Foreman of the Mt. Ephraim Department of Public Works be dismissed and that the ballot be counted in the representation election conducted among employees. The Hearing Officer found that the Foreman is not a supervisor within the meaning of the Act.

The Hearing Officer further recommends that the challenge to the ballot of a Sewer Department worker be upheld and that the ballot not be counted. The Hearing Officer determined that the method and process by which the employee cast his ballot so departed from approved Commission election procedure that it was rendered invalid.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Director of Representation who reviews the Report and Recommendations, any exception thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

H.O. NO. 87-20

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MT. EPHRAIM,

Public Employer,

-and-

Docket No. RO-87-18

I.B.F.O., LOCAL 473, AFL-CIO,

Petitioner.

Appearances:

For the Public Employer
Laskin and Botcheos
(George T. Botcheos Esq., of counsel)

For the Petitioner
Freedman and Lorry
(Mark P. Muller Esq., of counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDED DECISION

On August 18, 1986, the I.B.F.O., Local 473, ("Union" or "Local 473") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission") seeking certification as the exclusive representative of all Highway and Water/Sewer Department employees of the Borough of Mt. Ephraim ("Borough"). The Petition was supported by an adequate showing of interest, and pursuant to a Consent Agreement, agents of the Commission conducted a secret mail ballot election on October 22, 1986.

The results of the election as set forth in the Tally of Ballots (C-2) were as follows: three (3) votes cast for Local 473; one (1) vote cast against the Union, and two (2) challenged ballots. Local 473 challenged the ballots (C-5, C-4) of Eugene Sheridan and Joseph Seltzer and argued that their ballots should not be counted. The Union maintained that Sheridan is a supervisory employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and not appropriate for inclusion in a non-supervisory unit, and that Seltzer delivered his ballot in a manner inconsistent with Commission rules. The Borough disputes both contentions and argued that the ballots should be counted.

Since the challenged ballots were sufficient in number to affect the results of the election, the Director of Representation decided that a hearing was necessary to resolve the status of the challenged ballots. A Notice of Hearing was issued on December 12, 1986, and a hearing was conducted on January 22, 1987, during which the parties were given the opportunity to examine and cross-examine witnesses and to present evidence. The parties waived oral argument but submitted post-hearing briefs, the last of which was filed by March 27, 1987.

Upon review of the entire record, I make the following:

FINDINGS OF FACT

1. The Borough of Mt. Ephraim is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and is subject to its provisions (T9).^{1/}

2. The International Brotherhood of Fireman and Oilers, Local 473, is an employee representative within the meaning of the Act and is subject to its provisions (T9).

Re: Eugene Sheridan's Ballot

3. Eugene Sheridan is employed by the Borough of Mt. Ephraim Public Works Department in the position of General Foreman (T7, T107, T136). His immediate supervisor is Bob Choate, Superintendent of Public Works (T108). Supervising Mr. Choate is Stanley Alcavate, an elected member of the Borough's Board of Commissioners and Director of the Public Works Department (T149-150).

4. Alcavate testified that he has total authority over the operation of the Public Works Department ("DPW")(T150). It is undisputed that Alcavate alone has final and absolute authority to hire, fire and discipline all DPW employees (T32, T140, T151)^{2/}. In this regard, Alcavate has issued both written and oral reprimands (T151-152). Recommendations for discipline from Choate are

^{1/} Transcript designations are as follows: "T9" refers to the Transcript dated January 22, 1987, at page 9.

^{2/} Alcavate also makes the determination as to whether an employee should become permanent after the 30-day probation period (T148).

considered by Alcovate, but Alcovate testified that he independently evaluates these recommendations before taking any action thereon (T152). Alcovate does not receive recommendations for discipline from Sheridan (T152-153).

Upon becoming a Commissioner in 1984, Alcovate conducted an observation of Sheridan. Alcovate concluded that Sheridan was the best, most senior Department worker. Based on this evaluation, Alcovate gave Sheridan a \$3,000 raise and promoted him to the position of Foreman (T124-125, T153, T155-156).

