D.R. NO. 2003-14

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

In the Matter of

CITY OF ATLANTIC CITY,

Public Employer,

-and-

ATLANTIC CITY WHITE COLLAR PROFESSIONAL ASSOCIATION,

Docket No. RO-2003-23

Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 331,

Intervenor.

SYNOPSIS

The Director of Representation dismisses six election objections filed by Teamsters Local 331. Upon investigation, the Director finds that the first two objections, alleging that the City failed to file a timely eligibility list, and subsequently amended the list to add 46 names initially omitted, in alleged violation of N.J.A.C. 19:11-10.1, do not require setting aside the election. The Director finds that the City substantially complied with the eligibility list requirement when it timely served the election eligibility list in accordance with the rule and immediately provided a revised list to the parties one day before the election after it learned that certain employees had been omitted. The Director finds the City's omission to constitute inadvertent, administrative error.

As to the remaining four objections, the Director finds that Local 331's objection to the denial of its post election request to examine the checked-off eligibility does not concern conduct which affected the outcome of the election; that Local 331 provided no factually specific allegations or independent evidence that the City provided unequal access by allowing Association campaigning on work time and premises, that by

executing a Request to Proceed with the representation matter, Local 331 specifically waived any right to raise objections to the election based upon allegations in its unfair practice charge filed before the representation petition; and that Local 331 submitted no evidence that Association campaign literature containing alleged misrepresentations concerning Local 331 was distributed to employees, contained substantial misrepresentations, that it was deprived of sufficient time to correct or reply to the misrepresentations, or that the City actually permitted such literature to be posted on City property.

The Director issues a Certification of Representative.

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Intervenor.

Appearances:

For the Public Employer,
Obermayer, Rebmann, Maxwell & Hippel, attorneys
(Todd J. Glassman, of counsel)

For the Petitioner,
Virginia Darnell, Representative

For the Intervenor,
Szaferman, Lakind, Blumstein, Watter, Blader, Lehmann & Goldshore, attorneys
(Sidney H. Lehmann, of counsel)

DECISION

On September 12, 2002, the Atlantic City White Collar Professionals Association (Association) filed a representation petition seeking to represent all white collar employees employed

by the City of Atlantic City (City), and represented by the International Brotherhood of Teamsters Local 331 (Local 331).

On October 15, 2002, the City, the Association and Local 331 entered into an Agreement for Consent Election for a secret ballot election to be conducted by the Public Employment Relations Commission (Commission) on December 12, 2002. At the December 12 election, of approximately 492 eligible voters, 354 valid ballots were cast (approximately 72% of eligible voters cast ballots); 186 were cast for the Association, 158 votes were cast for Local 331, and 6 votes were cast for "No Representative." Four ballots were challenged and two ballots were void. Accordingly, a majority of the valid ballots were cast in favor of the Association.

On December 19, 2002, Local 331 filed timely post-election objections along with affidavits and other supporting documentary evidence. Local 331 raised six objections, as follows:

> 1. that the City failed to file a timely eligibility list; in violation of N.J.A.C. 19:11-10.1;
>
> 2. that the employer's amendment of the eligibility list wherein it added 46 names initially omitted, constitutes neither strict nor substantial compliance with the rule;
>
> 3. that the Commission's denial of Local 331's request to examine the post-election eligibility list, indicating which employees had voted, violated the New Jersey Right to Know Law, N.J.S.A. 47:1A-1 et seq.

4. that the City unlawfully permitted Association representatives to utilize City property, time, offices and vehicles for campaigning purposes;

5. that the City failed to fulfill conditions of an agreement it signed with Local 331 concerning an unfair practice charge (CO-2003-62) filed against the City prior to the representation petition; and

6. that campaign material distributed by the Association contained factual misrepresentations concerning Local 331.

By letter dated December 24, 2002, I acknowledged receipt of Local 331's objections and advised all parties that Local 331 had filed affidavits and supporting documentation pursuant to N.J.A.C. 19:11-10.3, to establish a prima facie case with respect to objections (1) and (2), and that an investigation had been initiated into those objections. The City and the Association were invited to submit position statements and specific factual information addressing the issues raised in those objections. After an extension of time for filing, both the City and the Association submitted position statements and supporting documents. Both the City and the Association assert that the City substantially complied with the eligibility list rule, and that the incumbent Local 331 should have known that the recreation department employees were part of the historical unit and were omitted from the eligibility list. The City and the Association request that the objections be dismissed.

Based upon my review, I make the following:

FINDINGS OF FACT

For at least the last 22 years[1], Local 331 has been the majority representative of the City's non-supervisory, white-collar employees. On August 30, September 3 and 10, 2002, Local 331 filed an unfair practice charge and amended charges (CO-2003-62) alleging, in pertinent part, that the City engaged in "a campaign of harassment, interference, and coercion" of Local 331 and its members, by refusing to process grievances, by retaliating and discriminating against employees active in Local 331, by refusing to provide information Local 331 requested to investigate and process grievances, and by unilaterally changing terms and conditions of employment without negotiations. The charge further alleged that the City "assisted and encouraged" the formation of an independent employee organization to challenge Local 331 for representation of the white-collar unit.

On September 12, 2002, the Association filed its representation petition seeking to represent Local 331's unit. On October 3, 2002, a Commission staff agent conducted an investigatory conference on the representation petition. At that conference, Local 331 demanded that its unfair practice charge block further processing of the representation petition.

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[1]Local 331 was certified to represent this unit sometime prior to October, 1981. See City of Atlantic City, D.R. No. 82-19, 7 NJPER 642, 643 (¶12289 1981).

