

D.R. NO. 2012-8

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

In the Matter of

Hudson County,
Public Employer,

-and-

Docket No. RO-2012-009

Hudson County Union Local 1, Amalgamated,
Petitioner,

-and-

IUPAT, AFL-CIO, District Council 711
Intervenor.

SYNOPSIS

The Director of Representation issues a Certification of Representative in favor of Hudson County Union Local 1 Amalgamated (Local 1) in an election to determine the representative of six painters represented by Local 1007, District Council 711, International Union of Painters and Allied Trades ("IUPAT"). An investigation by the U.S. Postal Service concluded that two of three ballots discovered in the post office box used by the Commission for mail ballot elections could not have been in the box by the date and time appointed for ballot collection. IUPAT and the County both requested that the ballots be counted. The Director finds that none of the after-discovered ballots will be counted because counting the third could not affect the outcome of the election and would compromise the secrecy of the ballot. The Director further finds the argument of IUPAT and the County that a new ballot due date in a corrected Notice of Election confused eligible voters to be unpersuasive; moreover, any such concerns not raised by the parties present at the ballot count were waived.

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IUPAT, AFL-CIO, District Council 711
Intervenor.

Appearances:

For the County
Louis C. Rosen, Esq., Deputy County Counsel

For the IUPAT, AFL-CIO, District Council 711
Spear Wilderman, P.C.
Martin W. Milz, Esq.

For the Hudson County Union Local 1, Amalgamated,
Cresci Law LLC
Peter J. Cresci, Esq.

DECISION

On July 22, 2011, Hudson County Union Local 1, Amalgamated ("Local 1") filed a representation petition seeking to represent a collective negotiations unit of approximately six painters employed by Hudson County, and currently represented by Local 1007, District Council 711, International Union of Painters and Allied Trades ("IUPAT"). In the absence of a consent, on October

24, 2011, I directed a secret mail ballot election. Ballots were mailed by the Public Employment Relations Commission ("Commission") on October 28, 2011, returnable to the Commission's post office box by 9:00 a.m. on November 17, 2011.

It should be noted that through an administrative error, the Notice of Election originally sent by the Commission incorrectly stated that the ballots would be returnable and would be counted on November 18, 2011. On November 9, 2011, a corrected Notice of Election, which provided that ballots were returnable to the Commission's post office box at 9:00 a.m. on November 17, 2011, and would be counted at 11:00 a.m. on the same day, was sent to all parties and the notices were posted in places where such notices are normally posted for affected employees.

On the morning of November 17, 2011 at the scheduled and announced time, a Commission staff agent collected all the envelopes (ballots) from the Commission's post office box. Of a universe of six eligible voters, two ballots were in the post office box.

Those two ballots were counted at the appointed time on November 17, 2011 by a Commission staff agent, in the presence of observers from Local 1, IUPAT and the employer. The tally showed two votes for Local 1. The tally sheet was signed by the Commission staff agent who conducted the count, as well as the

observers. Preceding the signature lines for the observers on the tally sheet, the following language appears:

The undersigned acted as authorized observers in the counting of ballots indicated above. We hereby certify that the counting was fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated. We also acknowledge service of this tally.

Pursuant to the provisions of N.J.A.C. 19:11-10.3(h), any party may file objections to the election within five days after the tally of ballots has been furnished. No objections were filed.

On the morning of November 23, 2011, before a certification of representative naming Local 1 as the majority representative issued, but after the five day objection period provided by N.J.A.C. 19:11-10.3, a Commission staff agent retrieving mail ballots from the Commission's post office box in an unrelated election matter found three envelopes in the box from the above-captioned election. One envelope was postmarked November 15, 2011, two were postmarked November 16, 2011 in the afternoon. All three ballots were secured in the Commission's safe, and the parties were notified by Deputy Director Roth by telephone and confirming letter of the discovery of the ballots on the afternoon of November 23, 2011; the parties were further advised that no certificate of representative would issue pending investigation of the circumstances which resulted in the three

ballots being placed in the Commission's post office box after the announced deadline.