Alcovate stated that, consistent with the Job Description (J-1) for General Foreman, Sheridan is expected to report to Choate "at the first sign of trouble" because Choate is the only one who has authority to make decisions in Alcovate's absence (T165-166).

5. Choate, as Superintendent, is charged with overall supervision of the day-to-day functions of the DPW. Choate reports directly to Alcovate (T128). He makes all daily work assignments and prepares the general seasonal duty schedule (T129-130). Choate has the authority to approve requests for compensation, vacation and sick time (T61, T138) and he can transfer employees (T131).

There is no formal, written evaluation procedure within the Department of Public Works. However, if Choate thinks a certain employee is doing a particularly good or bad job, he will inform Alcovate (T148). In addition, Choate has made recommendations to Alcovate regarding discipline of employees and feels the majority of these recommendation are followed (T132, T149).

In 1984, Choate was promoted to Supervisor and received a \$3,000 pay increase (P-1, T21, T25).

6. Sheridan testified without contradiction that as Foreman he has no authority whatsoever to hire, fire, transfer^{3/} or discipline employees (T109, T120, T131, T139, T149). He has never made any recommendations for discipline (T110), has never participated in the interviewing process, and has never been asked his opinion with regard to an employee's termination (T125).^{4/}

On one occasion, Sheridan recommended a man to Choate for possible employment in the Department.^{5/} Choate relayed this recommendation to Alcavate after his own independent evaluation, and the man was subsequently hired (T140).

7. In his position of General Foreman, Sheridan is required to perform most of the same duties as other DPW workers

^{3/} Choate testified that it is only possible to transfer employees between the Water and Sewer divisions of the Department. He conceded that if he were out, Sheridan would have the authority to ask a Sewer employee to help out in the Water Department, but that this was not equivalent to making a transfer (T142-143).

^{4/} In addition, both of the Department employees who testified for the Union stated that during the entire length of their employment with the Borough (Prichard, 7 years (T11); Rebel, 8-9 months (T48)), they have never personally been disciplined by Sheridan (T32, T60), nor have they ever witnessed Sheridan discipline or recommend discipline for anyone else (T36, T66).

^{5/} The man, John West, was a friend of Sheridan's whom Sheridan knew from his involvement with the Borough Fire Department. Sheridan stated that his only motivation for making this recommendation was to help out a friend (T128).

(T51, T109, T161). These jobs include operating Borough equipment (T18, T139), collecting leaves, replacing meters and patching streets (T27, T29-30, T59). Sheridan is also responsible for making sure that assigned work is completed (T17, T136, T165).

Sheridan testified that he does as much manual labor as all other DPW workers (T112). However, this contention was disputed by one of the workers. Ken Prichard testified that he believes Sheridan does only 2 hours of manual labor per day while the rest of his time is spent on supervisory duties (T39).^{6/}

8. It is undisputed that Sheridan has more authority over the other DPW workers when Choate is either out sick or on vacation (T19, T121, T136). In that circumstance, he has the authority to assign work (T17, T108, T121, T131) and to approve (but not disapprove) sick and compensation time requests (T114, T115). Sheridan never evaluates anyone, either in writing or orally (T117).

9. In addition to his other duties, Sheridan is charged with keeping time records of employees (T65, T112). He also maintains a card file reflecting the type of water service supplied to each home in the Borough (T113). To aid in this record-keeping duty, Sheridan is assigned a desk in the Borough garage (T18, T113, T137). No one else uses this desk and no other DPW workers (other than Choate) are assigned desks (T18-19, T113).

^{6/} In this regard, I credit Sheridan's testimony. Prichard conceded on cross-examination that he does not see Sheridan continuously throughout the workday because Sheridan moves from one job site to another (T43).

