

D.R. NO. 2019-5

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

In the Matter of

LAKEWOOD TOWNSHIP,

Public Employer,

-and-

Docket No. RO-2019-013

LAKEWOOD EMPLOYEE UNION,

Petitioner,

-and-

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES
COUNCIL 71,

Intervenor.

SYNOPSIS

Lakewood Employee Union (LEU) filed a representation petition to represent a unit of employees in the Township of Lakewood currently represented by the intervening incumbent organization, American Federation of State, County, and Municipal Employees, Council 71 (AFSCME). AFSCME sought an in-person election. After considering all the raised and relevant factors, the Director of Representation determines that a mail a ballot best fulfills the agency's mandate to conduct a free and fair election within a reasonable time and cost.

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Appearances:

For the Respondent,
Secare and Hensel, LLC
(Steve Secare, of counsel)

For the Petitioner,
(Walter S. Zimolong, of counsel)

For the Intervenor,
Zazzali, Fagella Nowak, Kleinbaum and Friedman
(Paul L. Kleinbaum, of counsel)

DECISION

On September 14, 2018, the Lakewood Employee Union (LEU) timely filed a representation petition, accompanied by an adequate showing of interest, seeking to represent a collective negotiations unit of full-time and part-time white-collar employees and police mechanics employed by the Township of

Lakewood (the Township). The petitioned-for unit is currently represented for purposes of collective negotiations by American Federation of State, County, and Municipal Employees, Council 71 (AFSCME). On September 24, 2018, the Township filed a letter, together with the requisite Certification of Posting. The letter advises that the Township takes no position regarding the petition. The next day we received from the Township a list of 97 employees, confirming the adequacy of LEU's showing of interest. N.J.A.C. 19:11-2.6.

On September 26, 2018, AFSCME intervened in this petition, based upon its most recent collective negotiations agreement with the Township, which expires on December 31, 2018. N.J.A.C. 19:11-2.7(b)2. On the same day, the assigned Commission staff agent sent LEU, AFSCME, and the Township a draft Agreement for Consent Election (Agreement) for a mail ballot election, which the Township promptly signed.

On September 28, 2018, Counsel for AFSCME advised the staff agent that AFSCME would not sign the Agreement because it preferred (for several stated reasons) that the Commission conduct an in-person election. The staff agent advised AFSCME Counsel of the Commission's general preference for mail ballot elections and asked Counsel to file a written request for an in-person election, together with the reasons, by 5 p.m., the close of business, October 1, 2018. Neither the incumbent nor the

petitioner objected to any other matter covered by the Agreement, including unit description, ballot placement, and applicable dates and procedures if the election were to be conducted by mail ballot. The petitioner does not object to a mail ballot election.

On October 1, 2018, AFSCME filed and served its letter seeking an in-person election on LEU and the Township, together with a certification of its executive director, Steve Tully (Tully Cert.). LEU and the Township have not filed any replies. AFSCME contends that since the election involves a small unit of less than 100 employees who all work in the Township of Lakewood and who all work a day shift (except for police dispatchers), an in-person election should be ordered. (Tully Cert., Para. 3, 6). AFSCME contends an in-person election would not require substantial participation by Commission staff.

AFSCME also contends that since its former local president, Michael Thulen, has established the rival petitioning organization, LEU, unit employees would benefit from seeing a "professionally run" in-person election with experienced staff representatives administering a procedure "similar to a political election" that would "impress upon the voters not only the seriousness of the election but also the legitimacy of the process" as opposed to simply getting a ballot in the mail. (Tully Cert., Para. 3-6, Exhibit B).

No disputed, substantial material factual issues warrant convening an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6.

ANALYSIS

The New Jersey Employer-Employee Relations Act (Act) empowers the Commission to resolve questions concerning the representation of public employees through the conduct of a secret ballot election. N.J.S.A. 34:13A-6(d). Our mandate is to conduct "timely, free and fair elections, within reasonable time and cost." City of Newark, D.R. No. 2007-1, 32 NJPER 262, 263 (¶107 2006)]. Our election procedure under N.J.A.C. 12:11-10.3(a), provides:

All elections will be by secret ballot . . .
The secret ballot may be accomplished
manually or by the use of a mail ballot or by
a mixed manual-mail ballot system, as
determined by the Director of Representation.

Accordingly, the methodology of the election is within my discretion.

In Vineland Bd. of Ed., D.R. No. 2014-13, 40 NJPER 385 (¶133 2014), the Director set forth these factors in evaluating which election method enables us to provide free and fair election within a reasonable time and cost:

- (1) Scattering of voters due to job duties over wide geographic area;

- (2) Scattering of voters due to significantly varying work schedules preventing presence at a common location at a common times;
- (3) Whether a strike, lockout, or picketing is in progress;
- (4) Desires of all the parties;
- (5) Likely ability of voters to read and understand mail ballots;
- (6) Availability and accuracy of addresses for employees;
- (7) Efficient and economic use of Commission agents and resources;
- (8) Size of unit;
- (9) Potential disruption to employers and employees by conducting in-person elections;
- (10) Security issues for in-person elections;
- (11) Employee access to telephone and/or Internet connections.

