

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Bruce Auer,)	
)	
Petitioner)	
)	
and)	
)	
Town of Normal (Public Works Department),)	Case No. S-RD-12-006
)	
Employer)	
)	
and)	
)	
Laborers International Union of)	
North America,)	
)	
Incumbent)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

On October 2, 2012, Administrative Law Judge (ALJ) Michelle N. Owen issued a Recommended Decision and Order (RDO) in the above-captioned case, finding that an incumbent union, Laborers International Union of North America, Local 362 (Incumbent) had prevailed in a Decertification Petition election and, consequently, that the Illinois Labor Relations Board should not decertify Incumbent's status as exclusive representative of a bargaining unit of employees of the public works department of the Town of Normal (Employer). The ALJ's determination was based on her finding that two ballots had been cast by ineligible voters and should not be counted.

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240, the Employer filed timely exceptions with which the Petitioner, Bruce

Auer, agrees.¹ Incumbent filed a response and cross-exceptions, and the Employer has filed a response to the cross-exceptions. For the reasons which follow, we reject the ALJ's recommendation, and order that the ballots in issue be counted and the results of the election be again tallied.

Issues

Specifically at issue is whether two persons who cast ballots were eligible to vote and have their ballots counted toward the election results. The potential addition of these two ballots could be critical to the result because, of the other 40 ballots cast, 20 were cast in favor of the Incumbent, 19 were adverse, and one was void. The Employer and the Petitioner contend the ballots should count because these voters, though not on the roster of active employees on the date of the election, had a reasonable expectation of future employment. The Incumbent contends that the two challenged ballots should not be counted because they were cast by persons ineligible to vote because they lacked a reasonable expectation of future employment, and also argues that the status of these two ballots had been determined by the Board agent at the election and the Employer and the Petitioner have waived any objection to their exclusion.

Relevant Authority

Board rules provide:

To be eligible to vote in an election, an employee must have been in the bargaining unit as of the last day of the payroll period immediately prior to the date of the direction of the election or the approval of a consent election agreement, and must still be in the bargaining unit on the date of the election.

80 Ill. Admin. Code §1200.130(a). However, the term "in the bargaining unit" includes not only those who are on an active duty roster, but those off such a roster if they have a reasonable

¹ Auer sent an email simply stating he agrees with the Employer that the two election ballots at issue should be counted.

expectation of future employment. Kustom Electronics, Inc. v. Nat'l Labor Relations Bd., 590 F.2d 817 (10th Cir. 1978), enf'g 230 NLRB 1037 (1977). All parties accept this proposition, but the ALJ found this expectation needs to be objectively reasonable, while the Employer argues the employees need only a subjectively reasonable expectation.

Background

Marcus Foltz and Kris Starkey, the two voters at issue, were hired in June 2011 as six-month employees in the Employer's street maintenance division. Their terms ended on December 2, 2011, before the election was held on December 20, 2011. The street maintenance division has a practice of hiring both six-month and ten-month term employees. Applications must be filed before hiring, and once hired, successful applicants are given a start date and an ending date. If they wish to work the following year, they must again fill out an application; however, the supervisor of the street maintenance division indicated that, if they do a good job, term employees' prospects for employment the following year are very good.

ALJ's Analysis

The ALJ applied the objectively reasonable standard with respect to Foltz and Starkey's expectations for future employment.² Referencing factors used by the National Labor Relations Board in Beloit Corp., Casting Div. v. N.L.R.B., 857 F.2d 1154 (7th Cir. 1988), she considered: 1) the employer's past experiences; 2) the employer's future plans; 3) circumstances surrounding

² The ALJ declined to address an argument raised by Incumbent in its post-hearing brief that, based on actions at the tally of ballots, the Employer and the Petitioner should be precluded from arguing Foltz and Starkey were eligible. She referenced the finding in the Executive Director's Report on Challenged Ballots and Objections to an Election that there was no evidence the parties reached consensus at the tally concerning Foltz and Starkey's eligibility. The Incumbent filed cross-exceptions to this portion of the RDO, but we agree with the Executive Director that there had been no consensus regarding the status of Foltz and Starkey such as to preclude our consideration of their eligibility to vote.

the layoff (which is the context in most cases examining the eligibility to vote on non-roster employees); and 4) what the employees were told about the likelihood of recall.

