

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

UNITED PUBLIC EMPLOYEES,

DOCKET NO. RO-83-103

Petitioner,

-and-

CWA SUPERVISORS (HIGHER LEVEL),
AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation dismisses objections filed by UPE to an election involving State higher level supervisors and certifies CWA Supervisors (Higher Level), AFL-CIO as the majority representative of these employees. The Director finds that the State's policy which allowed the employee organizations limited access to State facilities for the purpose of conducting informational meetings with the higher level supervisors was uniformly applied to both organizations. He rejects UPE's argument that because of its "grass roots" organization it was improperly disadvantaged by the State's policy which did not permit non-unit employees on pay status to electioneer with the higher level supervisors. The Director dismisses other objections raised by UPE which were not supported by evidentiary material.

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Appearances:

For the Public Employer
Irwin Kimmelman, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Petitioner
Fox & Fox, attorneys
(David I. Fox of counsel)

For the Intervenor
Steven P. Weissman, Associate Counsel

DECISION ON OBJECTIONS

Pursuant to a Decision and Direction of Election issued on January 31, 1983, ^{1/} a representation election was conducted by the Public Employment Relations Commission ("Commission") among approximately 1671 Higher Level Supervisors of the State of New Jersey ("State"). Employees were provided the opportunity to

1/ In re State of New Jersey and UPE and CWA Supervisors (Higher Level), AFL-CIO, D.R. No. 83-20, 9 NJPER 114 (¶ 14061 1983).

choose as their representative, either the United Public Employees ("UPE"), the petitioning employee organization, or CWA Supervisors (Higher Level) ("CWA"), the incumbent certified representative, or they could choose against representation. The election was conducted by mail; ballots were cast during the period of February 28, 1983 through March 21, 1983. The tally of ballots, as revised on April 25, 1983, after the disposition of certain challenged ballots, reveals that 488 valid ballots were cast for CWA, 382 valid ballots were cast for UPE, 90 valid ballots were cast against representation, and 5 ballots remain in the challenge category. A majority of ballots, therefore, was cast for CWA.

On March 28, 1983, UPE, through its attorney, filed post-election objections, pursuant to N.J.A.C. 19:11-9.2(h), alleging that the State engaged in certain conduct affecting the results of the election. UPE urges that the election should be set aside. Central among the issues raised by UPE was the claim that one element of the State's limited access policy, relating to the designation of authorized representatives for the purposes of conducting employee meetings, adversely affected UPE's organizing efforts. UPE's objections are the subject of this decision.

N.J.A.C. 19:11-9.2(h) sets forth the standard for reviewing election objections:

A party filing objections must furnish evidence, such as affidavits or other documentation, that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of

proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process. (emphasis added)

Under N.J.A.C. 19:11-9.2(i), if the Director of Representation concludes that the objecting party has presented a prima facie case, he shall conduct a further investigation; failure of the objecting party to furnish evidence which establishes a prima facie case may result in the immediate dismissal of the objections.

In discharging his duties under N.J.A.C. 19:11-9.2(h) and (i), the undersigned must keep firmly in mind the presumption that the Commission articulated in In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970) (Slip Opin. at 10), aff'd sub. nom. AFSCME, Local 1959 v. P.E.R.C., 114 N.J. Super. 463 (App. Div. 1971):

The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

See also, In re State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 265 (¶ 12114 1981); In re Passaic Valley Sewerage Comm., P.E.R.C. No.

81-51, 6 NJPER 504 (¶ 11258 1980); In re State of New Jersey and N.J.C.S.A./N.J.S.E.A., P.E.R.C. No. 76 (1973); In re City of Linden, E.D. No. 17 (1970); In re Ocean Cty., D.R. No. 79-34, 5 NJPER 220 (¶ 10121 1979), aff'd P.E.R.C. No. 80-12, 5 NJPER 303 (¶ 10166 1979); In re Cty. of Salem, D.R. No. 81-30, 7 NJPER 182 (¶ 12080 1981); In re Cty of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶ 10010 1979); In re City of Newark, D.R. No. 78-43, 4 NJPER 202 (¶ 4102 1978); In re Camden Cty. Bd. of Chosen Freeholders, D.R. No. 78-7, 3 NJPER 272 (1977). ^{2/}

Upon receipt by the Commission of UPE's objections, UPE was advised of its obligation to submit documentary evidence in support of the objections and was also advised of the requirement that it present a prima facie case. UPE subsequently submitted an affidavit of Paul Scherbina, Director of Operations for UPE, as its evidentiary proffer.

