

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

In the Matter of

TOWNSHIP OF EAST WINDSOR,

Public Employer,

-and-

DOCKET NO. RO-78-148

MERCER COUNCIL #4, NEW JERSEY  
CIVIL SERVICE ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation, ruling upon post-election objections, directs that results of a previous Commission election be set aside due to an improper meeting conducted by the employer within twenty-four hours of the election and orders that a second election be conducted among employees. The employer scheduled and convened a meeting among the employees concerning the election on "company time" within twenty-four hours of the commencement of the Commission election. The Director, citing the Peerless Plywood rule adopted by the National Labor Relations Board, finds that a meeting conducted by either an employer or an employee organization among employees within twenty-four hours of the commencement of an election and on "company time", improperly interferes with the sobriety of choice involved in a Commission election. The Director determines that there is no basis to distinguish between the applicability of the Peerless Plywood rule in the private sector with the applicability of such rule to the public sector where Peerless Plywood conduct is present.

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Appearances:

For the Public Employer,  
Michael Pane, Esq.

For the Petitioner,  
Fox & Fox, Esqs.  
(Richard H. Greenstein, of Counsel)

DECISION AND DIRECTION OF ELECTION

Pursuant to an Agreement for Consent Election dated April 17, 1978, entered into between Mercer Council #4, New Jersey Civil Service Association (the "Petitioner") and the Township of East Windsor (the "Township"), a secret ballot election was conducted by the Public Employment Relations Commission (the "Commission") on April 27, 1978, among all non-supervisory white collar and blue collar Township employees. The tally of ballots revealed that the Petitioner did not receive a majority of the valid ballots cast.

By letter dated April 28, 1978, the Petitioner filed post-election objections, supported by an affidavit. The Petitioner alleged that a pre-election speech by the employer had the effect of coercing the employees, thereby unlawfully interfering with employee free choice.

In accordance with N.J.A.C. 19:11-9.1(i), the undersigned, on June 7, 1978, caused an investigation to be conducted into the matters and allegations raised by the objections, in order to determine the facts. Pursuant to a request by Commission staff agent Arnold H. Zudick on July 17, 1978, the Township, on August 10, 1978, provided additional information regarding the events leading up to the election. The Township submitted a copy of a tape recorded by the Township at the pre-election meeting, and it submitted affidavits concerning the meeting. On September 5, 1978, the undersigned advised the parties that the information obtained in the investigation revealed the following:

1. The Township of East Windsor is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), is the employer of the employees involved in this proceeding, and is subject to the Act's provisions.

2. Mercer Council #4, New Jersey Civil Service Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. On April 17, 1978, the parties entered into an Agreement for Consent Election. A secret ballot election was

thereafter conducted by the Commission on April 27, 1978 beginning at 10 a.m. The Tally of Ballots revealed that of approximately 46 eligible voters, 42 votes were cast, of which 20 votes were cast for the Petitioner, 20 votes were cast against any employee representative, and 2 votes were challenged. <sup>1/</sup>

4. On April 28, 1978, the Petitioner advised the undersigned in writing that it objected to the conduct of certain Township officials prior to the election. The Petitioner requested that the election be "set aside due to the improprieties of said Township officials which directly affected the outcome of said election." The alleged improprieties cited are: (1) the calling by Township officials of an obligatory meeting; (2) the distribution of a flier at the meeting; (3) the reference to the flier at the meeting; and (4) the flier "is clearly an impermissible intrusion upon the representation election process" and "seeks to scare potential unit members..."

<sup>1/</sup> The two challenged ballots were challenged by the Commission staff agent who conducted the election. The two voters were challenged because their names did not appear on the eligibility list submitted by the Township to the Commission and the Petitioner prior to the election. The employer's payroll records indicate that the two individuals were hired on April 19, 1978, the day after the eligibility cut-off date of April 18, 1978, which cut-off date had been agreed to by the parties in the Agreement for Consent Election.

