

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-2003-77

NEW JERSEY CORRECTIONS ASSOCIATION, INC.,
AFFILIATED WITH THE FRATERNAL ORDER OF POLICE,

Petitioner,

STATE LAW ENFORCEMENT CONFERENCE OF THE
NEW JERSEY STATE POLICEMEN'S BENEVOLENT
ASSOCIATION,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission grants a request for review of the New Jersey Corrections Association, Inc., affiliated with the Fraternal Order of Police. The Director of Representation ordered a new mail ballot election because incorrect addresses resulted in disenfranchising enough voters to affect the outcome of the original election. The PBA requested cross-review of the dismissal of some of its objections. The commission finds that correct addresses were not supplied in time to allow the employees to vote and therefore that at least 120 eligible voters were disenfranchised. That number of disenfranchised voters could have affected the outcome of the election. The Commission sustains the Director's decision to set aside the election and direct a new election.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2004-49

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Appearances:

For the Public Employer, Peter C. Harvey, Attorney
General (George Cohen, Deputy Attorney General)

For the Petitioner, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For the Intervenor, Zazzali, Fagella, Nowak,
Kleinbaum & Friedman, attorneys (Robert A.
Fagella and Colin M. Lynch, of counsel)

DECISION

This case involves requests for review and cross-review of a decision of the Director of Representation ordering a new mail ballot election because incorrect addresses resulted in disenfranchising enough voters to affect the outcome of the original election. Because the request for review raises a

substantial question of law, we grant review. See N.J.A.C. 19:11-8.2.^{1/} The essential facts are not in dispute.

On March 18, 2003, the New Jersey Corrections Association, Inc., affiliated with the Fraternal Order of Police ("FOP") filed a petition seeking to represent certain law enforcement personnel employed by the State of New Jersey and represented by the State Law Enforcement Conference of the New Jersey State Policemen's Benevolent Association ("PBA"). On March 27, the PBA intervened. The negotiations unit consists of approximately 7000 employees.

On April 1, 2003, the parties entered into an Agreement for Consent Election providing for a mail ballot election and requiring, among other things, that the employer furnish the

1/ N.J.A.C. 19:11-8.2 provides:

(a) The commission will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

1. That a substantial question of law is raised concerning the interpretation or administration of the act or these rules;
2. That the director of representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. That the conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
4. That there are compelling reasons for reconsideration of an important commission rule or policy.

Director and the two unions with a list of all eligible employees and their home addresses. On April 15, the Director approved the Consent Agreement and directed the employer to post Notices of Election. Those notices described the details of the election and advised employees desiring more information to "communicate with the Director of Representation or the agent in charge of the election." The ballots would be sent out on July 1 and had to be received in the agency's post office box by 10:00 a.m. on July 23.

On May 30, 2003, the employer delivered the voter eligibility list to the Director. This list was based on the names and addresses in the centralized payroll department of the Department of Treasury. The unions had the list by June 2. On June 2, the election agent asked the parties to review the list for accuracy and to submit corrected addresses before the agency mailed ballots.

Ballots were mailed on July 1. Between July 8 and July 18, the United State Postal Service returned 188 ballots as undeliverable. The employees or the unions provided updated addresses for 20 of the returned ballots. New ballots were sent to those voters. They all cast ballots.

In response to agency inquiries, the employer provided updated addresses for 113 eligible voters on July 22, the day before the deadline for returning ballots. That same day, the

agency mailed ballots to those voters. The employer had obtained the updated addresses by comparing the addresses it had in its centralized payroll with the addresses it had in the central payroll of the Department of Corrections or at the local correctional facilities where the employees worked.

The ballots were counted on July 23, 2003. Of the 3,991 ballots cast, 1,998 votes were for the FOP; 1,917 votes were for the PBA; 12 votes were for having no representative; and 64 ballots were voided. The FOP received 81 more valid votes than the PBA and a majority of the valid votes cast.

Election objections were due by July 30, 2003. N.J.A.C. 19:11-10.3(h). On July 30, the PBA filed objections. Objection 1 asserted that a complete and accurate voter eligibility list as required by N.J.A.C. 19:11-10.1^{2/} had not been provided. In

2/ N.J.A.C. 19:11-10.1 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 and their last known mailing addresses and job titles. . . .

(b) Failure to comply with the requirements of this section may be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-10.3(h).

particular, the PBA contended that the employer did not provide correct mailing addresses for 113 eligible voters until July 22 or the last known mailing addresses for approximately 85 employees on military leave, thus effectively disenfranchising those eligible voters. Objection 2 contended that the agency should count 130 ballots retrieved from the post office box on July 29, because the post office allegedly misread some of the return addresses which may have caused those ballots to have been received past the July 23 deadline. Objection 3 contended that the FOP violated an obligation to provide all other parties with its address correction requests. By way of remedy, the PBA requested that the agency re-mail ballots to the 113 employees whose correct addresses were not provided until July 22 and the approximately 85 employees on military leave; and open the 130 ballots retrieved on July 29.

