D.R. NO. 2001-1

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and- Docket No. RO-2000-13

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

Employee Representative.

SYNOPSIS

The Director of Representation considers challenges to eleven voters in a secret ballot representation election. The parties agree that one voter is eligible and that one voter is ineligible. As to the remaining nine challenged ballots, the Director sustains the challenge to three voters finding that they hold titles/positions specifically excluded by the parties' pre-election agreements. Additionally, the Director determines that one voter resigned prior to the election and is ineligible. The Director finds that it is unnecessary to resolve the remaining five challenged ballots as they are not determinative of the election results.

As to the one eligible voter, since her ballot is not determinative, the Director orders that her ballot not be opened to preserve the secrecy of her choice. Finally, since APSG/NJEA did not receive a majority of the valid votes cast in the election, the Director will issue a Certification of Results indicating that no exclusive representative has been chosen.

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Employee Representative.

Appearances:

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

For the Employee Representative
Klausner, Hunter & Rosenberg, attorneys
(Stephen B. Hunter, Esq., of counsel)

DECISION

On April 10, 2000, a secret mail ballot run-off election was conducted by the Public Employment Relations Commission among all non-supervisory administrative employees of Rutgers University. 626 ballots were cast: 304 were cast for the Administrative, Professional and Supervisory Guild/NJEA (Administrative Unit) (hereinafter referred to as APSG/NJEA), 311 were cast for No Representative, and 11 ballots were challenged. 10 ballots were challenged by the Commission election agent because the voters' names did not appear on the eligibility list. One voter was challenged by the University because she had resigned.

Rutgers contends that ten of the eleven challenged voters held titles/positions specifically excluded by the parties Agreement for Consent Election and/or Side-bar Agreement. Rutgers contends that the remaining challenged voter was no longer employed as of the date of the count and thus ineligible to vote.

APSG/NJEA contends that the post-election challenged ballot determination should not be controlled by the parties' pre-election Agreement for Consent Election and Side-bar Agreement. It contends that the Commission should conduct a separate examination of the community of interest among the challenged voters to determine eligibility. As to those challenged voters who hold titles/positions not specifically excluded by the parties' election agreements, APSG/NJEA asserts that they are appropriately included in a non-supervisory, non-professional administrative unit.

Pursuant to N.J.A.C. 19:11-10.3(k), the Director has caused an investigation to be conducted concerning the challenges. In correspondence dated April 10, 2000, all parties were advised of their responsibility to present documentary and other evidence as well as statements of position relating to the challenged ballots. Both parties filed statements of position together with supporting documents and affidavits. Moreover, at the request of the APSG/NJEA, the Director afforded the parties additional time to submit reply memoranda and affidavits which were received on June 20, 2000.

Based upon the administrative investigation, I find the following facts:

1. On August 19 and 20, October 18, and November 19, 1999, the APSG/NJEA filed a petition and amended petitions for certification, seeking to represent certain administrative employees of Rutgers University. On August 26, 1999, the Rutgers Staff Union, AFT/CWA, AFL-CIO (RSU, AFT/CWA) requested to intervene. I tentatively granted the intervention subject to Rutgers submitting a corrected list of petitioned-for employees. I confirmed the adequacy of RSU, AFT/CWA's showing of interest. Subsequently, on December 21, 1999, it withdrew its request to intervene. Rutgers Staff Union AFT, AFL-CIO (RSU/AFT), an organization no longer affiliated with the CWA, requested to intervene. The intervention request was granted. N.J.A.C. 19:11-2.7.

2. On December 28, 1999, the parties signed an Agreement for Consent Election which provided for the conduct of a mail ballot election with ballots to be mailed on February 14, 2000 and counted on March 6, 2000. The Agreement described the collective negotiations unit as follows:

> Included: All regularly employed administrative employees at or below salary range 29 employed by Rutgers, The State University at its New Brunswick, Newark and Camden campuses and all field locations.
>
> Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police employees, casual employees; employees currently represented in other collective negotiations units; staff physicians employed by Rutgers in the Student Health Service; all faculty; all employees in salary range 30 and

> above; all associate deans, assistant deans and assistants to the dean; all academic directors who discharge at least one-half (50%) of a full-time academic job assignment; all T-coded employees and all other employees.

Under the Agreement for Consent Election, the payroll date for eligibility was December 10, 1999. In addition, the Agreement defines eligible voters as:

> ...those employees included within the unit described below, who were employed during the payroll period indicated below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in the military service. 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 are ineligible to vote.

