

D.R. NO. 2004-8

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-2003-077

NEW JERSEY CORRECTIONS ASSOCIATION, INC.
AFFILIATED WITH THE FRATERNAL ORDER OF POLICE,

Petitioner,

-and-

STATE LAW ENFORCEMENT CONFERENCE OF THE
NEW JERSEY STATE POLICEMEN'S BENEVOLENT
ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation sustains an election objection asserting that the State did not substantially comply with N.J.A.C. 19:11-10.1 when it provided a voter eligibility list with a determinative amount of inaccurate addresses in a mail ballot election. The Director dismisses the other election objections which asserted that ineligible employees voted in the election, postal mistakes disenfranchised voters, FOP had an unfair advantage in the election process and that military addresses should have been utilized for those eligible voters serving their country.

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Appearances:

For the Public Employer,
Peter C. Harvey, attorney general
(Stephan M. Schwartz, deputy attorney general)

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

For the Intervenor,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Robert A. Fagella, of counsel)

DECISION

On March 18, 2003^{1/}, the New Jersey Corrections Association,
Inc., affiliated with the Fraternal Order of Police (FOP), filed

^{1/} All events in this matter occurred in 2003.

a representation petition seeking to represent certain law enforcement personnel employed by the State of New Jersey (State) and represented by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association (PBA). The unit is comprised of non-supervisory law enforcement officers from the departments of Corrections, Human Services, Environmental Protection and Energy, and Law and Public Safety, and the Juvenile Justice Commission, Parole Board, Palisades Interstate Park Police and certain State colleges and universities. On March 27, I approved the PBA's request to intervene.

On April 1, the parties entered into an Agreement for Consent Election which provided that the Commission would conduct a mail ballot election among eligible voters beginning on July 1. The Consent Agreement also required the State to provide the Commission as well as the two competing employee organizations with an alphabetized list of all eligible employees who were on the payroll as of March 21.

By letter dated April 15, I notified the parties that I had approved the Consent Agreement, reminded the parties of the deadlines contained in the Agreement and directed the State to post the enclosed Notices of Election which described the election's details. The Notice of Election also advised

employees desiring more information concerning the election to contact us.

On May 30, the State timely delivered the voter eligibility list to the Commission. All parties to the election had the list by June 2. Included on the list were employees' names, addresses, job titles and assigned work facility. The State developed the eligibility list by integrating those employees who are not on central payroll (State colleges and universities and Palisades Interstate Park Police) into the centralized payroll list maintained by the State Department of Treasury.

On June 2, the Commission election agent suggested that the parties review the voter eligibility list for accuracy as to the names and addresses contained therein. In correspondence of the same date, the election agent advised the parties that any changes to the list agreed upon by June 18 would be processed in the initial ballot mailing. Any changes thereafter would be processed as a duplicate ballot and any proposed deletions from the list should be asserted as challenges at the ballot count on July 23.

By letter dated June 23, the Commission election agent again advised all parties regarding how changes to the official voter eligibility list and requests for ballots would be processed. The election agent advised that if the postal service, the employee or any party to the election provided an updated

address, the Commission would remail the ballot to the new address and simultaneously advise all parties. Additionally, the election agent encouraged all parties to copy one another when submitting corrections to the Commission.

Other than a clarification requested by the election agent, no modifications were submitted by the parties before the ballots were mailed to voters. On July 1, ballots were mailed to all voters on the official eligibility list.

On July 7, the FOP advised that approximately 95 corrections officers who graduated from class no. 193 on March 20 were left off of the voter eligibility list. The FOP requested that those officers receive ballots and be permitted to vote in the election. Upon receiving the list of officers in class no. 193 from the State on July 10, the Commission mailed ballots to those officers on the same day. Subsequently, the State and PBA agreed that these officers were eligible to vote in the election.

During the balloting period, a total of 188 ballots were returned by the U.S. Postal Service as undeliverable. The FOP and PBA also submitted requests for duplicate ballots during that period. The Commission requested all parties' assistance in ascertaining correct addresses for these voters. The parties were advised on July 8, that 40 ballots had been returned, on July 9, that 31 had been returned, on July 10, that 8 had been returned, on July 11, that 54 had been returned, on July 14, that

32 had been returned, on July 16, that 2 had been returned, on July 17, that 17 had been returned and on July 18, that 4 had been returned; all as undeliverable. In all cases, the Commission mailed ballots on the same day it received requests for duplicate ballots or corrected information during normal business hours. The Commission simultaneously notified all parties by telefax of the names and addresses of the employees to whom ballots were sent. The employees and/or the organizations provided us with updated addresses for 20 of the 188 returned ballots and those ballots were successfully cast by those 20 voters.

In response to a series of inquiries by the Commission for better addresses for employees whose ballots were returned as undeliverable, the State provided updated addresses for 113 eligible voters on July 22. That same day the Commission mailed ballots to those voters. The State obtained the correct addresses for the 113 employees by comparing the addresses it had in Treasury's centralized payroll with the addresses it also had in the Department of Corrections' central payroll or at the local correctional facility where the employee worked. The State did not perform a similar investigation for any eligible voter who did not work in the Department of Corrections.

By July 22 -- the end of the balloting period -- there were still 55 ballots that had been returned to us as undeliverable

for which the parties never provided the Commission with better addresses. Thus, ballots were never remailed to those employees.

