D.R. NO. 83-37

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

JERSEY CITY MEDICAL CENTER,

Public Employer,

-and-

INTERNATIONAL SERVICE WORKERS OF AMERICA,

DOCKET NO. RO-83-30

Petitioner,

-and-

LOCAL 1199-J, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation dismisses objections filed by Local 1199-J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199-J") to an election held in a unit of all Food Service Workers in the Food Service Department of the Jersey City Medical Center and certifies ISWA as majority representative. The Director finds that the Center substantially complied with the Commission's eligibility list rule requirements notwithstanding District 1199-J's receipt of the list nine days, rather than ten days, before the election.

Additionally, the Director dismisses an objection alleging that some employees were mailed altered copies of the Commission's election notice. District 1199-J did not demonstrate that the altered sample ballot circulated among employees was attributable to ISWA.

D.R. NO. 83-37

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

JERSEY CITY MEDICAL CENTER,

Public Employer,

-and-

INTERNATIONAL SERVICE WORKERS OF AMERICA,

DOCKET NO. RO-83-30

Petitioner,

-and-

LOCAL 1199-J, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Intervenor.

Appearances:

For the Petitioner
Schneider, Cohen, Solomon & DiMarzio, attorneys
(J. Sheldon Cohen of counsel)

For the Intervenor
Greenberg, Margolis, Zeigler & Schwartz, attorneys
(Mark S. Tabenkin of counsel)

DECISION

Pursuant to a Decision and Direction of Election issued October 29, 1982, [1/] a representation election was conducted on December 3, 1982, by the Public Employment Relations Commission ("Commission") among 86 employees in a unit consisting of "all

1/ In re Jersey City Medical Center, D.R. No. 83-19, 8 NJPER 642 (¶ 13308 1982).

food service workers in the Food Service Department of the Jersey City Medical Center ("Center") but excluding all other employees including managerial executives, supervisory employees, and police within the meaning of the Act." Employees were provided an opportunity to choose as majority representative either the petitioning employee organization, [International Service Workers of America ("ISWA")] or the intervening incumbent certified representative, [District 1199-J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199-J")], or to choose no representation. The tally of ballots reveals that a majority of ballots was cast for ISWA. 2/

On December 8, 1982, District 1199-J filed post-election objections pursuant to N.J.A.C. 19:11-9.2(h), alleging that both the Center and ISWA and/or its adherents had engaged in certain misconduct affecting the results of the election. Specifically, District 1199-J objects to the late transmittal of the voting eligibility list by the Center and the mailing of a campaign flyer by certain employee(s) that attached an altered Commission Notice of Election. District 1199-J requests that the above election be set aside and that it be rerun.

Pursuant to a Notice of Hearing dated February 15, 1983, hearings were held March 4 and 11, 1983, before Hearing Officer Joan Kane Josephson, at which time all parties were given the opportunity to examine and cross-examine witnesses, to present

2/ Forty ballots were cast for ISWA; 34 ballots were cast for District 1199-J; 2 ballots were cast against representation.

evidence and to argue orally. The Center declined to participate. On May 5, 1983, the Hearing Officer issued her Report and Recommendations. She recommended that the election be set aside and a new election be directed on the basis of the late receipt of the employee eligibility list and the mailing of altered Commission election notices by employee-adherents of ISWA. ISWA filed exceptions to the Hearing Officer's recommendations. District 1199-J did not file a reply.

The Hearing Officer found as follows:

N.J.A.C. 19:11-9.6(a) requires that the public employer provide an eligibility list consisting of voters' names, addresses, and job titles to the Commission and to participating employee organizations to be received no later than 10 days prior to the election. Under letter dated November 22, 1982, the Center simultaneously mailed to the Commission, ISWA and District 1199-J the election eligibility list. The envelope containing the list sent to District 1199-J's counsel was postmarked November 23, 1982, 1 p.m. and was received November 24, 1982, the ninth calendar day prior to the election scheduled December 3, 1982.

Further, one or two days prior to the election, an unknown number of eligible voters received a campaign flyer urging food service employees to "vote for ISWA." The flyer identified its distributor as the "Concerned Food Service Workers of the Jersey City Medical Center." ("Concerned Food Service Workers"). Attached to the flyer was an exact reproduction of a

Commission Notice of Election. The sample ballot appearing on the Notice of Election was altered by the placement, in ink, of an "X" in the box designated for ISWA. 3/ This material arrived in an envelope with a handwritten address without return address, bearing a 20 cent postage stamp postmarked November 30, 1982, North Jersey.

