

D.R. NO. 2000-12

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

ADMINISTRATIVE, PROFESSIONAL AND
SUPERVISORY GUILD/N.J.E.A.
(ADMINISTRATIVE UNIT),

Docket No. RO-2000-13

Petitioner,

-and-

RUTGERS STAFF UNION, AFT, AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation determines that 114 mail ballots, which were timely mailed by voters but misplaced by the Postal Service, should be opened, counted, and added to the tally of ballots previously counted in this election. The Commission's investigation reveals that the 114 ballots were posted-marked more than two weeks before the cutoff date for ballot receipt, but the Post Office did not surrender the ballots to the Commission agent on the day of the count. The Director determined that these voters did everything possible to exercise their right to vote and that right should not be disenfranchised by postal error. The Director rejects a request for a new election, as the misplaced ballots were now available to be counted and there is no basis for setting aside the entire election.

In addition, the Director voids 17 ballots post-marked one working day before the ballot pickup and thereafter. These voters had no reasonable expectation that their ballots would be received at the Commission's post office box in a timely fashion. He also voids two ballots without postmarks since there is no reliable assurance of timeliness.

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Appearances:

For the Public Employer
Grotta, Glassman & Hoffman, attorneys
(Theodore M. Eisenberg, of counsel)

For the Petitioner
Klausner, Hunter & Rosenberg, attorneys
(Stephen B. Hunter, of counsel)

For the Intervenor
Dwyer and Canellis, attorneys
(Brian Adams, of counsel)

DECISION

On August 19, 1999, the Administrative, Professional and Supervisory Guild/N.J.E.A. (Administrative Unit) filed a petition for certification, seeking to represent certain administrative employees of Rutgers University. The Rutgers Staff Union, AFT, AFL-CIO was permitted to intervene in this matter.

On December 28, 1999, the parties signed an Agreement for Consent Election which provided for the conduct of a mail ballot election among the University's administrative employees. Pursuant to the terms of the Consent Agreement, on February 14, 2000, we mailed ballots to eligible employees in the proposed unit. Among the instructions contained on the back of the ballot was the following:

Deposit this envelope, which requires no postage, in the United State [sic] Mail so that your ballot will be RECEIVED at the place shown on the return envelope^{1/} no later than Monday, March 6, 2000 - 10:00 a.m.

At 10:00 a.m. on March 6, the Commission's election agent retrieved 515 ballots from the Commission's post office box. At 11:00 a.m., a ballot count was conducted. The tally of ballots reveals that, of the 856 eligible voters, 490 valid votes were counted in addition to 15 challenged ballots. Of the valid votes counted, 183 votes were cast for APSG/N.J.E.A. (Administrative Unit); 73 votes were cast for Rutgers Staff Union, AFT, AFL-CIO; and 234 votes cast in favor of no representative. Thus, none of the choices on the ballot received a majority of the total votes cast, and on March 14, 2000, I ordered that a run-off election be conducted. The results of the run-off election are pending.

On April 10, 2000, while picking up the ballots for the runoff election, we learned that 114 ballots, postmarked on either February 16 or 17, 2000, were not surrendered to the Commission's

^{1/} The place shown on the return envelope was NJ PERC, P.O. Box 4651, Trenton, NJ 08650-9818.

election agent by the U.S. Post Office at the time ballots were collected on March 6. Additionally, 19 ballots postmarked on various dates were also given to us on April 10: six ballots were postmarked March 4, eight ballots were postmarked March 6; one ballot was postmarked March 7; one ballot was postmarked March 17; one ballot was postmarked March 20; and two ballots contained no postmark. On April 14, 2000, I advised the parties that these additional ballots relating to the initial election had been found, and invited them to submit position statements by April 24, 2000, concerning the manner in which this matter should be addressed.

The University suggests that in order to best effectuate voter choice and fulfill our obligation to oversee the fairness and validity of the election process, we should do the following:

1. Conduct an investigation in connection with the newly received ballots.
2. Assuming that no fraud or other irregularities are found, count the 114 ballots postmarked on February 16 and 17, 2000 and tally them with the ballots previously counted on March 6, 2000.
3. If the result of the combined tally is determinative, certify that result.
4. If the result of the combined tally is the same as the original March 6 count, requiring a run-off between NJEA and no representative, continue processing the April 10 run-off election.
5. If the result of the combined tally warrants a different run-off ballot choice, set aside the April 10 run-off election and proceed according to N.J.A.C. 19:11-10.4.

The NJEA suggests that the outcome of an election should reflect the free and fair choice of the voters with the goal being to conduct elections in laboratory conditions to determine the

uninhibited desire of employees. It contends that the integrity of the balloting procedures has been tainted. It asks that the March 6, 2000 election and the April 10, 2000 run-off election be set aside and a new election be conducted among the employees, with all three choices on the ballot.

The AFT submitted no position.

We have conducted an investigation regarding the newly discovered ballots. On April 17, 2000, I met with the Postmaster General and other United States Postal Service officials at the Trenton Processing and Distribution Center regarding the problem with the initial election's ballots. Our investigation revealed that the ballots were inadvertently misplaced and not immediately directed to the Commission's postal box upon their receipt at the Trenton Post Office. Our investigation further revealed no evidence of fraud, tampering with the ballots^{2/} or any intentional wrongdoing on the part of postal service employees. The newly discovered ballots from the March 6 election were collected by a Commission staff agent on April 10, 2000 and delivered to my office. Since April 10, 2000, they have been continuously maintained in the Commission's safe at its offices in Trenton.