On July 31, 2003, the PBA submitted a fourth objection. The PBA contended that approximately 116 employees who were no longer employed in the negotiations unit at the time of balloting were included on the voter eligibility list and may have inappropriately voted. Because there was no way to separate the eligible ballots from the ineligible ballots once commingled at the count, the PBA requested that the election be run again.

The Director investigated Objection 1. During that investigation, the employer furnished better addresses for seven

more eligible voters, bringing the total number of corrected addresses to 120.

On December 12, 2003, the Director dismissed part of Objection 1 and all of Objections 2, 3, and 4. Sustaining part of Objection 1, he set aside the results of the election, and directed a new mail ballot election. D.R. No. 2004-8, NJPER (¶_____ 2003).

The Director sustained the portion of Objection 1 dealing with inaccuracies in home addresses. Although he found no evidence of bad faith, he did find that the employer had better addresses for at least 120 eligible voters and perhaps as many as 166 eligible voters who did not receive ballots in time to vote. These voters were disenfranchised as a result of the list inaccuracies, a margin that could have affected the outcome of the election.

On January 2, 2004, the FOP requested review of the Director's decision. It argues that the decision was contrary to the rules and precedent of the Commission, as well as the precedent of the National Labor Relations Board ("NLRB") and other state labor relations agencies. It contends that the decision would require perfection, rather than substantial compliance, from employers supplying addresses for election eligibility lists.

On January 5, 2004, the PBA requested cross-review of the dismissal of its objections concerning the military addresses (Objection 1) and the allegedly ineligible voters on the eligibility list (Objection 4). The PBA notes that should we deny the FOP's request for review, its request would be moot.

On January 5, 2004, the employer requested a stay of the new election pending consideration of the FOP's request for review. The FOP indicated that a stay would be appropriate. The PBA opposed the request. On January 8, we granted a stay.

On January 8, 2004, the employer submitted a letter supporting the FOP's request for review. It contends that the Director failed to distinguish cases where names are omitted from an eligibility list from the instant case where addresses are incorrect. It asserts that if the Director's decision is upheld, no level of compliance will ever suffice if the vote differential is less than the number of undelivered ballots.

On January 13, 2004, the employer submitted a letter requesting that we deny the PBA's request for cross-review.

On January 15, 2004, the PBA filed its response to the other parties' submissions.

Conducting fair representation elections that permit employee free choice is a core function of our agency. N.J.S.A. 34:13A-6(d). Through our election processes, employees exercise their right to select a majority representative. That

representative becomes the exclusive representative for all unit employees and supplants an individual employee's right to represent himself or herself about matters of the utmost importance to the employee. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). In both the public and private sectors, the concept of employee free choice in the selection or rejection of a representative is interwoven with the responsibility of the governmental agency to ensure that the election choice is exercised under "laboratory conditions." East Windsor Tp., D.R. No. 79-13, 4 NJPER 445 (¶4202 1979); see also General Shoe Corp., 77 NLRB 124, 126 (1948).

In all our elections, the employer must provide an eligibility list of names, last known mailing addresses, and job titles to the Director of Representation and any employee organizations participating in the election. See N.J.A.C. 19:11-10.1. In a traditional on-site election, the purpose of this requirement is not to guarantee employees the opportunity to vote, but to enable employee organizations to put potential voters in a "better position to make a more fully informed and reasonable choice." Excelsior Underwear, Inc., 156 NLRB 1236, 1240 (1966) (private sector case establishing the requirement that employers provide unions with employee names and addresses before election). A significant body of case law, both in the private and public sectors, requires that an employer

substantially comply with the eligibility list requirement so that unions can send employees campaign information. If it does not, an election will be set aside. See Monmouth Cty., P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982) (employer's substantial compliance with Excelsior requirements gave unions sufficient opportunity to communicate with electorate in on-site election). Much of that case law is cited in the Director's decision. While that case law is relevant when deciding whether unions have been able to inform voters, it does not answer the problem in this case.

This case does not center on the right of unions to campaign. Instead, this case centers on our agency's obligation to conduct a fair mail ballot election. In a mail ballot election, the list of names and addresses is our primary mechanism for ensuring that negotiations unit employees receive ballots and have an opportunity to vote. While providing unions access to voters is an important right, providing voters access to the polls is a paramount obligation. In a mail ballot election, the critical question, then, is not whether there has been substantial compliance with the traditional Excelsior list requirement, but whether our election process has enabled negotiations unit employees to register the will of the majority.

