

D.R. NO. 81-12

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

In the Matter of

BOROUGH OF CLOSTER,

Public Employer,

-and-

DOCKET NO. RO-153

LOCAL 29, R.W.D.S.U., AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation rules upon challenges to voting eligibility in a Commission representation election. Agreeing with the findings and recommendations of a Hearing Officer, the Director finds that one of the two individuals challenged was not a supervisor and his vote should be tallied. The other individual was discharged prior to the election for cause and his ballot is not to be tallied. In this regard, the Director adopts the Hearing Officer's recommendation that the challenge proceeding is not the appropriate forum to assert that the individual was not discharged for cause. In a absence of the convening of a proceeding in an appropriate forum for contesting the validity of the discharge of an individual's, the discharge will be presumed to be for cause in a challenge proceeding.

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LOCAL 29, R.W.D.S.U., AFL-CIO,

Petitioner.

Appearances:

For the Public Employer

Andora, Palmisano, DeCotiis & Harris, attorneys
(M. Robert DeCotiis of counsel)
(Robert S. Romano, Jr., on the brief)

For the Petitioner

Parsonnet, Duggan & Pykon, attorneys
(Victor J. Parsonnet of counsel)

DECISION

Pursuant to an Agreement for Consent Election entered into by the Borough of Closter (the "Borough") and Local 29, R.W.D.S.U., AFL-CIO ("Local 29"), a secret ballot election was conducted by the Public Employment Relations Commission (the "Commission") on April 16, 1980 among the Borough's blue collar Department of Public Works employees. The Tally of Ballots reveals that of approximately 17 eligible voters, 8 ballots

were cast for Local 29, 7 ballots were cast against representation by Local 29 and two ballots were challenged. The challenged ballots are of sufficient number to affect the results of the election.

On June 5, 1980, the undersigned directed the conduct of an investigatory hearing with respect to the voting eligibility of the two individuals whose ballots were challenged. A hearing was held before Commission Hearing Officer Michael B. Berman on June 25, 1980 at which time all parties were afforded the opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Post hearing submissions were filed by the Borough and Local 29 on July 14 and 15, 1980, respectively, and the Borough filed an answering statement on July 21, 1980. The Hearing Officer issued his Report and Recommendations on August 21, 1980, which is attached hereto and made a part hereof. Local 29 filed exceptions to the Hearing Officer's Report on September 12, 1980. On September 17, 1980, the Borough filed a reply to Local 29's exceptions.

The undersigned has reviewed the entire record, including the transcript, Local 29's exceptions and the Borough's reply, and on the basis thereof finds and determines as follows:

1. The Borough of Closter is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the

employer of the employees who are the subject of the Petition, and is subject to the provisions of the Act.

2. Local 29, R.W.D.S.U., AFL-CIO is an employee representative within the meaning of the Act and is subject to its provisions.

3. Two challenged ballots, which were cast in the representation election conducted by the Commission on April 16, 1980, among the Borough's blue collar public works employees, are determinative of the results of the election. The ballot cast by Harvey Lampman was challenged by Local 29, which claims that Lampman is a supervisor within the meaning of the Act and may not be included in the nonsupervisory unit. The ballot cast by Anthony Rideout was challenged by the Borough, which asserts that Rideout was terminated for cause on April 7, 1980. The Agreement for Consent Election entered into by the Borough and Local 29 provides that employees terminated for cause and not reinstated prior to an election are not eligible voters.

Accordingly, challenged ballots are determinative of the results of the election and the instant matter is properly before the undersigned for determination.

4. The Hearing Officer found that Harvey Lampman, although denominated by the Borough as the "responsible person" of the sewers and drains section of the Public Works Department, is not a supervisor within the meaning of the

Act. Local 29, which challenged Lampman's voting eligibility, has not excepted to the Hearing Officer's findings and recommendations. The undersigned, noting the absence of any exceptions with respect to the voting eligibility of Lampman and in agreement with the Hearing Officer that Lampman does not hire, discharge, discipline or effectively recommend the same, adopts the Hearing Officer's findings and conclusions that Lampman is not a supervisor and is an eligible voter.

