

NH Supreme Court declined appeal of this decision on October 4, 1999, NH Supreme Court Case No. 99-430.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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AMHERST SUPPORT STAFF ASSOCIATION,	:	
NEA-NEW HAMPSHIRE	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. M-0759
	:	
AMHERST SCHOOL DISTRICT, SAU 39	:	DECISION NO. 1999-032
	:	(Election Appeal)
Respondent	:	
_____		:

APPEARANCES

Representing Amherst Support Staff, NEA-New Hampshire:

Philip G. Pratt, UniServ Director

Representing Amherst School District:

Thomas Flygare, Esq.

Also appearing:

- Dianne Cole, SAU #39
- Jeanne Wong, SAU #39
- Richard Lalley, Superintendent, SAU #39
- Gregory Andruschkevich, NEA-New Hampshire

BACKGROUND

The Amherst Support Staff, NEA-New Hampshire ("Association"), filed a Petition for Certification for support staff personnel employed by the Amherst School District, SAU No. 39, ("District") on September 10, 1998 for the job titles of instructional teaching assistants, custodians, secretaries and kitchen workers. The parties subsequently agreed to remove the job title of "custodians" from the proposed bargaining unit, as was subsequently conveyed to the PELRB by letter of November 13, 1998 signed by Philip G. Pratt for the

Association and Superintendent Richard Lalley for the District. An Order of Election was issued by the PELRB on November 19, 1998 followed by a pre-election conference with the parties in Amherst on December 14, 1998 which was attended by Superintendent Lalley and UniServ Representative Greg Andruschkevich. During the pre-election conference, the election date was set for Tuesday, January 12, 1999 at the Wilkins School Library, 80 Boston Post Road in Amherst from 3:00 to 3:45 p.m. That election was held as scheduled, and as elaborated upon in the "Finding of Facts," with the result that the Association received 25 valid votes while the proposition of "No Representative" received 24 valid votes. The District filed a challenge to the election results by letter of January 13, 1999 as contemplated by Rule PUB 303.11. The Superintendent wrote a second letter raising two (2) voter eligibility issues on January 20, 1999. The Association through Philip Pratt, filed a letter of response on January 29, 1999, within the time allocated in the Notice of Filing of the election appeal. Thereafter, this matter came to be heard by the PELRB on March 18, 1999, after an intervening continuance sought by and granted to the parties. The record in this matter was closed upon receipt of written closing arguments from the parties on April 1, 1999 and April 2, 1999, respectively.

FINDINGS OF FACT

1. The events and the chronology thereof, as set forth in the "Background" position of this document, are hereby affirmed without specific and individual reiteration.
2. The Order of Election which issued from the PELRB on November 19, 1998 called for the public employer to "immediately upon receipt of this Order forward to PELRB...and to the Petitioner, a complete list of the names and home addresses of the employees in the bargaining unit." That list was not provided until the pre-election conference on December 14, 1998 (District Exhibit No. 1) and was then approved by Lalley and Andruschkevich. It contained food services, instructional assistants and secretarial personnel by name, but without address. Maniscalco's name was not on the list of voters presented by Lalley and agreed to by him and Andruschkevich on December 14, 1998. Lalley's letter of January 20, 1999 complained that she should have been included.
3. District witness and its observer at the election, Dianne Cole, testified that Maniscalco's name was

not on the voting list because she was hired and originally coded as a "food service substitute" which caused her name not to be coded for printing. Cole said Maniscalco was hired "about the same time as Janice Bock," who was hired November 30, 1998 and whose name did appear on the voting list because she was hired directly into a food service position. (District Exhibit No. 1.) Cole was "not sure exactly what date" Maniscalco was hired when questioned on cross-examination. Likewise, neither she, Maniscalco nor any other interested party discovered, noticed or complained about the omission of Maniscalco's name from the voting list until the date of the election, notwithstanding that the Notice of Election packet, inclusive of the voting list, was provided to the public employer on December 16, 1998 and is required to be posted under Rule PUB 303.04. Maniscalco presented herself to vote on January 12, 1999, was told by the PELRB representative that her name was not on the voting list, and did not vote, either by regular or challenged ballot. Neither observer challenged Maniscalco's eligibility as a voter under Rule PUB 303.08 (a).

