



State of Alaska
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INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS,)
LOCAL 1547 and PUBLIC)
EMPLOYEES' LOCAL UNION 71,)
)
Petitioners,)
)
vs.)
)
UNIVERSITY OF ALASKA,)
)
Respondent.)

ORDER AND DECISION NO. 95

SUBJECT: CERTIFICATION OF ELECTION RESULTS PURSUANT TO PETITION
84-8 AND FOLLOWING INVESTIGATION BY LABOR RELATIONS
AGENCY OF OBJECTIONS RAISED BY PETITIONERS

The State Labor Relations Agency (the "Agency") convened a special meeting to investigate, through a hearing, objections raised by the International Brotherhood of Electrical Workers, Local 1547 ("IBEW") and Public Employees Local Union 71 ("Local 71") concerning an election tallied on July 17, 1985. The meeting was conducted in Anchorage, Alaska on August 22, 1985, and all members of the agency were present and therefore constituted a quorum. IBEW and Local 71, as joint petitioners for the election, presented arguments and evidence through their counsel Frederic R. Dichter and Kevin B. Dougherty, respectively. The respondent University of Alaska (the "University") presented evidence and arguments through its counsel William R. Mede. Testimony as well as documentary evidence was submitted by each party. The Agency having considered the arguments presented, and the evidence both testimonial and documentary, as well as the record of the proceedings before it, renders this decision in satisfaction of its investigatory obligations as follows:

Findings of Fact

1. IBEW and Local 71 sought to represent non-supervisory, non-confidential support staff employed by the University of Alaska statewide. Extensive hearings and proceedings were conducted before the Agency with respect to identifying the proper unit of employees to be represented by the petitioners, with respect to preparation of employees' rosters ("Excelsior lists"), with respect to various charges of unfair labor practices and other matters. These proceedings were conducted under the file enumerated Petition 84-8 before the Agency, and certain aspects of the decisions made by the Agency throughout this process were litigated in State Superior Court. After a substantial period of time and following complex and convoluted hearings throughout the process, an election in this matter was ordered by the Agency. The choice posed to the employees in the election was whether or not they wished to be represented by a collective bargaining representative comprising the IBEW and Local 71 jointly or whether they sought no representation.

2. On May 30, 1985, the agency issued its "Second Order Setting Election Procedure" and in that order provided:

The University shall submit its 2 AAC 10.150 voting rosters to the Agency no later than June 18, 1985. Copies are to be hand delivered to counsel for the petitioners and Agency counsel.

The ballots will be mailed by the Agency on or after June 29, 1985. The ballots will be counted at the Agency's offices on July 17, 1985 at 10:00 a.m. Ballots received by 8:00 a.m., July 17, 1985 will be counted in the election.

3. The election was held, and a quorum of numbers of the Agency convened on July 17, 1985 and counted the ballots. At the vote count on July 17, 1985, representatives of each of IBEW, Local 71 and the University were present and participated in the tabulation and count. The analysis of the disposition of secret ballots utilized in the election is as follows:

A. The number of ballots printed was 650.

B. The number of ballots mailed by certified mail on June 28 and 29, 1985 was 449.

C. The number of ballots mailed or completed by walk-ins after June 29, 1985 was 59.

D. The number of ballots hand-carried by Margaret Morehouse to Astrid dePerry was 30.

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E. The number of ballots returned due to incorrect addresses or refused by addressee was 34.

F. The number of ballots received in the mail after July 17, 1985 was 12.

G. The total number of ballots cast was 387; of these, 320 ballots were valid. The total number ballots challenged was 53 and 14 ballots were voided.

H. The vote, based on ballots accepted and not challenged, was 203 in favor of no representation and 117 in favor of representation by IBEW and Local 71, a voting spread of 86.

4. Within 5 days after the July 17, 1985 vote counting, IBEW and Local 71 filed 10 objections to the conduct of the election. Upon request of the University, Local 71 provided additional information to the University concerning the objections raised. The material furnished was provided at a pre-hearing conference conducted on August 14, 1985 in the offices of Robert M. Johnson, counsel for the Agency. The Agency duly notified the parties that it would investigate the objections raised and to that end scheduled a hearing for August 14, 1985, which hearing was by mutual agreement re-scheduled for August 22, 1985.

