

D.R. NO. 2003-10

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

In the Matter of

BOROUGH OF BERNARDSVILLE,

Public Employer,

-and-

Docket No. RO-2003-12

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1158, SUPERVISORS,

Petitioner.

SYNOPSIS

The Director of Representation dismisses objections to an election and certifies the petitioner to represent a unit of supervisors. The employer objected that two employees' ballots were improperly omitted from the ballot count. The Director finds that the first employee did vote and his ballot was in fact counted. The Director concludes that while the second employee's ballot had been inadvertently omitted from the ballot count, the additional vote could not have affected the outcome of the election. Accordingly, the objection was dismissed. An additional objection relating to another employee's non-receipt of a ballot was dismissed as untimely filed.

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Petitioner.

Appearances:

For the Public Employer
Apruzzese, McDermott, Maestro & Murphy, attorneys
(John Miller, III, of counsel)

For the Petitioner
Carella, Burn, Bain, Gilfillan,
Cecchi, Stewart & Olstein attorneys
(David Gilfillan, of counsel)

DECISION AND
CERTIFICATION OF REPRESENTATIVE

On August 21 and September 5, 2002, the International Brotherhood of Electrical Workers Local 1158 (IBEW) filed a Representation Petition with the Public Employment Relations Commission (Commission) seeking to represent supervisors employed by the Borough of Bernardsville (Borough).

The Borough and IBEW executed an Agreement for Consent Election providing for a secret ballot election to be conducted

among the Borough's supervisors to determine whether they wish to be represented for collective negotiations by IBEW Local 1158, Supervisors.^{1/} Pursuant to the terms of the Consent, the Borough supplied the Commission with a list of six employees it believed were eligible to vote. The election began when the Commission mailed ballots to the supervisors on the employer's eligibility list on October 17, 2002. On November 1, 2002, IBEW advised us that Jennie Lin had been omitted from the employer's eligibility list. The same day, we issued a challenged ballot to Lin.

Pursuant to the terms of the consent, ballots must have been received in the Commission's post office box by 10:00 a.m. on November 7, 2002 to be counted. Four ballots were received by and counted on November 7, 2002 with the following results:

For Local 1158, IBEW, Supervisors	3 votes
Against Representation	1 vote

There were no challenged ballots cast. Therefore, a majority of the valid votes counted were in favor of representation by IBEW. The parties were served with the tally of ballots. On November 13, 2002, the Borough filed objections to the election. N.J.A.C. 19:11-10.3(h). The Borough alleges that two supervisors, Robert Nelson and Scott McKay, told management that they mailed in their ballots on time, but that their ballots may not have been counted in

^{1/} A second election was simultaneously conducted among the Borough's clerical employees. The objections relate solely to the supervisors' unit.

the election. The Borough asserts that the votes of these two employees, if received and counted, would have changed the outcome of the election by making the vote 3 to 3.

The Borough submitted affidavits from McKay and Nelson, each stating that they voted against representation and that they mailed their ballots on October 21 and 24, respectively. The Borough asks that the Commission investigate to determine whether these votes were received and properly counted. Additionally, on December 16, 2002 the Borough filed a second objection to the election, alleging that eligible voter Marcia Sudano never received her ballot in the mail.

The IBEW replied to the first objection by letter dated November 21, 2002. It argues that the Commission properly counted all ballots received, and that the Borough has not provided any basis for setting aside the election. The IBEW responded to the Borough's second objection on December 23, asserting that the Borough's second objection is not supported by proofs and that the issue should have been raised during the election, not six weeks after the results. IBEW maintains that the objections should be dismissed.

ANALYSIS

N.J.A.C. 19:11-9.2(h) sets forth the standard for reviewing 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 specific evidence which that party relies upon in support of the claimed irregularity in the election process. [Emphasis added.]

This Rule sets up two separate and distinct components for evaluating election objections. 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 for the objecting party to make its prima facie case. Under N.J.A.C. 19:11-9.2(i), if the objecting party presents a prima facie case, I initiate an investigation; if the conduct does not warrant setting aside the election as a matter of law, or if the objecting party fails to proffer sufficient evidence to support a prima facie case, I may immediately dismiss the objections.

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

The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice.

Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

With regard to the first objection, I find that the Borough has not established a prima facie case as required by N.J.A.C.

