P.E.R.C. NO. 82-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MONMOUTH,

Public Employer,

-and-

LOCAL 56, UFCW, AFL-CIO,

Petitioner,

Docket No. RO-81-218

-and-

MONMOUTH COUNCIL 9, NJCSA,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission affirms certifications of results of election issued by the Director of Representation in two units of Monmouth County employees: (1) non-supervisory white collar employees of the office of County of Monmouth, County Clerk, and (2) non-supervisory white collar employees employed by the County of Monmouth. No employee organization received a majority of valid votes cast in either unit. Local 56, UFCW, AFL-CIO filed objections, claiming, inter alia, that the employer's submission of incomplete eligibility lists automatically invalidated the elections under N.J.A.C. 19:11-9.6. The employer had inadvertently omitted 5 names of 207 in the County-wide unit and 1 name of 29 in the County Clerk unit. In the absence of any supportable suggestions of bad faith or gross negligence, the Commission holds that the employer's substantial compliance satisfied N.J.A.C. 19:11-9.6.

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Appearances:
For the Public Employer, Meagher & Hrebek, Esqs.
(Robert J. Hrebek, of Counsel)

For the Petitioner, Hott, Goodman, Kropf, Margolis & Hernandez, Esqs.
(Timothy R. Hott, of Counsel)

For the Intervenor, Lomurro & Eastman, Esqs.
(Donald Lomurro, of Counsel)

DECISION AND ORDER

On April 3, 1981, a Petition for Certification of Public Employee Representative was filed with the New Jersey Public Employment Relations Commission by the United Food and Commercial Workers Union, Local 56, AFL-CIO ("Local 56"). Local 56 sought to represent a unit of all clerical, technical and professional employees of the County of Monmouth ("County").

On April 10, 1981, Monmouth Council 9, NJCSA ("Council 9") sought to intervene on the basis of an earlier petition it had filed in which it sought to represent employees of the

Monmouth County Clerk. The Director of Representation granted the requested intervention.

On July 10, 1981, the parties met and executed two Agreements for Consent Election in two different units: (1) non-supervisory white collar employees of the office of County of Monmouth, County Clerk ("County Clerk unit")[1/] and (2) non-supervisory white collar employees employed by the County of Monmouth ("County-wide unit").[2/] The parties agreed that employees in the first unit could vote for either Local 56, Council 9, or neither, and that employees in the second unit could vote for or against Local 56. On July 14, 1981, the Director of Representation approved the Agreements for Consent Election.

On July 27, 1981, elections were conducted in both units.[3/] The results follow:

County Clerk Unit

Eligible Voters (approximately)	Council 9	Local 56	Neither	Challenges
28	1	11	13	1

County-Wide Unit

Eligible Voters (approximately)	Local 56	No Representative	Challenges
200	48	45	7

1/ This agreed-upon unit excluded employees performing functions necessary and integrally related to the courts of Monmouth County, other employees of the County Clerk, other employees of the Judiciary, all other county employees and all other employees falling within the statutory exclusions.

2/ This agreed-upon unit excluded employees of the Judiciary, the County Clerk, the surrogate, and the sheriff, professionals, and all other employees falling within the statutory exclusions.

3/ These two elections were part of a six unit election process involving the employees of numerous county departments voting at three different places on the same day.

On July 30, 1981, the Director, in accordance with the parties' agreement, counted all challenged ballots and issued the following revised tallies in the two units:

County Clerk Unit

Eligible Voters	Council 9	Local 56	Neither
29	1	11	14

County-Wide Unit

Eligible Voters	Local 56	No Representative
207	50	50

On July 31, 1981, Local 56, pursuant to N.J.A.C. 19:11-9.2, filed objections to the elections in both units. The objections asserted, inter alia, that (1) the County had not included the names of all eligible unit employees on the eligibility list it submitted pursuant to N.J.A.C. 19:11-9.6, and (2) that a Board of Health official had improperly informed two employees that they could not vote in the County-wide unit.