5. At the hearing, IBEW and Local 71 specifically withdrew Objection Nos. 4, 7, and 9 and made no reference to Objection No. 10. The parties therefore specifically addressed Objection Nos. 1, 2, 3, 5, 6 and 8. These findings of facts will address the findings evidenced in the hearing relevant to the decision of the Board with respect to each of the objections.

6. IBEW and Local 71's Objection No. 1 asserted that "the voter eligibility list was submitted in an untimely manner in violation of Agency regulations and orders, and furthermore, the list was not complete or accurate." The University conceded that it did not provide the Excelsior list to the unions (or their counsel) on June 18, 1985 as required in the "Second Order Setting Election Procedure" issued by the Agency. The list was, however, delivered to William J. Pauzauskie (then counsel for the Agency) on July 18, 1985, and the unions were provided copies of the list on July 20, 1985. No evidence of bad faith in the delay existed. Preparation of that list was difficult and an updated list was not prepared until July 18, 1985. The mailings which had been prepared by IBEW and Local 71 in anticipation of the availability of the list on June 18, 1985 were delayed but were in fact subsequently sent to the listed persons. The delivery of the Excelsior list on June 20, 1985 more probably than not was more than 10 days prior to actual receipt of ballots by listed employees. This is so because the ballots were mailed out on Saturday, June 29, 1985, and therefore could not have been the hands of the voters until at least Monday, July 1, 1985, and

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probably later. In addition, the actual last date for acceptance of votes was July 17, 1985, 27 days after delivery of the voting roster to IBEW and Local 71. The list delivered by the University was amended on June 26, 1985 with the addition of 24 additional names. Of the 24 additional names, 20 were on an IBEW roll ("Candidate's Listing") and addresses for most of those 20 were available on that roll as well. At least 6 of the 24 had been personally contacted by Local 71's organizers. In addition, the evidence indicated that most of the 24 names were supervisors or otherwise excludable from the list, and only 4 or 5 names were properly includable on the Excelsior list. Of the ones properly includable, most were already on the IBEW roll.

7. The IBEW and Local 71 raised Objection Nos. 2 and 3 which read "the University granted wage increases to employees while the petition was pending.... [and] the University issued and announced issuing retroactive pay checks for the above increases while the voting was occurring." The evidence indicated that the pay increases were considered as in issue by the University in August, 1984 and arose with respect to changes from the pre-existing merit system to a cross-the-board raise system. After the change was proposed, requests were filed with the 1985 Legislature, and an appropriation from that Legislature funding the pay increases was passed in May, 1985. The funding for the retroactive pay increases generally track the same pattern. The Legislature was the source and means of any wage increases. IBEW and Local 71 specifically urged passage and award of the pay increases throughout the legislative process, and by letter dated May 29, 1985 specifically urged the University to take action with respect to the pay increases. Discussion of the pay issues was a consistent theme. The University announced the pay increases in June, 1985 through University publications and by flyers included in the payroll checks of University employees on July 3, 1985. The payments for the pay increases and retroactive payments were made in the pay check dated July 19, 1985, which reflected the first pay check which would have included funds available at the beginning of the Fiscal Year starting July 1, 1985. The University announcements did not insinuate that the University alone was the source of benefit increases, nor was there implication of "velvet glove" threat. See, Union Exhibits 1, 2, 5, 6; Univ. Exhibit E.

8. IBEW and Local 71 raised Objection No. 5, "the agency improperly gave out information on the number of ballots returned while time still remained to return ballots, thus influencing voters." Media representatives contacted the Administrative Assistant for the Agency and asked among other things about the number of ballots which had gone out to voters and which were returned. The Administrative Assistant responded to those media requests. In part based upon representations made by the Administrative Assistant, the Fairbanks Daily News-Miner ran an article indicating relatively low returns of ballots. Jim Gillaspie,

special representative for Local 71, testified that the unions would prefer a low voter turn-out and that a higher voter turn-out would probably favor the University. As a consequence, he opined that the unions were prejudiced by inducements encouraging the University to accelerate its campaign to get more voters, such as newspaper articles in the Fairbanks Daily News-Miner. The University testified that its campaign was generally to encourage voting on the issue of union representation and that while its efforts to get out the vote accelerated as the election date neared, that accelerated pace was a normal occurrence as an election date approached. No evidence was introduced that voters were specifically influenced by the Agency statements.

