

DC37, et. Al v. City, 18 OCB 1 (BOC 1976) [Decision No. 1-76  
(Cert.)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION

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In the Matter of

DISTRICT NO. 1-PCD, MARINE  
ENGINEERS BENEFICIAL  
ASSOCIATION, AFL-CIO,

-and-

DISTRICT COUNCIL 37, AFSCME,

-and-

LOCAL 333, UNITED MARINE DIVISION,

-and-

CITY OF NEW YORK (Department of  
Water Resources, Environmental  
Protection Administration)

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DECISION NO. 1-76

DOCKET NO.

RU-532-75

INTERIM ORDER

ON

OBJECTION TO ELECTION

Pursuant to Decision No. 56-75 of the Board of Certification, an election was held in this matter on December 15, 1975, the results of which were inconclusive. During the course of the election, representatives of the Marine Engineers Beneficial Association (MEBA), registered challenges to certain ballots; one ballot was designated "void" by O.C.B. Director of Elections Anthony A. Tivoli. Thereafter, each of the participating unions filed with the Board and served upon one another formal written statements in support of their respective positions either for or against the challenges to the ballots. District Council 37 (DC 37) and MEBA also took positions with regard to the one voided ballot. The City of New York has taken no position in this matter.

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Having considered all of the said submissions, the Board makes the following findings as to each of the individual unit employees whose ballots were challenged or voided:

1. Edward T. Kenny - The objections to Mr. Kenny's absentee ballot are as follows:

a. that he is on leave of absence and "has stated to several people that he will never return to the sludge boats"; and that although he has requested extension of his leave, no such extension has been granted;

b. that notice of the fact that Kenny was a unit employee eligible to vote was promulgated late; and that, since his eligibility to vote was established late, he could not have received the absentee ballot ten days before the election.

We find that Edward T. Kenny is a First Assistant Engineer in the Environmental Protection Administration and is, accordingly, an employee covered by the collective bargaining unit found by us to be appropriate in our aforementioned Decision No. 56-75. He is eligible to return from his present leave of absence to active employ-

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ment and by his recent request for extension of leave has indicated a continuing interest in making such a return to employment. The employing department reports that he has not been removed from the payroll. No other proof has been offered that he is not a unit employee in good standing in leave of absence status. Accordingly he was eligible to vote in the election.

The lateness of notice of his eligibility to vote due to an error by the employer in its compilation of the eligibility roster should not be allowed to disenfranchise the employee. Whatever the merits of the contention that this factor was prejudicial to alleged rights of any of the participating employee organizations, we conclude that such burden was equally shared by all of them, since it is not alleged that any of the participating unions was given advance notice of Mr. Kenny's eligibility to vote. We therefore find that there was no such prejudice to the rights of any participating union or unions as would warrant disenfranchisement of Mr. Kenny.

The allegation that Mr. Kenny could not have received his absentee ballot ten days before the election is without weight. The relevant provision is that requests for absentee ballots must be ". . . received in this office at least ten days prior to the date of election " not that the voter receive his ballot at that time. Moreover, this provision is intended to insure to the individual voter sufficient time to vote and return his ballot on

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or before the prescribed date for receipt by the Office of Collective Bargaining of such absentee ballots. Since Mr. Kenny received, executed and filed his ballot prior to the date prescribed, neither he nor any other party to the election can now make any valid objection to the effect that he was not given sufficient time in which to cast his ballot.

Accordingly we find that the challenges to the ballot of Edward T. Kenny should be dismissed.

2. Martin J. Tarpey and Frank Klembecki -

The challenges to the absentee ballots of these two employees were based upon the fact that, on the day of the election, each of them was on his regularly scheduled day off and that neither "was ill, hospitalized, on vacation or in military service" on that date. The quoted language of the formal objection derives from the language of the Notice of Election with regard to requests for absentee ballots which reads in pertinent part:

"Such requests will be approved only for established good cause such as illness, hospitalization, out of city vacation or military service."  
(emphasis supplied)

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It is the policy of the Board in accordance with well accepted concepts of sound labor relations practice to encourage and promote broad-based employee participation in the choice of collective bargaining representatives. One of the devices is to use absentee ballots in representation elections. The conditions set forth in the Notice of Election for the issuance of absentee ballots are not exclusive; they do not purport to be a complete list of the only terms and conditions upon which absentee ballots may be issued. On the contrary, the use of the words ". . . such as . ." makes clear that the listed conditions are intended only to exemplify the types of conditions which will warrant the issuance of absentee ballots. The clear and reasonable purpose of the Board in placing any restrictions on the use of absentee ballots is, on the one hand, to permit their use wherever a reasonable basis for the request is shown but, on the other hand, to prevent unnecessary absentee voting where no unusual inconvenience exists. In the instant case, Messrs. Tarpey and Klembecki were absent and at considerable distances from the city on the day of the election. To prohibit the use of absentee ballots in such circumstances would

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be to force the employees in question to sacrifice the use which they would otherwise make of their day off (a sacrifice not required of other participants in the election) or to lose their right to vote. We see no reasonable basis for such a rule and find that the issuance of absentee ballots to Messrs. Tarpey and Klembecki was in accordance with Board policy and that the challenges to their respective ballots should accordingly be dismissed.

