

D.R. No. 2009-12

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

In the Matter of

CITY OF SUMMIT,

Public Employer,

-and-

OPEIU LOCAL 32,

Docket No. RD-2009-004

Employee Organization.

-and-

LORI SUDOL, et al.,

Petitioner.

SYNOPSIS

The Director of Representation certifies the results of a mail ballot election over objections of OPEIU. Any inaccurate addresses on the excelsior list either were or could have been remedied and therefore OPEIU failed to demonstrate prejudiced in a free and fair election.

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Appearances:

For the Public Employer,
Apruzzese, McDermott, Mastro & Murphy, attorneys
(James L. Plosia, Jr., of counsel)

For the Employee Organization,
Mets, Schiro & McGovern, LLP, attorneys
(Kevin P. McGovern, of counsel)

For the Petitioner,
Lori Sudol, pro se

DECISION

On February 17, 2009, OPEIU, Local 32 filed timely objections to a secret mail ballot election conducted among a negotiations unit of full-time and regularly employed part-time dispatchers of the City of Summit. N.J.A.C. 19:11-10.3(h). On February 9, a Commission election agent tallied the results of the election, following our processing of a decertification

petition filed by unit employee Lori Sudol. The nine unit employees were each sent mail ballots seeking their decision on whether they wished to continue to be represented for purposes of collective negotiations by Local 32. A majority of voting employees voted against representation.

OPEIU requests that the election be set aside and a new one ordered. It contends that the City provided an eligibility list with incorrect addresses of two (2) employees, thereby violating N.J.A.C. 19:11-10.1. It filed certifications of two unit employees, Lauren Karsen (Karsen) and Steve Zampino (Zampino). On February 23, 2009, I wrote to the City and to Petitioner Sudol inviting their responses to OPEIU's objections. The City filed a letter, writing that any error on the eligibility list was correctable by OPEIU and/or the individual employees, and it disputes that the results of the election should be set aside. The Petitioner did not respond.

Based upon my review of the matter, together with the parties' submissions, I find the following facts:

On December 5, 2008, dispatcher Lori Sudol (Petitioner) filed a representation petition seeking to decertify OPEIU, Local 32 as the majority representative of a negotiations unit of police and fire dispatchers employed by the City of Summit. The petition was accompanied by an adequate showing of interest. N.J.A.C. 19:11-1.3. On December 29, 2008, I granted OPEIU's request to intervene on the petition. N.J.A.C. 19:11-2.7.

On December 30, 2008, Sudol, OPEIU and the City signed a consent agreement for a mail ballot election providing that the ballots were to be mailed on January 21, 2009 and received and counted on February 9, 2009. I approved the agreement on January 7, 2009. The next day, January 8, Notices of Election, together with sample ballots, were mailed to the City for posting. On January 9, the City provided us and OPEIU copies of the election eligibility list, as required by the consent agreement. The eligibility list set forth an alphabetical listing of the first and last names of eligible voters, together with their titles and addresses. Nine (9) names appeared on the list.

On January 30, 2009, OPEIU filed a letter, acknowledging its receipt of the City's list on January 8 and advising that the address provided for employee Lauren Karsen (Karsen) was incorrect. OPEIU provided us a corrected address for Karsen. That same day, a duplicate ballot was mailed to Karsen's corrected address. The duplicate ballot with Karsen's corrected address was received and counted on February 9, 2009. We were not advised of any other errors regarding the address of any other unit member.

The ballots were collected at the post office at 1:30 p.m. on February 9, 2009 and counted at 2:30 p.m. that day, pursuant to the terms of the consent agreement. A representative of OPEIU attended the mail ballot count at our Trenton office.

Seven of the nine mailed ballots were collected and counted. The majority of them, four, were cast against further representation by OPEIU Local 32; three votes were cast in favor of continued representation by OPEIU. The parties were provided a Tally of Ballots. OPEIU's objections followed.

OPEIU objects to the election based upon the City's failure to provide an accurate eligibility list pursuant to N.J.A.C. 19:11-10.1(b). OPEIU specifically objects that the list set forth inaccurate addresses for two (2) bargaining unit members, Karsen and Zampino, despite the fact that the City possessed their correct addresses.

Karsen's affidavit provides that she moved to a new address in July 2008. She promptly notified the City of the change and has since received paychecks and other employment-related documents at her new address. Karsen certified that she read our "Notice of Election" at her workplace. The notice provided that ballots would be mailed on January 21, 2009. By January 30, 2009, Karsen had not received a ballot. She promptly informed her union representative, confirmed her home address and learned that her previous address was provided on the City's list.

Later that day, OPEIU's attorney faxed a letter to the Commission's Election Officer, confirming Karsen's correct address and requesting that another ballot be forwarded to her at that address. A new ballot was mailed to Karsen at her corrected address. Karsen certified that she received the ballot and

mailed it on January 31, 2009. The ballot was received at our post office box, collected and counted on February 9, 2009.