In accordance with the Consent Agreement, the ballot count took place on July 23. Each party was afforded the opportunity to have five election observers during the count. At no time during the ballot count did any party challenge a voter's eligibility on the grounds that the voter was no longer employed by the State or otherwise not in the negotiations unit.

A total of 3,991 ballots were cast out of approximately 7,000 eligible voters. Of the 3,991 ballots cast, 1,998 votes were for the FOP; 1,917 votes were for the PBA; 12 votes were cast for having no representative and 64 ballots cast were voided for a variety of reasons. The FOP had garnered 81 more valid votes than the PBA and a majority of the valid votes cast.

At the conclusion of the ballot count, the parties were advised that in accordance with N.J.A.C. 19:11-10.3, the Commission would certify the results of the election unless objections were filed within five business days of the count and receipt of the tally of ballots. In this case, the fifth business day was on July 30.

On July 30, the PBA filed election objections asserting that the State failed to provide a complete and accurate voter eligibility list as required under Commission election rules (N.J.A.C. 19:11-10.1). In particular, the PBA contended that the

State did not provide the correct mailing addresses of 113 eligible voters until July 22, nor did it provide the last known mailing addresses for approximately 85 employees on military leave which effectively disenfranchised these otherwise eligible voters. The PBA also argues that the Commission should open and count 130 ballots which we retrieved from the post office box on July 29 because the post office made mistakes interpreting some of the return addresses on the ballot return envelopes which may have caused those ballots to have been received past the July 23 deadline. Though not contained in its list of election objections but raised in the certification of Local 105 President Edward Murphy filed in support of the PBA's election objections, the PBA asserts that the FOP did not follow election process rules when it failed to provide all other parties with a copy of address correction requests. The PBA maintains that this gave the FOP an unfair advantage in contacting those voters.

In its July 30 submission, the PBA requests, as a remedy, that those voters who were effectively disenfranchised through no fault of their own be given an opportunity to vote in the election. Instead of setting the election aside, the PBA requests that the Commission remail ballots to the 113 employees whose correct addresses were not provided until July 22 and the approximately 85 employees away on military leave; and open the 130 ballots retrieved from the post office box on July 29.

On July 31, the PBA submitted an additional election objection. The PBA contends that approximately 116 employees who were no longer employed in the negotiations unit at the time of balloting were included on the voter eligibility list provided by the State and may have inappropriately voted in the election. These employees, the PBA asserts, were ineligible to vote because they were terminated, promoted out of the unit or retired between the voter eligibility cut off date of March 21 and the time the ballots were mailed on July 1. With no effective way to separate the eligible ballots from the ineligible ballots once commingled at the count, the PBA now requests that the entire election results be set aside and the election be run again.

* * *

I opened an investigation into the election objection alleging that the State did not provide a complete and accurate voter eligibility list as required by N.J.A.C. 19:11-10.1, which perhaps disenfranchised 113 civilian voters and approximately 85 voters in active military service. I did not open an investigation into the election objection concerning the possibility that certain alleged ineligible employees voted, finding that this objection was untimely asserted under N.J.A.C. 19:11-10.3. I directed the FOP and State to respond to the allegation that the State did not substantially comply with N.J.A.C. 19:11-10.1. I gave them until September 2 to submit

their respective facts and legal positions on this issue.^{2/} Both the State and FOP requested extensions of time to file their papers. The PBA consented to the extensions. By September 10, all submissions were received by the Commission.

After reviewing the initial materials submitted by the FOP and State, I continued the investigation and directed the State to file additional information by September 26 regarding the addresses it had for certain employees before June 2 when the voter eligibility list was due. With the consent of the other parties, I granted the State's request for an extension to file the requested supplemental information. On October 3, the Commission received the State's submission.

On October 7, the PBA requested an opportunity to reply to the State's supplemental submission. On October 8, I afforded the PBA and FOP the opportunity to reply to the State's submission and additionally gave the PBA the opportunity to respond to the arguments raised in the FOP's earlier submission. Reply briefs were received by October 17. Our investigation reveals the following.

^{2/} On August 29, the PBA filed an appeal with the Commission of my decision not to investigate whether ineligible voters cast ballots in the election with the Commission. By letter dated September 5, the Chair of the Commission advised the PBA that its appeal was premature as the Director had not made a final determination on that issue.

As undeliverable ballots were returned to the Commission, we asked all parties for assistance in obtaining accurate addresses so that the ballots could be remailed with adequate time for those employees to cast viable ballots. On July 22, the State supplied updated addresses for 113 of the 168 employees who never received a ballot. The State ascertained the correct addresses by researching information that the Department of Corrections already possessed. On July 14, the State forwarded the lists of undeliverable ballots of July 8, 9, 10, 11 and 14 to the Department of Corrections. The July 16, 17, and 18 lists were forwarded by the State to the Department of Corrections on July 18. No other State departments were asked to do similar research during the election process. During the post-election investigation, seven other updated addresses were discovered by the State. Though specifically asked as part of our investigation, the State did not indicate whether or not it had any or all of the updated addresses before June 2 when the voter list was due. Therefore, we assume that it did possess better addresses for those 120 employees all along.

As to the remaining 48 employees who never received a ballot, two employees had the same address on file at both the Departments of Corrections and Treasury. Five of the 48 employees are no longer employed by the Department of Corrections, though it is unclear whether they work at a

different State department included in the voting unit or whether their employment was terminated. It is also unclear whether the State had more accurate addresses for the remaining 41 employees.

