

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:)	
)	
CITY OF LAKE MILLS,)	
Public Employer,)	
)	
and)	CASE NO. 102264
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 204,)	
Petitioner.)	

DECISION AND ORDER

On November 7, 2018, the International Brotherhood of Electrical Workers, Local 204 (IBEW or Local 204), filed an objection to the agency-conducted retention/recertification election of IBEW as the bargaining representative of a unit of Lake Mills employees (referenced as “BU-1063). From the Public Employment Relations Board’s (PERB) tally of votes on October 29, 2018, IBEW did not win the majority of bargaining unit employees’ votes in support of its retention/recertification. The tally was based on a total of twenty-eligible voters.

IBEW filed its objection, pursuant to Iowa Code section 20.15(4) and PERB subrule 621—5.4(2)(g), challenging the inclusion of one particular employee, Gary Fjelstad, in the list of total eligible voters. Fjelstad’s inclusion is outcome determinative because the ten votes in support of IBEW’s retention/recertification would constitute a majority otherwise.

On November 9, 2018, the City of Lake Mills filed a motion to dismiss IBEW’s objection asserting IBEW’s claim is essentially an untimely challenge to Fjelstad’s voter eligibility although it is couched in terms of an objection. The

City asserts PERB should not reach the merits of IBEW's claim because IBEW failed to timely challenge Fjelstad's eligibility or propose his deletion from the voter list as provided by PERB administrative rules.

In accordance with PERB rule 621—5.4(20) for objections such as the one filed by IBEW, we can dismiss the objection or proceed to hearing for resolution. We chose the latter and, pursuant to notice, scheduled the evidentiary hearing. Prior to the hearing, we approved the parties' proposed submission of stipulated facts and joint exhibits as the record. Oral arguments were presented before the Board on November 26, 2018. IBEW was represented by attorney Nate Willems and the City was represented by James Gilliam. Both parties filed post-argument briefs, the last of which was filed on December 6, 2018.

Based on our review of the record, as well as the parties' briefs and oral arguments, IBEW's objection to the BU-1063 retention/recertification election is **OVERRULED**.

I. FINDINGS OF FACT.

Our findings are those as set forth in the stipulated facts and joint exhibits, as well as our official notice of basic facts regarding the overall elections, and official notice of facts as requested by the parties with two exceptions as noted in the footnotes. The findings of fact are as follow:

A. IBEW's Certification to Represent BU-1063.

On December 30, 1996, PERB originally certified IBEW, in PERB Case No. 5499, as the exclusive representative of the following bargaining unit:¹

INCLUDED: All full-time and part-time employees of the City of Lake Mills, including, but not limited to employees in the job classifications of Electric Department Supervisor and Lineman, Water/Waste Superintendent, Generating Department Supervisor, Operator I and Operator II, Street Department Supervisor, Distributing Supervisor, Utility Laborer I, Utility Clerk I and II, Deputy City Clerk, Youth Director, Library Aides, Transit Drivers and Janitors.

EXCLUDED: Director of Public Works, Deputy Director of Public Works, all employees of the police and fire departments, and all others excluded by Iowa Code section 20.4.

B. Retention/Recertification Election Proceedings.

Pursuant to Iowa Code section 20.15(2), in the fall of 2018, PERB conducted retention/recertification elections of certified employee organizations that are parties to collective bargaining agreements with a June 30, 2019, expiration date. PERB concurrently conducted the elections on the same schedule. For each election case, representatives for the certified employee organization and the public employer were registered in PERB's electronic document management system, appeared in their respective cases, and received all the documents filed in the case.

On August 27, 2018, PERB filed a Notice of Intent to Conduct an Election in the BU-1063 retention/recertification election of IBEW. PERB filed similar

¹ There are discrepancies between the stipulated bargaining unit description and the unit description as it appears in PERB Case No. 5499. Our findings include the unit description as it appears in PERB Case No. 5499.

notices for all other retention/recertification elections. The next day, the City timely filed its initial voter list with PERB. Because the City considered “Fjelstad to be an active employee and otherwise a ‘public employee’ as defined by [c]hapter 20,” the City included Fjelstad “as an active employee in the position of Transit Driver” on the list.² PERB sent this list of employees to IBEW and filed the list after redacting confidential information.

