

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

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

DOCKET NOS. RE-81-2
RE-81-3
RE-81-4
RE-81-5

Intervenor,

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor,

-and-

NEW JERSEY STATE EMPLOYEES ASSOCIATION,
a/w AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Petitioner,

DOCKET NOS. RO-81-126
RO-81-127
RO-81-128
RO-81-129

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor,

-and-

NEW JERSEY STATE EMPLOYEES ASSOCIATION,
a/w AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation, on the basis of an administrative investigation, issues a determination with respect to certain challenged votes in recently conducted elections involving four white collar state employee negotiations units. The determinations were issued with respect to employees challenged by the State at the count as being confidential employees and certain employees whose votes were challenged by the Commission because their names did not appear on an eligibility list prepared by the State. Among the latter challenged voters are employees who were alleged to be confidential employees, casual employees and individuals not employed by the State.

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NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

Appearances:

For the State of New Jersey
Frank A. Mason, Director

For Communications Workers of America, AFL-CIO
Kapelsohn, Lerner, Reitman & Maisel, attorneys
(Sidney Reitman, of counsel)

For the American Federation of State, County
and Municipal Employees, AFL-CIO
Sterns, Herbert & Weinroth, attorneys
(John M. Donnelly, of counsel)

For the New Jersey State Employees Association, AFT
Fox & Fox, attorneys
(David I. Fox, of counsel)
Miller, Cohen, Martens & Sugarman, attorneys
(Nancy Schiffer, of counsel)

DECISION

Pursuant to a decision of the Public Employment Relations Commission (the "Commission"), 1/ secret ballot elections were conducted by mail among State of New Jersey employees in four negotiations units -- Administrative & Clerical Services Unit; Professional Unit; Primary Level Supervisors Unit; and Higher Level Supervisors Unit -- during a balloting period commencing February 17, 1981 and concluding March 9, 1981. Employees in each unit were provided the opportunity to designate either the Communications Workers of America, AFL-CIO ("CWA"), or the American Federation of State County & Municipal Employees, AFL-CIO ("AFSCME") or the New Jersey State Employees Association, affiliated with American Federation of Teachers, AFL-CIO ("SEA/AFT") (or certain separate supervisory employee affiliates thereof) as their exclusive representative or to choose no representative. Ballots were counted and tallied during the period of March 10 thru March 12, 1981. Pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and the rules of the Commission, N.J.A.C. 19:11-1 et seq., such designation must be made by a majority of unit employees voting in an election, and in the absence thereof, a runoff election between the two leading ballot positions is required. N.J.A.C. 19:11-9.3. The election tallies in three of the

1/ In re State of New Jersey, D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), motion for reconsideration denied P.E.R.C. No. 81-95, 7 NJPER (¶ 1981); appeal pending App. Div. Docket No. A-2310-80T2.

units -- the Administrative & Clerical Services Unit, Primary Level Supervisors Unit, and the Higher Level Supervisors Unit -- indicate that the disposition of certain challenged ballots, which is the subject of the within decision ^{2/} is necessary in order to certify the results of the election. ^{3/}

N.J.A.C. 19:11-9.2(k) provides:

If challenged ballots are sufficient in number to affect the results of an election, the director of representation shall investigate such challenges. All parties to the election shall present documentary and other evidence, as well as statements of position, relating to the challenged ballots. After the administrative processing of the challenged ballots has been completed, or where appropriate, the hearing process has been completed, the director of representation shall render an administrative determination which shall resolve the challenges and contain the appropriate administrative direction.

The determinations that follow are issued with respect to certain challenged ballots which may be administratively resolved without the necessity of an investigatory hearing.

^{2/} This decision is not related to certain post-election objections filed by SEA/AFT.

^{3/} CWA leads the balloting in each election. A disposition of challenges in the Administrative & Clerical Services Unit will reveal whether CWA has achieved a majority of valid ballots cast, or whether a runoff election with AFSCME is in order. In the Primary Level Supervisors Unit, a runoff election is indicated, and disposition of the challenged ballots will reveal whether AFSCME or SEA/AFT has achieved a runoff position. Similarly, a runoff election is indicated in the Higher Level Supervisors Unit, and disposition of the challenges will reveal whether AFSCME, SEA/AFT, or the "none" position will appear in the runoff position.

These challenges to voter eligibility arise in two contexts: (1) challenges to the eligibility of voters whose names appeared on employee eligibility lists prepared by the State; and (2) challenges to the eligibility of voters whose names were provided by the parties or who individually requested ballots from the Commission.

The employer- prepared eligibility lists were submitted to the Commission on January 23, 1981, in accordance with N.J.A.C. 19:11-9.6(a). These lists contained employee names, addresses, job titles and payroll code numbers. Copies of the lists were simultaneously made available to the unions. At the count, all parties were entitled to assert a challenge to the eligibility of any voter whose name appeared on the eligibility lists. In fact, only the State asserted such challenges at the count.