The Hearing Officer recommended that Anthony Rideout was an ineligible voter and that the ballot which he cast not be counted. The Hearing Officer reasoned that a representation challenge proceeding is not an appropriate forum for a collateral inquiry into the reasons for discharge of Rideout due to the availability of judicial and administrative forums in which Rideout may contest his discharge. The Hearing Officer noted that there was no evidence in the record indicating that Rideout had filed a court proceeding or civil service proceeding or an unfair practice charge before this Commission. Additionally, the Hearing Officer noted that Local 29 had not filed objections to the conduct of the representation election claiming that the Borough sought to influence the election by discharging Rideout.

In excepting to the Hearing Officer's Report, Local 29 urges that the challenge forum is appropriate to litigate the "cause" of Rideout's termination. Local 29

states that it has not asked for reinstatement, and is not claiming that there is an unfair practice involved. ^{1/} Rather, Local 29 asserts that it is "merely claiming that Mr. Rideout's discharge was not for cause within the rules of the Commission and that his vote should be counted." Local 29 has not cited to any authority in support of its position.

The issue before the undersigned in the instant challenge proceeding is whether the challenge forum is appropriate for litigating the basis of Rideout's discharge. The undersigned is guided in this regard by the experience and adjudications of the National Labor Relations Board (the "NLRB"). Lullo v. Int'l. Assn. of Fire Fighters, Loc. 1066, 55 N.J. 409 (1970).

The NLRB and the Commission have similar requirements concerning voting eligibility. Like the Commission election agreement, the NLRB election agreement also provides that employees discharged for cause and not reinstated prior to an election are ineligible to vote. The NLRB has determined that pre-election discharges are presumed to be lawful, and

^{1/} Significantly, on September 30, 1980, after the investigative hearing in the challenge proceeding and after the issuance of the Hearing Officer's Report and after the filing of its exceptions thereto, Local 29 filed an Unfair Practice Charge against the Borough asserting the following: "The above-named employer, by its officers, agents and representatives terminated the employment of Anthony Rideout because of his membership in and activities on behalf of Local 29, RWDSU, AFL-CIO and in order to affect the results of the election." The remedy sought by Local 29 includes the reinstatement of Rideout, back pay and rerun of the election.

a determination that a discharge is improper cannot be made in a representation proceeding. More specifically, in Spray Sales and Sierra Rollers, 225 NLRB No. 157, 93 LRRM 1025 (1976), the Board stated, in the context of a challenge proceeding:

In order for the Petitioner to prevail, it must be shown that the strikers were unlawfully discharged. This is because in challenged ballot cases discharge is presumed to be for cause where no unfair labor practice charge has been filed. That determination, however, cannot be made in a representation proceeding....

Thus, in the present case, the Board must presume that the discharges were lawful. To hold otherwise would place the Board in the position of making unfair labor practice findings in a representation proceeding where no charges have been filed. "The election process may be protected by the timely filing of charges with respect to the conduct in question." [Texas Meat Packers, Inc., 130 NLRB 1214, 47 LRRM 1294 (1961) Since the discharges are presumed to be lawful it follows that whatever voting rights the discharged employees may once have enjoyed have been extinguished. Accordingly, the challenge to their ballots should be **sustained** and the results of the election certified. (footnotes omitted)

The undersigned sees no reason to deviate from the NLRB's established practice in this area given the Court's instruction in Lullo and the similar proceedings available

to Local 29 and Rideout under the Act. Prior to the conduct of the eligibility investigation neither Local 29 nor Rideout filed an unfair practice charge or any other proceeding in a forum established for the purpose of adjudicating the propriety of the discharge. Therefore, in the instant challenge forum Rideout's discharge is presumed valid and the Borough's challenge to his voting eligibility is sustained.