A second investigatory conference was held on October 15. At that conference, Local 331 and the City entered into a Memorandum of Agreement concerning the charge, in which the City reaffirmed its obligation to remain neutral concerning the representation petition, and agreed to process grievances in a timely manner pending the outcome of the representation proceeding. Both the City and Local 331 agreed to maintain the terms and conditions of the collective agreement pending the outcome of the election. The City further agreed to post the agreement in locations where notices to employees are customarily posted, pending the outcome of the representation proceeding. The City and Local 331 also executed a Separate Memorandum of Agreement, specifying actions the City and Local 331 would take to process certain grievances detailed in the unfair practice charge.

Thereafter, Local 331 executed a Request to Proceed with an election on the representation petition, which provided as follows:

> In the Matter of Atlantic City and Local 331, Docket No. CO-2003-23:
>
> The undersigned hereby requests the Commission to proceed with the above-captioned representation case, notwithstanding the charge of unfair practices filed in Docket No. CO-2003-62. It is understood that the Commission will not entertain objections to any election in this matter based upon conduct alleged in the

> above charge occurring prior to the filing of the petition.
>
> /s/ Joseph Yeoman, President
> Date: October 15, 2002

Further processing of the charge has been held in abeyance pending the conclusion of the representation matter.

The City, Local 331 and the Association simultaneously signed a Consent Agreement, agreeing that the Commission would conduct a secret ballot election among the eligible white-collar employees on December 12 at two City locations: City Hall and the Public Safety Building. The parties determined that employees would be assigned to vote at one of the two sites based upon specific job classifications and/or work locations. The Consent specifically provided that the recreation department employees would vote at City Hall.

As set forth in the Consent Agreement and pursuant to N.J.A.C. 19:11-10.1, the City was required to provide to the Commission and both employee organizations with a list of the names of all eligible voters, along with their home addresses and job titles, no later than December 2, 2002. On October 16, in correspondence to all parties memorializing outstanding issues to be resolved prior to the approval of the Consent, the assigned staff agent confirmed that the City should prepare three alphabetized eligibility lists: a master list containing the names, addresses and job titles of all eligible employees, a

separate list containing the names of those employees who were assigned to vote at the City Hall polling place, and a separate list of those employees who were assigned to vote at the Public Safety polling place.

I approved the Consent Agreement on November 4, 2002. Thereafter, we issued Notices of Election for posting to employees. An Attachment to the Notice of Election specified, in part, that all recreation titles, including recreation attendant, recreation supervisor, and recreation program specialist, would vote at the City Hall location.

On November 20, 2002, the Commission received two eligibility lists from the City. On November 21, the staff agent faxed correspondence to all parties confirming receipt of the alphabetized "master" list and indicated that the City still needed to revise the second list into the format specified by the October 16 correspondence, and serve all lists upon the Commission and the organizations by December 2. On November 26, the City served copies of the alphabetized "master list" to Association spokesperson Virginia Darnell and counsel for Local 331.

On December 2, the City submitted separate lists for the City Hall and Public Safety voting locations, along with proof of service on both organizations. By letter of December 4 to all parties, the assigned staff agent confirmed receipt of the lists

and other final details concerning the election. The staff agent also reminded the organizations to review the eligibility lists carefully to ensure that employees were assigned to vote at the appropriate location.

By letter dated December 4, Local 331 complained to us that the City had failed to comply with the terms of the October 15 Memorandum of Agreement concerning its unfair practice charge. Local 331 alleged that the City had:

> continued in its refusal to process grievances, and to provide information requested by [Local 331]. This conduct, coming as it does during this period immediately prior to the representation election, undermines [Local 331's] status as the majority representative, notwithstanding the agreement; and furthers the impression that the City favors the challenging union. [Local 331], therefore, reserves the right to raise this conduct by the City as possible conduct effecting the result of the election, and as breaching the MOA.

On the morning of December 10, 2002, Association representative Virginia Darnell called the Commission's staff agent to assert that the names of certain eligible employees were missing from the list provided by the City. Darnell believed the group consisted largely of recreation employees who were assigned to vote at City Hall. Darnell faxed to the staff agent a copy of a memorandum directed to Karen Upshaw, the City's Personnel Director. The memorandum contained a total of 37 names: 35 recreation/youth services employees, one employee in the planning

department, and one employee in the construction department. At approximately 11:33 A.M., the Commission staff agent faxed a copy of the recreation list to Local 331 representatives for their review.

According to the City's time-stamp, Darnell's memorandum was received in the City's Personnel offices at 10:00 a.m. on December 10. The City submits a certification of Upshaw's secretary, William Duchesne. At Upshaw's direction, Duchesne had worked with the City's MIS department to generate the eligibility lists initially submitted by the City for the election. Immediately upon receiving Darnell's memorandum, Duchesne contacted Gerald Harrigan, the City's payroll supervisor, described the contents of the memorandum, and asked whether any individuals were omitted from the initial City Hall voting list.

The City submitted a certification by Harrigan. Upon review of Darnell's memorandum, Harrigan believed that all of the individuals listed were employed in the recreation department. Harrigan stated that the original City Hall voting list was generated by running a query for all employees listed with a reference code of "WHT" (the City's identifier for white-collar unit members). However, despite being white-collar unit members, the part-time recreation employees are identified as "PT"(part-time) in the data field in which full-time employees are encoded as "WHT." Harrigan ran another query for all employees in the

recreation department who were encoded as "PT." This query generated a "supplemental" list of 47 names and addresses.