The undersigned has carefully reviewed UPE's objections in accordance with the requirement that the accompanying evidence must precisely and specifically show that conduct has occurred which

^{2/} Parties filing objections to private sector elections must meet a similarly stringent burden of specificity and materiality. Thus, in NLRB v. Golden Age Beverage Co., 71 LRRM 2924, 2926 (5th Cir. 1969), a leading case, the Court observed that the objecting party had the burden of proving that there had been prejudice to the fairness of the election. The Court further stated:

This is a heavy burden; it is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required showing not only that the unlawful acts occurred, but also, that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

would warrant setting aside the election as a matter of law. In evaluating the objections and the affidavit in support thereof, the undersigned has also considered the State's written guidelines setting forth the limited access policy and the memorandum implementing the policy attached hereto and made a part hereof. Although these materials were not provided by UPE, they are attached to informal responses to the objections submitted by the State and by CWA. UPE's objections may not be considered in context without reference to the terms of the State's policy. Rather than dismiss UPE's evidentiary proffers as deficient, the undersigned will take notice of these documentary materials. ^{3/}

The undersigned shall first address UPE's objection concerning the State's limited access policy. On February 2, 1983, the State advised CWA and UPE that it would provide available facilities, upon request, to each organization, for purposes of conducting informational meetings with off-duty higher level supervisors. This policy, known as the Modification of Employee Relations Policy Guide #1, described permitted employee organization activity on State property during the "critical" election period. Under the policy, the organizations were permitted to conduct their informational meetings on State premises during off-duty hours through duly authorized representatives.

It appears that UPE claims that the State's policy permitted the above form of electioneering by unit or non-unit state employees who were on unpaid leaves of absence and permitted

^{3/} Ordinarily, unless and until an investigation were directed pursuant to N.J.A.C. 19:11-9.2(i), the only materials reviewed are those provided by the objecting party.

campaigning by representatives chosen from among all higher level supervisors. On the other hand, UPE asserts that the State did not allow such electioneering by non-unit employees on pay status. ^{4/} There is no evidentiary proffer to support a claim that the State limited the organizations to any set number of representatives who could obtain access. Further, there is no evidentiary proffer which would indicate that UPE was prohibited from adding additional qualified representatives for campaign purposes.

UPE's objection to the State's limited access policy relates solely to the above restriction on representatives who were permitted access to communicate with employees during this "critical period". UPE states:

... The basis for this first objection to the results of the election is that UPE's rights of free speech and rights to communicate with other employees were virtually and totally eliminated as far as "access to premises" is concerned as a result of the policies adopted by the State of New Jersey and CWA. UPE is a labor organization which relies primarily on "grass roots" support of employees in an election of this nature.

It is generally known that one of its primary platforms was a limitation on the use of so-called agency shop fees. It was critical to the campaign of UPE that its position with regard to agency shop fees and its other positions be widely disseminated among State employees during lunch periods, break periods,

^{4/} The term "non-unit employees" was understood by the organization as a reference to employees placed in three other units of white collar state employees, currently represented by CWA affiliates.

immediately before work and after work, and at other times. This dissemination of information obviously had to take place on the premises of the State of New Jersey. UPE sought from the State of New Jersey to have State employees during their free time, such as during lunch breaks, vacation time, or other times, gain access to State premises for purposes of exercising their rights of free speech and disseminating UPE's positions. The State of New Jersey, apparently in concert with CWA and through the Office of Employee Relations, headed by Mr. Frank Mason, refused to allow UPE representatives who are State employees on their free time as set forth above, to set forth UPE's position to other State employees. This limitation on the right of free speech caused UPE to fail to have the opportunity to communicate its position and adversely affected its situation in the election.

As is noted above, CWA was allowed to use non-unit persons who are on leaves of absence from State positions in units other than the Higher Level Supervisor Unit, to disseminate its position on State premises during the election. UPE representatives who are not in the unit were not allowed to do this on their own time.