With respect to the employer's past experiences, the ALJ noted that since 2001 the Employer maintained a practice of employing six-month and ten-month employees (six in street maintenance alone), but that none of those hired in street maintenance in 2010 were rehired in 2011. Furthermore, although all but one of the full-time employees in the waste removal division had started as a six-month or ten-month employee, no such term employee had become a permanent employee in the past two years. Finally, though Foltz and Starkey were on the winter snow plow on-call list and the supervisor of street maintenance, Scott Dennewitz, testified it was likely those on the list would be called to plow, the ALJ found the chance Foltz and Starkey would be called was too tenuous. Overall, she found this factor weighed in favor of finding Foltz and Starkey did not have a reasonable expectation of future employment.

On the second factor concerning the employer's future plans, the ALJ noted the Employer had since 2001 hired six-month and ten-month employees, but also noted that the Employer set its budget in April each year and that it could not state how many, if any, term employees it planned to hire in 2012. She found this factor weighed against finding a reasonable expectation of future employment.

The third factor looks at the circumstances surrounding the "layoff." The ALJ here noted that Foltz and Starkey had been hired for stated terms with exact end dates and found this factor weighed against a reasonable expectation of future employment.

Finally, regarding the likelihood of recall, the ALJ noted that both Foltz and Starkey had been told they had done a good job and that the Employer would like to have them back the next year. The supervisor of street maintenance and the supervisor of waste removal both said those

who did good work were encouraged to reapply the following year, and the former said the chance of reemployment for those who did were very good. However, the ALJ noted that Foltz and Starkey would have to reapply and the decision whom to hire was completely discretionary. Absent a policy or rule requiring preference for past good employees, the ALJ found what Foltz and Starkey had been told did not create an objectively reasonable expectation of future employment.

The ALJ found Foltz and Starkey's presence on the snow plow list did not establish a reasonable expectation because future employment depended on exigencies such as a severe snow storm and inadequate staffing. She found the fact that none of the term employees who worked in 2010 had been rehired in 2011 to be the strongest evidence in support of her conclusion that Foltz and Starkey lacked a reasonable expectation of future employment.

Employer's Exceptions

The Employer argues the ALJ improperly put the burden of proof on the Employer rather than on the party challenging the ballots. We do not see evidence that the ALJ did so, but agree with the Employer's basic proposition that, with respect to those voters whose names appear on the list of those eligible to vote,³ the party challenging a ballot bears the burden of proof.

The Employer also argues the ALJ erred in applying an objective test for reasonableness rather than a subjective test. In support of the use of a subjective test, it cites William Rainey

³ This list is commonly referred to as the "Excelsior list" after Excelsior Underwear, Inc., 156 NLRB 1236 (1966), in which the NLRB held that an employer's failure to provide a list of eligible voters would provide grounds for setting aside an election. Such a list is required under Section 1210.100(a)(2) of the Board's rules:

Within 7 days after service of a petition, the employer shall file with the Board a list containing the full names and titles of the employees in the proposed bargaining unit. In the event the employer does not supply the list within 7 days, the Board shall administratively determine the adequacy of the showing of interest, based on the information provided by the union.

