

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY DEPARTMENT OF PUBLIC WORKS

Public Employer

and

Docket No. R-9

JERSEY CITY PUBLIC WORKS EMPLOYEES, INC.
LOCAL 245

Petitioner

and

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 1959

Intervenor

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Second Election, 1/
a secret ballot election was conducted under the supervision of the
Commission's ad hoc election officer, Lester Wolff, on December 4, 1969
among the employees in the appropriate unit. The election officer
served upon the parties a tally of ballots which revealed that of 456
ballots cast, 228 were for the Petitioner, 216 were for the Intervenor,
3 were for neither organization, and 9 ballots were challenged. The
challenged ballots are determinative of the results of the election.

A written request for statements of respective positions on
each of the nine challenged voters was mailed to the parties on

1/ P.E.R.C. No. 23

December 15, 1969. The replies received by the Commission 2/ indicated an agreement or ~~consensus~~ among Petitioner, Intervenor and Public Employer to sustain the challenges to the ballots of four of the nine employees, to wit: Albert Thaler, Jr. and John Mastropietro as supervisors; and Mike Leone and James St. John as craft or "trade" employees. As a result of the harmony of positions among the parties, the tally of ballots is hereby revised as follows:

Approximate Number of Eligible voters.....	550
Votes cast for Local 245.....	228
Votes cast for Local 1959.....	216
Votes cast for Neither.....	3
Valid votes counted.....	447
Challenged ballots.....	5 <u>3/</u>
Valid votes plus challenged ballots.....	452

The Intervenor, Local 1959, by letter dated December 8, 1969 filed objections to the conduct and results of the election which were supplemented by a letter dated December 15, 1969. Pursuant to N.J.S.A. 34:13A-6(e) and the Commission's Rules and Regulations, Section 19:11-19 (i), a hearing was held on February 10, 1970 before Howard Golob, Hearing Officer for the Commission.

The objections are set forth fully in Hearing Officer Golob's Report and Recommendations, a copy of which is appended hereto. This Report, issued June 12, 1970, recommended that objection 1 and objection 2 be sustained, that objection 3 be overruled and that a third election be directed. Exceptions to the Hearing Officer's Report and Recommendations with a brief in support thereof have been filed by the Petitioner, Local 245.

2/ Letters were received from Mr. Yengo, Petitioner's attorney, on December 19, 1969, from Mr. Keller, Intervenor's representative, and from Mr. Kierce, Director of Personnel of the Public Employer, on December 22, 1969.

3/ The five challenged ballots that remain are not determinative and do not affect the results of the election.

The Commission will consider Petitioner's Exceptions individually as submitted.

Exception (a)-(1)

The hearing was granted on the basis of mere statements not under oath and failure to produce as witnesses the persons making the statements.

In Petitioner's brief at page three, the impropriety of granting a hearing based on a "mere letter" is argued. The second election was held on December 4, 1969 and on December 8, 1969, the Intervenor, Local 1959, by letter filed objections to the election specifically designated as such. 4/ The Commission finds that Intervenor's objections both in form and in substance complied with Section 19:11-19(f) of its Rules and Regulations 5/ and were timely.

Based on a preliminary investigation of Intervenor's Objections the Executive Director in his discretion determined that a hearing was necessary in order to resolve the matters in dispute and to determine issues of credibility. Pursuant to Section 19:11-19 (i) 6/ the Executive Director issued a Notice of Hearing on Objections to Conduct of the Election and Conduct Affecting the Results of the Election, dated January 20, 1970, and an Order Rescheduling Hearing, dated February 4, 1970. The Commission finds that its Executive Director was specifically empowered to direct that a hearing be held based on an investigation of timely filed objections.

4/ Hearing Officer's Report and Recommendation, p.2, recites these objections verbatim.

5/ This rule provides as follows:

"(f) Within five (5) days after the tally of ballots has been furnished, any party may file with the Executive Director an original and four (4) copies of objections to the conduct of the election or conduct affecting the results of the election which shall contain a short statement of the reasons therefor.

6/ The rule provides as follows:

(i) Where objections are filed...the Executive Director shall conduct an investigation and shall, where appropriate, issue a notice of hearing designating a hearing officer to hear the matters alleged and to issue a report and recommendations...

