

Elections

Once the appropriate bargaining unit has been agreed upon by the parties, determined by the Board, or established by statute, and voluntary recognition when allowed has not occurred, then the Board conducts an election among employees. A bill enacted into law during the 2020 legislative session amended the unit determination and election provisions of the State Employees Labor Relations Act, the Municipal Employee Relations Act, and the Labor Relations for Teachers Act. Specific timeframes are established for the scheduling of union representation elections. The statutes previously did not set specific timeframes.¹

Generally, under the Municipal Employee Relations Act and the State Labor Relations Act, employees voting in an election have voted only on the question of representation; whether they wish to be represented by a particular union or no union. Under those Acts, employees generally do not vote on the composition of the bargaining unit.²

The exception is professional employees; under both Acts professional employees may not be included in a bargaining unit with non-professional employees unless a majority of professional employees vote for inclusion in the unit.³ Professional employees are given two votes in an election; one to determine whether they wish to be included in the unit with non-professional employees, and the other whether they wish to be represented by the union or no union.⁴

In several cases, it has been disputed whether employees were professional employees. Professional employee means an employee engaged in work “requiring

¹ Act No. 180 (2019 Adj Sess.)

² Sections 23.18 and 33.17, Board Rules of Practice.

³ Id.; 21 V.S.A. §§1543 and 1724(c)(1).

⁴ Id.; Local 1201, AFSCME and Rutland Free Library Association, 13 VLRB 247 (1990).

knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.”⁵ In one case, the VLRB concluded that municipal police officers did not meet this definition.⁶

Under the Independent Direct Support Providers Labor Relations Act, which was enacted in 2013; and the Early Care and Education Providers Labor Relations Act, enacted in 2014; providers voting in an election vote only on the question of representation; whether they wish to be represented by a particular union or no union.⁷ Providers do not vote on the composition of the bargaining unit.

The Independent Direct Support Providers Act provides that there shall only be one statewide bargaining unit for independent direct support providers, and that a representation election conducted by the Board shall be by mail ballot.⁸ Shortly after enactment of the statute, the Board conducted a mail ballot election in which the providers decided whether they wished to be represented for exclusive bargaining purposes by AFSCME. There were 7,573 providers eligible to vote in the election. This was by far the largest number of eligible voters in any election ever conducted by the Board. AFSCME prevailed in the election, and the Board subsequently certified AFSCME as the exclusive bargaining representative of the providers.

However, under the State Employees Labor Relations Act and Judiciary Employees Act, employees voting in an election generally vote on two questions: whether they wish to be included in a particular bargaining unit and whether they

⁵ Local 200, Service Employees International Union, AFL-CIO and Town of Wilmington Police Department, 9 VLRB 166, 171 (1986); *citing* 21 V.S.A. Section 1502(11).

⁶ Id.

⁷ 21 V.S.A. §1635, 33 V.S.A. §3606 - 3608.

⁸ 21 V.S.A. §1635, 3 V.S.A. §941.

desire to be represented by a union.⁹ In cases under the State Employees Act where a union has filed an election petition to add employees to an existing unit, employees in the existing unit and employees being proposed to be added to the unit vote on whether they wish to be organized into the expanded unit. The ballots of employees the union is seeking to add to the bargaining unit are counted separately from the ballots of employees in the existing unit, and the majority of employees voting in each group must vote for the unit for the unit to be approved.¹⁰

Board staff arrange the details of elections with representatives of the involved union or unions and the employer. Elections usually are conducted at the involved workplace by a Board agent, typically the Board Executive Director, at a time convenient to employees. The Board may conduct an election in whole or in part by mail ballot if it is not practical or reasonable to hold an election at which employees may vote in person.¹¹ Also, the Independent Direct Support Providers Labor Relations Act explicitly provides that “a representation election for independent direct support providers conducted by the Board shall be by mail ballot.”¹²

Once the details of the elections are established, the Board issues a Notice of Election. The notice includes a description of the appropriate bargaining unit; a sample ballot; the date(s), time(s) and place(s) of the election; and voting instructions. The employer is required to immediately post the notice in a place or places normally used for employer-employee communications to ensure that all employees have sufficient warning of the date, time and location.¹³

⁹ Sections 13.13 and 53.13, Board Rules of Practice; 3 V.S.A. §941(e) and (g), 1021; In re Liquor Control Department, 135 Vt. 623, 625-26 (1978).

¹⁰ Petition of VSEA (re: Bargaining Unit for Department of Corrections Employees), 13 VLRB 287, 308 (1990). VSCFF and Vermont State Colleges, 10 VLRB 39, 50-51 (1987).

