

D.R. NO. 2003-4

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

In the Matter of

BOROUGH OF KENILWORTH,

Public Employer,

-and-

MICHAEL MAURO,

Docket No. RD-2002-11

Petitioner,

-and-

UNION COUNCIL NO. 8,

Intervenor.

SYNOPSIS

The Director of Representation dismisses election objections filed by Union Council No. 8. Council 8 alleged that the showing of interest submitted in support of the petition for decertification was fraudulent; that two supervisors, including the petitioner's representative, improperly voted; that the petitioner unlawfully coerced unit employees he supervises into decertifying Council 8; and that the shop steward, who is currently suspended from employment allegedly in retaliation for unit activity, was "forbidden" to vote.

The Director finds that Council 8 has not made a prima facie case that any of the conduct alleged warrants setting aside the election as a matter of law. The Director finds that by signing the consent election agreement, Council 8 waived all objections to the validity of the showing of interest or the constitution of the unit which could properly have been raised prior to the execution of the agreement; that objections to the election are not an appropriate substitute for challenging the eligibility of voters at the polls; that Council 8's allegation that the petitioner inappropriately influenced other votes is unsupported by evidence that the conduct occurred; and that Council 8 did not allege that the shop steward sought to vote and was improperly denied that right. Moreover, the Director finds that the participation of the voters in question could not have numerically affected the outcome of the election.

The Director issues a certification of the election results.

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Appearances:

For the Public Employer
Ruderman & Glickman, attorneys
(Allan C. Roth, of counsel)

For the Petitioner
Michael Mauro, representative

For the Intervenor
Loccke & Correia, attorneys
(Michael Bukosky, of counsel)

DECISION AND CERTIFICATION
OF RESULTS

Pursuant to an Agreement for Consent Election, the Public Employment Relations Commission conducted an on-site election among 17 employees of the Borough of Kenilworth's Department of Public Works. The eligible employees voted on whether they wish to continue to be represented by Union Council No. 8. A majority of the valid votes were cast against continued representation.

On August 5, 2002, Council 8 filed timely objections to the election. Council 8 contends that the election results should be voided for the following reasons:

1. The petitioner presented a fraudulent showing of interest to the Commission in support of its petition by merely reattaching signatures previously collected in support of a former representation petition by a rival organization (RO-2002-63);
2. Although supervisory employees were ineligible to vote, two supervisors voted, including Michael Mauro, the petitioner's representative;
3. Mauro unlawfully coerced unit employees he supervises into decertifying Council 8;
4. Shop Steward Joseph Tripodi, suspended by the Borough in retaliation for his union activity, was "forbidden" to vote.

Council 8 requests that the Commission fully investigate the allegations and that the election be set aside.

By letter dated August 6, 2002, I acknowledged receipt of the objections and advised Council 8 of its responsibility to furnish sufficient evidence to support a prima facie case demonstrating that conduct occurred which would warrant setting aside the election as a matter of law. On August 6, 2002, Council 8 submitted an affidavit from its President Edward Lodzinski in support of its objections. It also submitted job descriptions for the positions of mechanic/lead foreman and working foreman in support of its objection that these positions are supervisory and that the employees in these positions improperly voted in the election.

Based upon my review of the procedural history of this matter, together with Council 8's submission, I find the following:

Background

Since 1982, Union Council No. 8 has been the certified majority representative of the Borough's non-supervisory public works employees, except clerical workers.

On June 24, 2002, Michael Mauro filed a timely petition seeking to decertify Council 8 as the majority representative of the defined unit. The decertification petition was supported by an adequate showing of interest.

On July 10, 2002, Council 8, the Borough and Mauro met with the Commission's assigned staff agent to discuss the petition, voter eligibility and the mechanics of a secret ballot election. The parties agreed that those employees in Council 8's historical unit would be eligible to vote in the election. Mauro is employed by the Borough as a working foreman. The titles of "foreman" and "mechanic" have historically been included in the unit represented by Council 8, and each is listed in the salary schedule in Appendix A of Council 8's 1998-2000 collective agreement with the Borough covering this unit.