Regarding the two challenged ballots, the Petitioner stated at the tally of ballots that the two challenged employees were ineligible. Subsequently, the Township, by letter to the Commission, verified that the employees were not employed by the Township as of the eligibility cut-off date and the Township stated that these employees were ineligible. The application of N.J.A.C. 19:11-9.2(c) in this matter renders the two employees in question ineligible to vote. Accordingly, noting the absence of any substantial and material factual issue concerning this matter, the undersigned finds that Raymond Thompson and John Rindt were ineligible to vote in the election and their votes shall not be tallied.

5. Subsequently, the Township provided certain documentation to the Commission which established that Township officials called for and conducted a meeting concerning the election among the petitioned-for employees at approximately 10 a.m. on April 26, 1978, the day before the scheduled election. The documentation establishes that, at the meeting, the mayor of the Township made certain statements concerning the election and distributed printed copies of alleged factual schedules comparing salaries and benefits given to employees of the Township covered by a PBA agreement with those given to employees who were not covered by a collective negotiations agreement.

6. The Township also provided a tape recording which contains the mayor's speech followed by a question and answer period. During the course of the investigation the Township orally advised the Commission agent that the purpose of the speech was to provide information and to encourage employees to vote their own convictions.

In the September 5 letter, the undersigned, after reviewing the affidavits and documentation obtained in the investigation, the tape recording, a copy of the flier, and the parties' positions, stated that he was inclined to apply the precedent of the National Labor Relations Board in Peerless Plywood Co.<sup>2/</sup> to the instant matter, and to set aside the election. The undersigned stated that "...the critical element herein is not the content, or intent of the speech nor the alleged and disputed obligatory nature of the meeting, but that the meeting occurred at all. One of the

<sup>2/</sup> 107 NLRB 427, 33 LRRM 1151 (1953)

basic principles of labor law enunciated by the National Labor Relations Board is that an election speech made by either the employer or the union on employer time, to a massed assembly of employees, within twenty-four hours of a scheduled election, is inherently coercive, and violation of this election rule will cause an election occurring after such a speech to be set aside and a second election directed, whenever valid objections are filed."

The undersigned provided the parties with a copy of Peerless Plywood, and cited the following portions:

It is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this matter obtains the last most telling-word.

\* \* \*

Accordingly, we now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions alike will be prohibited from making election speeches on company time

to massed assemblies of employees within twenty-four hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be aside whenever valid objections are filed. 33 LRRM [at 1151-1152]

The undersigned noted, in his observations to the parties, that the Supreme Court in Lullo v. International Association of Firefighters, 55 N.J. 409 (1970), stated that the Commission should utilize Board law and policy as a guide to its own decisions.

The parties were provided with a period of time to study the Peerless Plywood decision, and afforded an opportunity, if desired, to provide legal argument distinguishing or rendering inapplicable the Peerless Plywood decision to New Jersey public sector representation proceedings.

On September 20, 1978, the Township filed a timely brief in response to the undersigned's letter. <sup>3/</sup> In its Statement of Facts, the Township emphasizes that attendance at the meeting was entirely voluntary on the part of employees. <sup>4/</sup> Additionally, the Township stated that it "decided that it would be appropriate to make some sort of statement to the employees, since the Union had held campaign meetings and the Township had done nothing to communicate with the employees." In this regard, the Township apparently

3/ The Petitioner has not provided a response.

4/ The Township also stated that a "significant" number of employees who attended were on their own time. The undersigned, in his letter dated September 5, 1978, found that the voluntary or obligatory nature of the meeting was not controlling under Peerless Plywood.

believes that the imminency of the election made it necessary to conduct its meeting either one or two days before the election.

The Township contends that the election should not be set aside, and, in specific response to the undersigned's September 5 letter, argues that (1) the Commission is not bound to apply, nor should it apply, NLRB private sector rulings unquestioningly in New Jersey public law cases; (2) the NLRB would not apply the Peerless Plywood rule to the facts in the instant matter; and (3) if the Peerless Plywood rationale is applied to representation proceedings, it should not be applied retroactively and more appropriately should be applied only through the administrative rule-making procedure.