The City timely posted PERB’s Notice to Employees on August 28 and distributed it to employees through the employees’ paychecks.³ The City mailed notices to Fjelstad and another employee, janitor Jean Bechtel, because they were not receiving paychecks during that timeframe.

On September 19, 2018, PERB filed its Order Directing an Election to be conducted on a telephonic/web-based basis between October 15 and October 29, 2018, for all retention/recertification elections. For each election, eligible voters were defined as “all employees in the bargaining unit who were employed in the unit of the date of this order, September 19, 2018.” That same day, the City timely posted the documentation and distributed it “to employees through paychecks.” By regular mail, the City again mailed the documentation to Fjelstad and Bechtel.

PERB conducted the telephonic/web-based elections, *i.e.*, actual voting, between October 15 and 29, 2018. Neither IBEW nor any employee challenged

² We consider the reasons for the City’s inclusion of Fjelstad as stipulated facts although the parties inadvertently requested official notice of these reasons.

³ It is unclear, but not material, whether the distribution was made along with the paychecks or through the paycheck distribution system.

the voter eligibility of Fjelstad at any time prior to the conclusion of the election on October 29, 2018.

On October 29, 2018, PERB filed its tallies of ballots for the retention/recertification elections. In all, PERB conducted 453 elections with 51,682 voters.

For the BU-1063 election, 10 of the 20 eligible voters voted in support of IBEW's retention/recertification. The next day, the City timely posted the tally for BU-1063 and distributed it "to employees through paychecks." Because Fjelstad and Jean Bechtel did not receive paychecks during that timeframe, each received notice again by regular mail.

IBEW filed its objection on November 6, 2018, asserting Fjelstad should not have been included in the City's list of eligible voters and the tally of votes. Prior to November 6, 2018, neither IBEW nor any employee filed an objection to the inclusion of Fjelstad as an eligible voter in this election.

C. Gary Fjelstad's Employment.

Fjelstad began employment as a part-time Transit Driver with the City in December, 2002. The City's "Municipal Employee" roster has included Fjelstad since the beginning of his employment. Fjelstad has also been included in the City's Drug and Alcohol Pool Eligibility List since the program's inception. Every July 1, including July 1, 2018, the City documented hourly wage increases for Fjelstad in accordance with the collective bargaining agreement negotiated between the City and IBEW.

A part-time Transit Driver does not have established shifts, work schedules, or guaranteed hours of work. Fjelstad worked the following hours for the calendar years indicated: 671.75 hours in 2015; 796.5 hours in 2016; and 73.5 hours in 2017. After October 1, 2017, Fjelstad notified the City that he wished to reduce his hours. As a result, the City assigned work to the other drivers and used Fjelstad as a substitute driver. The most recent date Fjelstad performed driving services is October 10, 2017. He was unable to work when called in by the City on October 17, 2017. However, Fjelstad reported to work when called in late 2017 or spring 2018 although his driving services were subsequently not needed. Fjelstad began receiving his retirement benefits in January, 2018.

II. CONCLUSIONS OF LAW.

IBEW seeks the exclusion of Fjelstad in PERB's tally of BU-1063's election results and advances a number of theories in support of its position. First, pursuant to PERB subrule 621—5.2(1)(b)(2), IBEW makes a postelection challenge; IBEW posits Fjelstad, once an eligible voter, left employment on October 10, 2018, and was no longer in the bargaining unit prior to the close of the election and should not be included in the tally. Second, pursuant to PERB subrule 621—5.4(2)(g), IBEW objects to the conduct of the election; IBEW alleges circumstances other than misconduct prevented the employees from freely expressing their preferences because the inclusion of Fjelstad in the tally diluted the other employees' votes. Third, pursuant to PERB subrule 621—5.2(3)(a)(1),

IBEW challenges the voter eligibility of Fjelstad throughout the election process; IBEW asserts its post-election challenge, although untimely, is appropriate.