10. The job description (J-1) for the General Foreman, Public Works, states that the Foreman works under the direction of the Superintendent of Public Works. It provides that the employee may supervise subordinate labor personnel on a job-for-job basis. The Foreman will be required to perform skilled work and supervisory capabilities in the absence of the Superintendent of Public Works and should assume that position until the return of the Superintendent. He must have a working knowledge of the Borough's ordinances pertaining to sewer, water, streets and trash collection and must be in good physical condition and of sufficient strength to perform department work, often under unfavorable climate conditions.

The job description for Water Department Worker (R-3), also requires a working knowledge of the Borough's ordinances and the same good physical condition and strength.

Re: Joseph Seltzer's Ballot

11. Joseph Seltzer, a Sewer Department worker, has been employed by the Borough for the past 10 years (T68). His immediate supervisor is Bob Choate, with whom Seltzer has boarded for the past 3-4 months.^{7/} (T12, T84).

12. Sometime prior to August 15, 1986, Seltzer signed a showing of interest authorization card for Local 473, I.B.F.O.,

^{7/} Seltzer was a boarder in Choate's house at the time of the representation election.

AFL-CIO. By letter to the Union dated August 15, 1986, however, Seltzer requested his authorization be withdrawn, and further stated that he did not wish to become a member of the Union (T76-77).

13. Pursuant to an Agreement for Consent Election signed on September 16, 1986, the ballots for the representation election conducted among the members of the Highway and Water/Sewer Departments of the Borough of Mt. Ephraim were mailed by the Commission on Wednesday, October 8, 1986. Receipt was required by the Commission no later than Wednesday, October 22, 1986 at 9 a.m., and the ballots were counted at the Commission Offices in Trenton on that date at 10:30 a.m.

14. Joseph Seltzer, an eligible voter, received^{8/} an Official Secret Ballot from the Commission^{9/} (T20).

8/ I take administrative notice of the alphabetized voter eligibility list, with home addresses, of those employees eligible to vote supplied by the Borough which was used by this agency for the mailing of Seltzer's ballot. The list sets forth Seltzer's address as 30 Second Avenue, Mt. Ephraim, New Jersey 08059.

9/ The ballot sent to Seltzer set forth the following:

NOTICE OF ELECTION

An election by secret ballot is being conducted under the supervision of the New Jersey Public Employment Relations Commission among the eligible voters to determine the representative, if any, desired by them for the purpose of collective negotiations with the public employer named on the enclosed ballot. Your name appears on the list of those who are eligible to vote in this election.

An OFFICIAL BALLOT, a SECRET BALLOT ENVELOPE and a RETURN ADDRESSED ENVELOPE are enclosed. To vote by mail, carry

Thereafter, on October 11, 1986, Seltzer appeared at the Spread Eagle Inn in Mt. Ephraim and encountered Kenneth Prichard,

9/ Footnote Continued From Previous Page

out the following instructions:

INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY UNITED STATES MAIL
(Read Carefully)

FROM THE TIME YOU OPEN THE ENVELOPE CONTAINING THE BALLOT, YOU SHOULD CONSIDER YOURSELF IN THE SAME POSITION AS THOUGH IN A VOTING BOOTH IN A MANUALLY CONDUCTED ELECTION. YOU SHOULD THEREFORE FOLLOW THE INSTRUCTIONS BELOW AND DROP YOUR BALLOT IN THE UNITED STATES MAIL BEFORE DISCUSSING IT WITH ANYONE. Read the official ballot carefully. Ignore the instruction on the ballot to "Fold and drop in ballot box," as this does not apply to persons who vote by mail. Mark an "X" in the square of your choice. Fold the ballot, put it in the envelope marked SECRET BALLOT and seal that envelope. Place envelope with ballot enclosed in large RETURN-ADDRESSED ENVELOPE. Seal this envelope. Sign your name (do not print it) on the the outside of the envelope in the space provided after the word "Signature." Deposit this envelope, which requires no postage, in the United States mail so that your ballot will be RECEIVED at the place shown on the return envelope not later than

WEDNESDAY, OCTOBER 22, 1986, 10:30 a.m.

