D.R. NO. 2000-7

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Public Employer,

-and-

NEW JERSEY EDUCATION ASSOCIATION, Docket No. RO-2000-49

Petitioner,

-and-

IUE LOCAL 423

Intervenor.

SYNOPSIS

The Director of Representation dismisses the intervenor's post-election objections alleging (a) the employer failed to provide a timely voter eligibility list, (b) the petitioner engaged in polling place misconduct, and (c) the Board refused to permit the intervenor's representatives to meet with unit members on school property one day before the election.

Applying Jersey City Medical Center, D.R. No. 83-37, 9 NJPER 411 (¶14188 1983) and NLRB cases, the Director finds that the Board was in "substantial compliance" with the requirements of N.J.A.C. 19:11-10.1 when it made a complete voter eligibility list available to all parties two days after the list due date.

The Director further finds that the intervenor did not establish a prima facie case as to the alleged polling place misconduct or the alleged denial of intervenor access to employees prior to the election.

The Director issues a certification of representative to the petitioner.

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Intervenor.

Appearances:

For the Public Employer,
Sharon D. Larmore, attorney

For the Petitioner,
Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, of counsel)

For the Intervenor,
Tomar, Simonoff, Adourian, O'Brien,
Kaplan, Jacoby & Graziano, attorneys
(Mary L. Crangle, of counsel)

Decision and Certification of Representative

On October 28, 1999, the Trenton Board of Education (Board), the petitioner New Jersey Education Association (NJEA), and the intervener/incumbent representative IUE Local 423 (IUE) entered into an Agreement for Consent Election for a secret ballot election to be conducted by the Public Employment Relations Commission

(Commission) on November 18, 1999.[1/] The election was to determine the exclusive negotiations representative, if any, for paraprofessional employees, including teacher aides, community agents, reading aides, medical aides, social work aides, math aides, learning disability aides and video-tape operators employed by the Board.

I approved the Consent Agreement on November 8, 1999. As set forth in that Agreement and pursuant to N.J.A.C. 19:11-10.1, the Board was required to provide to the NJEA, the IUE, and the Commission, a list of the names of all eligible voters along with their mailing addresses and job titles no later than close of business November 8, 1999. The Agreement also designated specific representatives to receive the voter eligibility list; the NJEA designated UniServ Representative Maureen Cronin, and the IUE designated Local 423 President Beatrice Shelton.

The November 18 election was conducted at three polling sites.[2/] Of approximately 199 eligible voters, a total of 146 valid ballots were cast; 83 votes were cast for the NJEA, 63 votes were cast for the IUE and no votes were cast for the "No Representative" choice. There were no void ballots and no ballots

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1/ N.J.A.C. 19:11-4.1.

2/ On November 15, 1999, the IUE filed an unfair practice charge alleging that the NJEA engaged in improper activity at an IUE general membership meeting for unit members held on site on November 4, 1999. On November 16, I denied IUE's request that its charge block the election.

challenged. Accordingly, a majority of the valid ballots were cast in favor of the NJEA.

On November 22, 1999, the IUE filed timely post-election objections along with affidavits and other documentary evidence in support.[3/] By letter dated November 24, 1999 the Acting Director of Representation acknowledged receipt of the IUE's objections and advised the IUE of its responsibility to furnish sufficient evidence to support a prima facie case demonstrating that conduct occurred which would warrant setting aside the November 18, 1999 election as a matter of law. The IUE was invited to submit any additional affidavits or documentation no later than December 6, 1999. No further documentation was received. Subsequently, by letter dated December 10, 1999, I informed the parties that an investigation into the IUE's election objections had been initiated, and invited the parties to submit position statements addressing the issues raised in the objections.

All parties submitted position statements and the Board also submitted documentation in support of its position. Based upon my review, I find the following facts:

Objection I

In its first objection, the IUE alleges that the voter eligibility list required by N.J.A.C. 19:11-10.1 was untimely filed

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3/ N.J.A.C. 19:11-10.3(h).

with its designated representative and that such untimely filing is grounds for setting aside the election.

There is no dispute that the eligibility list was due to the Commission on November 8, 1999, and that copies were to be simultaneously provided to Cronin and Shelton.

