P.E.R.C. NO. 87-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK REDEVELOPMENT AND
HOUSING AUTHORITY,

Respondent,

-and-

ESSEX COUNCIL 1, NEW JERSEY
CIVIL SERVICE ASSOCIATION

Docket Nos. RO-86-62 and
CO-85-220-119

Charging Party,

-and-

LOCAL 305, SERVICE EMPLOYEES
INTERNATIONAL UNION,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge and denies a request to review a representation election filed by Essex Council No. 1, New Jersey Civil Service Association against the Newark Redevelopment and Housing Authority and Local 305, Service Employees International Union. The charge and request for review alleged that the Authority and Local 305 violated the New Jersey Employer-Employee Relations Act when they threatened employees with discharge for supporting Council No. 1; denied Council No. 1 access to the workplace and when the Authority favored Local 305. The Commission, in agreement with the Director of Representation and Unfair Practices, finds that Council No. 1 did not prove these allegations by a preponderance of the evidence.

P.E.R.C. NO. 87-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK REDEVELOPMENT AND
HOUSING AUTHORITY,

Respondent,

-and-

ESSEX COUNCIL 1, NEW JERSEY
CIVIL SERVICE ASSOCIATION

Docket Nos. RO-86-82 and
CO-86-220-119

Charging Party,

-and-

LOCAL 305, SERVICE EMPLOYEES
INTERNATIONAL UNION,

Intervenor.

Appearances:
For the Respondent, Gerald L. Dorf, P.A. (Gerald L. Dorf and Lawrence Henderson, Of Counsel)

For the Charging Party, Harper, Hansbury & Martin, Esqs. (Frederic M. Knapp, Of Counsel) and Fox & Fox, Esqs. (Dennis J. Alessi, Of Counsel)

For the Intervenor, Oxfeld, Cohen & Blunda, Esqs. (Arnold S. Cohen, Of Counsel)

DECISION AND ORDER

On November 25, 1985, Essex Council No. 1, New Jersey Civil Service Association ("Council No. 1") filed a Petition for Certification of Public Employee Representative, accompanied by an adequate showing of interest,[1/] with the Public Employment

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1/ See N.J.A.C. 19:11-1.2

Relations Commission. Council No. 1 seeks to represent the employees of the Newark Redevelopment and Housing Authority ("Authority") currently represented by Local 305, Service Employees International Union, AFL-CIO ("Local 305").[2/] On January 30, 1986, the parties entered into a consent election agreement. On February 6, 1986, Director of Representation Edmund G. Gerber approved the agreement and directed that the election be conducted on February 21, 1986.

On February 13, 1986, Council No. 1 filed an unfair practice charge against the Housing Authority and Local 305. The charge alleges the Authority and Local 305 violated the New Jersey Employer-Employee Relations Act, specifically that the Authority violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7) and Local 305 violated N.J.S.A. 34:13A-5.4(b)(1), (2) and (5), when they "created an atmosphere which totally precludes the possibility of having a fair and impartial representation election." The charge specifically alleges that the Authority permitted Local 305 representatives to meet with bargaining unit members at the workplace during work hours; (2) permitted employees to be excused from work to attend such meetings; and (3) permitted Local 305

2/ On November 4, 1985, Commission designee Alan R. Howe granted interim relief restraining the Authority and Local 305 from "executing or giving effect to any collective negotiations agreement reached between [them] or to negotiate further, so long as the question concerning representation exists." I.R. No. 86-6, __ NJPER ___ (¶_____ 1985).

officers and representatives to leave work to attend such meetings, but denied Council No. 1 the same privileges and access to meet with bargaining unit members at the workplace. The charge further alleges that Local 305 and Authority representatives threatened employees with termination if they voted for Council No. 1 in the representation election.

Council 1 sought to block the election pending resolution of the unfair practice charge. Following an interim relief hearing, Director Gerber denied this request since the Authority and Council 1 had reached an agreement granting Council 1 access to the Authority's premises and Council 1 did not establish that any employees were threatened with discharge if they voted for Council No. 1.

On February 18, 1986, a Complaint and Notice of Hearing issued on the unfair practice charge. On February 24, 1986, both respondents filed Answers denying the charge's allegations.

On February 21, the representation election was conducted. There were 532 eligible voters: 297 voted for Local 305, 153 voted for Council No. 1 and 4 voted for no representation.

On February 27, Council No. 1 filed timely objections to the conduct of the election seeking to set aside the election results. It contends that the election was unfair because (1) the Authority threatened employees with termination if they voted for Council No. 1; (2) the employer favored Local 305 by (a) granting their representatives unlimited access to the workplace and denying

Council No. 1 similar opportunities and (b) supplying Local 305 with vehicles to transport employees to the polls; (3) Local 305 promised employees $1,000 if it won the election; (4) Local 305 supplied alcohol to voters; and (5) a Council No. 1 election agent was not permitted to use a copy of the Commission's list of eligible voters to challenge ballots.