See also, Bergen Cty., D.R. No. 2003-9, 28 NJPER 463, 465 (¶33170 2002) (citing San Diego Gas & Electric and Int'l. Brotherhood of Electrical Workers, Local Union 465, AFL-CIO, 325 NLRB 1143, 158 LRRM 1257 (1998)); City of Newark, 32 NJPER at 263. In applying the above criteria, I find that a mail ballot election is the most appropriate methodology in these particular circumstances.

Of the above-listed criteria, AFSCME's position statement only specifically addresses scattering of voters due to geography and work schedules, the size of the unit, and the use of Commission agents and resources. That is, AFSCME argues that since the election involves a small unit of less than 100 employees who all work in the Township of Lakewood and who all work a day shift (except for police dispatchers), an in-person election should be ordered. AFSCME also argues this would not require substantial participation by Commission staff.

AFSCME cites City of Newark as an example of a case in which the criteria favored an in-person election. Although the then-Director determined there would not be a significant burden on the agency to conduct an in-person election at a central location when the 94 eligible voters all worked between 11:00 a.m. and 2:00 p.m. and did not work far from the proposed voting site, critical to the Director's decision in ordering an in-person election was the employer's representation that the employee address list may have been inaccurate if employees provided inaccurate addresses to comply with the residency requirement. Id. The Director noted that the Commission has been conducting mail ballot elections since 1969, but explained:

While the agency will continue to conduct in-person elections where circumstances dictate, there will not be a preference or practice in favor of in-person elections even in contested elections. When laboratory conditions for elections can be adequately

met through the conduct of elections by mail, and/or in the future by telephone or internet systems or any combination thereof based upon the factors we consider, we will utilize those methodologies particularly when the financial and human resource cost to the agency in conducting in-person elections is unjustified.
[Id. at 263.]

That petitioned-for Township employees comprise a relatively small unit and are not widely dispersed by geography or work schedules, rendering an in-person election not as costly to the agency as would other election scenarios, does not make an in-person election more appropriate than a mail ballot election, since the mail ballots can also reach those employees. Particular factors, such as the potential inaccuracy of an employee home address list, can demonstrate that a mail ballot election is the less appropriate method.

AFSCME does not argue that the address list is inaccurate or that any inaccuracies cannot be corrected before the ballots are mailed. As explained in Vineland Bd. of Ed., the mail ballot election procedure contains adequate safeguards to ensure that ballots reach the intended addresses. The official address list is shared with all parties in advance of the election, so they may ensure that the addresses are accurate and current. The Notice of Election instructs employees to contact our agency directly if a ballot is not received by a particular date.

AFSCME has not asserted another argument related to the above-listed criteria that would make a mail ballot election less appropriate than an in-person election to justify the greater use of agency resources.^{1/} AFSCME asserts that as a consequence of its former local president now petitioning on behalf of LEU, employees would benefit from seeing a "professionally run" in-person election demonstrating the seriousness and legitimacy of the process, as opposed to their separate receipts of a ballot in the mail. Such a salutary result or goal does not distinguish this election case from any other, in our view. AFSCME does not argue that voters would be unable to read or understand the mail ballots. No facts suggest that voters would view the in-person election as more "professional" than a mail ballot election.

As noted in Newark, the Commission has conducted mail ballot elections since 1969. They are as "professional" as our in-person elections and are now the more common method in which we conduct representation elections. Any voter confusion regarding the ballots, the overall election proceeding, and the consequences thereof, is properly addressed through voter education outreach as part of the unions' election campaigns.

Vineland Bd. of Ed.

^{1/} The Commission, including our section, is experiencing a staffing shortage during this "open" representation period. I infer that the cost to efficient use of agency resources for an in-person election may be greater now than it was at the time of the Newark decision.

Accordingly, I issue the following order:

ORDER

A secret mail ballot election is hereby directed among the employees in the following unit:

Included: All regularly-employed full-time and part-time white-collar employees and police mechanics employed by the Township of Lakewood.

Excluded: All department and division heads, EMT employees, blue-collar employees; craft employees, managerial executives, police, confidential employees, supervisors, and casual employees within the meaning of the Act; and all other employees employed by the Township of Lakewood.

Eligible voters are those employed on the last day of the payroll period ending September 21, 2018,^{2/} including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in military service. Employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date are ineligible to vote. Employees in the unit described above shall vote to determine the collective negotiations representative, if any, for the unit in

2/ The Township has already submitted an eligibility list for this payroll period consisting of an alphabetical list of the names of eligible voters in the unit, together with their last known mailing addresses, simultaneously provided to the parties with a proof of service filed with us.
N.J.A.C. 19:11-10.1.

which they are employed and will have the option to vote for AFSCME Council 71, no representative, or Lakewood Employee Union.

Ballots will be mailed by the Commission to eligible voters in the unit on **October 18, 2018**. Ballots must be returned to the Commission's Post Office Box by 9:00 a.m. on **November 21, 2018**. The ballots will be counted the same day at 10:00 a.m. at the Commission's Trenton office.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/Jonathan L. Roth
Jonathan L. Roth
Director of Representation

DATED: October 5, 2018
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 October 16, 2018.