On November 4, 1999, the Board supplied Cronin and Shelton with an alphabetized list of eligible voters' names and work locations. On November 9, 1999, the designated representatives and the Commission received a list of names of eligible voters by polling site. Neither the November 4 nor the November 9 list contained employees' mailing addresses. Early on November 10, a Commission representative informed the Board's counsel by telephone that the voter eligibility list as submitted lacked employees' mailing addresses as required by the Commission Rules and the Consent Agreement. On the afternoon of the same date, the Commission's representative telephoned counsel for IUE and NJEA to advise them of the deficiency in the November 9 list.[4/] Late in the afternoon on November 10, the Board produced a computer payroll printout of eligible voters showing their mailing addresses, and informed the Commission that the new list was now available for the parties to pick up at the Board office. The Commission representative immediately telephoned IUE's counsel and Cronin to

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4/ At no time prior to November 10 did the NJEA or the IUE contact the Board or the Commission concerning the lack of addresses on the November 4 or November 9 eligibility lists.

inform them that a perfected list was available for pick up. Another NJEA representative picked up the list at the Board's office after the close of the school day on November 10 and delivered it to Cronin later that evening. Counsel for IUE directed that the list be mailed to the office of an IUE representative other than Shelton at a Bellmawr, NJ location.[5/]

The Board's counsel also had the IUE's copy of the list hand delivered to Shelton's home on or about November 11. Shelton was on vacation for the week of November 8 through November 12. Other than the IUE's instruction to mail the list, the IUE apparently made no other arrangements with the Board or the Commission to obtain the list in Shelton's absence.

Trenton schools were closed on November 11 for the Veteran's Day holiday, and on November 12. School was back in session on November 15. Shelton returned from her vacation sometime after November 11 and returned to work on November 15.

ANALYSIS

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

> (a) In all representation elections conducted pursuant to this subchapter, unless otherwise

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5/ While counsel for the IUE inquired as to the feasibility of sending the list via fax, there were concerns that because of the nature of the payroll printout, a faxed copy may have been illegible, thus counsel instructed that the list be mailed.

> directed by the Director of Representation, the public employer is required to file simultaneously with the Director of Representation and with the employee 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 addition, the public employer shall file a statement of service with the Director of Representation. 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. The Director of Representation shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.
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> (b) Failure to comply with the requirements of this section shall be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-10.3(h).

In reviewing objections which allege employer non-compliance with these provisions, the Commission has held that if an employer has "substantially complied" with the requirements of 10.1(a), the rule does not mandate setting aside the election. County of Monmouth, P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982). The substantial compliance standard is applicable to both the completeness of a list and the timeliness of its transmittal. Jersey City Medical Center, D.R. No. 83-37, 9 NJPER 411 (¶14188 1983). Thus, the question to be answered regarding Objection I is whether the Board substantially complied with the eligibility list requirements of N.J.A.C. 19:11-10.1.

The Commission's adoption of the substantial compliance standard is rooted in decisions of the National Labor Relations Board concerning an employer's obligation to provide a voter

eligibility list as established in Excelsior Underwear Inc., 156 NLRB 1236, 61 LRRM 1217 (1966).

In Excelsior, the Board established the requirement that within 7 days after the parties enter 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. In establishing the Excelsior rule, the Board placed particular emphasis on applying the rule 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. See also Monmouth.

In subsequent analyses of alleged non-compliance with the Excelsior rule, the Board has consistently held that the rule is not to be mechanically applied. Program Aides Co. Inc., 163 NLRB 54, 65 LRRM 144 (1967); Pole-Lite Industries Ltd., 229 NLRB 196, 95 LRRM 1080 (1977); Bear Truss Inc., 325 NLRB No. 216, 159 LRRM 1199 (1998). Rather than applying a mechanical approach, the Board has considered numerous factors in its analysis of whether an employer has substantially complied with the Excelsior

rule.[6/] The Board has to one degree or 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 that the union did not have enough time to reach employees, Wedgewood Industries, 243 NLRB 1190, 101 LRRM 1597 (1979), Taylor Publishing, 167 NLRB 228, 66 LRRM 1049 (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 an incumbent situation one party had the list for a significantly longer period than the other, Ben Pearson Plant (Consumer Division) - Brunswick Corporation, 206 NLRB 532, 84 LRRM 1138 (1973), and finally, whether the margin of the election vote as a factor tended to show

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6/ NLRB cases are often used as guidance for interpreting our Act. Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970). However, since Excelsior, the factors considered by the Board have not always been of equal import and the decision in cases rests heavily on its specific facts.

that the voters had the opportunity to be fully informed. Mod Interiors, 324 NLRB 164, 156 LRRM 1149 (1997); Alcohol and Drug Dependency Svcs. 326 NLRB No. 58, 160 LRRM 1093 (1998).