The record revealed that this campaign material was composed, duplicated and sent by a cook at the Center, Stephen Chamona (after being typed by his friends),on behalf of "all the employees who wanted a change" and were "supporting him" and "dissatisfied with 1199." 4/

Based upon the above, the Hearing Officer concluded, first, that there was not substantial compliance with the Commission's rule requiring receipt of the eligibility list ten days prior to the election, citing In re County of Monmouth, P.E.R.C. No. 82-80, 8 NJPER 134 (¶ 13058 1982) ("Monmouth"); Excelsior Underwear Inc., 156 NLRB 1236, 61 LRRM 1217 (1966); Program Aides Co., Inc., 163 NLRB 54, 65 LRRM 1244 (1976) ("Program Aides"); Wedgewood Industries Inc., 243 NLRB No. 161, 101 LRRM 1597 (1979) ("Wedgewood"); NLRB v. All-Weather Architectural Aluminum, 111 LRRM 2981 (9th Cir. 1982) ("All-Weather"), and, second, that on the facts of the instant case, the alteration and distribution of

3/ The alteration of the Notice of Election was disputed by ISWA. The Hearing Officer found that the Notice of Election was, in fact, altered.

4/ Chamona, as well as ISWA representatives, testified that this campaign activity was without the knowledge or assistance of ISWA.

such official Notice by an employee "representing 'all' the employees who support the successful party" requires the setting aside of an election. N.J.A.C. 19:11-9.1(b); [5/] Englewood Bd. of Ed., D.R. No. 82-47, 8 NJPER 251 (¶ 13111 1982) req. for review den. P.E.R.C. No. 82-93, 8 NJPER 275 (¶ 13120 1982) ("Englewood"); and Allied Electric Products, Inc., 109 NLRB 1270, 34 LRRM 1538 (1954).

ISWA's exceptions to the Hearing Officer's report are that: (1) the report fails to apply the burden of proof requirement under N.J.A.C. 19:11-9.2(h) and that the objecting party has failed to meet that burden; (2) the findings are not sufficient to support the conclusions; and (3) the Hearing Officer misapplied the appropriate and binding NLRB precedents. Additionally, ISWA challenges the Hearing Officer's findings as to the credibility of certain witnesses and inferences drawn from several witnesses' testimony.

The undersigned shall first consider District 1199-J's objection concerning the late submission of the employee eligibility list. As noted above, the Hearing Officer recommended that the "substantial compliance"standard be utilized in reviewing objections pursuant to the eligibility list rule. District 1199-J argued that the eligibility list rule of N.J.A.C. 19:11-9.6 required strict compliance and that any failure to comply was automatic grounds for setting aside the election.

5/ N.J.A.C. 19:11-9.1(b) states "the reproduction of any document purporting to be a copy of the commission's official ballot which suggests either directly or indirectly to employees that the commission endorses a particular choice may constitute grounds for setting aside an election upon objections properly filed."

In Monmouth, supra, the Commission determined that it would take guidance from the NLRB's application of its Excelsior rule, supra, after which the Commission eligibility list rule is patterned.[6/] Two problem areas unfold in Excelsior cases. One relates to the completeness of a list; the second, and that involved herein, relates to the timeliness of its transmittal. The objection

6/ In Excelsior the Board elaborated on the considerations which compelled its adoption of a rule requiring that the employer transmit an eligibility list within seven days of the direction of an election.

> ... The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed. (citations omitted)
>
> * * *
>
> ... It is rather to say what seems to us obvious -- that the access of all employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation. (emphasis in the original) (citations omitted) 61 LRRM 1218.

in Monmouth, supra, related to an incomplete list. The Commission, in applying Excelsior principles to objections involving this first problem area, adopted the Board approach which rejects the argument that absolute compliance with the rule, as opposed to substantial compliance, is essential.

Since Excelsior, the National Labor Relations Board ("Board" or "NLRB") has considered numerous cases raising the instant concern -- that of timeliness of transmittal -- wherein the employer either failed to submit the eligibility list or was late in its submission. In Program Aides, supra, the NLRB stated:

> ... we find nothing in our decision in Excelsior which would require the rule stated therein to be mechanically applied. The principal underlying rationale of Excelsior, requiring the Employer to disclose the names and addresses of eligible voters to the Union, is to provide the Union with an opportunity to inform the employees of its position so that they, the employees, will be able to vote intelligently.

In considering whether an employer has substantially complied with the requirements of the Excelsior rule, in the face of an untimely submission of the required employee eligibility list, the Board has considered a number of factors; including: (1) the number of days which the list was overdue; (2) the number of days which the Union has had the list prior to the election; and (3) the number of employees eligible to vote in the election.

