

D.R. NO. 2001-8

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

In the Matter of

TOWNSHIP OF MONTCLAIR,

Public Employer,

-and-

Docket No. RO-2001-14

CWA LOCAL 1040, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation dismisses an election objection, declines to set aside a professional option election and issues Certifications of Results. CWA Local 1040, AFL-CIO contended the Township violated N.J.A.C. 19:11-10.1 in that it failed to provide a complete eligibility list ten days before the election. The Director found that the Township substantially complied with the regulatory requirement providing the complete eligibility list eight days before the election. The Director also found that the Township's failure to timely provide CWA and the Commission with the third and final page of the eligibility list was merely an administrative oversight. As soon as the matter was brought to the Township's attention, the oversight was corrected.

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Appearances:

Genova, Burns & Vernoia, attorneys
(Robert C. Gifford, of counsel)

Weissman & Mintz, attorneys
(Judianne Chartier, of counsel)

DECISION

On February 9, 2001, a secret ballot election was conducted by the Public Employment Relations Commission (Commission) among two units of employees of the Township of Montclair: a unit of professional employees and a unit of nonprofessional, white-collar employees. Both units voted by in-person balloting on whether to be represented for collective negotiations by CWA Local 1040, AFL-CIO (CWA). The professional employees also voted on whether to be included in the same unit with nonprofessional employees.^{1/} A majority of the voting employees in each unit, professional and nonprofessional, voted

^{1/} N.J.S.A. 34:13A-6(d).

against representation. The professional unit also voted against a combined unit with nonprofessionals. On February 13, 2001, CWA filed timely post-election objections together with supporting documents.^{2/}

CWA objects to the election and requests that it be set aside and a new election ordered. It contends the Township violated N.J.A.C. 19:11-10.1 in that it failed to provide a complete eligibility list ten days before the election. CWA acknowledges a list was timely served, but contends that the Township omitted the names and addresses of 14 employees, approximately one-half of the eligible voters.

By letter dated February 13, 2001, I acknowledged receipt of the objection and advised CWA of its responsibility to furnish sufficient evidence to make a prima facie showing that conduct occurred which would warrant setting aside the election as a matter of law. The CWA was invited to submit any additional affidavits or documentation no later than February 21, 2001; none were received.

On February 23, 2001 the Township filed its opposition to the objection contending it substantially complied with the ten-day list requirement and that its failure to provide CWA and the Commission with the third and final page of the eligibility list was merely an administrative oversight. The Township

^{2/} N.J.A.C. 19:11-10.3(h).

contends that as soon as the matter was brought to its attention, the oversight was corrected; accordingly, there is no basis to set aside the results of the election.

Based upon my review of the procedural history of this matter, together with the parties' submissions, I make the following:

FINDINGS OF FACT

On August 18, 2000, CWA filed a Petition for Certification seeking to become the majority representative of the Township's full and part-time employees excluding police, fire and statutorily exempt employees. On September 5, 2000, CWA amended its petition to exclude supervisors and to clarify that it sought to represent all white collar, nonsupervisory professional and nonprofessional employees.^{3/}

On January 3, 2001, I approved the parties' Agreement for Consent Election. In the absence of the parties' agreement as to the election date, on January 9, 2001 I ordered that the election be conducted on February 9, 2001 from 12:00 p.m. to 1:00 p.m. at the Township Municipal Building. The eligibility list, based on the terms of the Consent Agreement, was due on January 29, 2001.

The Township provided the Commission and CWA's counsel, Judiann Chartier, with its eligibility list on January 29, 2001

^{3/} On September 11, 2000, OPEIU Local 32 sought to intervene in this matter but on September 25, 2000, withdrew its request.

(January 29 list). The list was complete as to the professional unit, listing names, addresses and titles of five professional employees. It was incomplete, however, as to nonprofessionals, listing names, addresses and titles of only ten nonprofessional employees.

Chartier's office received the list on January 29, 2001, however, she was away from her office until January 31. On January 31, Chartier faxed the list to CWA representative Connie English. On February 1, English advised Chartier that 14 names were omitted from the January 29 list of nonprofessional employees.

The same day, Chartier faxed a letter to Township Attorney Robert Gifford listing 14 nonprofessional employees' names and titles omitted from the eligibility list and requesting the Township to "[k]indly provide PERC and CWA with a revised Excelsior list immediately, to avoid objections to the conduct of the election based on an inadequate list and unnecessary challenges to ballots."^{4/}

On February 1, at 5:01 p.m., the Commission received a copy of Gifford's fax to Chartier which included a letter and revised list (February 1 list) including the names and addresses of an additional ten nonprofessional employees which were previously omitted, together with a separate list of four

^{4/} It is not clear what time that fax was sent to Gifford, but a copy of Chartier's letter was received by the Commission at 12:55 p.m., February 1.

employees whose eligibility the Township intended to challenge at the election. Chartier did not review the revised list until February 2.