A. Relevant Administrative Rules.

5.2(3) Challenges.

a. Types of challenges.

(1) A party may challenge, for good cause, the eligibility of any voter. The agency shall attempt to resolve the challenge. Whenever challenged ballots are unresolved and determinative of the outcome of an election, a hearing to determine the eligibility of the challenged voter(s) shall be scheduled and conducted. After the conclusion of the hearing, the board may, if necessary, order a new election, and the cost may be taxed to the nonprevailing party.

(2) In addition to voter eligibility challenges made pursuant to this subrule, employee organizations may make postelection challenges to the total number of bargaining unit employees for the employee organization's respective retention and recertification elections in accordance with paragraph 5.2(1) "b."

b. Methods of voter eligibility challenges. A party may challenge the eligibility of a voter as follows:

....

(3) Telephonic/web-based elections. A party shall challenge a voter's eligibility in writing to the agency with a copy to the other interested party. For retention and recertification elections, a party shall challenge that voter's eligibility at least seven days prior to the commencement of the election period for the telephonic/web-based elections. For all other elections utilizing this method, a party shall challenge that voter's eligibility prior to the end of the election period.

Iowa Admin. r. Code 621—5.2(3).

For the postelection challenges referenced above, PERB subrule 621—5.2(1) "b" provides in part,

The certified employee organization may file a postelection challenge to the number of bargaining unit employees if an eligible voter has left employment and is no longer in the bargaining unit prior to the close of the election or election period.

Id. at r. 621—5.2(1)(b)(2)(1).

621—5.4(20) Objections to an election.

....

5.4(2) *Objectionable conduct during election campaigns.* The following types of activity, ... if determined by the agency that such activity could have affected the results of the election, shall be considered to be objectionable conduct sufficient to invalidate the results of an election:

....

g. Any other misconduct or other circumstance which prevents employees from freely expressing their preferences in the election.

Id. at r. 621—5.4(2)(*g*).

B. Analysis.

IBEW's first claim is a post-election challenge, which allows an adjustment of the tally if eligible voters leave their unit prior to the close of the election. See *id.* at r. 621—5.2(1)(b)(2)(1). In support of its claim, IBEW assumes Fjelstad was an eligible voter, but contends he was no longer considered an employee a year after he last performed actual services on October 10, 2017. IBEW then theorizes Fjelstad became ineligible on October 10, 2018, and effectively left employment during the election period. Therefore, IBEW asserts this is a proper subject for a post-election challenge and requires an adjustment to the vote tally.

We are not persuaded that Fjelstad was an eligible voter who left employment during the election period as contemplated by the rule. Based on the facts, Fjelstad was not an eligible voter at all during the election period. Fjelstad began receiving retirement benefits in January 2018 and has not performed services since. In making our determination, we took into account that Fjelstad had reported to work sometime in late 2017 or early 2018. However, in the absence of the specific date, we are not persuaded that it occurred after he began receiving retirement benefits. From the record, the most reasonable inference is Fjelstad retired in January and was not an eligible voter

at the time of the retention and recertification election. Thus, we reject IBEW's first claim, its post-election challenge based on the theory Fjelstad left employment during the election period. *See id.* at r. 621—5.2(1)(b)(2)(1).

With respect to IBEW's second claim framed as a post-election objection, IBEW contends that voters were prevented from freely expressing their preferences because Fjelstad's inclusion diluted their votes. *See id.* at r. 621—5.4(2)(g). Assuming IBEW's contention that votes are diluted in this manner, we reject the merits of IBEW's objection. Based on our initial determination that Fjelstad was an ineligible voter before the election period, it stands to reason IBEW had opportunities throughout the election period to exclude Fjelstad and prevent the dilution of votes. IBEW had notice of the very short list of eligible voters and ample opportunity to conduct due diligence. Fjelstad had not worked for over six months. PERB administrative rules provide an adequate remedy whereby IBEW could have challenged Fjelstad's eligibility or proposed his deletion from the voter list. IBEW cannot claim harm from its own inactions and we cannot conclude that the voters were *prevented* from freely expressing their preferences under the circumstances. *See id.* at r. 621—5.4(2)(g).