On March 27, 1986, the Director issued a Notice of Hearing and Order consolidating the representation and unfair practice matters. He determined that a hearing was required to resolve the following issues: alleged threats of termination, alleged unequal access and the alleged use of Authority vehicles by Local 305.

On April 14, May 6, May 7 and May 16, 1986, the Director conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. At the conclusion of Council No. 1's case, Director Gerber dismissed the allegation that employees were threatened with termination if they voted for Council No. 1. He determined that no competent evidence was introduced to support this claim.

On July 17, the Director issued his decision on election objections and a recommended report and decision on the unfair practice complaint. D.R. No. 87-1, H.E. No. 87-5, 12 NJPER ___ (¶_____ 1986). He found that Council 1 failed to prove that Local 305 used Authority vehicles to transport workers to the polls and that Council No. 1 was granted equal access to the worksite. Therefore, he dismissed the election objections and recommended

dismissal of the Complaint. On July 31, 1986, the Director issued a Certification of Representative designating Local 305 as majority representative of "all administrative, clerical and maintenance employees of the Newark Redevelopment and Housing Authority."[3/]

On July 31, Council No. 1 filed exceptions to the Hearing Examiner's recommended decision and a request for review of his dismissal of the election objections.[4/] It contends that its request for review should be granted because a substantial question of law is presented: whether the incumbent union's use of employer vans to transport voters on election day violates the Act. It also contends the Director erred in (1) concluding that the agreement between Council No. 1 and the Authority concerning access cured any earlier denial of access; (2) finding that the Authority provided Local 305 with the schedule of when Council No. 1 was to meet with employees; (4) finding that its witnesses were not credible; (5)

3/ Commission designee Alan R. Howe had earlier granted interim relief restraining the Authority and Local 305 from "executing or giving effect to any collective negotiations agreement reached between [them] or to negotiate further, so long as the question concerning representation exists." I.R. No. 86-6, __ NJPER ___ (¶_____ 1985). The Director, therefore, stated that either party may seek to vacate the order pursuant to [my] decision." Hearing Examiner Howe subsequently vacated the restraint, I.R. No. 87-1, 12 NJPER 632 (¶17238 1986) and Chairman Mastriani denied Council No. 1's application for a stay.

4/ Pursuant to N.J.A.C. 19:14-8.1, the Commission reviews the Hearing Examiner's recommended decision concerning the unfair practice complaint. However, review of the decision dismissing election objections is discretionary. N.J.A.C. 19:11-8.2.

barring Oliver Cunningham's testimony because he violated the sequestration order; (6) excluding photographs of vans purportedly used by Local 305 on election day; and (7) excluding testimony concerning the prior disciplinary record of a witness.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 8-16) are accurate. We adopt and incorporate them here.

We agree with the Director that the Complaint should be dismissed. Council No. 1 simply did not prove its allegations. No evidence, other than hearsay, was introduced to support the allegations of threats of discharge. It was, therefore, properly dismissed. Weston v. State, 60 N.J. 36 (1972); Passaic County (Preakness Hospital), P.E.R.C. No. 85-109, 11 NJPER 305 (¶16108 1985). Nor does the record establish that the Authority either granted preferential access or supplied vehicles to Local 305. To the contrary, the weight of the evidence establishes that Council No. 1 was granted access consistent with and equal to that of Local 305 and that Local 305 rented its own vans.

We have considered Council No. 1's exceptions and find they are without merit. The first four challenge the Director's credibility determinations which we will not disturb. E.g., Atlantic Community College, P.E.R.C. No. _____, 12 NJPER ___ (¶_____ 1986). We also agree with the Director that Council 1 was given access to the workplace pursuant to its voluntary agreement with the Authority.

The final exceptions pertain to the Director's evidentiary rulings. These exceptions are meritless.

We will not disturb his decision to bar the testimony of a witness who violated his sequestration order. In granting Council 1's motion, he stated:

> I will grant the motion of sequestration...that means that if you are listening to any of this hearing...that means you will not be allowed to be called as a witness. (1T6)

Under the circumstances, his evidentiary ruling was proper. Sequestration serves the important purpose of preventing witnesses from being educated by the testimony of the witnesses that precede them. Ordinarily such motions should be granted. State of N.J. in interest of W.O., 100 N.J. Super. 358, 363 (App. Div. 1968). The Director made his ruling clear and the parties were aware of it. The proposed witness, Cunningham, was to testify concerning the same topic that had just been testified to in Cunningham's presence. Under these circumstances, his ruling was proper.

