

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SEBB OPINION 87-026

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In the Matter of  
Ohio Council 8, American Federation of State, County and  
Municipal Employees, AFL-CIO,  
Employee Organization,

and

Youngstown Metropolitan Housing Authority,  
Employer.

CASE NUMBER: 86-REP-5-0161

DIRECTION TO OPEN CHALLENGE BALLOT  
(Opinion Attached)

Before Vice Chairman Sheehan and Board Member Latané; October 22, 1987.

On November 18, 1986, a representation election was conducted in an appropriate unit of employees of the Youngstown Metropolitan Housing Authority (Employer). The results of the election showed that there were five (5) votes cast for Ohio Council 8, AFSCME (Employee Organization), five (5) votes cast for no representative, and one (1) challenged ballot. Since the challenged ballot was sufficient to effect the results of the election, the case was directed to hearing to resolve the challenge.

The Board has reviewed the record, the hearing officer's recommended determination and the exceptions.

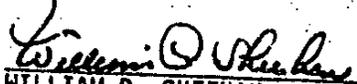
For the reasons stated in the opinion attached, incorporated by reference, the Board adopts the hearing officer's Findings of Fact, amends Conclusion of Law No. 3 to read: "By failing to object in writing to the Board to the form or content of the election eligibility list prior to the commencement of the election in question, AFSCME has not waived its right to insist that Ms. Peters' vote should be counted," and adopts the Conclusions of Law as amended.

The Board directs the Administrator of Representation to open the challenged ballot and to issue a revised tally.

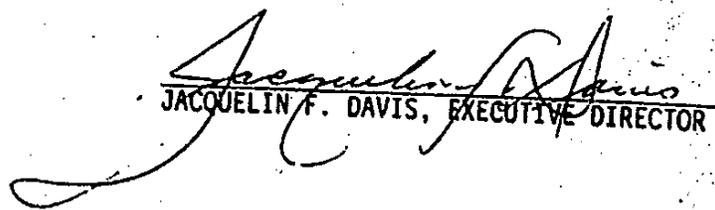
DIRECTION TO OPEN CHALLENGE BALLOT  
OCTOBER 22, 1987  
CASE NO. 86-REP-5-0161  
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It is so directed.

SHEEHAN, Vice Chairman, and LATANE, Board Member, concur. DAY,  
Chairman, absent.

  
WILLIAM P. SHEEHAN, VICE CHAIRMAN

I certify that this document was filed and a copy served upon each party  
on this 19<sup>th</sup> day of November, 1987.

  
JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

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OPINION

Sheehan, Vice Chairman:

I

The issues in the instant case arose out of a representation election which was conducted on November 18, 1986. The choices on the ballot were Ohio Council 8, AFSCME (AFSCME, Union or Employee Organization) and "no representative." The election was conducted pursuant to a consent election agreement executed by the representatives of the parties. Of the eleven ballots cast, five votes were cast for AFSCME, five for no representative, and one ballot, that of Ms. Patricia Peters, was challenged. Since the challenged ballot was sufficient to affect the result of the election, no winner was declared.

During the 10-day post election period both parties filed position statements in respect to the challenged ballot. The matter was directed to hearing and Hearing Officer Chester C. Christie conducted an evidentiary hearing on May 4, 1987.

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II

Ms. Patricia Peters was employed by the Youngstown Metropolitan Housing Authority as a homemaker, a bargaining unit position.<sup>1</sup> In September 1986, Ms. Peters bid on, and was selected to fill, a Serviceman II position<sup>2</sup> which was not part of the bargaining unit being determined by the election. The alphabetized eligibility list submitted by the employer of the employees eligible to vote as of October 7, 1986, did not include Ms. Peters' name. The employer indicated the position of Homemaker was vacant as of the date the list was issued and that the employee, Ms. Peters, would be transferred to the Maintenance Department as Serviceman II prior to the election.<sup>3</sup> Events later revealed that Ms. Peters was not transferred to her new position until December 1, 1986, and remained until that time in the position of Homemaker.<sup>4</sup>

At the pre-election conference on the day of the balloting AFSCME staff representative, Mr. Buddy Maupin, notified the employer and SERB's election official that one employee whose name did not appear on the eligibility list would attempt to vote.<sup>5</sup> The election official informed the parties there would be a challenge to any voter whose name does not appear on the list. Ms. Peters voted a challenged ballot.<sup>6</sup>

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<sup>1</sup>Finding of Fact (F.F.) 3.