This is a secret ballot election. YOUR BALLOT WILL BE VOID AND WILL NOT BE COUNTED UNLESS you:

1. Mark on the ballot only in the place provided for marking; do not identify yourself of the ballot.
2. Return the ballot in the same envelope which you receive for that purpose.
3. Sign your name in your own handwriting on the outside of the RETURN-ADDRESED ENVELOPE after the word "Signature," so that your name can be checked against the eligibility list.

After your name is checked against the eligibility list,

Footnote Continued on Next Page

another DPW worker. At that time the two men discussed the ballot Seltzer had received. Seltzer then retrieved the ballot from his car, brought it into the Inn, and tore it up in front of Prichard. After Seltzer tore up his ballot, he handed it to Prichard and said, "Now, does this give you my answer on how I'm going to vote?" (T13-14).^{10/}

9/ Footnote Continued From Previous Page

the SECRET BALLOT ENVELOPE will be removed from the envelope containing your signature. The envelope containing the ballot will be mixed with all other SECRET BALLOT ENVELOPES before it is opened by agents of the Commission and your ballot removed, thus insuring secrecy.

If you have any questions about this election you may contact the Commission's Executive Director or his agent at the address below.

N.J. PUBLIC EMPLOYMENT RELATIONS COMMISSION
495 West State Street
Trenton, NJ 08618
609-292-6780

The Return-Address Envelope provided Seltzer was addressed to New Jersey Public Employment Relations Commission, P.O. Box 5952, Trenton, New Jersey 08638.

10/ Seltzer denies that he tore up his ballot in front of Prichard at the Spread Eagle Inn. He maintains that he received the ballot at his Post Office Box, took it out of his box, and threw it in the trash at the Post Office, without tearing it up (T77-78). I do not credit Seltzer's testimony. His demeanor on the witness stand was uneasy and less than forthright. Seltzer appeared restless, defensive and sarcastic, using phrases such as "to my estimation" (T77) and "Now, I don't know where these gentlemen get the idea I tore it up in front of them." (T77-78).

Further, not more than a few moments later in his testimony, after flatly denying he ever tore up his ballot, the following exchange took place between Seltzer and his attorney: (T79-80)

Footnote Continued on Next Page

15. At some point subsequent to the Spread Eagle Inn incident, Choate asked Seltzer how he voted (T14). Seltzer told him

10/ Footnote Continued From Previous Page

Q. Did you ever have any conversation with respect to the ballot and why you tore the ballot up when both Mr. Prichard and Mr. Rebel were present?

A. No.

Q. Now, what happened after you tore up the ballot?

A. Well, I told Bob Choate that I tore the ballot up and he in turn found out later on--

Q. Let me just interrupt you for a moment. Did Mr. Choate know you tore the ballot up before you did it?

A. No, after I did it.

Q. Did you talk to him before you tore it up?

A. No.

Q. Before you tore the ballot up, did you talk to Mr. Choate about tearing up the ballot?

A. No, I did not.

Q. Okay. So after you tore it up, you contacted Mr. Choate?

A. Right.

Then, after apparently realizing his mistake, Seltzer continued as follows:

Q. And what did you tell him [Choate]?

A. I told him that I didn't tear it. I told him I threw the ballot in the wastepaper basket in the Post Office.

Footnote Continued on Next Page

that he had not voted at all, but rather that he had torn up his ballot (T79, T14). Choate then informed Seltzer that throwing out his ballot was a "bad thing" (T80). Choate went on to state, "You can't do that, if you don't vote it will be counted as a yes vote and the Union will get in" (T15, T62, T80).^{11/} Choate ended by saying to Seltzer, "We've got to get you another ballot" (T-15, T62).^{12/}

10/ Footnote Continued From Previous Page

Q. Okay, Okay.

Finally, the address to which the ballot was sent does not reflect a Post Office Box. While it is possible that there is an arrangement with the Post Office to forward Seltzer's mail to a box, there is nothing in the record to support his testimony.

