

D.R. NO. 2003-15

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

In the Matter of

CUMBERLAND COUNTY BOARD OF
SOCIAL SERVICES,

Public Employer,

-and-

NJCSA CUMBERLAND COUNCIL 18
(SUPERVISORS),

Docket No. RO-2003-27

Petitioner,

-and-

CUMBERLAND SUPERVISORS ASSOCIATION,

Intervener.

SYNOPSIS

The Director of Representation orders that a runoff election be rerun under N.J.A.C. 19:11-10.5, among county social services employees. The runoff election resulted in a tie vote, with one challenged ballot. The Director determines that the challenged voter is ineligible to vote in both the runoff and rerun elections. The Director finds that the disputed voter was in a period of pre-promotion training as of the eligibility cutoff date. The voter was not eligible as of the original cutoff date and cannot now vote in the rerun election.

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Intervenor.

Appearances:

For the Public Employer,
Harold B. Shapiro, attorney

For the Petitioner,
Tomar, O'Brien, Kaplan, Jacoby & Graziano, attorneys
(Mark E. Belland, of counsel)

For the Intervenor,
Sandra White, representative

DECISION

On February 21, 2003, a runoff election was held among employees of the Cumberland County Board of Social Services (Board).^{1/} Eligible employees voted on whether they wanted to be

^{1/} The runoff was necessitated by a prior election held on November 25, 2002, at which none of the choices received a
(continued...)

represented in collective negotiations by NJCSA Cumberland Council 18, Supervisors (Council 18) or the Cumberland Supervisors Association (Association). The result was a tie; ten votes were cast for Council 18 and ten for the Association, with one challenged ballot. Because the challenged vote could affect the election outcome, on February 21, 2003, we invited the parties to file position statements on the challenged ballot; the Board and the two employee organizations filed statements. Council 18 also supplied a certified statement executed by Challenged Voter Eileen Billings; the Board submitted a copy of Billings' "employee profile".

Based on our administrative investigation^{2/} of the challenged ballot we make the following:

FINDINGS OF FACT

On October 21, 2002, the parties entered into a Consent Agreement for an election which established a payroll cutoff date for eligibility to vote as October 11, 2002. The Consent provided that those eligible to vote had to be included in the defined unit, "who were employed during the payroll period indicated" The Agreement defines the unit as follows:

Included: All full-time and part-time social work supervisors, clerk supervisors, child

^{1/} (...continued)
majority of the valid votes cast.

^{2/} See N.J.A.C. 19:11-10.3(k).

support supervisors and human services specialists IV employed by Cumberland County Board of Social Services.

Excluded: All other employees, managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, police, casual employees, all employees represented in other negotiations units, director, deputy director, chief of administrative services, administrative field office supervisor, administrative supervisor, training supervisor, chief investigator, chief clerk, attorney, accountant, secretary to the director and security guard.

N.J.A.C. 19:11-10.3, Election procedures, states:

(c) Eligible voters shall be those employees included within the unit described in the agreement for consent election or as determined by the Commission or Director of Representation, who were employed during the payroll period for eligibility, including employees who did not work during that period because they were ill, or on vacation, or temporarily laid off, including those in the military service, and those on leaves of absence. In a manual ballot election, employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are those employees who have retired or quit or were discharged for cause prior to the commencement of the election and who have not been rehired or reinstated before the counting of ballots.

N.J.A.C. 19:11-10.4, Runoff elections, states:

(a) An election with three or more choices on the ballot (for example, at least two representatives and 'no representative') that results in no choice receiving a majority of the valid ballots cast will be considered an inconclusive election. In such cases, the

Director of Representation shall order a runoff election.

2. The ballot for a runoff election shall provide for a choice between the two choices receiving the largest number of votes in the prior election.

3. Employees who were eligible to vote in the prior election and who continue to be included in the voting unit on the date of the runoff election shall be eligible to vote in the runoff election.

(b) Only one runoff election shall be held pursuant to this section, but a rerun election may be ordered pursuant to this section.

N.J.A.C. 19:11-10.5, Rerun Elections, states:

(a) . . . A nullity shall also be declared where an election with three or more ballot choices is inconclusive because either all choices received an equal number of votes or two choices received an equal number of votes and a third choice received a higher number of votes that is less than a majority. If an election is declared a nullity, the Director of Representation shall order a rerun election.

1. The ballot for a rerun election shall have the same choices as provided on the ballot in the prior election.

2. Employees who are eligible to vote pursuant to N.J.A.C. 19:11-10.3(c) shall be eligible to vote in the rerun election.

3. The rerun election shall be conducted in accordance with N.J.A.C. 19:11-10.3 (Election procedures) as applicable.

(b) The scheduling of further elections pursuant to this section shall be at the discretion of the Director of Representation.

On October 28, 2002, Supervising Clerk Deborah Peacock was provisionally appointed to the position of assistant chief clerk, a non-unit position. She voted a challenged ballot in the election. In Cumberland Cty. Bd. of Soc. Svcs., D.R. No. 2003-11, __ NJPER __ (¶ 2003), I determined that Peacock was not eligible to vote in the first election, which commenced on November 4, 2002. I found that Peacock had already been promoted out of the unit by the time the election began, and therefore, Peacock's challenged ballot would be void. I directed a runoff election. In Cumberland, I did not rule on the potential eligibility of Peacock's replacement, Eileen Billings.