Program Aides, supra; Pole-Lite Industries, supra; cf. Rockwell International, 235 NLRB No. 160, 98 LRRM 1077 (1978). Consideration has also been given to the fact that an objecting party may be an incumbent organization with an in-plant presence. Kent Corp. 228 NLRB No. 12, 96 LRRM 1606 (1977) (NLRB adoption of A.L.J. decision). Further, the Board considers whether one organization's tardy receipt of the list could have materially affected the results of the election. Brunswick Corp., 206 NLRB No. 64, 84 LRRM 1338 (1973). 7/

The undersigned agrees with the Board and with the Hearing Officer herein that violations of the eligibility list requirement should not be judged by a mechanical compliance standard. To this end, the undersigned adopts the Board's reasoning and determines that the substantial compliance standard of Monmouth, supra, governing the completeness of a list, shall also extend to matters concerning the timeliness of the list.

In the instant matter, District 1199-J argues that the list was not only received one day late, nine calendar days prior to the election, but late in the afternoon on the day before Thanksgiving and a four-day holiday weekend. District 1199-J contends it therefore had use of the eligibility list for only four business days prior to the election.

In fact, District 1199-J received the list nine days before the election. It was capable of using U.S. mails as well

7/ In some cases, such as All-Weather, supra, cited by the Hearing Officer, the presence of employer bad faith or gross negligence is a contributing factor.

as in-person canvassing or telephone electioneering techniques utilizing the list. The Board requires that the eligibility list contain each employee's home address in order to afford the competing unions an opportunity to communicate with eligible voters away from the work environment and the employer's watchful eyes. District 1199-J had a four day holiday weekend as well as four additional business days to achieve this goal. 8/ Therefore, the undersigned rejects District 1199-J's claim that the late receipt of the list, which limited the campaign to four business days, is sufficient to support a meritorious objection. 9/

Thus, absent any supportable suggestion of bad faith or gross negligence by the employer, or the existence of any other impediment to its campaign capabilities, the undersigned believes that the Center substantially complied with the eligibility list rule requirement and that District 1199-J had sufficient opportunity to communicate with eligible voters.

8/ The undersigned is also not unmindful of the fact that District 1199-J is the incumbent representative, and has access to the worksite. It has negotiated a contract with the Center covering 1981-1982 which contains a dues deduction and agency shop provision. District 1199-J has not argued that it did not independently have a substantially complete and accurate list of employees which is normally processed by an incumbent or that ISWA's copy of the list was provided earlier. Compare Brunswick, supra.

9/ Compare, Wedgewood Industries, supra, wherein the Board found substantial compliance with the Excelsior rule where the employer, without willful delay, submitted the list one day late and the union actually had the list eight calendar days prior to the election in a unit of 76 employees. There, the list was received immediately before the plant's temporary shut down which resulted in only two days on which employees worked during the pre-election Excelsior period. The union lost the election since the ballots were evenly cast for and against representation.

Accordingly, the undersigned dismisses the post-election objection based on the untimely submission of the employee eligibility list.

The undersigned next considers the objection alleging that sample ballots marked with an "X" for ISWA were distributed in violation of N.J.A.C. 19:11-9.1(b).

The undersigned has previously applied the Commission rule concerning the improper reproduction and alteration of the Commission's official ballot. In re Englewood Bd. of Ed., D.R. No. 82-47, 8 NJPER 251 (¶ 13111 1982), req. for rev. den. P.E.R.C. No. 82-98, 8 NJPER 275 (¶ 13120 1982) (improper reproduction of Notice of Election by virtue of altered sample ballot attributed to successful party). In Englewood, it was noted that N.J.A.C. 19:11-9.1(b) was patterned after the rule enunciated by the Board in Allied Electric, supra. In Allied Electric, the Board said:

> ... The Board is necessarily concerned with the protection of its procedures designed to provide fair elections. The Board particularly looks with disfavor upon any attempt to misuse its processes to secure partisan advantage, and especially does it believe that no participant in a Board election should be permitted to suggest either directly or indirectly to the voters that this Government Agency endorses a particular choice.
>
> * * *
>
> ... it must, in order to preserve an atmosphere of impartiality, impose certain limitations on methods used in campaigning. The reproduction of a document that purports to be a copy of the Board's official secret ballot, but which in fact is altered for campaign purposes,

> necessarily, at the very least, must tend to suggest that the material appearing thereon bears this Agency's approval ... we believe it is unnecessary to permit unlimited freedom to partisans in election cases to reproduce official Board documents for campaign propaganda purposes ... Upon consideration, the Board has decided that in the future it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed will set aside the results of any election in which the successful party has violated this rule. (citations omitted)

In Englewood, the undersigned said:

> The concern of the Board for the integrity of its processes is equally shared by the undersigned in regard to the Commission's election procedures. Further, we look to the Board's policies for guidance, Lullo v. IAFF, Local 1066, 55 N.J. 409 (1970), as it affords consistency and predictability, particularly in the area of election misconduct. The undersigned can discern no valid distinguishing reason why the Commission should deviate from the rule set forth in Allied Electric, supra, which is designed to protect the integrity of the election process. (citations omitted).