The next exception pertains to the Director's refusal to admit photographs taken of the vans used by Local 305 on election day. We agree with Council No. 1 that the photographs were properly authenticated since the witness would have testified that they accurately reflected the color of the vans used by Local 305 on election day and therefore this could have been admitted to establish the vehicles' color. N.J. Rules of Evidence, Comment 1 to Evid. R. 1(13) (Anno. 1986); Garafola v. Rosecliff Realty Co., 24 N.J. Super. 28 (App. Div. 1952). See generally, McCormick's

Handbook on the Law of Evidence, (2d ed. 1972) at 530-535. But the exclusion plainly did not prejudice Council No. 1: the determinative question is not the color of the vans, but whether the Authority supplied them to Local 305. The photographs proffered do not support Council No. 1's allegation. To the contrary, they support Local 305's position that they rented the vans since one van's license plate is the same as that contained in the rental agreement.

The final exception is that the Director improperly excluded evidence pertaining to a witness' credibility on cross-examination. Specifically, Council 1 sought to challenge the credibility of one Local 305 witness by introducing evidence concerning a prior finding made in a union proceeding pertaining to that witnesses' alleged moral turpitude. Such evidence was properly excluded since it was evidence of a specific instance of conduct sought to be introduced to prove a trait of the witness' character for credibility purposes. Such evidence is not admissible in New Jersey.[5/] N.J. Rules of Evidence, Comment 4 to Evid. R. 22 (Anno. 1986); State v. Mondrosch, 108 N.J. Super. 1 (App. Div. 1969), certif. den. 55 N.J. 600 (1970).

5/ While the rules of evidence are not controlling in administrative hearings, N.J.A.C. 19:14-6.6, they are relevant in determining whether the hearing examiner properly exercised his discretion to exclude certain evidence.

Accordingly, we dismiss the Complaint. For the same reasons, we also deny Council No. 1's request to review the Director's dismissal of its objections to the conduct of the election. N.J.A.C. 19:11-8.2.

ORDER

The Complaint is dismissed and the request for review is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey
September 25, 1986
ISSUED: September 26, 1986

D.R. NO. 87-1
H.E. NO. 87-5

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

In the Matter of

NEWARK REDEVELOPMENT AND HOUSING AUTHORITY,

Public Employer/Respondent,

-and-

ESSEX COUNCIL NO. 1, NJCSA,

Petitioner/Charging Party,

Docket Nos. RO-86-62
CO-86-220-119

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 305

Intervenor/Respondent.

SYNOPSIS

The Director of Representation of the Public Employment Relations Commission dismisses objections to the conduct of an election filed by Essex Council 1, New Jersey Civil Service Association. An election was conducted on February 21, 1986 among the employees of the Newark Redevelopment and Housing Authority to determine what organization, if any, would represent these employees in collective negotiations. Local 305, S.E.I.U., AFL-CIO won the election over Council 1, N.J.C.S.A. Council 1 objected to the conduct of the election claiming that the Newark Redevelopment and Housing Authority provided Local 305 with vans on election day so that Local 305 could transport voters to the election site. Council 1 also alleged that the Housing Authority did not grant Council 1's representatives access equal to the representatives of Local 305.

Council 1 failed to prove by a preponderence of the evidence, any of its allegations. The Director also recommended that the unfair practice charges brought by Council 1 concerning the same allegations be dismissed.

A Director of Representation Decision is a final administrative determination and Commission review is discretionary. However, the findings of fact and conclusions of law on the unfair practice allegations are not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

D.R. NO. 87-1
H.E. NO. 87-5

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

In the Matter of

NEWARK REDEVELOPMENT AND HOUSING AUTHORITY,

Public Employer/Respondent,

-and-

ESSEX COUNCIL NO. 1, NJCSA

Docket Nos. RO-86-62
CO-86-220-119

Petitioner/Charging Party

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 305

Intervenor/Respondent,

Appearances:

For the Newark Redevelopment and Housing Authority
Gerald L. Dorf, Esq.
(Lawrence Henderson, Esq.)

For Essex Council No. 1
Fox and Fox, Esqs.
(Dennis Alessi, Esq.)
-and-
Harper, Hansbury & Martin, Esqs.
(Fredric Knapp, Esq.)

For SEIU Local 305
Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

DIRECTOR'S DECISION ON
ELECTION OBJECTIONS
-AND-
HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On November 25, 1985, Essex Council No. 1, New Jersey Civil Service Association (Council 1) filed a petition supported by an adequate showing of interest with the Public Employment Relations Commission. Council 1 seeks representation of all employees employed by the Newark Redevelopment and Housing Authority (Authority) currently represented by Local 305, Service Employees International Union, AFL-CIO (Local 305). Local 305 was granted intervenor status pursuant to the Commission's Rules. N.J.A.C. 19:11-2.7. On January 30, 1986, the parties to this matter entered into a Consent Election Agreement. On February 6, 1986, that agreement was approved and it was directed by this office that an election be conducted on February 21, 1986.

