

3/4/96

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD
OFFICE OF THE DIRECTOR

Local 7911, Communications Workers)
of America, AFL-CIO,)
)
Petitioner,)
)
and)
)
Dona Ana County,)
)
Public Employer.)

Case No. CP 19-95(C)
1 PELRB No. 16

REPORT OF THE DIRECTOR

Introduction

On January 25, 1996,¹ the Public Employee Labor Relations Board (PELRB or Board) conducted an election involving certain public employees at the detention center in Dona Ana County where Local 7911, Communications Workers of America (CWA or Petitioner) seeks to be recognized as exclusive representative for purposes of collective bargaining.

At the conclusion of the onsite election the Board's agent issued a tally of ballots which displayed a total of 58 eligible voters. Of that number 37 appeared to cast a ballot; there were two challenged ballots and zero invalid ballots. The popular vote was 37 ballots marked "YES" and zero ballots for "No Representation."

On February 1 Dona Ana County (County) filed objections to the conduct of the election pursuant to Board Rule 2.27, Objections.²

¹All dates herein are to calendar year 1996.

²Rule 2.27 states, in part, that "[w]ithin five (5) [work]days following the service of a tally of ballots, a party may file objections to conduct affecting the results of the election. The Director shall, within thirty (30) [work]days of the filing of such objections, investigate the objections and issue a report thereon."

Findings

On January 2 the PELRB issued 1 PELRB No. 16, its final action Decision and Order Directing Election at the detention center.³ In that final action the Board determined that the position of shift sergeant was not a “supervisor” as defined at § 4(S) under the Public Employee Bargaining Act (Act or PEBA) and the position of training sergeant was not a “management employee” (PEBA § 4(M)) or a “confidential” position (PEBA § 4(F)). Pursuant to its authority at § 13(A) in the PEBA, the PELRB designated an appropriate unit to include, among others, shift sergeant, training sergeant, classification sergeant, transport sergeant, and juvenile sergeant.

On January 25 a tally of ballots issued pursuant to Rule 2.24, Tally of Ballots, at the close of the election. On February 1 the County filed objections to conduct affecting the results of the election. The objections are timely filed.

A review of the tally of ballots reflects that Petitioner has satisfied the requirement set forth in the Act’s § 14(E): “No labor organization shall be certified as an exclusive representative unless at least sixty percent of the members of the bargaining unit vote in the election.” In this election 64 percent (37 of 58 eligible voters) appeared to cast a ballot. Since the 60 percent requirement was satisfied, the ballots were counted. The outcome of the election is 37 “YES” votes for CWA to be exclusive representative for purposes of collective bargaining and zero votes for “No Representation.”

In addition to the 37 eligible voters who appeared at the polling site, 2 individuals (whose names were not on the eligibility list) appeared to vote. These individuals cast challenged ballots. That is, their ballots were placed in sealed envelopes and segregated from all others by not depositing them in the ballot box. In addition to the Board’s agent informing the two voters they were not eligible to vote, the observers agreed they were not eligible. The challenged ballots remain in sealed envelopes apart from all other ballots.

There were no invalid ballots. A ballot is invalid if identification of the voter is possible,⁴ or if defaced or marked in such a manner as to render the ballot meaningless for purposes of determining whether it is an affirmative or negative vote.⁵

Finally, the Board’s agent conducted the election in accordance with PELRB rules and regulations as well as 1 PELRB No. 16. Petitioner’s and County’s observer present at the polling site signed the “Certification of Conduct of Election” form.

³On January 24 the County filed a notice of appeal with the Third Judicial District Court. *Local 7911, Communications Workers of America, AFL-CIO, Petitioner/Appellee, vs. Dona Ana County Detention Center, Respondent/Public Employer*, No. CV 96-66.

⁴*George K. Garrett Co.*, 120 NLRB 484, 41 LRRM 1519 (1958); *Eagle Iron Works*, 117 NLRB 1053, 39 LRRM 1379 (1957); *Burlington Mills Corp.*, 56 NLRB 365, 14 LRRM 148 (1944).

⁵*NLRB v. Vulcan Furniture Mfg. Corp.*, 214 F.2d 369, 34 LRRM 2449 (CA 5, 1954), *cert. denied*, 348 U.S. 873, 35 LRRM 2058 (1954); *Q-F Wholesalers*, 87 NLRB 1085, 25 LRRM 1254 (1949); *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 19 LRRM 2458 (CA 8, 1947), *cert. denied*, 332 U.S. 758, 20 LRRM 2673 (1947); *Woodmark Industries*, 80 NLRB 1105, 23 LRRM 1209 (1948).

Objections

1. Sergeants

The County's first objection is addressed in two parts. Part one concerns the sergeants. Specifically, the County asserts that a shift sergeant is a "supervisor" and the training sergeant, while not a supervisory position, is a management or confidential position. Section 13(C) of the PEBA, the County notes, precludes the inclusion of supervisory, management or confidential positions in a bargaining unit.

In a "separate but related objection" the County argues the following:

...the inclusion of the sergeants in the bargaining unit amounts to an inducement by the Union by the employee's chain of command. The employee's decision on how to vote should not be impacted by someone having influence over employment decisions affecting the employee. Because these positions evaluate and recommend discipline affecting the eligible voters, some employees may believe they should vote for the Union to win the favor of their supervisor. Furthermore, the Union President (who also holds one of the contested sergeant positions) sat as the Union's Observer during the election. This added to the inappropriate influence over the decision making of the other employees casting their votes.