Harrigan delivered the supplemental list of 47 names to Duchesne, who immediately entered them into the City Hall voting list. Duchesne also added one additional name, Crystal Lewis, which Duchesne had learned was also missing from the original City Hall voting list. Another employee whose name was among the 47 added by Duchesne, Mary Gunzenhauser, had been inadvertently omitted from the original City Hall voting list, despite appearing on the alphabetized master list provided by the City to both organizations on November 26, 2002.

Duchesne manually added a total of 48 names and addresses to the City Hall voting list; however, 7 of the entries ultimately proved to be duplicates (employees Stephen Cassidy, Maxine Ellis, Brian Gunter, Leanna Johnson-Johnson, Patrick O'Connor, Sandra Taylor, and Rashidah Nelson). Therefore, a total of 41 additional names were added to the City Hall eligibility list as a result of the City's revisions. The City did not provide a revised alphabetized master list containing the names and addresses of all eligible employees. On the afternoon of December 10, the City served the revised eligibility list for the City Hall polling site on counsel for Local 331 and the Commission staff agent by fax, and to Darnell by hand delivery.

The City collects union dues from its white-collar unit employees and transmits the dues to Local 331 on a monthly basis after the second paycheck of each month. The payment is accompanied by a deduction/earnings list indicating the City's record of the names of white-collar unit members. City Payroll Supervisor Gerald Harrigan certifies that all of the individuals listed on the report were dues paying members of Local 331's unit as of November 16, 2002 -- the date the last such report was generated. The list is broken into two alphabetized lists - one apparently listing those who pay the full amount of dues, and one listing of those employees who pay an agency shop fee. Neither list contains employee addresses.

Thirty-eight of the forty-one additional names added to the City Hall list by the City on December 10 are listed on the deduction/earnings list. The City asserts that the three remaining employees (Shay Steele, Kimberle Washington and Do'nise Wilson) are properly in the unit historically represented by Local 331, but have not been assessed union dues, and so were improperly excluded from the deductions/earnings list due to clerical error.

The City did not add the names of two employees in the construction and planning departments as indicated in Darnell's memorandum. One of the employees, Blanche Baker, had resigned from employment on November 6, 2002; and Richard Thompson, Fire

Inspector, held a newly created, non-unit title. Thus, Upshaw determined that these employees were not eligible to vote in the election. Upshaw explained the discrepancies concerning these two employees, as well as six of the seven duplicate entries, in correspondence to the staff agent on December 11.

On December 12, the representation election was conducted. Both the Association and Local 331 provided election observers at each polling place. The City did not have an observer. Local 331 did not assert any challenges based upon the December 10 revisions to the eligibility list at the polls. Twenty-seven of the forty-one employees added to the City Hall voting list voted. A majority of the valid ballots were cast in favor of the Association.

On December 13, counsel for Local 331 telephoned the assigned staff agent to request that Local 331's representatives be permitted to review the eligibility list used to check off voters as they entered the polls to determine whether any of the employees added to the list as a result of the December 10 revisions actually voted. Local 331 was advised that its request was denied.

ANALYSIS

Secret ballot elections conducted by the Commission carry a presumption that the voter's choice is a valid expression of the employees' representational desires. Thus, allegations of what

may seem to be objectionable conduct must be supported by evidence that the alleged misconduct interfered with or reasonably tended to interfere with the employees' free choice. The objecting party must establish, through its evidence, that a direct nexus exists between the alleged objectionable conduct and the voters' freedom of choice. City of Jersey City and Jersey City Public Works Employees, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd sub. nom. Am. Fed. of State, County and Municipal Employees, Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971), citing NLRB v. Golden Age Beverage Co., 415 F.2d 26, 71 LRRM 2924 (5th Cir. 1969); Township of Montclair, D.R. No. 2001-8, 27 NJPER 252 (¶32089 2001); Hudson Cty. School of Technology, D.R. No. 99-14, 25 NJPER 267 (¶30113 1999).

The standard of review of election objections contemplated by N.J.A.C. 19:11-10.3(I) was discussed in Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986). There, the Director found that:

> This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present in order for an investigation to be initiated. If this two-prong test is not met, the objections will be dismissed. [Id. at 314.]

Applying the above standards, I find that Local 331's objections do not form a basis to overturn the election.

1. & 2. Timeliness and Completeness of Eligibility List

Local 331 alleges that the City failed to file a timely list of all eligible voters at least 10 days before the election, as required by N.J.A.C. 19:11-10.1. It argues that the omission of the recreation department's 41 eligible voters from the list constitutes neither strict nor substantial compliance with the rule. It contends that the number of employees omitted from the list is greater than the 26-vote difference in the number of ballots cast for the Association and Local 331, thus affecting the outcome of the election.

N.J.A.C. 19:11-10.1 provides in relevant part:

> (a) In all representation elections conducted pursuant to this subchapter, unless otherwise directed by the Director of Representation, the public employer is required to file simultaneously with the Director of Representation and with the employees organization(s) an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters and their last known mailing addresses and job titles. . . . In order to be timely filed, the eligibility list must be received by the Director of Representation no later than 10 days before the date of the election.
>
> (b) Failure to comply with the requirements of this section may be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-10.3(h).