On October 22, 1981, the Director issued a decision dismissing the objections and certifying that Local 56 had not received a majority of the valid votes cast in either unit. D.R. No. 82-15, 7 NJPER 634 (¶12285 1981).

On November 6, 1981, Local 56, pursuant to N.J.A.C. 19:11-8.1, requested review of the Director's decision dismissing its objections and certifying the election results. On January 20, 1982, the Chairman, acting as the Commission's designee, granted the request for review. We have received statements of position from Local 56 and the County.

We first consider Local 56's contention that the Director erred in dismissing its objection concerning the eligibility lists the County supplied. The underlying facts are not in dispute. In the County-wide unit of 207 eligible voters, the employer submitted an eligibility list which incorrectly omitted the names of 5 eligible voters. In the County Clerk unit of 29 eligible voters, the employer supplied an eligibility list which incorrectly omitted 1 name. All employees not on the eligibility list voted and had their ballots counted. There are no indications that the omissions resulted from gross negligence or bad faith. Apparently the omissions resulted from inadvertence.

N.J.A.C. 19:11-9.6 provides:

> (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 together with their last known mailing addresses and job titles. In addition, the public employer shall file a statement of services 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 prior to 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 shall be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-9.2(h). Additionally, the director of representation may, in the exercise of reasonable discretion, issue a subpoena or direction requiring the production of the eligibility list, and in the event of noncompliance therewith, may institute appropriate enforcement proceedings pursuant to R. 1:9-6 (Enforcement of subpoena of public officer or agency).
>
> (c) Actions of the director of representation pursuant to this section shall not be reviewable under N.J.A.C. 19:11-8.1 (Request for review).

Local 56 asserts that the word "shall" in subsection 19:11-9.6(b) mandates that these elections must be set aside since the eligibility lists were not 100% complete. We disagree.

First, read in the context of the entire rule, the word "shall" in subsection (b) is intended to invoke the extreme sanction of automatically setting aside an election upon the filing of objections when an employer has failed to supply an eligibility list. Thus, subsection (a) delineates the rules for insuring that an eligibility list is filed in time and subsection (b) sets forth what can happen if a list is not filed. In particular, the first sentence of subsection (b) must be construed together with the second sentence. The latter authorizes the Director to subpoena a list or initiate enforcement proceedings to secure a list before an election; the former specifies the penalty an employer will face after an election if it refuses to submit a list and if objections are filed.

Second, N.J.A.C. 19:11-9.6 is modelled after and applied consonantly with the policy and precedent of the National Labor Relations Board ("NLRB"). In Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970), our Supreme Court recommended that the decisions of the NLRB serve as the model for decisions and policies interpreting the New Jersey Employer-Employee Relations Act, especially in the area of representation proceedings. The Court's recommendation is particularly apropos here since our rule was intended to embody a longstanding NLRB practice.

In Excelsior Underwear, Inc., 156 NLRB 1236, 61 LRRM 1217 (1966), the NLRB announced its requirement that an employer submit an election eligibility list which the Regional Director would in turn make available to all parties. The Board reasoned that the new requirement would foster the goal of an informed electorate and a fair election. It specifically stated: "Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." Supra at 1218. (Emphasis supplied).[4/]

Since Excelsior, the Board has considered numerous cases in which an employer has complied with its obligation to submit a list, but has omitted the names of a few employees or has otherwise not completely complied with its dictates. In Program Aids Co., Inc., 163 NLRB 54, 65 LRRM 1244, 1244-1245 (1967), the Board stated:

> "...[W]e find nothing in our decision in Excelsior which would require the rule stated therein to be mechanically applied....In these circumstances, we find that the Union was afforded sufficient opportunity to communicate with employees prior to the election and therefore the Employer-Petitioner has substantially complied with the requirements of the Excelsior rule.
> (Emphasis supplied)

4/ Litigation subsequently arose concerning the validity of the Excelsior rule since the Board created it through adjudication rather than rule-making. In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), a majority of the United States Supreme Court held that although the Board had improperly avoided the procedural safeguards of rule-making in announcing the Excelsior requirement, it had validly imposed that requirement in cases involving subsequent respondents. The Court approved the purposes behind the requirement. See, R. Gorman, Basic Text on Labor Law, pp. 16-17 (1976). Because the Commission's Excelsior list requirement was promulgated as a rule, rather than through adjudication, we have obviated the sticky procedural questions raised in NLRB v. Wyman-Gordon Co., supra.