19:11-9.1(h). A review of the objections and accompanying affidavits shows that the conduct alleged could not effect the outcome of the election. Of the two employees claiming to have voted in the election, Nelson's ballot was received, his name was checked off of the eligibility list, and his ballot was counted. McKay's ballot was not among the ballots picked up from the Commission's post office box on November 7. Apparently, McKay's ballot was inadvertently misdirected to the Commission's offices (rather than the official mail box, as required) and was not available to be counted with the other ballots on November 7, 2002. The Commission agent did not discover McKay's ballot in the Commission's safe until after the count. Because the additional vote could not alter the outcome of the election, we chose not to open the ballot since it would compromise the secrecy of the vote for no legitimate purpose. Therefore, McKay's vote was not counted.

Where there is a flaw in the election process which potentially affects the election outcome, we will conduct an investigation and take appropriate corrective action, including, where necessary, re-running the election. See Rutgers University, D.R. No. 2000-12, 26 NJPER 241 (¶31095 2000), req. for rev. den., P.E.R.C. No. 27 NJPER 1 (¶32000

2000), where we ordered that 112 ballots, originally misplaced by the post office, be opened and counted. However, where the objectionable conduct could not affect the outcome of the election, there is no basis to set the election aside and re-run the election. See Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002) (claim that two voters were improperly permitted to vote was dismissed where those votes could not have affected the outcome). Here, the additional vote that McKay asserts he cast against representation, was not numerically sufficient to potentially affect the outcome of the election.

Accordingly, I find that the first objection does not warrant setting aside the election as a matter of law and, therefore, does not state a prima facie basis to void the election. For the above reasons, I dismiss the first objection.

The second objection was filed on December 16, 2002. N.J.A.C. 19:11-10.(h) provides,

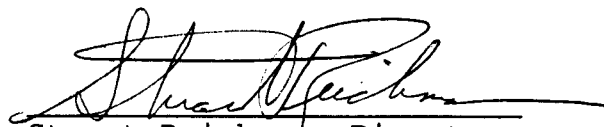
Within five days after the tally of ballots has been furnished, a party may file with the Director of Representation an original and four copies of objections to the conduct of the election or conduct affecting the results of the election, together with proof of service on all other parties. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. . . . (emphasis added).

Here, the Borough's second objection was not timely filed. The filing of one objection does not open the floodgates for additional objections filed outside the objections period as prescribed by the Rules. Therefore, I will not consider the merits of this objection. The second objection is dismissed as untimely.

ORDER

The objections are dismissed. A Certification of Representative is attached.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: January 3, 2003
Trenton, New Jersey

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

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BOROUGH OF BERNARDSVILLE,	>
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-and-	> DOCKET NO. RO-2003-12
	>
IBEW LOCAL 1158 FOR BOROUGH OF	>
BERNARDSVILLE SUPERVISORS,	>
Petitioner.	>

CERTIFICATION OF REPRESENTATIVE

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. A majority of the voting employees selected an exclusive majority representative for collective negotiations. No valid timely objections were filed to the election.

Accordingly, **IT IS HEREBY CERTIFIED** that

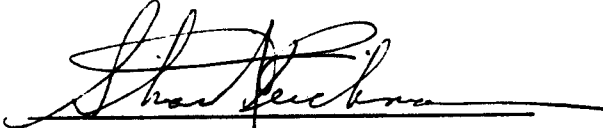
IBEW LOCAL 1158 FOR BOROUGH OF BERNARDSVILLE SUPERVISORS

has been selected by a majority of the employees of the above-named Public Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. Pursuant to the Act, the representative is responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership. The representative and the above-named Public Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment. When an agreement is reached it shall be embodied in writing and signed by the parties. Written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: Included: All regularly employed supervisory employees employed by the Borough of Bernardsville.

Excluded: Managerial executives, confidential employees, craft employees, professional employees, police employees, casual employees, non-supervisory employees and all other employees employed by the Borough of Bernardsville.

DATED: January 3, 2003
Trenton, New Jersey


Stuart Reichman
Director of Representation

Attachment: Certification of Representative

Dated: January 3, 2003

In the Matter of

Borough of Bernardsville

-and-

**IBEW Local 1158 for Borough of
Bernardsville Supervisors**

Docket No. RO-2003-12

Service on the following:

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