¹¹ Sections 13.14, 23.19 33.18, 53.14, and 73.14, Board Rules of Practice. The 2020-2021 pandemic resulted in elections being conducted by mail ballot during that period.

¹² 21 V.S.A. §1635(b).

¹³ Sections 13.12, 23.17, 33.16, 53.12, 63.12, and 73.12, Board Rules of Practice.

After the issuance of a Notice of Election, the employer is required to file with the Board and the other party or parties, by a specified date prior to the election, a list of the names and mailing addresses of the eligible employees in the bargaining unit as of a specified payroll period. The Board gives the other party or parties an opportunity to file any objections to this list by a specified date prior to the election. If objections are not filed, the Board will consider that list final and no additions or deletions will thereafter be permitted unless agreed to by the parties. At the time the voter eligibility list is filed, the employer also is required to post copies of the list providing the names, but excluding the mailing addresses, of employees eligible to vote in the election next to where the Notice of Election was posted.¹⁴

The failure of a petitioning union to object to a voter eligibility list can have serious ramifications. In an election among non-teaching school employees, the union did not object to the list submitted by the employer. At the election, an individual who was not on the list appeared to vote. The Board agent conducting the election set aside her ballot as a challenged ballot. The results of the election were: 17 employees voting in favor of the union, 17 voting against the union, 1 spoiled ballot because the choice was indeterminable, and 1 challenged ballot. The Board did not count the spoiled ballot in the results, and also did not consider the challenged ballot a valid vote. The Board stated: “The employer having proposed the list, and the union not having objected, we will deem the list of voters to be stipulated to by the parties with no additions or deletions thereafter permitted, unless agreed to by both parties.” As a result, the election ended in a tie and the union was not certified as the bargaining representative.¹⁵

¹⁴ Sections 13.16, 23.21 33.20, 53.16, 63.15, and 73.16, Board Rules of Practice.

¹⁵ Champlain Valley Union School Staff Association VEA/NEA Local 325 and Champlain Valley Union High School District #15, 3 VLRB 93, 94-95 (1980).

The Board permits employees to vote by absentee ballot if they will not be present at the time and place established for the election for particular reasons.¹⁶ In practice, employees most often are permitted to vote by absentee ballot due to a previously scheduled vacation, long-term illness, scheduled day off from work, or scheduled assignment away from the workplace.

The Board agent conducting the election ensures that the election site is arranged so that the right of employees to vote by secret ballot is preserved. Each party has a right to have one observer present during the election and at the counting of ballots.¹⁷ An observer may challenge any prospective voter prior to a vote being cast for cause except for questions of eligibility, which had to be raised prior to the election. The Board agent conducting the election rules on the challenges, and the agent's decision is final.¹⁸

The Board agent commingles any absentee ballots with the other ballots cast at the election before ballots are counted. As soon as polls close, the Board agent counts the ballots in the presence of the observers. The observers may object to any spoiled ballots, and the Board agent will consider void any ballot marked so that the choice is indeterminable.¹⁹ An employee organization must receive a majority of valid votes cast in an election to become exclusive bargaining representative of the involved employees.²⁰

Any interested party may file with the Board, within 10 days of the election, an objection to the conduct of the election. The provisions with respect to content of the objection, service, answer and investigation by the Board are specified in the

¹⁶ Sections 13.15, 23.20, 33.19, 53.15, and 73.15, Board Rules of Practice.

¹⁷ Sections 13.17, 23.22, 33.21, 53.17, and 73.17, Board Rules of Practice.

¹⁸ Sections 13.19, 23.24, 33.23, 53.19, 63.18, and 73.19, Board Rules of Practice.

¹⁹ Sections 13.18, 23.23, 33.22, 53.18, 63.18, and 73.18, Board Rules of Practice.

²⁰ Sections 13.20, 23.25, 33.24, 53.20, 63.19, and 73.20 Board Rules of Practice.