On February 21, 1986, an election was conducted. Out of 532 eligible voters, 297 cast their votes for Local 305, SEIU and 153 votes were cast for Essex Council No. 1, NJCSA. Four votes were cast in favor of no representation. On February 27, 1986, Council 1 filed timely objections to the election and on March 27, 1986, it was found that there were substantial and material factual issues in dispute concerning three of Council 1's objections that could only be resolved through a hearing. Accordingly, a Notice of Hearing was issued. The issues in dispute are whether or not (1) unit members were threatened with termination by Authority and/or Local 305 representatives if they voted for Council 1; (2) representatives of Local 305 were given unlimited access to meet with unit members at the workplace during work time while simultaneously, Council 1 was

denied equal opportunity for access to the employees; and (3) the Authority unfairly aligned itself with Local 305 by supplying Local 305 with Authority-owned vehicles for the purpose of transporting voters from the workplace to the election site; further, these vehicles were driven by representatives of Local 305 and exhibited signs soliciting employees to vote in favor of Local 305.

On March 27, 1986, when the Notice of Hearing was issued on the election objections case, it was consolidated with an unfair practice complaint which concerned two of the same factual issues as those raised in Council 1's objections to the conduct of the election. That unfair practice charge complaint was based upon a charge filed by Council 1 on February 13, 1986 against the Housing Authority and Local 305. The charge alleges that beginning on or about January 28, 1986, international and local representatives of Local 305 were permitted by the Housing Authority to meet with unit members during working hours at the workplace and on Authority property. The Housing Authority operates public housing apartment complexes throughout the City of Newark. It was alleged that the on site meetings lasted for more than two hours and electioneering efforts were made at that time. It was further alleged that the employer knowingly excused bargaining unit members from their normal working hours to attend such meetings with no reduction in compensation. However, representatives of Council 1 had allegedly been denied access and equal opportunity to meet with bargaining unit members at the workplace during working hours even though it

requested equal opportunity to meet and confer with bargaining unit members. The employer had allegedly either denied those requests or failed to act upon them in their entirety.

The charge also alleged that certain employees were threatened with discharge if they voted for Council #1.

The charge alleges that these actions constituted violations of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7)[1/] and §5.4(b)(1), (2) and (5). [2/]

The unfair practice charge was accompanied by a demand for interim relief in which it was requested that the charges block the election. A show cause order was signed and made returnable on February 14, 1986. At the interim relief hearing it was determined

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; and (5) Violating any of the rules and regulations established by the commission."

that the Authority and Council 1 had worked out an agreement granting Council 1 access to the Authority's premises. The Agreement set forth a schedule which allowed representatives of Council 1 to go on to the various housing projects and have meetings with the employees.

Further, at the show cause hearing, the Charging Party declined or otherwise was unable to provide the names of any Authority employees who were threatened with discharge if they voted for Council 1. It was found that the Charging Party did not meet its burden and the application for interim relief was denied[3/]

In State of New Jersey, D.R. 81-20, 7 NJPER 41 (¶12019 1980), aff'd. P.E.R.C. No. 81-84, 7 NJPER 105 (¶12044, 1981) mot. for recon. den., P.E.R.C. No. 81-95, 7 NJPER 133 (¶12056 1981), affd. sub. nom. New Jersey State Employees Assn., Local 4089 a/w AFT, AFL-CIO v. State of New Jersey, et al., App. Div. Docket No. A-3275-80T2 and in State of New Jersey, D.R. 83-20, 9 NJPER 114, (¶14061 1983), the Director of Representation held that a party to a representation proceeding that asserts an unfair practice charge must specifically state whether it desires that the charge block the pending representation proceedings. A party seeking to block a representation proceeding must submit documentary evidence in the

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3/ It was noted that the interim relief standard is twofold: the Charging Party must prove that it has a substantial likelihood of success on the merits and that it will suffer irreparable harm if the requested relief is not granted.

representation forum which shows that events occurred which prevent the conduct of a fair and free election. Where such material has not been furnished, the Director of Representation will decline to exercise his discretion to block an election. Given the lack of proofs and the agreement between the Housing Authority and Council 1, the interim relief application to block the election was denied.

Hearings in these consolidated matters were held on April 14, May 6, May 7 and May 16, 1986, at which time all parties were given an opportunity to examine and cross-examine witnesses, submit evidence and argue orally. All parties submitted briefs which were received by June 24, 1986. At the conclusion of Council 1's case, the Authority moved to dismiss those allegations of the complaint and the objections to the conduct of the election concerning threats made against employees by both Local 305 and the Authority. All the evidence adduced by the Charging Party concerning these threats was hearsay testimony. Moreover, none of the witnesses for Council 1 would reveal either the names of those persons who were threatened or the names of those employees who told them individually or collectively that unit members were being threatened. Accordingly, pursuant to the residuum rule (see N.J.A.C. 1:1-15.8(b)), which requires that legally competent, credible evidence exists in order to make a specific finding of fact, the motion to dismiss was granted.