4. Voter Alice Pezzullo, a food service worker, called in sick and was absent from work on January 11 and 12, 1999 but, nevertheless, presented herself and voted on January 12, 1999. No challenge to her voting was offered at the time of the election but her voting was questioned in Lalley's letter of January 20, 1999.
5. The polls were scheduled to be open from 3:00 p.m. to 3:45 p.m. Voters came from various work locations in the District; they were employed at locations other than the Wilkins School. Association witness Pratt testified that the polls opened "a few minutes late" because the site of the election, the school library, was not "set up" when he and the PELRB representative (Rule PUB 303.05) arrived. The polling place where the election officials and observers were to sit was not arranged and the voting area consisting of reading carrels had personal belongings which had to be removed before actual voting could start.
6. Association witness Pratt testified that at about 3:30 p.m. the PELRB representative, the PELRB Executive Director, asked the observers if they knew the time. The District observer, Cole, did not have a watch and testified that she started to consult her beeper

for the time. Pratt testified that he checked his watch and agreed with the Executive Director that it was 3:30 p.m., after "factoring in" that his watch was about three (3) minutes fast. At this time, the school clock showed approximately 3:33 p.m. No formalized agreement as to "official time" or "official watch" followed this exchange of information between the observers and the Executive Director.

7. Wilkins School secretary, Jeannie Wong, returned to the library shortly after 3:30 p.m. to get the election results for the next day's daily bulletin. She recalls being asked by Pratt or the PELRB representative if the clocks were centrally controlled in the building, which she answered affirmatively, and if they were fast, i.e., showed a time later than actual time. She testified that parents sometimes complain that school clocks are fast when they bring their children to school only to find out they are already late.
8. Both Cole and Pratt recalled that the last few voters were scattered and that the PELRB representative had started to pick up the area when voter Tracey Rosen presented herself to vote when the school clock showed 3:45 p.m. When asked why she was presenting herself to vote at that time, she responded, "I still have three minutes" and was allowed to vote, according to testimony of both Jeannie Wong and of Phil Pratt.
9. After Rosen voted, Nancy Kelley and Robin Merrifield presented themselves to vote. Cole remembers them coming in sequence and Pratt remembers them coming in together. Both were allowed to vote. Depending on the testimony of Pratt or Cole, the last of them, Merrifield, voted at 3:48 or "3:50ish," according to the clock on the wall in the school library.
10. The election observers for the Association and the District both signed the "Tally of Ballots" and the "Certification on Conduct of Election" forms provided by the PELRB, the second of which provides, in pertinent part:

WE HEREBY CERTIFY that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret and that the ballot box was protected in the interest of a fair and secret vote.

DECISION AND ORDER

There are three elements to the District's appeal. We first address the issue of the voter who called in sick yet presented herself to vote later in the day, shortly before the polls closed. There is no (Finding No. 4.) basis to disqualify this bargaining unit member from voting. Her name was on the voting list as had been presented and agreed upon at the pre-election conference. (Finding No. 2.) No objection was offered to her voting at the time she presented herself, obtained a ballot, went to mark the ballot and returned to the ballot box to cast that ballot. She was out of work on the day of the election due to sickness. While she was not in a working status at the time she voted, her voting is no different than an employee on approved leave who comes to vote. Both are *bona fide* members of the bargaining unit and both are eligible to vote. As noted in the final paragraph of the Association's post-hearing brief, the appeal of this particular issue was not timely raised under Rule PUB 303.11. This challenge to the election is without merit.

The second issue involved Tracey Maniscalco (Finding No. 3) whose name did not appear on the voting list, the same voting list on which Pezzullo's name did appear (Finding No. 4). As was the case with Pezzullo, this matter was also raised in Lalley's letter of January 20, 1999, too late to be considered timely under Rule PUB 303.11. Likewise, Maniscalco's name did not appear on the same voting list which was approved by the parties at the pre-election conference. The evidence presented to the PELRB at the hearing was that there was no objection to the omission of Maniscalco's name until the date of the election, notwithstanding that the list *supplied by the district* which was *signed by the superintendent* was posted for at least seven days as part of the election notice packet. (District Exhibit No. 1.) (Emphasis added.) At hearing, Diane Cole explained that Maniscalco's name was miscoded as a "food service substitute" and, therefore, did not make the list supplied by the employer. On the other hand, Janice Bock, hired at approximately the same time, did have her name appear because it had not been improperly coded.