There are three factors which have been consistently applied by the Board in its initial analysis of an alleged untimely provision of the Excelsior list. 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 at 197.

On the issue of compliance with the timeliness requirements of 19:11-10.1(a), the Commission has established precedent along these same lines. In Jersey City Medical Center, the Director of Representation considered these same three factors in determining that the employer had substantially complied with 19:11-10.1 when it mailed the eligibility list to the objecting party/incumbent more than 10 days before the election even though the list was not received by the incumbent until 9 days before the scheduled election. Applying the second factor set forth above (length of time the union had the list prior to the election) the Director also found that although the list was received late in the afternoon of November 24, the day before a 4 day holiday weekend, the operative time frame was triggered when the list was received; thus the union had the list 9 days prior to the election. In this regard, the Director pointed out that the

incumbent had a 4 day holiday weekend as well as 4 additional work days to communicate with eligible employees. Id. at 412.

Finally, even though the number of eligible voters in Jersey City Medical Center totaled 86 employees, the Director found that the incumbent had sufficient time to use the mail as well as in-person canvassing and telephone to inform the employees of the issues.7/

Applying Jersey City Medical Center to the instant case, the eligibility list was due from the Board on November 8, 1999. Prior to that date, the parties had received a list of names and work locations for all eligible voters, albeit without mailing addresses. When the Board made the list available for both unions to pick up at its offices on November 10, it was two days late. When neither Shelton nor any other IUE representative picked up the list, the Board hand delivered it to Shelton's home. Shelton returned to her home from a vacation sometime during the weekend

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7/ Little Egg Harbor Municipal Utilities Authority, D.R. No. 88-1, 13 NJPER 619 (¶18231) is factually distinguishable from Jersey City Medical Center, and the instant case. In Little Egg Harbor, there was no incumbent. The unit consisted of 12 eligible voters and the vote tally was 6 yes, 6 no. The names of two of the voters were omitted from the original voter eligibility list, and not given to either the Commission or the petitioner until 18 days after the list was due and 8 days after ballots had been mailed out to voters. The Director found that the employer's effort to inform the union of the omitted names was not substantial compliance due to both the untimely provision of the names "well after 10 days before ballots were mailed" and that the number of names omitted constituted 18 percent of the eligible voters. Finally, the parties in Little Egg Harbor agreed to a second, on-site election.

of November 13 and found the list there waiting for her.[8/] There is no claim that the Board's failure to comply with N.J.A.C. 19:11-10.1(a) was intentional. Immediately upon notification by the Commission staff agent that the list was deficient, the Board developed a new list which complied with N.J.A.C. 19:1-10.1(a) and acted to avoid further delay by making the list available to both parties on November 10. After the NJEA arranged to pick up the list from the Board on November 10, the Board took the additional step to promptly hand-deliver the list as best it could to the designated IUE representative. Bear Truss, Inc.

In assessing factor number two (the number of days which the employee organization(s) have the list prior to the election), the IUE was served with the list on November 11, a total of 7 days before the election. Additionally, just as the union in Jersey City Medical Center had received the list prior to a 4 day holiday weekend, in the instant case the IUE constructively received the list prior to a 4 day holiday weekend also. In Jersey City Medical Center, the operative time frame was triggered when the list was delivered regardless of the holiday. Nonetheless, had

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8/ We note that the IUE does not assert in its objection or supporting documentation that Shelton would have been available to receive the list had it been delivered on November 8, the due date. The IUE asserts that a note from the Board attached to the list was dated November 11 -- thus IUE argues that the list was not delivered to Shelton's home until that date or later. Even assuming the list was delivered on November 11, it was available to the parties on November 10.

the IUE made arrangements for someone other than Shelton to receive the list, it could have used the list over the holiday weekend and for the remaining 4 working days before the election.

