

TOWN OF BARNSTABLE AND AFSCME, COUNCIL 93, AFL-CIO AND BARNSTABLE MUNICIPAL EMPLOYEES ASSOCIATION, MCR-3758 (7/27/88). RULING ON OBJECTIONS TO ELECTION.

42.328 facsimile ballot
 92.35 stipulations
 92.49 other motions

Commissioners participating:

Maria C. Walsh, Commissioner
 Elizabeth K. Boyer, Commissioner

Appearances:

David B. Ellis, Esq. - Representing the Town of Barnstable
 Wayne Soini, Esq. - Representing AFSCME, Council 93, AFL-CIO
 Nathan S. Paven, Esq. - Representing the Barnstable Municipal Employees Association

RULING ON OBJECTIONS TO ELECTION

Statement of the Case

The Labor Relations Commission (Commission) conducted an on site election among certain professional and non-professional employees of the Town of Barnstable (Town) on March 3, 1988. Of the total of 127 votes cast by the non-professionals, the Barnstable Municipal Employees Association (BMEA) received 65, AFSCME received 57, there were two votes for no employee organization, and there were three challenged ballots. Of a total of five votes cast by professional employees, four of the five voters voted not to be included in an overall collective bargaining unit consisting of professional and non-professional employees; and the BMEA received three votes and AFSCME received two votes. Following the ballot tabulation, AFSCME filed timely objections to the conduct of the election. On March 28, 1988, the Commission conducted an investigation concerning the objections, at which AFSCME filed a brief and BMEA presented an oral argument on the issues. On April 27, 1988, both unions signed a Stipulation of Facts and waived the submission of additional briefs.¹

STIPULATED FACTS

1. The Commission held an on site election on March 3, 1988, between AFSCME, Council 93, AFL-CIO, the petitioner, and Barnstable Municipal Employees Association (BMEA), the incumbent, for professional and non-professional employees of the Town of Barnstable.

¹The Town did not participate in the investigation. By letter dated April 8, 1988, the Town stated that it took no position concerning the statement of facts set forth in the stipulation, it would not file a brief, and that it had no objection to the Commission relying on such stipulation of facts if agreed to by the other parties to this proceeding.



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2. The Commission provided its Notices of Election to the Town for posting on February 16, 1988, and the Town posted these notices on February 17.
3. On or about February 22, 1988, the BMEA sent a mailing on yellow paper, which bore the BMEA logo, to all bargaining unit members.
4. On February 25, 1988, the BMEA mailed to all bargaining unit employees a facsimile ballot.² Nothing else was contained in the envelope other than the facsimile ballot.
5. The February 25 mailing came in an envelope with the return address: BMEA, 230 South Street, Hyannis, MA 02601.
6. The facsimile ballot enclosed in the BMEA mailing was the same size as the Commission's sample non-professional ballot enclosed with the Notice of Election. It contained the same heading at the top, "Commonwealth of Massachusetts, Labor Relations Commission." It repeated the same instructions: "This is a secret ballot. Do not sign your name. Mark an 'X' in one box only then fold your ballot to conceal your vote. If you spoil your ballot, return it to the Commission's agent and get a new one. I desire to be represented by:..." It then contained three boxes with the names of the choices in the same position as the Commission's sample. Like the Commission's, this specimen had the word "Sample" printed across its front. The typeface of the two was virtually identical. The two shared the same layout, grammar, and capitalization.
7. The BMEA specimen differed from the Commission's sample non-professional ballot in that it was printed on pink paper instead of the Commission's blue paper. The BMEA sample ballot also included the words "Vote Right" with an arrow pointing to the box for the Barnstable Municipal Employees Association, and below the words "Vote Right" were the letters "BMEA" in bold print.
8. On February 25, BMEA also posted copies of the BMEA sample ballot on bulletin boards at the Town Hall, the employee lounge and at the School Committee office.

²On May 31, 1988, BMEA filed a "Motion to Withdraw from Stipulation" alleging that the facts surrounding the mailing of the sample ballot had not been properly presented in the stipulation. Specifically, BMEA argued that the sample ballot and a "yellow" flier from the BMEA to employees in the bargaining unit were mailed together in the same envelope and were not sent separately. The BMEA also submitted a supporting affidavit. Because the BMEA's motion was filed before the issuance of this Decision, we shall permit BMEA to withdraw from the stipulation but only to the extent that the stipulation had specified that "Nothing else was contained in the envelope [mailed to voters] other than the facsimile ballot."