As a part of the exception taken to the granting of a hearing, Local 245 argues that hearsay is the basis for one of the objections raised by Local 1959. Section 19:11-19 (f) of the Rules provides that objections to the conduct of an election or conduct affecting the results of an election "shall contain a short statement of the reasons therefor." The statement by Mr. Klingensmith in the Objections that an agreement as to election "ground rules" was violated is a reason for the stated objection and is not hearsay. Since objections are in the nature of an administrative pleading which puts facts in issue and which causes an investigation to be conducted, they are not evidence because the proceedings are then at the investigatory not the hearing stage. Furthermore the hearsay objection relates to admissibility of evidence at a formal proceeding and does not pertain to matters addressed to pleadings, administrative or otherwise 7/. Therefore, the Commission finds that Petitioner's exception as to hearsay has no merit.

Local 245 further argues that statements in support of the objections "were not under oath". This contention has no merit in that Section 19:11-19 of the Commission's Rules and Regulations provides that the Executive Director shall conduct an investigation where objections are filed. There is no specific requirement that every statement obtained in an investigation be under oath nor that such investigations be conducted only by affidavit. Pursuant to his authority the Executive Director issued a notice of hearing for the purpose of taking sworn testimony in order to resolve all matters in dispute. The Commission

7/ N. J. Evidence Rules, 1967, Rule 63.

finds that the fact that preliminary statements were not under oath is no basis for exception to the granting of a hearing.

Petitioner argues that a public works employee who gave a statement during the preliminary investigation, "(d)id not testify" at the hearing. The failure to produce a witness at a hearing does not render the hearing a nullity where his testimony would be cumulative or corroborative. At the hearing Mr. Klingensmith and Mr. Nardolilli were produced by Local 1959 to testify in part concerning the drinking. The Intervenor in its discretion elected not to call an employee as a witness. The Commission cannot speculate that his testimony would be adverse to Local 1959 when in a prior letter the employee related the observation of the dispensing of alcoholic beverages. Since the objecting party bears the burden of proof pursuant to Section 19:11-19(i) the Commission will not infringe on the right of parties to control the presentation of their evidence. The Commission finds that the failure to produce the employee as a witness is no basis for declaring the hearing improper.

For the foregoing reasons and findings, the Commission overrules in its entirety Petitioner's Exception (a)-(1).

Exceptions (a)-(2) and (a)-(3)

The Hearing Officer's report makes reference to a previous election and the fact that Local 245 filed objections as to the previous election.

The recommendation was prejudiced and a result of bias on the part of the Hearing Officer.

The reference on page two of the Hearing Officer's report to a previous election and objections thereto was necessary to outline the factual setting under which the matter was presently being considered.

Mr. Yengo, attorney for Petitioner, concludes that the fact the Hearing Officer mentioned the previous election was set aside based on objections filed by Local 245 indicated a feeling that Local 1959 now deserved a favorable determination on its objections. This allegation is completely unsupported both by the record and by the Report and Recommendations of the Hearing Officer. Therefore, the Commission finds the reference to a prior election as a basis for exception totally without merit.

The charge of bias and prejudice on the part of the Hearing Officer must be given careful scrutiny by the Commission due to its serious nature. It is one thing to generally charge bias and prejudice when a Hearing Officer's recommendation is unfavorable to one's position but it is quite another to substantiate this accusation by competent evidence. In this matter there is no proof whatsoever of any conduct on the part of the Hearing Officer that could be considered biased or prejudiced. Clearly, the record reflects courtesy and fairness to both sides on the part of the Hearing Officer. General reference to a telephone conversation in Petitioner's brief is hardly the type of competent evidence necessary to substantiate an accusation of bias. 8/ Based on the total absence of any proof in the record, or in any other form, of bias or prejudice on the part of the Hearing Officer, the Commission finds no merit whatsoever in Petitioner's allegation of bias or prejudice.

For the foregoing reasons and findings, the Commission overrules Petitioner's Exceptions (a)-(2) and (a)-(3).

8/ Mr. Yengo states "A bitter argument ensued and by the tone of his voice and his remarks Yengo told the Hearing Officer he would expect an unfavorable recommendation."

Exception (a)-(4)

The hearing was not conducted by any acceptable rules of evidence.