The Commission's eligibility list requirements are modeled after the National Labor Relations Board's requirement that the employer provide the competing organizations with a list of employee names and addresses. That doctrine was set forth in Excelsior Underwear Inc., 156 NLRB 1236, 61 LRRM 1217 (1966). In Excelsior, the Board established the requirement that, within seven days after the parties entered into a consent election agreement, or after the Regional Director or Board directs an election, the employer must file with the Regional Director an election eligibility list, containing the names and mailing addresses of all eligible voters. The Regional Director then makes the list available to all parties.[2] The purpose of the Excelsior rule is to afford eligible employees an opportunity to hear the arguments concerning representation. The Board reasoned that having had this opportunity, the employees would be in a better position to make a more fully informed choice. The ultimate result would be a fair and free election. Excelsior. The Commission has adopted the logic of this policy as well as the Board's substantial compliance doctrine in the applying the rule. See, Monmouth Cty., P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982); Montclair; Trenton Bd. of Ed., D.R. No. 2000-7, 26 NJPER

[2]Note that the NLRB's rule provides that failure to comply with the eligibility list requirement "shall be grounds for setting aside the election whenever proper objections are filed." (Emphasis supplied). See J.P. Phillips, Inc., 336 NLRB 130, 169 LRRM 1293 (2001).

148 (¶31058 2000); and Jersey City Medical Ctr., D.R. No. 83-37, 9 NJPER 411 (¶14188 1983). The substantial compliance doctrine applies to both the timeliness and the completeness of the eligibility list submission. Jersey City Medical Ctr.

The Board has consistently applied three factors in analyzing claims that the employer failed to substantially comply with the Excelsior rule. These factors include a concern for (1) the number of days the list was late, (2) the number of days which the union had the list prior to the election, and (3) the number of employees eligible to vote in the election. Pole-Lite Industries Ltd. and cases cited therein, 229 NLRB 196, 197, 95 LRRM 1080, (1977).

In subsequent analyse,s of alleged non-compliance with the Excelsior rule, the Board has also consistently held that the rule is not to be mechanically applied. Bear Truss Inc., 325 NLRB 1162, 159 LRRM 1199 (1998); Pole-Lite Industries; Program Aides Co. Inc., 163 NLRB 54, 65 LRRM 144 (1967). Rather than applying a mechanical approach, the Board has considered numerous additional factors in its analysis of whether an employer has substantially complied with the Excelsior rule. The Board has another considered whether the objecting party had an in-plant presence, Kent Corp., 228 NLRB 72, 96 LRRM 1606 (1977); the reason for the late transmittal of the list, Rockwell Manufacturing Co., 201 NLRB 358, 82 LRRM 1190 (1973); Tom's Trains Treats, Inc., d/b/a Auntie

Anne's, 323 NLRB 669, 156 LRRM 1191 (1997); whether there was a showing that the union essentially was unable to communicate with employees because of the failure to provide the list, McGraw Edison, 234 NLRB 630, 97 LRRM 1262 (1978); whether there was a showing that the delay in obtaining the list adversely affected the union's campaign, or the union did not have enough time to reach employees, Wedgewood Industries, 243 NLRB 1190, 101 LRRM 1597 (1967); whether there is evidence that the employer's failure to comply with the Excelsior requirement was due to intentional misconduct, and whether the employer corrected its mistake promptly when informed of it, Bear Truss Inc.; whether, in a situation with two competing organizations, one organization had the list for a significantly longer period than the other, Ben Pearson Plant (Consumer Division) - Brunswick Corporation, 206 NLRB 532, 84 LRRM 1338 (1973); and finally, whether the margin of the election vote tended to show that the voters had the opportunity to be fully informed. Alcohol and Drug Dependency Svcs. 326 NLRB 519, 160 LRRM 1093 (1998); Mod Interiors, 324 NLRB 164, 156 LRRM 1049 (1997).

* * *

In this matter, Local 331 alleges that the 46 names omitted from the City's first list constitutes 13.1% of the valid votes cast. Local 331 further allege that they were prevented from communicating or campaigning with the omitted employees.

In the brief accompanying its objections, Local 331 alleges that if the employer added only the 37 names submitted by the Association to the eligibility list, then the number of eligible voters should total 483 and there remains a discrepancy as to at least 9 additional eligible voters on the list which Local 331 has yet to identify, constituting further evidence of the "damage which has been inflicted upon [Local 331's] ability to engage in a meaningful campaign." Local 331 further alleges that the fact that "the election was decided by 28 votes, indicates that the failure to comply with the eligibility list rule requirements could have been dispositive of the election."

Local 331 further argues that since it was the Association that called the deficiency in the list to the City's attention, and provided the list of names, "[t]he Association was able to contact those employees and argue its positions to them and disparage [Local 331]. [Local 331] had no opportunity to contact those employees to deliver its message." Susan Taylor, Local 331's business agent, asserts in her certification that during their campaign, Local 331 "worked from" the list of 446 names provided by the City, and that the omission of "37 to 46" names form the list "prevented" Local 331 from seeking out those employees. I note that Taylor's assertion was not raised in the body of the objections.

The Association maintains that the City substantially complied with the eligibility list rule, and that the Commission's acceptance of the City's revised list facilitated an orderly election and avoided conflict, confusion and delay at the polls. The Association points out that the employees on the City's revised list have been part of the unit historically represented by Local 331 for many years. The Association submits that, as the recreation department was included in the consent agreement executed by the parties, Local 331 should have discovered, as the Association did, that the recreation employees were inadvertently omitted from the initial list by the City; therefore, the City's revision of the list did not affect Local 331's ability to campaign with those employees nor did it affect the outcome of the election. Absent allegations of bad faith or gross negligence, the Association argues that an informed electorate participated in the election. The Association further submits that the recreation employees are dues-paying members and strong supporters of Local 331; that recreation employee Timothy Naji is a Local 331 shop steward; and that Darnell's memorandum suggesting that 37 names had been omitted from the eligibility list was forwarded to Naji as well as to the City and the Commission. The Association requests that the objections be dismissed.