In applying Allied Electric, the Board in each case determines whether the reproduced board document or facsimile has been defaced or altered in such a way to suggest either directly or indirectly to the voters that the Agency endorses a particular choice in the election and whether the successful party or its agents are responsible for violating the rule. Vernon Convalescent Center Co., 194 NLRB 439 n.2, 78 LRRM 1673, 1674 (1971); and Hughes Tool Co., 119 NLRB 739, 41 LRRM 1169 (1957). An election

will not be set aside unless it is shown that the alterations were the work of the successful party or its agents. Thus, in Bush Hog, Inc. v. NLRB, 420 F.2d 1266, 73 LRRM 2066 (5th Cir. 1967), the Circuit Court, enforcing a Board bargaining order, held:

> But unlike Allied, there was no showing in the instant case that the union, the successful party, was responsible for the alterations in the Board's leaflets. We think it clear that conduct not attributable to the opposing party cannot be relied on to set aside an election. The only exception to this general principle, not applicable here, is where coercive and disruptive conduct or other action is so aggravated that a free expression of choice of representative is impossible (citations omitted). Any other rule would invite the third parties or one of the protagonists who doubted the election outcome to anonymously create incidents and then attempt to use them to set aside the election. 73 LRRM, at 2068.

Also, in NLRB v. Fuelgas Co., Inc., 674 F.2d 529, 109 LRRM 3242 (6th Cir., 1982) ("Fuelgas") the Court of Appeals affirmed a Board decision not to set aside an election where the losing employer alleged that the successful union's election observer defaced the sample ballot posted in the employees' room. In so doing, the Court said:

> First, even if we assume contrary to the Regional Director's investigative findings, that the Union's observer did deface the sample ballot, it is not at all clear that Fuelgas would have grounds for relief absent evidence that the Union had authorized or condoned the misconduct. See NLRB v. Morgan Health Care Center, 618 F.2d 127, 129, 103 LRRM 2800 (1st Cir. 1980). Second, and more

> important, is the fact that irrespective of the authorship of the marks on the sample ballot, Fuelgas has offered no evidence whatsoever that the defacement affected the fairness of the election.... To hold, as Fuelgas appears to suggest that a single incident involving an anonymous mark penciled on a sample ballot automatically indicates an unfair election would stretch the rule of Allied Electric Products, [supra], and its progeny beyond the limits of reason and common sense. 109 LRRM, at 3244. 10/

In the instant matter, an unknown number of employees received in the mail an exact replica of the Commission's official sample ballot marked with an "X" in the "ISWA" box. There was no identification of the source other than a separate piece of

10/ See also: Morgan, supra, (fact of an employee engaged in organizing support for the union is not sufficient to establish an agency relationship between the actor and the union absent evidence that the union "either authorized or condoned any of the questioned conduct.") Citing Owens-Corning Fiberglass Corp., 179 NLRB 219, 72 LRRM 1289 (1969), enforced 435 F.2d 960, 75 LRRM 2489 (4th Cir. 1970); Firestone Tire & Rubber Co., 120 NLRB 1644, 42 LRRM 1244 (1958) (fact that employee was prominent in union's organizing campaign is not sufficient to establish employee was acting as agent of union. But see, PPG Industries Inc. v. NLRB, 109 LRRM 2721 (4th Cir. 1982) ("PPG") where the court attributed election-eve threats and other egregious conduct by an in-plant organizing committee ("IPOC") to the union and denied enforcement of the Board certification and bargaining order. The court cited NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 92 LRRM 3282 (4th Cir. 1976) which found that IPOC members were agents of the union. In PPG the court found that the IPOC members as a group were acting as an "alter ego" for the union, not as two mutually independent allies supporting a common cause. Contra: NLRB decision in Georgetown Dress, 214 NLRB 108, 88 LRRM 1593 (1974); 88 LRRM 1656 (1975) in which the Board held IPOC members are not agents of the union. See also: Certain-Teed Products Corp. v. NLRB, 562 F.2d 500, 96 LRRM 2504 (7th Cir. 1977).

attached campaign literature from "Concerned Food Service Workers at the Jersey City Medical Center." 11/

On these facts, the undersigned finds that the threshold condition for activation of the Commission and Allied Electric rules is present. The ballot is an exact replica of the Commission's official sample ballot, and it conveys the impermissable impression that the Commission endorses ISWA, the successful party in the election.