Zampino's affidavit provides that he has resided and received paychecks at his current address for about one year. He previously lived with his parents at another address. Zampino certified that he read the "Notice of Election" posted at his workplace, specifically noting the provision advising that the ballots would be mailed on January 21, 2009. Zampino did not receive a ballot at his home. Zampino certified that a few days later, he received a telephone call from his sister who told him that mail addressed to him had arrived at his parents' address. He certified that he told his sister that he would pick up the mail, and a few days later, he did. Among the retrieved items was a secret mail ballot on which he cast a choice and mailed it "a few days later." Zampino certified that he does not know what day he mailed the ballot but maintains that had it been sent to his correct address, he would have mailed it sooner than he did. Zampino's ballot was received in the Commission's post office box on February 12, 2009, three days after the tally of ballots.

ANALYSIS

Elections conducted by the Commission carry a presumption that each voter's choice in a secret ballot election is collectively a valid expression of the employees' representational desires. Allegations of what may seem to be objectionable conduct must be supported by evidence that the

alleged misconduct interfered with or reasonably tended to interfere with the employees' free choice. The objecting party must provide evidence of a direct nexus between the alleged objectionable conduct and the freedom of choice of the voters. City of Jersey City and Jersey City Public Works Employees, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd sub nom. Am. Fed. of State, County and Municipal Employees, Local 1959 v. PERC., 114 N.J. Super. 463 (App. Div. 1971), citing NLRB v. Golden Age Beverage Co., 415 F.2d 26, 71 LRRM 2924 (5th Cir. 1969); Hudson Cty. Schools of Technology, D.R. No. 99-14, 25 NJPER 267, 268 (¶30113 1999).

The Director of Representation must review the objections and supporting evidence to determine “. . . if the party filing objections has furnished sufficient evidence to support a prima facie case.” N.J.A.C. 19:11-10.3(i). The veracity of the proffered evidence is assumed. If the evidence submitted is not enough to support a prima facie case, the Director may dismiss the objections immediately. If sufficient evidence is submitted, then, and only then, will the Director investigate the objections. See State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd NJPER Supp. 2d 123 (¶104 Appl Div. 1982).

The standard of review of election objections contemplated by N.J.A.C. 19:11-10.3(i) was discussed in Jersey City Medical

Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986). There, the Director found:

This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present in order for an investigation to be initiated. If this two-prong test is not met, the objections will be dismissed. [Id. at 314]

Applying the above standards to OPEIU's objection, I initiated an investigation into whether the City had provided an accurate election eligibility list as required by N.J.A.C. 19:10-10.1.

Eligibility List Objections

N.J.A.C. 19:11-10.1 provides, in relevant part:

(a) In all representation elections conducted pursuant to this subchapter, unless otherwise directed by the Director of Representation, the public employer is required to file simultaneously with the Director of Representation and with the employee organization(s) an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters and their last known mailing addresses and job titles. In addition, the public employer shall file a statement of service with the Director of Representation. In order to be timely filed, the eligibility list must be received by the Director of representation no later than 10 days before the date of the election. The Director of Representation shall not grant an extension

of time within which to file the eligibility list except in extraordinary circumstances.

(b) Failure to comply with the requirements of this section may be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-10.3(h).

In State of New Jersey and NJ Corrections Assn., Inc. and SLEC, P.E.R.C. No. 2004-49, 30 NJPER 4 (¶13 2004), the Commission upheld the Director of Representation's decision to direct a new election in which the employer did not substantially comply with N.J.A.C. 19:11-10.1 by providing a voter eligibility list with an outcome - determinative number of inaccurate addresses in a mail ballot election. The Commission held:

Conducting fair representation elections that permit employee free choice is a core function of our agency. N.J.S.A. 34:13A-6(d). Through our election processes, employees exercise their right to select a majority representative. That representative becomes the exclusive representative for all unit employees and supplants an individual employee's right to represent himself or herself about matters of the utmost importance to the employee. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). In both the public and private sectors, the concept of employee free choice in the selection or rejection of a representative is interwoven with the responsibility of the governmental agency to ensure that the election choice is exercised under 'laboratory conditions.' East Windsor Tp., D.R. No. 79-13, 4 NJPER 445 (¶4202 1979); see also General Shoe Corp., 77 NLRB 124, 126 (1984).

