

89-001

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STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
Professionals Guild of Ohio,  
Employee Organization,  
and  
Butler County Board of Mental Retardation  
and Developmental Disabilities,  
Employer.

89-001

CASE NUMBER: 87-REP-05-0132

DIRECTIVE AND OPINION

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;  
September 15, 1988.  
Davis, Vice Chairman:

i. Procedural Background

On October 15 and 16, 1987, Board agents conducted a secret ballot representation election for an appropriate unit of employees of the Butler County Board of Mental Retardation and Developmental Disabilities ("Employer"). Choices on the ballot were the Professionals Guild of Ohio ("Employee Organization") and "No Representative." At the conclusion of the voting, the ballots were tallied, and there were one hundred fifty-two (152) votes cast for the Employee Organization, one hundred two (102) votes for "No Representative," and no challenged ballots. As permitted by Ohio Administrative Code (O.A.C.) Rule 4117-5-10, the Employer timely filed objections to the election, alleging that the Employee Organization had engaged in improper pre-election conduct. On December 17, 1987, the Board directed the matter to hearing.

Prior to the hearing, the Employee Organization and the Employer reached an agreed resolution of the disputed election issues. On July 6, 1988, the parties submitted to the Board a settlement agreement in which they agreed that a rerun election would be held on July 28 and 29, 1988. In accordance with O.A.C. Rule 4117-5-10(B), the parties specified that voter eligibility would be determined by use of the original eligibility date of September 9, 1987. On July 8, 1988, the Board approved the parties' consent election agreement and directed that a rerun poll be conducted.

The results of the rerun election are: eighty-six (86) votes for the Employee Organization, eighty-four (84) for "No Representative," and eleven (11) challenged ballots. The challenged ballots are sufficient to affect the results of the election. Thus, the outcome of the election cannot be determined or certified until the challenges have been resolved.

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Pursuant to O.A.C. Rule 4117-5-10, the parties filed statements and documentation regarding their positions on the eleven challenged ballots. On September 15, 1988, this Board voted to resolve the challenged ballots in a manner consistent with information supplied by the parties. The basis for this resolution is set forth in this opinion. On December 6, 1988, the Employer filed a "Motion to Strike, Or, In the Alternative, For Leave to Submit Additional Evidence And Motion to Reconsider." The Employer sought to have the Board reject certain filings submitted by the Employee Organization. The Employer alleges that such documents were not timely filed in compliance with O.A.C. Rule 4117-5-10, which provides that position statements regarding challenges shall be filed within ten days of the election. This rule, however, also provides that the Board will conduct an investigation regarding possible resolution of the challenges. In the course of such investigation, materials may be sought in addition to those submitted with the position statement. For such documents, the Board staff may establish deadlines in accordance with the course of the investigation. Thus, it would be inappropriate to conclude that materials submitted after the 10-day limitation for position statements automatically would be untimely. In this instance, however, the documents were not requested as part of the Board's investigation. As will be shown below, the documents to which the Employer objects were not relevant to the reasoning leading to this Board's decision. Thus, striking these documents would be unnecessary. The Employer, however, should be given the opportunity to respond to such material and, therefore, the Board on December 22, 1988, granted the Employer leave to submit additional materials. On that same date, the Employer's Motion for Reconsideration was denied.

II. Analysis and Determination

A review of the relevant documents indicates that the Employee Organization and the Employer agree that the following employees were not eligible to vote and that their ballots should not be counted: Trina J. Maggard, Frankie G. Alford, Susan Hounshell, June Hounshell, and Holly Tramte. The parties also agree that Sherry Lynn (Wright) Rader was eligible and that her ballot should be opened and counted.

The number of unresolved challenged ballots thus is reduced to five (5). This number still is sufficient to affect the outcome of the election. Accordingly, these challenges will be addressed and resolved. The five voters whose eligibility remains in question fall into two

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In its memorandum in support of the December 6, 1988, motion, the Employer states that it "withdraws from its earlier agreement and requests that the Board determine the eligibility status of June Hounshell." Employer's Memorandum filed December 6, 1988, page 7. The Employer cites no reasons for this change of position, which is inserted at the conclusion of the memorandum without explanation or elaboration. The Board maintains its original determination based upon Employer's statement that June Hounshell was not an eligible voter. Employer's Position Statement, filed August 8, 1988, page 9.

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categories: (A) three voters whose names did not appear on the list of employees eligible to vote in the first election (Shepard, Cox, and Hayes) and (B) two voters whose names did appear on the original eligibility list (Evans and Hardin).<sup>2</sup>

A. Proper List

This Board has promulgated a rule requiring that in rerun elections:

[o]nly employees who were eligible to vote in the first election and who remain eligible on the date of the rerun election shall be eligible to vote in the rerun election.