3. The parties also entered into a Side-bar Agreement specifying that certain titles are appropriately included in the petitioned for unit. Those titles were listed in Appendix A, attached to the Side-bar Agreement. The parties further agreed that "certain employees holding managerial, confidential, supervisory, or professional positions must be excluded from the unit notwithstanding that they hold titles which are otherwise included in the unit." These "hybrid" titles consisting of both included and excluded positions were listed in Appendix B attached to the Agreement. Various titles/positions were asterisked in Appendix B. The parties stipulated that "all asterisked positions are excluded from the petitioned-for unit and are not eligible to vote." Among the specifically excluded titles/positions listed in Appendix B are

"Program Associate II, Extension Specialists, Staff" and "Library Associate II, Library of Science & Medicine, Staff."

4. On March 6, 2000, the mail ballots were counted. The results were 183 votes for APSG/NJEA (Administrative Unit), 73 votes for RSU/AFT, and 234 votes against participating employee representatives. There were 15 challenged ballots. Since no choice received a majority of the valid ballots cast, and in accordance with N.J.A.C. 19:11-10.4(a)(2), I ordered a run-off election between the two choices receiving the largest number of votes: APSG/NJEA (Administrative Unit) and No Representative.

I ordered the ballots in the run-off election mailed on March 20, 2000 with the ballot count scheduled for April 10, 2000. The parties were informed that employees who were eligible to vote in the March 6, 2000 election which designated the payroll period for eligibility as December 10, 1999, and who continued to be included in the voting unit on the date of the run-off election were eligible to vote in the run-off election. N.J.A.C. 19:11-10.4(a)(3).

5. On April 10, 2000, a ballot count was conducted in the run-off election. The result of that count was 304 votes for APSG/NJEA, 311 votes for No Representative, and 11 ballots challenged. 10 ballots were challenged by the Commission's Election Officer because the voters' names were not on the eligibility list. One ballot was challenged by Rutgers because the employee had resigned

prior to the election date and was no longer employed by the University.1/

6. As to the 11 challenged ballots, the parties have agreed that Theresa Liu is eligible because her title is included in the agreed upon unit, but her name was inadvertently left off the eligibility list.

7. The parties also agree that Michael Hutton is ineligible. As of the December 10, 1999 eligibility date, he was represented by AFSCME and, therefore, specifically excluded under the parties Agreement for Consent Election.

8. David Evers has held the title of Assistant Dean since at least November 10, 1999. This title is specifically excluded in the parties' Agreement for Consent Election.

9. Peter Anderson has been employed by Rutgers since 1998 as a Library Associate II at the Science and Education Research Center which is a satellite facility of the Library of Science and Medicine.

1/ On April 18, 2000, the process of the challenged ballot determination in the April 10, 2000 run-off election was suspended while the Director solicited positions from the parties on newly discovered ballots from the March 6, 2000 count. A revised Tally was issued for the March 6, 2000 count after the Director determined that some of the mail ballots, which were timely mailed by voters but misplaced by the U.S. Postal Service, should be opened, counted and added to the tally of ballots previously counted. Rutgers, The State University, D.R. No. 2000-12, 26 NJPER 241 (¶31095 2000), req. for rev. den. P.E.R.C. No. 2000-101. The revised tally did not change the March 6 election result requiring that a run-off election be conducted between the APSG/NJEA and no representative. The processing of the challenged ballots from the April 10 run-off election was continued thereafter.

All Library Associate II titles in the Library of Science and Medicine are specifically excluded in Appendix B of the parties' Side-bar Agreement.

10. Bonnie Altizio has been employed by Rutgers since January 3, 1997 as a Program Associate II, Extension Specialist. All Extension Specialist positions in the title of Program Associate II are specifically excluded in Appendix B of the parties' Side-bar Agreement.

11. Stacey Mecka resigned effective March 31, 2000 to accept a position with an employer unassociated with the University. She started work with her new employer on April 10, 2000. According to her personnel data record, on March 31, 2000 she had 20.3 accumulated vacation days.

12. Jean SanFilippo has, since April 1999, held the title of Business Manager IV and is assigned to the Institute for Health, Health Care Policy and Aging Research at the University's New Brunswick campus. The Business Manager IV title is not listed in Appendix A or Appendix B of the parties Side-bar Agreement.

13. Keith Bosley was employed by Rutgers as a Laboratory Researcher IV from February 1, 1998 until January 2, 2000 when he was promoted to Laboratory Researcher III. The Laboratory Researcher IV title is included in Appendix A of the parties' Side-bar Agreement as a specifically included title. The Laboratory Researcher III title is not listed in either Appendix A or Appendix B.