The thrust of this case is IBEW's last claim, which is a challenge to Fjelstad's voter eligibility. *See id.* at r. 621—5.2(3)(a)(1) and 5.2(3)(b)(3). Although we have addressed the underlying issue and determined that Fjelstad was an ineligible voter, the question is whether IBEW is precluded from making this untimely challenge and obtain relief, *i.e.*, a new election. It is clear that IBEW did not comply with the filing deadline for this challenge "at least seven

days prior to the commencement of the election period.” *See id.* at r. 621—5.2(3)(b)(3). The City maintains the filing deadline is mandatory and IBEW’s failure to meet the deadline precludes our ability to grant relief. On the other hand, IBEW asserts that the administrative rules contemplate post-election challenges and failure to meet the filing deadline is not fatal to reaching the merits of an untimely voter eligibility challenge and obtaining relief through a new election.

Accordingly, the threshold issue is whether the rule’s deadline is mandatory and a party’s failure to comply is fatal to the filing of a subsequent untimely voter eligibility challenge. In making our determination, we are guided by the courts’ principles of statutory construction that are equally applicable to the construction and interpretation of administrative rules. *See, e.g., Steinbronn v. State of Iowa (DHS)*, 06-MA-7 at p. 8 (PERB 2008) (citing *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003)). Thus, we follow the courts’ analysis of whether a statutory duty is mandatory or directory.

“Mandatory and directory statutes each impose duties. The difference between them lies in the consequence for failure to perform the duty.” *Taylor v. Dep’t of Transp.*, 260 N.W.2d 521, 522 (Iowa 1977). In determining whether a duty is mandatory or directory, courts look to the nature of the duty in light of the purpose the statute was designed to serve. *Downing v. Iowa Dep’t of Transp.*, 415 N.W.2d 625, 628 (Iowa 1987). When the duty imposed by the provision is essential to the main objective of the whole statute, the provision is mandatory, and failure to perform the duty will invalidate subsequent

proceedings. *Id.* When the duty imposed is not essential to the main statutory objective, but is designed to assure order and promptness in the proceeding, the provision is directory and failure to perform the duty will not affect the validity of subsequent proceedings unless prejudice is shown. *See id.* *See also State v. Grimes*, 569 N.W.2d 378, 381 (Iowa 1997); *Taylor*, 260 N.W.2d at 523.

Applying this analysis to the voter eligibility challenge means IBEW is precluded from an untimely challenge and relief if in fact the filing deadline (duty) is essential to a main chapter 20 objective and thus, mandatory. Following the guiding principles set by the courts, we think that, as a general matter, the deadlines set by PERB administrative rules for the retention/recertification elections are mandatory. PERB's conduct of these elections is a clear objective set out in chapter 20. Iowa Code section 20.15(2) sets parameters within which the retention/recertification elections are to occur for a certified employee organization, *i.e.*, "prior to the expiration of the bargaining unit's collective bargaining agreement." *See* Iowa Code § 20.15(2)(a). The time period in which PERB must conduct the retention/recertification elections is specified. For agreements with a June 30 expiration date, such as the agreement in this case, PERB must conduct the elections between June 1 and November 1 of the preceding year. These are the objectives set by chapter 20.

The fulfillment of these objectives is no ordinary task given the sheer numbers, limited time, limited resources, and the stakes involved in the outcomes. In this context, PERB administrative rules carry out these

objectives as required by Iowa Code section 20.6(5) and set out various processes, taking into account the number of elections and eligible voters, the rights of parties involved, and the limited time frames involved. Just to name a few procedures or remedies, the rules address the filing of agreements, objections to notices of intent to conduct the elections, payment of the election fees, filing of voter lists, voter eligibility challenges, post-election challenges, and objections to the conduct of the election. See Iowa Admin. Code ch. 621—5. There are many steps involved in these elections that are interdependent and require the completion of one step before another can begin.