O.A.C. Rule 4117-5-10(B). See also South Community, SERB 86-003 (February 10, 1986). Moreover, the parties' agreement that gave rise to this rerun election expressly states that the former eligibility date of September 9, 1987, was to be used.<sup>3</sup>

Under O.A.C. Rule 4117-5-10(B) (and, in this case, the language of the parties' agreement), the parties are bound by the list used and eligibility determinations made in the preceding election, except as to those employees whose eligibility may have ceased. The threshold requirement for eligibility of any voter in a rerun election is that he or she must have been eligible to vote in the first election. Whether an employee was

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<sup>2</sup>The facts set forth and relied upon in this decision are not in dispute and are gleaned from documents contained in the Board's public file, including the position statements and supporting documentation submitted by the parties. References to documentation are intended for convenience and are not intended to suggest that such references are the sole documentation for the facts stated.

<sup>3</sup>The eligibility language in the parties' rerun election agreement is identical to that set forth in the original consent election agreement that led to the first election. That language, standard for any consent election agreement, is:

The eligible voters shall be those employees, included within the bargaining unit described below, who were employed as of September 9, 1987, including employees who did not work during said payroll period because they were ill or on vacation, temporarily laid off, or in the military services of the United States, but excluding any employees who have since quit or been discharged for cause.

Consent Election Agreement filed September 16, 1987, providing for an election on October 15 and 16, 1987, page 1; and Consent Election Agreement filed July 6, 1988, providing for a rerun election to be held on July 28 and 29, 1988, page 2.

eligible to vote in the first election is determined by the constitution of the original eligibility list and the resolution of any objections or challenges thereto.

This approach is warranted because rerun elections occur when an event or conduct has tainted the conditions necessary to ensure a procedurally pure election in which employees could have exercised their free and untrammelled choices. The rerun election is a reproduction of the proper circumstances of the first election, but with the elimination of the contaminating factors. Thus, the eligibility list remains constant except for the deletion of those employees who have ceased employment in the unit. New voters cannot be added to the voting body. Such additions would negate the effort to reproduce the circumstances of the previous election. Prohibiting supplementation also prevents an employer from using its hiring power during the interim to add employees who might skew the results of a rerun election -- an election that is designed to be a repetition of an earlier election in which the additional employees would not have been participants. As stated in South Community, SERB 86-003 (February 10, 1986) at 217, this policy "is supported by the hygienic electoral principle that eligibility lists ought to receive maximum protection from manipulation."

B. Employees Not Included on Original List

By application of O.A.C. Rule 4117-5-10, the agreement of the parties, and the foregoing policies, the three employees whose names did not appear on the eligibility list as compiled by the Employer for the October 1987 election remain ineligible to vote in the rerun election. The Employer pursues arguments addressing the reasons why, by virtue of transfers and reassignments, these three employees should now be eligible. The simple fact, however, is that they were not eligible on September 9, 1987, and

\*This approach is common in other jurisdictions when determining eligibility for run-off elections when no choice has received a majority. See, e.g., National Labor Relations Board Case Handling Manual, Section 11350.5, paragraph 13.505, page 390; Commerce Clearing House; Florida Public Employment Relations Commission Rule 38D-18.04(3); Illinois State Labor Relations Board and Local Labor Relations Board Rule 1210.130(b); and New Jersey Public Employment Relations Commission Rule 19:11-9.3(b). This Board shares the widely accepted goals of preserving the circumstances of the prior vote and protecting election eligibility from manipulation and has determined that these principles are applicable in rerun as well as run-off elections. See South Community, SERB 86-003 (February 10, 1986). Thus, O.A.C. Rule 4117-5-10(B) was promulgated. Compare Michigan Employment Relations Commission Rule 49 and Wisconsin Employment Relations Board Rule 21.08(5)(b) and 21.11(2)(b), leaving eligibility determinations for both run-off elections and reruns to the discretion of the respective labor relations boards.

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cannot become eligible by the Employer's procedural deviation of creating a new list.<sup>5</sup>

C. Waiver

The Employer argues that the employees in question are eligible because their names appeared on the Employer's revised July 1988 list and the Employee Organization failed to object in writing to the new listing. The Employer cites O.A.C. Rule 4117-5-07(C)<sup>6</sup> and argues that the union's failure to object prior to the rerun election constitutes a waiver of its right to challenge the eligibility of those employees whose names appeared on the second list.

In an ordinary election, a party's failure to object in writing could be fatal. This case, however, involves a rerun rather than an initial election, and the revised list submitted by the Employer is not controlling. The controlling eligibility determinations stem from the original September 1987 list that was submitted for use in the initial election.

Proper constitution of the revised list should have been clear to the Employer from the terms of the agreement and the applicable rule. It would have been appropriate for the Employer to have submitted a duplicate of the original list, designating any deletions of employees who had become ineligible by operation of Board rule. It was not appropriate for the Employer to provide additions. While the Employer simply may have been attempting to file what it believed to be a current list, this second list is actually an improper effort to supplement the true eligibility list. The only proper eligibility list in existence in preparation for the rerun election was the Employer's original July 1987 list. Any objections to voter eligibility would have to have been made as they related to that list. The Employee Organization's position with regard to eligibility of all five employees in question is consistent with eligibility as determined by the first list. Therefore, there was nothing to which the union must

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<sup>5</sup>The Employer's argument with regard to the eligibility of one of these employees is that her name erroneously was omitted from the initial list. This argument can be more adequately addressed following the discussion of the principles of waiver. Hence, this point will be treated in section D, below.