14. Anne Marie DiCostanzo has held the title/position of Visual Arts Coordinator at the Mason Gross School of the Arts (MSGA) since August 27, 1994. This title/position is listed in Appendix B and is among four identical title/positions of Visual Arts Coordinator at the MSGA, three of which are included titles/positions and one of which is excluded from the voting unit. There is no way to ascertain whether DiCostanzo holds the excluded or included title/position.

15. Maria Grace and Elizabeth Gorman work in the Office of Financial Services at the University's Camden campus. They held the title of Head Accounting Clerk, an AFSCME unit position, when on October 6, 1999, they were recommended for a pending upgrade to Principal Accounting Assistant, a title/position listed in Appendix B of the parties' Side-bar Agreement. All Principal Accounting Assistant titles/positions are included in the voting unit with the exception of one, namely, the Principal Accounting Assistant/RC, Student Centers & Student Activities, Staff.

On February 18, 2000, Gorman and Grace were notified by University Human Resources that they were reclassified to Principal Accounting Assistant effective October 6, 1999. However, a number of University generated documents concerning seniority and dues payments and personnel data records reflect an "effective date" of March 17, 2000 and an "entry date" of October 6, 1999 for the reclassification. Gorman and Grace paid dues to AFSCME through the beginning of March 2000.

ANALYSIS

David Evers, Peter Anderson, and Bonnie Altizio

It is clear that Evers, Anderson and Altizio held titles/positions specifically excluded by the parties' pre-election agreements. Evers' Assistant Dean title is specifically excluded in the Agreement for Consent Election. Anderson's Library Associate II title in the Library of Science and Medicine and Altizio's Program Associate II, Extension Specialist title/position are specifically excluded in Appendix B of the Side-bar Agreement.

APSG/NJEA asserts that specific unit exclusions are not dispositive when administrative investigations reveal that the affected challenged voter does in fact possess a community of interest with included eligible voters. It also asserts that it agreed to the specific unit inclusions and exclusions embodied in the pre-election agreements in order to expedite the election process and avoid a prolonged dispute over the many administrative titles. APSG/NJEA contends that despite the pre-election agreements the challenge ballot procedure permits the parties to revisit unit composition issues.

Rutgers contends that the Agreement for Consent Election and the Side-bar Agreement do not violate state law, regulation or public policy and should control in the challenge ballot determination. It asserts that the Commission may not now nullify the parties' voluntarily reached agreements as to unit composition to create a new voting unit.

The Commission is charged with the responsibility of preventing and/or resolving labor disputes. N.J.S.A. 34:13A-2. It is Commission policy to encourage and/or facilitate the parties' voluntary resolution of labor matters -- including determining the appropriate unit composition of newly created or proposed negotiations units. Accordingly, Commission regulations specifically contemplate voluntary agreements for consent elections. N.J.A.C. 19:11-4.1.

In this case, the parties' entered into two pre-election agreements which control the voter eligibility of Evers, Anderson and Altizio. "Where there is a mutual intent to exclude employees from the unit, the Commission will not look behind that agreement to examine the unit status of these employees." Tp. of Roxbury, D.R. No. 89-33, 15 NJPER 345 (¶20153 1989); See also Chathams Dist. Bd. of Ed., D.R. No. 89-2, 14 NJPER 525 (¶19223 1988)(director voided ballots of five voters who did not meet the eligibility criteria set forth in the parties' Consent Agreement.)

The parties' pre-election agreements are clear and unequivocal as to the excluded titles/positions of Evers, Anderson and Altizio. There is no reason for me to look beyond the parties' stipulated agreements in determining their eligibility or lack thereof.

The result in Roxbury and the result I propose here, is consistent with Commission policy which promotes the voluntary resolution of labor disputes. In Roxbury, the Director explained why he rejected the union's attempt to include an employee it previously agreed to exclude from the unit:

> To permit either party to avoid a negotiated settlement concerning unit composition simply by reasserting the dispute via a challenged ballot, would quickly discourage parties from engaging in settlement process for representation disputes. [15 NJPER at 346.]

The Commission's practice is consistent with the National Labor Relations Board (NLRB) policy to hold the parties to their stipulated agreements that a particular unit is appropriate. In Avecor, Inc. v. NLRB, 931 F.2d 924 (D.C. Cir. 1991), cert. denied 502 U.S. 1048, 116 L.Ed.2d 812, 112 S.Ct. 912 (1992), the Board held that when the parties stipulate the bargaining unit, the Board has a limited function.