The undersigned, however, is constrained to comment upon the recent filing of the Unfair Practice Charge against the Borough (footnote 1), as it affects the representation proceeding at this juncture. The Commission's policy is to certify the results of a representation election with expedition in order to provide the parties with the certainty of the election results. Where employees have rejected representation, such definitiveness permits the employer to resume his normal personnel functions. Where a representative has been selected, a certification of representative issues and is accompanied by an order directing the employer to engage in negotiations with the majority representative upon demand. Therefore, the Commission requires that post-election representation proceedings be initiated and resolved at the earliest possible time following an election. Accordingly, a Certification of Representative or Certification of Results will always issue immediately after a representation election unless one or

both of the following conditions are present: (1) there are election eligibility challenges which are determinative of the election results; or (2) election objections are received within five working days after an election.

The initiation of a unfair practice proceeding, without more, will not delay the issuance of a certification. Thus, where challenges are not determinative of the results of an election and where post-election objections have not been filed, a certification will issue notwithstanding the pendency of an unfair practice proceeding.

Where a charge is filed prior to a challenge or objection investigation, the proceedings may be consolidated, where appropriate. However, where the investigation process inclusive of the investigative hearing has been completed, the filing of a charge will not affect the issuance of the appropriate certification. This procedure provides sufficient opportunity to raise representation claims and unfair practice claims as they affect the representation proceeding, without interfering with the due speed required in certifying the election results.

The undersigned therefore determines that the employer's challenge respecting the voting eligibility of Rideout is upheld. The ballot of Lampman shall be opened

and tallied, and the appropriate certification shall issue. 2/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: October 9, 1980
Trenton, New Jersey

2/ The undersigned notes that Local 29 did not file post-election objections seeking to have the election set aside. Nevertheless, Local 29's unfair practice charge raises the claim that the Borough's discharge of Rideout "affect(ed) the results of the election." As remedy, Local 29 seeks to have the election set aside and rerun. This remedy is normally pressed in a post-election objections proceeding. If the charge has merit (and the undersigned expresses no opinion in this regard) the Commission may find it necessary to pass upon the propriety of awarding such a remedy in an unfair practice forum where the charging party has not filed timely post-election objections.

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

In the Matter of

BOROUGH OF CLOSTER,

Public Employer-Respondent,

- and -

Docket No. RO-80-153

LOCAL 29, R.W.D.S.U., AFL-CIO

Employee Organization-Petitioner.

SYNOPSIS

A Commission Hearing Officer, considering the challenge to two voters in a Commission conducted election in a unit of blue collar employees of the Department of Public Works, recommends the challenge to one voter be sustained and the challenge to the other voter be overruled and the vote counted. The sustained challenge was found to be ineligible to vote. The individual had been discharged for cause since the designated payroll period and had not been reinstated before the election date. The overruled challenge was found not to be a supervisor within the meaning of the Act and, therefore, the Hearing Officer recommends that the challenge be dismissed and the ballot counted.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, any exceptions 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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For the Public Employer

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(M. Robert DeCotiis, Of Counsel)

(Robert S. Romano, Jr., on the brief)

For the Petitioner

Parsonnet, Duggan & Pykon, Esqs.

(Victor J. Parsonnett, Of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On March 12, 1980, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission by Local 29, R.W.D.S.U., AFL-CIO ("Local 29"), seeking to represent a unit consisting of all employees of the Department of Public Works of the Borough of Closter (the "Borough").

The parties entered into an Agreement for Consent Election and on April 16, 1980, the election was held. The tabulation of the ballots cast, as indicated on the Tally of Ballots, shows that 8 votes were cast for Local 29, 7 votes were cast against the participating employee representative and there were two challenged ballots. Therefore, challenges are sufficient in number to affect the results of

the election.