80 Ill. Admin. Code §1210.100(a)(2).

Harper Cmty. College 512 v. Harper College Adjunct Faculty Ass'n, 273 Ill. App. 3d 648 (4th Dist. 1995). There, the Illinois Educational Labor Relations Board (IELRB) found certain employees were not “short-term employees” and for that reason were not excluded from protections of the Illinois Educational Labor Relations Act, 115 ILCS 5 (2010) (IELRA). The definition of “short-term employee” in the IELRA is tailored to fit with the academic calendar, but otherwise shares with our Act’s definition of the term the requirement that the employee have a “reasonable assurance” of subsequent employment by the same employer.⁴ In reversing the IELRB, the Appellate Court in Harper College stressed that “reasonable assurance” is different from “reasonable expectation”:

The Board’s interpretation confuses “expectations” with “assurance.” *An “expectation” is an employee’s subjective belief that he will be rehired.* An “assurance” requires more than mere expectations. An “assurance” implies some affirmative act by the employer to demonstrate that it intends to rehire an employee, like a contract or oral representation. “Reasonable assurance is not quite a guarantee, but almost.”

273 Ill. App. 3d at 652 (emphasis supplied).⁵ It should be noted that the court did not have before it the question of what standard should apply in determining eligibility to vote; it was

⁴ The IELRA definition of “short-term employee” reads:

“Short-term employee” is an employee who is employed for less than 2 consecutive calendar quarters during a calendar year and who does not have a reasonable expectation that he or she will be rehired by the same employer for the same service in a subsequent calendar year. Nothing in this subsection shall affect the employee status of individuals who were covered by a collective bargaining agreement on the effective date of this amendatory Act of 1991.

115 ILCS 5/2(q) (2010). Section 3(q) of our Act reads:

“Short-term employee” means an employee who is employed for less than 2 consecutive calendar quarters during a calendar year and who does not have a reasonable assurance that he or she will be rehired by the same employer for the same service in a subsequent calendar year.

⁵ ILCS 315/3(q) (2010).

⁵ The Fourth District applied this same rationale in its review of this Board’s determination of short-term status and in doing so responded to a decision of the Appellate Court, First District. In City of Tuscola v. Ill. State Labor Relations Bd., 314 Ill. App. 3d 731, 736, 737 (4th Dist. 2000), the Fourth District stated

concerned with determining what “assurance” meant within the meaning of the definition of a short-term employee and, in contrasting it with “expectation”, described the latter term only in a general sense. The Employer’s attempt to use this language as authority for stating the standard by which we determine eligibility to vote should be an employee’s subjective expectation for future employment goes far beyond the Appellate Court’s holding. Indeed, the Act’s qualification that the expectation must be “reasonable” naturally lends itself to consideration of factors outside the employees’ subjective belief. We reject the Employer’s contention that a subjective standard applies.

We recognize that the cases cited by the ALJ in support of her use of an objective test are not authoritative on that point. However, use of the four factors she used is unquestionably the practice of the NLRB and, even if not previously formally adopted for use by this Board, we adopt them here. In our determination of whether Foltz and Starkey had a “reasonable expectation” of future employment, we consider those same four factors and place the burden of proof on the party challenging their eligibility to vote.

Our application of the facts to the four factors identified by the ALJ leads us to slightly different results. For example, the ALJ found that the second factor, the employer’s future plans, weighed against finding a reasonable expectation because the budget would not be made until April and the Employer could not say until then how many it planned to hire in the future. We

“[t]o the extent that the Public Labor Board’s five-part test under section 3(q) of the Public Labor Act allows for a finding of ‘reasonable assurance’ based on an employee’s subjective expectations absent any affirmative act on the employer’s part, that test is contrary to law, and we reject it” and, again, “to the extent that the court in [Northwest Mosquito Abatement Dist. v. Ill. State Labor Relations Bd., 303 Ill. App. 3d 735, 743 (1st Dist. 1999)] based its decision on the expectations of the District’s employees rather than the conduct of the District, we disagree with its analysis.”

agree with the ALJ that there is insufficient evidence to ascertain the employer's future plans, but find this renders this factor neutral, not pro-eligibility.

The ALJ was entirely correct with respect to the third factor: the circumstances surrounding the "lay-off." The two employees at issue had no continuing period of employment with an anomalous layoff; they were term employees with a definite end date to their employment. This factor strongly weighs against any reasonable expectation of future employment.