3. Voided Ballot No. MO-3 -

Director of Elections Anthony A. Tivoli declared void an absentee ballot purportedly executed by Richard Grapes on the ground that prescribed procedures for the execution and filing of absentee ballots had not been complied with. A letter of instruction containing a self-addressed, stamped return envelope was sent with each absentee ballot issued by the Office of Collective Bargaining in connection with the subject election. Among the instructions was the direction to place the executed ballot in the self-addressed, stamped envelope which ". . . must be signed by you in the lower left hand

corner above the line SIGNATURE OF VOTER."  
The return envelope, itself, bore on its  
face the legend:

"I PERSONALLY VOTED THE WITHIN BALLOT.

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Signature of Voter  
Void if not signed"

and on the sealing flap the notice:

"Have you signed the front of this  
envelope? If you fail to sign  
the envelope your vote will be  
void."

The reason for the signing procedure described above is to insure that the absentee ballot returned to the Office of Collective Bargaining was executed by the employee to whom it was issued.<sup>1</sup> The circumstantial evidence offered in opposition to the action taken by the Director of Elections is not conclusive and is insufficient as a basis for waiving the Board rule creating a condition precedent to the opening and counting of an absentee ballot, namely, that the envelope in which it is mailed to the Office of Collective Bargaining be signed by the absentee voter. In the instant matter, that condition precedent was not satisfied. We find that this defect warranted the voiding of the ballot. We note,

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Secrecy of the ballot is insured by the fact that the ballot is contained in a sealed, blank envelope inside the return envelope; the blank envelope is removed and mingled with others before being opened and the ballot is thus not identifiable with the voter when it is removed for counting.

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moreover, that although the letter of instruction accompanying the absentee ballot contained the notice that "to be counted, the absentee ballot must be received by the Office of the Board by December 12, 1975," the voided ballot was mailed in Liberia on December 11, 1975, and was not received by the Office of Collective Bargaining until December 15, 1975. Accordingly, we find that the objection to the action of the Director of Elections in voiding absentee ballot No. MO-3 should be dismissed.

The Report Upon Secret Ballot issued by the Director of Elections on December 15, 1975, shows that of approximately 62 eligible voters, 57 cast valid and unchallenged ballots; 28 voted for District Council 37, AFSCME, 15 voted for District No. 1-PCD, Marine Engineers. Beneficial Association, AFL-CIO, and 14 voted for Local 333, United Marine Division.

The count of valid unchallenged ballots does not provide any of the participating unions with a majority of the valid votes of employees who took part in the election. Neither does the count of said ballots indicate conclusively, and without reference to the three challenged ballots, which of the participating unions would be entitled to take part in a run-off election. We will, therefore, direct that the said challenged ballots be opened and counted.



**DETERMINATION AND ORDER**

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that Edward T. Kenny, Martin Tarpey, and Frank Klembecki were properly permitted to vote in the said election by absentee ballot and that the challenges to their respective ballots should be and the same hereby are dismissed; and it is further

DETERMINED, that prescribed procedures for the execution and filing of absentee ballots not having been complied with in the execution and filing of absentee ballot No. MO-3 the said ballot is void and the objection to the action of the Director of Elections in declaring the said ballot void should be and the same hereby is dismissed; and it is further

ORDERED, that the Director of Elections, at a meeting to be held at 10:00 A.M. on January 14, 1976, at the offices of this Board at 250 Broadway, New York, New York, 28th floor, which meeting may be attended by representatives of each of the parties to this proceeding, shall open the envelopes containing the absentee ballots of Edward T. Kenny, Martin J. Tarpey and Frank Klembecki, and shall then and there announce the votes contained therein and shall thereafter prepare and issue to the parties a revised Report Upon Secret Ballot; and it is further

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ORDERED, that, in the event the revised Report Upon Secret Ballot fails to provide any of the participating unions with a majority of the valid votes of employees who took part in the election, a run-off election conforming to the provisions of Section 2.15 of the Revised Consolidated Rules of the Office of Collective Bargaining shall be held on January 30, 1976, at The Office of Collective Bargaining, 250 Broadway, New York, New York (28th floor) between the hours of 12:00 Noon and 6:00 P.M. In this election, retaining the same positions on the ballot, the union shown by the revised Report Upon Secret Ballot to have received the highest number of votes and the union shown to have received the second highest number of votes shall be entitled to participate, provided, however, that, if there should be a tie between two unions for the second highest number of votes shown in the revised Report Upon Secret Ballot, all three of the unions party to this matter shall be entitled to participate in the run-off election; and provided further that all unit employees on payroll as of January 2, 1976, shall be eligible to vote in said run-off election; and it is further

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ORDERED, that the Director of Elections shall impound and retain unopened, and as part of the Board's file in this matter, voided absentee ballot No. MO-3.

DATED: New York, New York.  
January 12, 1976.

ARVID ANDERSON  
C h a i r m a n

WALTER L. EISENBERG  
M e m b e r

ERIC J. SCHMERTZ  
M e m b e r