The undersigned has given careful consideration to the Township's positions, and observes and concludes the following:

The Commission, through its administrative rules, has established procedures whereby an election may be set aside where pre-election conduct has been found to have interfered with the free choice of employees. In both the public and private sectors, the concept of employee free choice in the selection or rejection of a representative is interwoven with the responsibility of the governmental agency to insure that the election choice is exercised under "laboratory conditions." If the conduct surrounding an election has not afforded employee free choice, the Commission's rules provide for the direction of another election.

The Commission has chosen not to define by specific rule the conduct that interferes with free choice. To do so would of



necessity require that the Commission predict every nuance that might constitute election interference and then define by rule such prohibited conduct with either great specificity or sweeping generality. The rule making function in the first instance would be an impossibility; the second rule-making function would of necessity be of such nature as to intrude upon and chill permissible behavior.

Thus, the Commission has left determinations of election interference to its adjudicatory functions. Where a party's conduct has interfered with employee free choice a direction of a second election is in order. While the conduct constituting interference may have been unintended, the Commission's ultimate concern is with the ability of employees to exercise their choice in an atmosphere that is free of interference. The protection of employee free choice requires that specific conduct constituting interference with free choice be remedied even in those instances where the specific objectionable conduct has not been put to an adjudicatory test in earlier Commission decisions.

The adoption of the established federal private sector policy of Peerless Plywood does not mean that all pre-election conduct within twenty-four hours of an election is flatly prohibited. Peerless Plywood stands for the proposition that an employer or an employee organization meeting conducted among employees within twenty-four hours of an election and on "company time" constitutes conduct which improperly interferes with the sobriety of choice involved in

the election. The NLRB, in applying this rationale, has looked to whether the facts in the particular matter fall within the Peerless doctrine, or whether the facts indicate exceptional circumstances warranting further examination, and perhaps a different conclusion.

The Township herein argues that the Peerless rationale would not be applied by the Board to the circumstances herein, insofar as the meeting was entirely voluntary and there was minimal incursion into the twenty-four hours. The cases cited by the Township analyze instances which are exceptions to the factual predicates of Peerless in that the meetings commenced when they would not be in violation of Peerless. In these cases the Board excused any specific violations of Peerless prohibited conduct as "accidental" and/or "inconsequential" intrusions into the twenty-four hour period. <sup>5/</sup>

<sup>5/</sup> In Granite State Veneer, 123 NLRB 1497, 44 LRRM 1154 (1959), the employer commenced a speech before the twenty-four hours but the speech was not concluded before an accidental intrusion of several minutes into the twenty-four hour period. In WATE, Inc., 123 NLRB 301, 43 LRRM 1422 (1959), an employer's speech was adjourned before the twenty-four hour period but post-adjournment conversations between the employer and some employees, which were initiated by the employees, intruded into the twenty-four hour period by 10 to 25 minutes. The Board characterized these conversations as "pre-election talk, normally to be expected after a speech, rather than an extension of the speech itself." In Nebraska Consolidated Mills, 165 NLRB 639, 65 LRRM 1361 (1967), an extemporaneous meeting of employees and union representatives occurred during the twenty-four hour period which was voluntarily attended and on employee time. The circumstances also involved a 5 minute intrusion into company time. The Board first noted that the Peerless rule does not prohibit meetings on or off company premises during the twenty-four hour period where attendance is voluntary and the employees are not on company time. The Board analogized the 5 minute intrusion into company time to the circumstances involved in WATE and Granite State Veneer, characterizing the circumstances therein

The meeting in the instant matter, however, was scheduled and conducted entirely within the twenty-four hour period; thus, circumstances which might give rise to a Peerless exception, e.g., the length of intrusion into the twenty-four hour period, the inadvertance of the intrusion, the nature of the discussion intruding into the twenty-four hour period, or the voluntary nature of attendance, are not applicable herein.