Two factual allegations remain to be resolved here: (1) whether Council 1 was denied equal access to unit members and (2)

whether the Authority supplied vehicles to Local 305 to transport employees from the work location to the polling place.

It is noted that the factual and legal determinations made herein on the objections to the conduct of the election are final administrative determinations by the Director of Representation (pursuant to N.J.A.C. 19:11-9.2(5); review by the Commission is discretionary (N.J.A.C. 19:11-7.4). However, the findings of fact and conclusions of law made on the remaining unfair practice allegations are recommendations only and are subject to automatic review by the Commission (N.J.A.C. 19:14-7.1).

In addressing election objections, the Commission presumes that an election conducted under its supervision:

> is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employees' freedom of choice. Conduct seemingly objectionable, which does not establish interference or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. Jersey City, P.E.R.C. No. 43 (1970).4/

4/ In Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980), the Commission held that the Jersey City standard is necessarily a flexible one, dependent upon the severity of election abuse and the amount of time available during the election campaign for the parties to counteract misconduct on their own. "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." Thus, the requirement of direct evidence of interference with employees free choice may be tempered by the severity of the alleged conduct.

In a hearing on objections to an election, the "objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the result of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process." N.J.A.C. 19:11-9.2(h); see also, N.J.A.C. 19:11-9.2(i), (j) and N.J.A.C. 19:11-6.1 et seq.

In an unfair practice case, the Commission's Rules require that the Charging Party "shall prosecute the case and shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." N.J.A.C. 19:14-6.8. Accordingly, the burden of proof standards for the findings of fact herein are the same for both the unfair practice charge and the objections to the election.

At the hearing, evidence was submitted concerning events which took place as early as October 1985, and extending into January 1986. However, Council 1's charge specifically alleges that certain events concerning lack of access began "on or about January 28, 1986." In addition, the consent election agreement signed by the parties on January 30, 1986, provides that the parties "hereby waive a hearing and all issues that could properly be raised at a said hearing and agree" to participate in a secret ballot election. Accordingly, absent any application by Council 1 to amend its pleadings, events which occurred prior to January 30, 1986, will not

be considered in determining if the results of the election should be set aside.[5/]

There is no dispute that three officers of Local 305 were released from Authority duties to devote themselves full-time to Local 305's business in accordance with a Memorandum of Understanding between the Authority and Local 305 and that these employees actively engaged in electioneering during the time in question.

On February 11, 1986, the Authority and Council 1 entered into an agreement granting voter access to the President of Council 1, Ernest Stapleton, and one other representative of Council 1. This Agreement was memorialized in a letter from the Authority's attorney to Counsel for Council 1 dated February 12, 1986.

The agreement further provided for the opportunity of Council 1 to address Authority employees on work time. A schedule prepared by Council 1 setting out when their meetings with employees would take place at some thirteen sites was also agreed to by Council 1 and the Authority.

On February 13, 1986, Hakim Rasheed was granted time off with pay to campaign on behalf of Council 1 and on February 14, 1986, Oliver Stapleton and Fred Hetrick were also granted release time with pay to campaign for Council 1.

5/ While events which occurred prior to January 30, 1986 can be considered to prove unfair practice charges, they cannot be used as a basis to set aside the election. Since Council 1 seeks no relief other than to set aside the election, the pre-January 30, 1986 events are therefore not considered.

The election site for all employees throughout the City was at 57 Sussex Avenue, the offices of the Authority.

Ernest Stapleton, President of Essex Council 1, testified that on the day of the election he was in the parking lot adjacent to 57 Sussex Avenue. He positioned himself as far away from the polling place as he could while remaining in the parking lot. He saw several vans being driven by Authority employees who were members of Local 305 and who had been given the day off. According to his testimony, the vans came into the polling area prior to the start of the actual balloting and continued bringing in voters throughout the day. He testified that the vans were yellow-looking or cream color and had words or letters identifying them as Newark Housing and Redevelopment Authority vans; further, he testified that the drivers of the vans were wearing sports shirts with the number 305 on the front and the vans had signs in the windows stating "Vote Local 305." Stapleton testified that there were between seven and ten vans being operated on the day of the election in the parking lot. At the hearing, Stapleton testified that he recognized only three people who were driving the vans: Gwen Nelson, Jenkins and a "white fellow" whose name he did not know. All were officers of Local 305. However, in an affidavit written by Stapleton on February 26, 1986, Stapleton stated that he recognized Gwen Nelson and Robert Allen.

Stapleton also testified that he attempted to meet with bargaining unit people at the Authority's central office and he was

ordered to leave the premises. Stapleton is not currently an employee of the Housing Authority. He was told that he had to be accompanied by a security guard and sign in at the receptionist's office. He was not allowed to go into the building. Stapleton could not recall when this occurred. On cross-examination, he couldn't say if it happened in November 1985 or after February 14, 1986, the date that the Housing Authority and Council 1 entered into their agreement concerning access. Stapleton denied that he was permitted access to the projects or anywhere else (Tr. 4/14/86, p. 38) and stated that he made later attempts at access and was "run off the projects." In response to the question of when this occurred, Stapleton said, "Well, this occurred right after--before the election. You understand?" He was very argumentative and unresponsive as a witness.