The PBA has supplied us with a list of 107 employees on military leave. Allegedly, these employees were disenfranchised because ballots were sent to their civilian addresses not the military address listed on their activation orders. Of the 107 employees, 37 voted in the election. Twenty-one of the 107 names on the list do not appear on the official voter eligibility list, and are presumptively ineligible. Eleven eligible employees were on military leave for only part of the time during which the election was run and, therefore, were not precluded from casting a timely ballot. Significantly, the PBA has not provided any direct evidence, by affidavit or otherwise, from the voters themselves that would support the contention that they did not vote or that they did not receive a ballot because they officially changed their address to the military location yet their ballot was wrongly mailed to their home rather than their military address.

In the Department of Corrections, if an employee wishes to change her/his mailing address of record s/he must affirmatively do so. Military addresses are viewed as temporary. Should an employee request that her/his permanent mailing address be changed to the military address, it will be changed at the

departmental level. For an employee to change her/his address in the centralized payroll system maintained by the Department of Treasury, s/he must submit that change on a federal withholding tax form. In this case, neither the Department of Corrections nor the Department of Treasury received a single request to change a civilian address to a military address from any eligible voter during the election process.

ANALYSIS

Elections conducted by the Commission carry a presumption that the voters' choice in a secret ballot election is a valid expression of their representational wishes. The objecting party must establish, through evidence, that a direct nexus exists between the alleged objectionable conduct and the freedom of choice of the voters. City of Jersey City and Jersey City Public Works Employees, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd sub. nom. Am. Fed. of State, County and Municipal Employees, Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971), citing NLRB v. Golden Age Beverage Co., 415 F.2d 26, 71 LRRM 2924 (5th Cir. 1969); see also Magnolia Bd. of Ed., D.R. No. 2001-5, 27 NJPER 116 (¶32042 2001); Hudson Cty. Schools of Technology, D.R. No. 99-14, 25 NJPER 267, 268 (¶30113 1999).

N.J.A.C. 19:11-10.3(h) sets forth the initial standard for review of election objections:

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 the specific evidence supporting its claim of irregularity in the election process.

Pursuant to N.J.A.C. 19:11-10.3(i), the Director of Representation must then review the objections and supporting evidence to determine "if the party filing objections has furnished sufficient evidence to support a prima facie case." The truth of the specific evidence offered by the objecting party is assumed. If the evidence submitted is not enough to support a prima facie case, the Director may dismiss the objections immediately. If sufficient evidence is submitted, then, and only then, will the Director investigate the objections. See State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd NJPER Supp.2d 123 (¶104 App. Div. 1982).

The standard of review of election objections contemplated by N.J.A.C. 19:11-10.3(i) was discussed in Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986). There, the Director of Representation explained:

This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. The first is a substantive component: the allegation of conduct which would warrant setting aside the

election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present in order for an investigation to be initiated. If this two-prong test is not met, the objections will be dismissed. [Id. at 314.]

See also Essex County Probation Department, D.R. No. 87-20, 13 NJPER 170 (¶18076 1987).

Applying the above standards, I initiated an investigation into whether the State had provided a complete and accurate election eligibility list as required by N.J.A.C. 19:11-10.1.

Objection #1: Whether the State provided an accurate voter eligibility list.

The PBA asserts that the State did not provide an accurate voter eligibility list by June 2, as required by the Agreement for Consent Election and N.J.A.C. 19:11-10.1. The PBA alleges that this in turn caused voters, through no fault of their own, to be denied a ballot in time to vote in the election. The PBA further claims that once the problem became known during the balloting process, the State took too long to provide more accurate addresses, leaving no time for the affected voters to receive and return their ballots.

There are two categories of employees which the PBA asserts were effectively disenfranchised from voting due to the

inaccurate voter eligibility list: (1) employees in active military service and (2) employees listed on the eligibility list with inaccurate addresses.

Both the State and the FOP contend that this election objection should be dismissed because the State substantially complied with the requirement to provide a complete and accurate voter eligibility list. They assert that the inaccuracies resulted in less than 3% of ballots returned as undeliverable. Moreover, they argue that once it was discovered that there were address inaccuracies, it was the responsibility of all parties to endeavor to provide the Commission with correct employee addresses.

* * *

A. Military Leave

The PBA maintains that an employee who is activated for military duty must submit to the State his military orders which contain a military address. Therefore, the PBA argues that the State had military addresses for employees on active duty before June 2 and should have used them in the eligibility list for election purposes.

The State contends that it provided the Commission with the last known mailing addresses of all eligible voters on active duty. The State argues that there is a change of address procedure in place which it has a right to rely upon and that no

employee on military duty has requested that his/her official mailing address be changed to the military address.

The FOP adds that the PBA has not provided any evidence that employees in active military service did not vote because the ballots were mailed to their civilian addresses. The FOP asserts that active military duty does not necessarily equate to being stationed far from home or mean that mail was not promptly forwarded to an eligible voter.

The Agreement for Consent Election was signed by all parties to the election. It required the State to provide the home addresses of eligible voters. N.J.A.C. 19:11-10.1(a) requires, in pertinent part, that the employer provide the last known mailing addresses of eligible voters. In the context of this case, and reading the Consent Agreement in conjunction with the Commission rule, the only fair meaning of "last known mailing addresses" is the home addresses of eligible voters. The State complied with the terms of the Consent Agreement and the requirements of Commission rules when it provided the home addresses of eligible voters.