In all our elections, the employer must provide an eligibility list of names, last known mailing addresses, and job titles to the Director of Representation and any

employee organizations participating in the election. See N.J.A.C. 19:11-10.1. In a traditional on-site election, the purpose of this requirement is not to guarantee employees the opportunity to vote, but to enable employee organizations to put potential voters in a 'better position to make a more fully informed and reasonable choice.' Excelsior Underwear, Inc., 156 NLRB 1236, 1240 (1996) (private sector case establishing the requirement that employers provide unions with employee names and addresses before election). A significant body of case law, both in the private and public sectors, requires that an employer substantially comply with the eligibility list requirement so that unions can send employees campaign information. If it does not, an election will be set aside. See Monmouth Cty., P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982) (employer's substantial compliance with Excelsior requirements gave unions sufficient opportunity to communicate with electorate in on-site election). Much of that case law is cited in the Director's decision. While that case law is relevant when deciding whether unions have been able to inform voters, it does not answer the problem in this case.

This case does not center on the right of unions to campaign. Instead, this case centers on our agency's obligation to conduct a fair mail ballot election. In a mail ballot election, the list of names and addresses is our primary mechanism for ensuring that negotiations unit employees receive ballots and have an opportunity to vote. While providing unions access to voters is an important right, providing voters access to the polls is a paramount obligation. In a mail ballot election, the critical question, then, is not whether there has been substantial compliance with the traditional Excelsior list requirement, but whether our election process has enabled negotiations unit employees to register the will of the majority.

The Commission went on to specifically address the question of whether future mail ballot elections would be overturned whenever the number of undelivered ballots could be determinative of the outcome of the election. In answering that question, "no," the Commission added a safeguard against voter disenfranchisement by requiring this directive, prominently displayed, in the Notice of Election:

If you believe you are an eligible voter and you do not receive a ballot in the mail by [date - two days after the last date any ballots any ballots should have been received], call the Director of Representation immediately at [telephone number]. If you do not receive a ballot and do not call, you may lose the opportunity to vote in this election.

The Commission added:

This modification accords with NLRB practice and that of other State labor relations agencies. Including this language in no way diminishes an employer's obligation to act in good faith and to timely provide a current list of employee names and addresses. A perfect list remains the goal. But we recognize that employees may move and that errors may occasionally occur. This additional safeguard will instruct eligible voters on what to do if they do not receive a ballot so that they can receive one in plenty of time to vote. Eligible voters will thus have every opportunity to exercise their right to vote. If they forego that opportunity, the onus of their not being able to vote may be on them. Cf. Erie Cty. and Erie Cty. Sheriff, 18 NYPARB 4120 (¶18-4071 1985) (rejecting election objection where number of errors in eligibility list was small and 7 of 8 employees who did not vote had access to notice of election detailing the procedures for requesting a replacement

ballot); California State Employees' Ass'n, 6 PERC ¶13043 (Final HE 1982) (rejecting election objection despite outcome determinative number of undeliverable ballots where notice of election provided telephone number for eligible voters to call for duplicate ballots).

The City timely provided the Commission and all parties with the eligibility list before January 9, 2009 as required by the consent agreement. In its January 30, 2009 letter to the Commission, OPEIU acknowledged receipt of the eligibility list from the City on January 8, 2009. OPEIU argues that the eligibility list set forth inaccurate addresses for two (2) bargaining unit members, Karsen and Zampino, and therefore the election should be set aside.

OPEIU notified the Commission of the inaccurate address provided for Karsen and gave us a corrected address. The Commission immediately issued a duplicate ballot to her corrected address, which was returned and counted on February 9, 2009. Accordingly, OPEIU's argument regarding Karsen is moot. This example illustrates that the Commission's mail ballot election procedures, if followed, will address and correct errors, permitting voters to exercise their free choice in a fair election.

OPEIU asserts that Zampino's address on the City's eligibility list was also incorrect. We were provided his parents' address at which he no longer resided. Neither OPEIU nor Zampino notified the Commission of this inaccuracy. Zampino

was informed that mail had arrived for him at this parents' home and a few days later he picked up his mail, including the ballot, and a few days later he mailed his ballot. Zampino maintains that if the ballot had arrived at his correct address, he would have completed and mailed it sooner than he did. In his affidavit, Zampino acknowledges having read our "Notice of Election," providing in a pertinent part that ballots would be mailed to bargaining unit members on January 21, 2009. Zampino did not identify in his affidavit another portion of the posting which instructs eligible voters to call the Director of Representation immediately if they did not receive a ballot by January 28, 2009. If Zampino acted sooner, his completed ballot may have been received in time for the count.

Any inaccurate addresses could have been or were remedied, as in the instance of the Karsen ballot. If Zampino or OPEIU had notified the Commission of the error in Zampino's address, a new ballot would have been mailed expeditiously. OPEIU has not demonstrated that the ballot mailed to Zampino's parents' address prejudiced its or his participation in a free and fair election. Monmouth Cty. Therefore, OPEIU's eligibility list objection is dismissed.

Attached hereto is the appropriate Certification of Results.

ORDER

The objections are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Arnold H. Zudick
Director of Representation

DATED: April 1, 2009
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by April 13, 2009.