The record, however, does not support a finding as to the second requirement of Allied Electric, that the successful party was responsible for the violation of the rule. There is no evidence that Chamona was an ISWA agent or that ISWA supported, encouraged, or had knowledge of Chamona's mailing. Neither is there evidence to support a finding that an amorphous entity designated as the "Concerned Food Service Workers" is ISWA's "agent" or "alter ego," thereby placing responsibility for violation of the rule on ISWA. 12/

In sum, District 1199-J had the responsibility in this objection to show that the altered sample ballot circulated among employees was attributable to ISWA. This has not been demonstrated

11/ There is substantial record evidence to support the Hearing Officer's findings that at least two employees received marked sample ballots.

12/ The undersigned is not necessarily convinced that IPOC activities,limited only to improper ballot alterations can be a basis for an Allied Electric violation. In any event, under the facts herein, the undersigned cannot find the existence of an in-house organizing committee on the basis of Chamona's signing the flyer "Concerned Food Service Workers" and his description of that term as encompassing all employees who wanted a change and were supporting him. Curiously, Chamona was District 1199-J's shop steward when he engaged in this activity.

notwithstanding District 1199-J's full opportunity to cross-examine Chamona and ISWA officials and a full opportunity to present witnesses under direct examination. 13/ In re Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶ 11258 1980).

Accordingly, for the above reasons, the undersigned dismisses the objections in their entirety. In accordance with the rules of the Commission the undersigned issues the appropriate certification of representative (attached hereto) to ISWA.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: June 30, 1983
Trenton, New Jersey

13/ The testimony linking Chamona to the flyer was elicited by ISWA. ISWA effectively rebutted the presumption which the undersigned, in initially reviewing the instant matter, had accorded to this objection based on the documentary submissions by District 1199-J.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

Jersey City Medical Center,

Public Employer,

-and-

International Service Workers of America,

Petitioner,

-and-

District 1199-J,

Intervenor.

DOCKET NO. RO-83-30

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the undersigned in accordance with the New Jersey Employer-Employee Relations Act, as amended, and Chapter 11 of the Commission's Rules and Regulations; and it appearing from the Tally of Ballots that an exclusive representative for collective negotiations has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefore;

Pursuant to authority vested in the undersigned, IT IS HEREBY CERTIFIED that

International Service Workers of America

has been designated and selected by a majority of the employees of the above-named Public Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the said representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. Pursuant to the Act, the said representative shall be responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership; the said representative and the above-named Public Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment; when an agreement is reached it shall be embodied in writing and signed by the parties; and written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: All food service workers in the Food Service Department employed by the Jersey City Medical Center excluding all other employees including managerial executives, supervisory employees, confidential employees, craft employees, professional employees and police within the meaning of the Act.

Carl Kurtzman, Director
of Representation

DATED: Trenton, New Jersey
June 30, 1983

H. O. NO. 83-12

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY MEDICAL CENTER,

Public Employer,

-and-

INTERNATIONAL SERVICE WORKERS OF AMERICA, Docket No. RO-83-30

Petitioner,

-and-

LOCAL 1199-J, NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Intervenor.

SYNOPSIS

A Commission Hearing Officer recommends that the Director set aside an election and order a new election.

She found that the public employer did not submit the election eligibility list of voters to the Director and the parties to the election in a timely fashion pursuant to N.J.A.C. 19:11-9.6(a). She found that under the facts of this case there was not substantial compliance with the Excelsior rule based on an evaluation of the NLRB cases.

She also found that supporters of the successful party reproduced the Commission's sample ballot, marked it to indicate a preference for that party and mailed it to voters with campaign literature. She found that to be a violation of N.J.A.C. 19:11-9.1(h).

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

H.O. NO. 83-12

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY MEDICAL CENTER,

Public Employer,

-and-

INTERNATIONAL SERVICE WORKERS OF AMERICA, Docket No. RO-83-30

Petitioner,

-and-

LOCAL 1199-J, NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Intervenor.

Appearances:

For the Petitioner
Schneider, Cohen, Solomon & DiMarzio, Esqs.
(J. Sheldon Cohen, of Counsel)

For the Intervenor
Greenberg, Margolis, Zeigler & Schwartz, Esqs.
(Mark S. Tabenkin, of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On September 8, 1982, a Petition for Certification of Public Employee Representation was filed with the Public Employment Relations Commission ("Commission") by the International Service Workers of America ("ISWA") seeking to represent a unit of nonsupervisory food service employees employed by the Jersey City Medical Center ("Center"). These employees are currently represented by District 1199-J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199-J"), which intervened in the proceeding pursuant to N.J.A.C. 19:11-2.7, on the basis of a current contractual agreement.