However, we believe the ALJ erred with respect to the first factor, the employer's past experience. This employer has a multi-year history of hiring six-month and ten-month employees, and a history of re-hiring for similar terms some who had performed well. That it had not rehired in 2011 those who had worked in street maintenance during 2010 was explained by the fact that one such employee did not reapply and the others had not performed well. Furthermore, with respect to Foltz and Starkey's placement on the snow plow list, past history shows that it typically snows in the Bloomington-Normal area during the winter, suggesting likely future employment for Foltz and Starkey. Overall, past history weighs in favor of finding a reasonable expectation of future employment, at least for those who had performed well in the past like Foltz and Starkey.

Finally, contrary to the ALJ, we find the final factor, the likelihood of recall, also weighs in favor of finding a reasonable expectation. There almost certainly was going to be work to be performed. Unlike a manufacturer in the private sector, the Town of Normal is not likely to lose sales or go out of business. Under the present financial climate, continued means to pay people to perform that work may be more questionable for municipalities in a general sense, but there is no specific information indicating Normal faced cutbacks. And, although they would have to

again apply, Foltz and Starkey had been told they had done good work, their superiors told them they would like to have them back, and their co-workers had told them there was a good chance they would be back if their bosses liked their work. There is no need for a formally documented policy of rehiring good past employees as the ALJ believed; a longstanding actual practice is sufficient.

Considering the four factors together, the circumstances of the “layoff” or termination weighs heavily in favor of finding a lack of reasonable expectation, consideration of the employer’s future plans is neutral, but the Employer’s past history and the likelihood of recall weigh in favor of finding a reasonable expectation of future employment. Overall, we find Foltz and Starkey had a reasonable expectation of future employment, and for this reason that their ballots should be opened and counted.

ORDER

IT IS HEREBY ORDERED that the election ballots cast by Marcus Foltz and Kris Starkey be opened and counted, and the results of the decertification petition election held in this case re-tabulated.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



Dan Johnson, Chairman



Michael G. Cole, Member



Albert Washington, Member

Members Besson and Brennwald, dissenting:

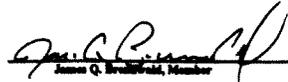
While we agree with the majority’s analysis regarding the appropriate standard to be applied in this type of case, we respectfully dissent from the majority’s ultimate determination

that the two individuals at issue, Foltz and Starkey, had a “reasonable expectation of future employment,” such that they should have been deemed eligible to vote in the subject decertification election. Based on the record, it is clear that, as of the date of the election, both individuals were ex-employees of the Employer, their six-month terms of employment with the Employer having expired. It is equally clear that, for each individual, any future employment with the Employer was entirely dependent upon both his submission of a new employment application, and a decision by the Employer to re-hire him. These circumstances are substantially and qualitatively different from those of a current employee on layoff or leave status who remains on a recall or other reinstatement list, and whose return to active employment status would not require re-application and re-hire, as was the case in Kustom Electronics, Inc. v. Nat’l Labor Relations Bd., 590 F.2d 817 (10th Cir. 1978), enf’g 230 NLRB 1037 (1977).⁶ The facts of this case are also distinguishable from the circumstance of a recurring seasonal employee who is automatically considered for re-employment each season without having to reapply (see, for example, the Fourth District’s unpublished order in Quincy Park Dist. v. Int’l Ass’n of Machinists & Aerospace Workers, No. 4-95-0643, 13 PERI 4004 (Ill. App. Ct., 4th Dist., Sept. 12, 1996), cited by the Employer in its exceptions). We also agree with the ALJ that the placement of Foltz and Starkey on the “snow plow” list, for potential engagement on a short-term, one-time basis in the event of short staffing in the face of a weather emergency, falls short of constituting a reasonable expectation of future employment.

⁶ And even employees on layoff or leave status will be excluded from voting if it cannot be shown that they otherwise have a reasonable expectation of reinstatement to active status. See, e.g., Rockford Twp. Hwy. Dep’t, 1 PERI 2017 (IL SLRB 1985) and Beloit Corp. Casting Div. v. N.L.R.B., 857 F.2d 1154 (7th Cir. 1988), enf’g 230 NLRB 1037 (1977).