<sup>2</sup>F.F. 2.

<sup>3</sup>F.F. 3.

<sup>4</sup>F.F. 8.

<sup>5</sup>F.F. 7.

<sup>6</sup>F.F. 7.

III

The issues are:

- 1) Did the employee organization object in writing to Patricia Peters name being excluded from the list prior to election?
- 2) Did the employee organization know or should it have known of the defect in the content of the eligibility list?
- 3) Did the employee organization waive its rights to object to the contents of the eligibility list?

The hearing officer answered in the negative on issue No. 1 and in the affirmative on No. 2 and No. 3. There is no factual dispute with regard to Issue No. 1.

The Board rejects the Hearing Officer's conclusions on issues No. 2 and No. 3 for the reasons adduced below.

IV

Ohio Administrative Code Rule 4117-5-07(C) provides:

"Failure to object in writing to the board to the form or content of the election eligibility list prior to the commencement of an election shall constitute a waiver of the objection if the objecting party knew of the defect prior to the election, or through the exercise of reasonable diligence should have known."

The union, of course, as the facts of the case reveal, did not object in writing to Patricia Peters' name being excluded from the list of eligible voters. They had no basis for objecting. The employer had insisted that Patricia Peters would be transferred to her new position of Serviceman II (out of the bargaining unit) before the election. The union had no reason to be dubious. They knew Ms. Peters had successfully bid on her new position and when the Homemaker position was broached with the employer representative at the meeting which resulted in the consent election

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agreement, the employer's response was that Ms. Peters would be transferred prior to the election. The employer representative, Mr. Christian, even inquired what Ms. Peters' status would be if her name were placed on the eligibility list and later transferred before the election. The union accurately replied that if she were not eligible to vote on election day her ballot could be challenged. It is evident that an honest and forthright exchange as to Ms. Peters' status was held between the parties. At no time was the union given any reason to doubt Ms. Peters' pre-election transfer. Hence, there was no basis to file an objection in writing.

V

Did the employee organization know or have reason to know of the defect in the content of the eligibility list? Obviously, the Union was aware Ms. Peters' name was not on the eligibility list, but against the employer's assurances of Ms. Peters pending transfer, did this signal a defective list? Not in the judgment of this Board. It is fair to assume that Ms. Peters' transfer could have been effectuated at anytime up to, and including, the moment she appeared at the polls. It wasn't until the election took place that it became clear Ms. Peters was still in the position of Homemaker. Only then did the deficiency of the eligibility list reveal itself. Again, prior to this time, the union had no basis for suspecting a defect in the list.

VI

The final question is whether the employee organization waived its right to object to the content of the eligibility list. The Board's reasoning in the first two issues is to deny the latter. On this matter, the Hearing Officer misapplied the policy opinion set forth in Fraternal Order of

Police, Ohio Valley Lodge No. 112 and City of Loveland, SERB Case No. 84-RC-05-1095 (May 30, 1985). The Loveland case involved a recognition election composed of sergeants and above and concerned the designation of a police officer to act in the absence of the chief. The city designated one lieutenant to perform in that capacity and had so notified that person and the counsel for the city. However, twelve days later when SERB received the eligibility list, the designated lieutenant's name was among the eligible voters. The election was conducted and not until three weeks after issuance of the eligibility list and a week after the election did SERB know that this one lieutenant had been designated to act in the absence of the chief. The city was the author of the eligibility list. It had control over its issuance. It was the authority that made the designation. It had full knowledge of all these events. The Board properly ruled that the city waived its right to object. The single similarity existing between Loveland and the instant case is that both involve representation elections in which objections were subsequently filed. The Hearing Officer's reliance on Loveland (supra) is misplaced.

For these reasons, the Board directs the Administrator of Representation to open the challenged ballot and issue a revised tally.

In reaching this conclusion, the Board does not believe the employer acted in bad faith. For whatever administrative reason, the transfer of Ms. Peters simply did not take place in accordance with the intended schedule.

Latané, Board Member, concurs. Day, Chairman, absent.