Director of Representation Proceedings, Carl Kurtzman, caused an administrative investigation to be conducted into the petition and on October 29, 1982 directed that an election be conducted pursuant to the provisions of the Commission's rules. He directed that the election be conducted among the employees in a unit consisting of: all food service workers in the Food Service Department, but excluding all other employees including managerial executives, supervisory employees, confidential employees, craft employees, professional employees and police within the meaning of the Act. See: In the Matter of Jersey City Medical Center, D.R. No. 83-19, 8 NJPER 642 (¶ 13308 1982).

On December 3, 1982 an election was conducted with the following result:

Approximate Eligible Voters	86
I.S.W.A.	40
District 1199-J	34
Neither	2
Challenges	0

On December 7, 1982, District 1199-J filed objections to the election pursuant to N.J.A.C. 19:11-9.2(h). District 1199-J argued that the election should be set aside because the election eligibility list was not timely filed as required in N.J.A.C. 19:11-9.6(a) and because the Commission's sample ballot suggesting Commission endorsement of ISWA was reproduced and mailed to voters in violation of N.J.A.C. 19:11-9.1(b).

On January 21, 1982 District 1199-J submitted affidavits to the Director in support of the allegations contained in the objections. Based on that submission the Director determined that in accordance with N.J.A.C. 19:11-9.2(h) and (i), District 1199-J had met its burden of providing sufficient evidence of objectionable conduct to support

a prima facie case. The Director also concluded that there were substantial and material factual issues which more appropriately would be resolved at a hearing.

Hearings were held before the undersigned Hearing Officer on March 4 and March 11, 1983 in Newark, New Jersey. Both parties filed post hearing briefs by April 21, 1983. The final transcript of the proceeding was received on April 26, 1983. Upon the entire record in this proceeding, the Hearing Officer finds:

The Jersey City Medical Center is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (the "Act"), is the employer of the employees who are the subject of this proceeding and is subject to the provisions of the Act. 1/

The International Service Workers of America and District 1199-J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO are employee representatives within the meaning of the Act and are subject to the provisions of the Act.

Pursuant to a direction of election an election was scheduled for December 3, 1982.

On November 22, 1982 John J. Doyle, Chief of Personnel and Labor Relations for the Medical Center mailed to the Commission an election eligibility list for the election and simultaneously mailed copies of the list to the employee organizations' counsels. The list was mailed to counsel for District 1199-J in an envelope post marked "1 p.m., Nov. 23, 1982" (I-4 in Evid) and was received by him on

1/ The employer did not participate in this procedure.

November 24, 1983. November 24, 1982 was a Wednesday, the day prior to Thanksgiving and nine days prior to the election.

One or two days prior to the election (Tr. I-31) a mailing was sent to a number of the employees in this unit by Stephen Chanona, a cook at the medical center. The actual number sent is unknown. When Chanona was asked where he received the mailing list he replied:

> From the office in the kitchen. There is a mailing list of all employees there. That is what I used, basically, to send out whatever addresses I could get, I couldn't get the addresses on every employee but I sent out as much as I can with addresses that I had available to me.
> (Tr. II-5-6)

The address on the envelope was hand written and it contained no return address. (I-2 in Evid.) The envelope contained two pieces of paper. One item was a piece of campaign literature urging food service workers (I-1A in Evid.):

> THROW OUT 1199-J!!!
> VOTE--International Service Workers of America."
> (See Appendix A)

and was "from, concerned Food Service Workers of the Jersey City Medical Center." Chanona testified that the concerned Food Service Workers were "all" the employees who wanted a change who were supporting him. He testified:

> I used that phraseology because of concerned Food Service Workers because instead of listing all the employees names on this ballot which would take too much time, myself being shop steward for 1199 who was the forerunner in taking out 1199, voting out 1199 and that is why I used that phraesology, Concerned Food Service Workers because all the employees who wanted a change were supporting me instead of having all the names printed on a piece of paper, I just used

> that phraseology of concerned Food Service Workers. Those are the employees that were dissatisfied with 1199. (Tr. II-3,4) (Emphasis added)

He testified that he prepared I-1A himself and had it typed by friends.

The second enclosure was a complete reproduction of the Commissions Notice of Election which incorporates a sample ballot. (I-1B in Evid.) At least some of the ballots had an "x" in the square indicating a choice for "International Service Workers of America." 2/ (Appendix B)

N.J.A.C. 19:11-9.6(a) provides that the public employer is required to file an election eligibility list simultaneously with the director of representation, and the employee organizations "no later than 10 days prior to the date of the election."

N.J.A.C. 19:11-9.5(b) provide:

> Failure to comply with the requirements of this section shall be grounds for setting aside the election whenever proper objections are filed...