<sup>6</sup>O.A.C. Rule 4117-5-07(C) provides that:

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.

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have objected. Waiver under O.A.C. Rule 4117-5-07(C) is inapplicable in this instance.<sup>7</sup>

D. Employee Whose Name Erroneously Was Omitted from Original List

With regard to Bonnie Hayes, one of the three employees whose name was not on the original list, the Employer argues that the omission from the original list was in error: Hayes was on disability leave on September 9, 1987, but retained reemployment rights and therefore should have been listed as eligible for the October 1987 election. The Employer, however, falls into the very waiver it had projected for the Employee Organization. While an employee on medical or disability leave would have been presumed eligible had her name appeared on the original list, the Employer's failure to raise the issue during the first election procedure precludes reopening the issue now. The eligibility list for a rerun election remains frozen in time from the first election to the rerun, with the exception of deletions.

E. Employees Whose Names Were Included in Original List

There remain two challenged ballots, and, even with the preceding resolutions, these votes (cast by Evans and Hardin) may be determinative. Therefore, these challenges also must be addressed. As stated above, the names of both Evans and Hardin appeared on the original eligibility list. The Employer argues, however, that these employees subsequently became ineligible to vote because on December 9, 1987, they were removed from employment. While a legitimate discharge of an employee prior to a rerun election could be a meritorious basis for ineligibility, the discharges in the case had been disaffirmed prior to the rerun election. On March 29, 1988, the State Personnel Board of Review "ordered that the removals of both [Evans and Hardin] be disaffirmed and that they be restored to their employment as Residential Specialists I." Patina Hardin and Linda J. Evans v. Butler County Board of Mental Retardation and Developmental Disabilities, Personnel Board of Review Case Nos. 87-REM-12-0843 and 87-REM-12-0853 (order issued March 30, 1988).<sup>8</sup> This order of reinstatement eliminates any

<sup>7</sup>The Employee Organization did receive a copy of the Employer's supplemental list and expressed orally its opposition to the contents. Employee Organization's letter and attachments, filed August 26, 1988. Even though the document was not a proper eligibility list, it seldom is in a party's best interest to remain silent in the face of a potentially problematic filing. As a practical matter, if the Employee Organization had stated this opposition in writing prior to the election, the Board and the parties would have been spared the time and effort spent on the procedural issue of waiver.

<sup>8</sup>The order regarding Evans was affirmed by the Butler County Court of Common Pleas in Butler County Board of Mental Retardation and Developmental Disabilities v. Evans, Case No. CV88-04-0470 (opinion issued July 13, 1988). The order regarding Hardin was appealed to the Hamilton County Court of Common Pleas, and that appeal was dismissed for lack of jurisdiction. Butler County Board of Mental Retardation and Developmental Disabilities v. Hardin, Case No. A-88-02973 (entry issued September 1, 1988).

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question regarding the eligibility of Evans and Hardin. Pursuant to the Personnel Board of Review's ruling, these employees, at the time of the election, had a right to continued employment, and they properly were considered to be employees. Evans and Hardin voted in the election, thus demonstrating their interest in maintaining employee status. That the Employer has continued to litigate the issue and has refused to offer reinstatement does not disenfranchise these employees.

The Employer argues that Hardin "has accepted employment elsewhere at Queen City as a typist, [and therefore] she has forfeited any claim to eligibility and no longer has a substantial interest in the terms and conditions of employment at the Butler County Board or [sic] MRDD." Employer's Statement of Position, filed August 8, 1988, page 8. The and was so employed at the time of the election, she was eligible to vote unless an offer of reinstatement had been made and had been rejected or finality. Neither Board of Review ruling had been reversed with lodged a legal challenge to termination cannot be expected to remain without reemployment. Indeed, in cases in which back wages are appropriate as a damage award, an employee has a duty to mitigate such damages by seeking gainful employment in the interim. See, e.g., National Labor Relations Board v. Miami Coca-Cola Bottling Co., 360 F. 2d 569, 62 LRRM 2155, 2158 (5th CA 1966), and Harvest Queen Mill and Elevator Co., 90 NLRB 320, 26 LRRM 1189 (1950). The acceptance of employment in itself does not suggest an abandonment of the employment that is the subject of litigation.

### III. Conclusion

The Board upholds the challenges to the ballots cast by Maggard, Alford, Susan Houchell, Julie Hounnell, Trame, Shepard, Cox, and Bain. These ballots will remain sealed and will not be counted. The challenges to ballots cast by Rader, Evans, and Hardin are found to be without merit. These voters were eligible and their votes will be counted. The Administrator of Representation is directed to open and count these three challenged ballots at a time to be established in consultation with the parties. After the opening of these ballots, a revised tally of ballots will be issued.

It is so directed.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member, concur.

*Jacqueline F. DAVIS*  
JACQUELINE F. DAVIS, VICE CHAIRMAN

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You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas Court within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 19<sup>th</sup> day of January, 1989.

Cynthia L. Spanski  
CYNTHIA L. SPANSKI, CLERK

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