

In the Matter of CITY OF SPRINGFIELD
and
SPRINGFIELD ASSOCIATION OF HIGHWAY AND
BRIDGE WORKERS
and
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO
(Intervenor)
and
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (Intervenor)
Case No. MCR-4602

- 43.35 *list of employee names and addresses*
- 43.36 *list of eligible employees*
- 43.8 *voter eligibility*
- 93.61 *dismissal of petition*

May 28, 1998
Robert C. Dumont, Chairman
Claudia T. Centomini, Commissioner

- Brian J. McCook, Esq. *Representing the City of Springfield*
- John D. Connor, Esq. *Representing the Springfield Association of Highway and Bridge Workers*
- Steven A. Torres, Esq. *Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO*
- Michael R. Salvon, Esq. *Representing the National Association of Government Employees*

RULING ON OBJECTIONS TO ELECTION

Statement of the Objections to the Election

Pursuant to a Decision and Direction of Election issued by the Labor Relations Commission (Commission) on January 15, 1998,¹ the Commission conducted an on-site secret ballot election on February 26, 1998 to determine whether a bargaining unit of all full-time and regular part-time blue collar, non-professional employees in all City of Springfield (City)

departments desired to be represented by the Springfield Association of Highway and Bridge Workers (Association), or by the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (AFSCME), or by the National Association of Government Employees (NAGE), or by no employee organization.²

At the conclusion of the election, all three competing unions, which had observers present at all times during the election, signed the certification on the conduct of the election that states in part: “[w]e hereby certify that the balloting was fairly conducted, that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot boxes were protected in the interests of a fair and secret vote”. The City did not have an observer present during the balloting process.

The certification of counting and tabulation of ballots, copies of which were signed by all parties and were made available to the parties at the conclusion of the election, reflects the following results:

Ballots cast for Springfield Association of Highway and Bridge Workers	109
Ballots cast for National Association of Government Employees	5
Ballots cast for American Federation of State, County and Municipal Employees, Council 93, AFL-CIO	83
Ballots cast for neither/no employee organization	8
Blank ballots	0
Void ballots	0
Challenged ballots	1
Total of ballots cast	216

On March 4, 1998, AFSCME timely filed objections to conduct affecting the results of the election alleging that the City-provided eligibility list was inaccurate. By letter dated March 6, 1998, the Commission directed AFSCME to submit documentary and testimonial evidence in the form of sworn affidavits that supported its objections. See, Commission Rule 14.12, 456 CMR 14.12. All other parties to the election were provided with an opportunity to respond to AFSCME’s submission. AFSCME timely filed its response on March 18, 1998, and the Association and the City filed written statements on the objections with the Commission on March 27, 1998 and March 30, 1998, respectively. The Commission has examined the entire record in this case, including the parties’ submissions and legal memoranda, and has determined that, even if all the facts alleged by AFSCME were credited, they fail to establish a sufficient legal basis for setting aside the election. Therefore, AFSCME’s objections are overruled, and a certification of representatives shall issue.

1. The Commission’s decision is reported at *City of Springfield*, 24 MLC 50 (1998).

2. The Commission determined that the following bargaining unit was appropriate for collective bargaining within the meaning of Section 3 of M.G.L. c. 150E (the Law):

All full-time and regular part-time blue collar, non-professional employees in all City of Springfield departments, excluding all registered nurses and licensed practical nurses, all employees of the civic center and symphony hall, all building department inspectors, civil engineers, bath attendants, all clerical and white collar administrative employees, all supervisors, foremen, timekeepers, and all managerial, confidential and casual employees, and all other employees of the City of Springfield.

Objection No. 1

AFSCME alleges that the City's list of eligible voters contained the names of three ineligible City foremen or supervisors, Frank Mancuso, Edward Olejarz, and Alexander Sawicki, who are represented by AFSCME, Local 3065 (Local 3065) in a separate supervisory bargaining unit. Further, one of these three employees, Alexander Sawicki, a member of Local 3065's executive board, voted free from challenge during the election. In its memorandum, AFSCME states that its designated observer at the election personally observed Mr. Sawicki casting a ballot during the election. AFSCME argues that this one ineligible voter prejudiced the outcome of the election because the Association achieved a majority by a single vote.

