

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:)	
)	
AFSCME IOWA COUNCIL 61,)	Case No. 8698
Petitioner,)	
)	
and)	
)	
STATE OF IOWA,)	
Public Employer.)	

RECEIVED
2014 JAN 14 AM 11:43
PUBLIC EMPLOYMENT
RELATIONS BOARD

RULING

On December 30, 2013 pursuant to Iowa Code section 20.15(4) and PERB subrule 621—5.4(3), the Public Employer, the State of Iowa, filed an objection to the representative certification election conducted among certain employees of the Public Employer. The State alleges that misconduct or other circumstances prevented voters from freely expressing their preferences and seeks an order from the Public Employment Relations Board (PERB or Board) invalidating the results of that election and ordering a second election.

Pursuant to notice, the Board held an evidentiary hearing on the objection at its offices in Des Moines, Iowa, on January 6, 2014. Jeffrey Edgar represented the State and Mark Hedberg represented AFSCME Iowa Council 61. Both parties gave oral arguments at the hearing.

Based upon the entire record, and having considered the parties' arguments, the Board concludes that the State has failed to establish that any misconduct or other circumstance prevented voters from freely expressing their preferences in the election and makes the following:

FINDINGS OF FACT

On September 30, 2013, AFSCME filed a petition for a representative certification election for a bargaining unit of certain employees of the State first determined in 1977, which had remained unrepresented for purposes of collective bargaining. *See* 77 PERB 363 *et seq.*; 93 PERB 4897. This unit, commonly referred to as the “education unit,” was described by reference to job classification titles, most of which do not presently exist due to the consolidation of classifications and other changes to the State’s classification systems which have occurred since 1977.

In conjunction with this case, the parties stipulated to an updated description of the education unit, which the Board tentatively approved on October 31, 2013. An objection to the proposed decision was timely filed, which the Board subsequently overruled on November 18, 2013, following an investigation of its merits.

On November 26, 2013, the Board issued a Notice of Certification Election by Mail Ballot, which stated that PERB would mail ballots and voting instructions to the residences of eligible voters on December 3, 2013, and that ballots must be received by and would be tallied on December 17, 2013. This notice was emailed to all members of the bargaining unit, and the State was directed to post the notice in a place customarily used for posting information for employees.

In accordance with chapter 5 of its rules, PERB followed its established procedures in conducting the election by mail ballot. PERB received lists of

eligible voters from the Department of Administrative Services and the State Board of Regents and assigned a corresponding code number to each individual voter. The ballots were prepared and mailed to voters along with a white secret ballot envelope, a postage-paid brown return envelope, and voting instructions. The brown return envelope denoted the corresponding voter's code number and had a signature line printed on it. The voting instructions clearly stated that the ballots must be received by 3:00 p.m. on December 17, 2013. The instructions also included the following paragraph:

IF YOU ARE UNABLE TO RETURN YOUR BALLOT BY MAIL, YOU MAY VOTE AT THE PUBLIC EMPLOYMENT RELATIONS BOARD OFFICE PRIOR TO 3:00 P.M. ON DECEMBER 17, 2013. VOTERS WHO ARE BLIND, CANNOT READ, OR BECAUSE OF ANY OTHER PHYSICAL DISABILITY ARE UNABLE TO MARK THEIR OWN BALLOT AND SIGN THEIR RETURN ENVELOPE MAY HAVE THE ASSISTANCE OF ANY PERSON THE VOTER MAY SELECT, OR MAY RECEIVE SUCH ASSISTANCE AT THE PUBLIC EMPLOYMENT RELATIONS BOARD.

Each day PERB received brown return envelopes, that day's receipts were rubber-banded together and held in a storage box. On December 17, 2013, PERB staff verified that the signature on the brown return envelope matched the name on the eligible voter list via the pre-assigned code numbers.

At 3:00 p.m. on December 17, 2013, PERB staff first opened the brown return envelopes, removing a white secret envelope from each and placing the white secret envelopes in a ballot box. The white secret envelopes were commingled in the ballot boxes. PERB staff then opened the white secret envelopes, removing a ballot from each. The ballots were then counted and tallied. The results of the election were as follows:

1. Votes cast for AFSCME Iowa Council 61(yes)	233
2. Votes cast for no employee organization (no)	103
3. Void ballots	7
4. Valid votes counted (sum of lines 1 and 2)	336
5. Unresolved challenged ballots	0
6. Maximum possible vote count	336
7. Majority based on maximum possible vote count	169

The State then timely filed this objection to the election, alleging that misconduct or other circumstances warrant invalidation of the election. In support of its objection, the State submitted the affidavits of Dr. Jeffrey Berger, the Deputy Director for the Iowa Department of Education, and Michael Barber and Steve Mitchell, eligible voters in the election. At hearing, the Board heard the testimony of Barber and Mitchell and took official notice, without objection, to the Notice of Certification Election by Mail Ballot emailed to the eligible voters, an email dated November 26, 2013, from PERB to the eligible voters, the voting instructions sent to eligible voters with their ballot, PERB's election procedures, a series of emails between Barber and PERB administrative law judge Jan Berry, and the tally of the ballots.