11/ According to Seltzer, Choate explained this by saying if Seltzer did not vote, the numbers were such that there would be more votes for the Union than against it, and that he (Choate) needed Seltzer to vote against the union (T92). Seltzer also stated that before Choate told him to get another ballot, Choate had no doubt that Seltzer would vote against the union (T15).

12/ At the hearing, Seltzer recounted the end of this conversation somewhat differently. He stated that he himself came up with the idea that he should obtain another ballot, and that Choate only added that he (Choate) thought that was a "good idea" (T80). Again, I do not credit Seltzer's testimony in this area. Instead, I credit Prichard's and Rebel's recitation of what Seltzer initially told them was said by Choate.

Both Prichard and Rebel were believable, credible witnesses. They each similarly testified to an early morning, October 21, 1986, conversation with Seltzer, in which Seltzer told them of Choate's reaction to Seltzer's destruction of this ballot

Footnote Continued on Next Page

16. Seltzer telephoned the Commission and requested another ballot (T15, T49, T81). A second ballot was then forwarded to Seltzer, which he received on or about October 20, 1986 (T81).

17. At approximately 9 a.m. on October 21, 1986, Choate drove Seltzer,^{13/} in a Borough jeep,^{14/} to the Commission's Trenton offices, located at 495 West State Street, and hand delivered^{15/} his ballot (T16, T49-50, T81-82, T101).

12/ Footnote Continued From Previous Page

(T15, T62). (Seltzer acknowledges having this conversation with Rebel but denied Prichard was present (T78-79).) Up until the reference to obtaining another ballot, Seltzer's hearing day account of what was said by Choate matched Prichard's and Rebel's recollection of what Seltzer told them on October 21. Thus, while it is true that Prichard's and Rebel's testimony on this subject is hearsay, I find it to be more reliable than Seltzer's version.

13/ Seltzer possesses his own car and was capable of driving himself to return his ballot on that day (T15-16, T101).

14/ In response to questions concerning the actual marking of the ballot and the ride to Trenton with Choate, Seltzer claimed he marked his ballot at his office in the Sewer Plant and sealed it while no one else was present (T100). He maintained that the ballot was already sealed according to the printed instructions when he left for Commission with Choate. Further, he stated that Choate did not see Seltzer's marked ballot, nor did they discuss it during the ride to Trenton (T101-102). Again, because of prior inconsistencies and the general untrustworthiness of this witness, I do not here credit Seltzer's testimony. However, there is nothing in the record to support an alternate scenario concerning these facts and accordingly, I make no findings thereon.

15/ When Seltzer telephoned the Commission office regarding obtaining a second ballot, the Commission agent with whom he spoke indicated that, due to the nearness of the election, it would be permissible for him to forward the ballot by Express Mail in order to assure timely delivery. However, no mention was made of the method of hand-delivery to the Commission offices as an approved means of returning a ballot (T100).

ANALYSISSheridan's Ballot

N.J.S.A. 34:13A-5.3 provides in relevant part:

... nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership.

The above-quoted provision of the Act has been interpreted to contain the statutory definition of supervisor: that being an employee having the authority to hire, discharge, discipline, or effectively recommend same. Cherry Hill Department of Public Works, P.E.R.C. No. 30 (1970). A determination of supervisory status however, requires more than a job title or description or mere assertions that an employee may have supervisory authority. In Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976) it was found that:

...the bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employee in question, the mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status. Id. at 360.

Thus, in determining whether Eugene Sheridan is a supervisor within the meaning of the Act (and therefore not eligible to be represented by the petitioning union) I must focus on whether he actually exercises supervisory authority.