On or about September 4, 1998, during the Commission's investigation of the issues raised in this case, the City provided the Commission and all parties with a list of 282 City employees that it contended constituted an appropriate bargaining unit. The list contained the employee's job title, work location, and the identity of the employee organization that currently represented the employee for the purposes of collective bargaining. The list contained the following information:

No.	Name	Title	Location	Union
171	Mancuso, Frank	Wkg.Fore/Maintenanceman	T	AFSCME,L.910
200	Olejarz, Edward	Working Fore/Maintenanceman	T	AFSCME,L.910
232	Sawicki, Alexander	Working Fore/Maintenanceman	T	AFSCME,L.910

During the September 22, 1998 hearing, the City introduced into the record an updated, corrected list of 285 City employees, which, in the City's view, constituted the identity of all non-professional blue collar employees currently represented by either the National Association of Government Employees or AFSCME, Local 910, AFL-CIO. This list, identified as City Exhibit #3, contained the names of Frank Mancuso, Edward Olejarz and Alexander Sawicki and their job title working foreman/maintenanceman aside each of their names.

Just prior to the conclusion of the September 22, 1997 hearing, the parties stipulated that two (2) titles, working maintenance foreman and water construction foreman, the incumbents of which are currently represented by the United Steelworkers of America in a separate supervisory bargaining unit, were not at issue in this case. During the discussions that led to that stipulation, the parties agreed that the three persons identified as working foreman/maintenanceman on City Exhibit 3, see excerpt above, were included in AFSCME's supervisory unit. Further, the parties agreed that the three names would be deleted from the list, and the City agreed to file a corrected list. Although the stipulation was placed on the record, the apparent agreement among the parties that Frank Mancuso, Edward Olejarz and Alexander Sawicki were properly excluded from any unit found appropriate by the Commission, was not placed on the record, nor was it placed in writing.³ On January 30, 1998, the City filed with the Commission an election eligibility listing containing the names, addresses, and

job title of all voters, including Frank Mancuso, Edward Olejarz and Alexander Sawicki. The City served this list concurrently on all parties to the case.

On or about February 5, 1998, the Commission mailed a copy of its Notice of Election to all parties to this representation election. The Commission's Notice of Election contained the following information:

Authorized Observers

The Public Employer and the three employee organizations may each select and designate one representative to act as observer and checker and to assist the agents of the Commission in identifying voters during the election. The authorized representatives for the Public Employer and the three employee organizations may be present at all times from the opening of the polls to the completion of the counting of the ballots and may challenge and protest ballots.

Further, consistent with its usual practice and procedure, on or about February 5, 1998, the Commission mailed to all parties a copy of its "Rules for Observers." These rules contain the following information:

INSTRUCTIONS FOR OBSERVERS IN REPRESENTATION ELECTIONS

Functions to Observers

As election observers you have two primary functions: first, to assist the personnel of the Commission in voter identification and check off and other election processes; second, to act for one of the parties in observing the conduct of the election, and making challenges on behalf of the party. Each of these functions should be performed as directed by the Commission agent in charge.

Identification of Voters

You, and the observers for the other parties, will be asked to check off on the eligibility list, the name of the eligible employees as they appear to vote. The Commission agent will ask the voter his name and address. In some elections, identification will also be required. If you are satisfied that the voter is eligible, you should check off his or her name on the list provided by the Commission agent. If you have a question, or wish to challenge, speak to the Commission agent. **DO NOT ADDRESS ANY VOTER DIRECTLY. DIRECT ANY CHALLENGE OR INQUIRY TO THE COMMISSION AGENT.**

Challenging Voters

You should challenge voters only for good cause. If you doubt the eligibility of a voter, you should make your challenge to the Commission agent, not the voter. You need state only, "I challenge," or "I challenge on behalf of ." The agent will then ask you the reason for the challenge. You may have a question on eligibility. If so, challenge the voter, and ask the agent for an explanation. If you are satisfied with the voter's eligibility after the explanation, you may withdraw the challenge.

Commission rule 456 CMR 14.12(2) provides that "[A]ny party may challenge, for good cause, the eligibility of any person to participate in the election."

3. Our information is based on the refreshed recollection of the Commission agent who conducted the September 22, 1997 hearing. A different Commission agent

conducted the February 26, 1998 election, and she was not aware of this unwritten agreement. No party referred to this agreement in their submissions.

For purposes of ruling on this objection, we credit AFSCME's statement that Frank Mancuso, Edward Olejrz and Alexander Sawicki were ineligible voters, and that Mr. Sawicki voted free from challenge. Therefore, because no material issue is in dispute, a hearing is unnecessary. *University of Massachusetts Medical Center*, 7 MLC 1710 (1981). There is no Commission case law that addresses whether this conduct is a sufficient basis for the Commission to set aside the results of the election. However, there is well-established precedent under the National Labor Relations Act, 29 U.S.C. s.151 *et. seq.* (the Act).

