D.R. NO. 2003-12

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

In the Matter of

TOWNSHIP OF WANTAGE,

Public Employer,

-and-

Docket No. RO-2003-26

I.U.P.C.P.E., LOCAL 911,

Petitioner.

SYNOPSIS

The Director of Representation dismisses objections to an election and orders that a determinative challenged ballot be opened and counted. The Petitioner's first objection alleged that one employee was improperly permitted to vote. The Director found that challenges to voter eligibility must be asserted at the time of the election, not as election objections. In any event, the employee did not actually vote in the election.

The Petitioner's second objection concerned the disposition of one challenged ballot, which was determinative of the election's outcome. When the employer conceded the challenged voter's eligibility, the Petitioner argued that the ballot should not be opened but rather the election should be rerun to preserve the secrecy of the vote. The Director observed that compromising the secrecy of eligible challenged votes is an unavoidable consequence of the election procedure.

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Appearances:

For the Public Employer
Laddey, Clark & Ryan, attorneys
(Thomas N. Ryan, of counsel)

For the Petitioner
Thomas M. Egan, attorney
(Alan Seijas, of counsel)

DECISION

On September 25 and October 7, 2002, I.U.P.C.P.E. Local 911 (Local 911) filed a Representation Petition with the Public Employment Relations Commission seeking to represent white-collar employees employed by the Borough of Wantage (Borough). The parties agreed that the proposed collective negotiations unit is appropriate but disagreed about the unit eligibility of Assistant Township Clerk Christine Von Oesen.

The Township and Local 911 executed an Agreement for Consent Election providing for a secret ballot election to permit the white-collar employees a vote on whether they wish to be represented for negotiations by Local 911. The Consent also

provided that the assistant township clerk could participate in the election by challenged ballot.

Pursuant to the terms of the Consent Agreement, the Township submitted a list of those employees it believed to be eligible to vote in the election. The election began when the Commission mailed ballots to eligible voters on the list on November 1, 2002. Pursuant to the terms of the consent, all ballots received in the Commission's post office box by 10:00 a.m. on November 22, 2002 were counted. The results of the election were as follows:

For Local 911	8 votes
Against Representation	8 votes
Challenged ballot	1 vote
Total votes cast	17 votes

Accordingly, neither choice on the ballot received a majority of the valid votes counted. On November 25 and again on January 8, we asked the parties for statements of position and supporting evidence concerning the eligibility of the challenged ballot. By letter dated January 10, the Township withdrew its challenge to Von Oesen and asked that her ballot be opened and counted.

On November 27, 2002, Local 911 filed objections to the election pursuant to N.J.A.C. 19:11-10.3(h). Local 911 alleges that 1) because counting the challenged ballot would compromise the secrecy of Von Oesen's vote, the election should be set aside and a new election conducted; (2) the ballot of employee Claude Wagner should be voided as he was ineligible to vote.

ANALYSIS

Local 911's first objection is that the election should be set aside and rerun because opening Von Oesen's ballot would destroy the secrecy of her vote. An objecting party must demonstrate that the conduct complained of interfered with or reasonably tended to interfere with the employees' free choice. 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. School of Technology, D.R. No. 99-14, 25 NJPER 267, 268 (¶30113 1999). Here, there is no conduct interfering with the employee's free choice since Von Oesen had no way of knowing when she cast her vote that her ballot would determine the election outcome. Therefore, there is no basis for this objection.

Moreover, while we have not had occasion to explain our rationale, we have previously ordered the opening and counting of a single challenged ballot. See Rockaway Tp., 17 NJPER 132 (¶22053 1991), and Burlington City, H.O. No. 2002-1, 28 NJPER 1 (¶33000 2001). In the private sector, the National Labor Relations Board[1/] has specifically addressed the argument Local 911 makes

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1/ NLRB cases are often used as guidance for interpreting our Act. Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970).

here: that opening an eligible challenged ballot would improperly destroy its secrecy. In Davidson Chemical Company, Div. of W.R. Grace & Co., 37 LRRM 1417, 115 NLRB No. 123 (1956), the Board rejected this argument and held that, while it is true that the employee's vote, once opened, would be known publicly, this is an unavoidable consequence of the challenge procedure. The Board stated:

> We believe that the policies of the Act will best be effectuated by counting the ballots of all eligible voters in determining the choice of a bargaining representative, even if, as a result of challenge procedure, the choice of one or more of the eligible voters becomes public knowledge (footnotes omitted). Id. at LRRM 1417.

See also Prestige Hotels, Inc. d/b/a Marie Antoinette Hotel, 45 LRRM 1092, 125 NLRB No. 22 (1959); Superior Protection, Inc., ___ LRRM ___, 2002 NLRB Lexis 397 (2002).

Here, I find that it is appropriate to open and count the employee's challenged ballot. While we strive to provide employees with an election procedure which preserves secrecy, it is equally important to ensure finality and promptness to the election result. To leave every election open to a rerun possibility whenever a small number of challenges are determined eligible and the voters' choices might be disclosed would create the potential for endless delays, frivolous challenges, and uncertainty in the process of choosing or rejecting union representation. Additionally, here there is no evidence of any coercion or threats to the employee concerning her vote. Of

course, her right to participate in the election, and vote for or against representation, is protected by the Act, and any retaliation against her exercise of that right would violate §5.4 of the Act. Accordingly, I find that Von Oesen's ballot should be opened and counted.

Local 911's second objection is that Claude Wagner was ineligible and should not have been permitted to vote. Each party has the opportunity to challenge the ballot of any voter whose eligibility was in doubt. N.J.A.C. 19:11-10.3(e). The time to assert such a challenge is during the election -- in a mail-ballot election, this chance to challenge comes at the election count. The election objections process is no substitute for asserting a challenge to voter eligibility after the vote is cast. Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002). Here, Local 911 could have, but did not, assert any additional timely challenges to voter eligibility. Therefore, this objection is without merit.

ORDER

The election objections are dismissed. The ballot of Von Oesen shall be opened and counted forthwith, and a revised Tally of Ballots shall issue. Thereafter, the appropriate certification shall issue.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Stuart Reichman
Director of Representation

DATED: January 28, 2003
Trenton, New Jersey