By asserting that (1) sergeants should be excluded, based on PEBA § 13(C), from this appropriate unit and (2) including them constitutes an improper inducement, the County seeks to have the Board find the position of sergeant to be a nonbargaining-unit position. In other words, the County seeks a reconsideration and reversal of the Board's final action in 1 PELRB No. 16. An administrative agency, such as the PELRB, does not have the authority to reverse or reconsider its final action unless the legislature expressly granted the Board power to do so.⁶ PEBA does not contain an express provision allowing the PELRB to reconsider 1 PELRB No. 16. The County's assertions of (1) supervisory status for sergeants and (2) improper inducement are premised on its continuing argument that a sergeant is a "supervisor." These assertions, presented in the form of objections to the conduct of an election, are not consistent with the findings of fact and conclusions of law in 1 PELRB No. 16. As an agent of the PELRB, I am "bound by formal decisions of the Board."⁷

Furthermore, this issue falls outside the parameters of Rule 2.27 because supervisory status has been adjudicated before the Board and resolved. It was raised under Rule 2.15(c) and properly addressed. By raising the issue again the County breaches Rule 2.15(c) and seeks to have the Board breach Rule 1.23 which precludes a "de novo" review of the issue. The County's objection, to be found meritorious, requires the Board to violate its rules and regulations and the Act.

To fall within the purview of Rule 2.27 an objection to conduct affecting the outcome of an election must deal with "conduct." The only statement in this objection that may be construed as conduct concerns the presence of the training sergeant serving as an observer (part two in the first objection). The use of a bargaining-unit employee who is eligible to vote and serves as an official for the local unit

⁶ See "Denial of Motion for Reconsideration" in *New Mexico State University*, 1 PELRB No. 13 (November 8, 1995).

⁷ *Los Alamos County*, 1 PELRB No. 3, fn. 2 (December 1994).

is permissible under Rule 2.22, Observers.⁸ There is no statement or action alleged or identified by the County to have been undertaken by the Petitioner's observer which affected the outcome of the election other than being present. In this regard, the County's observer signed the "Certification of Conduct of Election" form thereby signifying and acknowledging that the election was conducted fairly and properly.

In sum, part one in the first objection centering on the issue of supervisory status does not concern an issue appropriate for consideration under Rule 2.27, that is, conduct affecting an election, and can not be addressed by the Board without the PELRB violating its rules and regulations and the PEBA. It must be dismissed. The second part in the first objection dealing with the union's observer to the election is also dismissed because the presence of the public employee union president as an observer did not affect the outcome of the election.

2. Challenged Ballots

The County objects to two individuals, a Maintenance Worker III and a Records/Systems Operator, casting ballots and contends they were counted in the tally. Observers and the Board's agent agreed that the two persons were not eligible to vote; those ballots remain in sealed envelopes apart from ballots in the ballot box. The challenged ballots were not counted and thus not included in the tally issued at the conclusion of the election. They are correctly identified on the tally sheet as "challenged" and not "invalid."

With respect to "invalid" ballots, the County asserts that issuing a tally of ballots showing "0 invalid votes" is indicative or proof the two ballots were counted. The findings do not support the assertion. As noted above, an "invalid" vote or ballot is one that contains a signature or name on it or is defaced or marked in some manner such that it could not be tallied, i.e., a "yes" or "no representation" vote. A challenged ballot is not the same as an invalid ballot.

The second objection, then, is dismissed because the conduct alleged to affect the outcome of the election did not occur as presented by the County. The two individuals' votes were not counted and the tally of ballots accurately reflects zero invalid ballots.

RECOMMENDED DECISION

1. Sergeants

Part One: The issue of supervisory status for the position of sergeant can not be addressed by the PELRB without violating its rules and regulations and the Act itself. The issue is not properly before the Board under Rule 2.27. Part One is dismissed.

⁸Rule 2.22 Observers states:

Each party shall be entitled to an equal number of observers to observe and assist in each polling area, and to witness the counting of ballots. The Director has complete discretion to determine the number of observers. Observers shall not be supervisory or managerial employees or labor organization employees. However, representatives of the parties in addition to the observers may observe the counting of ballots.

Second Part: The issue of the presence of the union president serving as an observer is dismissed.

2. Challenged Ballots

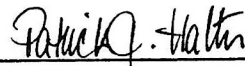
The issue of challenged ballots and invalid ballots is dismissed

Request for Review

Rule 2.27 states that “[a] party adversely affected by the Director’s...report may file a request for review with the Board under the same procedures set forth in Rule 2.15[.]”

Rule 2.15(a) states that any party may file a request for review within ten (10) [work]days after its issuance. “The request for review shall state the specific portion of the Director’s recommended disposition to which exception is taken and the factual and legal basis for such exception. The request may not rely on any evidence not presented to the Director. The request must be served on all other parties.”

Board review is based on the “existing record” (Rule 2.15(c)) or, as stated in Rule 1.23, “shall be based on the evidence presented or offered at the earlier stages of the proceeding, and shall not be de novo.” (Rule 1.23).



Patrick J. Halter
Director, PELRB

March 4, 1996
Albuquerque, New Mexico