

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Ohio Patrolmen's Benevolent Association,

Rival Employee Organization,

and

United Auto Workers-Region 2, Local 70,

Incumbent Employee Organization,

and

Cuyahoga County Sheriff's Department,

Employer.

Case No. 2002-REP-03-0062

**DIRECTIVE SUSTAINING ELECTION OBJECTIONS, SETTING ASIDE ELECTION
RESULTS, AND DIRECTING RERUN ELECTION
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
February 27, 2003.

On March 28, 2002, the Ohio Patrolmen's Benevolent Association ("OPBA") filed a Petition for Representation Election – Employee Organization with the State Employment Relations Board ("Board") seeking to displace the incumbent employee organization, United Auto Workers-Region 2, Local 70 ("UAW") as the exclusive representative for a bargaining unit consisting of "All Corrections Corporals" employed by the Cuyahoga County Sheriff's Department ("Employer"). On May 23, 2002, the Board issued a Direction to Election to the parties that included a requirement that the Employer, no later than June 3, 2002, serve on each Employee Organization and file with the Board a numbered, alphabetized election eligibility list setting forth the names and home addresses of all employees eligible to vote as of May 23, 2002. The Employer did not file with the Board or serve on all parties an alphabetized election eligibility list containing the names and home addresses of all employees eligible to vote as of May 23, 2002. Pursuant to Ohio Administrative Code Rule 4117-5-07(E), an alphabetized list containing names only was used as the eligibility list for the election. On July 23, 2002, the Board conducted the secret ballot election. Of thirty-six eligible voters, twenty ballots were cast. The OPBA received four votes, the UAW received fifteen votes, and No Representative received one vote.

The OPBA filed post-election objections maintaining collusion between the Employer and the UAW. The OPBA challenged the election results because the election eligibility list it was provided did not contain the home addresses of the employees in the bargaining unit. On September 5, 2002, the Board directed the post-election objections to an evidentiary hearing and coordinated the representation proceeding with the unfair labor practice case. The parties waived a hearing and, instead, submitted the case on joint stipulations and briefs. On January 9, 2003, a Recommended Determination was issued by the Administrative Law Judge, recommending that the Board find that the OPBA's objections to the July 23, 2002 election have merit and warrant setting aside the election results and conducting a rerun election in accordance with Ohio Administrative Code Rule 4117-5-10(B). No exceptions were filed to the Recommended Determination.

After reviewing the record, the Recommended Determination, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Recommended Determination, incorporated by reference; sustains the objections filed by the Ohio Patrolmen's Benevolent Association; sets aside the results of the July 23, 2002 election; directs that a rerun election be conducted, in accordance with Ohio Administrative Code Rule 4117-5-10(B), in the bargaining unit at a time and place to be determined by the Labor Relations Section Administrator in consultation with the parties; and directs the Cuyahoga County Sheriff's Department to serve on each of the employee organizations and file with the Board a numbered, alphabetized election eligibility list setting forth the names and home addresses of all employees eligible to vote as of May 23, 2002.

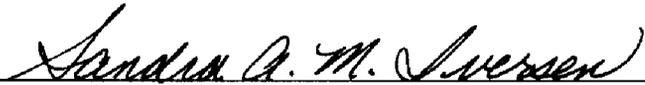
It is so ordered.

DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



CAROL NOLAN DRAKE, CHAIRMAN

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 7th day of March, 2003.



SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION,	:	CASE NO. 02-REP-03-0062
	:	
Rival Employee Organization,	:	
	:	
and	:	
	:	
UNITED AUTO WORKERS-REGION 2, LOCAL 70,	:	BETH C. SHILLINGTON
	:	ADMINISTRATIVE LAW JUDGE
Incumbent Employee Organization,	:	
	:	
and	:	
	:	
CUYAHOGA COUNTY SHERIFF'S DEPARTMENT,	:	
	:	<u>RECOMMENDED DETERMINATION</u>
Employer.	:	

I. INTRODUCTION

On March 28, 2002, the Ohio Patrolmen's Benevolent Association ("OPBA") filed a Petition for Representation Election – Employee Organization with the State Employment Relations Board ("SERB") seeking to displace the incumbent employee organization, United Auto Workers-Region 2, Local 70 ("UAW") as the exclusive representative for a bargaining unit consisting of "All Corrections Corporals" employed by the Cuyahoga County Sheriff's Department ("Employer"). On May 23, 2002, SERB issued a Direction to Election to the parties that included a requirement that the Employer, no later than June 3, 2002, serve on each Employee Organization and file with SERB a numbered, alphabetized election eligibility list setting forth the names and home addresses of all employees eligible to vote as of May 23, 2002.