9. IBEW and Local 71 stated in Objection No. 6 that "Misrepresentations about union dues and internal affairs of the joint petitioners were made by the University". No evidence was presented with respect to the issue of union dues. Evidence was, however, presented with respect to representations made the University concerning voter perception of the joint petitioners. Evidence indicated that a critical issue in the eyes of many potential voters was whether they would be represented specifically by IBEW or Local 71. The question of exactly which employees would be represented by which of the two joint petitioners was unresolved between the unions until a meeting among those unions sometime prior to June 17, 1985. On June 17, 1985, the business managers of each of IBEW and Local 71 sent a letter to "University of Alaska, Physical Plant - Power Plant - Building Maintenance Employees" stating that an election among all eligible employees to determine the best way to handle a division of the membership would be held after certification by the Agency. All new employees thereafter would be put into whatever unit was appropriate as determined by the respective business managers. The University made statements in the University Report, a publication for faculty and staff of the University and in other releases concerning the lack of certainty or control of representation. Testimony from Jan Campbell, organizer for IBEW, indicated that the publishers of the University Report may not have had in-hand the June 17, 1985 letter from the business managers of IBEW and Local 71. Campbell stated that the statements made by the University with respect to representation within the two unions were not clear statements of the facts as perceived by IBEW and Local 71, but that it would not be "unfounded" for someone to construe the University statements consistently with those made in the June 17, 1985 letter. The University also made statements describing IBEW as having a "caste system", which statements were inaccurate.

10. IBEW and Local 71 stated in Objection No. 8 that "an unspecified number of ballots were mailed to the employer thus compromising the security of the ballots in the balloting process." Approximately 30 ballots were delivered by the Administrative Assistant of the Agency to Margaret Morehouse, a

University employee who then delivered those ballots to Astrid dePerry, general counsel for the University. Ms. dePerry provided those ballots to a number of University employees who cast the ballots outside the presence of Ms. dePerry, sealed the ballots in official envelopes and returned those envelopes (with two exceptions) to Ms. dePerry with an affidavit stating that the secrecy of their vote had been maintained. These ballots were then returned by Ms. dePerry to the Administrative Assistant for the Agency. The idea of giving ballots to the University employees for the transmission to prospective voters was a consequence of pleas by some voters in the Fairbanks area for ballots they had not received through the mail process and the conclusion that the only realistic way of physically making those ballots available to the voters was through a person going to Fairbanks. The Administrative Assistant in good faith ascertained that making those ballots available through University employees, who were known to be in Anchorage and returning to Fairbanks in a timely fashion, would enfranchise more rather than fewer persons. Jim Gillaspie of Local 71 stated that if he knew that the Agency would make ballots available to persons for transmission to prospective voters, that he would have sought that opportunity for delivering ballots to other voters. The ballots which were in fact returned by the University to the Agency were segregated in the vote counting process on July 17, 1985, as challenged ballots and were neither opened nor counted. No evidence suggested that the ballots were tampered with.

Conclusions of Law

1. Pursuant to 2 AAC 10.180, a party may file an objection within 5 calendar days after the tally of ballots to the manner in which the election was conducted. After receiving objections, the Agency is charged with investigating the objection and "based on its findings, the Labor Relations Agency will issue a certification of the results of the election or order any other appropriate action including a new election." The investigation process may include hearings and statements and evidence may be taken at such hearings by the Agency in fulfilling its responsibilities. AS 23.40.160.

2. The relief sought by the petitioning IBEW and Local 71 appears to be an ordering of a new election. Unlike unfair labor practice charges or other matters where specific cease-and-desist orders can be fashioned, overturning an election is a drastic measure. While NLRB precedent is to be given great weight as required by the Agency's regulations, the Alaska Supreme Court, has ascertained that ordering of a new election is an extraordinary remedy requiring a substantial showing by the complaining party. See, for example, Hammond v. Hickel, 588 P.2d 256, 258-59 (Alaska 1978) and Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972).

3. It is in light of the drastic remedy sought by the petitioners, that the conclusions of law with respect to each of the six objections raised in the hearing process will be addressed.