The parties executed an Agreement for Consent Election, which stipulated the appropriate unit as follows:

Included: All regularly employed non-supervisory employees of the Borough of Kenilworth, Department of Public Works.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft, professional, police and casual employees, employees in other bargaining units, and all other employees. . . .

The Consent Agreement further provided that the Commission would conduct a secret ballot election among the employees in the existing unit, and that the Borough would provide a list of eligible voters pursuant to the terms of the Consent. The Borough provided such a list and served a copy on Council 8 and the Petitioner at the conference. The list contained the names of eighteen employees. Mauro's name appeared on the list of eligible voters. Council 8 never specified the name of the employee holding the position of mechanic/lead foreman. However, that employee's name apparently appeared on the eligibility list as well.

By letter dated July 12, I advised the parties that the Consent Agreement had been approved and provided Notices of Election describing the voting unit, the parties' rights to challenge voters for cause, and other details of the election.

On July 16, 2002, the Borough submitted a revised list of eligible voters, omitting Joseph Tripodi from the list. Council 8 and Mauro were simultaneously sent a copy of the revised list.

On August 1, a staff agent of the Commission conducted an on-site election. The petitioner and the Borough each provided election observers. Mauro acted as the election observer for the Petitioner. Mauro's name appeared on the list of eligible

voters. Council 8 did not designate an employee to act as an election observer on its behalf.

All seventeen employees on the eligibility list cast valid votes. Seven votes were cast in favor of continued representation by Council 8. Ten votes were cast in favor of decertification. There were no challenges to the eligibility of any voters. Specifically, Joseph Tripodi did not attempt to cast a challenged ballot.

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 its evidence, that a direct nexus existed 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 the Director's 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, the Director will 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 find that Council 8 has not shown that the conduct alleged warrants setting aside the election as a matter of law. I will consider each of the objections below:

Objection #1: Challenges to Showing of Interest

In its first objection, Council 8 alleges that the showing of interest presented in support of the decertification petition consisted of signatures solicited in support of a separate, earlier representation petition and were, therefore, fraudulently presented in support of the current petition.

As a threshold matter, N.J.A.C. 19:11-10.3(h) requires that objections to an election assert irregularities in the conduct of the election or conduct which affected the results of the election. This objection concerns the showing of interest supporting the petition, not irregularities in the conduct of the election or conduct affecting the election outcome.

In any event, the showing of interest supporting any Petition for Decertification is required to state that employees no longer wish to be represented for purposes of collective negotiations by the incumbent representative or by any other

employee representative. Additionally, all showings of interest are required to be originals -- no photocopies are accepted.

N.J.A.C. 19:0-1.1. These requirements must be met for the Commission to initiate processing of the petition. In this matter, I determined as a preliminary matter, that the showing of interest conformed to the requirements of the Rule section in every respect, and that the petition should be processed.

In Jersey City Medical Center, D.R. No. 83-19, 8 NJPER 642 (¶13308 1982), the Director stated:

The submission of a showing of interest by a Petitioner is an administrative requirement for the purpose of ensuring that sufficient interest exists among employees on behalf of the petitioner to warrant the expenditure of Commission resources in processing the petition. It is uniquely an administrative concern, and questions relating to its validity must be raised in a prompt manner.

The principles of Jersey City Medical Center, 8 NJPER at 642, were recently reaffirmed by the Appellate Division of the New Jersey Superior Court in City of Newark and the Ass'n of Government Attorneys, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), review den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J. Super. 460 (App. Div. 2002). In that case, the court rejected the employer's argument that the showing of interest submitted in support of a petition to represent certain attorneys was defective, finding:

Any error made in determining a "showing of interest" will be remedied by the election itself. In this case, for example, the election result -- certification of the Association --

discloses a strong likelihood that there was sufficient support for the union at the time the petition was filed. We acknowledge, of course, that this is not inevitably true and that employees who cast their ballots in favor of the Association may have been against the union when first confronted by the question. But measured by the election result, any error in the preliminary proceedings would be considered harmless.