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9. After February 25, no further mailings were sent to bargaining unit members by either BMEA or AFSCME.
10. The results of the March 3, 1988 elections were as follows:
 - 1) The professional employees voted 4 to 1 not to be included in an overall bargaining unit with non-professional employees.
AFSCME received 2 votes
BMEA received 3 votes
There were no votes for No Union, and no protested, challenged, blank or void votes.
 - 2) The non-professional employees voted as follows:
AFSCME received 57 votes
BMEA received 65 votes
There were 3 Challenged Ballots
There were no blank or void ballots.
11. The Commission [is asked to take note] of the fact that some thirteen (13) of the listed eligible voters' addresses were post-office boxes rather than home addresses.
12. The Commission [is asked to take note] of the fact that there had not been a representation election conducted by the Labor Relations Commission among the employees of this unit since 1969. (MCRE-21).

As noted above, see n. 2, in support of its "Motion to Withdraw from Stipulation" the BMEA proffered an affidavit from the President of the BMEA claiming that the BMEA's mailing to employees included not only the facsimile ballot but also a "flier" printed on yellow paper. Both the flier and the facsimile ballot are appended to this Decision as Appendices 1 and 2 respectively. The AFSCME both opposes the BMEA Motion to Withdraw from Stipulation and contests the evidentiary proffer of the BMEA.³ We need not resolve the factual conflict, however, because even assuming the truth of the BMEA factual submission, it does not alter our decision in the case.

OPINION

The issue of the use of reproduced specimen ballots for partisan campaign purposes has arisen in prior cases. The Commission has noted that specimen ballots that have been marked for one party can create the impression that the Commission favors one ballot choice over another. Such an impression of Commission partiality can substantially jeopardize employee free choice. Commonwealth of Massachusetts, 10 MLC 1053, 1055 (1983). In Commonwealth of Massachusetts (UNIT 4), 2 MLC 1261, 1264 (1975), the Commission invalidated an election where the prevailing union had

³AFSCME contends that the facsimile ballot was not mailed with the flier.



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distributed specimen ballots with an "X" marked in the union's box. The Commission explained that it was critical for the Commission to "guard its mandate to be impartial and avoid even the appearance of departing from neutrality."

The Commission enforces the statutory mandate under Section 4 of the Law to conduct public employee representation elections to "ensure that employees voting in a representation election exercise a free and informed choice." Commonwealth of Massachusetts (Unit 4), supra at 1263. In this case we are concerned with strictly maintaining the appearance of this agency's complete neutrality in a partisan election campaign. See Commonwealth of Massachusetts (Unit 1), 7 MLC 1293, 1294 (1980). The standard applicable to analysis of the election objections is whether the sample ballot which has been reproduced "could have reasonably misled employees to believe that the Commission favored a particular election choice." Commonwealth of Massachusetts (Unit 1), supra at 1297. Our consideration of certain objective factors, including the appearance of the marked ballot and the manner in which it was disseminated, are critical to this analysis. Commonwealth of Massachusetts, 10 MLC at 1056.

In Commonwealth of Massachusetts, supra at 1056-1057, we overturned an election in which a sample ballot distributed by one party to the election was slightly smaller than the ballot in the Commission's Notice of Election, omitted the seal of the Commonwealth, and had a small union bug in the lower right hand corner. But because the Sample had been marked with a red "X" in the box for one of the competing unions, the Commission concluded that voters could receive the misimpression that the Commission favored one of the unions. We also noted that the sample was enclosed with a mailing of union campaign literature although not attached to any other document in that mailing.

In the instant case, the marked BMEA specimen ballot is virtually identical to the one contained in the Commission's Notice of Election. The BMEA specimen differed from the Commission's sample non-professional ballot only in that it was printed on pink paper while the Commission's sample ballot contained in the Notice of Election was printed on blue paper. The BMEA sample ballot also included the words "Vote Right" with an arrow pointing to the box for the Barnstable Municipal Employees Association, and below the words "Vote Right" were the letters "BMEA" in bold print. The sample was mailed in an envelope with the BMEA name and return address and, we shall assume,⁴ along with campaign literature for the BMEA.

BMEA argues that voters could not have been misled to believe that the facsimile ballot was from the Commission since it was clearly marked with the BMEA initials, was sent in a BMEA envelope and was enclosed with BMEA campaign literature. The BMEA ignores the impact that can be created by the perception that one party apparently has access to Commission ballots from which to create campaign literature or the perception that the Commission has permitted one party to claim Commission endorsement of its campaign by apparently permitting alteration of the ballot.

⁴ See discussion at p. 1071, supra.



