

D.R. NO. 2014-8

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

In the Matter of
CAMDEN COUNTY,

Public Employer,

-and-

Docket No. RO-2013-058

POLICE BENEVOLENT ASSOCIATION,
LOCAL 35,

Petitioner,

FRATERNAL ORDER OF POLICE,
LODGE 218,

Intervenor.

SYNOPSIS

The Director of Representation issues a Certification of Representative in favor of the Fraternal Order of Police Lodge 218 in an election to determine the representative of police officers below the rank of sergeant employed by the Camden County Police Department. The Director finds that nine ballots received after the cutoff date for ballot receipt should not be added to the tally of ballots previously counted in the election. The Director finds that voters who mailed ballots three days prior to the ballot count had no reasonable expectation that their ballots would be received at the Commission's post office box in a timely fashion.

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Appearances:

For the Public Employer,
Office of Camden County Counsel
(Sherri L. Schweitzer, County Counsel)

For the Petitioner,
Alterman and Associates, attorneys
(Stuart Alterman, of counsel)

For the Intervenor,
Markowitz and Richman, attorneys
(Matthew D. Areman, of counsel)

DECISION

On June 14, 2013, and by amendment dated June 17, 2013, Camden Police Benevolent Association, Local 35 (PBA), filed a petition with the Public Employment Relations Commission (Commission), supported by an adequate showing of interest, seeking to represent all regularly employed police officers below

the rank of sergeant employed by the Camden County Police Department. The Fraternal Order of Police, Lodge 218 (FOP) was permitted to intervene by letter dated July 15, 2013. On July 30, 2013, I approved the parties' consent agreement for an election. The consent agreement provided that ballots would be mailed to eligible employees on August 28, 2013. The mail ballots had to be received in the Commission's post office box by 9:00 a.m. on Tuesday, October 1, 2013 in order to be counted at 10:00 a.m. on the same day in the Commission's Trenton office.

A Notice of Election was provided to the parties by letter dated July 30, 2013. The Notice of Election states, in pertinent part, the following:

Eligible employees will receive a Secret Ballot, Instructions and a stamped, return-addressed envelope. In order for a ballot to be valid, the instructions must be carefully followed and the ballot must be received no later than the date fixed for returns. Only those ballots which are delivered to our Post Office Box on the fixed date and time will be counted.

The ballots, which were mailed to eligible voters on August 28, 2013, contain the following instructions:

Deposit this envelope, which requires no postage, in the United State [sic] Mail so that your ballot will be RECEIVED at the place shown on the return envelope no later than October 1, 2013, 9:00 a.m.

On October 1, 2013 at 9:00 a.m., a Commission staff agent collected all the ballots in the Commission post office box. At

10:00 a.m., a ballot count was conducted. Of the valid votes counted, 86 votes were cast for the FOP and 84 votes were cast for the PBA. In accordance with N.J.A.C. 19:11-10.3(g), the parties were furnished with a tally of ballots on October 1, 2013.

I informed the parties by letters dated October 3 and October 8, 2013 that a total of nine ballots were collected from the Commission's post office box after the October 1, 2013 ballot count in this matter. The parties were asked in each letter to submit statements of position. No party took the position that these ballots should be opened, nor did any party file objections to the tally of ballots during the requisite time period.

N.J.A.C. 19:11-10.3(h). Nevertheless, by letter dated October 15, 2013, I informed the parties that having learned that the USPS was utilizing new technology in place of postmarks, Commission precedent dictated that we should continue to investigate the after-acquired ballots to determine what information the orange fluorescent identification tag on each of the ballots could provide about each ballot's processing.

At my direction, Commission personnel met with supervisors at the Trenton office of the United States Postal Service ("USPS") and requested that the USPS examine the nine ballots and provide us with any information concerning when the ballots were first processed by the USPS, as that information could be used

for the USPS to predict when each of the ballots should have been in the Commission's post office box.

