

LOS ANGELES CITY EMPLOYEE RELATIONS BOARD

In the Matter of a Representation Election)
)
 Involving)
)
 ENGINEERS AND ARCHITECTS)
 ASSOCIATION,)
)
 and) Report on Objections to
) Conduct of Election
 SERVICE EMPLOYEES INTERNATIONAL)
 UNION, LOCAL 721,)
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 and)
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 CITY OF LOS ANGELES.)
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A. Background

On May 13, 2009 the Engineers and Architects Association filed Objections to the Conduct of Elections with respect to two of the six elections in which ballots were counted on May 6. A copy of the Objections are attached hereto as Exhibit 1.

On June 22, the Board authorized Chair Edna Francis to appoint someone to investigate the election objections, and she thereafter appointed the undersigned. On June 30, the undersigned sent a letter to Adam Stern, counsel for EAA, requesting that EAA provide declarations under penalty of perjury describing with specificity the manner in which the conduct objected to interfered with the election such as to raise issues sufficient to require a hearing. A copy of this letter is attached hereto as Exhibit 2.

On July 16, Mr. Stern submitted two declarations in support of the objections, one by EAA staff coordinator Angel Calvo (attached hereto as Exhibit 3), and one by labor representative

Benjamin Pezzillo (attached hereto as Exhibit 4).

On July 23, the undersigned sent a follow-up letter to Mr. Stern asking a number of questions to clarify points covered in the Calvo and Pezzillo declarations, and providing a general description of the ballot counting process that occurred on May 6, and continuing into the morning of May 7. As noted in the letter, the description of the ballot counting process was prepared based upon conversations with Tony Butka and Robert Bergeson. Mr. Stern was requested to provide responses, verified under oath, to the specific questions set forth in part I of the letter, and state any disagreement with the accuracy of the description of the ballot-counting process set forth in part II of the letter. A copy of this letter is attached hereto as Exhibit 5. The amended tally of ballots from the MOU 17 election, referred to in part II, ¶ 8 of the letter is attached as Exhibit 6.

On August 3, Mr. Stern sent a letter in response to the questions and general description in the July 23 letter. The responses in the letter were not verified under oath, as had been requested. A copy of Mr. Stern's letter is attached hereto as Exhibit 7.

On August 5, the undersigned sent a final letter to Mr. Stern requesting clarifications (attached hereto as Exhibit 8), and on August 11, Mr. Stern's office provided a second declaration by Mr. Pezzillo in response (attached hereto as Exhibit 9). Mr. Pezzillo's declaration refers to a "written directive" by Mr. Bergeson the day before the ballot count regarding ballot envelopes with inaccurate or incomplete employee identification numbers. A copy of Mr. Bergeson's May 5 email to the parties on this issue is attached hereto as Exhibit 10.

B. Summary of objections.

The purpose of this report is to organize the attached information in a manner to assist the Board in determining whether EAA has provided sufficient evidence to merit a hearing, or whether

the objections should be dismissed without a hearing. It should be noted that since the Board has not adopted detailed procedures for investigating objections to elections, PERB regulations 32738 and 32739 were cited in obtaining evidence, by means of declarations, from the objecting party to evaluate whether there was sufficient evidence to merit a hearing. PERB regulation 32738 sets forth the following standard:

“(c) Objections shall be entertained by the Board only on the following grounds:

- (1) The conduct complained of interfered with the employees’ right to freely choose a representative, or
- (2) Serious irregularity in the conduct of the election.”

Referring to the Objections filed by EAA (Ex. 1), the first twelve objections refer to matters pending in UERP proceedings another hearing officer or officers. Of the remaining Objections, #15 and #16 dealt with the approximately 300 ballot envelopes which lacked postmarks and were challenged. That issue has previously been resolved by the Board. It is not clear that #21, #22, and #23 state objections as such, and these allegations are not addressed herein. The remaining Objections may be summarized as follows:

1. After all parties had agreed on an eligibility list, a new eligibility list was produced on the morning of the election and after discussions between PERB staff and SEIU representative Grant Lindsay, the new list was utilized for the purpose of conducting the ballot count over the objections of EAA (Objection #14). (See also 1st Pezzillo declaration, ¶14; Calvo declaration, ¶¶ 4, 5.)