Section 19:14-5 of the Commission's Rules and Regulations, entitled "Rules of Evidence", provides: "The parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by the Rules of Court. All relevant evidence is admissible..." The Commission believes that the foregoing rule is dispositive of the exception. Repeated reference by Petitioner to hearsay testimony concerning "ground rules" is no basis for exception. The claimed hearsay was corroborated by direct evidence and thus no objectionable aspect attaches to it. Furthermore, the parties are not bound to a strict adherence to evidence rules in an administrative hearing, due to its investigatory nature. Due process of law dictates that a hearing be fundamentally fair and the record indicates that this hearing met this standard of procedural due process of law. The Commission finds that the hearing was conducted fairly and each side was given an opportunity to present its evidence freely and to call and cross examine witnesses.

For the foregoing reasons and findings, the Commission overrules Exception (a)-(4).

Exception (a)-(5)

The Hearing Officer permitted management, in the person of Robert Murphy to attend the hearing despite the demand before the hearing to bar his attendance on the ground that his presence may tend to intimidate witnesses.

Section 19:14-1 provides that hearings for the purpose of taking evidence shall be public unless otherwise ordered for good

cause shown. Since good cause was not demonstrated to the Commission, the Executive Director, or the Hearing Officer, the hearing was not ordered to be private. Therefore, Mr. Murphy or any other individual could not be barred from attendance at a public hearing. Also the allegation of intimidation by his presence, whether actual or possible, is totally unsupported by the record. The Commission finds that Petitioner's contention lacks merit and overrules Exception (a)-(5).

Exception (a)-(6) and (a)-(7)

The recommendation is inconsistent. In part the testimony of Robert Klingensmith is rejected and in part accepted by the Hearing Officer.

The recommendation rejects completely the testimony of impartial witness and testimony offered in behalf of Local 245.

Petitioner argues that the Hearing Officer's recommendation is inconsistent yet there is no attempt made to point out the specific inconsistencies between the Hearing Officer's Report and Recommendations and the transcript of the hearing. Reference is made to the fact that only one sticker was testified to as being seen by Klingensmith. Mr. Yengo, attorney for Petitioner, is incorrect in his reading of the record in that Mr. Klingensmith testified to seeing two large stickers on Mr. DeCarlo's car. Any mention generally of acceptance and rejection of Klingensmith's testimony unaccompanied by specific references to pages in the Hearing Officer's Report must be dismissed as having no basis in fact. Parenthetically, we note that it is a judicially recognized principle that the testimony of a witness may be credited in part and rejected in part.

Regarding Exception (a)-(7) the Commission's Hearing Officer has every right to consider the testimony and to credit certain witnesses in determining the weight to which evidence would be given. In determining matters of credibility the Hearing Officer had the best opportunity to observe the demeanor of the witness in evaluating his testimony. Reference to "impartial witnesses" in Petitioner's Exceptions and to the Hearing Officer's rejection of their testimony is not supported by the Report and Recommendations. The Hearing Officer chose to credit Mr. Klingensmith and there is ample support for this finding in the record. Therefore, the Commission finds that the Hearing Officer's recommendation is not inconsistent and overrules Exceptions (a)-(6) and (a)-(7).

Exception (b)

The Commission having considered carefully Petitioner's Exceptions to certain language 9/ in the Hearing Officer's Report and Recommendation overrules Exception (b) in its entirety.

The Commission has considered the Hearing Officer's Report and Recommendation and concludes as follows.

9/ Petitioner's Exceptions, p. 1, contained the following:

(b) Objection is made to the following parts of the Hearing Officer's report:

1. Under - BACKGROUND - page 3, any and all references to a previous election and objections by Local 245.
2. OBJECTION No. 1 - page 3 finding of fact by the Hearing Officer as follows:
"At a pre-election conference attended by representatives of the parties it was agreed that there would be no campaigning within 100 feet of the polling place, a reasonable distance."
3. ANALYSIS - page 6.
More particularly - "honored more in its breach than its observance".
"with Local 245 stickers displayed."
4. Prejudicial citing of Klingensmith's testimony.

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. Intervenor's objections will be reprinted below and treated individually in the order of their submission.

Objection No. 1

1) At the pre-election conference sponsored by the American Arbitration Association, the rules and procedures for conducting the election were worked out by mutual consent of all parties. One such item of agreement was that there would be no electioneering within 100 feet of the polling place. This rule was flagrantly and almost continuously violated by officers of Local 245 during the entire polling period. (between 7:30 A.M. and 5:00 P.M.)

