

D.R. NO. 89-21

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

In the Matter of

NORTH BERGEN BOARD OF EDUCATION,

Public Employer,

-and-

NORTH BERGEN EDUCATION ASSOCIATION,

Docket No. RO-E-89-28

Petitioner,

-and-

NORTH BERGEN FEDERATION OF TEACHERS,

Intervenor.

SYNOPSIS

The parties entered into an Agreement for Consent Election in order to determine the majority representative for a collective negotiations unit of clerical employees. The ballots cast by the five challenged voters were determinative of the election outcome.

On the basis of an administrative investigation, the Director of Representation found the five challenged voters to be ineligible to vote in the election and declined to count their ballots.

Although the Director found the challenged voters to be performing clerical work, he found the petitioner to have sought an election in the extant unit which historically excluded the challenged voters. Relying on longstanding Commission case law, the Director refused to modify the petitioned-for historical unit during the pendency of a legitimate question concerning representation.

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Appearances:

For the Public Employer  
Ruderman & Glickman, Esqs.  
(Mark S. Ruderman, of counsel)

For the Petitioner  
Zazzali, Zazzali, Fagella & Nowak, Esqs.  
(Paul L. Kleinbaum, of counsel)

For the Intervenor  
Dwyer & Canellis, Esqs.  
(Paul J. Burns, of counsel)

DECISION

On September 1, 1988, North Bergen Federation of Teachers, Local 1060, NJSFT, AFT, AFL-CIO ("Federation") filed a Petition for Certification of Public Employee Representative (Docket No. RO-89-16), supported by an adequate showing of interest, with the Public Employment Relations Commission ("Commission"). The

Federation seeks to consolidate its professional unit, which consists of certificated teachers and other professional employees, with its clerical unit, which consists of all clerks and clerk aides.

On September 20, 1988, the North Bergen Education Association, NJEA, NEA ("Association") filed a Petition for Certification of Public Employee Representative (Docket No. RO-89-28), supported by an adequate showing of interest, seeking to represent a unit of all clerical employees employed by the North Bergen Board of Education ("Board").

On October 4, 1988, an informal investigatory conference concerning docket numbers RO-89-16 and RO-89-28 was conducted by a Commission staff attorney with representatives of each of the parties in order to determine the relevant facts. N.J.A.C. 19:11-2.2 and 2.6. During the conference, the Federation was granted intervenor status in the Association's petition.<sup>1/</sup> At the conference, the parties were advised that the Commission would first conduct an election in petition docket number RO-89-28, in the clerical unit, and then proceed with the processing of the Federation's consolidation petition (docket number RO-89-16). See Barnegat Bd. of Ed., D.R. No. 88-15, 14 NJPER 16 (¶19005 1987) and

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<sup>1/</sup> The Federation was granted intervenor status as there was no dispute that the Federation is the majority representative of the employees included in the clerical unit and on the basis of a showing of interest submitted by the Federation in docket no. RO-89-16.

Barnegat Bd. of Ed., D.R. No. 88-31, 14 NJPER 160 (¶19065 1988), req. for rev. den. P.E.R.C. No. 88-79, 14 NJPER 223 (¶19081 1988), mot. for recon. den. P.E.R.C. No. 88-91, 14 NJPER 256 (¶19096 1988). Although the Federation initially would not consent to an election for the clerical employees, it later modified its position and agreed to execute an Agreement for Consent Election.

On October 25, 1988, the parties met and executed an Agreement for Consent Election. The Consent Agreement described those eligible to vote as "[a]ll clerical employees, including all clerical aides, employed by the North Bergen Board of Education."

On November 15, 1988, an election was conducted in accordance with the terms of the Agreement for Consent Election. Thirty-seven of the 40 employees on the eligibility list voted: 17 votes were cast in favor of the Federation, 15 votes were cast in favor of the Association and 5 ballots were challenged. The Federation challenged the eligibility of 4 voters, alleging that they did not hold titles included in the petitioned-for collective negotiations unit. The Federation challenged the votes of Connie Calabrese, Ann McDonnell, Ann Krey and Christina Boesch, on the grounds that they served in teacher aides titles. The PERC election officer challenged the vote of Shirley Yulinski on the ground that her name was not included on the eligibility list prepared by the Board of Education. The Federation also challenges Ms. Yulinski's ballot, but on the ground that her title is "teacher aide" rather than "clerical aide" and, therefore, is not properly in the unit.