On October 8, 2002, the Board voted to promote Principal Clerk Eileen Billings to supervising clerk effective on October 28, 2002. On that date the Board promoted Billings on a provisional basis to supervising clerk, a title included in the unit. On or about October 1, 2002, the date she was recommended for promotion, Billings began working side-by-side with Supervising Clerk Peacock in order to more fully learn supervising clerk job duties. Billings worked about half of her 35-hour week with Peacock. In a certified statement, Billings asserts that from October 1 through 27 her job duties were the same as her duties as a supervising clerk and that, as a principal clerk, she assisted Peacock.

Billings did not assert a right to vote in the election which was counted on November 25, 2002, and was not included on the Board's list of eligible employees.

ANALYSIS

The issue here is whether the sole challenged ballot cast by Eileen Billings should be counted. The Board takes no position on the issue.

The Association argues that Billings' vote should not be counted because the runoff election is a continuation of the original election in which Billings was not eligible and: "Eileen Billings was not among the original names on the roster, so she cannot be considered as remaining on the list [for the runoff election.]" (Association position statement February 6, 2003).

Council 18 argues that Billings' vote should be counted. It asserts that she is now in a unit title and that the purpose of N.J.A.C. 19:11-10.4(a)(3) is to clarify that employees eligible to vote in the prior election and who continue to be included in the voting unit but who did not vote in the prior election may vote in the runoff election. It argues that Billings should have been considered eligible as of the eligibility cutoff period in the original election (payroll period ending October 11, 2002). By then, it argues, Billings was performing the duties of the supervising clerk for at least part-time hours and thus, from that time forward shared a community of interest with other unit

titles. To not permit Billings' vote to count would disenfranchise Billings and the position of supervising clerk since Peacock was also ineligible to vote in the prior election. Alternatively, it argues Billings' was at least a part-time supervising clerk during that period because of the hours she was performing those duties alongside Peacock. It notes that the unit description includes part-time employees.

* * * *

The purpose of establishing voter eligibility criteria is to provide predictability to all parties concerning the composition of the voting unit and to prevent the employer from manipulating the pool of eligible voters. Moreover, newly added employees to the negotiations unit after the payroll cut-off would have limited exposure to the issues of the election. Thus, it is appropriate to exclude such employees from the election. This rationale is equally applicable whether the employee is newly hired or newly promoted into the unit after the established eligibility date.

Voter eligibility is normally determined by an employee's employment status both during the stipulated payroll period for voting eligibility and on the date of the election. Cumberland; Rockaway Tp., D.R. No. 91-21, 17 NJPER 132 (¶22053 1991).

The NLRB and the Commission have similar requirements concerning voter eligibility.^{3/} In NLRB v. Tom Wood Datson, Inc., 767 F.2d 350, 119 LRRM 3415 (7th Cir. 1985), the court noted:

It is the Board's settled policy that an individual "must be both 'hired' and 'working' on the eligibility date in order to participate in a Board-directed election." Family Heritage Home, 491 F.2d at 347, 349. The purposes of the rule are to establish certainty and stability in the election process, and to simplify the process of identifying eligible voters. PRS Limited, d/b/a F. & M. Importing Co., 237 NLRB 628 (1978). A subsidiary rule had been adopted by the Board which defines "working" under the "hired and working requirement" as meaning the "actual performance of bargaining unit work" and excluding "participation in training, orientation or other preliminaries" (emphasis added). See Speedway Petroleum, Division of Emro Marketing Co., 269 NLRB 926, 926 n.1 (1984). The "pre-work" rule serves two functions. It operates as a prophylactic against an employer's attempt to manipulate an election by hiring employees favorable to its position just prior to the election. Second, the rule also is a "simple and fair" means of determining whether newly hired employees are part of the bargaining unit. [767 F.2d at 352.]

Applying the above principles, I find that Billings was not holding a unit title during the payroll period ending as of October 11, 2002. In fact, she was not appointed to the position until October 28. Her duties between October 1 and 27 were part

3/ See Lullo v. Int'l Association of Firefighters, Local 1066, 55 N.J. 409 (1970).


of her pre-appointment training. Peacock was responsible for those supervisory duties during that period. As of the payroll cutoff date of the original election - October 11, 2002 - Billings was in training, and therefore, not eligible to vote in the first election. Accordingly, she was ineligible to vote in the election as well. N.J.A.C. 19:11-10.4(a)(3).

Accordingly, Billings ballot must be voided. The election result is a tie vote; that election must be declared a nullity. It will, therefore, be necessary to conduct a rerun of the runoff election. N.J.A.C. 19:10.4(b).

ORDER

The rerun election is hereby ordered to be conducted by mail ballot. The election will commence within 30 days of the date hereof. Eligible voters will be those eligible to vote in the first election. Billings is ineligible to vote in this rerun election. Employees will vote on whether they wish to be represented for collective negotiations by Cumberland Supervisors Association or by NJCSA Council 18 (Supervisors). The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman

DATED: March 25, 2003
Trenton, New Jersey