The USPS supervisors informed us that each of the nine ballots was sprayed with an orange fluorescent identification tag, which is part of a system used by the USPS to determine the time, date, and location where pieces of mail were processed. The USPS advises that, of the nine after-acquired ballots, three should have been received in the Commission's post office box by October 1, 2013 at 9:00 a.m., while the remaining six ballots should have been received thereafter. The orange fluorescent identification tags on the three ballots indicated that each was first processed by the USPS on Saturday, September 28, 2013, three days prior to the ballot count in this matter, at USPS locations remote to the Commission's post office box.

One of the nine ballots contained no signature and is considered void. That void ballot was not one of the three ballots first processed on September 28, 2013, but was part of the remaining six that were first processed by the USPS on September 30, 2013. The USPS also informed us that five of those six ballots should have been received in the Commission's post office box prior to October 3, 2013 at 9:00 a.m., while the remaining ballot should have been received after October 3, 2013. However, on October 3, 2013 at 9:00 a.m., when collecting ballots for an unrelated election, a Commission agent retrieved three of

the nine after-acquired ballots. On October 7, 2013, the remaining six ballots were collected from the Commission's post office box. Clearly, all nine ballots were not in the post office box on October 1 or October 3.

Additionally, the USPS informed us that ballots, like other pieces of mail, are no longer postmarked by the USPS as a matter of course. This information is also contained on the USPS website, which states that "[p]ostmarks are not required for mailings bearing a permit, meter, or pre-canceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing systems."

See http://about.usps.com/handbooks/po408/ch1_003.htm.

As a result of the information obtained from the USPS, by letter dated October 24, 2013, I informed the parties that I was inclined to find that those ballots that were first processed by the USPS September 30, 2013 or thereafter should not be considered as part of the ballot count in this matter. I also informed the parties that voters who mailed ballots three days prior to the ballot count had no reasonable expectation that their ballots would be received in the Commission's post office box in a timely fashion. I invited the parties to submit statements of position.

The PBA responded on October 28, 2013, arguing that a new election should be ordered or, in the alternative, that the three

after-acquired ballots should be opened and tallied.^{1/} No party has argued that the ballots first processed September 30, 2013 or thereafter should be opened.^{2/}

The FOP did not submit a statement of position by October 28, 2013, but did respond to the PBA's statement of position by letter dated October 30, 2013, wherein they note that they did not receive the PBA's statement until the afternoon of the 29th. The FOP maintains their previously expressed position that the after-discovered ballots should not be opened. The FOP argues

1/ In its October 29, 2013 submission, the PBA has alleged "that some members of the FOP have used their authority to intimidate or coerce incoming members of the police force to vote for them in the representation election." To the extent the PBA is objecting to the tally of ballots in accordance with N.J.A.C. 19:11-10.3(h), such objection is untimely. Objections were due within five days after the tally of ballots was furnished. The ballots were counted in this matter on October 1, 2013 and the tally of ballots was furnished on that day. Further, I informed the parties on October 8 and October 24, 2013 that no party had filed objections to the tally of ballots during the requisite time period. Those letters invited the parties to submit statements of position concerning the after-acquired ballots and did not serve to extend the time period within which to file objections. Accordingly, I will not consider this objection. Additionally, the objection is not accompanied by any evidence, such as affidavits or other documentation, as required by N.J.A.C. 19:11-10.3(h). Even if the objection were not untimely, I would dismiss it for lack of specific competent supporting evidence.

2/ While the PBA states that the after-acquired ballots should be opened, its submission presents no argument why the ballots postmarked September 30, 2013 or thereafter should be opened and instead argues only in support of opening those ballots processed on September 28, 2013.

that it should be certified as the exclusive majority representative based on the October 1, 2013 ballot count.

The FOP asserts that Commission precedent supports its position that only in cases where error on the part of the USPS is uncovered should after-acquired ballots be opened. The FOP argues that absent such evidence, only ballots in the Commission's post office box at the designated time and date should be counted. Finding otherwise, the FOP asserts, would render the "designation of a date and time for the receipt of ballots a mere fiction" and "a perversion of the process" resulting in "unnecessary delays in the election and certification process, a surge in representation-related litigation, and an increased potential for gamesmanship."

The FOP notes that the October 1, 2013 deadline was agreed to by the parties in the Agreement for Consent Election and was prominently displayed on the Notice of Election. Finally, the FOP argues that it is "completely unreasonable to assume that something placed in the mail on Saturday will be delivered by 9 a.m. on Tuesday."