Berger did not testify at the evidentiary hearing, making it difficult for the Board to assess his credibility. In his affidavit, he stated that two emails sent from Dr. Connie Brooks [REDACTED] were sent during work hours despite both being dated on a weekend. Berger appears to have no personal knowledge of the alleged misconduct, but rather is reporting what he was allegedly told by unnamed individuals who apparently only provided him with vague descriptions. Because of this, the veracity of Berger's statements is

questionable at best, and the Board does not find his affidavit probative of misconduct unless supported by corroborating evidence.

Attached to Berger's affidavit are two emails sent from Brooks. The first email, dated Sunday, December 8, 2013, states in part:

As many of you know, we canvassed staff at the DE to ensure 51% support BEFORE we asked for cards to be signed. All ballots are ANONYMOUS, but PERB and AFSCME are tracking names on the outer envelopes to identify who is voting. While many of those who don't support unions said they wouldn't stop others from organizing and would withhold their vote, many who WE identified as not supportive ARE voting.

If you are a supporter and have not returned your ballot, **please do so**. My understanding is that ballots will be counted at 3:00 on Friday, so they need to be RECEIVED by then, not postmarked by then.

The second email, dated Saturday, June 1, 2013, states:

The "Not Assigned" list has been whittled down dramatically, with only 7 left to sift into the "DO NOT CONTACT" or "OK TO TALK TO" categories. Support remains above the 51% needed to win an election at the DE. The "Not Likely" category includes many who gave no indication either way as to how they would vote. Some might actually vote yes. I also ask that if they don't support the union but don't hate the idea that they just not vote. So these "Likely" counts are conservative.

Steve Mitchell, an Education Program Consultant in the Iowa Department of Education, Board of Education Examiners, testified that he had received the December 8 email from a co-worker, but that it was not directly emailed to him. He stated that while the email prompted him to visit PERB offices on December 9 and 13, 2013, the email did not affect his vote nor did he know of anyone whose vote was affected because of the email. On his

December 9 visit, Mitchell requested a copy of the list of those individuals that had been identified as having submitted their votes, which had been mentioned in the December 8 email. He was told that PERB maintained no such list.¹ He expressed concern that inaccurate information was being provided to bargaining unit members by supporters of AFSCME. In his affidavit, Mitchell also opined that a comment made by a PERB staff member during the counting of the ballots reflected bias.

Michael Barber, a Rehabilitation Technology Specialist for the Iowa Department for the Blind, testified that he had raised concerns with PERB prior to the election concerning the confidentiality of ballots returned by the visually impaired and blind, but that his concerns were not addressed. Email correspondence from November 18-25, 2013, between Barber and PERB administrative law judge Jan Berry reveals that PERB did attempt to address Barber's concerns. Ultimately, in an email dated November 25, 2013, Barber wrote that he would have someone help him with his ballot as "it would be an undue hardship to create the braille/print ballots for all," adding that PERB should consider online voting for future elections.

Barber further testified that there was no way of knowing how many eligible voters were visually impaired or blind, that he was able to vote, and that he did not know of anyone who was prevented from voting.

¹ PERB acquires an eligible voters list from the public employer pursuant to PERB subrule 621—5.1(2)(b), but does not maintain a list of individuals that have submitted their votes.

CONCLUSIONS OF LAW

In its objection to the election, the State contends that the Board should invalidate the results of the election due to objectionable conduct and other circumstances which occurred during the election and direct another election. The State contends that the following constitute objectionable conduct that warrants invalidation of the results:

1. Multiple material misstatements occurred without sufficient opportunity to respond to such misstatements;
2. Prohibited practices occurred during the subject election including, but not limited to, interference with bargaining unit members' expressions of their voting preference by advising employees unfavorable to organizing that a non-vote would equate to a "no" vote, so they should refrain from voting if they will vote "no";
3. Blind voters were not afforded opportunity to submit a completely secret and confidential ballot;
4. Votes were being tracked, and voters identified, prior to the vote submittal deadline thereby compromising voter anonymity;
5. Generally, the election did not occur in a completely sterile environment in which employees could, through a secret ballot process, express their true opinions about union representation.

Iowa Code section 20.15(4) provides:

Upon written objections filed by any party to the election within ten days after notice of the results of the election, if the board finds that misconduct or other circumstances prevented the public employees eligible to vote from freely expressing their preferences, the board may invalidate the election and hold a second election for the public employees.