> First it must ensure that the stipulated terms do not conflict with fundamental labor principles. Having done so, its task is simply to enforce the agreement. If the terms of the stipulation are unambiguous, the Board must hold the parties to its text. If the terms are ambiguous, the Board may look to the usual factors governing the definition of an "appropriate unit," including the community-of-interest standard. [931 F. 2d at 932.]

See also Desert Hospital v. NLRB, 91 F.3d 187 (D.C. Cir. 1996) (where the parties entered into a pre-election stipulation regarding eligibility which the Board enforced); Windham Community Memorial Hospital and Hatch Hospital Corp., 312 NLRB 54 (1993)(where the Board rejected a Regional Director's conclusion on voter eligibility where the Director's determination required him to look beyond the plain meaning of the parties' stipulation. The Board found that the parties' clear and unequivocal written stipulation is an expression of the parties' intent and will not be overridden as long as it does not violate any express statutory provision or established Board policy.)

APSG/NJEA relies primarily on two NLRB cases in support of its position that the parties' pre-election agreements to exclude certain titles/positions are not determinative of eligibility and that voter eligibility can be determined through the challenge ballot procedure. Both cases are distinguishable, and I decline to follow them here. In NLRB v. Adrian Belt Co., 578 F.2d 1304, 99 LRRM 2503 (9th Cir. 1978), the parties agreed to exclude office clericals from the agreed upon unit. The administrative investigation of a challenged voter revealed that the employee was a plant clerical not an office clerical. The excluded title, therefore, was an eligible voter. Resolution of the voter's challenged ballot did not conflict with the terms of the agreement. Here, there is no doubt that Anderson, Evers and Altizio hold titles/positions which are specifically excluded by the parties' pre-election agreement.

Similarly, in Ely & Walker, 151 NLRB 636, 58 LRRM 1513 (1965), the other case relied upon by APSG/NJEA, the parties agreed that the appropriate unit of production and maintenance employees excluded office clerical employees. The union challenged two employees as being office clerical employees. The Director found that two challenged voters were eligible because one employee was a plant clerical not an office clerical, and that the other employee was a dual function employee who worked half of her time as a plant clerical employee and, therefore, under NLRB rules may be included in the unit. Again, there was no contention that if the two challenged employees were found to be office clericals, the agreement between the

parties was not binding as to their exclusion. The only issue was whether they held the excluded position of office clerical.

APSG/NJEA has not shown that the parties' pre-election agreements violate any fundamental labor principles. I decline to allow the challenge ballot procedure to serve as a means to circumvent the parties' pre-election agreements. Therefore, based on the foregoing, I find that Evers, Anderson and Altizio are ineligible voters and that their ballots are void and will not be counted.

Stacey Mecka

It is undisputed that Stacey Mecka notified the University on March 12, 2000 that she was resigning effective March 31, 2000 and that she started her new position outside of the University on April 10, 2000. APSG/NJEA asserts that since Mecka had 20.3 accumulated vacation days she was still on the Rutgers payroll as of the election date and was, therefore, eligible to vote as a current employee.

The parties' Agreement for Consent Election states that employees who quit since the designated payroll period and are not rehired before the election date are ineligible to vote. Moreover, the Agreement as well as the Commission rules, N.J.A.C. 19:11-10.3(c), also provide that eligible voters shall include employees who were employed during the payroll period for eligibility, including employees "who did not work during that period because they were ill, or on vacation, or temporarily laid off, including those in the military service." APSG/NJEA asserts that since Mecka was eligible to

vote on December 10, 1999, the payroll period for eligibility, and was eligible as of the date that she mailed her ballot, her vote should be counted. Rutgers contends that Mecka's resignation prior to the election renders her ineligible pursuant to the parties' Agreement and Commission rules. N.J.A.C. 19:11-10.3(c) and 10.4a(3).

In a representation election, voter eligibility is normally determined by an employee's employment status both during the payroll period for voting eligibility and on the date of the election. Rockaway Tp., D.R. No. 91-21, 17 NJPER 132 (¶22053 1991). The NLRB and the Commission have similar requirements concerning voter eligibility.2/ Ordinarily, employees who are on vacation or on leave of absence are eligible where they intend to continue working afterwards. See Tp. of North Brunswick, D.R. No. 85-16, 11 NJPER 155 (¶16068 1985) (clerk typist on medical leave of absence eligible to vote); County of Essex, D.R. No. 96-1, 21 NJPER 295 (¶26188 1995) (corrections officer had not resigned but was on leave of absence and, therefore, eligible to vote).