2. Despite a pre-election agreement that party representatives would be limited to two observers, a large number of supporters of SEIU were allowed into the room where ballots were counted, where they moved about without restriction and had access to ballots. In this context, there were several occurrences of note: (a) Many hours after the ballot count had been completed in the MOU 17, six additional ballots for that election were discovered under allegedly suspicious

circumstances (Objection #13); (b) SEIU's attorney, Robert Hunt, was present during the count and participated in certain discussions, whereas EAA's attorney was not present (Objection #17); (3) an SEIU representative, Mayee Crispin, "who was responsible for leading Petitioner's raid against Respondent," was present in the room and was photographed with her head down on a table near two boxes containing ballots, allegedly demonstrating a general lack of control and "essentially unfettered access to the ballot boxes" by party representatives other than designated observers (Objection #17). (See also Calvo declaration, ¶¶3, 6-10.)

3. During pre-election meetings, it was announced that if two ballots were received from one person, both ballots would be discounted, but this rule was unilaterally changed during the ballot count by Mr. Butka, who announced that if there were two ballots from the same person, the one with the earlier postmark would be counted (Objection #18). In addition, some employees were able to obtain duplicate ballots without providing providing employee identification, or for reasons other than that the original ballot was lost or destroyed (Objection #20). (See also Calvo declaration, ¶11; 2nd Pezzillo declaration, ¶¶ 2, 5.)

4. Ballots not bearing employee i.d. numbers were opened and counted in violation of agreed-to rules and the instructions on the official Notice of Election, which included the statement: "Failure to complete the Identification Envelope in its entirety may prevent your ballot from being counted." (Objection #18; and see Calvo declaration, ¶12; 2nd Pezzillo declaration, ¶¶ 3, 4.)

C. Evidence relating to specific Objections.

1. New eligibility list.

In essence, this Objection is that after an eligibility list had been agreed to by the parties during pre-election meetings, a new eligibility list was substituted on the day of the election over

EAA's objection. (Objection #14, and see Calvo declaration ¶¶ 4, 5; 1st Pezzillo declaration, ¶ 4.) The circumstances under which the new eligibility list was produced are set forth in my July 23 letter to Mr. Stern (Ex. 5, part I, ¶ 1). Essentially, the explanation is that the new list was prepared by Laura Triner, the Personnel Department analyst who had been responsible for preparing previous lists, simply to delete the names of any employees who were no longer employed in bargaining unit positions as of May 5, in compliance with Board rules and procedures set out in an April 10 letter to the parties from Mr. Bergeson. In Mr. Stern's response to that account, the only matter contested has to do with whether Mr. Calvo ever agreed to the use of the new eligibility list during the ballot count (Ex. 7, p.1). Other than that, the account provided in my July 23 letter may be taken as undisputed, including the fact that the updated eligibility lists produced on the morning of May 6 were in fact the lists that were used during the ballot counts.¹ EAA has provided no evidence to indicate that the updated lists were incorrect or incomplete in any manner.

2. Admission of SEIU supporters to the ballot count.

Objection #13 alleges that the parties agreed on election rules specifically limiting all parties to two observers during the ballot count, and that despite this agreement, a "large number of people were allowed to enter the room," and persons who were not party observers "were allowed without restriction to mill about the count area and have access to ballots." In the Calvo declaration, ¶ 3, Mr. Bergeson's March 4 letter is identified as confirming the rules of the election, and in particular the 8th bullet point on page 2, "confirms the parties' agreement to limit the number of observers for each party to two." The 8th bullet point in that letter (attached as Exhibit A to the Calvo declaration) states in full:

¹ A copy of Mr. Bergeson's April 10 letter, referred to in my July 23 letter, is attached hereto as Exhibit 11.

“● May 1: Deadline for employee organizations and the City to notify CSMCS and the Board of the identity of their two observers if they choose to have observers.”