4. With respect to Objection No. 1, each party cited NLRB and judicial authority concerning the degree of prejudice caused to an election by untimely submission of Excelsior lists or inaccurate lists. The Excelsior rule enunciated the requirement that voter lists and addresses be provided to the unions (via the Agency) in order to lend credibility to representation efforts. Excelsior Underwear, Inc., 156 NLRB 1236, 1966 CCH NLRB ¶ 20, 180; 2 AAC 10.150. The weight of the authority is one of case-by-case determination in addressing whether the Excelsior rule has been substantially complied with, and mechanical attention to timeliness is not required. Program Aids Co., Inc., 65 LRRM 1244 (1967). Where clear harm has been shown to the unions seeking representation by the failure to comply in timely fashion with Excelsior lists, elections have been overturned. However, in those instances where elections have been overturned because a list was tendered two days late (or such figure as is comparable to this matter), additional impact was shown. For example, in American Laundry Mach. Division the proposed collective bargaining representative was harmed because its mailing plan was clearly prejudiced and the employer refused to agree to an extension in the election even though the NLRB itself caused the delay in transmitting the list. 234 NLRB 100, 1978 CCH NLRB ¶ 19, 701. In other instances, failure to provide an election list in timely fashion was permitted particularly given inadvertent error and the recognition that the overturning of an election was a drastic action. Program Aids, supra [list 4 days late]; Pole-Lite Industries, Ltd., 995 LRRM 1080 (1977). Here, the good faith failure to provide an Excelsior list in specifically timely fashion violated an order of the Agency, but did not violate the Agency's regulation requiring that "the public employer shall submit an alphabetical roster of employees eligible to vote to the Labor Relations Agency and the candidates for representation at least 10 calendar days prior to the date set for the election." 2 AAC 10.150. In this case the actual "election" itself is a process occurring over several weeks of time in as much as this was a mail election. Ballots were sent by mail on or after June 29, 1985 with the obvious result that recipients of that mail would not get ballots until several days later. Moreover, the actual final date for submitting a ballot was July 17, 1985, some 21 days after the ballots were mailed. Consequently, the degree of prejudice to the petitioners was not substantial in that it would appear that there was no violation of a regulation but rather a lack of compliance with an order of the Agency, which in the context of that order established an election occurring over a 33-day period.

5. IBEW and Local 71's Objection Nos. 2 and 3 relate to timing of salary increases and retroactive pay checks with the election. The case law in this matter precludes a direct and positive linkage of pay increases to elections because of its potential for prejudice to the voters. See, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). However, where evidence exists that the wage increases and retroactive pay amounts had been planned for several months, and particularly where the union itself sought those very actions in the same time frame immediately prior to the election, distinctions can be drawn with case law cited by the union. Exchange Parts, for example, relied on proof of the employer's purpose in conferring benefits, no prior plan for those benefits, and timing of notices suggesting the "fist inside the velvet glove." Id. at 406-409. In Esquire, Inc., the employer violated the LMRA by granting an increase which was not an outgrowth of pre-election efforts and was granted "in response to the organizing campaign." 104 LRRM 1470 (1980). But, the same employer did not violate the LMRA regarding announcement of an improved retirement plan a few days before the election, because that plan had been adopted before the union activities and was a product of third-party input. Id. The University did not take such actions as would satisfy the analysis of Exchange Parts and other cases cited by the union, because here while benefits were conferred, those benefits pre-existed the unionization effort, were discussed by all parties (and advocated by the unions), and were timed primarily by the third-party, legislative process.

6. IBEW and Local 71's Objection No. 5 related to information tendered by the Agency to the media concerning invalid returns. No Agency regulation or applicable law requires that information concerning the number of ballots distributed, requested or returned be maintained in a secret fashion. The term secret ballot has not been interpreted to include secrecy with respect to such information. In the absence of specific prohibitions against disclosure of information, AS 09.25.110, requires that public information be made available to the public. To the extent that the information tendered to the public had any impact, testimony has suggested that it caused greater turn-out rather than a lower turn-out. Such an impact is the preferred alternative in the election process, whereas case law restrictions upon dissemination of information have generally related to prohibition of such actions as would "chill" voter responses.