The IUE points out that in Tom's Trains Treats, Inc., a union's possession of an eligibility list only 5 days prior to an election, those 5 days including a weekend and federal holiday, was significant. The Board found that the employer had not substantially complied. However in that case, the Board also found that the list was 12 days late and the employer had no extenuating circumstances or compelling explanation for the delay. In the instant case, the list was only 2 days late and the employer's delay was due to its correcting the mistake it had made on the original list. Additionally, in Rockwell Manufacturing Co., which the IUE argues is analogous to the instant case, the list was 11 days late, over 100 employees in a 208 person unit lived in rural areas, and the Board found it very disturbing that the reason given by the employer for the delay was an "unintentional oversight." Rockwell is distinguishable from the instant case regarding the number of days the list was late, and with respect to the geographical diversity of the voters.

As to the third factor considered in this analysis, the number of eligible voters, the total number in this case was 199. The significance of this factor goes to the policy behind the Excelsior rule as stated earlier; have the voters had the opportunity to be fully informed of the issues in the campaign or

has this right been impaired by the late delivery of the list. In Taylor Publishing, the Board has determined that the employer substantially complied with Excelsior requirements where an eligibility list was one day late, the union had the list 9 days prior to the election and the unit exceeded 1,000 employees. In the instant case, the unit is comprised of 199 voters. While the number of voters is not insignificant, the IUE has not demonstrated an inability to contact the voters and fully inform them of the election issues in the 7 days between the receipt of the list and the election.

As noted earlier, the Board and the Commission have considered factors other than the three listed above in applying the substantial compliance standard. The importance of those factors differs from case to case. In evaluating whether eligible voters have had the opportunity to be informed of the election issues, a further factor considered by the Board and Commission is that the objecting union may be an incumbent organization with an "in-plant" presence among the employees. Jersey City Medical Center; Kent Corp. While not relieving the employer of its obligation to supply a voter eligibility list to all employee organizations who are parties to an election, the fact that an incumbent, in the instant case the IUE, has officials among the eligible employees on a daily basis cannot be ignored. This presence may itself diminish the importance of the use of the list

in informing the employees of the election issues.[9/] In this regard, as early as November 4, 1999, the IUE also took the opportunity to hold membership meetings during the campaign to inform the voters of the issues. I take administrative notice of the IUE's unfair practice charge Docket No. CO-2000-116, wherein the IUE alleged that NJEA organizers disrupted an IUE membership meeting on school property on November 4, 1999. Additionally, IUE local officials had a daily presence at work locations, enjoyed daily contact with paraprofessionals, had a list of eligible employees at their work locations early on in the campaign, conducted at least one membership meeting by November 4, and, as late as November 17, the IUE international representatives were being escorted to work sites by local officials and speaking one-on-one with eligible employees. (See Objection III).

9/ This is not to say that if the union has other means of obtaining the list, those means absolve the employer of its duty to supply a complete and timely list. Neither do other means of obtaining employees names and addresses act as a substitute for receipt of the list. The point in the instant case as in Jersey City Medical Center, is determining the real importance of the list to the incumbent, given the in-plant presence. In Grays Drug Stores, Inc. 197 NLRB 924, 80 LRRM 1449 (1972), cited by the IUE for the proposition that evidence of a union's lack of need for the list is not relevant, the issue before the Board was the unit structure, not the employer's failure to comply with the Excelsior requirement. The reference to the Excelsior requirement came in a footnote and was in response to the employer's attempt to litigate whether a list needed to be provided at all, not whether the employer had failed to substantially comply after providing an untimely list. Gray's Drug Stores, at 926, n. 16.

Based upon all of the particular facts of this case, I find that the Board substantially complied with the eligibility list rule since the IUE has not demonstrated that the delay in the delivery of the perfected eligibility list has precluded it from affording voters the opportunity to hear arguments concerning representation issues prior to the election and the right to participate in a free and fair election. Monmouth. IUE's Objection I is dismissed.

Objections II and III

IUE's Objection II alleges that the NJEA used a Board supervisory employee as an election observer at the Holland School polling site and that that observer left the site midway through the election (approximately 4:18 p.m.) and "conferred" over a list of names with NJEA representative Cronin who was outside the polling area wearing NJEA insignia and approaching eligible voters. IUE asserts this activity warrants setting aside the election.