The election was conducted by in-person balloting on February 9, 2001. In the professional unit,^{5/} all of the five eligible voters voted. Four voted against inclusion with nonprofessionals and against representation by CWA. In the nonprofessional unit, 19 of 20 employees on the employer's eligibility list voted: 14 voted against representation, five voted for representation by CWA. An additional two ballots were challenged.^{6/} The parties were provided with a Tally of Ballots for each voting unit. CWA's objections followed.

ANALYSIS

Secret ballot elections conducted by the Commission carry a presumption that the voter's choice is a valid expression of the employees' representational desires. Thus, allegations of what may seem to be objectionable conduct must be supported by evidence that the alleged misconduct interfered with or reasonably tended to interfere with the employees' free choice. The objecting party

^{5/} The Act provides that negotiations units including professional and nonprofessional employees shall not be appropriate unless a majority of the voting professional employees vote for inclusion in a unit with nonprofessionals; this is commonly referred to as a "professional option election." See N.J.S.A. 34:13A-6(d); see also N.J.A.C. 19:11-10.7

^{6/} N.J.A.C. 19:11-10.3(e).

must establish, through its evidence, that a direct nexus exists between the alleged objectionable conduct and the voters' freedom of 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).

The standard of review of election objections contemplated by N.J.A.C. 19:11-10.3(i) was discussed in Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986).

There, the Director found that:

This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present in order for an investigation to be initiated. If this two-prong test is not met, the objections will be dismissed. [Id. at 314.]

Applying the above standards, I find that CWA's objection does not meet the evidentiary or substantive component necessary to warrant further investigation. For the following reasons, the objection is dismissed.

N.J.A.C. 19:11-10.1 provides, in relevant part:

(a) In all representation elections conducted pursuant to this subchapter, unless otherwise directed by the Director of Representation, the public employer is required to file simultaneously with the Director of Representation and with the employee organization(s) an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters and their last known mailing addresses and job titles. In addition, the public employer shall file a statement of service with the Director of Representation. In order to be timely filed, the eligibility list must be received by the Director of Representation no later than 10 days before the date of the election. The Director of Representation shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

(b) Failure to comply with the requirements of this section may be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11- 10.3(h). Additionally, the Director of Representation may, in the exercise of reasonable discretion, issue a subpoena or direction requiring the production of the eligibility list, and in the event of noncompliance, may institute appropriate enforcement proceedings pursuant to court rules.

Importantly, N.J.A.C. 19:11-10.1(b) was amended on August 7, 2000, replacing the word "shall" with "may" in the first sentence. See 32 N.J.R. 1503(a), 32 N.J.R. 2926(b). This amendment codified the Commission's substantial compliance doctrine. If the Township has substantially complied with the requirements of N.J.A.C. 19:11-10.1(a), then N.J.A.C. 19:11-10.1(b) does not automatically require setting aside the election. See generally Monmouth Cty., P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982) (objection overruled where employer omitted five names from list of 207); Trenton Bd. of Ed., D.R. No. 2000-7, 26 NJPER 148 (¶31058 2000); and Jersey

City Medical Ctr., D.R. No. 83-37, 9 NJPER 411 (¶14188 1983).^{7/}

The substantial compliance doctrine applies to both the timeliness and the completeness of the eligibility list submission. Jersey City Medical Ctr. The eligibility list requirements are calculated to afford eligible employees an opportunity to hear the arguments concerning representation so they are better able to make a fully informed choice at the polls. Monmouth Cty.; Trenton Bd. of Ed.

CWA objects to the election conducted on February 9, 2001, and argues that the Township violated its N.J.A.C. 19:11-10.1(b) obligation to provide a complete eligibility list by January 29, 2001. CWA contends the Township did not substantially comply with the eligibility list requirements in this case. CWA acknowledges that the Township timely provided 15 of 25 employees' names and addresses, including the entire professional unit, but provided the remaining names and addresses of the nonprofessional unit only after CWA complained -- less than ten days before the election - and, therefore, the election should be set aside.

Generally, there are three factors used in analyzing whether there has been substantial compliance with the eligibility list submission requirements: (1) the number of days the list was late; (2) the number of days the employee organization had the

^{7/} The Commission's substantial compliance doctrine is based on the National Labor Relations Board's decision in Excelsior Underwear, Inc., 156 NLRB 1236, 61 LRRM 1217 (1966).

list prior to the election; and (3) the number of eligible voters. Trenton Bd. of Ed.

As to the first factor, technically, the list in this case was not late, it was incomplete. There were 25 eligible voters in two voting units, professional and nonprofessional. The eligibility list for professionals, consisting of five voters, was complete and timely filed on January 29. Accordingly, there is no basis to set aside the results of the election in that unit.