At my direction, Commission personnel met with supervisory personnel at the Trenton office of the United States Postal Service ("USPS"), and requested that the USPS examine the three ballots, and determine the reasons why the ballots were not in the Commission's post office box by 9:00 a.m. on November 17, 2011. On November 29, 2011, I received a memorandum signed by Gregory P. Neiderman, Supervisor, Customer Services, USPS Trenton, New Jersey.^{1/} Mr. Neiderman advised that his investigation revealed that based on USPS records "the Business Reply Envelope postmarked on November 15, 2011 should have been in your PO Box prior to the election cut off date of November 17, 2011 at 9:00 a.m." He further advised that the two envelopes postmarked on November 16, 2011 would not have been in the post office box by the cut off date and time "under any circumstances based upon the date and time when they were postmarked."

By letter of December 2, 2011, I provided the parties and the employer with a procedural summary of the election, a copy of the Neiderman memorandum, and outlined my position, based on Commission precedent, that the two ballots postmarked November 16, 2011 be considered void, and the third ballot postmarked

^{1/} Neiderman signed a certification on December 19, 2011, (copy attached), repeating the facts outlined in his memorandum.

November 15, 2011 should not be opened since the ballot would not be outcome determinative, and the secrecy of the voter's ballot might be compromised due to the small size of the unit. I asked that the parties submit their respective arguments concerning the disposition of the three ballots by December 8, 2011. The parties were finally reminded that due to the nature of the proceeding, the matter required expedient handling.

The employer's counsel telephoned me on December 6, 2011, asking for an extension of time to respond; I sent a letter confirming that conversation to the parties and the employer on the same day, noting that I had declined to grant an extension of time beyond December 12, 2011 due to the Commission's long standing policy of expediting representation cases, and noting that a certification of representative was pending. Mr. Rosen, counsel for the County, formally requested an extension of time by letter of December 7, 2011; I granted an extension of time to respond to all parties until the close of business on December 12, 2011 by letter of December 8, 2011.

Local 1, by letters of November 23, 2011 and December 12, 2011, opposed the opening of any of the three ballots at issue, noting that the deadline for ballots to be received at the Commission was 9:00 a.m. on November 17, 2011, and any ballots not in the Commission's post office box at that time did not meet the deadline for voting. Local 1 also raised the possibility of

fraudulent conduct, although no specific allegations were made.

Citing Rutgers, The State University, D.R. No. 2000-12, 26 NJPER 241 (¶31095 2000), req. for review denied., P.E.R.C. No. 2000-101, 27 NJPER 1 (¶3200 2000), (the Commission counted 114 additional ballots when the post office inadvertently misplaced ballots which arrived prior to the due date), Local 1 strongly opposed the opening of any of the ballots. Local 1 noted that unlike the facts presented in Rutgers, the three election ballots were not "misplaced" by the USPS, they were not present at the announced deadline for voting.

By letter of December 7, 2011, IUPAT urged that all three ballots be opened, arguing that any other course of action would unfairly disenfranchise the individuals who submitted their votes prior to the deadline. IUPAT further argued that the change in ballot count date from November 18, 2011 to November 17, 2011 was "sudden and unexplained", and created confusion in the minds of the voters.

The employer, by letter of December 7, 2011, relies on Rutgers in support of its position that the ballots should be counted, noting the purported confusion created by the change in dates for ballot return from November 18, 2011 to November 17, 2011.

Reliance on Rutgers by IUPAT and the employer for the proposition that all three ballots should be opened is misplaced.

In Rutgers, while results of a run-off election were pending, Commission staff learned that 114 ballots relating to the original election had not been placed in the Commission's post office box upon their receipt at the Trenton Post Office. Those voters in Rutgers who promptly returned their ballots to the Commission consistent with instructions had a reasonable expectation that their actions would result in their ballots being received in a timely manner and counted; those ballots were counted by the Commission. However, those ballots which were postmarked two days before the scheduled cut off were not counted. The Director of Representation determined that the voters who mailed their ballots so close to the deadline could not have had a reasonable expectation that the ballots would be received in time to be counted.