Pursuant to a Notice of Hearing, a hearing was held before the undersigned Hearing Officer on June 25, 1980, at which time all parties had an opportunity to examine witnesses, present evidence and argue orally. The Borough filed a post-hearing brief on July 14, 1980. Local 29 filed its statement in lieu of brief on July 15, 1980, and the Borough filed an answering statement on July 21, 1980. At the hearing, the parties agreed to the following stipulations.

Stipulations

1. The Borough of Closter is a public employer, is the employer or was the employer of the employees in question and is subject to the provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act").

2. Local 29, R.W.D.S.U., AFL-CIO is an employee organization, is the Petitioner in this matter, and is subject to the provisions of the Act.

3. In accordance with the Agreement for Consent Election executed by the parties, and in accordance with the Rules of the Commission, an election was conducted in this matter to determine whether the employees wish to be represented for purposes of collective negotiations by Local 29 or no representative. Challenged ballots cast by Anthony Rideout and Harvey Lampman are determinative to the results of the election.

4. Mr. Rideout was challenged by the Borough. The Borough alleges that he had been fired for cause and, therefore, was barred

from participating in the election. Mr. Lampman was challenged by Local 29. Local 29 alleged that he is a supervisor within the meaning of the Act and cannot be in a unit of nonsupervisory employees, and, therefore, his ballot should be voided.

Findings of Fact

Upon the entire record, the exhibits submitted into evidence and the briefs and statements in the instant proceeding, the Hearing Officer finds as follows:

1. The Department of Public Works consists of four separate sections divided by function: Mechanic, Sewers and Drains, Streets and Roads and Sanitation. The Department employs approximately 17-^{1/}18 employees including the Superintendent.

2. Harry Lampman is one of two employees assigned to the Sewers and Drains section. He is a machine operator and has been designated as the "responsible person" for the section by the Borough. The other person assigned to the section is Rudolph Albelli, who is also a machine operator.^{2/} Lampman was hired by the Borough in 1973. Prior to his employment with the Borough, he worked for the company^{3/} that installed many of the sewers and drains within the Borough.

3. The Act defines a supervisor as an individual who has the power to hire, discharge, discipline or to effectively recommend the same.^{4/} It goes on to say that supervisors may not be repre-

1 / Evidence B-1 and P-1.

2 / Evidence B-1.

3 / Tr. pp. 16-17.

4 / N.J.S.A. 34:13A-5.3.

sented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership. ^{5/}

4. As a machine operator, Mr. Lampman is required to operate various pieces of equipment necessary for the maintenance and upkeep of the sewers and drains within the borough. Apparently, several pieces of the equipment can be run from ground level, others must be used in the sewer or drain. ^{6/} Both men work side-by-side as a team. ^{7/} They are two of the four machine operators employed by the Borough. ^{8/} The others, Alfred Goodwin and Fred Rivera, work in the Streets and Roads section. Lampman is the highest paid machine operator, earning \$16,500 for 1980. (The others are paid a salary of \$15,800). He receives the same rate of pay as the mechanic and the "responsible person" in the Sanitation section of the Department. ^{9/}

5. The Borough Administrator described Lampman as an "exceptionally bright individual" and superior worker who has been placed "in charge" of the section by the Superintendent, ^{10/} and as an employee who "can work on his own." ^{11/} This was confirmed later by the tes-

^{5/} N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-6(d). Three exceptions are cited which are inappropriate to the instant matter.

^{6/} Tr. pp. 16-17.

^{7/} Tr. pp. 17, 47.

^{8/} Tr. p. 17.

^{9/} This part of the recitation of the Findings of Fact is taken from P-1 and B-1.

^{10/} Tr. p. 15.

^{11/} Tr. p. 21.

timony of Local 29's witness. ^{12/} That person pointed out that Lampman was a better worker than Albelli, has more experience than Albelli and is, in fact, still teaching Albelli how to operate the various machines involved in their work. The record is devoid of any indication of Lampman having the power to hire, discharge, discipline or effectively recommending the same. Nor, apparently, is he involved in the adjustment of grievances on behalf of the Borough.