Consistent with section 20.15(4), the Board promulgated PERB subrule 621—5.4(2), providing for the filing of objections to elections, and subrule 621—5.4(3), which provides:

Objectionable conduct during election campaigns. The following types of activity, if conducted during the period beginning with the filing of an election petition with the board and ending at the conclusion of the election, and if determined by the board 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:

- a. Electioneering within 300 feet or within sound of the polling place established by the board during the conduct of the election;
- b. Misstatements of material facts by any party to the election or its representative without sufficient time for the adversely affected party to adequately respond;
- c. Any misuse of board documents, including an indication that the board endorses any particular choice appearing on the ballot;
- d. Campaign speeches to assembled groups of employees during working hours within the 24-hour period before the election;
- e. Any polling of employees by a public employer which relates to the employees' preference for or against a bargaining representative;
- f. Commission of a prohibited practice;
- g. Any other misconduct or other circumstance which prevents employees from freely expressing their preferences in the election.

The provisions of the statute and PERB rules represent a codification of principles developed by the National Labor Relations Board in the private sector recognizing that certain conduct, though perhaps not constituting an

unfair labor practice, may be grounds for setting aside an election. See generally, Higgins, *The Developing Labor Law*, BNA Books, 517 (6th ed. 2012).

PERB rules must be read in conjunction with the statutory provisions they implement. Thus, the types of misconduct described in the rules must have been such as “prevented the public employees eligible to vote from freely expressing their preferences,” as stated in the statute in order to justify the Board’s invalidation of an election under these provisions.

Even assuming the complained of conduct or other circumstances were improper, there is simply no evidence that the conduct prevented the public employees eligible to vote from freely expressing their preferences in the election. The Board will not invalidate an election based purely on speculation and conjecture. Here, the evidence presented actually tends to prove that eligible voters did in fact freely express their preferences.

Mitchell testified that the December 8 email had no effect on his vote and that he has no knowledge that the email affected any other individual’s vote. The State presented no evidence establishing that the June 1 email interfered with eligible voters’ expressions of their preferences.² Nor did the State present any evidence that an AFSCME-created list or PERB’s rumored list of individuals who had voted had any effect on voters. Any statements made by

² To the extent the June 1 email could be viewed as interference with eligible voters’ expressions of their voting preferences, the date of the email was nearly four months before the petition for certification election was filed, and therefore is not objectionable conduct sufficient to invalidate the results of the election. See PERB subrule 621—5.4(3) (“The following types of activity, if conducted *during the period beginning with the filing of an election petition* . . . shall be considered to be objectionable conduct sufficient to invalidate the results of an election.”) (emphasis added).

PERB staff, or anyone else, after 3:00 p.m. on December 17, 2013, surely had no effect on eligible voters' ability to freely express their preferences because all ballots must have been submitted by that time in order to be counted.

Barber also testified that the procedures employed by PERB during this election did not deprive him or, to his knowledge, anyone else of the ability to make their preferences known. While the Board is certainly sympathetic to Barber's concerns, the record reflects that PERB did attempt to address his concerns, but that ultimately Barber waived his objection in the November 25 email by writing that he would have someone else help him with his ballot as "it would be an undue hardship to create the braille/print ballots for all." Moreover, the State presented no evidence of the number of eligible voters who may have been similarly affected, and thus the Board cannot determine if the election could have resulted differently.

Even if Barber did not waive his objection, PERB's procedures for mail ballots comply with absentee balloting procedures for the blind and visually impaired outlined in the Iowa Code, despite not being governed by them. Section 53.15 provides in relevant part:

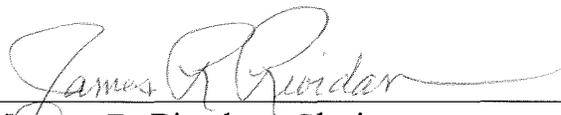
Registered voters who are blind, cannot read, or because of any other physical disability, are unable to mark their own absentee ballot, may have the assistance of any person the registered voter may select.

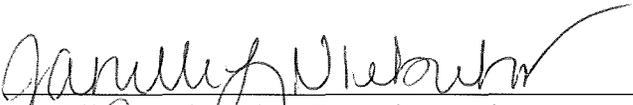
The Board cannot conclude that its mail balloting procedures as they concern the blind and visually impaired would constitute objectionable conduct sufficient to invalidate the election results when the lawmakers of this State have approved and codified such procedures for other types of elections.

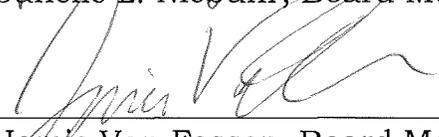
Based upon all of the foregoing, the State's objections to the election are hereby OVERRULED. A majority of the valid votes in the election having been cast in favor of the unit's representation by AFSCME, the State's objection having been overruled, and AFSCME having previously complied with the registration and annual reporting requirements of Iowa Code section 20.25, an order certifying AFSCME as the unit's exclusive representative for purposes of collective bargaining shall be issued.

DATED at Des Moines, Iowa, this 14th day of January, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
James R. Riordan, Chair


Janelle L. Niebuhr, Board Member


Jamie Van Fossen, Board Member

Email and mail copies to:

Jeffrey Edgar
Hoover State Office Building – Level A
1305 East Walnut
Des Moines, IA 50319
jeffrey.edgar@iowa.gov

Mark Hedberg
100 Court Ave., Suite 425
Des Moines, IA 50309
mark@hedberglaw.com