For all of these reasons, we would affirm the ALJ's conclusions of law that the two individuals at issue were ineligible to vote, and that the Incumbent prevailed in the election.


Paul A. Brown, Member


James Q. Brundage, Member

Decision made at the State Panel's public meetings held in Springfield, Illinois, on February 5, 2013, and in Chicago, Illinois and, by means of video conference, Springfield, Illinois, on March 12, 2013; written decision issued in Chicago, Illinois on June 28, 2013.

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North America, Local 362)	
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Incumbent)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 19, 2011, Bruce Auer (Petitioner), filed a Decertification Petition in Case No. S-RD-12-006 with the State Panel of the Illinois Labor Relations Board (Board), pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin Code, Parts 1200 through 1240 (Rules). The Petitioner sought an election to determine whether Laborers International Union of North America, Local 362 (Union) would continue as the exclusive bargaining representative of a bargaining unit of employees employed by the Town of Normal (Employer) in its Public Works Department, originally certified by the Board on October 7, 2010, in Case No. S-RC-10-234 (Unit).

On December 20, 2011, the Board, pursuant to the parties' stipulation for a consent election, conducted an election among the Unit's employees. After the election, the ballots were

tallied and the result was forty eligible voters, of which twenty ballots were cast in favor of continued representation, nineteen ballots were cast for no representation, one ballot was found to be void, and zero ballots were challenged.

The Employer and Petitioner filed timely objections to the election. After an investigation of the objections, the Board's Executive Director, on February 1, 2012, issued a Report on Challenged Ballots and Objections to an Election, which found that the tally of ballots should have included a designation that two challenged ballots were cast during the vote.¹ The Executive Director also found that the challenged ballots were determinative of the outcome and ordered a hearing to determine whether either or both of the challenged ballots were cast by persons eligible to vote in the election.

A hearing was held on April 16, 2012, in Chicago, Illinois, at which time all parties appeared and were given a full opportunity to participate, present evidence, examine witnesses, argue orally, and file written briefs. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following.

I. ISSUE AND CONTENTION

The issue in this case is whether the two challenged ballots were cast by persons eligible to vote in the election, and thus should be opened and counted. The Union contends that the persons whose votes were challenged did not have a reasonable expectation of future

¹ The tally had reflected that there were no ballots challenged during the vote. However, during the course of the election, two employees cast ballots that were challenged by the observer for the Union. Both employees were included on the list of eligible voters; however, the Union's observer challenged the ballots on the basis that neither were employed by the Employer as of the date of the election. Prior to the tally of ballots, the Board Agent assigned to conduct the election discussed the status of the two employees with representatives of the parties. The Public Works Supervisor Robin Weaver indicated that both had been "terminated." This communication served as the basis for the Board Agent's determination to not open the two ballots and instead indicate that there were no challenged ballots.

employment, and therefore they were ineligible to vote at the election and their ballots should not be opened and counted.²

The Petitioner and the Employer contend that the persons whose votes were challenged did have a reasonable expectation of future employment, and therefore they were eligible to vote at the election and their ballots should be opened and counted.

II. FINDINGS OF FACT³

The Public Works Department is made up of four divisions: Street Maintenance, Equipment Maintenance, Waste Removal, and Sewer Maintenance. Since at least 2001, the Public Works Department has maintained a practice of employing six-month and ten-month employees, in addition to its full-time and regular part-time employees. Marcus Foltz and Kris Starkey, the individuals whose ballots were challenged at the December 20, 2011 election, were hired as six-month employees in the street maintenance division in June 2011. Foltz and Starkey's six month terms ended on December 2, 2011. It is uncontested that Foltz and Starkey were not scheduled for work after December 2, 2011, and were not scheduled for duty as of December 20, 2011, when the Board conducted the election.