Whether this bullet point represents an “election rule” as alleged by EAA is subject to question. It may also be noted that Board rule 7.07 allows parties to designate two observers, but does not specifically address whether additional persons may be present during the ballot count. EAA has provided no evidence that anyone other than the parties’ designated observers performed duties reserved for official observers, i.e. verifying voter eligibility, registering challenges, or performing related election duties.

The basic evidentiary support for this objection is set forth in paragraphs 6 through 10 of the Calvo declaration. In paragraphs 6 and 7, Mr. Calvo states that there were 8-12 SEIU supporters present at various times during the count. In my July 23 letter (Ex. 5), a general description of the ballot-counting process, based upon my conversations with Mr. Butka and Mr. Bergeson, is set forth in Part II. Part II, paragraph 1 describes the situation at the outset of the count when Mr. Butka, Mr. Bergeson and the party observers returned to Board offices after picking up the ballots at the post office. At that point, there were approximately 20 *ad hoc* City Clerk employees present to perform ballot-counting duties, and, in addition 5-7 SEIU supporters. The presence of the large number of City Clerk employees may have created the impression of a large number of outside persons. From this account, it is not accurate that SEIU supporters had already “packed the room,” as alleged by EAA (Ex. 7, ¶2[a]). It should be noted that in Mr. Stern’s letter, it is stated that EAA does not dispute the description of the ballot counting process contained in Part II of my July 23 letter (see, Ex.7, p. 4).

In Mr. Stern’s responsive letter, it is conceded that EAA was permitted to have its own supporters in the ballot counting room, although it is stated that this did not occur until after the

ballot-counting process had begun and that only a few EAA supporters were able to attend (Ex. 7, p. 2). The primary objection is that SEIU supporters were allowed to “mill about” and to have access to the ballots. However, as described in some detail in Part II, paragraphs 2 through 7 of my July 23 letter, the only persons who handled the ballots at any time during the ballot-counting process were Mr. Butka, Mr. Bergeson, and the City Clerk employees who functioned as election officials. While ballots from any particular election were being counted, the uncounted ballots from other elections were in Postal Service trays on the head table, under the supervision of Mr. Butka and Mr. Bergeson. After the ballots from an election were counted and tallied, the ballots were sealed in storage boxes, and the observers signed over the tape sealing the boxes. As conceded in paragraph 4(a) of Mr. Stern’s responsive letter, “Neither Mr. Pezzillo nor Mr. Calvo witnessed any spectator to the election touch a ballot, but both saw several SEIU supporters leave the area in which they were sitting and position themselves right next to the ballots. This happened on more than one occasion.” (Ex. 7, p. 3.)

There are three specific allegations regarding persons other than designated observers who were present in the room. First, it is alleged that six ballots from the MOU 17 election were discovered hours after the ballot-counting for that election had been concluded, and it is implied that somehow the lack of control over the movements of people in the room may have been responsible. The circumstances regarding the six ballots in question are set forth in Part II, paragraph 8 of my July 23 letter. As noted, by agreement of the parties, the six ballots were not counted and were included as challenged ballots on the amended tally of ballots (see Ex. 6). The challenged ballots, including these six ballots, were insufficient in number to affect the outcome of the election.

Second, EAA has attached to the Objections a photograph taken at some point during the

ballot count. This photograph purports to show SEIU supporter Mayee Crispin seated with her head down on a table near two boxes containing ballots while other individuals in the photograph have their backs to her (Objection #17; Calvo declaration, ¶ 10). It is questionable whether the photo shows anything of significance. A person, presumably Ms. Crispin, appears to be resting at the right-hand side of the photograph. There is a box also pictured, but the perspective of the photograph is such that it cannot be determined how close Ms. Crispin might be to the box. Also, as noted previously, any storage boxes of this type contained ballots from elections in which the counting had been completed, and such boxes had been sealed and signed by the observers. Further, there may well have been other persons outside the frame of the photograph near Ms. Crispin. The photograph provides a very limited and uncertain perspective of what was happening at the time it was taken. See also my July 23 letter, Part II, paragraph 9, regarding napping during the lengthy ballot-count.