Additionally, the PBA has not substantiated its claim that employees on active military duty did not vote because their ballots were not mailed to military addresses. Of the 107 names submitted by the PBA, 37 in fact voted in the election, 21 did not appear on the voter eligibility list and 11 were not serving

in active duty during the entire election period and, consequently, could have voted. This leaves 38 eligible voters that under the PBA's contention were arguably disenfranchised. However, the PBA has failed to provide a single affidavit from an affected voter or any other evidence establishing that these employees were prevented from voting.

Consequently, I dismiss this portion of objection 1.

B. Eligibility list address inaccuracies

N.J.A.C. 19:11-10.1 states, in pertinent part:

(a) In all representation elections conducted pursuant to this subchapter, unless otherwise directed by the Director of Representation, the public employer is required to file simultaneously with the Director of Representation and with the employee organization(s) an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters and their last known mailing addresses and job titles. In addition, the public employer shall file a statement of service with the Director of Representation. In order to be timely filed, the eligibility list must be received by the Director of Representation no later than 10 days before the date of the election. The Director of Representation shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

(b) Failure to comply with the requirements of this section may be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-10.3(h).

In reviewing objections which allege employer non-compliance with this rule, the Commission has analyzed whether an employer has substantially complied with the requirements of 10.1(a).

County of Monmouth, P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982); Trenton Board of Education, D.R. No. 2000-7, 26 NJPER 148 (¶31058 2000); Jersey City Medical Center, D.R. No. 83-37, 9 NJPER 411 (¶14188 1983). In the context of these three on-site election cases, the Commission reasoned that the primary purpose of the eligibility list is to provide the employee organization(s) with a reliable means to communicate with voters so that the voters could make a more fully informed choice in a free and fair election. See Excelsior Underwear, Inc., 156 NLRB 1236, 61 LRRM 1217 (1966). In Excelsior Underwear, the issue addressed was whether the employer(s) had substantially complied, *i.e.*, whether the eligibility list was timely delivered and sufficiently complete and accurate so that the employee organization(s) could communicate with voters. In determining substantial compliance, we do not rely on a mechanical approach but consider numerous factors. See Trenton at 150.

However, in the context of a mail ballot election, the eligibility list takes on an additional important purpose. The list becomes the conduit by which the Commission provides voters with ballots. As in Trenton, Monmouth and Jersey City, in a mail ballot context, the Commission is dependent on the completeness

and accuracy of the employer-prepared eligibility list to accomplish its duty to provide a ballot to each eligible voter.

The Commission has looked to National Labor Relations Board (NLRB or Board) precedent in analyzing cases concerning eligibility list compliance.^{3/} The NLRB has not applied Excelsior Underwear mechanically and does not mandate setting aside an election, upon objection, if the employer has substantially complied with its obligation to provide an election eligibility list. Following NLRB case law, the Commission held in County of Monmouth that where omissions from the list do not result from bad faith or gross negligence, an employer will be found to have substantially complied with the rule when it inadvertently omits a small percentage of eligible voters from the list even when the outcome of the election is close. See Telonic Instruments, 173 NLRB 87, 69 LRRM 1398 (1968) (union lost by one vote; Board found substantial compliance despite omission of four names out of 111 eligible voters); West Coast Meat Packing Co., 195 NLRB 21, 79 LRRM 1199 (1972) (union lost by two votes; Board found substantial compliance despite omission of two of 44 names from eligibility list and five challenged ballots);

^{3/} In Lullo v. Int.'l Ass'n of Firefighters, 55 N.J. 409 (1970), the New Jersey Supreme Court recommended that the decisions of the NLRB serve as a guide for decisions and policies interpreting the New Jersey Employer-Employee Relations Act, especially in the area of representation proceedings.

Kentfield Medical Hospital, 219 NLRB 32, 89 LRRM 1697 (1975) (finding that omission of 5 names out of 82 eligible voters, or 6%, did not warrant setting aside election notwithstanding that the union lost by only 3 votes). Thus, the Commission found that the County had substantially complied with the requirement to provide an election eligibility list despite a small percentage of omission errors. In doing so, the Commission noted that the six eligible voters omitted from the lists did, nevertheless, vote in the election.

Over the years, NLRB case law has dealt with two types of election list errors: (1) omissions of names and/or addresses and (2) inaccuracies of addresses. Absent a finding of bad faith or gross negligence, the Board has treated omissions more seriously than inaccuracies in determining whether an employer has substantially complied with the Excelsior Underwear rule.

In omission cases, historically, the Board primarily focused on the percentage of omissions relative to the number of employees in the unit in evaluating whether an employer substantially complied, where bad faith or gross negligence was not an issue. See, Telonic Instruments; West Coast Meat Packing Co.; Kentfield Medical Hospital. Recently, however, the Board reconsidered its approach to omission cases in Woodman's Food Markets, Inc., 332 NLRB 503, 165 LRRM 1209 (2000).

In Woodman's Food Market's, Inc., the Board considered an election objection which asserted that the employer did not provide a complete and accurate voter eligibility list because the list omitted the names of 12 (6.8%) eligible voters. As this was an on-site, in-person election, the Board focused on the union's ability to communicate with eligible voters and the voters' ability to make an informed decision at the polls.