Initially, the PBA claims that ballot challenges are permitted in this instance, citing N.J.A.C. 19:11-10.3(k). I disagree. Pursuant to N.J.A.C. 19:11-10.3(e), "[a]n observer or the election agent 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
...." No party challenged any ballots during the ballot count.
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. den., P.E.R.C. No. 2003-26, 28 NJPER 438 (¶33161
2002); Tp. of Hainesport, D.R. No. 94-14, 20 NJPER 100 (¶25050
1994). Moreover, the after-acquired ballots do not concern the
eligibility of any person to participate in the election, as
required by N.J.A.C. 19:11-10.3(e).

Issues concerning the proper procedures to deal with late
ballots have been the subject of several Director's decisions.
In Rutgers, The State University, D.R. No. 2000-12, 26 NJPER 241
(¶31095 2000), req. den., P.E.R.C. No. 2000-101, 27 NJPER 1
(¶32000 2000), 114 ballots were not in the Commission post office
box by the time announced for the ballot collection, despite
evidence that the ballots had been in the post office for
approximately two weeks prior to the date the ballots were to be
retrieved for the count. The Director reasoned that voters who
mailed their ballots weeks before the announced date of the
ballot count had a reasonable expectation that their ballots
would be received and counted. The Director also determined that
those voters who mailed their ballots two days prior to the date
of the ballot count had no reasonable expectation that their

ballots would be received in the Commission's post office box in time to be counted. In reviewing the Director's decision, the Commission stated that "[i]n a situation where the postal service misplaced a significant number of ballots, no option on how to proceed would have been perfect. Counting the ballots was the best option among the imperfect solutions." Id. at 1.

In State of New Jersey, D.R. No. 2004-8, 29 NJPER 531 (¶171 2003), approximately 4,000 ballots were picked up on July 23, 2003, the day of the ballot count, out of a universe of approximately 7,000 eligible voters. The margin for the prevailing party was 81 votes. On July 29, 130 additional ballots were discovered at the Commission's post office box. The PBA filed multiple objections to the tally of ballots and the election procedures, including an objection that the 130 ballots collected on July 29 should be counted. The PBA alleged that the 130 ballots may have been received late due to postal error, and further that the postal service erroneously returned some ballots to voters.

The Director dismissed the objection concerning the late ballots, noting that the PBA had failed to provide specific, competent evidence in support of the objection.

In Monmouth County, D.R. No. 2011-5, 36 NJPER 431 (¶168 2010), the Director ordered that seven ballots received in our post office box after the ballot count be counted. Investigation

revealed the ballots were mailed and received in the post office with enough time to be placed in the Commission's post office box before the due date.

The staff agent collected ballots on Monday, August 16, 2010 at 9:00 a.m. With 25 voters eligible to cast ballots, 17 ballots were collected on August 16. The ballots were counted and the margin was one vote. No objections were filed and a certification issued on August 24. On August 25, a staff agent collecting ballots for another election retrieved seven ballots intended for the August 16 ballot count. One ballot was postmarked on August 9, three ballots were postmarked August 10, two ballots were postmarked August 11, and one ballot was postmarked August 12. Additionally, one of the seven ballots had a round, red BRM (business reply mailer) stamp on it showing that the cost for mailing the ballots was charged to the Commission's account on August 12, 2010. Our investigation revealed that the seven envelopes were processed in the Trenton Post Office BRM section on August 12, 2010, four days prior to the ballot count. Relying on Rutgers, the Director ordered the seven ballots opened.

The PBA has requested that I order a new election, relying in part on Hudson County, D.R. No. 2012-8, 38 NJPER 267 (¶91 2012), P.E.R.C. No. 2013-18, 39 NJPER 180 (¶55 2012), req. den. P.E.R.C. No. 2013-031, 39 NJPER 208 (¶68 2012). The PBA's

reliance on the Commission's holding in Hudson County is misplaced. The PBA asserts the following: "The three ballots that the USPS indicated should have been delivered by the deadline were somehow delayed; as in Hudson County, this is sufficient for remand to a new election." While the Commission considered the mishandling of ballots as one factor in its analysis, it was but one of several factors the Commission reviewed in rendering its decision in Hudson County, wherein the Commission stated:

[T]here was a confluence of circumstances which casts doubt upon the outcome of the election. The initial administrative error misstating the date by which ballots were to be received; the failure to insure that all eligible voters were made aware of the corrected date; the small number of potential voters involved; and finally and most importantly the apparent mishandling of the mailed ballots by the [USPS]. Id. at 181.