The Board and the Association maintain that the five challenged employees are properly included in the unit and that their votes should be counted.

We have conducted an administrative investigation as to whether or not the challenged ballots are valid and should be counted. All parties were provided with an opportunity to submit statements of position and supporting evidence pertaining to the eligibility of the challenged voters. The parties were also provided with an opportunity to submit responsive statements of position. On January 30, 1989, we sent the parties a letter advising them that we were inclined not to count the ballots of the challenge voters and providing them with an additional opportunity to respond. The Board and the Association filed timely responses setting forth their exceptions to the January 30, 1989 letter. The Federation filed a reply to the Board's and Association's exceptions and urged that the finding of the January 30 letter be adopted in a decision. There are no substantial and material factual disputes which may more appropriately be resolved through the conduct of a formal hearing. Accordingly, the disposition of the status of the challenged voters is properly based upon our administrative investigation. The following facts appear.

The Board submitted an "Application for Approval of School Aide Position" form to the State Department of Education, Division of County and Regional Services, for each of the challenged voters. The application indicates that the type of school aide position for

which the Board has sought approval is for a clerical position. Among the other types of school aide positions shown on the form for which the Board could have requested approval are classroom, classroom (special education), kindergarten and general. The Board has also filed Applications for Approval of School Aide Position for a general aide (Maria Cuebas) and a classroom aide (Lori Fischer).

On June 22, 1987, the Board adopted a resolution appointing the challenged voters to work as teacher aides for the period between September 6, 1988 through June 30, 1989. The resolution indicates that Shirley Yulinski was appointed on a part-time basis; the other four challenged voters were appointed on a full-time basis. While the collective negotiations agreement provides for part-time clerical employees to be paid at the rate of \$5.10 per hour during school year 1988-1989, the resolution indicates that Ms. Yulinski would receive only \$4.50 per hour during the 1988-1989 school year. The resolution is silent on whether Ms. Yulinski receives benefits under the collective agreement. It specifies, however, that the other challenged voters, who work full-time, receive no benefits.

Since 1982, the Federation has represented the clerical collective negotiations unit. While the Board and the Federation may not have specifically agreed to exclude employees from the clerical unit serving in the title teacher aide, no claim has been made prior to this election that teacher aides are or should be included in the petitioned-for unit. The February 7, 1989 affidavit

of Peter Fischbach, Assistant Superintendent of Schools, indicates that "[i]t was the Board's intent to include the challenged employees in the clerical unit." However, the facts in this record establish that until the petition in the above-captioned matter was filed, the Board took no action to accomplish the intention stated in Fischbach's affidavit. For example, we note that none of the employees who have cast challenged ballots have ever paid either membership dues or agency shop fees to the Federation. There is no indication that the challenged voters ever sought to be included in the unit or sought Federation assistance in any manner.

Each of the challenged voters has submitted an affidavit indicating that she does not work in a classroom assisting teachers or students. Each employee states that she performs only clerical duties which include filing, answering telephones, recordkeeping, operating business machines, collating information, typing, sorting mail and ordering supplies.

Job descriptions have been proffered for each of the challenged voters. The job descriptions indicate that each of these voters performs general clerical work. The employees are required to operate various business machines, collate student, teacher and parent information, file, keep records, answer telephones, open mail, type and perform other general clerical duties as assigned. The job descriptions of the challenged voters are similar to the job description of Dorothy Shannon, an employee serving in the title clerical aide and eligible to vote in the election.

Pursuant to N.J.A.C. 19:11-9.6(a), the employer prepared and filed an election eligibility list, consisting of the names of all eligible voters. The list was simultaneously provided to the Commission and the employee organizations. In Fischbach's affidavit, filed in response to our January 30, 1989 letter, he states that he was responsible for preparing the voter eligibility list. He indicates that he included four of the challenged voters' names (Boesch, Calabrese, Key and McDonnell) on the eligibility list because it was the Board's position that such employees were in the clerical unit. However, we note that the four challenged voters names were added at the bottom of the eligibility list, out of alphabetical order. We further note that the voter eligibility list was prepared separately from the initial list of unit employees, submitted by the Board on or about October 3, 1988, for the purpose of checking the showing of interest (see below). No explanation is offered as to why the fifth challenged voter's name (Shirley Yulinski) was not also included on the voter eligibility list.