Faced with similar issues, the National Labor Relations Board (Board) prohibits post-election challenges to voter eligibility, unless the Board, or the party benefiting from the prohibition knew that a voter was ineligible and suppressed that fact. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 19 LRRM 2128 (1946). Drawing an analogy between democratic political elections and union representation elections, the Court determined that the Board's prohibition is a reasonable adjustment to the principal of majority rule, designed to protect the process from fraud and abuse, and to bring finality to elections. *NLRB v. A.J. Tower Co.*, 329 U.S. at 331-333, 19 LRRM at 2131-2132. Further, the Court stated:

Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, post-election challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by post-election challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

NLRB v. A.J. Tower Co., 329 U.S. at 332, 19 LRRM at 2132.

We see no reason to disagree with the Board's general policy against post-election challenges to voter eligibility, as described and approved by the Court. Applying it to the facts of this case, we find that AFSCME, the statewide affiliate of its locals, knew prior to the election that Mr. Sawicki was a member of Local 3065's executive board. AFSCME had the voter eligibility list in its possession for at least three (3) weeks prior to the election. Further, AFSCME had an observer present during the February 26, 1998 election, who was able to challenge any voter for cause, Commission Rule 14.12(2), 456 CMR 14.12(2), but who either inadvertently, or through oversight, failed to do so. Therefore, we determine that AFSCME's objection is in the nature of a post-election challenge to voter eligibility, which the Commission will not consider unless either the Commission agent or the party benefiting from this rule knew of the voter's ineligibility and suppressed the facts. *Solvent Services, Inc.*, 313 NLRB 645, 45 LRRM 1193 (1994).

Although not raised by the objecting party, we next examine the record in this case to determine whether AFSCME's objection falls

within the stated exception. During the September 22, 1997 unit determination hearing, the parties agreed that Frank Mancuso, Edward Olejrz and Alexander Sawicki, all working foreman/maintenance men, were currently included in Local 3065's supervisory bargaining unit, and were not at issue in this case. Further, the parties agreed that these three names would be deleted from the list, and the City agreed to file a corrected list. This agreement was not reduced to writing, nor placed on the record of the hearing. In its January 15, 1998 decision, the Commission determined that the City's proffered bargaining unit, coextensive with City Exhibit 3, was appropriate. On January 30, 1998, the City filed with the Commission and the parties a list of eligible voters that contained the names, individual job titles and addresses for 293 persons, including Frank Mancuso, Edward Olejrz and Alexander Sawicki. No party to the election objected to the list until AFSCME filed this post-election challenge as part of its objections to the election.

Board decisions after *A. J. Tower* narrowly construe its exception to post-election challenges. For example, in *Fern Laboratories, Inc.*, 232 NLRB 379, 97 LRRM 1315 (1977), the Board declined to set aside an election where a person voted free from challenge despite the fact that the parties' written election eligibility agreement, that was given to the Board, provided that this employee would vote subject to challenge. The Board majority expressly declined to require a Board agent to state a challenge, when a party's observer, either inadvertently or negligently failed to do so. The Board distinguished this case from *Laubenstein & Protz, Inc.*, 226 NLRB 804 (1976), where the Board determined that its agent had a duty to challenge a voter's eligibility in light of: 1) a verbal understanding, integral to a settlement of an unfair labor practice, that the employee would vote subject to challenge; 2) an on-the-record stipulation that the person, whose supervisory status was in dispute, would be included on the eligibility list, but would vote subject to challenge; and, 3) discussions about this challenge between the parties, and with the Board agent just prior to the opening of the polls. *Laubenstein & Portz, Inc.*, 226 NLRB 804 (1976). See also, *Solvent Services, Inc.*, 313 NLRB 645, 45 LRRM 1193 (1994) (Board agent had no duty to challenge a ballot because the agent had no actual knowledge of a voter's ineligibility notwithstanding the employer's counsel's typed notation on the voter list stating he was permanently laid-off.) We see no reason to disagree with the Board's construction of the exception to the general rule against post-election challenges, and we shall look to Board precedent to the extent it is applicable to Commission election procedures.

It is not Commission practice to review eligibility lists filed with the Commission, unless a party to the election challenges their content. Further, it is Commission procedure for its agent to only challenge the eligibility of a person who appears to vote, but whose name does not appear on the voting list. See *e.g. Town of Whitman*, 16 MLC 1248, 1249 (1989). Occasionally, the Commission directs that a representation election proceed, with the incumbents of specific disputed unit placement positions voting subject to a Commission challenge. See, *e.g. Massachusetts Board of Community Colleges*, 2 MLC 1146 (1975). Here, any Commission knowledge of Mr. Sawicki's probable ineligibility is not based on

any suppressed facts. Rather all parties to the election were present during this discussion about Mr. Sawicki's eligibility, and all parties were in a position to challenge his inclusion on the City's voting list. During the representation election, AFSCME had an observer present who had the opportunity to challenge Mr. Sawicki's eligibility, and failed to do so. *See*, Commission Rule 14.12(2), 456 CMR 14.12(2).