N.J.A.C. 19:11-9.6 is modeled after and applied consonantly with the policy and precedent of the National Labor Relations Board

2/ Four witnesses who were public supporters of ISWA testified they received the material without an "x" in the box (Tr II-31, 35, 56 and 61). Two witnesses testified they received ballots with an "x", and testified that other employees advised them they received ballots with an "x" (Tr I-16,26). One of the witnesses who received the marked ballot was Medica Martin who was the actual recipient of I-1A & 1B and I-2. She was not a public supporter of 1199J; the other witness was. One reason I credit the Martin testimony is that she was the only witness who testified on this issue who was publicly neutral as to the election. Furthermore, this was a piece of campaign literature not a public service mailing by the Commission. The purpose of the mailing was to convince voters to vote for ISWA. It is illogical that Chanona, working completely on his own, but representing all of the people who were dissatisfied with 1199, would not have indicated a preference on the ballot.

("NLRB"). In Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970), our Supreme Court recommended that the decisions of the NLRB serve as the model for decisions and policies interpreting the New Jersey Employer-Employee Relations Act, especially in the area of representation proceedings. The Court's recommendation is particularly apropos here since our rule was intended to embody a longstanding NLRB practice.

In Excelsior Underwear, Inc., 156 NLRB 1236, 61 LRRM 1217 (1966), the NLRB announced its requirement that an employer submit an election eligibility list which the Regional Director would in turn make available to all parties. The Board reasoned that the new requirement would foster the goal of an informed electorate and a fair election. It specifically stated: "Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." Supra at 1218. (Emphasis supplied). 3/

Counsel for ISWA argues that the NLRB has refused to set aside elections when employers have substantially complied with the Excelsior rule even though the stated deadline may not have been met. The Commission has adopted the NLRB's refusal to apply the rule mechanically in interpreting N.J.A.C. 19:11-9.6. The Commission refused to set aside

3/ Litigation subsequently arose concerning the validity of the Excelsior rule since the Board created it through adjudication rather than rule-making. In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), a majority of the United States Supreme Court held that although the Board had improperly avoided the procedural safeguards of rule-making in announcing the Excelsior requirement, it had validly imposed that requirement in cases involving subsequent respondents. The Court approved the purposes behind the requirement. See, R. Gorman, Basic Text on Labor Law, pp. 16-17 (1976). Because the Commission's Excelsior list requirement was promulgated as a rule, rather than through adjudication, we have obviated the sticky procedural questions raised in NLRB v. Wyman-Gordon Co., supra.

an election where an employer substantially complied with the rule in County of Monmouth, P.E.R.C. No. 82-80, 8 NJPER 134 (¶ 13058 1982). In Monmouth the Commission cited approvingly the following quote from Program Aides Co., Inc., 163 NLRB 54, 65 LRRM 1244, 1244-1245 (1967),

> ...[W]e find nothing in our decision in Excelsior which would require the rule stated therein to be mechanically applied....In these circumstances, we find that the Union was afforded sufficient opportunity to communicate with employees prior to the election and therefore the Employer-Petitioner has substantially complied with the requirements of the Excelsior rule.
> (Emphasis supplied)

While the undersigned agrees with Counsel for ISWA as to the standard to be applied, I do not agree with his application of the standard to the facts in the instant matter.

The NLRB has set out certain objective standards for compliance in examining "substantiality" of compliance. See NLRB v All-Weather Architectural Aluminum, 111 LRRM 2981 (9th Cir. 1982) ("All-Weather"). In All-Weather the Court cited approvingly, Wedgewood Industries, Inc., 2422 NLRB 1190, 1191, 101 LRRM 1597 (1979) which set out the following objective factors to be considered in examining the substantiality issue:

(1) The number of days the list was overdue,

(2) The number of days the union had the list prior to the election, and

(3) The number of eligible voters in the unit.

The Court noted in All-Weather "Substantial failures to comply have

been found where the list was not provided until a few days before the election." (111 LRRM at 2982).

The first factor listed above has little application here because under the Excelsior rule the list must be supplied seven days after approval of the election agreement. In All-Weather the list was two months overdue (after signing the consent) but neverless still prior to the election.

Here the list was technically available to the parties nine days prior to the election but the day before Thanksgiving. While the ten days does not mean ten "work" days, I do feel that it is a factor to be considered when examining whether there has been "substantial" compliance with the rule. The undersigned does not recommend that the Director find that to be substantial compliance. Furthermore, since the unit consists of full time and part time employees who work many different shifts, the unions' effective use of the lists in communicating with employees is more complicated. The undersigned feels they should have had the complete ten days.

N.J.A.C. 19:11-9.1(b) provides:

> The reproduction of any document purporting to be a copy of the commission's official ballot which suggests either directly or indirectly to employees that the commission endorses a particular choice may constitute grounds for setting aside an election upon objections properly filed.