See also, e.g., Jat Transportation Co., 131 NLRB 132, 48 LRRM 1038 (1961). Thus, the Board, in construing the identical language which N.J.A.C. 19:11-9.6(b) extracted from Excelsior, has already eschewed the interpretation which Local 56 favors. The history of the Excelsior rule and, in particular, the Board's refusal to apply that rule mechanically, confirm our interpretation that N.J.A.C. 19:11-9.6 does not mandate the setting aside of an election, upon objection, if the employer has substantially complied with the rule.[5/]

We now consider whether the inadvertent omission of 5 names in the unit with 207 eligible voters and 1 name in the unit with 29 eligible voters constitutes insubstantial compliance with N.J.A.C. 19:11-9.6(b), making new elections appropriate.[6/] In determining whether an employer has substantially complied with Excelsior, the Board compares the number of names omitted with the number of voters the list should have contained (the Excelsior list plus the omitted names). See, e.g., Jat Transportation Co., supra;[7/] Lobster House, 186 NLRB No. 27, 75 LRRM 1309 (1970);

5/ Reflection on the practical ramifications of Local 56's analysis also compels its rejection. Suppose the State had left 1 name off each eligibility list it submitted in the recent statewide elections involving over 32,000 State employees in 4 different units. If the employees in each unit had selected no representative, should the elections have been invalidated because the State had not completely complied with N.J.A.C. 19:11-9.6?

6/ We predicate the following analysis of "substantial compliance" on the absence of any indication of bad faith or gross negligence in the instant case. We do not consider whether a "substantial compliance" analysis would be applicable if such an implication were present.

7/ In Jat Transportation Co., the Board, in finding substantial compliance, also considered that several employees inadvertently left off the eligibility list nevertheless voted and that other employees could have done likewise. The Board observed that an

(continued)

Chromalloy American Corp., 245 NLRB 119, 102 LRRM 1405 (1979). Further, if an employer has substantially complied with the Excelsior requirements and any omissions do not result from bad faith or gross negligence, then the Board will not set aside an election merely because the outcome was close. See, Telonic Instruments, 173 NLRB 87, 69 LRRM 1398 (1968) (union lost by one vote; Board found substantial compliance despite omission of 4 names out of 111 eligible voters); cf. West Coast Meat Packing Co., 195 NLRB 21, 79 LRRM 1199 (1972) (union lost by two votes; Board found substantial compliance despite omission of 2 of 44 names from eligibility list and 5 challenged ballots). The Board will find substantial compliance where an employer has inadvertently omitted a small percentage of eligible voters from an eligibility list. See, Kentfield Medical Hosp, 219 NLRB 32, 89 LRRM 1697 (1975)(7%); Advance Industrial Security, Inc., 230 NLRB 14, 95 LRRM 1209 (1977) (6%); West Coast Meat Packing Co., supra (4%); Telonic Instruments, supra (3.6%).

7/ (continued)
eligibility list is merely a tool used to facilitate an orderly election; it is not a final list of all eligible employees.

The Commission, like the Board, requires the posting of Notices of the filing of a representation petition and the holding of the election. N.J.A.C. 19:11-2.4 and 19:11-9.1. All employees are thus put on notice of the election date and place and are informed of the type of employees included in the unit and the type of employees excluded from the unit. The posting even includes a sample ballot. The efficacy of the Commission posting rules is demonstrated by the fact that all six employees not on the eligibility lists voted.