Six and ten-month employees are hired to work in a classified position for no longer than their stated term of employment. Six-month and ten-month employees must fill out an application before hire. Once they are hired, they are told the start and end date for their term of

² The Union also argues in its post-hearing brief that the eligibility of challenged persons was decided at the election because the parties certified that there were 40 eligible voters and no challenged ballots. Thus, the Union asserts that the Employer and Petitioner are precluded from bringing up the issue now by way of objections pursuant to Section 1210.140(g)(2) of the Board's Rules. I find however that this issue has already been decided by the Executive Director's Report on Challenged Ballots and Objections to an Election, which states, "[d]espite the notation by the Board agent on the tally of ballots, it is also clear that the ballots challenged by the Union were not resolved at the tally . . . there is no evidence that the parties reached consensus at the tally concerning the eligibility of either Foltz or Starkey." Thus, I will not address the Union's argument that the Employer and Petitioner are precluded from bringing it here.

³ The facts are based on the testimony of Tom Ramirez, Scott Dennewitz, Pamela Reese, Kris Starkey, Marcus Foltz, Edward Williamson, and Robin Weaver.

employment. These employees are not automatically reinstated the following year. Rather, if they want to work in a subsequent year, they must fill out a new application. The Public Works Department is informed by April 1st, the beginning of its budget year, whether there will be money available in the budget for the six and ten-month positions. Scott Dennewitz, the supervisor of Street Maintenance, reported that if an employee does a good job during his term, his or her prospects for employment the following year are very good.

When Foltz and Starkey were hired in June 2011, they were both told that the position would last for six months and would end in December 2011. They were also told that if they wanted to be considered for a position the following year they would need to fill out a new application. Foltz reported that at the end of his six-month term, Dennewitz told Foltz that Foltz had done a good job, and that if Foltz was interested, Dennewitz would like him to come back the following year and apply. Dennewitz also informed Starkey that he had done a good job and asked Starkey if he was interested in coming back the next year. Starkey indicated that he was interested. Dennewitz testified that he indicated to Starkey that if he was interested in re-applying next year, he would like to have him back.

In regard to Foltz's impressions of his chances of re-hire, he reported that he felt he would have a "good shot" of working the following year if "all went well" during the 2011 season. Foltz also stated that a "couple guys" who also worked on his shift said it was common for six-month employees to work again the following year. Foltz also reported that Chris Toberman, another co-worker, told him "man, if you work out and you get along with everybody and you work hard, that it would be most likely you would come right back the next year."

Foltz voted at the December 20, 2011, election because "I considered – I had intentions of going back the next year so I just figured I would go vote. I figured I was entitled to vote."

Starkey voted at the election because "I thought I would be coming back there next year to work on the next season."

Employer's Past Experience

Dennewitz reported that it is common in his department for six-month and ten-month employees to be rehired as six-month or ten-month employees if they have done well in the previous season. He also reported that it is common for former six-month or ten-month employees to be hired into full-time positions in later years. Chris Toberman was a part-time employee for at least two or three years, and is now a full-time employee in Street Maintenance. Neil Harrington started as a six-month employee and was re-hired back as a six-month employee at least two years. Dallas Woodworth, Eric Murphy, Jeff Miller, and Louie Harrison also worked as six or ten-month employees for more than one season. However, none of the three six-month employees in 2010 were rehired in 2011. Two of those employees were not hired back because of attendance issues and poor performance. The evidence did not reveal the reason for the third employee not being re-hired. However, Dennewitz reported that in the years prior to 2010, he has re-hired six-month and ten-month employees to work the following year.

Waste Removal Supervisor, Tom Ramirez, testified that in regard to six and ten-month employees, "We always encourage them if they are good to apply again in the spring. We tell them when the jobs will open again and for what timeframe they will be open. And then - - and highly encourage them, you know, to apply, if they are interested." In Waste Removal, all but one of the current full-time employees started as a six-month or ten-month employee. Charles Barlow, Ryan Larkin, Conrad Rierdon, John Burkhardt all worked for more than one year as a six or ten-month employee before they were hired as a full-time employee. Jeff Powell was hired four years in a row as a ten-month employee.

