

D.R. NO. 91-21

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

In the Matter of
ROCKAWAY TOWNSHIP,

Public Employer,

-and-

P.B.A. LOCAL 287,

Docket No. RO-91-22

Petitioner,

-and-

F.O.P. LODGE 31,

Incumbent.

SYNOPSIS

The Director of Representation rules upon a challenge to a voter's eligibility in a Commission representation election where the ballot cast was determinative of the election outcome. On the basis of an administrative investigation, the Director found the challenged voter was eligible to vote in the election and directed that the vote be counted.

At the time of the election, the challenged voter was suspended with pay pending the completion of a prosecutor's investigation. The record does not indicate whether the challenged voter, now suspended with pay, will be discharged, given some lesser discipline or exonerated. The Director concluded that the employer's future plans concerning challenged voter's employment status was now too indeterminate to deny the voter's statutory right to choose his majority representative.

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Appearances:

For the Public Employer

Anthony P. Guadagnino, Business Administrator

For the Petitioner

Zazzali, Zazzali, Fagella & Nowak, attorneys
(Paul L. Kleinbaum, of counsel)

For the Incumbent

Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION

Pursuant to an Agreement for Consent Election entered into by the above parties on September 14, 1990, a representation election was conducted by the Public Employment Relations Commission ("Commission") on October 25, 1990 among all uniformed and non-uniformed police officers and sergeants employed by Rockaway Township ("Township"). Employees were provided the opportunity to choose a representative for collective negotiations: either the

P.B.A., Local 287 ("P.B.A.") or the F.O.P., Lodge 31 ("F.O.P.") or choose not to be represented. The Tally of Ballots reveals that 21 valid ballots were cast for the P.B.A.; 20 valid ballots were cast for the F.O.P.; no valid ballots were cast against representation and one ballot was challenged by the P.B.A. The challenged ballot was cast by Police Officer Arthur Togle. The challenged ballot is determinative of the results of the election. See N.J.A.C. 19:11-9.2(e) and (k).

An administrative investigation was conducted into the issues raised by the challenge, pursuant to N.J.A.C. 19:11-9.2(k). At present, I do not find any substantial and material factual disputes which may more appropriately be resolved through the conduct of a formal hearing. See N.J.A.C. 19:11-2.6(b). Accordingly, I believe that the disposition of this matter is properly based upon the administrative investigation. These facts appear.

1. On October 25, 1990, the Commission conducted a representation election among all uniformed and non-uniformed police officers and sergeants employed by Rockaway Township.

2. The P.B.A. challenged the ballot cast by Arthur Togle, a police officer employed by Rockaway Township who is included in the police officer/sergeant collective negotiations unit. Togle's ballot was challenged because, at the time of the election, he was suspended with pay.

3. The challenged ballot is determinative of the outcome of this election.

4. In accordance with the Agreement for Consent Election executed by the parties herein, the employees eligible to vote in this election were all uniformed and non-uniformed police officers and sergeants regularly employed by the Township of Rockaway who were on the payroll during the pay period ending September 7, 1990.

5. The Commission's official Notice of Election posted for this election states:

THOSE ELIGIBLE TO VOTE ARE: ALL UNIFORMED AND NON-UNIFORMED POLICE OFFICERS AND SERGEANTS REGULARLY EMPLOYED BY THE TOWNSHIP OF ROCKAWAY WHO WERE ON THE PAYROLL FOR THE PAY PERIOD ENDING SEPTEMBER 7, 1990.

The Notice of Election further states:

Employees eligible to vote are those described under VOTING UNIT in the attachment to this Notice of Election, including employees who did not work during the designated payroll period because they were out ill or on vacation or temporarily laid off, and also including employees in the military service. Employees must appear in person at the polls in order to be eligible to vote. Employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

6. On September 5, 1990, Tokle was suspended with pay by the Township for an indefinite period of time pending the outcome of a criminal investigation being conducted by the Morris County Prosecutor's Office.

7. The Township asserts that upon the conclusion of the Morris County Prosecutor's investigation, it will determine what discipline, including possible termination, should be brought against Tokle.

8. Tokle's employment relationship with the Township may continue for an indefinite period of time. Tokle's suspension with pay is related to the outcome of the Prosecutor's investigation which was not concluded at the time of the election. The factual record here suggests nothing about Tokle's future employment status. At the conclusion of the Prosecutor's investigation and after completing its own review of the case, the Township may decide to institute discipline against Tokle, after which he may resume normal active employment status.

The P.B.A. claims that since Tokle is suspended with pay, he is not eligible to participate in the election because a suspension is tantamount to a discharge and discharged employees are not eligible to vote. Because the suspension is indefinite and may result in the termination of Tokle, the P.B.A. argues that there is "no reasonable expectancy of employment in the near future."

The F.O.P. asserts that Tokle was, and continues to be, an employee of the Township because he remains on the payroll of the Township. The F.O.P. argues that there is no basis for assuming that Tokle's employment will be terminated in the future as the

Township may choose a lesser penalty based upon the outcome of the Prosecutor's investigation.

The Township has taken no position on this issue.

N.J.A.C. 19:11-9.2(c) states:

The eligible voters shall be those employees included within the unit described in the agreement for consent election...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....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.