The Employer did not file with SERB or serve on all parties an alphabetized election eligibility list containing the names and home addresses of all employees eligible to vote as of May 23, 2002. Pursuant to Ohio Administrative Code Rule 4117-5-07(E), an alphabetized list containing names only was used as the eligibility list for the election.¹

¹All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117.

On July 23, 2002, SERB conducted the secret ballot election. Of thirty-six (36) eligible voters, twenty (20) ballots were cast. The OPBA received four (4) votes, the UAW received fifteen (15) votes, and No Representative received one (1) vote.

The OPBA filed post-election objections maintaining collusion between the Employer and the UAW. The OPBA challenged the election results because the election eligibility list it was provided did not contain the home addresses of the employees in the bargaining unit. The OPBA maintains that, through its actions, the Employer was determined to prevent a fair election.

The OPBA also filed Case No. 02-ULP-06-0453 alleging that the Employer violated §§ 4117.11(A)(1) and (2) by refusing to provide the alphabetized election eligibility list containing names and home addresses. On August 15, 2002, SERB found probable cause to believe an unfair labor practice had been committed and directed the case to hearing. SERB has coordinated these proceedings.

II. ISSUE

Whether SERB should sustain the OPBA's election objections, set aside the July 23, 2002 election, and direct a rerun election?

III. FINDINGS OF FACT²

1. The Cuyahoga County Sheriff's Department is a "public employer" as defined by § 4117.01(B). (S. 1)
2. The Ohio Patrolmen's Benevolent Association is an "employee organization" as defined by § 4117.01(D). (S. 2)
3. The United Auto Workers-Region 2, Local 70 is an "employee organization" as defined by § 4117.01(D). (Complaint, ¶ 5; Answer, ¶ 5)
4. On March 23, 2002, the OPBA filed a Petition for Representation Election – Employee Organization ("Petition") with the State Employment Relations Board ("SERB"), seeking to represent a bargaining unit of the Employer's Corrections

² All references to the Stipulations of Fact are indicated parenthetically by "S.," followed by the stipulation number. All references to the Joint Exhibits are indicated parenthetically by "Jt. Ex.," followed by the exhibit number. References to the stipulations and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for that related finding of fact.

Corporals. The UAW is the incumbent exclusive representative for this bargaining unit. (Complaint, ¶ 5; Answer, ¶ 5; S.3; Jt. Exh. A)

5. SERB notified the Employer of the Petition through correspondence dated April 3, 2002. The correspondence requested that not later than April 17, 2002, the Employer provide an alphabetized, numbered list of employees in the proposed bargaining unit to SERB and the other parties pursuant to Rule 4117-5-04(C). On April 15, 2002, an alphabetized, numbered list of Corrections Corporals was transmitted to SERB, the OPBA, and the UAW. (S. 4-7; Jt. Exhs. B, C)
6. On April 30, 2002, SERB transmitted a Consent Election Agreement to the parties, asking that it be returned by May 7, 2002. Paragraph 3 of the Consent Election Agreement states as follows:

Pursuant to Ohio Administrative Code Rule 4117-5-07, the employer shall file with the Board and serve on the parties an accurate alphabetized, numbered list of eligible voters' names and home addresses. The list shall be filed by the earlier of these two dates: (1) ten days after the Board issues the direction to election, or (2) ten days prior to the election.

(S. 8; Jt. Exh. D)

7. The Employer and the UAW negotiated a successor collective bargaining agreement that was executed on May 7, 2002. (Complaint, ¶ 6; Answer, ¶ 6)
8. On May 23, 2002, SERB issued and served on the parties a Direction to Election, and on June 4, 2002, SERB issued and served on the parties a corrected Direction to Election. Each document stated, in relevant part, as follows:

The election shall be held at a date, time, and place to be determined by the Representation Section in consultation with the parties. No later than June 3, 2002, the Employer shall serve on each Employee Organization and file with the Board a numbered, alphabetized election eligibility list setting forth the names and home addresses of all employees eligible to vote as of May 23, 2002.

(S. 9-10; Jt. Exhs. E, F)

9. On June 6, 2002, SERB mailed the Employer's attorney a letter stating, in part, as follows:

The directive states that the Employer shall serve on each Employee Organization and file with us a numbered alphabetized election eligibility list no later than June 3, 2002. We have not received the list. You must file the list no later than June 14, 2002.