Regarding those ballots challenged in the second context, the unions were permitted to submit lists of names which did not appear on the employer-prepared lists but which the unions claimed were the names of eligible voters. These lists were submitted prior to and during the balloting period. Additionally, the Commission provided ballots to individuals who communicated directly with the Commission and requested a ballot. During the balloting period and immediately upon its conclusion, all parties were provided with updated lists of those individuals who received ballots in the above manner. At the election, ballots received from these voters were challenged by the Commission since their

names did not appear on the election eligibility lists. The Commission provided all parties with the names of the voters which it had challenged and requested that the parties provide documentation and statements of position in order to resolve the outstanding questions concerning voter eligibility; however, the parties could agree upon the disposition of only one of the challenged ballots.

Notwithstanding the parties' inability to reach agreement, the unions did agree to accept the State's verification of records pertaining to the employment status of any employees who were employed on December 12, 1980, (the payroll date for identifying the eligibility of voters) and who continued to be employed at the time of the count. The parties agreed that upon such verification, the eligibility challenge would be lifted as to all employees who were identified as eligible voters. The parties agreed to void the ballots of those employees who were identified as within other State negotiations units which were not involved in the elections.

On Monday, March 16, 1981, the State provided the Commission and the unions with the information culled from State payroll records with respect to virtually all the individuals who voted and were challenged in the second context discussed above. The information revealed, in part, that (1) some of the individuals who requested ballots were current unit employees who were eligible to vote; (2) that some employees who were unit employees were hired after December 12, 1980; (3) that some individuals were members of

other negotiations units; (4) that some individuals had retired or resigned from state service; (5) that some individuals were not employed but, were carried on the payrolls in an inactive status; ^{4/} (6) that some individuals were not on file as State employees; (7) that some individuals in eligible titles were considered by the State to be confidential employees; (8) that some individuals were casual employees; and (9) that some individuals were employed in positions which were exempt from inclusion in any of the negotiations units.

At the March 16 conference, SEA/AFT and AFSCME representatives were not prepared to accept the State's verification information. Therefore, the Commission granted these unions an additional period of time, until March 19, 1981, to provide information to dispute the State's records with regard to the first six categories listed above. The State was requested to identify those employees in category 8 who worked less than 20 hours per week, since these employees, by virtue of the unit definition contained in the contract appear not to be unit members.

On March 19, 1981, AFSCME and SEA/AFT stated that they did not have any information to dispute the State's verification of records. ^{5/} The Commission staff agent,

^{4/} The employment of these individuals is deemed by the State as having been terminated. These individuals are not on a leave of absence and are not temporarily laid-off.

^{5/} SEA/AFT stated that its investigation into these challenges resulted in the confirmation that six individuals were eligible to vote. SEA/AFT disputed the State's records as to only one individual and agreed to supply information to the Commission as to this exception on March 23, 1981. Such information has been supplied to the Commission and the State has agreed with SEA/AFT that the individual is an eligible voter.

therefore, announced that the ballots of voters in categories 1 thru 6 would be counted or voided based on the State's verification records. The undersigned confirms this conclusion and determines that the ballots of voters in category 1 should be counted and that the ballots of voters in categories 2 thru 6 should be voided.

Further attempts at resolving the remaining challenges were not successful. Accordingly, the parties were advised of their responsibilities to provide factual proffers to support certain of their claims by 9 a.m. Tuesday, March 24, 1981. The parties were advised that in the absence of factual proffers which would place significant facts in dispute necessitating the convening of an evidentiary hearing, administrative determinations would issue based upon the challenge investigation. The materials requested related to the following challenges: (1) challenges asserted by the State to persons on the eligibility lists based upon claims that these voters were confidential employees; (2) challenges by the State against voters, whose names were not on the eligibility lists, on the basis of asserted confidential status (category 7, above); (3) challenges by the State to voters whose names were not on the eligibility lists, on the basis of alleged casual status (category 8, above); and challenges by the State to voters whose names were not on the eligibility lists on the basis of alleged managerial or exempt status (category 9, above). The undersigned shall consider these challenges seriatim.

1. Pursuant to the rules of the Commission, N.J.A.C. 11-9.2(e), challenges to voter eligibility respecting voters whose names appear on the eligibility lists must be asserted at the election prior to the casting of the vote. Procedurally, the challenge is asserted as the voter appears before observers and is identified. In mail ballot elections, the challenge is asserted when the voter's return ballot envelope is identified and matched with the voter eligibility lists. A party which does not assert a challenge when the return ballot envelope is identified may not subsequently assert a challenge.