The purpose of a representation election is to provide public employees with the opportunity to make a free and fair choice about whether or not they wish to be represented by a labor organization. Eligible voters have the additional choice not to vote at all, expressing no preference on the question of representation. However, all eligible voters have the paramount responsibility to be aware of the procedural requirements of casting their ballots, namely that the ballots be mailed with sufficient time to be present in the Commission's post office box on the date and time specified. See Monmouth County and CWA Local


1087, D.R. No. 2011-5, 36 NJPER 431 (¶168 2010) (Director of Representation orders that ballots received in Commission post office box after original due date be counted after investigation by the Postal Service determined that the ballots should have been in the post office box prior to the election cut off date).

An inquiry by the United States Postal Service has determined that the two ballots which were postmarked November 16, 2011 would not have been in the Commission's post office box by the cut off date. The argument advanced by IUPAT and the employer that the correction of the cut off date by means of a new Notice of Election, issued on November 9, 2011, confused eligible voters is not persuasive.

Ballots in this election were mailed on October 28, 2011. Voters had ample time to consider their options, and determine how to proceed, even with a change in the date for the return of the ballot. Moreover, the time to raise objections to the election was within the five day period permitted by N.J.A.C. 19:11-10.3. Representatives from Local 1, IUPAT and the employer attended and observed the count on November 17, 2011, and signed the tally sheet at the conclusion of the count. The failure of any party to file a timely objection based on perceived procedural confusion on the part of eligible voters constitutes a waiver of the objection which IUPAT and the employer now raise. The voters who cast their ballots on November 16, 2011, like the

late voters in Rutgers, could have had no reasonable expectation that their ballots would be received at the Commission's post office box and available for pick-up at 9:00 a.m. on November 17, 2011. Rutgers at 7. Therefore, there is no basis to count those two ballot, and to do so would undermine the procedural integrity of the election process.

The ballot cast on November 15, 2011, according to the certification of Gregory P. Neiderman, should have been in the post office box at the appointed time; however, it was not. Opening the ballot would serve no useful purpose, since one more vote, regardless of how it was cast, could not change the outcome of this election. With a universe of eligible voters of this size, opening the ballot would also risk the secrecy of the ballot. I therefore find that the ballot will not be opened, and a Certificate of Representative in favor of Local 1 is attached.


Gayl R. Mazuco
Director of Representation

DATED: December 28, 2011
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 January 9, 2012.

NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION
P.O. Box 429
TRENTON, NEW JERSEY 08625-0429
(609) 292-9830
E-MAIL: mail@perc.state.nj.us

In the Matter of	>	
	>	
HUDSON COUNTY,	>	
Respondent,	>	
	>	
-and-	>	
	>	
HUDSON COUNTY UNION LOCAL 1	>	
AMALGAMATED,	>	Docket No. RO-2012-009
Petitioner,	>	
	>	
-and-	>	
	>	
IUPAT, AFL-CIO, DISTRICT COUNCIL 711,	>	
Intervenor,	>	
	>	

CERTIFICATION OF GREGORY P. NEIDERMAN

1. I am currently employed by the United States Postal Service as the Supervisor of Customer Services at the United States Postal Service (USPS), located at 680 Highway 130 in Trenton, New Jersey.

2. I am aware that the State of New Jersey, Public Employment Relations Commission, has secured Post Office Box number 55778 at the United States Post Office located at 2601 Brunswick Avenue, Trenton, N.J., 08638 to receive ballots via postage prepaid Business Reply Envelopes when conducting mail elections.

3. Gayl Mazuco, Director of Unfair Practices and Representation, through Commission staff, advised me of facts concerning the election in Commission Docket Number RO 2012-009.

4. Director Mazuco advised that all ballots in RO-2012-009 were due in the Commission's post office box by 9:00 a.m. on November 17, 2011, and that when the ballots were collected at the above-appointed place and time by a Commission staff agent, of a total of 6 eligible voters, 2 ballots had been returned.