The City asserts that it substantially complied with the rule by producing eligibility lists twenty-four days and fourteen

days prior to the election; that despite ample opportunity to inspect the City's list, Local 331 never advised the City that the eligibility lists were incomplete, although reasonable investigation would immediately have revealed that certain unit members were inadvertently excluded; that immediately upon notice from the Association that the eligibility list appeared incomplete, the City conducted an inquiry, found that several names were inadvertently omitted from the lists due to administrative error, and forwarded corrected lists to all parties; and that Local 331 has produced no evidence that it was unable to identify, effectively campaign or communicate with all unit members and eligible voters in advance of the election, or that the City intentionally omitted names of unit members from any production.

The City further submits that, as the incumbent representative, Local 331 knew the identity of its unit members, since the City provided Local 331 with a monthly list of the names of dues paying members, as recently as almost four weeks prior to the election. The City further asserts that of the names added to the list on December 10, only three did not appear on the deductions/earnings list provided to Local 331 on November 16, 2002; therefore, only these three employees were previously unidentified to Local 331 by the City two days before the

election, which could not have affected the outcome. The City requests that the objections be dismissed.

* * *

In Montclair, CWA objected to an election on the grounds that the employer violated its N.J.A.C. 19:11-10.1(b) obligation to provide a complete eligibility list, where the employer timely provided 15 of 25 employees' names and addresses. The list included the entire professional unit but did not include non-professional employees. The remaining names and addresses of the non-professional employees included in the unit were added only after CWA complained, which was less than ten days before the election. CWA contended that the employer had not substantially complied with the eligibility list requirements and argued that the election should be set aside.

I found in Montclair that the list was not technically late, but incomplete. The list was sent to the union's counsel pursuant to the parties' agreement, but counsel did not review it until two days later. When the Township was advised the list was incomplete, it provided the missing names and addresses that same day. Based on the Township's conduct in correcting its omission, I found that the Township's omission was an unintentional, administrative oversight. I further found that had the union been diligent in its review of the list when it was received, the correction likely

could have been made in time to comply with the ten-day requirement of N.J.A.C. 19:11-10.1(a).

As noted earlier, a further factor considered by the Commission as well as the NLRB in evaluating whether eligible voters have had the opportunity to be informed of the election issues is whether the objecting union is an incumbent organization with an "in-plant" presence among the employees. Trenton; Jersey City Medical Center; Kent Corp.

Applying the standards set forth in Montclair and Trenton Bd. of Ed. to this case, I find that Local 331's first and second objections do not warrant setting aside the election. There is no dispute that the eligibility list was due to the Commission on December 2, 2002. There is likewise no dispute that the initial list was served upon both organizations by the December 2 due date, and that the December 10 revised list was served upon both organizations on that date. Therefore, I conclude that the City's initial list was not untimely, but incomplete. Thus, the inquiry turns to whether the incompleteness of the list affected the parties' ability to contact voters for campaigning purposes.

Local 331 is correct that the number of eligible voters omitted from the list (41), is greater than the vote spread between the two organizations. This, in and of itself, is not sufficient grounds to find that the omission of the 41 names

affected the outcome of the election. While Local 331 asserts they were "prevented from campaigning or communicating with" the recreation employees, Local 331 did not submit any evidence that it would have used the home addresses - for instance, to mail campaign materials to voters' homes - even if it had been given the addresses of the additional employees, or that it did a mailing to all other eligible voters on the City's initial list. In other words, it did not establish that, but for the City's omission of the 41 names from the list, it would have contacted those voters at their home addresses.

Local 331 cannot claim that they were prevented from knowing about the recreation department employees' eligibility. Local 331 has been the incumbent representative of the white-collar unit for more than 20 years. The Association petitioned to represent the existing unit, which has historically included the recreation department. The recreation department employees were specifically mentioned in the Consent Election Agreement and Notice of Election. In addition, the City provided Local 331 with a dues deduction list of unit employees as late as November 2002 (just one month before the election), which included all but three of the missing 41 names. Further, Local 331 had an in-plant presence. As the incumbent, it is the certified representative of these employees. One of Local 331's shop stewards is an employee of the recreation department. Based upon these facts, Local 331

may not now credibly claim that it had no way of knowing about the recreation department employees as eligible voters.

In addition, the Association and Local 331 received the City's first eligibility list 16 days prior to the election. The list was served on both organizations simultaneously. The Commission's staff agent instructed both organizations to review the list and advise us of any errors. As the incumbent, Local 331 knew or should have known that the recreation department employees, who were part of its unit, should have been included on the City's eligibility list. Both organizations had an equal opportunity to review the list and use it to campaign among voters. The fact that the Association discovered the omission of the recreation department's employees before Local 331 is of no consequence.

This is not to say that an employer is absolved of its responsibility to supply an accurate eligibility list in conformity with the rule section whenever the incumbent has other means to communicate with the voters. Nor does the fact that the organization has other means of obtaining employees' names and addresses act as a substitute for receipt of a complete voter eligibility list. However, we will consider those facts in determining whether a defective eligibility list prejudices the objecting party's ability to communicate with the voters prior to

the election and interferes with the employees ability to vote in a free and fair election. See Jersey City Medical Center.

