

VERMONT LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL #98, AFL-CIO)	
)	DOCKET NO. 80-24
and)	
)	
CITY OF MONTPELIER)	

MEMORANDUM AND ORDER OF CERTIFICATION

On March 20, 1980, the International Union of Operating Engineers, Local #98, AFL-CIO (hereinafter, the "Petitioner") filed a Petition for Election of Collective Bargaining Representative with the Vermont Labor Relations Board pursuant to 21 V.S.A. §1724. Through that petition, the Petitioner seeks exclusive bargaining representative status for the maintenance and service employees of the City of Montpelier Department of Public Works (hereinafter, the "Employer").

By letters dated April 30 and May 5, 1980, from Robert Clark, business agent for the Petitioner, and William Hayden, City Manager, the parties notified the Clerk of the Board of their agreement as to the appropriate bargaining unit and requested a consent election be scheduled.

Thereafter, on May 13, 1980, a Notice of Consent Election to be held May 21, 1980, was sent from the Clerk of the Board to the parties. Clerk of the Board Martha Farmer conducted the election in the Employer's public works garage on May 21 at 3:30 p.m. as scheduled and according to the agreed upon checklist of eligible voters. Stephen Gray, Public Works Director, observed the balloting for the Employer. Robert Codling, a public works employee in the proposed bargaining unit, observed for the Petitioner.

The voting concluded at 4:00 p.m. The ballots were counted by Ms. Farmer, who determined the following results:

International Association of Operating Engineers, Local #98	16
No Union	<u>15</u>
Total valid votes	31
Spoiled ballot, indeterminable choice	<u>1</u>
Total ballots cast	32

Ms. Farmer, as noted in the tally above, set aside and did not consider the single spoiled ballot in the total of valid votes cast.

By letter dated May 28, 1980, filed with the Board on June 2, 1980, the Employer, through counsel Allan Drachman, objected to the election. The Employer contends the Board agent should not have discounted from the votes cast the ballot which had "x"'s in both the "I.A.O.E." and "No Union" boxes. The Employer maintains that all votes cast, including defective ballots and those determinative of a choice, must be counted in determining whether a petitioning union received the 51% affirmative vote required by 21 V.S.A. §1724(e). Interpreting the language of that section to require consideration of all ballots cast, spoiled or otherwise, the Employer concludes that with 16 affirmative votes, the Petitioner failed to receive the required 51% majority (16 of 32 votes being only 50%).

The issue is whether the 51% majority required by statute to certify representation is based on a percentage of all ballots cast, whether valid or not, or whether only valid ballots are to be considered. The issue is raised by the variance between 21 V.S.A. §1724(e), which states:

In determining the representation of municipal employees in a collective bargaining unit the board shall conduct a secret ballot of the employees and certify the results to the interested parties and to

the employer. The original ballot shall be so prepared as to permit a vote against representation by anyone named on the ballot. No representative will be certified with less than a 51 percent affirmative vote of all votes cast.

(emphasis added)

and 21 V.S.A. §1724(f), which provides for runoff elections. That section states:

If in such election none of the choices receive at least 51 percent affirmative vote of all votes cast, a runoff election shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the original election.

(emphasis added)

We conclude the 51% majority is to be determined as a percentage of the 31 valid ballots cast, for two principal reasons.

The first is based on our construction of the controlling and related statutes cited above. The first issue is whether the presence of the term "valid," as it modifies "votes" in 21 V.S.A. §1724(f), indicates a legislative intent to have a different meaning in 21 V.S.A. §1724(e), thus requiring a 51% affirmative vote of all ballots cast rather than valid ballots cast to certify a representative.

The presence of the adjective "valid" in 21 V.S.A. §1724(f) appears superfluous to us. When the counter of ballots is trying to determine a majority between several choices in order to place the choices receiving the "largest and second largest number" of votes on a runoff ballot, he can only consider those ballots which clearly indicate the voter's intent. Therefore, there can be no reasonable distinction between valid and invalid votes in the runoff situation, and hence no clear reason for the different usage in the two situations. Moreover, we cannot see how 21 V.S.A. §1724(e), which provides in pertinent part that:

