

D.R. NO. 96-1

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

In the Matter of

COUNTY OF ESSEX,

Public Employer,

-and-

Docket No. RO-95-184

FOP LODGE 71,

Petitioner,

-and-

PBA LOCAL 153,

Intervenor.

SYNOPSIS

The Director of Representation dismisses the Petitioner's post-election objections on the grounds that insufficient evidence was proffered to support a prima facie case that the presence of supervisors in the "no-electioneering zone" during the election intimidated eligible voters at the poll. In addition, the Director held that a ballot was correctly voided by the election officer because the voter's intention was not clearly indicated on the ballot. He also dismissed objections alleging that ineligible voters participated in the election. The Director found that five challenged voters were eligible and ordered that their ballots be opened.

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Appearances:

For the Public Employer
John T. Lyons, Jr., Assistant County Counsel

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

For the Intervenor
Zankowitz, Goldsmith & Sayers, attorneys
(William D. Sayers, of counsel)

DECISION

Pursuant to a Decision and Direction of Election in County of Essex , D.R. No. 95-29, 21 NJPER 193 (¶26127 1995) ("Essex I"), on May 18, 1995, the Public Employment Relations Commission ("Commission") conducted a representation election for Essex County corrections officers assigned to the County Jail in Newark. Pursuant to N.J.S.A. 34:13A-6, 258 ballots were cast by correction

officers, of which 4 ballots were voided, 123 votes were cast for the PBA Local 153 Essex County Corrections Officers ("PBA"), 121 votes were cast for the FOP Essex County Public Safety Lodge 71 ("FOP") and six ballots were challenged. The challenged ballots are determinative of the outcome of the election.

On May 23, 1995, the FOP filed timely post-election objections and on June 6, 1995 filed supporting affidavits. The PBA filed a response to the objections. All parties submitted statements of position concerning the challenged ballots.

Objections to Election

The FOP filed four objections. They are:

1. During the election, discussions took place between the Director of Corrections, Assistant Warden and PERC election officer in the "no-electioneering zone" and the presence of these supervisors in the no-electioneering zone intimidated voters.

2. Sergeant Maurice McCoy, a supervisor from the Internal Affairs Division, was in the no-electioneering zone both inside and outside the facility during the election.^{1/}

3. The PERC election agent voided a ballot which clearly reflected the voter's intention to vote for the FOP.

4. Four employees were permitted to vote although they were not eligible to vote.

N.J.A.C. 19:11-9.2(h) sets forth the standard for reviewing election objections:

^{1/} Objection two does not allege that Sergeant McCoy's presence had any effect on eligible voters.

A party filing objections must furnish evidence, such as affidavits or other documentation that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce specific evidence which that party relies upon in support of the claimed irregularity in the election process. [Emphasis added].

Pursuant to N.J.A.C. 19:11-9.2(i), if we conclude that the objecting party has presented a prima facie objections case, we will initiate an investigation; if the objecting party fails to proffer sufficient evidence to support a prima facie case, we may immediately dismiss the objections.

In Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 43 (1970), aff'd sub. nom. AFSCME Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971), the Commission articulated the following policy:

The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employees' freedom of choice. Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

I find that, as to objections one and two, the FOP has failed to proffer sufficient evidence to support a prima facie case

that discussions and the presence of the Director of Corrections, an Assistant Warden and an Internal Affairs Sergeant in the no-electioneering zone at various times during the election intimidated or otherwise interfered with eligible voters' freedom of choice at the poll. There is no evidence offered to show that their presence and these discussions caused eligible voters who intended to vote, not to vote, or caused voters to cast a vote not of their free choice. The supporting affidavits are devoid of any proof that the presence of these superiors interfered with bargaining unit employees' right to freely vote for their choice.^{2/} See, City of Newark, D.R. No. 92-14, 18 NJPER 113 (¶23054 1992) and County of Atlantic D.R. No. 79-17, 5 NJPER 18 (¶10010 1979). Therefore, I hereby dismiss post-election objections one and two.

Objection three states that the PERC election agent voided a ballot which clearly reflected the voter's intention to vote for the FOP. This objection, too, must be dismissed. On the ballot in question, the choices of "No Representative" and "FOP Essex County Public Safety Lodge #71" were both marked, rendering it impossible to definitively ascertain the voter's selection.

Objection four alleges that four employees who were ineligible voters were permitted to vote. Each party to the

^{2/} The affidavit of Pierre N. Valles includes a statement regarding Sergeant Nick Candito who is not mentioned in the timely filed post election objections. As this matter was not asserted within five days after the tally of ballots as required by N.J.A.C. 19:11-9.2(h), it cannot be considered.

election was permitted to have an observer present to challenge the eligibility of any person coming to vote. The FOP and PBA each had an observer present at the election. N.J.A.C. 19:11-9.2(e) provides that a challenge to a voter must be asserted before that person casts a ballot. All observers to this election were instructed as to the requirements of the challenged ballot process.

Before being permitted to vote, each person who came to the poll was approved by the observers. Approval was indicated by a color-coded check mark next to the person's name on the official voter eligibility list.

Voting records indicate that the FOP observer placed a checkmark next to names of both Kevin Onoverole and Pat Scanlon on the official voter eligibility list, thereby approving their voting eligibility. The time to have objected was prior to their votes being cast, not after.