Local 473 argues that Sheridan possesses several indicia of supervisory status which would necessarily classify him as a supervisor. It cites Sheridan's substitution for Choate when Choate is out, his exclusive use of a desk in the garage for the preparation of employee time sheets and water department records, and his additional salary in support of this argument. While the record does demonstrate that Sheridan performs these duties, they are simply not enough to warrant his classification as a supervisory employee.

The testimony at the hearing clearly established that Sheridan has no authority to hire, fire, transfer or discipline employees or effectively recommend same. He has never evaluated subordinates nor has he ever participated in any personnel decisions. Authority to make work assignments or approve requests for sick or compensation time is only extended when Choate is out. Sheridan can never deny an employee's request for time. While he has use of a desk, this is merely to accommodate his record-keeping responsibility.

Further, although Sheridan has the title designated as "Foreman", he is a working foreman. He performs the same or substantially the same amount of manual labor as all other department workers. As most senior employee, he has the responsibility of making sure the assigned work gets completed for which he receives a higher salary.

Based on the foregoing, I find that Sheridan does nothing more than act in the capacity of a lead employee, in recognition of his seniority and experience in the Public Works Department. Accordingly, I find that Eugene Sheridan is not a supervisor within the meaning of the Act. See also County of Middlesex, D.R. No. 79-8, 4 NJPER 396 (¶4178 1978); and Borough of Closter, D.R. No. 81-12, 6 NJPER 528 (¶11269 1980).

Seltzer's Ballot

The issue regarding the challenge to Seltzer's ballot is whether the method or process by which Seltzer cast his vote so departed from approved Commission procedure that it cannot be counted.

N.J.A.C. 19:11-9.1 et seq. sets forth the lengthy and detailed procedure which must be followed in Commission conducted representation elections. Reference is made to mail ballot elections as follows:

All elections shall be by secret ballot and shall be conducted under the supervision and direction of a Commission agent. The secret ballot may be accomplished manually or by the use of a mail ballot or by a mixture of manual-mail ballot system, as determined by the Director of Representation.
(N.J.A.C. 19:11-9.2(a).)

In implementing a mail ballot system, the Commission has adapted the specific procedural protections outlined in the N.J.A.C. for manual ballots and applied them to the mail ballot situation. These procedures are incorporated into the Notice of Election and

Instructions to Eligible Employees Voting by United States Mail which are sent to every voter with his or her mail ballot.

Since the Commission's inception and authorization to conduct public sector employee representation elections, the sanctity of the election procedure has been of utmost importance. In an early Executive Director's decision it was stated:

Perhaps the most fundamental function of the Commission is to insure that public employees shall have and shall be protected in the full exercise of the rights guaranteed to them by the Act. N.J.S.A. 34:13A-5.3. In furtherance of this aim, the law provides for secret ballot elections to ascertain the employees' choice of a majority representative. Elaborate procedures have also been developed for maintaining the secrecy of the vote...
City of Jersey City, E.D. No. 76-19, 2 NJPER 30, 31 (1976).

Further, in City of Newark, D.R. No. 78-43, 4 NJPER 202, 203 (¶4102 1978), the Director of Representation, in deciding to conduct an investigation into alleged irregularities in the election procedure, echoed the same basic policy:

The Commission views the secret ballot election process and the proper conduct thereof, as one of its most significant responsibilities. Accordingly, in order to protect the integrity of the Commission's election process, the undersigned determined to conduct an investigation...
(emphasis supplied)

Thus, the Commission is charged with defining the parameters of legitimate behavior within the election process in order to uphold the protections of the Act.