See also Essex Cty., D.R. No. 85-25, 11 NJPER 433 (¶16149 1985); Woodbridge Tp. Bd. of Ed., D.R. No. 77-9, 3 NJPER 26 (1977); City of Jersey City, E.D. No. 76-19, 2 NJPER 30 (1976).

Further, the election herein was conducted pursuant to a Consent Election Agreement which was executed by all parties. If Council 8 believed that the showing of interest in support of the representation petition was fraudulent, or that members of the historical unit were statutory supervisors, the appropriate time to raise those issues was before the Agreement for Consent Election was signed. When Council 8 consented to submit to an election, it waived all issues that could have been properly raised at that time and any objections to the election on those grounds. Essex County Probation Department, D.R. No. 87-20, 13 NJPER 170 (¶18076 1987). Moreover, the high voter turnout, coupled with the election result in favor of decertification, "discloses a strong likelihood that there was sufficient support" for the decertification petition at the time it was filed. City of Newark.

Therefore, I am satisfied that the showing of interest was proper and valid on its face, and that an election was

appropriate to resolve the representation question. Council #8's objection #1 is dismissed.

Objection #2: supervisory employees voted

Council 8 alleges that supervisory employees were improperly included on the list of those eligible to vote in the election, and permitted to vote. Any challenge to the eligibility of particular voters is appropriately raised by the election observers at the polls. N.J.A.C. 19:11-10.3(e), provides in pertinent part:

An observer or the election agent may challenge the eligibility of any person to participate in the election. Such challenge must be asserted prior to the time that a person casts a ballot. . . . A challenged voter shall be permitted to vote and the ballot shall be sealed in an appropriate challenge ballot envelope.

In this case, no employee votes were challenged. In fact, Council 8 did not designate an election observer on its behalf who could have asserted any necessary challenges concerning voter eligibility. Objections to the election are not an appropriate substitute for asserting a challenge to the eligibility of particular voters. Magnolia, D.R. NO. 2001-5, 27 NJPER 116 (¶32042 2001); Tp. of Hainesport, D.R. No. 94-14, 20 NJPER 100 (¶25050 1994).

Moreover, even if the two alleged supervisory employees had voted improperly, and the shop steward had been permitted to vote, the conduct would not warrant setting aside the election as

a matter of law because the exclusion of the two challenged ballots or the inclusion of an additional ballot could not numerically affect the outcome of the election. The Tally of Ballots reveals that all of the 17 eligible voters on the list cast valid ballots. Out of the 17, 7 voted to for Council 8 to continue as the majority representative and 10 voted against representation. If the names of the two employees alleged to be supervisors had been removed from the list of eligible voters, then 15 employees would have been eligible to vote. Assuming the two alleged supervisors voted in favor of no representation, and assuming the shop steward could have voted in favor of representation, the score could at most result in a tie vote of 7 to 7, still resulting in a lack of a majority of valid votes cast in favor of continued representation by Council 8. Accordingly, I dismiss Council 8's objection #2.

Objection #3: Mauro Intimidated Voters:

As stated above, Council 8 cannot now challenge the eligibility of a voters in the objections process. Since Mauro was an eligible voter and a member of the existing unit, he was lawfully entitled to campaign in the election and attempt to influence other unit members in the election, just as union supporters may do. Moreover, Council 8's objection is unsupported by evidence that the conduct occurred. The affidavit submitted by Lodzinski was not based upon personal knowledge of the facts

attested to therein. In Fairview Bd. of Ed., D.R. No. 88-32, 14 NJPER 222 (¶19080 1988), the Director held that "[T]he Commission will not overturn the results of a representation election based solely upon a party's characterization of events." Id. at 223. I therefore dismiss objection #3.