In the instant case, the employer inadvertently omitted 5 names of 207 in the County-wide unit (2.4%) and 1 name of 29 in the County Clerk unit (3.4%). The employer prepared these lists at the same time it prepared lists in 4 other units of employees in various County departments. All six employees omitted from the lists voted. Given the circumstances in this case, it would be unreasonable to require perfection in the compilation of an eligibility list as a precondition for the holding of a valid election. In the absence of any supportable suggestion of bad faith or gross negligence, we believe that Local 56 had sufficient opportunity to communicate with the electorate and that the employer substantially complied with N.J.A.C. 19:11-9.6. Accordingly, we hold that the Director properly dismissed this objection.

We next consider whether the Director erred in dismissing the objection alleging that a Board of Health official improperly informed two employees that they could not vote in the County-wide unit. The pertinent undisputed facts follow.

At the County-wide unit election, two Board of Health employees presented a memorandum from the Health Officer of the Board of Health. The memorandum purported to be an official challenge to the eligibility of the two employees; the Health Officer claimed that the employees worked for the Board of Health, allegedly an autonomous agency, rather than the County. When the two employees voted, the Commission election agent asserted

a challenge to their ballots. Subsequently, the parties agreed that these ballots were cast by eligible voters and should be counted. Accordingly, the two ballots were counted.

Local 56 contends that the Board of Health official lacked standing to assert a challenge during the election process and that the County, by agreeing that the two voters were its employees, "...improperly inserted itself into the polling place when it should have allowed its observer to exercise rights of challenge." The County responds that the Director's dismissal of this objection should stand because the parties agreed to count all challenged ballots.

We are at a loss to understand how Local 56 could have suffered from the decision to count these two ballots. Local 56 objects to the standing of the Board of Health or County to challenge these voters. However, it obtained the desired relief when the Director, in accordance with the agreement of all parties, counted their ballots. Accordingly, the objection provides no basis for setting aside the election. In re State of New Jersey, P.E.R.C. No. 81-112, 7 NJPER 189 (¶12083 1981), appeal pending App. Div. Docket Nos. A-4164-80-T1 and A-3275-80-T1. Further, we perceive no evidence that an atmosphere was created that rendered a free choice by the voters improbable. Accordingly, we dismiss this objection.

Having reviewed the entire record carefully, we find no basis for setting aside the elections and accordingly affirm the Director's orders certifying the results of these elections.

ORDER

IT IS HEREBY ORDERED that the certifications of election results issued in this case and attached to this decision are affirmed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Newbaker, Butch and Suskin voted for this decision. None opposed. Commissioners Graves and Hartnett were not present.

DATED: February 9, 1982
Trenton, New Jersey
ISSUED: February 10, 1982

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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County of Monmouth, County Clerk,

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-and-

Local 56, U.F.C.W., AFL-CIO,

Petitioner,

-and-

Monmouth Council #9,

Intervenor.

DOCKET NO. RO-81-218

CERTIFICATION OF RESULTS OF ELECTION

An election having been conducted in the above matter under the supervision of the undersigned Executive Director in accordance with the Act and Chapter 11 of the Commission's Rules and Regulations and Statement of Procedure; and it appearing from the Tally of Ballots that no exclusive representative for collective negotiations has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned,

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 of 1968.

UNIT: Non-supervisory white collar employees of the Office of the County Clerk, County of Monmouth excluding those employees performing functions necessary and integrally related to the Courts of Monmouth County, other employees of the County Clerk, other employees of the Judiciary, all other County employees, managerial executives, supervisors as defined by the Act, confidential employees, and other employees.

Carl Kurtzman, Director
of Representation

DATED: October 21, 1981

Trenton, New Jersey

STATE OF NEW JERSEY
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UNIT: Non-supervisory white collar employees employed by the County of Monmouth excluding employees of the Judiciary, employees of the Offices of the County Clerk, the Surrogate and the Sheriff, supervisors within the meaning of the Act, managerial executives, professional employees, police, employees in other negotiations units, employees of the Prosecutor.

Carl Kurtzman, Director
of Representation

DATED: October 21, 1981

Trenton, New Jersey