Gerald Lange, NJEA UniServ Representative, also filed an affidavit in response to our January 30, 1989 letter. He states that after reviewing the October 3, 1988 initial list of unit employees -- prepared by the Board at the Commission's request for the purpose of checking the showing of interest accompanying the petition -- he noticed that the names of four challenged voters were omitted from the list. Lange states that shortly thereafter, he called Board representatives in order to advise them that the four



challenged voters should be added to the list. Lange states that "[t]he Board subsequently revised the list to include the challenged voters."

While Lange's and Fischbach's statements regarding the manner in which the four challenged voters came to be included on the voter eligibility list are not inconsistent with each other, Fischbach's affidavit makes no reference to the assertion made in Lange's affidavit that the names of the four challenged voters were placed on the voter eligibility list as the result of a request initiated by the Association. Rather, Fischbach's affidavit indicates only that he included them on the eligibility list because it was always the Board's position that these employees were included in the unit.

Soon after its receipt of the election eligibility list, the Federation contacted the Commission's election agent assigned to this matter and advised him of its objection to the four (4) employees whose names had been added to the voter eligibility list by the Board.<sup>2/</sup> The Federation was advised of its right to challenge the eligibility of any person to participate in the election in accordance with N.J.A.C. 19:11-9.2(d) and (e).

In Op. of No. Brunswick, D.R. No. 78-4, 3 NJPER 260 (1977), the Director of Representation stated:

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<sup>2/</sup> The four names to which the Federation objected are the same individuals which the Federation challenged during the election.

[T]he Commission's policy is that when a disputed factual issue as to the voting eligibility of certain employees is not substantial and material under the circumstances presented, an election should proceed with the disputed employees being afforded the opportunity to vote subject to challenge.

...While the undersigned is aware that allowing employees...to vote a challenge ballot leaves the question as to their eligibility in doubt, he is also concerned with the need for determining, without undue delay, the choice of the exclusive representative by the vast majority of potential voters whose eligibility to vote is not in dispute. Accordingly, the challenge ballot mechanism provides...voters with the opportunity to cast ballots in the election and at the same time allows non-disputed voters the opportunity, as is likely here, to resolve the question concerning representation in as expeditious a manner as possible. Such a procedure is preferable to the delay inherent in conducting formal proceedings as to the employee eligibility prior to an election. [Id. at 261-262].

See also County of Morris Park Commission, D.R. No. 80-17, 6 NJPER 37 (¶11019 1979).

Out of 41 potentially eligible voters in the petitioned-for unit, the Federation questioned the eligibility of four voters (slightly less than 10%) prior to the conduct of the election. We find that it was proper to proceed with the conduct of the election because the dispute over voter eligibility was not substantial and material under the circumstances presented. The Federation was provided with and exercised its right to challenge voters' eligibility during the course of the election. The challenged ballots were sufficient in number to affect the results of the election. In accordance with N.J.A.C. 19:11-9.2(k), we have

conducted the required administrative investigation in order to resolve the challenged ballots.

In light of the particular facts in this case, we find that the ballots of the challenged voters should not be counted. We note that the Association's petition, filed on September 20, 1988, describes the unit as "clerks, secretaries"; the petition further indicates that the unit size was 33 employees and that the petitioned-for unit was represented by the Federation. In response to our initial correspondence investigating this petition, the Board submitted a letter dated September 28, 1988 and included a list of all employees in the petitioned-for unit.<sup>3/</sup> The Board's initial list contains 35 names and does not include the names of the 5 challenged voters. In its statement of position, the Board did not contend that the petitioned-for unit should include the 5 challenged voters.<sup>4/</sup> The Board's September 28 letter and the initial list of unit employees was also provided to the Federation and the Association.

Between September 28, 1988 and October 25, 1988 (the date of the investigatory conference in this matter) correspondence was

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3/ The Commission uses this initial list to check the showing of interest submitted by the petitioner.