Like our Agreement for Consent Election , the NLRB's model Consent Agreement provides that employees "...out ill, on vacation, or temporarily laid off..." are eligible to vote. The NLRB has also determined that employees on sick leave or a leave of absence are eligible to vote if they are to be automatically restored to their

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2/ As to the applicability of NLRB precedent, See Lullo v. Int'l Association of Firefighters, Local 1066, 55 N.J. 409 (1970).

jobs when the employees are ready to resume work. Keeshin Charter Service, 105 LRRM 1030 (1980). Employees who were on a leave of absence on the date of the election were eligible to vote, even though the employees never returned to work after the election. Sioux City Brewing Co., 24 LRRM 1534 (NLRB 1949). The employees intent to quit sometime after the election is irrelevant in determining his status as of the date of election. Otarion Listener Corp., 44 LRRM 1514 (NLRB 1959).

Unlike Otarion, however, here Mecka's "intent" is not at issue in determining her voter eligibility. It is undisputed that Mecka resigned prior to the election count, had actually, completely severed her employment relationship and had no expectation of continued employment with Rutgers. In Cty. of Essex, the challenged voter was still employed but, as of the voting eligibility cutoff date and the election date, was on a leave of absence and, therefore, eligible to vote. Here there was no expectation that Mecka intended to return to work - her resignation had already become effective.

In Ocean Cty., D.R. No. 79-25, 5 NJPER 128 (¶10076 1979), the Director considered challenges in a run-off election to the voting eligibility of certain health employees who were transferred off the County payroll two days before the election. The union had argued that the actual transfer of these employees took place after the election. In finding these employees ineligible to vote, the Director rejected a formulaic approach to eligibility determination. He stated:

> A fundamental principle of labor relations is that the employees to be represented make their

> own selection. To place that power of selection in the hands of employees whose employment status was being altered pursuant to actions instituted prior to the election would abrogate the rights of unit members to self-determination and would undermine the democratic process by which a majority representative should be determined. [Id. at 130.]

APSG/NJEA's position, if adopted, would permit an exclusive representative to be selected by an employee who is no longer a unit member. This result is antithetical to the purposes of the Act and our obligation to provide unit employees with the opportunity to select their exclusive representative.

Based on the foregoing, I find that Stacey Mecka is ineligible to vote and order her ballot voided.

Thus, there are no substantial or material facts in dispute regarding the eligibility of five voters -- Michael Hutton, Peter Anderson, David Evers, Bonnie Altizio, and Stacey Mecka. The parties have agreed that Hutton is ineligible to vote. Anderson, Evers and Altizio hold titles/positions which are specifically excluded by the parties' pre-election agreements. Mecka resigned effective March 31, 2000 prior to the April 10, 2000 ballot count and was, therefore, no longer an employee as of the count date. Therefore, the eligibility of these challenged voters is appropriately determined by the administrative investigation. N.J.A.C. 19:11-2.6(d).

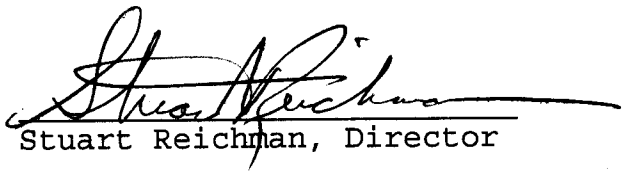
Having found that Hutton, Evers, Anderson, Altizio and Mecka ineligible to vote, and having found that Liu is eligible to vote, five challenged voters remain: Jean SanFillippo, Anne Marie DiCostanzo, Keith Bosley, Elizabeth Gorman and Maria Grace. Since the

remaining five challenged voters could not affect the outcome of the election, it is unnecessary to determine their eligibility. Chathams Dist. Bd. of Ed., D.R. No. 89-2, 14 NJPER 524 (¶19223 1988); Parsippany-Troy Hills, D.R. No. 97-11, 23 NJPER 321 (¶28143 1997). In the April 10 run-off election, "No Representative" received 311 votes; APSG/NJEA received 304 votes. Even if all remaining five challenged ballots plus Liu's vote were cast in favor of APSG/NJEA, it would not have a majority of the valid votes cast. N.J.A.C. 19:11-10.7.3/

ORDER

Theresa Liu has cast an eligible ballot, but it will remain unopened. The ballots of Michael Hutton, David Evers, Peter Anderson, Bonnie Altizio and Stacey Mecka are void. I will issue a Certification of Results pursuant to N.J.A.C. 19:11-10.3(1), finding that a majority of eligible voters chose not to be represented.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman, Director

DATED: July 11, 2000
Trenton, New Jersey

3/ Although Theresa Liu is an eligible voter pursuant to the parties' agreement, I do not intend to order her ballot opened. Her ballot is not determinative of the outcome of this election and opening it would impair the secrecy of her vote.