In the instant case, a secret mail ballot was forwarded to eligible voter, Joseph Seltzer. For him, the actual election

procedure began when he received that ballot and its accompanying instructions. At that point, Seltzer made the first departure from the normal voting process: he tore up his ballot. In a one-union representation election, whether on-site or by mail, the eligible voter has three options for expressing his or her choice. He can vote "Yes", he can vote "No" or he can choose not to vote. Here, Seltzer initially chose not to participate in the Commission-conducted election. By tearing up his ballot, and by saying "Now, does this give you my answer on how I'm going to vote," Seltzer clearly expressed his preference, as well as his opinion on the election procedure.^{16/}

The second, and more serious departure from the approved Commission election process was in the action by an agent of the Borough (Choate) of persuading an eligible voter to participate in an election which he had already decided to ignore, and in helping that voter obtain a duplicate ballot^{17/}. The facts reveal that Choate

^{16/} I am not suggesting that Seltzer's anti-union position was not known. The testimony at the hearing established that everyone including Choate, Seltzer's supervisor, knew that Seltzer was opposed to the union before the ballots were received.

^{17/} I am compelled to note here that I have interpreted Commission rules and regulations concerning the representation election procedure to ensure the integrity of the process and to insulate it from outside interference from beginning to end. As I see it, this means that the "laboratory conditions" mandate extends from the time the election is scheduled, to when the ballots are mailed out by the Commission, to when the secret ballots are marked by each eligible voter and sent back to the Commission, to when all the ballots are actually counted at the Commission offices. Although this period is

sought out Seltzer in order to discover how he voted. Upon learning that Seltzer had destroyed his ballot and decided not to vote, Choate convinced Seltzer that this action was not good for the Borough and that he (Seltzer) should get another ballot from the Commission as soon as possible.

I find Choate's interference with Seltzer's participation in the election procedure to be so outside the accepted Commission practice and policy for conducting elections that it can not be overlooked. It is well-settled that an employer cannot compel an employee to take part in an election as a condition of his or her continued employment. Here, the record demonstrates that but for Choate's intervention, Seltzer's participation in the representation election would have ended when he tore up his ballot at the Spread Eagle Inn.^{18/} Choates' action of convincing Seltzer that he must vote, and further going so far as to say "We've got to get you another ballot," is clearly beyond the bounds of permissible employer

17/ Footnote Continued From Previous Page

much longer than in an on-site election, and although all of it (except for the count) is outside the Commission's immediate supervision, the strict protections against interference must be carried through and maintained.

18/ I do not mean to suggest that a voter would not be free to change his or her mind. If Seltzer had torn up his ballot and then at some later date decided on his own that he wished to vote, there would have been nothing preventing him from obtaining a second ballot (provided the Commission determined he was eligible to receive a duplicate) and vote within the time allotted. Here, however, that was not the situation.

election behavior. If this type of employer interference is ignored, it would, in essence, be giving public employers free reign to interject themselves into the election process by seeking out known anti-union voters and making sure their votes get cast.^{19/}

The third departure from approved Commission election procedure was in the manner in which Seltzer delivered his ballot. On the day before the ballots were to be counted, Seltzer was driven by his supervisor (Choate) in a Borough vehicle on Borough time, to the Commission offices in Trenton where he hand-delivered his ballot.

There are two elements to this delivery which must be addressed. First, is that Seltzer was driven to Trenton by his supervisor in a Borough vehicle, during the time he was supposed to be working. No reason is given why Seltzer did not drive to Trenton in his own car. Moreover, there is no indication that he was rebuked for going on Borough time or that he was docked the appropriate amount of pay. To the contrary, this action was sanctioned and even facilitated by the Borough in Choate's offer to drive Seltzer in the Borough jeep.

^{19/} I am not finding that Choate coerced Seltzer into voting against the union, but rather that Choate's intrusive involvement in the election process itself, as it applied to Seltzer, destroyed the viability of Seltzer's ballot. The matter before me was not an unfair practice charge, nor was it in the form of election objections. It was a representation matter concerning the validity of the Union's challenge to Seltzer's ballot. Therefore, in my proceeding, there was no burden of proof and I permitted no evidence going to (a)(3) type coercive activity.