In overruling prior cases that relied solely on percentages, the Board stated:

Nevertheless, in applying the "substantial compliance" rule, the Board in some cases has declined to set aside the election on the ground that the number of omissions constituted only a small percentage of the total number of eligible voters, even though the number of omissions involved a determinative number of voters. See, e.g., Kentfield Medical Hospital, 219 NLRB 174, 175 (1975) (finding that omission of 5 names out of 82 eligible voters, or 6%, did not warrant setting aside election notwithstanding that union lost by only 3 votes).

We find that this approach - which focuses solely on the percentage of omissions relative to the number of employees in the unit - fails to adequately effectuate the purposes of the Excelsior rule. Accordingly, while we will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions. [165 LRRM at 1210.]

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Accordingly, we overrule our prior cases to the extent they have [focused on a single factor] and hold that whether the omissions involve a determinative number of names must be considered in determining whether to set aside the election. [Id. at 1211.]^{4/}

In cases prior to Woodman's Food Markets, Inc., the Board used a mathematical percentage of error in cases where addresses were inaccurate and there was no showing of bad faith or gross negligence. In Mod Interiors, Inc., 324 NLRB 164, 156 LRRM 1049 (1997), the Board ordered a new election where 40 percent of the addresses on the voter eligibility list were inaccurate. However, as summarized by the administrative law judge in Medic One, Inc., 331 NLRB 464, 171 LRRM 1295 (2000):

. . . the Board has yet to find that an address inaccuracy rate below 40 percent constituted insubstantial compliance. For instance, in Lobster House, 186 NLRB 148 (1970), inaccuracies on the Excelsior list were found to be of an insubstantial nature to affect the results of the election, when 20 out of 97 addresses were erroneous (a 16 percent error rate). Similarly, in West Coast Meat Packing Co., 195 NLRB 37 (1972), where 22 percent of addresses on the Excelsior list was deemed inaccurate, the inaccuracies were not found to be substantial enough to require setting aside the election. In that case, the addresses had been drawn from the W-4 forms completed by employees. In Days Inns of America, 216 NLRB 384 (1975), 13.2 percent of voter addresses were

^{4/} In Woodman's, the Board specifically reserved on the issue of whether the policy expressed with respect to the omission of names should also apply to incorrect addresses. 165 LRRM at 1211, n. 11.

incorrect, those addresses also having been drawn from employee personnel forms. In Fountainebleau Hotel Corp., 181 NLRB 1134 (1970), the Board found substantial compliance with the Excelsior requirement despite inaccuracies on the list which involved 18 percent of eligible voters. In Women in Crisis Counseling & Assistance, 312 NLRB 589 (1993), there was a 30-percent inaccuracy rate, and the Board ruled that the employer had substantially complied with the requirements of the Excelsior rule by providing the full names and addresses of all the eligible voters it had on file.

It should be noted that in all these cases, there was no showing of bad faith or gross negligence, and the errors involved inaccuracies and not the omission of eligible voters from the list. Notable also in some of these cases, the vote was close enough to have been possibly affected by the number of errors on the list. For instance, in Lobster House, the vote was 27 yes and 41 no; in West Coast, the vote was 17 yes and 19 no; in Fountainebleau, the vote was 125 yes and 138 no. [331 NLRB at 472.]

Medic One, Inc. concluded by finding that an inaccurate address rate between 8.6% and 12.96% was not enough to support a finding of non-compliance under the facts of that case.

At least one Board administrative law judge has extended the Woodman's Food Markets, Inc. test to address errors on election lists. In Washington Fruit and Produce Company, 2000 WL 33665596, 2000 NLRB Lexis 932 (NLRB Div. of Judges 2000), the election list had over 28% of the employees' addresses wrong (87 incorrect addresses). The union lost the election by 40 votes. The number of inaccurate addresses exceeded the margin of loss by

the union and were thus determinative. In ordering a new election, the administrative law judge first emphasized the importance of a union having correct addresses in order to communicate with eligible voters. He then went on to discuss the care and diligence an employer should take in preparing the eligibility list in the first place and in promptly correcting any errors as they surface. Though the errors were not made in bad faith, the ALJ stated:

I think it is fair to conclude that he did not give the task the professional attention that it deserved. He was not conscientious as impelled by Thrifty Auto Parts, supra. He did not correct the first errors which were brought to his attention until 3 days before the election, even though he had been notified of them almost 3 weeks earlier. He may well have been handicapped by the holiday season or by the time the Company took to find out the new addresses, but neither of these serves as a valid excuse.

The only proper approach here was to have ascertained the correct addresses in the beginning. Respondent knew . . . that the database of addresses was not up-to-date. Efforts should have been made to obtain the correct addresses immediately upon the signing of the stipulated election agreement. He should have impressed upon Respondent the need for accurate addresses.

. . . Respondent should have provided an Excelsior list with correct addresses. If there were nothing else in this case, the election must be overturned on this basis alone and a new election ordered. [2000 NLRB Lexis at 274-275.]

It is important to note that all of the above-cited Board cases took place in the context of on-site, in-person elections. Thus the Board's analysis emphasized the importance of the union's ability to communicate with eligible voters so that they can make an informed decision when they cast their ballots. While this is an important consideration, errors on the eligibility list in mail ballot elections can have a far more prejudicial impact. Not only can they lead to an uninformed voting electorate, but they can also lead to the complete disenfranchisement of voters.