Oliver Stapleton testified on behalf of Council 1. He was active in campaigning for Council 1 and is an employee of the Authority. He testified that several Local 305 members came to the projects (specifically Felix Fuld and Bradley Homes) where he works. He recalled that Joe Chaneyfield, Robert Allen, Gwen Nelson, "Sidik" and Ralph Jefferson, who was identified as an international representative of the SEIU, visited the projects at which he worked. However, Oliver Stapleton testified that these visits occurred approximately two weeks before Washington's Birthday (i.e., Monday, February 17th). When Council 1 had its meetings with all the employees of the Bradley/Fuld projects, there were only ten

employees at one and eight at the other. He testified that he had heard that Local 305 organizers came to each project after Council 1's representatives left. He also testified that he was an observer on the day of the election and before going into the polls he observed two or perhaps three vans parked outside of the polling place. Although he did not have a perfect recollection, he recalls that on perhaps some of the vans the Housing Authority name appeared. Finally, Oliver Stapleton testified that he heard from someone else that on the day before the election, Local 305 conducted an organizational meeting at approximately 2 p.m., during normal working hours.

Fred Hetrick testified for Council 1. Hetrick has been a member of the executive board of Local 305 for the past 2-1/2 years. Hetrick testified that he campaigned for three days on behalf of Council 1 immediately prior to the election and he visited the Stella Wright, Felix Fuld and Kretchner Homes. He went to these projects along with Ernest and Oliver Stapleton as well as Hakim Rasheed. He recalled that prior to the election, representatives of Local 305 had come to the Columbus Home to campaign; he specifically recalls Ralph Jefferson and Andrew Dedinsky. The meetings took place in the lunch room after employees were assembled by Local 305. Employees were released from their jobs to meet with Local 305 by a supervisor; one of these meetings occurred a week before the election. He also recalled that an organizational meeting of Local 305 took place one day before the election and this meeting occurred

at approximately 2 p.m. on a Wednesday or Thursday at a local church. He was not invited and did not attend the meeting; nevertheless, he was told what happened at the meeting by one of the employees who worked at the project with him. Hetrick observed the vans which brought employees to vote at the election. He could not recognize any of the drivers. He saw that the vans had Local 305 signs in the windows. He testified that some of the vans had Housing Authority signs on the front door and that the vans were a bright color, either white or yellow.

Hakim Rasheed was a member of Local 305 and Council 1 and was for a time a member of Local 305's negotiating team. He testified he was removed from the negotiations team because he did not agree with the contract negotiations. Rasheed is the nephew of Ernest Stapleton[6/] He works at Baxter Terrace Housing project. He campaigned for Council 1. He testified he was not permitted to meet with bargaining unit members on work time until the week prior to the election. Prior to that time he had to take personal leave to meet with employees. He said that visiting the projects in accordance with the schedule created by the agreement of February 11 was hit or miss: out of the 16 projects listed on the schedule they had meetings with employees at only eight of them. Council 1 organizers were forced to split up to meet with more people under the schedule. Rasheed claims that Chaneyfield, Dubinsky, Jefferson,

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6/ Transcript of Interim Relief Hearing February 14, 1986

Calvin Chambers and Gwen Nelson all came to Baxter Terrace to meet with unit members on a daily basis & Local 305's representatives had unlimited access to Housing Authority buildings. He further testified that every time Council 1's representatives visited a project, Jefferson, Chambers and Chaneyfield came to that project. Rasheed also testified about a 2:30 meeting at St. Joseph's Church which employees from his project attended. He also testified that he saw vans with Housing Authority marks on them picking up voters and taking them to these organizational meetings.

None of the Council 1 witnesses had direct knowledge of the union meetings held during work time on February 20, 1986, the day before the election, at St. Joseph's Church. Andrew Dedinsky, Vice President of Local 305, testified that Local 305 held its regular monthly meetings on the third Thursday of the month at St. Rose of Lima Auditorium and February 20, 1986, the day before the election, was the third Thursday of February. There was in fact a meeting held at St. Rose of Lima at approximately 5 p.m. Dedinsky further denied that Local 305 held a meeting of any type at St. Joseph's Church on February 20, 1986. Dedinsky admitted that Local 305 held a meeting at St. Joseph's Church on January 15, 1986, which was well before the agreement for consent election.

Georgia Ransome, the Director of the Anti-Crime Program at St. Joseph's Church, testified that she coordinates special affairs and activities for the Church and has handled the contracts for Local 305 meetings at the Church. Specifically, she testified that

Local 305 did not hold any meetings at the Church on February 20, 1986 as alleged by Council 1.