As more fully set forth in his Report, the Hearing Officer found that the parties agreed to refrain from electioneering within a 100 feet radius of the polling place, that Petitioner's President DeCarlo parked his car for a time within the restricted area, that this car bore Petitioner's campaign stickers, that DeCarlo and his supporters congregated for a time within the restricted area, moved away but later returned and were joined by Intervenor's representative and his adherents. The Commission does not agree that this conduct is sufficient to warrant setting aside the election. To hold that the act of entry within the restricted area is, without more, a valid objection, would reduce the issue of an election's legitimacy to a

rather mechanical exercise, emphasizing form over substance. In this case the record discloses that representatives and adherents of both organizations did enter within 100 feet of the polling place, but the record fails to disclose that these individuals, once present, engaged in electioneering. Though not a preferred condition, their mere presence is not, per se, electioneering and does not necessarily establish interference with the election process or the voters' freedom of choice. Concerning DeCarlo's car and its display of campaign stickers, the record shows that it was parked in the restricted area for a period of time, the duration of which the objecting party and the record as a whole fails to establish, the car was promptly removed when objection was raised, and was moved to a location where the stickers were no longer visible; at least, there is no evidence that voters saw such. Intervenor's representative Klingensmith states he saw no stickers after the car was removed. Under all the circumstances the Commission concludes the conduct described does not constitute interference. Accordingly Objection No. 1 is overruled.

Objection No. 2

2) In the garage next to the voting room, and connected by an open doorway, officers of and others representing Local 245 freely and openly dispensed alcoholic beverages to eligible voters before and after entering the polling place, as an inducement for votes.

The Commission adopts the Hearing Officer's findings of fact concerning Intervenor's Objection No. 2. However, the record is barren of any testimony not only that any voters were inebriated but also that voters were given alcoholic beverages as an inducement or reward for voting for Local 245. Mr. Klingensmith and Mr. Nardolilli testified that they were offered drinks by Petitioner's representatives. But neither of

these two men were eligible to vote. The fact that people were drinking in a garage near a polling place is no basis for setting this election aside absent proof that the dispensing of alcoholic beverages interfered with the voters' ability to cast their ballots freely without inducement or reward. Moreover, the record fails to establish how many of these "people" were employees on their way to vote. The Commission in no way condones dispensing of alcoholic beverages to voters during an election. However, the Commission must examine the record carefully to determine if the drinking interfered with the voting. In the instant case the Commission finds insufficient evidence of interference with orderly voting due to drinking or dispensing of alcoholic beverages.

For the foregoing reasons, the Commission overrules Intervenor's Objection No. 2.

Objection No. 3

3) The President of Local 245, Mr. Thomas DeCarlo was afforded special privileges by the employer in that he was permitted to park his personal automobile in the D.P.W. garage within 10 feet of the doorway to the polling area. From time to time he and others representing Local 245 got in and out of his car and during most of the remainder of voting hours they stood in groups between Mr. DeCarlo's car and the doorway to the voting room. By contrast, representatives of and supporters of Local 1959 were required by representatives of the employer to remove their cars which were parked outside at the curb across the street from the building where the voting was taking place.


The Commission has carefully considered the Hearing Officer's Report and Recommendations that Intervenor's Objection No. 3 be overruled. The Commission hereby adopts the Hearing Officer's findings and recommendations and overrules Objection No. 3.

In summary, the Commission overrules each and every objection filed by Intervenor. Therefore, Petitioner, having received a majority of all valid votes cast, plus challenged ballots, will be certified.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that Local 245, Jersey City Public Works Employees, Inc. has been designated and selected by a majority of the employees of the above-named Public Employer, in the unit of all white collar and blue collar employees in the Department of Public Works, excluding craft employees, professional employees and supervisors within the meaning of the Act, policemen and managerial executives, as their representative for the purposes of collective negotiations; and that pursuant to the New Jersey Employer-Employee Relations Act of 1968, the said organization is the exclusive representative of all employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment.

BY ORDER OF THE COMMISSION


William L. Kirchner, Jr.
Acting Chairman

DATED: July 27, 1970

Trenton, New Jersey