Accordingly, extending the concepts set forth by the Board in Woodman's Food Market, Inc. to mail ballot elections, a multi-factor determination is appropriate to ascertain whether the inaccuracies or omissions in an eligibility list warrant setting aside an election.^{5/} We consider the following factors:

^{5/} The FOP has urged that we follow the result of a strikingly analogous case decided by a hearing officer of the California Public Employment Relations Board (PERB) and adopted without exceptions by California PERB. In California State Employees' Association, S-SR-6, 6 PERB ¶13048 (1982), the hearing officer dismissed an election objection claiming non-compliance in preparing the Excelsior list where 6.3% of the addresses on the list were inaccurate, reduced to 5.8% by corrective efforts. The list's margin of error was determinative in a state-wide mail ballot election for corrections officers. The hearing officer relied on NLRB case law to arrive at his decision. The NLRB cases that he relied upon, however, were prior to the Board's ruling in Woodman's Food Markets, Inc. Consequently, I have chosen not to follow the California case.

- 1) the percentage of eligible voters who were affected by the inaccuracies or omissions;
- 2) whether the number of affected voters is determinative of the election outcome;
- 3) the employer's explanation for the eligibility list deficiencies;
- 4) whether the deficiency resulted from gross negligence or bad faith;
- 5) the employer's diligence in correcting list deficiencies once identified;
- 6) the size of the collective negotiations unit;
- 7) whether actions available to employees could have remediated the disenfranchisement; and
- 8) other relevant factors.

In the instant case, the State provided an election eligibility list with 188 inaccurate addresses out of approximately 7000. The initial error rate of undeliverable ballots was 2.7%, which was reduced to 2.4% through the corrective actions of the FOP and PBA (leaving 168 undeliverable ballots). Our investigation revealed that of the 168 remaining undeliverable ballots, the State had 120 correct addresses when it initially prepared the election eligibility list for the June 2 delivery. Of the remaining 48 employees, it was discovered that the State did not have a better address for two of them. It could not be determined whether more accurate addresses were available for the remaining 46. Thus, the adjusted rate of error attributable to the State is 2.37%.

The PBA lost the election by a margin of 81 votes. The State had more accurate addresses for as many as 166 eligible voters who did not receive ballots in time to vote. I find that 166 eligible voters were disenfranchised as the result of the list inaccuracies, a margin which could affect the outcome of the election.

It certainly should be the employer's goal to submit a perfectly accurate Excelsior list, as required by the Commission's rule, and that is typically the case. However, as a practical matter, we recognize that on rare occasion, eligibility lists which contain errors are provided to the Commission. County of Monmouth. Standing alone, a 2.37% error rate is insufficient to warrant setting aside an election. Here, however, the rate of error exceeds the margin of votes cast in favor of the winning employee organization, and, therefore, could affect the outcome of the election. Accordingly, we will examine the remaining factors enumerated above.

There has been no claim, and the evidence does not support, that the State acted in bad faith during the election process. The State knew and understood the importance of providing a complete and accurate list in a mail ballot election and to that end, submitted an eligibility list which was 97.63% accurate. The State supplied a list which apparently it believed to be complete and accurate as of June 2. However, it had more

accurate addresses in its data base all along. With additional care and the due diligence it eventually performed, it would have provided a more accurate list in the first place. The State had from April 1 to June 2 to prepare the list. It is this initial error, which effectively disenfranchised at least 120 voters, which set the stage for the problems in this election.

The State and FOP have argued that the inaccurate address problem was caused by the employees themselves when they changed their addresses only at the local institutions and not with centralized payroll at the Department of Treasury. They contend that this occurred because, with the advent of direct deposit of paychecks, it is no longer necessary for employees to change their addresses at centralized payroll. However, the practice of employees changing their addresses locally but not at centralized payroll is widely known. The State knew or should have known that the addresses maintained at the Department of Treasury's centralized payroll would probably not be as accurate as those kept at the departmental level.

Once the ballots were mailed on July 1 and the inaccurate address problem was exposed as ballots were returned to the Commission as undeliverable, it was a difficult task for the parties to remedy during the three weeks before the count. Nevertheless, the State did not exhibit the urgency that the circumstance dictated. The parties were notified of the

undeliverable ballots on a rolling basis as they were returned to the Commission. By July 11, the parties had already been notified of 133 returned ballots. Instead of dealing with the returns as they were delivered, the State waited until July 14 to send the entire bundle of ballots, which had now swelled to 165 returns, to the Department of Corrections. The State took the same approach again with the July 16, 17 and 18 returns. This resulted in the Commission not receiving the 113 corrected addresses until July 22, which made it a virtual certainty that those voters, through no fault of their own, would not be able to vote in the election. Additionally, the State never attempted to investigate its records for the addresses of those unit employees working outside of the Department of Corrections.

Under the circumstances, it cannot be said that the State made the kind of conscientious effort to correct the addresses as envisioned and required by Thrifty Auto Parts, 295 NLRB 1118, 131 LRRM 1801 (1989), and as expected by this Commission. See also Washington Fruit and Produce Company; Laidlaw Medical Transportation, 326 NLRB 925, 160 LRRM 1107 (1998).

The State and FOP contend that it was the responsibility of all parties to correct the addresses once the problem became known and nothing prevented voters who had not received a ballot from requesting one during the process. There is some merit to the State's and the FOP's contention. Voters bear some

responsibility to act affirmatively to obtain a ballot during the course of an election and are so advised in our Notice of Election. With Notices of Election posted and both employee organizations engaging in active campaigns, it is unlikely that during the three week balloting period voters were not aware that an election was in progress and of whether they had received a ballot in the mail. In fact, the PBA, FOP, and individual voters did submit address corrections and requests for ballots during the course of the election. However, this does not relieve the State of its obligation to provide a complete and accurate eligibility list in the first instance and to take aggressive corrective measures when a problem arises. This argument only serves to deflect the focus from the State's responsibility under N.J.A.C. 19:11-10.1 to provide all parties with an initial eligibility list which accurately states employees' last known mailing addresses.