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BMEA also contends that if there was any question of misrepresentation, AFSCME failed to fulfill its responsibility to correct the misimpression by addressing the issue with the bargaining unit, despite having had adequate time to do so. We disagree. Our examination of the facts presented persuades us that this facsimile ballot could reasonably have led employees to believe that the Commission endorsed one of the parties to this election, and that no party to the election could effectively correct this perception of the Commission's partiality.

As we found in Commonwealth of Massachusetts, 10 MLC at 1057, the striking similarity in typeface and layout to that of the sample ballot in the Commission's notice is significant. Moreover, as we have noted in prior cases, the presence of written instructions on an otherwise unaltered reproduction of the election notice could have reasonably misled the employees. See Commonwealth of Massachusetts (Unit 1), 7 MLC at 1297; Commonwealth of Massachusetts, 10 MLC at 1057.

Furthermore, we do not accept BMEA's argument that AFSCME had an obligation to resolve any voter confusion which was engendered by the BMEA's mailing of the altered sample ballot. We perceive no steps, and BMEA has not suggested any, that AFSCME could have taken to restore voter confidence in the impartiality of the Commission's election process.⁵ Moreover, even assuming we were to find that AFSCME had some obligation to clear up any resulting confusion, the brief period between the February 25 mailing and the March 3 election would not have provided AFSCME with an adequate opportunity to contact the voters.

Because we believe that the public perception of the neutrality of this agency is critical to the election process, we will not allow the integrity of the election process to be compromised for partisan campaign purposes. Accordingly, we set aside the results of this election and order that a new election be conducted.

ORDER

Wherefore, on the basis of the foregoing, the Commission orders:

1. That the results of the March 3, 1988, election among certain professional and non-professional employees of the Town of Barnstable be set aside; and
2. That, pursuant to the power vested in the Commission by G.L. c.150E, a new election be conducted under the direction of the Commission among employees in the aforementioned bargaining unit at such time and under such conditions as are contained in the Notice of Election issued by this Commission; and
3. That four (4) copies of an election eligibility list containing the names and addresses of all eligible voters must be filed by the Employer

⁵ If any party had a responsibility to correct the misimpression of Commission partiality, it was the BMEA.



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with the Executive Secretary of the Commission, Room 1604, Leverett Saltonstall Building, 100 Cambridge Street, Boston, MA 02202 within fourteen (14) days from the date of this decision. The list of eligible voters shall consist of all persons included in the unit approved by a hearing officer of the Commission by decision of January 22, 1988,⁶ whose names appear on the payroll of the Employer on July 22, 1988, and who have not since quit or been discharged for cause.

The Executive Secretary shall make the list available to all parties to the election. Since failure to make timely submission of this list may result in substantial prejudice to the rights of the Employees and the Parties, no extension of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

⁶The hearing officer's decision issued on January 22, 1988, although it was dated erroneously January 22, 1987.



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APPENDICES

The two appendices which are a part of this decision are presented on the following pages. Cite as follows:

Appendix I, 15 MLC 1076

Appendix II, 15 MLC 1077



B M E A

PERSONAL.....You, the employees of the Town of Barnstable, are BMEA, no one else. What we accomplish and can accomplish in the future we do together and for each other.

LOCAL.....We are right here working alongside each other. The BMEA Officers and Board of Directors are always available. We are not national or state-wide, nor do any other municipalities share our organization.

CONCERNED....Our rights and expectations deserve fair hearing, evaluation, and response. We are patiently, and sometimes impatiently, waiting for our right to resume negotiations.

SUCCESSFUL...BMEA has worked hard to achieve fair compensation and employment policies for all of its members. We have a proven track record. Our Department Head group has just recently negotiated a successful 2 year contract at 18%. Town Officials are ready to resume negotiations with us.

B M E A

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

NON-PROFESSIONAL
EMPLOYEES

OFFICIAL BALLOT

1. This is a secret ballot. Do not sign your name.
2. Place an "X" in one box only and then fold your ballot to conceal your vote.
3. If you spoil your ballot, return it to the Commission's agent and get a new one.

I DESIRE TO BE REPRESENTED BY:

MARK AN "X" IN THE BOX OF YOUR CHOICE.

AMERICAN FEDERATION OF
STATE, COUNTY AND
MUNICIPAL EMPLOYEES,
COUNCIL 93, AFL-CIO

NO EMPLOYEE ORGANIZATION

BARNSTABLE MUNICIPAL
EMPLOYEES ASSOCIATION

SAMPLE

VOTE

RIGHT

B M E A

MASSACHUSETTS LABOR CASES

CITE AS 15 MLC 1078

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