Martin D'Amato voted by a challenged ballot pursuant to N.J.A.C. 19:11-9.2(e). At the conclusion of the balloting, all parties to the election, including the FOP, agreed that D'Amato was an eligible voter and to include his vote in the election. The FOP cannot now object to counting D'Amato's vote.

Finally, there is no evidence to substantiate that James A. Intorella participated in this election. There are no approval check marks next to Intorella's name nor does his name appear on any challenged ballot envelopes. In the absence of any evidence to the contrary, I conclude that he did not vote in this election.

Accordingly, I hereby dismiss post-election objections three and four.

Challenged Ballots

There are six challenged ballots that are determinative of the outcome of the election. The challenged voters and the bases of the challenges are:

1. Louis Masi was challenged by the FOP because he is assigned to the Internal Affairs unit at the Jail Annex.

2. Nick Striglia was challenged by the FOP on the grounds that he is an instructor at the Essex County Police Academy and not assigned to the County Jail in Newark.

3. Dave Zawacki was challenged by the FOP because he, too, is assigned to the Internal Affairs Unit at the Jail Annex.

4. Eric Brown was challenged by the PBA on the grounds that he had resigned from his position as corrections officer at the County Jail located in Newark.

5. Mark Hayek was challenged by the FOP because he was terminated as an employee in February, 1995 and was not rehired until April 24, 1995, after the voter eligibility cutoff date of April 14, 1995.

6. Michael Masi was challenged by the PERC election officer because his name did not appear on the official voter eligibility list supplied by the County.

Pursuant to N.J.A.C. 19:11-9.2(k), all parties have submitted statements of position and I find the facts to be as follows:

Employees Louis Masi, Nick Striglia and Dave Zawacki are County corrections officers on the payroll for the County Jail in Newark. Historically, they have been included in the bargaining unit and are currently represented by the incumbent majority representative, the PBA. Since all three officers are in the bargaining unit and will work under the terms and conditions of employment negotiated by the majority representative chosen in this election, their ballots should be opened and counted. Therefore, the ballots of Louis Masi, Nick Striglia and Dave Zawacki shall be included in the election.

The PBA asserts that Officer Eric Brown had resigned from his corrections officer position. The County of Essex states that Officer Brown was on a leave of absence from February 27, 1995 through May 27, 1995. During this time he remained on the payroll of the County Jail in Newark. As of June 7, 1995, his employment status with the County of Essex as a corrections officer was uncertain.

In Essex I at 194, I held that:

Those eligible to vote must have been employed during the payroll period immediately preceding [April 25, 1995], including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service.... Ineligible to vote are 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.

See N.J.A.C. 19:11-9.2(c). Tp. of North Brunswick, D.R. No. 85-16, 11 NJPER 155 (¶16068 1985). The National Labor Relation Board's model Consent Election Agreement provides that employees "...out ill, on vacation, or temporarily laid off..." are eligible to vote. The NLRB has determined that 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. 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).^{3/}

Here, the voting eligibility cutoff date was April 14, 1995 (the end of the last payroll period preceding April 25, 1995). The election was held on May 18, 1995.

I conclude that Eric Brown did not resign but rather was on a leave of absence during the period from February 27, 1995 to May 27, 1995. I further find that he remained on the payroll during this period which included the voting eligibility cutoff date of

^{3/} As to the applicability of NLRB precedent, see Tp. of Bridgewater v. Bridgewater Pub. Works, 91 N.J. 547 (1982).

April 14, 1995, and the date of election on May 18, 1995.

Therefore, he is an eligible voter and his ballot will be counted.

Although Hayek was terminated in February, 1995, the Merit System Board returned him to the eligibility list on March 13, 1995 and on April 24, 1995 Hayek was returned to duty. Therefore, his status is analogous to employees who did not work during the eligibility period because "they were out ill, on vacation or temporarily laid off." Such employees are eligible to vote. Accordingly, I determine that Hayek's ballot shall be opened and counted in the election.

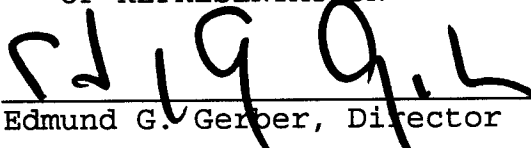
There is a factual dispute regarding the eligibility of Officer Michael Masi that cannot be resolved without further investigation. The PBA states that Michael Masi was on the payroll for the Essex County Jail in Newark during the payroll eligibility period which ended on April 14, 1995. The County's position is that Officer Masi was on the Jail Annex payroll during the voter eligibility period and was not an employee of the Essex County Jail in Newark until he was transferred to that payroll on April 24, 1995. It is the FOP's contention that Michael Masi should not be allowed to vote because he is assigned to a facility other than the Essex County Jail in Newark.

I conclude that the eligibility of Michael Masi cannot be resolved at this time. We will open the other five challenged ballots found to be eligible. If after the five challenged ballots are opened a determinative result to the election is not obtained, I

will conduct a full investigation into Masi's eligibility to vote in this election.

Accordingly, the challenged ballots of Officers Louis Masi, Nick Striglia, Dave Zawacki, Eric Brown and Mark Hayek shall be opened and counted on July 17, 1995, at 10 a.m. in the Trenton office of Public Employment Relations Commission, 495 West State Street. In addition, I dismiss the post-election objections filed by the FOP for the reasons stated above.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

Dated: July 7, 1995
Trenton, New Jersey