6. The Borough Council has the final authority to hire, discharge and discipline the employees of the Borough. ^{13/} All recommendations come from the Borough Administrator to the Council. The Administrator is responsible for the day-to-day operation of all departments including the Department of Public Works. If there is a need to hire, discharge or discipline an employee in the Department of Public Works, the procedure would be for the Superintendent to make a recommendation to the Administrator who would then pass that recommendation on to the Council. ^{14/}

This completes the recitation of findings of fact concerning the eligibility of Harry Lampman to participate in the election conducted in the instant matter and his subsequent eligibility to be a member of the petitioned-for collective negotiating unit.

7. Anthony Rideout was an employee in the Sanitation section of the Department. Prior to the opening of the hearing in this matter, the parties entered into Stipulations of Fact, which are attached

^{12/} Tr. pp. 50-51.

^{13/} N.J.S.A. 40A:9.9; N.J.S.A. 40A:9-191.

^{14/} Tr. pp. 14, 38, 43, 51.

hereto and made a part hereof, concerning the eligibility of Mr. Rideout to participate in the election. ^{15/} Based on those Stipulations of Fact and the briefs and statements submitted, the undersigned Hearing Officer will reach his conclusions.

Statement of Law and Conclusion

Harry Lampman

It has long been the Commission's position that the assertion of supervisory authority is insufficient to sustain a claim of supervisory status; ^{16/} and that is the situation here.

The Borough Administrator is in charge of personnel, including the employees of the Department of Public Works. ^{17/} The Superintendent of the Department reports directly to him concerning the day-to-day operations of that Department. ^{18/} Under the direction of the Superintendent are four sections, one of which is Sewers and Drains. ^{19/} Within that section are two employees, Harry Lampman and Rudolph Albelli. ^{20/} Lampman is called the "responsible person" for that section by the Borough. Looking past that designation, and at the functions and duties of the two men, it can be seen that the two men work side-by-side and are, in fact, a team. ^{21/} As on most

^{15/} Tr. pp. 7-10.

^{16/} In re Somerset County Guidance Center, D.R. 77-4 (1976), and In re Brookdale Community College, D.R. 78-10 (1977).

^{17/} Tr. p. 12.

^{18/} Tr. p. 12.

^{19/} Tr. p. 13.

^{20/} Evidence B-1 and P-1..

^{21/} Tr. pp. 17, 21, 32, 39, 43, 46, 47, 50, 51.

teams, someone may be called the captain and the other, the team member. That is the situation here. Lampman is the captain and Albelli is the team member.

Lampman was hired by the Borough in 1973 and was, in fact, hired away from the company which had installed many of the sewers in the Borough. ^{22/} He is considered by all to be a superior employee. He can work independently and without direct supervision. He is more experienced than Albelli and has been continuously teaching Albelli what to do and how to do it. ^{23/}

There is no mention in the record of a single instance of Lampman being involved in the hiring, discharge or disciplinary processes. Local 29's witness could not recall a single instance of Lampman ever recommending the hiring or discharge of anyone. ^{24/} Furthermore, he stated that Lampman has never been involved with the grievance procedure. ^{25/} When asked about who would have the right to discipline Albelli, he said that the responsibility would rest with the Administrator. ^{26/} The witness apparently was correct when asked "Is there any difference in what they do?" he responded by saying "Only thing, he's carrying a title. That's it."

The undersigned Hearing Officer agrees with the witness's statement and finds that Harry Lampman is not a supervisor within the meaning of the Act.

^{22/} Tr. pp. 16-17.

^{23/} Tr. p. 51.

^{24/} Tr. pp. 16-17

^{25/} Tr. pp. 16, 20, 50.

^{26/} Tr. p. 43.