The Peerless Plywood rule is sound and established Board policy, and the Board's conclusion that Peerless-type conduct constitutes improper interference is reasonably grounded. The undersigned sees no basis, nor has any basis been advanced, that would distinguish the applicability of private sector approach to public sector approach where Peerless-type conduct is present. Like the Board, the Commission will not apply Peerless principles with myopic vision. Additionally, as a rule of general applicability, Peerless provides the framework to assist all parties in the public sector in gauging their appropriate campaign conduct. Consistency between the private sector and public sector in this context of pre-election conduct is the favorable procedure since it serves to harmonize the standard of conduct in both spheres.

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5/ (Cont'd)

as involving "accidental and inconsequential extension of speeches and discussions...." In a fourth case cited by the Township, Rodac Corporation, 231 NLRB No. 29, 95 LRRM 1608 (1977), the Board applied Peerless to circumstances where an employer's speech commenced prior to the twenty-four hour period and intentionally intruded 7 minutes into the twenty-four hour period.

Accordingly, the undersigned shall set aside the first election and direct a second election among the employees herein in the unit described below. <sup>6/</sup>

Pursuant to N.J.A.C. 19:11-2.6(b)(3), the undersigned directs that an election be conducted among the employees described in footnote 6. The election shall be conducted no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth below who were employed during the payroll period of April 18, 1978, including employees who did not work during that period because they were ill, on vacation or temporarily laid-off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees

6/ Included: All white collar and blue collar employees employed by the Township of East Windsor, including employees in the following titles: Building Inspector, Tax Collector, Animal Control Officer, Sanitation Laborer, Clerk, Sanitation Driver, Accounting Clerk, Radio Officer, Clerk/Typist, Planning Board Secretary, Crossing Guard, Sanitation Foreman/Driver, Custodian, Assessment Clerk, Roads Worker, Records Clerk, Payroll Clerk, Assistant Mechanic, Juvenile Secretary, Tax Assessor, Account Clerk, Mechanic, Deputy Court Clerk, Building Inspector, Recreation Clerk, Clerk/Switchboard, Plumbing Inspector, Engineering Inspector.

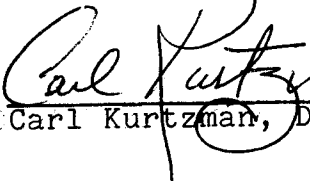
Excluded: Managerial executives, police, supervisors within the meaning of the Act, professional employees, casuals, craft employees, and confidential employees, and those employees in the following list of titles: Housing Assistant, employees in the Township Clerk's office, Township Manager, Recreation Director, Chief Building Inspector, Deputy Clerk, Township Clerk, Judge, Roads Supervisor, Manager's Secretary, Administrative Assistant, Municipal Court Clerk, Finance Director, Township Attorney, Housing Inspector, Township Engineer, Prosecutor, Welfare Director, Secretary to Chief of Police, and substitute employees.

who quit or were discharged for cause since the designated period and who have not been rehired or reinstated before the election date. <sup>7/</sup>

Those eligible to vote shall vote whether or not they desire to be represented for the purposes of collective negotiations by Mercer Council #4, New Jersey Civil Service Association.

A majority of valid ballots cast shall determine the results of the election. The election directed herein shall be conducted in accordance with the Commission's Rules and Statement of Procedure.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Carl Kurtzman, Director

DATED: October 19, 1978  
Trenton, New Jersey

<sup>7/</sup> The election eligibility list provided to the Commission for utilization during the prior election shall be utilized as the election eligibility list for the election directed herein, as modified by any submission provided by the Township amending such eligibility list in accordance with the above and reflecting the names of those employees who have quit or were discharged for cause since the designated period. Such list shall be provided within ten (10) days prior to the election in accordance with the procedures set forth in N.J.A.C. 19:11-9.6.