Finally, the City's omission from the list was not deliberate, discriminatory, or in bad faith. It made an obvious, administrative mistake which it promptly corrected once it was discovered. Trenton Bd. of Ed.

Based upon all of the above, I conclude that City's inadvertent omission of 41 names from the eligibility list and the parties' receipt of the corrected list one day before the election, do not warrant setting aside the election. Objections one and two are hereby dismissed.

3. The denial of Local 331's request to review the post-election eligibility list

Local 331 objects to the denial of its post-election request to examine the checked off eligibility list, allegedly in violation of the New Jersey Right to Know Law, N.J.S.A. 47:1A-1 et seq. This objection does not concern conduct which could have affected the outcome of the election and must be dismissed.

I also note that the election observer designated on behalf of Local 331 could have asserted a challenge to the eligibility of any of the employees on the December 10 revised list if and when such person appeared at the polls; however, no challenges based upon the December 10 revisions were asserted. See Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002) (N.J.A.C. 19:11-10.3 permits each party to the election to have an observer

present for the election who may challenge the eligibility of any person to participate in the election; objections to the election are not an appropriate substitute for asserting a challenge to the eligibility of particular voters); see also Magnolia Bd. of Ed., D.R. No. 2001-5, 27 NJPER 116 (¶32042 2001); Tp. of Hainesport, D.R. No. 94-14, 20 NJPER 100 (¶25050 1994). Objection number three is hereby dismissed.

4. Association's Alleged Use of City Property for Campaigning Purposes

Local 331 alleges that the City allowed representatives of the Association to utilize City property, time, offices and vehicles for campaigning purposes, constituting unlawful employer assistance to the Association or at least creating the impression that the City endorsed the Association. More specifically, Local 331 alleges that the City allowed Association supporters, particularly Anthony Cox and Joseph Polillo, "to campaign for the Association on City time, in their City uniforms, utilizing their City phone numbers, City fax machines, perhaps City copiers, and meeting rooms, and otherwise totally support[ed] their campaign to replace [Local 331], or at least giving that impression," and such action constituted conduct affecting the results of the election. Local 331 alleges that the City provided such assistance to the Association during the open period prior to the filing of the representation petition through the date of the election. In the letter brief accompanying its objections, Local 331 alleged that

this conduct occurred after Local 331 objected to such conduct by letter of December 11, 2002.

Local 331 submitted Association campaign literature indicating that employees could contact Association organizers at their City numbers for information, and memoranda indicating that Association organizational meetings were scheduled on City Hall property.

Local 331 presented statements from Local 331 employees and former and current City employees in support of these allegations. Susan Taylor, a business agent for Local 331, asserts that Association representatives were repeatedly observed campaigning on City time, in their City uniforms, in City Hall, and utilized City communications facilities, and property for campaign purposes with the City's knowledge and consent, including on the date of the election; and that Association campaign literature was distributed throughout City Hall and other City facilities, indicating that interested employees could contact Association representatives during business hours, utilizing City phones and offices. Taylor's certification states that on December 11, Local 331 president Joseph Yeoman sent a letter to the City protesting that the City was allowing the Association to use City equipment and material for campaign purposes, and the City took no action.

Taylor asserts that "(e)mployees who were supporters of [Local 331] were not permitted to campaign, and/or organize, or

otherwise campaign on City time." Taylor further asserts that this conduct, along with the termination and/or discipline of Local 331's supporters, created the impression that the City and Mayor Langford supported the Association; and that the City "was discouraging and would retaliate against" Local 331 supporters. Taylor also asserts that Association supporters were known to support Mayor Langford's campaign. Taylor further asserts that on December 12, when the results of the election were announced, she observed Assistant Business Administrator Dominick Capella "joined in the celebration" with Association supporters, particularly Cox and Polillo.

Ricky Cistrunk, a business agent employed by Local 331, asserts that while performing shop visits in the City, he observed Joseph Polillo doing a large share of organizing in City hallways during City time, and that he received reports of Anthony Cox being allowed to campaign while on duty and "out of the area of his responsibility," including on the second floor of the Public Safety Building.

Patrick McGuin, an employee of Local 331, asserts that on the date of the election, he saw Joe Polillo in City uniform and driving a City pickup truck. McGuin also raises concerns about other Association supporters in City uniform on the date of the election, the assignment of Association supporters as election

observers, and the presence of Association supporters at the opening and closing of the polls.

Local 331 presents the affidavits of former City employees Winston Reynolds and Preston Milbourne.[3] Reynolds, a former Local 331 chief shop steward, asserts that he was an active participant in the November 2001 mayoral campaign which resulted in the election of the current mayor, Lorenzo Langford. Reynolds asserts that because of his actions in support of Local 331 and his perceived support of the former mayor, he was terminated from his employment with the City on or about May 17, 2002. Reynolds further asserts that he was aware that two Association organizers, Cox and Polillo, were and continue to be active supporters of Mayor Langford; that as City housing inspectors, Cox and Polillo wear a uniform which is similar in appearance to some of the uniforms worn by superior officers in the City's police department; and that Cox and Polillo are associates of Dominick Capella, a director of Langford's campaign, who was recently appointed to a newly created post of assistant business administrator. Reynolds asserts that Capella was "observed

[3]Milbourne's name did not appear on the list of employees eligible to vote in the election. On the date of the election, Milbourne appeared at the City Hall polling site and alleged that he had been unjustly terminated from his City employment. Milbourne cast a challenged ballot, which remained unresolved after the close of the polls and was not counted.

speaking with Mr. Cox and Mr. Polillo during the count for the [December 12] election, and supporting the [Association]."