Objection #4: Shop steward was "forbidden" to vote

Council 8 asserts that Joseph Tripodi, a Council 8 shop steward who is currently suspended from his employment with the Borough, was "forbidden" to vote in the election. Although Tripodi's name did not appear on the list of employees eligible to vote in the election, he had the right to cast a ballot pursuant to the Commission's challenged ballot procedure. N.J.A.C. 19:11-10.3(e). Council 8 has not alleged facts or provided evidence that Tripodi sought to exercise that right and was improperly denied the opportunity to vote.

Moreover, as stated above, the inclusion of an additional ballot, even if cast in favor of continued representation by Council 8, would not have been sufficient to affected the outcome of the election. If Tripodi's name had been included on the list of eligible voters, the total number of eligible voters would rise to 18 (if the two alleged supervisors' names were included) or 16 (if they were not). If there were 18 eligibles, and Tripodi cast a ballot in favor of Council 8, the election results could only have resulted in a tally of 8 votes in favor of continued

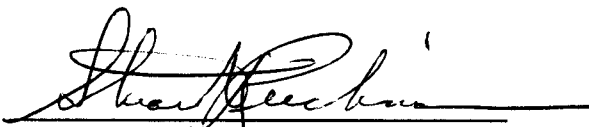
representation to 10 votes against. If there were 16 eligibles, a vote by Tripodi in favor of Council 8 could only have resulted in a tie vote (8 votes in favor of representation and 8 votes against). The Commission will not construe a tied election vote to be in favor of representation; an organization may only be certified by majority vote. Tp. of Hainesport; Evesham Tp. Bd. of Ed., D.R. No. 79-36, 5 NJPER 253 (¶10143 1979). Therefore, either scenario would result in a lack of a majority of valid votes cast in favor of continued representation by Council 8. I therefore dismiss that objection.

Based on all the foregoing, I find that Council 8 did not meet the procedural or evidentiary standards set forth in Jersey City Medical Center to state a prima facie case as to any of its post-election objections. For the above reasons, I dismiss all of the objections.

ORDER

The objections are dismissed. A Certification of Results of the Election is attached.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: August 28, 2002
Trenton, New Jersey

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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Public Employer,	>	
-and-	>	
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MICHAEL MAURO,	>	DOCKET NO. RD-2002-11
Petitioner,	>	
-and-	>	
	>	
UNION COUNCIL NO. 8,	>	
Intervenor.	>	

CERTIFICATION OF RESULTS

An election was conducted in this matter in accordance with the New Jersey Employer-Employee Relations Act, as amended, and the rules of the Public Employment Relations Commission. No exclusive representative for collective negotiations was selected, and no valid timely objections to the election were filed.

Accordingly,

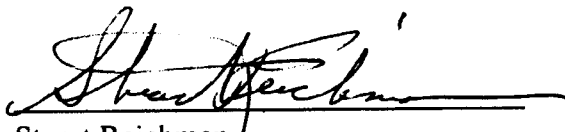
IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast by the employees in the unit described below for any employee organization appearing on the ballot. There is no exclusive representative of all the employees within the meaning of the New Jersey Employer-Employee Relations Act.

The election was conducted in a unit described as:

Included: All regularly employed non-supervisory employees of the Borough of Kenilworth, Department of Public Works.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft, professional, police, casual employees, employees in other bargaining units, and all other employees employed by the Borough of Kenilworth, Department of Public Works.

DATED: August 28, 2002
Trenton, New Jersey


Stuart Reichman
Director of Representation

Attachment: Certification Results
Dated: 8/28/02

In the Matter of

Borough of Kenilworth

-and-

Michael Mauro

-and-

Union Concil No. 8

Docket No. RD-2002-11

Service on the following:

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