Under the facts of this case, we decline to find that the Commission agent had a duty to challenge Mr. Sawicki's eligibility. The primary duty of raising objections to the eligibility list rests with the parties to the election, not the Commission. Similarly, we decline to find that the election should be set aside because the Association arguably benefited from the fact that an ineligible person voted in the election. Accordingly, because the objecting party was in the same position as all other parties to the election, and failed to timely challenge Mr. Sawicki's eligibility, we decline to consider this objection because it is in the nature of a post-election challenge to voter eligibility. Therefore, to bring finality to the election, this objection is overruled.

Objection Number 2

AFSCME alleges that the City's eligibility list contained inaccurate mailing addresses for thirty-five persons, or 12% of the total eligible voters. AFSCME argues that this 12% error rate in the voter eligibility list deprived these eligible voters from receiving its informational mailings and, therefore, they were not fully informed of the issues surrounding the election. AFSCME does not contend that the inaccuracies on the voter eligibility list were the result of City gross negligence or intentional misconduct.

The Commission directs a public employer to provide a list of the names and addresses of all eligible voters, and then makes this list available to all competing employee organizations to place the unions in the same position as the public employer to communicate with eligible voters, thus insuring an informed electorate. *City of Springfield*, 14 MLC 1010, 1013 (1987). An inaccurate voter eligibility list may constitute cause for setting aside an election. *City of Springfield*, 14 MLC at 1012, citing, *City of Quincy*, 1 MLC 1161, 1164 (1974); *Commonwealth of Massachusetts*, 9 MLC 1842 (1983).

Faced with objections to an election that allege inaccuracies in the eligibility list, the Commission examines the potential harm to employees, not the prejudice to competing unions. *Commonwealth of Massachusetts*, 7 MLC at 1306. For example, the Commission has set aside an election because the eligibility list omitted the names and addresses of 14% of the eligible voters. *City of Springfield*, 14 MLC at 1013, citing, *The Lobster House*, 186 NLRB 148, 75 LRRM 1309 (1970) reasoning that omissions are more serious than inaccurate addresses. However, absent evidence that an inaccurate voter list worked to the advantage or disadvantage of any party to an election, the Commission has declined to set aside an election where the objecting party is the current exclusive representative and all competing unions had access to the same lists and that contained the same inaccuracies. *Commonwealth of Massachusetts*, 7 MLC at 1306. Further, the Commission has determined that issues of an employee organization's "actual access to employees other than through the eligibility list, or the

extent to which employees omitted from the list are aware of the election issues, are not litigable matters." *City of Springfield*, 14 MLC at 1013. Accord, *Mod Interiors, Inc.*, 324 NLRB No. 33, 156 LRRM 1049 (1997).

Here, no other party to the election disputes AFSCME's allegation that the voter eligibility list contained thirty-five inaccurate addresses. Therefore, because no material fact is in dispute, a hearing is unnecessary. *University of Massachusetts Medical Center*, 7 MLC 1710 (1981). However, even crediting this fact, we find that the 12% error rate in voter's addresses is not so substantial to warrant setting aside this election. There is no evidence that the City acted in bad faith or was negligent in compiling the eligibility list. Nor is there any evidence that this 12% error rate was to the advantage or disadvantage of one party over another in communicating their respective positions to the eligible voters. *See*, *Commonwealth of Massachusetts*, 7 MLC 1036. Accord, *Women In Crisis Counseling*, 312 NLRB 589 (1993) (Inaccurate addresses for 30% of the eligible voters constitutes substantial compliance with the requirements of *Excelsior Underwear*, 156 NLRB 1236 (1966)); *Texas Christian University*, 220 NLRB 396 (1975) (Inaccurate addresses for about 18% of the eligible voters and the omission of about 3% of the eligible voters constitutes substantial compliance with the *Excelsior* rule); *Days Inns of America, Inc.*, 216 NLRB 384 (1975) (Inaccurate addresses for about 13.2% of the eligible voters constitutes substantial compliance with the *Excelsior* rule); *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (Inaccurate addresses for 22% of the eligible voters and omission of 4% of the eligible voters constitutes substantial compliance with the *Excelsior* rule).

CONCLUSION

For the reasons stated above, we conclude that AFSCME's objections fail to establish a sufficient basis for setting aside the election. Accordingly, they are overruled. Because the tally of ballots shows that the petitioner, the Springfield Association of Highway and Bridge Workers has received a majority of valid ballots cast, a certification of representatives shall issue in the usual course.

SO ORDERED.

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