7. IBEW and Local 71's Objection No. 6 required an analysis of whether misrepresentations concerning internal affairs of the unions were made by the University and if so whether those misrepresentations were so significant as to require overturning the election. The NLRB has repeatedly adjusted its analysis with respect to misrepresentation claims. In its current form, the NLRB's position is one of avoiding the

analysis of the truth or falsity of claims made in election contests. Midland National Life Ins. Co., 110 LRRM 1489 (1982). This case law signifies a departure from NLRB decisions rendered by prior panels of the NLRB, but more importantly reflects an appreciation that the role of reviewing labor agencies such as the NLRB and therefore by implication the Agency should not be that of playing the role of adjudicating truth or falsity. If misrepresentations are so egregious as to chill the rights of one party or the other to rebut effectively those claims, then logic would suggest the possibility for reversal of an election process. See, Id.; Hollywood Ceramics Co. Inc., 51 LRRM 1600 (1962). In this instance, the misrepresentations alleged by the union focus upon University representation about a lack of clarity as to which of IBEW or Local 71 would in fact represent University employees. However, only after June 17, 1985, did the unions in fact have a position as to how that representation would occur, and the allegation of misrepresentation has been contested by one of the union's own witnesses who stated that a potential interpretation could be applied to the University assertions which would render those assertions consistent with the perspective of IBEW and Local 71. To the extent that University assertions of a "caste system" existing in the IBEW were untrue, these assertions were contained in a memorandum originally issued on June 24, 1985 and subsequently repeated in a another memorandum on June 26, 1985. There was no evidence presented that the timing of these statements precluded rebuttal by the unions or the ability of the voters to discount propaganda. Midland National Life Ins. Co., 110 LRRM at 1491 - 93.

8. IBEW and Local 71's Objection No. 8 concerned ballots delivered to the University for transmission to certain employees who did not have mail access to those ballots. If the ballots were in fact counted or were not capable of being segregated at the July 17, 1985 vote count, the propriety of the process of disseminating these ballots might be an issue. However, since the ballots were capable of being segregated and were so segregated and were never counted, the issue of improper delivery is moot. Only if the alleged impropriety were of such a nature as might chill the election process, might relief be required even though the specific claim is moot by the factual circumstances. See, "laboratory conditions" analysis in Midland National Life Ins. Co., 110 LRRM at 1492 and 1494 - 95 (dis-sent). No evidence was presented indicating that the method of transmission of these ballots chilled the voting rights of any persons. The allegedly improper ballots were not counted and because the difference in the vote exceeded the number of challenged ballots, the issue ceases to exist. 2 AAC 10.170(b) provides that "if the challenged ballots are not determinative of the election, the ballots will be disregarded and will not constitute a basis for objection to the conduct of the election."

9. The cumulative weight of asserted errors may permit an election to be overturned if circumstances so provide. See, Hammond v. Hickel, supra. However, in this case no one asserted basis for error was sufficient to overturn the election nor was the cumulative weight of those matters in which error might exist sufficient to overturn the election.

Order and Decision

Based on the foregoing findings of fact and conclusions of law and upon the Agency's investigation of the issues raised by IBEW and Local 71, the Agency unanimously orders and decides that:

1. The election conducted during the period of June 29 through July 17, 1985 shall be certified and appropriate evidence of certification shall be prepared and delivered by the Agency effective August 30, 1985. That certification will state that the majority of the employees casting ballots voted for no representation.

2. The objections raised by IBEW and Local 71 have been investigated and after having heard the arguments and the evidence presented by the parties and having conducted its own investigation, the Agency finds that no basis exists for those objections individually or cumulatively to compel an order for a new election in this matter.

3. The Agency recognizes that no election and ballot system is perfect in its capacity to deliver ballots to all persons requiring them. However, in this election, the affected persons were well served by a well-run election. It is ordered, however, that in the absence of specific procedures to the contrary, ballots will be handled only by authorized representatives of the Agency, the postal service (in mail ballot elections), and by voters and that ballots shall not be delivered to other persons.

4. This order and decision sets forth the rationale for the decision announced by the Agency on August 22, 1985.

DATED this 27 day of August, 1985.

STATE OF ALASKA LABOR RELATIONS
AGENCY

By C. R. "Steve" Hafling
C. R. "Steve" Hafling
Chairman