Third, it is alleged that SEIU's attorney, Robert Hunt, was present at times during the count and participated in certain discussions concerning several issues that arose. When questioned as to whether EAA was told it could not have its attorney present, Mr. Stern responded that EAA was never told it could have its attorney present, and that he was not consulted during the count (see Ex. 5, part I, #3; Ex. 7, #3).

3. Duplicate ballots.

The primary objection by EAA regarding duplicate ballots is that prior to the ballot count Mr. Butka unilaterally changed the rule announced prior to the election – that both ballots would be discounted – and instead announced that the ballot with the earlier postmark would be counted. In my July 23 letter (Ex. 5), EAA was questioned about whether its observers attempted to challenge

any such ballots at the time they were to be counted. In addition, it was noted that the rule “announced” by Mr. Butka appeared to be consistent with the procedure discussed in Mr. Bergeson’s March 13 letter to the parties (see Ex. 5, part I, #5). Mr. Stern’s letter failed to respond adequately to questions about whether duplicate ballots or ballots without employee i.d numbers had been challenged by the EAA observers, and I followed up with a letter requesting further clarification regarding these two issues (Ex. 8). The second Pezzillo declaration, filed in response, stated, with regard to the duplicate ballot issue, that although Mr. Butka made the statement prior to the counting that the earliest postmarked ballot would be counted, “I have no recollection that we ever actually encountered duplicate ballots.” (Ex. 9, #5.)

EAA also objected that prior to the election, ERB staff improperly gave duplicate ballots to employees who failed to provide an employee identification number or requested a ballot for reasons other than that they had moved and failed to receive the ballot mailed to them (Objection #20). EAA failed to support this allegation in response to the original request to provide declarations describing with particularity the basis of its objections (Ex. 2). Beyond that, it is difficult to discern how this allegation, if proven, could have compromised the election, since the eligibility of all voters was determined at the time the ballots were counted, and any duplicate ballots could have been challenged (see Ex. 5, part II, ¶¶ 7, 8). In addition, as stated by Mr. Pezzillo, he had no recollection of encountering duplicate ballots during the count (Ex. 9, ¶ 5).

4. Ballots with no employee i.d. number, or incorrect employee i.d. number.

In addition to the duplicate ballot issue, EAA objected that ballot envelopes without employee identification numbers were opened and counted, allegedly in violation of the ballot instructions and the rules set forth in the official Notice of Election (Objection #12). As with

duplicate ballots, I attempted to have EAA clarify whether it had challenged any such ballots during the actual ballot count (Ex. 8). My purpose in seeking clarification on this point was to ascertain whether any objection by EAA to the counting of such ballots may have been waived by its failure to register a timely challenge. Mr. Pezzillo's declaration in response arguably raises a factual question with regard to whether there was an attempt made to challenge ballots without proper employee i.d. numbers (Ex. 9, ¶ 4). However, he states further that Mr. Bergeson issued a written directive the day before the count stating that ballots with inaccurate or incomplete employee numbers "would not be challengeable" if the identity of the voter could otherwise be determined (Ex. 9, ¶ 3). A copy of Mr. Bergeson's May 5 email to the parties on this issue is attached as Exhibit 10. The email does not state that such ballots could not be challenged. Beyond that, Mr. Bergeson explained that nothing in the ERO or the Board's rules require an employee number as a condition of ballot validity, that the only reason to request the employee number is to determine eligibility in the event that there are two potential voters with the same name, and that there is no reason that failure to include an employee number, or providing an incorrect number, should be a basis for voiding a ballot (Ex. 10). This email provides a reasonable explanation for why ballots without employee identification numbers should be counted.

Conclusion

As previously stated, this report is provided to expedite the Board's consideration of whether EAA's Objections to the elections conducted in the bargaining units covered by MOUs 8 and 17 warrant a hearing, or should be dismissed without a hearing.

Dated: August 18, 2009



Frank Silver