Although the free flow of information during an election campaign is preferred, not every available means of communication must be in place to insure that employees are able to make an informed choice. The ability to address assembled employees on an employer's property is but one forum through which an employee representative may communicate with employees. Communication outlets are otherwise available through: the normal interchange among unit employees on an individual basis during off-duty time; leaflet distribution; use of employer supplied-lists of names and addresses of unit employees for in-person visitation, mailings, and telephone solicitation; off premises meetings and rallies; and

media announcements. Assuming the availability of these other outlets, the private sector experience from which the Commission takes guidance, holds that an employer may restrict campaign access to its property, and may deny organizational access by nonemployees entirely. Such conduct does not have the tendency to interfere with an employee's freedom of choice, and is not cause for setting aside an election, provided that the employer enforces its policy evenly. See General Electric Co., 61 LRRM 1222 (1966).

An employer that permits campaign access for meetings with assembled employees must provide equal opportunities to the election participants. NLRB v. Waterman Steamship Co., 309 U.S. 306 (1940). In the present matter, the State's policy concerning authorized campaigners was applied to both organizations equally and there is no evidence that it was not uniformly applied. ^{5/} Apparently, both organizations were provided the opportunity to designate unlimited numbers of representatives from among the approved categories. It seems that UPE was able to marshal the resources of only nine of the 1670 higher level supervisors on pay status and two nonemployees. ^{6/} There is no evidence that the State denied a leave of absence to any unit or non-unit employee who desired to take a leave for UPE campaign purposes.

^{5/} UPE proffers that one CWA supporter who is a nonunit employee on pay status actively campaigned among higher level supervisors. UPE did not present evidence indicating that the CWA supporter's activities were in the context of the approved format or that the State had approved the selection of this representative or had knowledge of and condoned this person's activities.

^{6/} Even with this limitation, UPE has not shown that it was unable to conduct a full measure of on-site meetings or other contact with employees.

UPE's argument that it was disadvantaged by the State's policy is admittedly attributed to its own form of organizational support and its limited capabilities. It claims that up to forty non-unit employees would have participated in its informational meetings, but has proffered the names of only five individuals (among whom are at least two of its officers and its Director of Operations).

It is unlikely that if the State had permitted non-unit employees to electioneer on State premises, such a revised policy would have equalized the relative opportunities available to exploit the on-site meeting policy. Since there are approximately 32,000 State employees in the four white collar collective negotiations units and only approximately 1600 in the higher level supervisors unit, a relaxation of the rule barring organizational activities by non-unit employees on State time and on State premises would have exposed the 1600 higher level supervisors to the exhortations of a potential group of approximately 30,000 employees. These remaining 30,000 employees are in units currently represented by CWA. It would seem that the rule precluding organizational activities by non-unit members rather than working to UPE's disadvantage, foreclosed an advantage which would have accrued to CWA in this unit, as the result of its majority representative status among 30,000 state employees in the other negotiations units.

In dismissing this objection, the undersigned concludes that the State's policy provided equal opportunities and was uniformly applied. UPE has not demonstrated that it was unable to address employees through the informational meeting forum. Its

contention that it was not able to take as much advantage of the informational meeting forum as it perceived would be beneficial appears to be attributable solely to its own organizational infirmities. ^{7/} The State could not be expected to tailor its policies to make up for UPE's weaknesses. There is no proof that the State acted in concert with CWA to disadvantage UPE.

The undersigned shall now address UPE's additional objections.

UPE asserted in its initial filing that: "Use of any bulletin boards was denied even though CWA had use of such bulletin boards." The State's modified policy guide permitted the posting of notices of organizational meetings by either organization on State bulletin boards. The State's policy did not permit CWA to post any campaign materials on the bulletin boards to which it is contractually entitled for contract administration purposes.

UPE's objection that it was not afforded bulletin board space in accordance with the State's policy is not supported by any evidentiary proffer indicating that a particular request was denied. This objection is dismissed.

^{7/} Although access was not permitted on State premises to non-unit employees there was no limitation placed on campaigning and electioneering at the work site during non-duty hours by all members of the higher level supervisors unit, the only employees directly involved in this election. Since UPE submitted a valid showing of interest of 30% of the employees in the higher level supervisors unit, it appears that a significant group of UPE rank and file "grass roots" adherents were available at the various state work sites to promote the UPE campaign among other higher level supervisors.