In a representation election, voter eligibility is normally affected by an employee's employment status both during the payroll period for voting eligibility and on the date of the election. The National Labor Relations Board ("NLRB") has defined "being employed during the payroll period" to mean both that the voter must be employed and working on both the eligibility date and the date of the election. NLRB v. Tom Wood Datsun, 768 F.2d 151, 119 LRRM 3415 (7th Cir. 1985). An employee must be actively employed on the eligibility dates in order to be eligible to vote. BLK Steel Co., Inc., 102 LRRM 1532 (NLRB 1979). Roy N. Lotspeich Publishing Co., 83 LRRM 1380 (NLRB 1973).

Employees who plan to retire or resign but are still on the payroll and working at the time of the election are eligible to

vote. NLRB v. General Tube Co., 331 F.2d 751, 56 LRRM 2161 (6th Cir. 1964).

Employees on sick leave or a leave of absence are eligible to vote if they are to be automatically restored to their jobs when the employees are ready to resume work. Keeshin Charter Service, 105 LRRM 1030 (NLRB 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, because their status on the election date was that they would be returning to work after the leave of absence. Souix City Brewing Co., 24 LRRM 1534 (NLRB 1949). Accord, Otation Listener Corp., 44 LRRM 1514 (NLRB 1959), where an employee on sick leave was determined eligible to vote. There, the NLRB noted that neither the employer nor the employee had taken any steps prior to the election to terminate the employment relationship; the employee's intent to quit sometime after the election is irrelevant in determining his status as of the date of election. Cf. Ethyl Products Co., 114 LRRM 1013 (NLRB 1983). However, an employee granted an open-ended leave for personal reasons who establishes not even a ballpark date for returning to work is not eligible to vote in a representation election. Sid Eland, Inc., 109 LRRM 1369 (NLRB 1982).

Employees discharged for cause prior to the date of the election are not eligible to vote. Rish Equipment Co., 58 LRRM 1274 (NLRB 1965). However, employees who have been discriminatorily discharged are entitled to vote. Tampa Sand & Material Co., 50 LRRM 1438 (NLRB 1962).

Employees who have been laid off, although not working on either the eligibility date or on the date of the election, may be eligible to vote if they have a reasonable expectancy of recall in the near future. Atlas Metal Spinning Co., 112 LRRM 1273 (NLRB 1983). In deciding whether a reasonable expectancy of recall exists, the NLRB applies these factors: (1) the employer's past experience with layoffs; (2) the employer's future business/hiring plans; (3) the circumstances of the layoff; and (4) what the employee was told about the likelihood of recall. Atlas Metal.

Tokle's status does not clearly fall within the NLRB-private sector experience. The employer has taken no position on this issue. Pending the completion of the prosecutor's investigation, the disciplinary determination by the employer and possibly, a grievance arbitration, we are unable to determine whether Tokle's present suspension with pay will be converted into a discharge, some lesser form of discipline or an exoneration. Awaiting the completion of these various proceedings is likely to result in "extreme delay or confusion" in resolving this representation question.^{1/}

^{1/} But cf. Pacific Tile and Procelain Co., 50 LRRM 1394 (NLRB 1962). In Pacific Tile, two employees had been discharged prior to the election eligibility date. The employees attempted to vote in the election; their votes were challenged; the Regional Director determined they were ineligible. The NLRB noted that under the circumstances of the case -- where it did not have the results of the discharge

On the other hand, Tokle is still employed by the Township, is still on the payroll and is still being paid. Because there are no facts in the record which indicate that Tokle will be terminated, there is not a sufficient basis to determine that Tokle is ineligible to vote in this election. Otarion Listener Corp. The employer's future plans for Tokle's employment status and the final result which would flow from any employer action is too indeterminate at this point for us to rely upon to deprive Tokle of the basic statutory right to choose his majority representative. N.J.S.A. 34:13A-5.3, Ethyl Products Co. See also Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976). Based upon the

1/ Footnote Continued From Previous Page

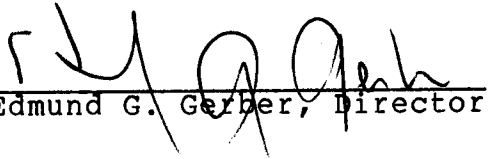
arbitrations -- it was unable to determine the eligibility of the discharged employees on the election date. Accordingly, the NLRB deferred ruling on these two challenges, noting that if the challenged votes are determinative, the Regional Director must further investigate the challenges. Before Pacific Tile, if an employee was discharged prior to the eligibility date, the employee would be determined ineligible to vote in the election absent the filing of an unfair practice charge to challenge the discharge. Pacific Tile held a charge challenging the discharge was not necessary; the filing of a grievance challenging the discharge was sufficient to allow the employees to vote by challenge ballot in an election. In making the determination to await the outcome of a discharge arbitration, the NLRB noted that it did not foresee the possibility that following this course would result in extreme delay or confusion in resolving representation questions. Because of the potential for extreme delay here, we are not inclined to follow that course.

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foregoing, I conclude that Tokle is an eligible voter and his vote should be counted. This matter should proceed in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: February 19, 1991
Trenton, New Jersey