(S. 11; Jt. Exh. G)

10. On June 24, 2002, SERB notified all parties that the election would be held on July 11, 2002. The correspondence from SERB indicated that SERB would use "the alphabetized list of employees as provided by the Employer dated April 15, 2002." (S. 12-13; Jt. Exh. H)
11. On June 25, 2002, the OPBA filed an unfair labor practice charge with SERB. The charge concerned the Employer's failure to file and serve an eligibility list containing an alphabetized list of names and home addresses of those eligible to vote in the election. (S. 14; SERB Case No. 02-ULP-06-0453)
12. On June 26, 2002, the Employer's counsel wrote a letter to SERB outlining the Employer's objections to the upcoming election. (S. 15; Jt. Exh. I)
13. On July 10, 2002, SERB notified the parties that the July 11, 2002 election was postponed. (S. 16; Jt. Exh. J)
14. On July 11, 2002, SERB notified the parties that the election was rescheduled to July 23, 2002, and that SERB would use "the alphabetized list of employees as provided by the Employer dated April 15, 2002." (S. 17; Jt. Exh. K)
15. The election was held on July 23, 2002. Of thirty-six (36) eligible voters, twenty (20) ballots were cast. The OPBA received four (4) votes, the UAW received fifteen (15) votes, and No Representative received one (1) vote. (S.18)
16. On July 25, 2002, the OPBA timely and properly filed post-election objections. (S.19)
17. On September 5, 2002, SERB directed the post-election objections to an evidentiary hearing and coordinated the representation proceeding with the unfair labor practice case. (S. 20)

IV. ANALYSIS AND DISCUSSION

Rule 4117-5-07 provides as follows:

- (A) After the board directs an election, the employer shall file with the board and serve upon each party to the election an alphabetized numbered election eligibility list containing the names and home addresses of all eligible voters. Unless otherwise directed by the board, the eligibility list must be filed and served by the earlier of these two dates:
 - (1) Ten days after the board issues the direction of election; or
 - (2) Ten days prior to the commencement of the election.
- (B) The board may require the employer to arrange the list according to polling sites or in any other manner which it deems appropriate.
- (C) 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.
- (D) At any time prior to or during the pre-election conference, the parties may jointly agree in writing to additions to or deletions from the eligibility list.
- (E) If the employer fails to timely file a proper eligibility list, the board may, at its [sic] discretion, compile a list from any sources available to it.

The parties do not dispute that the Employer never produced an alphabetized numbered election eligibility list containing the names and home addresses of all eligible voters, as required by Rule 4117-5-07(A). The Employer's refusal to produce this list cannot be attributed to inadvertence. SERB provided the Employer with written notice of this requirement on four separate occasions: (1) the Consent Election Agreement (Jt. Exh. D); (2) the Direction to Election (Jt. Exh. E); (3) the Corrected Direction to Election (Jt. Exh. F); and (4) SERB's June 6, 2002 letter to the Employer's legal counsel (Jt. Exh. G). Moreover, the OPBA objected in writing, as contemplated by Rule 4117-5-07(C), to the Employer's refusal to provide the election eligibility list when the OPBA filed an unfair labor practice with SERB on June 27, 2002.

Rule 4117-5-10(B) provides in relevant part as follows:

If post-election objections are filed or if challenged ballots are sufficient in number to affect the results of the election, the board shall investigate such objections or challenges. Position statements on challenged ballots must be filed within ten days of the service of the tally of ballots. The board shall issue a directive resolving relevant issues based upon the investigation; provided, however, that disputed issues of material fact may be determined upon an evidential hearing. The board may dismiss the post-election objections or challenges, direct the counting of some or all of the challenged ballots, or where warranted, set aside the previous election and direct another election.

The official Notice of Election that SERB requires the Employer to post to give notice to the affected employees states in relevant part as follows:

Every effort will be made to protect your right to a free choice. Improper conduct will not be permitted. All parties are expected to cooperate fully with the Board in upholding the basic principles of a fair election. If agents of either the employee organization or the employer interfere with your rights to a free election, the election may be set aside by the Board.

The question presented in this representation proceeding is whether setting aside the previous election and directing another election is warranted. In In re Lake County Engineer, SERB 86-046 (11-20-86) ("Lake County"), 1984-86 SERB 343, SERB addressed the issue of whether an employer's refusal to provide an election eligibility list to the incumbent employee organization before a decertification election warranted setting aside the election. In setting aside the election and directing a rerun election, SERB stated in relevant part as follows:

The Employer admits that no eligibility list was served on the Employee Organization, but contended that this failure was not prejudicial to the Employee Organization because it was the incumbent exclusive representative and knew the names and addresses of all the eligible employees in the bargaining unit. * * *

The obligation imposed on the Employer by Ohio Administrative Code Rule 4117-5-07(A) to furnish each party an alphabetized election eligibility list is explicit. It provides for no exemptions or exceptions and is not dependent on the showing of an Employee Organization's need for such information. The Employer's reliance on the assumption that the Employee Organization knew the names and addresses of all eligible employees was wrong. If any assumption is to be made, it is that every name and every address on the

roster of eligible employees is not necessarily known to the Employee Organization. *The eligibility list is an integral part of the elections process and the purpose of the list is to facilitate that process. It is essential to the fair conduct of the election procedure.* The Employer erred by ignoring the requirement of Ohio Administrative Code Rule 4117-5-07(A).