5. Director Mazuco further advised that on the morning of November 23, three additional envelopes (ballots) for this election were discovered in the Commission's post office box. One of the ballots was postmarked November 15, 2011, and two were postmarked November 16, 2011. Commission personnel met with me and requested that I examine the three ballots, and determine, using USPS resources, the reasons why the ballots were not in the Commission's post office box at 9:00 a.m. on November 17, 2011.

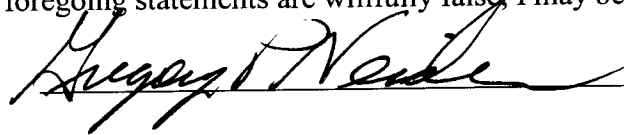
6. USPS staff's review of the postmarks on the 3 ballots received in the post box on November 23 and the postal service records revealed that one of the three ballots was postmarked on the afternoon of November 15, 2011 at Kearny, New Jersey. The other two envelopes were postmarked on the afternoon of November 16, 2011 at Kearny.

7. After review, I have concluded that the ballot postmarked November 15, 2011 should have been in the Commission's post office box prior to November 17, 2011 at 9:00 a.m. The envelope was dispatched to the appropriate delivery office; however it was delayed in reaching its destination for unknown reasons. The delay appeared to have been in the Postal Service dispatch and transportation system. No improper handling was identified.

8. I also concluded that the 2 ballots postmarked on November 16, 2011 would not have been in the Commission's Post Office box by the election cut off date of November 17, 2011 at 9:00 a.m. under any circumstances, based upon the date and time when they were postmarked.

9. I advised Director Mazuco of these facts by letter dated November 29, 2011.

10. I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I understand that if any of the foregoing statements are willfully false, I may be subject to punishment.



Gregory P. Neiderman
Supervisor of Customer Services

DATED: December 19, 2011

Sworn & subscribed to

before me this 19th day of December, 2011

Patricia Taylor Bord Esq.
An attorney at law of the
State of New Jersey

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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Public Employer,

-and-

HUDSON COUNTY UNION LOC 1 AMALGAMATED,

Petitioner.

-and-

IUPAT, AFL-CIO, DISTRICT COUNCIL 711

Intervenor.

DOCKET NO. RO-2012-009

CERTIFICATION OF REPRESENTATIVE

An election was conducted in this matter in accordance with the New Jersey Employer-Employee Relations Act, as amended, and the rules of the Public Employment Relations Commission. A majority of the voting employees selected an exclusive majority representative for collective negotiations. No valid timely objections were filed to the election.

Accordingly, **IT IS HEREBY CERTIFIED** that

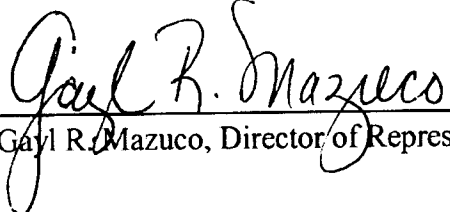
HUDSON COUNTY UNION LOCAL 1 AMALGAMATED

has been selected by a majority of the employees of the above-named 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 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. The representative is responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership. The representative and the above-named Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment as required by the Act.

UNIT: Included: All regularly employed painters employed by the County of Hudson.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; professional employees, police employees, craft employees, casual employees, employees in other bargaining units, and all other employees.

DATED: December 28, 2011
Trenton, New Jersey



Gayl R. Mazuco, Director of Representation

Attachment:

Certification of Representative dated: December 28, 2011

In the Matter of

HUDSON COUNTY

-and-

HUDSON COUNTY UNION LOC 1 AMALGAMATED

-and-

IUPAT, AFL-CIO, DISTRICT COUNCIL 711

Docket No. RO-2012-009

Service on the following:

Louis Rosen, Esq.
Deputy County Counsel
Hudson Cty
Office of the County Counsel
567 Pavonia Ave
Jersey City, NJ 07306

Martin W. Milz, Esq.
Spear Wilderman, P.C.
230 S Broad St, Ste 1400
Philadelphia, PA 19102

Peter J. Cresci, Esq.
Cresci Law LLC
830 Avenue A
Box 74
Bayonne, NJ 07002