Milbourne asserts that on December 12, after the election was over, he overheard Cox being interviewed by a newsperson. In response to the newsperson's statement that a Local 331 employee had just stated that City employees would lose their healthcare benefits, Cox responded, "the Mayor assured us we would not lose our healthcare."

Local 331 also presents affidavits from City employees Sean Wyett, Cotieth Stafford, Tanya Fonville, Pamela Harris, and Leslie Lewis.

Wyett asserts that Cox made statements in Cox's sister's office and in the break room concerning the benefits of "this new thing." It is unclear from Wyett's statements whether he alleges he witnessed these statements or whether they are alleged to have occurred on City time.

Stafford asserts that she witnessed Cox soliciting signatures in the morning and placing literature concerning the Association on a desk around noon time. It is unclear from Stafford's statement on which date this conduct allegedly occurred.

Fonville asserts that on December 11, 2002, at an unspecified time and place, she had a conversation with Anthony Cox about whether she had any questions concerning the Association.

Harris asserts that Cox was in uniform at Atlantic City Municipal Court (Harris' work location) in early October 2002, soliciting "votes on the in-house union."

Lewis asserts that she was called away from her work during work hours to a meeting in the lunch area to talk with Cox concerning "what the new union can do for us (and) what Local 331 wasn't doing for us." Lewis asserts that Cox was allowed to do so by management and was in uniform at the time.

* * *

Even assuming as a fact that Association supporters were campaigning in the workplace, such a claim is insufficient to invalidate an election without a showing that the employer sanctioned such conduct and that the rival organization was prohibited from the same access to the employees. The Commission has previously addressed election objections based upon claims of employees campaigning in the workplace on work time.

In Ocean County Judiciary, D.R. No. 86-25, 12 NJPER 511 (¶17191 1986), CWA filed post-election objections alleging that the OPEIU enjoyed regular and frequent access to the voters during work hours at their work stations, while similar access was denied to CWA's own representatives. Thus, CWA alleged that the employer provided an unfair advantage to OPEIU in the election as well as created an appearance of employer preference for OPEIU. In support of these allegations, CWA documented that employees were

approached by OPEIU representatives during work hours at the employees' Judiciary offices; that CWA complained to the Judiciary about OPEIU's workplace access, and that CWA representatives were told they would not be permitted into work areas to address workers during work time. The employer denied granting permission to any union representatives to campaign or solicit employee support during work hours at the work place and that if either organization was able to gain access to the workers, it was not with the employer's permission. The employer subsequently issued a formal ban on solicitations by any organizations during work hours at employee work stations.

The Director of Representation dismissed the objections, relying in part on NLRB precedent including LaPointe Machine Tool Company, 113 NLRB 171, 172, 36 LRRM 1273, 1274 (1955), where the NLRB held that:

> It is not an interference with an election to permit one of two unions to solicit support on company time and property where there is no showing that the other union involved had requested, and had been denied, similar privileges. Ocean County Judiciary at 512, citing LaPointe Machine Tool Company, 113 NLRB at 172, 36 LRRM at 1274.

The Director found that there was no evidence that it was denied similar access, or that CWA representatives even tried to gain such access during the period at issue. Moreover, the director found there was no evidence presented which supported the CWA's contention that the employer granted access to either

organization during the election campaign. See also Essex County Probation Department, D.R. No 87-20, 13 NJPER 170 (¶18076 1987) (citing Ocean County Judiciary; permitting one organization to engage in a certain campaign activity where there is no showing that the other organization involved made a similar request and was denied similar privileges does not constitute unequal access; denial of similar access is the crucial element of unequal access); Trenton Bd. of Ed. (union's claim concerning activity of rival organization could not be sustained where there was no evidence of disparate treatment or unequal access).

Here, Local 331 provides no factually specific allegations or independent evidence that the City allowed Association campaigning on work time and premises, that the Association acted with the City's permission or that the City endorsed the Association's conduct.

To the extent the affidavits of Taylor, McGuin and Milbourne appear to raise allegations concerning the political affiliations of Association supporters, these allegations are raised outside the scope of the election objections, and, moreover, do not appear to raise allegations of conduct protected by the Public Employer-Employee Relations Act. In particular, we are unable to ascribe any statement to the Mayor from Milbourne's assertion that Cox stated "the Mayor assured us we would not lose our healthcare." Moreover, even if the City had taken the position that employee

healthcare benefits would not be changed if the Association won the election, that position would be consistent with Commission caselaw indicating that terms and conditions of employment must be maintained throughout the election period or changed through negotiations. See Bergen County, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983). Accordingly, I dismiss objection number four.

5. City's Alleged Failure to Fulfill Agreement on Charge

Local 331 alleges that the City failed to fulfill conditions of the memorandum of agreement signed by the parties concerning Local 331's unfair practice charge.

Local 331 filed the subject charge on August 30, 2002 and amended it on September 3 and 10, 2002. The Association filed its representation petition on September 12. Therefore, all of the events alleged in the unfair practice charge occurred prior to the filing of the representation petition.

On October 15, Local 331 and the City signed two agreements to resolve the unfair practice charge pending the outcome of the representation proceeding. One of those agreements particularly memorialized the fact that the charge was filed prior to the representation petition. Thereafter, Local 331 executed a separate Request to Proceed in the representation matter, which specifically waived any right to raise the events alleged in the unfair practice charge as post election objections. Having so

waived, Local 331 cannot now resurrect the allegations in the form of election objections. See Atlantic County Utilities Authority, D.R. No. 93-18, 19 NJPER 185 (¶24091 1993); remanded for consideration of post-petition conduct, P.E.R.C. No. 94-6, 19 NJPER 416 (¶24185 1993), objections re post-petition conduct dismissed D.R. 94-25, 20 NJPER 244 (¶25121 1994) (election objections based upon identical allegations raised in unfair practice charge dismissed where organization expressly waived its right to file election objections over the conduct alleged in the charges).