I have reviewed the parties' submissions and considered the facts of this particular case. The Act guarantees public employees

^{2/} There was no evidence of tampering with the post-marks. The ballots were clearly postmarked as received by various local post offices and were not date-stamped by private meters.

the right to be represented by an employee representative of their own choosing or to refrain from forming an employee organization.

N.J.S.A. 34:13A-5.3. The Commission is empowered to resolve representation disputes by ascertaining the free choice of the employees, which is usually done through a secret ballot election.

N.J.S.A. 34:13A-6.

The University and the NJEA agree that the election process should reflect the free and fair choice of the voters as to whether they wish to be represented by an employee representative. They disagree as to how best to effectuate that result. I am persuaded, however, that in furtherance of the purpose of the Act, the fairest method of resolving this issue for the employees and parties, is to count the 114 ballots postmarked on February 16 and 17, 2000. This course of action preserves the integrity of the election process and preserves the employees' rights of expression. See generally, Watchung Hills Reg. Bd. of Ed., D.R. No. 86-21, 12 NJPER 317 (¶17122 1986) (where the Director refused to set aside a mail ballot election where the parties agreed to count late-received ballots).

The University and the NJEA cite various NLRB and Commission cases in support of their respective positions concerning the appropriate disposition of the ballots. The NJEA relies on New Jersey College of Medicine and Dentistry, E.D. No. 31, NJPER Supp. 122 (1971) and Borough of Brooklawn, D.R., No. 94-13, 20 NJPER 99

(¶25049 1993)^{3/} in support of its contention that we should set aside both elections and start with a new one.

In College of Medicine, 126 eligible voters never received their mail ballots due to inaccurate voter mailing addresses. Ballots were returned to the Commission as undeliverable and the Commission had insufficient time to re-mail. The 126 potential ballots were determinative of the election results. We ordered a new election, as a significant number of employees had been disenfranchised from voting. In Brooklawn, eligible voters failed to return their mail ballots in accordance with the Commission's voting instruction.^{4/} Accordingly, on the day of the ballot count, there were no ballots in the Commission's post office box to be counted. In both cases, all of the parties agreed to set aside the election results and conduct a new election.

In this case, unlike College of Medicine and Brooklawn, voters received their ballots, promptly returned them to the Commission in accordance with our instructions and, based on the

^{3/} The NJEA also relies on Berkeley Township, P.E.R.C. No. 86-112, 12 NJPER 358 (¶17135 1986) and Somerset Cty. College., E.D. No. 59, NJPER Supp. 593 (¶150 1974). However, these cases are readily distinguishable. Neither involved mail ballot elections. In both cases voters were disenfranchised from voting because the polls opened late. The only means to remedy the defect was to order a rerun election.

^{4/} Voters all placed their Commission-supplied return envelopes (with ballots) into a larger envelope and mailed this envelope certified mail to the Commission post office box. Apparently, the certified mail was returned, unclaimed, to the voters.

February 16 and 17 postmarks, had a reasonable expectation that their ballots would be received in a timely manner and counted. Moreover, unlike Brooklawn where no ballots were available to be counted, the choice of the 114 missing votes has been preserved, and the ballots are now available to be counted.

The critical difference between the facts of this case and those of College of Medicine and Brooklawn is that in those matters, since the ballots were not viable, there were no indicia of the voters' intent. Here, the 114 voters did everything in their power to exercise their right to vote; those votes should not be disregarded due to circumstances beyond their control.

Rutgers asserts that the ballots postmarked March 4 should be subject to challenge; that the two ballots without postmarks be voided since there is no reliable assurance of timeliness; and that the remaining ballots with postmarks after March 6 be voided as untimely.

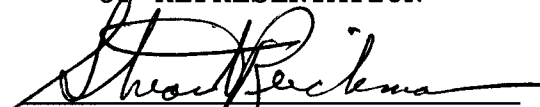
I find that those voters who mailed their ballots on Saturday, March 4 had no reasonable expectation that their ballots would be received at the Commission's post office box in a timely fashion and available for pick-up at 10:00 a.m. on Monday, March 6, 2000 in Trenton. Accordingly, there is no basis to count ballots postmarked on or after March 4, 2000. The timeliness of the ballots with no postmark cannot be ascertained and, consequently, should not be counted.

Based upon the foregoing, we will conduct a count of the 114 ballots postmarked on February 16 and 17, 2000. All other ballots from the March 6 election which were picked up on April 10, are voided. All ballots of eligible voters shall be tallied with the ballots previously counted on March 6, 2000. If the result of the revised tally is determinative, I will void the run-off election conducted on April 10, 2000 and issue an appropriate certification. If the result of the revised tally reveals that a run-off election is required between the NJEA and no representative, we will continue processing the April 10 run-off election. If the result of the revised tally warrants a different run-off ballot choice, we will set aside the April 10 run-off election and proceed in accordance with N.J.A.C. 19:11-10.4.

ORDER

A Commission election agent will conduct a count^{5/} at the Commission's Trenton office, subject to the provisions of N.J.A.C. 19:11-10.3, of the 114 ballots postmarked on February 16 and 17, 2000.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: May 3, 2000
Trenton, New Jersey

^{5/} The parties will be contacted to establish the date for the count.