In light of the foregoing, I find that the State did not substantially comply with the requirements of N.J.A.C. 19:11-10.1(a) when it provided incorrect addresses on the election eligibility list which, in the aggregate, ultimately proved to be adequate to effect the outcome of this mail ballot election and failed to promptly and adequately remediate those deficiencies. I find that under these facts, such breach of the Commission's

rule warrants the setting aside of the election as a matter of law.

Objection #2: Whether postal mistakes affected election results.

The PBA claims that postal errors caused the late delivery of the 130 ballots which we picked up on July 29. It urges that we open and count those ballots. The only evidence proffered by the PBA to support its claim is a certification by Edward Murphy, which states in pertinent part:

The PBA believes there are numerous reasons to conclude that these ballots may have been received late through postal error, and certainly not through any fault of the voter. Indeed, several unit members have advised us the Post Office erroneously returned the ballot to the voter - rather than PERC - because the Post Office misunderstood the method used by PERC in addressing the envelopes.

As an initial matter, all parties specifically agreed to a mail ballot election. Indeed, the most practical way to conduct this election was by mail. This case comports with Cty. Of Bergen, D.R. No. 2003-9, 28 NJPER 463 (¶33170 2002), where we explained the considerations which go into the determination of whether to conduct a mail ballot or on-site election.

No system of balloting is perfect. However, when a mistake occurs that is so significant as to disenfranchise voters, the Commission will take appropriate action. See Rutgers University,

D.R. No. 2000-12, 26 NJPER 241 (¶31095 2000), req. recon. den.,
P.E.R.C. No. 2000-101, 27 NJPER 1 (¶32000 2000) (where we ordered
114 ballots opened and counted because the United State Postal
Service, due to no fault of the voter, failed to timely place the
ballots in the Commission's post office box.)

Here, the PBA has failed to provide specific, competent
evidence to support its objection. The evidence it has supplied
is too general and amounts to mere speculation. The PBA has not
provided names or affidavits of any voter allegedly
disenfranchised by postal errors. Thus, the PBA has not carried
its burden of proof. This objection is dismissed.

**Objection #3: Whether the FOP timely provided the parties with
address corrections.**

The PBA contends that the FOP did not follow the election
process rules when it failed to provide all other parties with a
copy of address correction requests. The PBA argues that this
gave the FOP an unfair advantage in contacting those voters.

While it is true that the election officer asked the parties
to copy each other with such requests, under the facts of this
case, no harm resulted from the FOP's alleged non-compliance.
Here, the Commission was able to process address correction
requests by getting the ballots out on the same day the request
was made. Moreover, we notified all parties of the names and

corrected addresses that same day by telefax. The gap in time between when the FOP should have copied the PBA and when the PBA actually received the information from us is insignificant. The conduct complained of did not give the FOP an unfair advantage in the election process and does not warrant setting aside the election as a matter of law. Hence, I dismiss this objection.

Objection #4: Whether ineligible voters were included on eligibility list and may have voted.

The PBA asserts that approximately 116 ineligible employees appeared on the eligibility list and may have voted in the election. As an initial matter, N.J.A.C. 19:11-10.3(h) provides that election objections be filed within five days after the tally of ballots has been furnished to the parties. In this case, the tally of ballots was furnished to the parties at the conclusion of the ballot count on July 23. Timely election objections were due by July 30. The PBA did not file this objection until July 31.

The PBA contends that this objection is merely an extension of its timely objection that the State failed to provide a complete and accurate voter list. Further, the PBA avers that I should liberally construe PERC rules to prevent an injustice in this case.

I find this objection to be untimely and is, therefore, dismissed. Even assuming arguendo that this objection were timely, I dismiss it on the following grounds:

N.J.A.C. 19:11-10.3(c) in pertinent part provides that employees who have retired or were discharged for cause prior to the commencement of the election and who have not been reemployed before the counting of ballots are ineligible to vote. This rule naturally extends to employees who are promoted out of a voting unit but are still employed by the same employer. Cumberland Cty. Bd. of Soc. Serv., D.R. No. 2003-15, 29 NJPER 150 (¶43 2003).

All parties to the election who receive the voter eligibility list in advance of the election have some degree of responsibility to review it for accuracy. The process, as codified in N.J.A.C. 19:11-10.3(d) and (e)^{6/}, gives the parties

6/ N.J.A.C. 19:11-10.3(d): Unless otherwise approved by the Director of Representation or by the election agent, all observers shall be non-supervisory employees of the public employer. Each party shall be allowed an equal number of observers. Observers shall:

1. Act as checkers at the voting place and in the counting of the ballots;
2. Assist in the identification of voters;
3. Challenge the eligibility of voters and ballots; and
4. Otherwise assist the election agent.

N.J.A.C. 19:11-10.3(e): An observer or the election agent
(continued...)

an opportunity by way of observers to challenge the eligibility of voters and ballots during the ballot count on the day of the election.

Here, the PBA and FOP had the eligibility list by June 2. They were specifically encouraged by the election agent to review the list for accuracy and submit proposed changes before the initial mailing on July 1. By Notices of Election as well as by letter of April 15, we apprised all parties of their right to assert challenges to voter eligibility at the July 23 ballot count.