Lake County, supra at 344 (emphasis added).

The concerns identified by SERB in Lake County apply with even more force here, in an election involving a rival employee organization, an outsider, in addition to an incumbent employee organization. The arguments advanced by the Employer in its post-hearing brief, and by the UAW in its post-hearing brief, are without merit.

The Employer's primary argument is that it was excused from furnishing a proper election eligibility list because, notwithstanding the lack of such a list, SERB held the election. In so doing, SERB exercised the discretion afforded it under Rule 4117-5-07(E) and "compile[d] a list from any sources available to it," specifically, the alphabetized, numbered list the Employer furnished to SERB when SERB undertook its initial investigation of the OPBA's petition.³ But SERB's exercise of its discretion can in no way be considered an excusal of the Employer's failure to follow the rules, a waiver of the OPBA's right to object to the Employer's failure to furnish the list required by Rule 4117-5-07(A), or a waiver of the OPBA's right to request that the election results be set aside. In addition, the record does not demonstrate that the OPBA ever agreed or acquiesced to the use of the SERB list. Put simply, the Employer acted at its peril in failing to furnish the required election eligibility list.

Additionally, SERB's Lake County decision calling for strict enforcement of the rule requiring a proper election eligibility list is supported by an analysis of the underlying reason for the rule: ensuring that the affected employees are provided with information necessary for free and fully informed exercise of their statutory rights. The National Labor Relations Board ("NLRB") has an analogous rule, which has been upheld and enforced by the United States Supreme Court. NLRB v. Wyman-Gordon Co. (1969), 394 U.S. 759. In North Macon Health Care Facility (1994), 147 L.R.R.M. 1185 ("North Macon"), the NLRB reviewed the significant policy concerns underlying this requirement.

The NLRB has the responsibility to ensure that elections are conducted free from interference, restraint, or coercion, or any other elements that prevent or impede a free and

³ The April 15, 2002 list of employees was filed by the Employer pursuant to, and to comply with, Rule 4117-5-04(C). SERB uses this alphabetized, numbered payroll list to determine whether the petitioner's showing of interest is sufficient and whether a question concerning representation exists. Since this list lacks the employees' addresses and the names of all of the employees eligible to vote as of May 23, 2002, pursuant to the Direction to Election, it does not satisfy the Employer's obligations under Rule 4117-5-07(A).

reasoned choice. Among the factors that undoubtedly tend to impede such a choice is lack of information about one of the choices available. "An employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." North Macon, 147 L.R.R.M. at 1186 (quoting Excelsior Underwear, Inc. (1966), 156 N.L.R.B. 1236, 1241 ("Excelsior"). Second, the election eligibility list provides employee organizations with the ability to reach all employees with its arguments in favor of representation. "This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious--that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters." North Macon, supra at 1187 (quoting Excelsior) (emphasis in original).

The UAW's argument that the OPBA could have accessed the employees by other means is without merit. The election eligibility list is the means by which SERB ensures that *all* parties have access to *all* eligible employees. Both SERB, in Lake County, supra, and the NLRB have recognized that the rule is prophylactic, so that evidence of bad faith and actual prejudice is unnecessary. "[A]n employer's failure to provide a complete and accurate list of eligible voters is an injury to *employees*, not just to [employee organizations]: an incomplete or inaccurate list can effectively prevent employees from obtaining information necessary for the free and fully informed exercise of their [statutory] rights.... '[T]he potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply.'" North Macon, 147 L.R.R.M. at 1187 (emphasis in original) (quoting Excelsior, 156 N.L.R.B. at 1244).

The OPBA's objections to the July 23, 2002 election have merit and warrant setting aside the election results and conducting a rerun election.

V. CONCLUSIONS OF LAW

1. The Cuyahoga County Sheriff is a "public employer" as defined by § 4117.01(B).
2. The Ohio Patrolmen's Benevolent Association is an "employee organization" as defined by § 4117.01(D).
3. The United Auto Workers-Region 2, Local 70 is an "employee organization" as defined by § 4117.01(D).
4. The Ohio Patrolmen's Benevolent Association's objections to the July 23, 2002 election have merit and warrant setting aside the election results and conducting a rerun election in accordance with Rule 4117-5-10(B).

VI. RECOMMENDATIONS

It is respectfully recommended that:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board sustain the objections filed by the Ohio Patrolmen's Benevolent Association and issue a **DIRECTIVE** setting aside the results of the July 23, 2002 election and directing a rerun election in the bargaining unit described below:

INCLUDED: All Corrections Corporals.

EXCLUDED: All others.