Currently, in Waste Removal, there are two ten-month employees: Chad Moody, and an open position that will not be filled until June. In 2010, the part-time employees were Jeff Powell and John Shepherd. Powell was not rehired in 2011 because "his attitude had deteriorated." Shepherd was not rehired because he did not apply for a position. In the last two years, Waste Removal has not hired any full-time employees.

Winter Maintenance Crew List

The Public Works Department maintains a winter maintenance crew assignment document, which contains snow plowing assignments. The document also contains a list of people who will be on-call to assist in the event there is a severe snowstorm. Six-month and ten-month employees can sign up to be on the on-call snow plow list. Both Foltz and Starkey signed up and were placed on the on-call list. They were not told what the rate of pay would be.

Dennewitz reports that if a six or ten-month employee's name is placed on the on-call list, it is likely that he or she will be called in to plow. Foltz and Starkey reported that fellow employees told them that they would probably be called in to plow. If an on-call individual is called in, he or she does not need to fill out a new application to do snow plowing.

III. DISCUSSION AND ANALYSIS

A. Eligibility of Voters

Section 1210.130 of the Rules states:

To be eligible to vote in an election, an employee must have been in the bargaining unit as of the last day of the payroll period immediately prior to the date of the direction of the election or the approval of a consent election agreement, and must still be in the bargaining unit on the date of the election.

If an employee is absent from the active duty roster as of the date of the election, they are ineligible to vote, unless they have an objectively reasonable expectation of future employment or recall. Rockford Highway Dep't, 1 PERI ¶2017 (IL SLRB 1985); Rantoul City School Dist.

137, 10 PERI ¶1068 (IL ELRB ALJ 1994), citing Beloit Corp. Casting Division v. Nat'l Labor Relations Bd., 867 F.2d 1154 (7th Cir. 1988); Nat'l Labor Relations Bd. v. Fresh'nd-Aire Co., 226 F.2d 737 (7th Cir. 1955).⁴

This Board has not explicitly stated what constitutes an “objectively reasonable expectation of future employment.” However, the National Labor Relations Board and the Illinois Educational Labor Relations Board consider the following objective factors: 1) the employer’s past experience; 2) the employer’s future plans; 3) circumstances surrounding the layoff, and 4) what the employees were told about the likelihood of recall. Beloit, 857 F.2d at 1157; Quincy Park Dist., 11 PERI ¶2009 (IL SLRB 1994), aff'd by unpub. order sub nom Quincy Park District v. Int'l Ass'n of Machinists & Aerospace Workers, 13 PERI ¶4004 (4th Dist. 1996); Rantoul City School Dist. 137, 10 PERI ¶1068.

In Rockford Highway Dep't, 1 PERI ¶2017, a truck driver whose license had been revoked and had been told he would be rehired when it was reissued was not eligible to vote in an election. The Board found that he did not have a reasonable expectation of future employment because he had been laid off for a year and a half and still did not have a license on the payroll eligibility cutoff date.

In Town of Cicero, 2 PERI ¶2028 (IL SLRB 1986), police officers on disability pensions, who were allowed to be called back to work in cases of emergency were not eligible to vote in an election. The Board stated that “given the length of time since these individuals had last worked

⁴ The Employer argues that “expectation” is an employee’s “subjective” belief that he or she will be rehired, citing William Rainey Harper Cmty. College 512 v. Harper College Adjunct Faculty Ass'n, 273 Ill. App. 3d 648, 653 (4th Dist. 1995), which reversed and remanded a decision of the Illinois Educational Labor Relations Board. However, Rockford Highway Dep't, 1 PERI ¶2017, a decision of this Board, uses the phrase “objectively reasonable expectation.” Moreover, the National Labor Relations Board also holds that a reasonable expectation of recall is based on “objective” factors. Beloit, 857 F.2d at 1157.

for the Employer, anywhere from two to eight years, we find that none of these individuals has a reasonable expectation of continued employment.”

In this case, I find that Foltz and Starkey did not have an objectively reasonable expectation of future employment.