At the count, the State challenged the ballots of certain employees which it had initially placed on the eligibility lists, and stated as the basis of the challenge, that the voters were confidential employees. The State, therefore, has been required to submit a factual proffer to support its naked claim. In reply, the State has presented a positional statement arguing that the voters who it challenged are confidential employees and, therefore, excluded from the units by contract and by the Act. However, the State has not submitted any evidence to support a claim that any of these voters are confidential. Since the State prepared the eligibility lists and submitted them on January 23, 1981, it would appear the State has had ample opportunity to acquire evidence needed to refute its own eligibility lists. The Commission, therefore, has not been presented with any evidence to support a claim of noneligibility. On the other hand, the inclusion on the eligibility lists of individuals, employed as of the eligibility date

in eligible unit titles, raises a presumption of eligibility. The undersigned, therefore, determines that the ballots cast by individuals in this category of challenges should be counted.

2. On March 16, 1981, the State identified certain voters whose names did not appear on the eligibility lists as employees who occupy eligible unit titles, but who are allegedly confidential employees. All parties were provided with this information. The undersigned has provided all parties the opportunity to present a factual proffer supportive of any claim of ineligibility for these employees who would otherwise be identified as unit employees. ^{6/} No such evidentiary proffer has been submitted. Accordingly, since the Commission has been provided with undisputed information that these challenged employees were employed on the eligibility date in eligible unit titles and since no information supportive of confidential status has been proffered, the undersigned finds that the ballots of these individuals should be counted.

3. Regarding alleged casual status, the State, at the request of the Commission, identified those voters in this category whose work averaged less than 20 hours per week. The current contracts covering unit employees includes only those employees who are "employed a minimum of twenty (20) hours per week." At the March 19 conference, the unions questioned the

^{6/} Opportunities to investigate these and other challenged employees were provided earlier than March 16, 1981. As indicated above, lists of employees who were mailed challenge ballots were circulated to all parties as early as February 18, and were updated through March 10. During the count, all individuals who cast such ballots were identified.

manner in which the State derived these averages. ^{7/} Additionally, SEA/AFT argued that certain other factors of employment indicia affected some individuals and that the minimum 20 hour factor should not be utilized automatically as a basis for disqualification. There was, therefore, no agreement to declare these identified voters as ineligible. The State is hereby requested to provide data regarding these employees establishing their annual earnings and hourly rates of compensation for the calendar year 1980.

The parties were advised, however, that the voters whose work averaged 20 or more hours per week appeared to be eligible, unless some evidence were presented in support of a claim that the individuals were not contractually included in the unit or otherwise ineligible. ^{8/} The State has indicated that certain of these employees, identified as "intermittent claims taker" (or related titles) are considered by the State as temporary employees because they may not work more than 315 hours in a yearly quarter. ^{9/} No evidentiary proffer has been submitted with respect to the other employees identified as averaging at least 20 hours of work per week. Accordingly, with the exception of the "intermittent claims taker" titles, there is no basis to question the eligibility of these voters,

^{7/} The State traced employment records for the period of mid-December 1980 through March 6, 1981.

^{8/} The three unions agreed that employees averaging at least 20 hours per week were eligible voters.

^{9/} These employees are the subject of a Clarification of Unit proceeding pending before the Commission.

and their ballots shall be counted. 10/

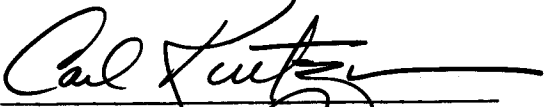
5. The State has provided information that some of the voters who were not on the eligibility list are employed in titles designated as either managerial or exempt. Each union stated on March 19 that it had no information to dispute the State's verification of payroll records. The unions were provided with an additional opportunity until March 24 to provide any evidence disputing the State's information and/or disputing the placement of the titles in either managerial or exempt status. With only two exceptions, no information or positions contrary to the State's information have been provided, and the undersigned shall deem as void the ballots cast by the ineligible voters.

6. The investigation reveals that several individuals were in titles associated with one of the units on December 12, 1980 and, before the date of the election, were transferred to another unit involved in the election. These ballots shall be counted in the units where the individuals were located on the day of the election. The investigation also reveals that several employees received ballots corresponding to units other than the unit in which they were employed. These ballots shall be counted in the units where the individuals were actually employed.

10/ Ballots in the "intermittent claims taker" category shall remain challenged for the purposes of this decision.

Accordingly, for the reasons stated above, the undersigned directs that certain challenged ballots be counted or voided, and tallied, consistent with the dispositions above. A revised tally shall be prepared and issued to the parties. II/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman Director

DATED: March 25, 1981
Trenton, New Jersey

11/ The State has challenged the voting eligibility of employees of the judiciary. All parties have been requested to submit statements of position by March 25, 1981, concerning the voting eligibility of employees of the judiciary. A determination will subsequently be made concerning the eligibility of judiciary employees, if the votes of these employees are determinative of the results of the election.