Again, I find the Borough's intrusion into the election process, as it applied to Seltzer, to be so far outside accepted Commission practice that Seltzer's ballot cannot be counted. For Seltzer, the strict election protections enforced by the Commission extended up until the time he returned his ballot. The Borough, knowing Seltzer was going to vote against union representation, literally went out of its way to make sure Seltzer's ballot arrived at the Commission's offices in time to be counted. Analogizing this to the manual voting situation, the Borough, in effect, escorted a known anti-union voter to the voting booth, stood with him while he voted and dropped his ballot in the ballot box, and then escorted him back to his work site. This would not have been tolerated by the Commission election agent in an on-site election and similarly cannot be tolerated in the realm of a mail ballot election.

The National Labor Relations Board^{20/} has found unlawful on-site election interference even when employer conduct has been far less intrusive than the Borough's actions. For example, in Antenna Dept. West, 266 NLRB 909, 113 LRRM 1075 (1983), employer interference was found where the supervisor remained in the voting area for 10-15 minutes, urged employees to hurry up and vote, and talked to employees as they waited to vote. In Electric Hose and Rubber Co., 262 NLRB 186, 110 LRRM 1282 (1982), employer interference

^{20/} The experience and adjudications of the NLRB can be used as a guide for public sector determinations. Lullo v. Int'l Assn. of Firefighters, Loc. 1066, 55 N.J. 409 (1970).

was found in a supervisor's unexplained presence in an area where employees had to pass on their way to the voting area. Here, Choate chauffeured Seltzer in a Borough vehicle for two hours (during work time) so that employee Seltzer could deliver his not-so-secret ballot to the Commission. Clearly, this type of extreme intrusion into Seltzer's voting process destroys the validity of his ballot.

The second element of Seltzer's ballot delivery which must be addressed is that it was hand-delivered. The instructions sent to Seltzer with his ballot (see footnote no. 9) explicitly set forth step-by-step directions regarding returning the ballot by United States Mail. A return envelope with a P.O. Box address (not the Commission's office address) was provided to Seltzer for the purpose of ensuring that his vote would be counted with the rest. Nowhere was it mentioned that hand-delivery to the Commission offices was an accepted method for return of the ballot. Yet, despite all of these clear instructions, Seltzer chose to ignore the Commission procedure. Together with the other more damaging departures from approved Commission procedure, and based on all of the facts of this case, I conclude that the challenge to the ballot of Joseph Seltzer must be upheld and accordingly his ballot may not be counted.^{21/}

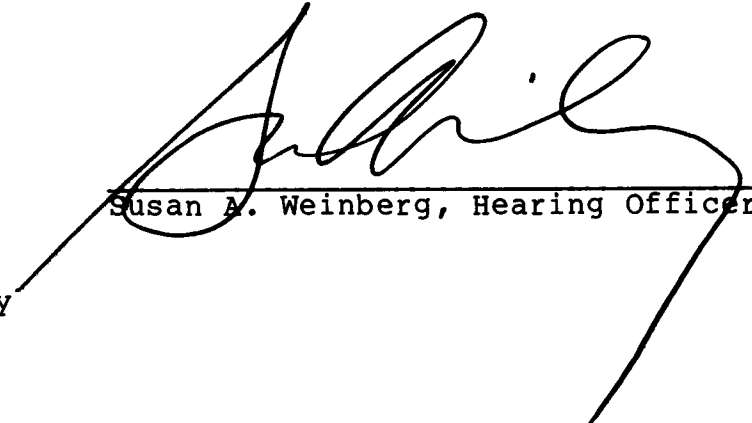
^{21/} The issue of whether or not hand-delivery of a ballot by itself would be sufficient to render a ballot invalid has not been addressed by the Commission and need not be addressed here.

RECOMMENDATIONS

I recommend the following:

(1) The challenge to Eugene Sheridan's ballot be dismissed, and the ballot be counted.

(2) The challenge to Joseph Seltzer's ballot be upheld, and the ballot not be counted.



Susan A. Weinberg, Hearing Officer

DATED: May 28, 1987
Trenton, New Jersey