4/ In fact, the Board suggested that the historical unit represented by the Federation was the most appropriate unit. While the Board went on in its letter to argue against amalgamating the clerical and professional units, the point noted here is that early in the processing of this case, the Board considered and spoke to the issue of composition of the Federation's clerical unit.

exchanged between the parties themselves and between the parties and the assigned Commission staff attorney. Some of this correspondence addressed the unit eligibility of several employees (not at issue here). However, during this period, neither the Board nor the Association suggested including the 5 challenged voters to the Commission staff attorney or the Federation. Nor was this issue ever raised at the investigatory conference on October 25, 1988, despite Lange's having raised this issue with the Board shortly after October 3, 1988. (See Lange affidavit dated February 7, 1989).

Since 1982, and up to at least June 22, 1987, when the Board adopted its resolution to hire aides for school year 1988-89, the Board and the Federation treated the challenged voters in a manner demonstrating that they were excluded from the clerical unit. Neither the Board nor the Federation ever sought to have the challenged voters pay union membership dues or representation fees in lieu of dues as provided by the collective agreement. Shirley Yulinski's rate of compensation was not paid in accordance with the clerical unit agreement,<sup>5/</sup> and the other four challenged voters working full-time did not receive contractual benefits. The challenged voters never sought to be included in the unit.

Based upon these facts, we conclude that the challenged voters were always excluded from the historical clerical unit, that

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<sup>5/</sup> The record does not show the full-time wage rate of the four challenged voters.

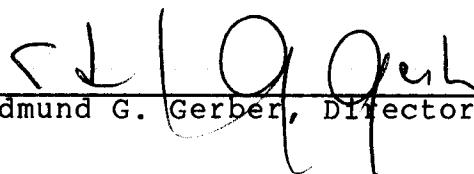
nothing in this record supports finding that either the Board or the Association ever tried to change the unit status of the challenged voters, that the Association appeared to petition for the historical unit, that the Board appeared to believe that the petitioner was seeking the historical clerical unit and the Federation certainly believed that the petitioner was seeking the historical unit. It was late in the processing of the case that the issue of including the challenged voters in the unit was first raised to the Commission and the Federation -- approximately November 7, 1988, when the voter eligibility list was submitted.

The issue for decision here is not whether the 5 challenged voters -- who appear to perform clerical duties -- are appropriate for inclusion in the Federation's clerical unit. Rather, the issue is whether they are eligible to vote in a representation election based upon a petition seeking an election in the existing clerical negotiations unit.

The Commission has addressed the issue of modifications to an extant collective negotiations unit during the pendency of a legitimate question concerning representation. The Commission's policy is to promptly proceed with an election in an appropriate, petitioned-for historical unit and not to process requests made by any party to modify the existing unit. Barnegat Bd. of Ed., D.R. No. 88-15, 14 NJPER 16, 18 (¶19005 1987). See also City of Newark, D.R. No. 85-24, 11 NJPER 344 (¶16126 1985); City of Hoboken, D.R. No. 85-4, 10 NJPER 597 (¶15276 1984); State of New Jersey (N.J.

Civil Service Assn.), D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981), request for rev. den. P.E.R.C. No. 81-112, 7 NJPER 189 (¶12083 1981); and Tp. of North Brunswick. The facts here establish that the Board and the Federation never acted prior to the election to include the challenged voters in the unit. Indeed, it appears that the four challenged voters placed on the voter eligibility list were added as an afterthought. No explanation was ever offered as to why Yulinski, who was in the same situation as the other four challenged voters, was not included on the eligibility list. Under the facts of this case, we find no compelling reason to disturb the existing unit arrangement at this time.<sup>6/</sup> Accordingly, we conclude that the challenged voters are not eligible to vote in this election and thus, we decline to count the challenged ballots. We certify the election on the basis of the tally of valid ballots cast in the election conducted by the Commission on November 15, 1988.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Edmund G. Gerber, Director

DATED: February 28, 1989  
Trenton, New Jersey

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<sup>6/</sup> After the election process has been concluded, the Board or the majority representative may file the proper petition seeking to include the challenged voters in the unit.