The employer should not now profit from its error to the detriment of the Association. Rule PUB 303.03 (a) contemplates that "disputes regarding the accuracy of the voting list shall be raised at the pre-election conference. Board shall resolve any disputes regarding the accuracy of the updated list prior to the day scheduled for election." (Emphasis added.) Our review of the data, including the original list of voters signed by Lalley and Andruschkevich on December 14, 1998, established that the only party able to identify the miscoding was the employer. That left Maniscalco as a "stealth" employee, whose potential eligibility was known only to the employer and who was not susceptible to recruiting efforts by the employee

organization. There was no attempt to remedy the omission of Maniscalco's name during the time the Notices of Election and the accompanying voters' list were posted. While we are of a mind that the broadest discretion should be accorded to voters to allow them to vote, we are also of a mind that, at some point, the parties and the PELRB should be able to rely on the integrity of the voting list, especially when the power to alter that list rests in the hands of one party and the modification (or lack of modification of the list) is detrimental to the other party. At the conclusion of the election, both partisan observers, one of whom was Cole, signed the fair election practices certificate. (Finding No. 10.) But for the margin of this election, the attempts, after the fact, to change Maniscalco's status would never have occurred. At this point, it is inappropriate to permit the casual compiling of the list of voters by the employer to work to the detriment of the Association. We, the Board, have the right and obligation to rely on information provided by the employer. That information cannot be in a constant state of flux. For the reasons stated, we also find the Maniscalco challenge to be without merit.

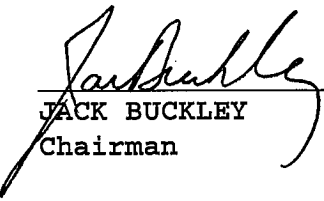
The third and final issue on appeal was the time during which the election was conducted. The election was posted to be conducted between 3:00 p.m. and 3:45 p.m. on January 12, 1999. The voting appears to have started nearly on time notwithstanding that school officials had to arrange for the removal of personal belongings from the voting carrels as late as 3:00 p.m. (Finding No. 5.) There is no challenge to the time the polls opened.

The complained of activity concerns whether the polls were inappropriately kept open longer than 3:45 p.m., at least as 3:45 p.m. was reflected on the wall clock in the library. We find it both critical and persuasive that the discovery of the discrepancy with the library wall clock occurred at approximately 3:30 p.m., before anyone would have known that the election results would be so close. It was between 3:30 p.m. and 3:35 p.m. when the PELRB representative learned that the library clock was fast, as confirmed by both Pratt (Finding No. 6) and Wong (Finding No. 7). With this in mind, it was neither unreasonable nor inappropriate that the PELRB representative permitted persons to vote after the library wall clock showed 3:45 p.m. To have done otherwise would have been unduly discriminatory to eligible voters coming from other buildings in the District which were on a different time and would have reduced the total time allowed for the voting process to less than forty-five minutes, given that the voting carrels were not available at the posted starting time. (Finding No. 5.) As noted earlier, this Board favors broad discretion in allowing eligible employees to vote. Under the facts of this case, the decision of the PELRB representative was in keeping with that discretion. Likewise, it was the watch of the PELRB representative which ultimately controlled the voting times, a fitting and unbiased

timepiece considering an apparent discrepancy in the clocks in various buildings in the district and the absence of any other predetermined agreement as to a controlling timing device. Thus, while we, and the parties, acknowledge that at least one employee voted after the library wall clock showed "3:45," the circumstances under which votes were cast after that time were fully justified by the obvious confusion about a "fast" clock, by the fact that this discrepancy was discovered at a time when it was not known that this would make any difference in the outcome of the election, and by the fact that the contested voters were in and about the premises of the election by the time it "really" was 3:45 p.m. to the outside world. The appeal is DISMISSED.

So ordered.

Signed this 12th day of May, 1999.



JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members E. Vincent Hall and Seymour Osman present and voting.