In this case, correct addresses were available but were not supplied in time to allow the employees in question to vote. As

a result, at least 120 eligible voters were disenfranchised. That number of disenfranchised voters could have affected the outcome of the election.^{3/} It was as if a significant group of employees in an on-site election was barred from reaching the polls. See, e.g., Berkeley Tp., P.E.R.C. No. 86-112, 12 NJPER 358 (¶17135 1986) (setting aside election where late opening of polls could have affected outcome); Nyack Hosp., 238 NLRB 257 (1978) (setting aside elections in two units where number of possibly disenfranchised employees was sufficient to have affected the outcomes); Ace Letter Service Co., 187 NLRB 581 (1970) (setting aside election where certain employees were denied access to the polls). Under these circumstances, we believe that the Director reasonably decided to direct a new election.

The FOP and the employer raise a legitimate concern: will this ruling mean that elections will be overturned any time the number of undelivered ballots is greater than the vote differential? The answer is no, given an additional safeguard against voters being disenfranchised. We will now require that Notices of Election prominently display this language:

^{3/} We agree with the Director's reliance on Woodman's Food Markets, Inc., 332 NLRB 503 (2000), in considering the closeness of this mail ballot election where errors in the eligibility list disenfranchised a determinative number of voters. See also Henry Street Settlement, 277 NLRB 901 (1985) (closeness of results supported decision to direct second mail ballot election).

If you believe you are an eligible voter and you do not receive a ballot in the mail by [date - two days after the last date any ballots should have been received], call the Director of Representation immediately at [telephone number]. If you do not receive a ballot and do not call, you may lose the opportunity to vote in this election.

This modification accords with NLRB practice and that of other State labor relations agencies. Including this language in no way diminishes an employer's obligation to act in good faith and to timely provide a current list of employee names and addresses. A perfect list remains the goal. But we recognize that employees may move and that errors may occasionally occur. This additional safeguard will instruct eligible voters on what to do if they do not receive a ballot so that they can receive one in plenty of time to vote. Eligible voters will thus have every opportunity to exercise their right to vote. If they forego that opportunity, the onus of their not being able to vote may be on them. Cf. Erie Cty. and Erie Cty. Sheriff, 18 NYPERB 4120 (¶18-4071 1985) (rejecting election objection where number of errors in eligibility list was small and 7 of 8 employees who did not vote had access to notice of election detailing the procedures for requesting a replacement ballot); California State Employees' Ass'n, 6 PERC ¶13043 (Final HE 1982) (rejecting election objection despite outcome determinative number of undeliverable ballots where notice of election provided telephone number for

eligible voters to call for duplicate ballots).^{4/} We also note that this is not a case where better addresses were unavailable.

In light of this ruling denying the FOP's requested relief, we do not consider the petition for cross-review. The PBA correctly asserted that ordering a new election would moot its petition and we do not believe that the issues raised in that petition are substantial enough to warrant our review anyway.

Contrast Zirger v. General Accident Ins. Co., 144 N.J. 327 (1996) (court considered moot issue that was of substantial importance, likely to reoccur, and capable of evading review).

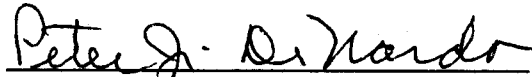
Re-running this election, with updated addresses and the additional safeguard, will afford as many eligible employees as possible the opportunity to vote in this important representation matter. Our obligation to afford that opportunity outweighs the inconvenience to the parties and to this agency in conducting a re-run election. Once we meet that obligation, it will be for the employees themselves to exercise their right to vote and to decide the outcome.

^{4/} Extending the balloting period is another option that has been used by the NLRB and may be appropriate in a particular case. See Inter-Con Security Systems, Inc., 2003 NLRB Lexis 329 (ALJ Decision 2003) (election objections overruled where NLRB Region, with employer's cooperation, made extensive efforts to obtain correct addresses, mailed ballots to corrected addresses, and extended balloting period to permit those ballots to be returned).

ORDER

The FOP's request for review is granted. The decision to set aside the election and direct a new election is sustained. The Director of Representation should issue a new direction of election as quickly as possible, consistent with this decision.

BY ORDER OF THE COMMISSION



Peter J. DiNardo
Acting Chairman

Acting Chairman DiNardo, Commissioners Buchanan, Katz and Sandman voted in favor of this decision. None opposed. Chairman Henderson and Commissioner Mastriani abstained from consideration.

DATED: January 29, 2004
Trenton, New Jersey
ISSUED: January 29, 2004