In support of this objection, the IUE has provided the affidavit of Beatrice Shelton who was an IUE election observer at the Holland School polling site. Shelton attests that the NJEA observer, Pamela Owens, is a Human Resources Analyst for the Board who "handles employment relations matters" for paraprofessionals. Shelton also attests that she (Shelton) as well as other paraprofessionals "view" Owens as "having control over terms and

conditions of employment of paraprofessionals". According to Shelton, Owens deals with paraprofessionals concerning hiring, orientation, transfer "and the like", and when acting in her capacity as IUE Local President, Shelton deals with Owens concerning resolution of issues related to the terms and conditions of employment for paraprofessionals. Finally, Shelton attests that she saw Owens leave her position as NJEA observer at the Holland School polling site midway through the election and that Owens was replaced for the remainder of the election by employee Joan Hill.

In addition to Shelton's statement, the IUE submitted a statement from IUE International Representative Thomas Fagan, who was outside "in the vicinity of the Holland School" polling site on the day of the election. Fagan states that he saw NJEA observer Owens leave the polling site and "appear to be reviewing a list of names" with Cronin outside the voting area. Cronin then left the area and returned approximately 25 to 35 minutes later. While Fagan was in the vicinity of the polling site he observed Cronin wearing a hat displaying a NJEA insignia and approaching voters as they came to vote.

The NJEA responds that Owens is not a supervisory employee of the Board as evidenced by the Board's employment records for Owens, and that Owens had arranged with the Commission election agent to remain for only a portion of the polling time due to her need to attend to a prior commitment she had that day.

Finally, the NJEA asserts that although Cronin was at the Holland School site and conversed with two or three individuals, she stayed outside the restricted voting area at all times.

The Board provided a job description for Owens and asserts that Owens, as a Human Resource Analyst, is not a supervisor. Additionally, the Human Resource Analyst position is included in the non-supervisory Business and Technical negotiations unit represented by the NJEA, where Owens is the local president.

IUE's Objection III alleges that on November 17, 1999, two IUE international representatives, Fagan and Jean Zimber, and two paraprofessionals went to the Columbus School to speak with paraprofessionals at the school during their lunch hour but were required by the principal to leave.[10/]

In support of Objection III, the IUE has provided two affidavits. In an affidavit from Thomas Fagan, he states that he went to the Columbus School on November 17 with International

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10/ While not specifically alleged in the post-election objections submitted by IUE, in an affidavit provided with the objections, IUE International Representative Fagan states that he is "aware that on November 5, 1999 the NJEA was permitted to use a school loudspeaker to summon paraprofessionals" to an on-site meeting with NJEA. As this assertion was not submitted with the objections, I do not consider its merits. However, even assuming that the allegation was asserted in the objections, the IUE does not allege that the IUE requested and was refused the use of a school loudspeaker or meeting space. Thus, this claim does not support a prima facie case of disparate treatment of the IUE or unlawful preference for the NJEA by the Board. Ocean County, D.R. No. 86-25, 12 NJPER 511 (¶17191 1986).

Representative Zimber and two paraprofessionals to meet with paraprofessionals on their lunch hour. After signing in at the school office, Fagan and the others proceeded to the "staff cafeteria" or as it is described in the second affidavit from paraprofessional Betty Glenn, the "teachers' room."

Shortly after Fagan and Zimber arrived at the area, the school principal came to the room and "criticized" them for being in the area and "accused them of being on the premises illegally," making them look bad in the eyes of the paraprofessionals witnessing the incident. At some point, the principal asked Fagan and Zimber to come out of the area, escorted them to her office, and made them leave the building. Glenn, who had been with Fagan and Zimber in the area, was not permitted to be present while the principal spoke with Fagan and Zimber in her office. Glenn states in her affidavit that she had accompanied Fagan and Zimber to Trenton High School earlier that same day to speak with paraprofessionals on their lunch hour with no interference from school officials.

In its submission, the Board asserts that the Columbus School principal has full authority as the chief building administrator to require individuals to obtain her permission to be in the building and to use the teachers' room to conduct a meeting during the school day. According to the Board, that room is used for a variety of purposes and if the IUE representatives wished to use the room for a meeting on November 17, they should

have made prior arrangements. The Board denies that the principal embarrassed or admonished the IUE representatives.

ANALYSIS

Objections II and III

The law is well settled that an election conducted by the Commission carries with it a presumption that the choice expressed by voters in a secret ballot election is a valid expression of the employees' wishes. 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 existed between the alleged objectionable conduct and the freedom of choice of the voters. Hudson County Schools of Technology D.R. No. 99-14, 25 NJPER 267, 268 (¶30113 1999). Jersey City Dept. of Public Works, 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).