Board Rules of Practice.²¹ Subsequent to expiration of the period for objecting to the conduct of the election, and if the Board has not set aside the election as a result of any objection filed, the Board issues an order of certification or non-certification of the union as bargaining representative, as applicable.²²

The VLRB has specifically declined to assist in the conducting of representation elections under the Labor Relations for Teachers Act. The Teachers Act contains the following provision relative to the conduct of a referendum for teachers or administrators to vote whether they wish to be represented by a particular employee organization:

In the interest of expediting the referendum and minimizing the cost thereof, the petitioning party or parties and the school board may agree together to conduct cooperatively the referendum themselves. Alternatively, the parties may select an impartial person or agency to conduct or aid in the conducting of the referendum. Failing agreement among all interested parties on the conduct of the referendum, any of the petitioning parties or the school board may request that the referendum be conducted with the aid and assistance of the American Arbitration Association or its designee. The American Arbitration Association or its designee shall have the responsibility for making decisions on any and all matters in dispute regarding the mechanics of the referendum, eligibility and other necessary decisions relating to the conduct of the referendum.²³

In acting on a request to assist in conducting a representation referendum, the Board stated:

Arguably, the Board, as “an impartial agency”, may voluntarily aid the conducting of a referendum upon the agreement of all parties. However, absent specific authorizing legislation such as exists under the labor relations acts administered by the board, the Board chooses not to voluntarily assume such duties.²⁴

²¹ Section 13.22, 23.27, 33.26, 53.22, 63.21, and 73.22, Board Rules of Practice.

²² Sections 13.23, 23.28, 33.27, 53.23, 63.22, and 73.23, Board Rules of Practice.

²³ 16 V.S.A. §1992(d).

²⁴ Election Petition re: Fayston Elementary School Teachers, 9 VLRB 206, 207 (1986). *See also* Rutland City School District and Rutland Administrators Association, 11 VLRB 208 (1988).

The VLRB has had to make few decisions concerning the conduct of elections resulting from petitions filed by unions to represent employees not represented by a union. The VLRB has established what it has termed a "just and workable standard of review for evaluating representation election propaganda".²⁵ The task is to balance the right of the parties to wage free and vigorous election campaigns against the right of employees to make an untrammelled choice of their bargaining representative.²⁶

The VLRB adopted the standards established by the National Labor Relations Board in Shopping Kart Food Market,²⁷ which assumes that employees are mature individuals, capable of recognizing and discounting campaign propaganda for what it is.²⁸ The VLRB will not engage in extensive analysis of campaign communications to ascertain a particular statement's truth or falsity.²⁹ The VLRB will only intervene if the method of misrepresentation renders employees unable to recognize campaign material for what it is. An example is misuse of Board processes or documents.³⁰

In one case, the Board concluded that statements by management officials that employees and the employer would have better relations in the absence of a union, that the presence of an "outside" union in the workplace would result in more adversarial relations, and that procedures already in place to discuss conditions of employment should be attempted before employees opted to be represented by a union, fell within the prescribed limits of employer speech.³¹ The Board noted that the statements contained no threats of reprisal if employees opted to form a union

²⁵ IUOE Local 98 and Town of Springfield, 3 VLRB 221, 225-226 (1990).

²⁶ Id.

²⁷ 228 NLRB No. 190 (1977).

²⁸ UOE Local 98 and Town of Springfield, 3 VLRB 221, 225-226 (1990).

²⁹ Id.

³⁰ Id.

³¹ United Paperworkers International Union v. Town of Wilmington, 20 VLRB 1, 3-4 (1997).

and contained no improper promises of enhancements in wages, hours and other conditions of employment to stifle the union organizing campaign and disrupt employees' free choice for or against unionization.³² Employees maintained the ability to adequately assess the credence to give employer views, and exercise free choice on union representation.³³

The Board concluded in another case that a request by a personnel director to meet with teachers during a union organizing campaign and attempt to dissuade them from voting for the union constituted protected speech under the "freedom of speech" provision of the Municipal Act.³⁴ Also, the Board concluded in another union organizing case that employer communications with employees consisted "mainly of qualified predictions and some pedantic puffery within the prescribed limits on employer speech".³⁵

In ruling on objections to the conduct of an election, the VLRB will not set aside an election unless improper conduct may have had an effect on the results of the election.³⁶ Failure of an employer to bring a problem to the Board's attention prior to an election, and failure of an employer to have an observer present at an election, played a part in a Board decision denying an employer's objection to an election, where such notice to the Board and presence of an observer could have assisted in preventing problems.³⁷

³² Id. at 4.

³³ Id.

³⁴ Chittenden South Supervisory Teachers' Association v. Chittenden South Supervisory School District, 5 VLRB 332 (1982)

³⁵ International Union of Operating Engineers #98 and Town of Springfield, 3 VLRB 221, 225 (1980).

³⁶ IUOE Local 98, AFL-CIO and Windham Solid Waste Management District, 17 VLRB 80, 83-84 (1994). Chauffeurs, Teamsters, Warehousemen and Helpers, Local 597 and Chittenden County Transportation Authority, 13 VLRB 112, 117-118 (1990).

³⁷ Windham, 17 VLRB at 83-85.