To the extent that Local 331 alleges that the City engaged in conduct which allegedly violated the settlement after the October 15 conference and settlement agreement, no factual specifics in the objections or accompanying brief and affidavits support a finding that such conduct affected the outcome of the election. Accordingly, objection five is dismissed.

6. Misrepresentations in Association Campaign Literature

Local 331 alleges that campaign material distributed by the Association contained untrue allegations of fraud and loss of monies by Local 331. Local 331 submits an undated Association campaign document containing the words "fraud and corruption" in bold type, and indicating later in the body of the document that "the guys from Pleasantville took more of your raise than you

did." Local 331 alleges that this document misrepresents the amount of annual Local 331 dues, and associates a recent dues increase with fraud and corruption by Local 331. Local 331 submits another undated document purportedly signed by Association representative Polillo, suggesting that Local 331 has lost $300,000.00 over the last 20 years. Local 331 asserts that these statements create the inaccurate impression that Local 331, and its president Joseph Yeoman, have been accused of improper conduct. It is unclear from Local 331's objections when these statements were allegedly made.

In Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1990), the Commission articulated its standard for reviewing statements made during a representation election campaign. It held that a representation election will be set aside where there has been a misrepresentation or similar campaign trickery which involves a "substantial departure from the truth," made at a time which prevents parties from making an effective reply. The misrepresentations, whether deliberate or not, must reasonably be expected to have a significant impact on the election. See also, Bergen Community College, D.R. No. 90-19, 16 NJPER 170 (¶21069 1990), adopting H.O. No 90-3, 16 NJPER 23 (¶21035 1990); Middlesex County Utilities Auth., D.R. No. 90-2, 15 NJPER 501 (¶20207 1989; Morrisview Nursing Home, D.R. No. 89-27,

15 NJPER 237 (¶20097 1989), request for review denied, PERC No. 89-124, 15 NJPER 331 (¶20147 1989).

Where an objecting party alleges that material factual misrepresentations interfered with employee free choice, that party must show either an inability to effectively reply or provide direct evidence of interference. Passaic Valley; Bergen Community College; City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982). Absent a showing that the alleged misstatement is a "substantial departure from the truth," the objection will be dismissed. Camden County Judiciary, D.R. No. 92-9, 18 NJPER 30 (¶23009 1991), req. for rev. denied P.E.R.C. No. 92-86, 18 NJPER 103 (¶23048 1992).

While certain Association literature may have contained misrepresentations of fact,[4] Local 331 submitted no evidence concerning when the campaign literature was allegedly distributed to employees, that the misrepresentations were substantial, or that Local 331 was prevented from making an effective reply. Since Local 331 has provided no facts establishing the time frame of the alleged misrepresentations, it has not been established that Local 331 was deprived of sufficient time to correct the misrepresentations. See Bergen Community College (distribution of flyer by rival organization 36 hours prior to the start of the election left enough time for objecting party to correct the

[4]We make no finding with respect thereto.

misrepresentation); Morrisview Nursing Home (where alleged misstatements were made at least nine days prior to election, Commission found that union had adequate time to disseminate its own information).

Moreover, Local 331 has not established that the City actually permitted campaign literature containing misstatements of fact concerning Local 331 to be posted on City property, in a manner that directly affected the outcome of the election. See City of Newark, D.R. No. 95-2, 20 NJPER 342 (¶25176 1994). Therefore, I find that Local 331 has not supplied sufficient evidence to meet the Commission's standard for establishing campaign misrepresentations which affected the outcome of the election. Objection six is dismissed.

ORDER

The objections are dismissed. A Certification of Representative is attached.

Stuart Reichman
Director of Representation

DATED: March 4, 2003
Trenton, NJ

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of	>	
	>	
CITY OF ATLANTIC CITY,	>	
Public Employer,	>	
	>	
-and-	>	
ATLANTIC CITY WHITE COLLAR	>	
PROFESSIONAL ASSOCIATION,	>	DOCKET NO. RO-2003-23
Petitioner,	>	
	>	
-and-	>	
IBT LOCAL 331,	>	
Intervenor.	>	
	>	

CERTIFICATION OF REPRESENTATIVE

An election was conducted in this matter in accordance with the New Jersey Employer-Employee Relations Act, as amended, and the rules of the Public Employment Relations Commission. A majority of the voting employees selected an exclusive majority representative for collective negotiations. No valid timely objections were filed to the election.

Accordingly, **IT IS HEREBY CERTIFIED** that

ATLANTIC CITY WHITE COLLAR PROFESSIONAL ASSOCIATION

has been 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 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 representative is responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership. The 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. Written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: Included: All regularly employed white collar employees of the City of Atlantic City.
Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police employees, casual employees; omnibus operator, museum attendant, employees in other bargaining units, and all other employees of the City of Atlantic City.

DATED: March 4, 2003
Trenton, New Jersey

Director of Representation

Attachment: Certification of Representative
Dated: March 4, 2003

In the Matter of

City of Atlantic City
-and-
Atlantic City White Collar Professional Association
-and-
IBT Local 331
Docket No. RO-2003-23

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