Anthony Rideout

The Petitioner argues that the discharge of Anthony Rideout was without just cause. The argument is misplaced. The Rules of the Commission, which are recited on the Agreement for Consent Election executed by the parties, reads "Ineligible to vote are those employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date." ^{27/}

The distinction between "just cause" and "cause" is very significant. It has been written that

The published criteria have become so widely accepted as to attain the status of common law for evaluating "just cause" This arbitral body of common law reaffirms management's inherent right to discipline and discharge for just cause, but implicit in this right is the corollary obligation to be fair and reasonable, to make decisions affecting an employee's status and security which are neither arbitrary, capricious nor discriminatory. ^{28/}

and the highly respected Arbitrator and the acknowledged expert in the field of labor relations, Louis Kesselman, wrote in one of his awards:

The Arbitrator finds no basis in the contract or in American industrial practice to justify a discharge for misconduct away from the place of work unless:

- 1) behavior harms Company's reputation or product...
- 2) behavior renders employee unable to perform his duties or appear at work, in which case

^{27/} N.J.A.C. 19:11-9.2

^{28/} Paul Prasow and Edward Peters, Arbitration and Collective Bargaining (New York: McGraw Hill, 1970), p. 35.

the discharge would be based upon inefficiency or inability of other employees to work with him. 29/ (Emphasis added)

However, the undersigned is not called upon to determine if the dismissal was for just cause. Obviously, the burden for finding cause is considerably less. Should the undersigned determine that the discharge was for cause then he would have to make the recommendation that Rideout was an ineligible voter and his ballot should be voided.

The answer might have been different had the Petitioner filed an unfair practice charge alleging that the discharge was in part or wholly motivated by anti-union animus. But, that is not the case. There is no allegation that the employer sought to influence the outcome of the election by discharging Rideout. No charge has been filed nor has the Petitioner filed objections to the conduct affecting the results of the election. This leaves the undersigned to make his recommendation solely on the basis of "Was the discharge for cause?"

In the absence of a charge of unfair practice or the timely filing of objections to the conduct affecting the results of the election, there exists a statutory scheme for the review of a governing body's decision to dismiss an employee 30/ and for the recovery of salary loss because of an illegal suspension or dismissal. 31/ There

29/ Frank Elkouri and Edna Asper Elkouri, How Arbitration Works (Washington, D.C.: Bureau of National Affairs, 1973), p. 617, citing Louis Kesselman "W.E. Caldwell Company," 28 LA 434,436-437 (1957).

30/ N.J.S.A. 40A:9-161.

31/ N.J.S.A. 40A:9-172.

needs to be some allegation of impropriety on the part of the employer for the undersigned to replace his judgment for that of the employer.

The Courts have stated:

Whether there was or was not a proper proceeding for dismissal, cannot be inquired into collaterally. It must be reversed by a direct proceeding to set aside the illegal removal... 32/

That is what the Petitioner is requesting the undersigned to do. If the undersigned were to find Rideout to be an eligible voter then, in fact, he would be determining that Rideout had not been discharged for cause. The proper forum for such a determination is the Courts and not a challenged voter proceeding before the Commission.

Recommendation

For the above mentioned reasons, the undersigned hereby recommends to the Director that:

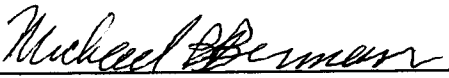
1. Harry Lampman is not a supervisory employee within the meaning of the Act, that he is an eligible voter and, as such, his ballot be counted.

2. Anthony Rideout was discharged prior to the election conducted by the Commission; that the Commission not replace the decision of the Borough with one of its own formulation, absent the filing of an unfair practice or objections to the conduct affecting the election; that the proper forum for challenging the dismissal

32/ VanSant v. Atlantic City, 68 N.J.L. 449 (Sup. Ct. 1902). This was repeated in Lindsay v. Hudson County, 10 N.J. Misc. 627 (Sup. Ct. 1932). "Whether there was or was not a proper proceeding for dismissal cannot be inquired into collaterally."

of Rideout is the Courts and not a representation proceeding before the Commission; and, that, therefore, his ballot be voided.

Dated: August 21, 1980
Trenton, New Jersey


Michael B. Berman
Hearing Officer