Moreover, the standards for review of election objections contemplated by N.J.A.C. 19:11-10.3(i)[11/] are discussed in

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11/ This rule section was recodified from N.J.A.C. 19:9.2(i) to N.J.A.C. 19:10.3(i) in 1995.

Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986), where 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 to my review of Objections II and III, I find that the IUE did not meet the evidentiary or substantive component necessary to establish a prima facie case.

In Objection II, the IUE objects to the presence of NJEA election observer Owens, who it asserts is a Board supervisor, and to Owens' early departure from the polling area.[12/] The IUE also

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12/ As to the substitution of a second observer for Owens during the election hours, I take administrative notice of the fact that election observers are routinely spelled with replacements as part of the conduct of elections so long as the polling place is not disrupted. In this case, Owens' replacement had been arranged with the Commission election agent in advance.

N.J.A.C. 19:11-10.3(f) provides:

> The election agent shall have responsibility for the conduct of the election, and may establish any procedures the agent deems necessary to facilitate the election process

Footnote Continued on Next Page

objects to what it describes as a "conference" outside the voting area between Owens and Cronin, who was wearing an NJEA hat. According to the IUE, the two "appeared to be reviewing a list of names." Finally, Cronin assertedly "approached" voters outside the polling area as they came to vote.

While the IUE provided affidavits from Beatrice Shelton and Thomas Fagan, each of whom observed at least part of the assertedly objectionable activity, I find no evidence which supports the allegation that Owens was a supervisor who therefore would have been disqualified to serve as an election observer absent my prior approval. N.J.A.C. 19:11-10.3(d).[13/] In this regard, while Shelton's affidavit states that she and other paraprofessionals may "view" Owens as a supervisor, nothing in Shelton affidavit provides

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12/ Footnote Continued From Previous Page

> and preserve the integrity of the secret ballot.

The IUE does not allege that this substitution interfered with the orderly process of the election or that any voter was prevented from voting free of restraint or interference as a result of the substitution. County of Salem, P.E.R.C. No. 81-121, 7 NJPER 239 (¶12107 1981) aff'g, D.R. No. 81-30, 7 NJPER 182 (¶12080 1981).

13/ N.J.A.C. 19:11-10.3(d) provides in relevant part:

> Unless otherwise approved by the Director of Representation or by the election agent, all observers shall be non-supervisory employees of the public employer.

evidence that Owens' is in fact a "supervisor" within the meaning of the Act.[14]

As to Fagan's affidavit in which he describes observing Owens and Cronin engaging in what "appeared" to be a review of a list outside the polling area, again the IUE has not provided evidence which precisely or specifically shows any objectionable conduct occurring. There is no allegation that Owens or Cronin spoke to each other inside the restricted polling area or that Cronin ever entered that area. Cronin's mere presence outside the polling area is not, per se, objectionable. In fact, Fagan admits that he also was in the area outside the poll. Additionally, even if Cronin were wearing a hat with an NJEA insignia on it and "approaching voters" as they came to the polling place, such action, outside of the restricted polling area established by the Commission election agent does not interfere with voters free choice. See Atlantic Cty, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979)(mere presence of union officials outside polling area, without evidence of interference with employees' free choice, not a basis to invalidate an election). Fagan's statement of what "appeared" to be happening is a characterization of what was taking place and the Commission will not overturn the results of an election based solely on a characterization of events. Fairview Bd. of Ed., D.R. No. 88-32, 14 NJPER 222, 223 (¶19080 1988).

14/ N.J.S.A. 34:13A-5.3 provides a description of the duties of an employee which establish the employee as a supervisor including "having the power to hire, discharge, discipline, or to effectively recommend the same."

Beyond a mere allegation that Owens' and Cronin's presence at the polling site coerced voters, there is no supporting evidence presented by IUE in this regard. Moreover, there is no showing that the conduct complained of interfered with or reasonably tended to interfere with the free choice of the voters at the Holland polling site, or any other polling site. Hudson County.

Based upon all of the foregoing, I find that the IUE did not meet the procedural or evidentiary component to establish a prima facie case as to Objection II. The IUE has not demonstrated that the alleged conduct in fact occurred nor has it shown that such conduct, even assuming it had occurred, would interfere with voters free choice.

The same standard and analysis is applicable to Objection III. In Objection III, the IUE generally alleges that on November 17, 1999, IUE International Representatives Fagan and Zimber were "chastised", "humiliated", placed in a "bad light" in front of paraprofessionals, and prevented from meeting with paraprofessionals on their lunch hour in the teacher's room at the Columbus School.