Arthur Wilson, Principal of St. Rose of Lima School, testified that Local 305 uses the Church Auditorium at 5 p.m. on the third Thursday of the month for a meeting and Local 305 held a meeting on February 20, 1986.

Dan Beasley, an Authority employee, testified concerning the use of Authority vans on the election date. Beasley testified that his job responsibilities include the monitoring of the use of Authority motor vehicles. The Authority motor pool has restricted access through two gates; one of the gates is usually open, and the other is usually locked. The Authority employs a private security company which supplies guards for the motor pool. Private security guards were on duty on February 21, 1986. These security guards maintain a log of all vehicles entering and departing the motor pool. The log reveals that only one beige passenger van was signed out of the pool on the date of the election. This van left the pool at 11:32 a.m. and returned at 1:49 p.m. It is noted that the voting hours of the election were between 11 a.m. and 3:30 p.m.

Andrew Dedinsky testified that on February 11, 1986, he personally rented four vans from Econo-Car, each with a fourteen passenger capacity, in order to transport people to the polls on February 21, 1986. Dedinsky provided documentation for the rental, including a cancelled check and the rental agreements with Econo-Car for the four vans on the election date.

Gwen Nelson and Calvin Chambers testified on behalf of Local 305. They testified that they each drove one of the four vans rented by Local 305 on the day of the election. The rented vans were white. Nelson and Chambers admitted that they wore Local 305 sweatshirts when they drove the vans and later in the day placed signs for Local 305 in the windows of the vans. They denied that they or any other Local 305 advocates drove vans owned by the Housing Authority. Anyone who wanted to get into a van to go to vote was allowed to do so. Council 1 introduced photographs of the vans owned by the Housing Authority and one of the vans rented by Local 305. The license plate of the rental van in the picture matched the license plate listed in one of the rental agreements in evidence. There is a great deal of testimony disputing the color of the vans and the color photographs in evidence are not dispositive of the color. However, the photos do seem to indicate that the Housing Authority vans are beige and the rental vans are white, which is consistent with the testimony of Local 305's witnesses.

ANALYSIS

A. Use of Housing Authority Vehicles

Council 1 has failed to prove by a preponderance of the evidence that Local 305 used Housing Authority vehicles to transport workers to the election on the day of the election. Three of Council 1's four witnesses testified that they saw Local 305 people

drive Housing Authority vans; Local 305's people all testified they rented their own vans and did not use Housing Authority vans. Here, the most compelling evidence is not the testimony but rather the business records of the Housing Authority, which show that only one (1) van was signed out for a short time during the election period, and the rental agreements between Econo-Car and Local 305. In particular, the contract rental agreements constitute independent credible evidence and must be given greater weight than the inconsistent testimony of witnesses who have an interest in the election outcome. The documents were authentic and compel the conclusion that Council 1 has failed to prove that Local 305 used Housing Authority vans to transport workers to the election site.[7/]

7/ In finding that Council 1 failed to prove that the Housing Authority assisted Local 305 by providing it with vans, it is not necessary to decide whether or not it would have been an unfair practice and/or would have interfered with a fair election if the Housing Authority had provided vehicles to transport workers. See, Broward County Police Benevolent Association, Inc., Florida P.E.R.C., 10 FPERC 703, (¶15294 1984); where the Florida Public Employment Relations Commission found that police officers had been allowed to leave work early in marked police cars owned by the employer to attend a union meeting of one of the competing unions two (2) days prior to the election. It was held that:

> the appropriate test for evaluating alleged objectionable conduct is 'whether a particular event or action, when viewed objectively from the perspective of the voters, reasonably appears to have interfered with the employees freedom of choice'. The interference must be significant. The tendency to influence the outcome of the election must be substantial. Applying the above

Footnote Continued on Next Page

Council 1 also argues that, whether or not Authority vans were actually used by Local 305, the appearance of such conduct could have interfered with employee free choice by suggesting an employer preference in the election. This argument is not persuasive. I have found that the Authority vans have clear and sizeable lettering on them which identify the vans (Exhibits pp. 3-5), while the rented vans had no such lettering (Exhibits pp. 6-9). It strains credulity to suggest that Authority employees, who see Authority vans regularly, could not detect the difference.

B. The denial of equal access

The Commission held in Union County Regional Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50, 53, (1976) that an incumbent union can negotiate and secure agreement of the right to exclusive access to employees and the facilities of an employer in order to carry out its functions as an employee representative. Such contract provisions are consistent with labor relations stability. However, during the pendency of a labor relations campaign,

> the interests of the individual employees in being able to freely choose their representative will outweigh the need for stability. If an incumbent is permitted the use of an

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7/ Footnote Continued From Previous Page

> legal considerations, we do not believe that this conduct rises to the level of constituting a significant impediment to the employees' freedom of choice. at p. 704 (citation deleted)

> employer's facilities for communication with employees, the employer will have to make provisions to allow the challenging group access to the facilities....Additionally, the requirement of strict neutrality by the employer during such periods shifts the balance against exclusivity.