UPE's objection that "locations for dissemination of literature were denied even though CWA had such locations available to it" is unsupported by any evidentiary proffer and is dismissed.

UPE's objection that "UPE representatives were denied the right to hold any kinds of meetings after working hours or before working hours outside of premises where unit employees worked" is not supported by any specific evidentiary proffer in support thereof. This objection, therefore, must be dismissed.

UPE asserts that Paul Scherbina, its Director of Organization, "sought to encourage employees to attend a rally in support of a UPE position. He was warned by his employer, the State of New Jersey, that he should not have promoted such a rally, and the State took other action to discourage Mr. Scherbina from promoting the UPE position in this election."

Scherbina's affidavit fails to address the above claim. Thus, no documentation is provided as to which employees Scherbina attempted to encourage, when this occurred, which UPE position was being supported, the identification of the State agent who warned him, when it occurred, and in what manner. There is no documentation with regard to any other "action to discourage."

Accordingly, this objection is not supported by any evidentiary proffer and must be dismissed.

UPE asserts that the State provided an eligibility list which was inaccurate in many respects. It further asserts that

CWA was able to use other lists to obtain names not appearing on the eligibility list.

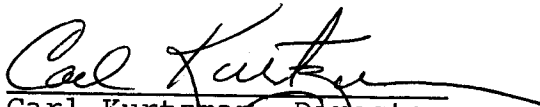
There is no allegation that UPE requested lists from the State which were denied, or that the State withheld any information as to any known eligible voter. The Commission's election records reveal that the State's central payroll records failed to list the names of 31 eligible voters, reflecting a 2% error factor. ^{8/} No additional errors have been uncovered. This minor inaccuracy is not a sufficient basis to set aside an election. In re Cty. of Monmouth, D.R. No. 82-15, 7 NJPER 634 (¶ 12285 1981), aff'd P.E.R.C. No. 82-80, 8 NJPER 134 (¶ 13058 1982).

There is no evidence that CWA's discovery of these 31 not-on-list unit members was as the result of any information provided by the State in an illegal manner.

Based upon the foregoing the undersigned concludes that UPE has failed to "precisely and specifically show that conduct has occurred which would warrant setting aside the election as a matter of law," and its objections are dismissed in their entirety. In accordance with the rules of the Commission, and the revised tally of ballots, the undersigned issues the appropriate certification of representative (attached hereto) to CWA Supervisors (Higher Level), AFL-CIO.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

DATED: May 2, 1983
Trenton, New Jersey


Carl Kurtzman, Director

^{8/} The Commission provided UPE with the names and addresses of these voters during the election.



STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

EMPLOYEE RELATIONS
100 WEST STATE STREET
TRENTON, NEW JERSEY
08602

February 2, 1983

FRANK A. MASON
DIRECTOR

Mr. Don Sanchez, Area Director
Communications Workers of America
Capitol Plaza Hotel
240 W. State St.
Trenton, NJ 08608

Mr. Charles W. Alston
United Public Employees
PO Box 827
Trenton, NJ 08603-0827

Dear Gentlemen:

On January 31, 1983 the Public Employment Relations Commission ordered that an election be conducted in order to determine the exclusive majority representative of State employees serving in the Higher Level Supervisory Unit. Where as it has been and continues to be the policy of the State to encourage all eligible employees to express an informed opinion when they mark their ballots, the attached policy guide sets forth the conditions and procedures under which your organizations may properly arrange access to premises for purposes of meeting with employees eligible to vote in the upcoming election. Such policy conforms with the PERC decision in Union County Regional Board of Education Et. Al. (PERC No. 76-17, 1976). The attached policy guidelines have been forwarded to all departmental Employee Relations Coordinators for implementation as of February 7, 1983.


Please note that during this campaign period, access to premises may be requested by contacting the respective departmental Employee Relation Coordinator with reasonable advance notice so that proper meeting facilities may be arranged. Access to State premises shall not be provided without prior permission for the specific time, date and location desired. Employees who choose to attend an informational meeting may only do so before or after their workshift or during lunch or mid-shift breaks.

It is the employee organization's responsibility to provide the local management official, with notices which may be posted, indicating the time date and location of such meeting. Only notices and/or descriptions of informational meetings may be posted. Posting must be approved in advance by local management personnel and management will provide appropriate bulletin boards for such posting.