Fagan's and Glenn's affidavits were offered in support of these allegations. Glenn states in her affidavit that she was present when Fagan and Zimber (neither of whom are members of the unit or employees of the Board) came to the teachers' room. At some point in time, the school principal went to the teacher's room and assertedly accused the two representatives of being on the premises illegally, required them to leave the room and come to her office,

and eventually leave the school. There is no indication in either Glenn's or Fagan's affidavit of the number of paraprofessionals who were present in the room to witness what assertedly took place. It is apparent that no paraprofessionals observed the discussion between the principal and the IUE representatives which took place in the principal's office. While both affiants attest that the IUE international representatives had "signed in" at the office, there is no evidence that prior permission had been requested to enter the building or to use the teachers' room to meet with paraprofessionals. Further, there is no indication that the IUE would have been prevented from meeting with the paraprofessionals in the teachers' room at lunch time had they requested permission in advance. Finally, there is no allegation that NJEA representatives had engaged in the same activity and had been allowed to stay and meet with paraprofessionals on their lunch hour in the teacher's room.15/

The IUE's description of the manner in which Fagan and Zimber were addressed by the Columbus School principal as being "made to look bad", chastising and embarrassing them, is merely their characterization of what took place and goes to how these two

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15/ As noted previously, the Board argues that the principal has the authority and responsibility to establish and maintain requirements and procedures for being on school premises and conducting meetings on the premises during the school day. Assertedly, one of these requirements is that persons wishing to be in the building and conduct meetings must obtain the principal's prior approval. According to the Board, the IUE international representatives did not do so.

representatives assertedly felt at the time and cannot be the basis to set aside an election. Fairview Board of Education.

While the Commission has found that during a representation campaign, employee organizations are entitled to equal access to employees, a claim of unequal access will only be sustained when one organization shows that it requested but was denied the access granted to another organization. Ocean County.; Union Cty Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); Cty of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983); Cty of Monmouth, D.R. No. 92-11, 18 NJPER 79 (¶23034 1992). Thus, the IUE's claim cannot be sustained as it has not asserted disparate treatment or unequal access and, therefore, has not presented evidence in support of such claims.

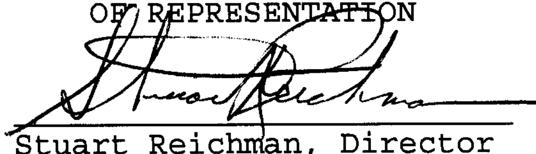
Accordingly, based upon all of the foregoing, I find that the IUE has failed to establish in Objection III a prima facie case with regard to the allegations of improper activity and interference with employees' free choice which would warrant setting aside the November 18, 1999 election.

Accordingly, for the above reasons, I dismiss all of the objections. In accordance with the Rules of the Commission, I issue the appropriate certification of representative (attached hereto) to the NJEA.

ORDER

The objections are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman, Director

DATED: February 25, 2000
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of TRENTON BOARD OF EDUCATION, Public Employer, -and- NEW JERSEY EDUCATION ASSOCIATION ASSOCIATION, Petitioner, -and- IUE LOCAL 423, Intervenor.	> > > > > > > > > > > > > > > >	DOCKET NO. RO-2000-49

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.

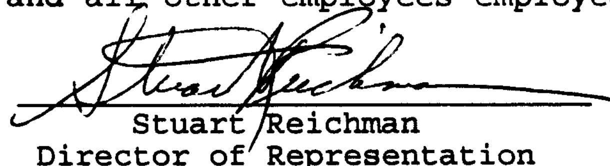
Accordingly, IT IS HEREBY CERTIFIED that

NEW JERSEY EDUCATION 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 paraprofessionals including teacher aides, community agents, reading aides, medical aides, social work aides, math aides, learning disability aides, video-tape operators employed by the Trenton Board of Education.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police employees, casual employees, all employees represented by other negotiations representatives and all other employees employed by the Trenton Board of Education.



DATED: February 25, 2000
Trenton, New Jersey

Stuart Reichman
Director of Representation

ATTACHMENT: Certification of Representative
Dated: February 25, 2000

In the Matter of

Trenton B/E
-and-
NJEA
-and-
IUE Local 423
Docket No. RO-2000-49

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