Employer's Past Experience

The Employer has maintained a practice of employing six-month and ten-month employees since 2001. Dennewitz testified that it is common for these employees to be rehired in the following season. The Employer provided examples of six employees being rehired in a subsequent season in Street Maintenance. However, none of the three six-month employees hired in 2010 were rehired in 2011. In Waste Removal, none of the two ten-month employees hired in 2010 were rehired in 2011. Further, although all but one of the current full-time employees in Waste Removal started as a six-month or ten-month employee, no full-time employees have been hired in the past two years.

Foltz and Starkey were also placed on the winter snow plow on-call list. Dennewitz reported that if an employee's name is on the list, it is likely that he or she will be called in to plow. I find that the chances of Foltz and Starkey being called in to do snow plowing are too tenuous to evidence a reasonable expectation of future employment. The Employer's past experience thus suggests that Foltz and Starkey did not have a reasonable expectation of future employment.

Employer's Future Plans

Since the Employer has maintained a practice of employing six-month and ten month employees since 2001, the evidence suggests that six-month and ten-month employees would be hired in 2012. However, the Employer did not state how many six-month and/or ten-month

employees it would be hiring in 2012. The Employer stated that the number of positions hired is determined by the budget which is completed in April. Although, the Employer stated that it has always found money in the past to pay for these positions, it did not state how many, if any, it would be filling in 2012. Thus, the Employer's future plans weigh against a finding that Foltz and Starkey had an objectively reasonable expectation of future employment.

Circumstances Surrounding Layoff

The evidence showed that six-month and ten-month employees are told that their positions are for a stated term. They are given an exact start and end date. Thus, the employees are aware that their positions are temporary. The circumstances surrounding layoff do not weigh toward a finding of reasonable expectation of future employment.

Likelihood of Recall

Foltz and Starkey were both told that they had done a good job in the 2010 season. They were also informed that the Employer would like to have them work again the following year. Dennewitz and Ramirez both testified that if a six-month or ten-month employee does a good job, they are encouraged to apply again the following year. Further, Dennewitz reported if an employee does a good job, his prospects for reinstatement the following year are "very good." However, in order to be hired the following year, Foltz and Starkey would first have to fill out a new application. The Employer would maintain complete discretion on whether to hire Foltz and/or Starkey. The Employer could choose to hire Foltz and Starkey and/or another prior employee and/or an employee who has no prior experience working for the Employer. In addition, the Employer did not provide any policy or rule that says a former employee who does a good job will be chosen over an employee with no experience the following year. Thus, I find

that what Foltz and Starkey were told about the likelihood of recall does not support a finding that they had an objectively reasonable expectation of future employment.

In addition, I find that the chances of Foltz and Starkey being called in to snow plow do not establish a reasonable expectation of future employment since recall is based on several exigencies that may never happen, i.e., a sever snow storm and inadequate staffing. I also find the fact that none of the six-month or ten-month employees who worked in 2010 were rehired in 2011 to be the strongest evidence suggesting that Foltz and Starkey did not have an objectively reasonable expectation of future employment. In sum, I find that based on the objective factors stated above, Foltz and Starkey did not have a reasonable expectation of future employment. Therefore, I find that they were ineligible to vote at the election and their ballots should not be opened and counted.

IV. CONCLUSIONS OF LAW

1. I find that challenged ballots were cast by persons ineligible to vote in the election and thus should not be opened and counted.
2. I find that Laborers International Union of North America, Local 362 prevailed in the election.

V. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, Laborers International Union of North America shall continue as the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

INCLUDED: All full-time, regular part-time employees employed by the Town of Normal in Public Works Street Maintenance, Public Works Equipment Maintenance, Public Works Sewer Maintenance, and Public Works Waste Removal.

EXCLUDED: All other employees of the Town of Normal as well as all supervisors, managerial, professional, confidential and short term employees as defined by the Illinois Public Labor Relations Act.

VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 2nd day of October, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Michelle N. Owen
Administrative Law Judge