Schedule A

Should any questions arise, please feel free to contact either David Collins or myself.

Very truly yours,



Frank A. Mason
Director

enc.

MODIFICATIONS OF EMPLOYEE RELATIONS POLICY GUIDE #1

Permitted Employee Organizations' Activities
During Election Proceedings Only

On January 31, 1983 the Public Employment Relations Commission ordered that elections be conducted in order to determine the exclusive majority representative of State employees serving in the Higher Level Supervisory Unit.

The organizations competing for status as the exclusive majority representative are the following:

Communications Workers of America
United Public Employees

It is a long-standing State policy to encourage all eligible voters to express an informed opinion when they mark the ballot. Ballots will be sent by mail directly to an eligible employee's home address on or about February 28, 1983 by the Public Employment Relations Commission.

The Employee Relations Policy Guide #1 dated December 15, 1969 regarding employee organizations' activities continues as State policy. However, to provide an opportunity for eligible negotiating unit employees to better understand the platforms and policies of the above-named employee organizations which will appear on the ballot, effective February 7, 1983 the following temporary modifications of that policy are hereby implemented for the duration of the election period or other time as established by the State:

- a) If any of the above organizations request the use of an available State facility to conduct an informational meeting, such requests, made in advance, may be uniformly approved if physical facilities are available, provided there are no demonstrations or interference with normal operations, and provided eligible employees attend only during off duty hours. Employee organizations requesting access for the purpose of conducting an informational meeting with appropriate employees must, in advance of the desired meeting date, make their requests for access to the responsible local management official. The employee organization shall be responsible for supplying local management personnel with notices indicating times and dates of such meetings. The local management official shall undertake the posting of such notices. The local management official shall arrange for a suitable meeting location so as to assure all eligible employees rights to attend or not to attend the informational meeting. Permission granted to the above-listed employee organizations for access to premises is conditioned upon peaceful conduct of all such meetings with responsibility for damage to State property being assumed by the organization making such request. Approval for access to premises may be revoked at any time by the State.

- b) Distribution of appropriate organizational literature to eligible employees who voluntarily attend such meetings is allowed. Representatives from the respective employee organizations may not wander through an institution or facility on order to distribute literature, talk with employees, or for any other reason. (This is not meant to limit distribution of literature at approaches to a State facility off State property which is allowed under the basic policy.)
- c) The normal six-week period between the successive granting of access to above-listed employee organizations shall be suspended during this campaign period only. It is the local management official's responsibility to ensure that access to premises for the purpose of conducting an informational meeting does not become so frequent as to create an operational disruption.
- d) Bulletin board space should be made available in order to post information submitted by the employee organizations through the responsible management official, provided that such material is approved in advance as to content by the administration. The posted material shall not contain anything profane, obscene or defamatory of the State or its representatives and employees, nor anything constituting election campaign material.
- e) This modification of Employee Relations Policy Guide #1 is made only for the above-named employee organizations and only for the period of this election.
- f) Representatives of the named employee organizations should meet only with employees in the Higher Level Supervisors Unit with regard to the election situation.

Office of Employee Relations
February 1, 1983



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

UNITED PUBLIC EMPLOYEES,

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-and-

CWA SUPERVISORS (HIGHER LEVEL),
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Intervenor.

DOCKET NO. RO-83-103

Higher Level
CERTIFICATION OF REPRESENTATIVE

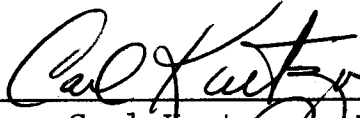
An election having been conducted in the above matter under the supervision of the undersigned in accordance with the New Jersey Employer-Employee Relations Act, as amended, and Chapter 11 of the Commission's Rules and Regulations; and it appearing from the Tally of Ballots that an exclusive representative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

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

CWA SUPERVISORS (HIGHER LEVEL), AFL-CIO

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

UNIT: All higher level supervisors employed by the State of New Jersey excluding managerial executives, confidential employees, professionals and craft employees, policemen, all other supervisors within the meaning of the Act.



Carl Kurtzman, Director
of Representation

DATED: Trenton, New Jersey
May 2, 1983