With the steps and procedures so interdependent in the context of over 400 elections concurrently conducted with over 50,000 voters during a short time frame, the duties imposed by the relevant administrative rules are essential to PERB fulfilling chapter 20's objective of conducting the retention/recertification elections. Ordinarily, in the absence of the sheer numbers and complexity given the nature of the retention/recertification elections, these duties imposed by the rules may be characterized as those simply designed to "assure order and promptness in the proceeding." However, as stated, these are no ordinary elections. If the deadlines in these elections were directory, PERB could potentially face hundreds of late filings, including voter lists, objections, challenges, and election fees. If this were the case, PERB could not fulfill the statutory objective of completing the elections.

Turning to a voter eligibility challenge made pursuant to PERB subrules 621—5.2(3)(a)(1) and 621-5.2(3)(b)(3), we conclude the rule's deadline is

mandatory. IBEW makes much of the subrule's provision which provides that a party "may" challenge a voter's eligibility. However, the method of challenge states, "[f]or retention and recertification elections, a party *shall* challenge that voter's eligibility at least seven days prior to the commencement of the election period for telephonic/web-based elections." See *id.* at r. 621—5.6(3)(a)(1) and 5.6(3)(b)(3) (Emphasis added.). The former simply confers the right to making a challenge while the latter imposes a duty in the method of making the challenge. What is relevant is whether the duty is mandatory or directory.

For all of the reasons discussed, the duty to meet the deadline and file a timely voter eligibility challenge is essential to PERB's ability to fulfill chapter 20's objective of conducting retention/recertification elections. The deadline is unique to retention/recertification elections conducted on a telephonic/web-based basis and differs from all other elections. This is because the retention/recertification deadlines are interdependent, have been set in a meaningful manner to effectively manage the underlying issues, and are crucial to PERB's ability to carry out elections of this magnitude. For this reason, we have rejected exceptions and, for instance, revoked certifications of certified employee organizations that have failed to timely pay their election fees. Otherwise, the retention/recertification deadlines would have no teeth. We are unwilling to open the floodgate to what could be countless exceptions to the retention/recertification rules and their applicable deadlines. The voter eligibility challenge filing deadline, as contained in PERB subrule 621—5.2(3)(b)(3) is mandatory. IBEW failed to

comply with the mandatory deadline and is therefore precluded from making subsequent challenges and obtaining relief.

III. CONCLUSION.

We reject the several claims advanced by IBEW with respect to the inclusion of Fjelstad as an eligible voter in the election and vote tally for the retention and recertification election BU-1063. We agree that Fjelstad was an ineligible voter. Nonetheless, the record reflects the City's inclusion of Fjelstad as an eligible voter was done in good faith and IBEW failed to comply with the mandatory filing deadline for challenging Fjelstad's eligibility.

Accordingly, we enter the following:

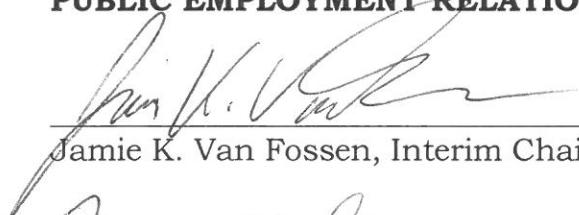
ORDER

The International Brotherhood of Electrical Workers, Local 204's objection and ancillary challenges are OVERRULED. The Board will issue an order of decertification in accordance with the tally of retention and recertification election votes filed by PERB on October 29, 2018.

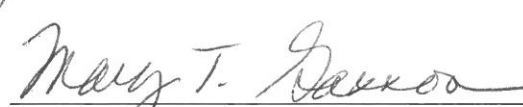
This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 2nd day of January, 2019.

PUBLIC EMPLOYMENT RELATIONS BOARD



Jamie K. Van Fossen, Interim Chair



Mary T. Gannon, Board Member