(n)o representative will be certified with less than a 51% affirmative vote of all votes cast

can be interpreted to mean all ballots cast. The statute does not use the term "ballot." Our general election statute provides for ballots to be rejected and not counted if the intent of the voter cannot be determined. 17 V.S.A. §1143. Such ballots are not "votes." See also In re Manchester Town Election, 115 Vt. 230 (1947). We conclude, therefore, that 21 V.S.A. §1724(e) should be interpreted by applying the percentage calculation to valid votes. The Eighth Circuit Court of Appeals came to the same conclusion in upholding a National Labor Relations decision ordering an employer to bargain with a representative under similar election circumstances. Semi-Steel Casting Co. v. N.L.R.B., 160 F.2d 388 (1947), cert. denied, 322 U.S. 758 (1947). There, the court held that ballots marked so that the choice is indeterminable do not prejudice either party, express no choice, and do not contribute to the results of the election in any way:

The Board's practice in determining the result of an election on the basis of the number of valid votes cast cannot be said to prejudice the rights of either party to the election. On the other hand, it seems reasonably designed to secure certainty and finality in elections and to determine the identity of the bargaining representative upon the free choice of the employees actually and clearly expressed at the polls. It is not unreasonable to say that the employee whose vote was marked both for and against the union did not in fact participate in the election. So far as can be ascertained from his ballot, he attended the polls merely to express his indifference to the result. His action contributed no more and no less to the determination of the choice of the majority of the employees than did the action of those eligible employees who did not vote.

Semi-Steel, supra at 392.

The second reason for certifying the results of this election as a vote affirming representation by the Petitioner is a policy matter referenced by the court in the foregoing passage of Semi-Steel, supra. Where the statute provides the Board in 21 V.S.A. §1724(g) with the authority to make conclusive findings in certifying the results of any election (unless reviewed under unfair labor practice proceedings), we understand the purposes of the Act are best served by prompt Board certification finalizing election results. This is particularly so in this case where there is an unquestionable demonstration of the will of the voters and statutory election procedures were meticulously followed. Contra, International Union of Operating Engineers, Local #98 and the Town of Springfield, 3 VLRB 221 (1980). We endorse the principle underlying the policy of finality of elections. In a democratic society election results are the will of the people. These results should not be invalidated by some technical construction which would defeat that policy if the intent of the majority is clear.

Furthermore, our law (21 V.S.A. §1724) does not require that all, or even a minimum percentage of the eligible voters, must vote in order for election results to be certified. The language of our law requires a majority of "all votes cast." Presumably, if only one of several eligible employees voted in a representation election and voted in favor of representation, we would have to certify representation, that vote representing 100% of all votes cast. If the legislature had intended 21 V.S.A. §1724(e) to require a 51% affirmative majority of all votes cast, valid or not, it would seem that a consistent policy would require in addition that at least a majority of the proposed unit deposit some ballot in the ballot box as a way of protecting employees from having a collective bargaining representative selected by a minority.

In summary, we conclude that the 16 votes in favor of representation represents a 52% majority of the 31 valid votes cast in this matter, and that the single spoiled ballot not be considered as a vote cast.

ORDER

As a result of the election of May 21, 1980, it is ORDERED that the International Union of Operating Engineers, Local #98, AFL-CIO, be certified as the exclusive bargaining representative of the Department of Public Works employees of the City of Montpelier, which includes:

DEPARTMENT OF PUBLIC WORKS - FOUR DIVISIONS

A. Street Division - Equipment Operator II (3), Equipment Operator I (3), Truck Driver (9), for a total of fifteen (15) persons now employed in the Street Division.

B. Administrative Division Stock Records Clerk II (1), Clerk Typist III (2), for a total of three (3) in the Administrative Division.

C. Equipment Division - Mechanic II (2), Mechanic I (2), Stock Records Clerk I (1), for a total of five (5) in the Equipment Division.

D. Water and Sewer Division Sewer Plant Operator (2), Equipment Operator I (1), Mechanic (2), Equipment Operator I (1), Sewer Plant Operator Apprentice (1), Truck Driver (4), for a total of eleven (11) in the Water and Sewer Division.

But excludes:

The Department of Public Works Director, Stephen Gray.
Assistant Director, Richard Fielder.
Administrative Assistant, Michael Paterson.
Street Division Superintendent, George Kramer.
Foremen, Glen Gilbert and Charles Pelletier.
Equipment Division Superintendent, George Kramer (mentioned above).
Foreman, Robert Demers.
Water and Sewer Division Superintendent, Durwood Lamb.
Foreman, Roger Ball.

Dated this 16th day of June, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

Robert H. Brown
Robert H. Brown