The Commission did not find that USPS predictions about ballot delivery alone are sufficient to order a new election, as suggested by the PBA. The "confluence of circumstances" that concerned the Commission in Hudson County are simply not present in this matter.

The PBA also relies upon Borough of Brooklawn, D.R. No. 94-13, 20 NJPER 99 (¶25049 1993), wherein the Director dismissed an objection to an order to rerun an election. In Borough of Brooklawn, all three voters placed their ballots into a large

envelope and mailed the ballots to the Commission's post office box by certified mail. Since the large envelope was sent by certified mail, it was not placed in the Commission's post office box by postal employees and was therefore not picked up by the Commission staff agent on the day of the ballot count. The Director noted that the large envelope containing the ballots was timely received by the post office that houses the Commission's post office box and ordered a rerun election. I do not believe that Borough of Brooklawn dictates the same result here. There is no evidence that the after-acquired ballots in this matter were received by the post office that houses the Commission's post office box in a timely manner.

Similarly, the PBA's reliance on Rutgers is misguided. The PBA asserts that in Rutgers, as in this matter, "the ballots were delayed for reasons that are unclear, despite the lack of misconduct." The Director in Rutgers found that ballots were inadvertently misplaced upon their receipt at the Trenton post office. Those after-acquired ballots were postmarked at least 17 days prior to the date of the ballot count. The Director reasoned that voters submitting such ballots had a reasonable expectation that the ballots would be received and counted. However, the Director also determined that other after-acquired ballots that were postmarked two days prior to the ballot count should not be opened and added to the vote tally. The Director

found that voters who mailed in their ballots two days prior to the date of the ballot count had no reasonable expectation that their ballots would be received in the Commission's post office box in time to be counted.

The PBA also attempts to compare Monmouth County to this matter. In Monmouth County, an investigation revealed that seven after-acquired ballots were actually present in the Trenton Post Office four days prior to the ballot count, but mishandling resulted in the ballots being diverted from the Commission's post office box. There is no evidence in this matter to suggest that the after-acquired ballots were actually present in the Trenton Post Office prior to the October 1, 2013 ballot count. To the contrary, the fluorescent identification tags reveal that the ballots at issue were first processed on September 28, 2013 at locations remote to the Commission's post office box, which is located in Trenton.

Further, the PBA claims that since ballots are no longer postmarked as a matter of course, no evidence could be presented to show postal error. I disagree. Ballots were misplaced in Rutgers and Monmouth County, showing clear postal error. The investigations conducted in those matters revealed that the ballots were actually present in the post office, yet not placed in the Commission's post office box, prior to the announced date and time for ballot collection. In this matter, fluorescent

identification tags were used to identify when ballots were first processed by the USPS. The PBA's suggestion that ballots could have been "submitted a week prior to their processing" is merely speculation. While the PBA is correct that postmarks have a date that documents a time and place where a piece of mail was first received by a post office, the USPS analyzed the fluorescent identification tags in this matter and informed us that three of the ballots were first processed on September 28, 2013. I informed the parties by letters dated October 3, October 8, and October 13, 2013 that one of the ballots was postmarked on September 28, 2013. That ballot was one of the three ballots first processed by the USPS on September 28, 2013. That information allows analysis, as would a postmark, of whether voters had a reasonable expectation that their ballots would be received by 9:00 a.m. on October 1, 2013.

As in Rutgers, where the Director found that ballots postmarked two days prior to the day of the ballot count should not be counted, I find that voters who mailed us ballots three days prior to the ballot count had no reasonable expectation that their ballots would be received in the Commission's post office box in a timely fashion, especially since September 29, 2013 was a Sunday. To find otherwise would deviate from Commission precedent requiring evidence of actual postal error resulting in late delivery. In this matter, no such postal error is evident.