See also State of New Jersey, D.R. No. 83-20, 9 NJPER 114 (¶14087 1983), req. for rev. den., P.E.R.C. No. 83-118, 9 NJPER 182 (¶14085 1983).

It is undisputed that Local 305 enjoyed access to employees of the Housing Authority in the days immediately following the signing of the consent election agreement and, on the basis of the testimony of the Council 1 witnesses, Council 1 may have been denied equal access to employees from the signing of the consent through the execution of its access agreement with the Authority on February 11, 1986. On February 11, 1986 Council 1 did enter into an agreement with the Authority to provide for equal access. Two days later, on the 13th, it filed the instant unfair practice charge and its demand for interim relief. At the interim relief proceeding on February 14, 1986, the attorney for Council 1 admitted there was an agreement as to access. It was argued, however, that this agreement should not be binding because there was a snow storm during the prior week which made it difficult to campaign and there was a holiday the day after the agreement was entered into (Lincoln's Birthday was on Wednesday, February 12, 1986) and another holiday was scheduled to be celebrated the following Monday, (Washington's Birthday).

The Commission should not look into or second guess an agreement voluntarily and knowingly entered into by the parties which apparently cures what might otherwise be an improper action. While Council 1 did not, by this agreement, expressly waive its right to claim a denial of equal access, its claim of such denial must be viewed in context. The agreement was made nearly two weeks before the election and provided for extensive access to Authority employees. As for intervening holidays, there is no gainsaying that Council 1 knew or should have known that these holidays would take place before it ever entered into the agreement. Further, the snow storm was "an act of God" and cannot be attributed to to anyone's improper actions[8/] and this snow storm affected all parties equally. Moreover, Council 1 was served with a list of all of the Housing Authority's employees (including addresses) ten days before the election and accordingly it had an alternative means of campaigning.

Although all four of Council 1's witnesses complained about the limited time to campaign under the schedule, that schedule was created by Council 1 and was part of its access agreement. Nor is the appearance of Local 305 people campaigning in the footsteps of Council 1 controlling here, for Council 1 had the same right by way of that agreement.

8/ It is noted that on the date of this snow storm, February 12, 1986, the Commission conducted a election in Passaic County involving nearly 300 employees and there was an 85% voter turnout. Accordingly, it is difficult to conclude that this snow storm totally prevented Council 1's supporters from campaigning.

Only Ernest Stapleton and Hakim Rasheed testified that as soon as they finished campaigning at a site, Local 305 people would immediately show up and moreover, employees would not be assembled in accordance with the schedule in the equal access agreement. If this testimony is credible, it might demonstrate that the Housing Authority was aiding or assisting Local 305 people in giving them Council 1's agreed upon schedule. Oliver Stapleton also testified that he was told Local 305 people were following around Council 1 people. He himself did not make any such observations. I find that, absent independent, objective evidence in support of the testimony of Ernest Stapleton and Hakeem Rasheed, I cannot fully credit this testimony. Both men are parties vitally interested in the outcome of this hearing. Ernest Stapleton, in particular, was an emotional witness who avoided answering questions and clearly exaggerated while testifying. Hakim Rasheed is the nephew of Ernest Stapleton. In too many points of testimony, both men made statements which did not comport with objective facts. Specifically, it is clear that Local 305 rented four (4) white vans and those vans had no Housing Authority markings on them. Yet both men insisted that they saw only beige vans with Housing Authority markings on them on the day of the election. Both men insisted that they heard from unnamed employees that Local 305 and the Housing Authority were threatening some of the employees. Yet neither man would name an employee who was threatened or directly stated that somebody else was threatened. As the finder of fact, I am constrained to follow the maxim "false in one, false in all" and cannot credit their testimony that they were followed about by Local 305 or that the

Housing Authority failed to live up to the agreement in having employees available pursuant to the schedule. Moreover, even assuming that Local 305 representatives did follow Council 1 representatives to Authority sites, Council 1 representatives had similar flexibility to approach employees on site if the employees were not working. Furthermore, the time of the alleged conduct left ample opportunity for rebuttal by Council 1's representatives. Under the totality of the circumstances, I find that Council 1 failed to prove by a preponderance of evidence that the Housing Authority did not provide equal access to Council 1.

Accordingly, for the reasons set forth above and in accordance with N.J.A.C. 19:11-7.4, the objections to the conduct of the election are hereby dismissed. Further, it is recommended that the Commission dismiss the unfair practice allegations in this matter in their entirety.

It is noted that there is an outstanding Commission Order restraining Local 305 and the Housing Authority from negotiating. That order was entered by Commission Designee Alan Howe. Either party may seek to vacate the order pursuant to the Director's Decision.

Edmund G. Gerber
Director/Hearing Examiner

DATED: July 17, 1986
Trenton, New Jersey