A partial list consisting of ten names and addresses of employees in the nonprofessional unit was timely received by the Commission and CWA's attorney on January 29, 2001. The last page of the list was omitted. The remaining ten names and addresses of eligible nonprofessional employees were provided February 1, 2001, eight days before the election.

Based on the foregoing, the complete list in the nonprofessional, nonsupervisory unit was two days late. When the Township was advised the list was incomplete, it immediately (the same day) provided the missing names and addresses. There is no claim the Township's conduct in providing an incomplete list was intentional. Based on the Township's conduct in correcting the omission, providing the final page of a three page list, I find that it was an administrative oversight.

The January 29, 2001 eligibility list due date, based on the Consent Agreement, was calculated to be 12 days before the election - 2 days more than required by N.J.A.C. 19:11-10.1(a).

The list was sent to CWA's counsel pursuant to the parties' agreement. Apparently, CWA made no arrangement for receipt or review of the list on that date. Chartier did not review it until two days later on January 31. The missing names and addresses were not identified until February 1. The Township corrected the list the same day. Had CWA been diligent in its review of the list on January 29, it is likely the correction could have been made in time to comply with the ten-day requirement of N.J.A.C.

19:11-10.1(a).

As to factor number two, in Trenton Bd. of Ed., service of the complete eligibility list seven days before the election constituted substantial compliance with N.J.A.C. 19:11-10.1(a). Here, CWA had the complete list eight days before the election. Moreover, CWA has not presented any evidence that the late service of the complete list prevented it from contacting eligible voters to present arguments concerning representation. There is no evidence that CWA was prevented from contacting eligible voters by mail, or that eight days was insufficient time to present arguments to the voters concerning representation.

The third factor is the number of eligible voters. The significance of this factor underlies the policy of requiring eligibility list disclosures in sufficient time before an election. The issue is whether the voters have had the opportunity to be fully informed of the issues in the campaign or whether that opportunity was impaired by the late service of the

list. The presumption is that employee organizations will make use of the names and addresses to contact the voters. The later the list is provided and the larger the unit, the more difficult it is to reasonably contact voters before the election. Trenton Bd. of Ed.

As previously discussed in connection with the second factor, there is no evidence CWA attempted to contact any of the eligible voters. Therefore, it may not now assert it was prejudiced by not timely receiving the list. Moreover, in Trenton Bd. of Ed., the eligibility list in issue was provided seven days before the election and consisted of 199 voters. There, the employee organization failed to demonstrate it was unable to contact voters and fully inform them of the election issues. Likewise, here CWA has not demonstrated it was unable to contact ten voters (those not included on the January 29 list) in the eight days between receipt of the complete list and the election.

Other factors considered in connection with timely submission of eligibility lists include whether the objecting party had an in-plant presence, Kent Corp., 228 NLRB 72, 96 LRRM 1606 (1977); the reason for the late transmittal of the list, Rockwell Manufacturing Co., 201 NLRB 358, 82 LRRM 1190 (1973); Tom's Trains Treats, Inc., d/b/a Auntie Anne's, 323 NLRB 669, 156 LRRM 1191 (1997); whether there was a showing that the union essentially was unable to communicate with employees because of the failure to provide the list, McGraw Edison, 234 NLRB 630, 97

LRRM 1262 (1978); whether there was a showing that the delay in obtaining the list adversely affected the union's campaign, or the union did not have enough time to reach employees, Wedgewood Industries, 243 NLRB 228, 66 LRRM 1049 (1967); whether there is evidence that the employer's failure to comply with the eligibility list requirement was due to intentional misconduct and whether the employer corrected its mistake promptly when informed of it; and finally, whether the margin of the election vote as a factor tended to show that the voters had the opportunity to be fully informed. Mod Interiors, 324 NLRB 164, 156 LRRM 1149 (1997); Alcohol and Drug Dependency Svcs., 326 NLRB 58, 160 LRRM 1093 (1998); see also Monmouth Cty., Jersey City Medical Ctr., and Trenton Bd. of Ed.

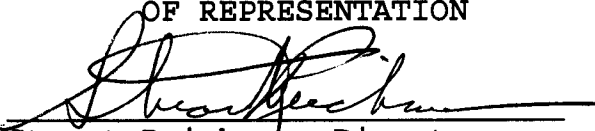
Not all of the foregoing factors are triggered in this matter. I do note CWA did not have an "in plant" presence. However, the Township's reason for late transmittal of the list - administrative oversight - combined with its prompt correction of the list and lack of evidence of intentional misconduct, are mitigating factors. Additionally, there has been no showing that the CWA was unable to communicate with voters or that its campaign was adversely affected by the late service of the complete list.

Based on all the foregoing, I find that CWA did not meet its burden of demonstrating that conduct occurred which warrants setting aside the election. For the above reasons, I dismiss the objection. Additionally, I am issuing the appropriate Certification of Results of each voting unit.

ORDER

The objection is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman, Director

DATED: March 2, 2001
Trenton, New Jersey