Although the USPS utilizes technology that allows it to identify the time, date, and location of processing for ballots sprayed with an orange fluorescent identification tag, that technology cannot determine when a ballot is placed in the Commission's post office box. Accordingly, the USPS prediction that ballots first processed on September 28, 2013 should have been in the Commission's post office box cannot form the basis upon which we decide to open the ballots in the face of concrete evidence that the ballots were not in the post office box on the date projected by the USPS. Cf. State of New Jersey. While the Director in Monmouth County found that ballots postmarked four days prior to the date of the ballot count should be opened, in that instance there was evidence that the ballots were actually received and processed in the Trenton Post Office four days prior to the date the ballots were to be counted. There is no such evidence in this matter.

Additionally, we have been informed that the USPS no longer regularly postmarks ballots that are processed through their system. As we have previously voided ballots that bore no postmark, since timeliness of the ballots with no postmark could not be ascertained, we can no longer do so, based on the information provided to us by the USPS. Instead, we will investigate after-acquired ballots on a case-by-case basis to determine if voters have been disenfranchised, and to determine

whether fraud, tampering, or intentional wrongdoing on the part of the USPS has occurred.

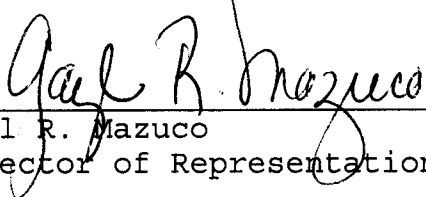
Finally, the PBA asserts that failing to count the after-acquired ballots violates voters' fundamental rights and the fundamental fairness doctrine, arguing that "technical quibbles" and "procedural detail" should not govern the Director's decision. In State of New Jersey, the Director acknowledged that while no system of balloting is perfect, the Commission would take appropriate action when a mistake occurs that is so significant as to disenfranchise voters. No such mistake occurred in this matter. The consent agreement provided that ballots would be mailed to eligible voters on August 28, 2013 and required that ballots must be received by October 1, 2013 at 9:00 a.m. in order to be counted. The ballots themselves contained instructions that ballots needed to be received no later than October 1, 2013.

If an eligible voter did not mail their ballot within sufficient time for receipt in the Commission's post office box by 9:00 a.m. October 1, 2013, that voter was not disenfranchised absent a showing of mistake or extenuating circumstance outside of the voter's control. It is not the election process which disenfranchises eligible voters who neglect to arrive at polling places during the hours when they are open, or who fail to cast mail ballots in a timely fashion. See IMO Ocean County

Commissioner of Registration, 379 N.J. Super 461, 470 (App. Div. 2005) (absentee ballots received after polls close on election day will not be counted).

I find that for the foregoing reasons, the after-acquired ballots should not be opened. A Certificate of Representative is attached.

Very truly yours,



Gayl R. Mazuco
Director of Representation

DATED: November 1, 2013
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by November 13, 2013.

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

In the Matter of	>	
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CAMDEN COUNTY,	>	
Public Employer,	>	
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-and-	>	DOCKET NO. RO-2013-058
	>	
POLICE BENEVOLENT ASSOCIATION LOCAL 35,	>	
Petitioner.	>	
	>	
-and-	>	
	>	
FRATERNAL ORDER OF POLICE LODGE 218,	>	
Intervenor.	>	

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

FRATERNAL ORDER OF POLICE LODGE 218

has been selected by a majority of the employees of the above-named 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. 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 Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment as required by the Act.

UNIT: Included: All regularly employed police officers below the rank of sergeant employed by Camden County.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, casual employees and all police sergeants, lieutenants, captains, deputy chiefs, chief; and all class 1 and class 2 special law enforcement officers and all other employees employed by Camden County.

DATED: November 1, 2013
Trenton, New Jersey



Gayl R. Mazuco, Director of Representation

Attachment:

Certification of Representative dated: November 1, 2013

In the Matter of

CAMDEN COUNTY

-and-

POLICE BENEVOLENT ASSOCIATION LOCAL 35

-and-

FRATERNAL ORDER OF POLICE LODGE 218

Docket No. RO-2013-058

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