The parties had an additional 22 days to continue their review of the eligibility list before the ballot count on July 23. Each party was allowed five election observers during the checking and opening of the ballots. During the entire election process, not one employee ballot was challenged on the grounds

6/ (...continued)
may challenge the eligibility of any person to participate in the election. Such challenge must be asserted before a person casts a ballot and shall be recorded in writing specifying the name of the challenged person, the name of the challenging party, and the reason for the challenge. All persons whose names do not appear on the eligibility list maintained by the Commission election agent shall automatically be challenged by the election agent. A challenged voter shall be permitted to vote and the ballot shall be sealed in an appropriate challenge ballot envelope after the voter marks the ballot, which sealed envelope shall be dropped in the ballot box. At the conclusion of the balloting, the parties may be provided the opportunity to resolve the challenged ballots, subject to the approval of the election agent.

that the employee was no longer included in the negotiations unit.

Election objections are not an appropriate substitute for asserting a challenge to the eligibility of particular voters. Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002) req. recon. den., P.E.R.C. No. 2003-26, 28 NJPER 438 (¶33161 2002); Magnolia Bd. of Ed.; Tp. of Hainesport, D.R. No. 94-14, 20 NJPER 100 (¶25050 1994). The PBA had both the obligation and the opportunity to affirmatively assert challenges to any ballots cast by employees it believed were retired, promoted or terminated for cause before the ballot count. It did not do so. I dismisses this objection.

REMEDY

As recited above, on July 30, the PBA filed timely election objections. Among other things, it sought a remedy calling for the Commission to remail ballots to the 113 eligible voters whose correct addresses were not provided until July 22. It did not ask for the election to be set aside and run again. On July 31, the PBA submitted an additional objection. In that objection, it sought a remedy requiring that the election results be set aside and a new election conducted. The July 31 objection was dismissed on the grounds that it was untimely filed and lacked merit to warrant setting aside the election. Thus, the PBA's

only viable remedial application seeks the remailing of the 113 ballots.

As many as 166 eligible voters were disenfranchised from the election process. For the reasons stated in the analysis of objection number one, above, the election is set aside. I have not discovered any precedent, nor has any been cited to me, that would support the conduct of a limited election among only the 166 disenfranchised voters. Under the facts of this case, I find that laboratory conditions are best achieved by conducting another election among all eligible voters.

ORDER

Election objections numbers 2, 3 and 4 are dismissed. The part of election objection number 1 concerning active military service addresses is also dismissed. The part of objection number 1 concerning the inaccurate eligibility list is sustained and the election results of July 23 are set aside and a new election is directed.

I **ORDER** that a new election be conducted in accordance with this decision in the unit described in the April 1 Agreement for Consent Election as follows:

Included: All law enforcement employees including full-time permanent and provisional employees of the State of New Jersey in the following titles: 12041-Aeronautical Operation Specialist, 32271-Campus Police Officer, 32081-Conservation Officer 3, 32641-Correction Officer Recruit, 40804-Correction Officer Recruit, Juvenile Justice, 32991-Inspector ABC, 61769-Parole Officer, Recruit, 40803-Parole Officer Recruit,

Juvenile Justice, 32332-Police Officer Health Care Facility, 32352-Police Officer PIP, 32090-Ranger Trainee, 32092-Ranger 1, 32642-Senior Correction Officer, 40808-Senior Correction Officer, Juvenile Justice, 32992-Senior Inspector ABC, 32662-Senior Interstate Escort Officer, 61773-Senior Parole Officer, 40806-Senior Parole Officer, Juvenile Justice, 51342-Special Agent Trainee, 51344-Special Agent 2, 51343-Special Agent 3, 33083-Weights and Measures Inspector I, 33082-Weights and Measures Inspector II, and 33081-Weights and Measures Inspector II.

Excluded: Managerial Executives, Supervisors, State Troopers, employees represented in other certified bargaining units, classifications within the Department of Higher Education except those in the State College System, all other employees of the State of New Jersey not included within the Statewide Law Enforcement Unit, confidential employees and non-police employees.

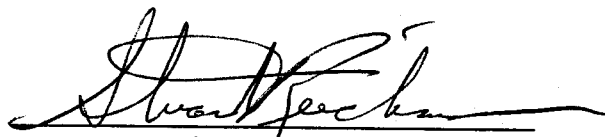
Employees shall vote on whether they wish to be represented for purposes of collective negotiations by the New Jersey Corrections Association, Inc., affiliated with the Fraternal Order of Police or by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association; or not be represented. Those eligible to vote must have been employed during the payroll period immediately preceding the date below^{7/}, 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 or otherwise excluded from the collective negotiations unit since the designated

7/ See Cumberland County, P.E.R.C. No. 2003-89, 29 NJPER 240 (¶72 2003).

payroll period and who have not been rehired or reinstated before the election date. The election will be conducted by mail ballot. Ballots will be mailed by the Commission on February 6, 2004. To be counted, ballots must be received in the Commission's post office box by 10 a.m. on March 3, 2004. The ballot count will commence at 11 a.m. on March 3, 2004 at a location to be announced.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than January 9, 2004. A copy of the eligibility list shall be simultaneously provided to the employee organizations with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.



Stuart Reichman
Director of Representation

DATED: December 12, 2003
Trenton, New Jersey