The Commission's rule is patterned after Allied Electric Products, 109 NLRB 1270, 34 LRRM 1538 (1954) in which the National Labor Relations Board noted that it was:

> ...concerned with the protection of its procedures designed to provide fair elections.

> The Board particularly looks with disfavor upon any attempt to misuse its processes to secure partisan advantage [citations ommitted], and especially does it believe that no participant in a Board election should be permitted to suggest either directly or indirectly to the voters that this Government Agency endorses a particular choice. [emphasis added] Id.

The Board went on to state that:

> ...it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its fact ... [citations ommitted] Id. at 1539

In Englewood Board of Education, D.R. No. 82-47, 8 NJPER 251 (13111 1982) req. for rev. den. P.E.R.C. No. 82-93, 8 NJPER 275 (¶ 13120 1982) the Director noted:

> The Board has held that any alteration of a Board document which falls within the purview of the Allied Electric rule constitutes a per se violation. 2/
>
> The concern of the Board for the integrity of its processes is equally shared by the undersigned in regard to the Commission's election procedures. Further, we look to the Board's policies for guidance Lullo v. IAFF, Local 1066, 55 N.J. 409 (1970), as it affords consistency and predictability, particularly in the area of election misconduct. 3/ The undersigned can discern no valid distinguishing reason why the Commission should deviate from the rule set forth in Allied Electric, supra, which is designed to protect the integrity of the election process.

2/ Superior Knitting Corp., 112 NLRB 984, 36 LRRM 113 (1955); The DeVilbiss Co., 114 NLRB 945, 37 LRRM 1061 (1955); GAF Corp., 234 NLRB 1209, 97 LRRM 1417 (1978); Mercury Industries, Inc., 238 NLRB 896, 99 LRRM 1391 (1978); contra, Member Penello's dissent, GAF, supra and Mercury, supra, in which Penello objects to the rule being applied in a "mechanical" fashion.

3/ See In re Tp. of East Windsor, D.R. No. 79-13, 4 NJPER 445, (¶ 4202 1978), applying principles of Peerless Plywood Co., 107 NLRB 427, 33 LRRM 1151 (1975)."

Counsel for ISWA argues this matter does not fall within the purview of Allied Electric because the sample was "unaltered" and that a participant in the election - ISWA - was not directly or indirectly responsible but rather an independent third party. He argues that the Allied rule requires setting aside the election only if an altered Board document is used by a successful party.

As indicated above, the undersigned credited the testimony of the witness who testified she received an altered ballot.

Chanona testied that he was the "forerunner in taking out 1199" and that he sent the "ballot" on behalf of all the employees who wanted a change." He denied he had any assistance from ISWA in this matter.

While this individual denied he acted as an agent of the successful party in this matter, the undersigned believes that under the facts of this case (an employee representing "all" the employees who support the successful party) that the protection of the integrity of the Commission's election procedures is so important that the Director should set aside the election. 4/

The Commission noted in Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶ 11258 1980):

> The Commission recognize[s] that election objections can encompass a broad range of abuses. In

4/ I would distinguish a case involving Commission documents from cases cited by Council for ISWA where an employee's electioneering does not create an agency relationship between the union and the employee. These cases involve disputes among partisans in an election. N.L.R.B. vs. Morgan Health Care Center, Inc., 618 F. 2d 127, 129 (1st Cir., 1980); Owens-Corning Fiberglass Corp., 179 N.L.R.B. 219, 223 (1969), enforced 435 F. 2d 960 (4th Cir., 1970). Here we are concerned with the neutrality of the Commission's election procedures.

> reviewing the spectrum of possible election campaign misconduct, it would be unrealistic to require the same type of proof or apply any standard in an inflexible manner. To rigorously apply one test would not provide for the varying severity of election abuse and the ability of the parties to counteract certain types of misconduct or their own during the campaign. The latter part of the standard ... is intended to provide the flexibility essential to the Commission if it is to meet its responsibility to regulate the conduct of election in a manner which achieves the goal that the tally of ballots is a reflection of the free choice of employees. The standard recognizes that elections should not be easily or routinely overturned but that types of conduct which have a strong tendency to jeopardize the atmosphere necessary for a fair election will not be condoned.

Therefore, in view of the timing of the mailing of the eligibility list and the use of the Commission's election notices in this case, I would recommend that the Director set aside the election of December 3, 1982 and direct a new election among food service workers in the Food Service Department of the Jersey City Medical Center in order that the employees be provided with an opportunity to determine whether they wish to be represented by the International Service Workers of America or District 1199-J, National Union of Hospital and Health Care Employees, AFL-CIO.

Respectfully submitted,

Joan Kane Josephson
Hearing Officer

DATED: May 5, 1983
Trenton, New Jersey