D.R. NO. 81-2

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

In the Matter of

PASSAIC VALLEY SEWERAGE COMMISSION,

Public Employer,

-and-

DOCKET NO. RO-80-23

LOCAL 1158, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner.

SYNOPSIS

The Director of Representation, ruling on post election objections, sets aside an election where the employer improperly granted employees additional benefits and made promises of future benefits during the critical period prior to the election. The granting of these benefits, not in conjunction with the normal course of business, had the natural tendency of interfering with the voters' free choice. Specifically, the Director finds that during the critical period the Sewerage Commission granted a full 7% increase to certain employees when, under the 1980 salary schedule recommended by a management study, the employees were entitled to smaller increases or no increases at all. The Director further finds that a new election be conducted among these employees within thirty (30) days.

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LOCAL 1158, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner.

Appearances:

For the Public Employer
Ambrosio & Ambrosio, attorneys
(Gabriel Ambrosio of counsel)

For the Petitioner
Robert Sarcone, attorney
(Gerald E. Fusella of counsel)

DECISION AND DIRECTION OF ELECTION

Pursuant to an agreement for consent election dated September 17, 1979, entered into between Passaic Valley Sewerage Commission (the "Sewerage Commission") and Local 1158, International Brotherhood of Electrical Workers ("Local 1158"), secret ballot elections were conducted by the Public Employment Relations Commission (the "Commission") on October 16, 1979, in a unit comprised of all blue collar employees and in a unit consisting of craft employees of the Sewerage Commission. The tally of ballots revealed that Local 1158 did not receive a majority of the valid ballots cast.

By letter dated October 18, 1979, Local 1158 filed post-election objections, supported by documentation. Local 1158 alleged that, through the dissemination of these documents during the pre-election period, the Sewerage Commission unlawfully interfered with employee free choice.

Based on the October 18, 1979 submission, the undersigned in accordance with N.J.A.C. 19:11-9.2(h) and (i), concluded that Local 1158 had met its burden of providing sufficient evidence of objectionable conduct to support a prima facie case. Further, under N.J.A.C. 19:11-9.2(j), the undersigned, after a preliminary investigation, concluded that there were substantial and material factual issues in dispute which would more appropriately be resolved after a hearing. Accordingly pursuant to a Notice of Hearing dated November 13, 1979, a hearing was held on December 17, 1979 before Arnold H. Zudick, a Hearing Officer of the Commission. At this hearing, all parties were given an opportunity to examine and cross examine witnesses, to present evidence and to argue orally. Subsequent to the close of hearing, Local 1158 filed a brief on February 13, 1980. The Sewerage Commission did not file a post-hearing brief.

On March 25, 1980, the Hearing Officer issued his Report and Recommendations. The Hearing Officer found that Local 1158 had not satisfied its burden of proving, as required by N.J.A.C. 19:11-9.2(h), that certain documents disseminated by the Sewerage Commission during the pre-election period interfered with the employees' freedom of choice. Therefore, the Hearing Officer recommended that the objections be dismissed and that an appropriate certification be issued based upon the tally of ballots.

Although neither party has filed objections to the Hearing Officer's Report and Recommendations, the undersigned has undertaken a review of this matter in order to determine whether he shall adopt, reject or modify the Hearing Officer's Report and Recommendations, pursuant to N.J.A.C. 19:11-7.4. The undersigned has carefully considered the entire record in this proceeding including the Hearing Officer's Report and Recommendations and determines as follows:

1. The Passaic Valley Sewerage Commission is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of this proceeding and is subject to the provisions of the Act.

2. Local 1158, International Brotherhood of Electrical Workers is an employee representative within the meaning of the Act and is subject to its provisions.

3. On August 15, 1979, Local 1158 filed a Petition for Certification of Public Employee Representative with the Commission seeking to represent a unit of employees employed by the Sewerage Commission. On September 17, 1979, the Sewerage Commission and Local 1158 executed a consent election agreement for elections in a unit of blue collar employees and another unit of craft employees employed by the Sewerage Commission.

4. On October 16, 1979, elections were held in both units of employees and the tally of ballots for each unit revealed

that the majority of employees who voted in each unit did not wish to be represented by Local 1158. By letter dated October 18, 1979, Local 1158 advised the undersigned that it objected to the Sewerage Commission's circulation of certain pre-election campaign materials to the employees. Local 1158 alleged that these actions by the Sewerage Commission were unfair and prejudicial and directly affected the results of the election. Accordingly, Local 1158 requested that the results of the election be set aside and a new election be ordered. The alleged unfair and prejudicial campaign literature cited by Local 1158 in its October 18, 1979 submission and subsequently submitted as evidence at the hearing, is as follows: (1) A Sewerage Commission resolution, dated September 12, 1979, hand-delivered to all employees, which stated that, effective January 1, 1980, the salary scale of all employees would be increased and that before November 14, 1979, individual consideration would be given to certain other employees for increases in their salaries (Exhibit J-15); (2) An October 9, 1979 handbill circulated to the employees which stated that all salary increases in the future would be effectuated by increasing the salary guide as it was done for 1980, and that all employees would receive this increase plus any step increment that they were entitled to in accordance with their position on the salary guide (Exhibit J-16); and (3) An October 12, 1979 Sewerage Commission handbill circulated to the employees, which allegedly intentionally misled the employees by stating that if Local 1158 were successful

in the pending election all employees would have to join and pay dues (Exhibit J-17).

5. In considering these three objections the Hearing Officer found that: (1) Local 1158 failed to meet its burden of proving that any employees were improperly interfered with as the result of the Sewerage Commission's September 12, 1979 resolution and October 9, 1979 handbill circular; and (2) Any inaccuracies contained in the Sewerage Commission's October 12, 1979 handbill circular did not improperly interfere with the employees' free choice because it was in reply to a handbill previously circulated by Local 1158, which was also inaccurate.

Prior to reviewing the Hearing Officer's specific findings and recommendations, the undersigned must take note of several relevant principles of labor law. Under a longstanding policy of the National Labor Relations Board [1/] the critical period to be examined in determining whether an employer's conduct has improperly interfered with the election process begins with the date of the filing of a representation petition rather than the date of the execution of the consent election agreement. The Board stated in Goodyear Tire & Rubber Co., 51 LRRM 1071 (1952):

> Where such conduct occurs after the filing of a representation petition, therefore, there is no sound reason for ignoring it or immunizing it simply because it occurs before a consent agreement or stipulation is signed

1/ In Lullo v. Intern'l Assoc. of Firefighters, 55 N.J. 409 (1970) the N.J. Supreme Court stated that the Commission should utilize Board law and policy as a guide in its own decisions.

> by the parties. The filing of the petition should be clear notice in all cases that objectionable conduct is thereafter taboo. 2/

See also, Teamsters Local 769 v. NLRB, 92 LRRM 2077 (1976).

In evaluating objections to an election the NLRB has stated: "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." American Freightways Co., Inc., 44 LRRM 1302 (1959). In effect, the Board has held that in order to prevail the union is not required to prove that the objectionable conduct was specifically intended to influence the voters or to demonstrate that it actually had the effect of restraining the voters' free choice. El Rancho Markets, 98 LRRM 1153 (1978). Accordingly, an employer is held to have those consequences that naturally and logically flow from his conduct. As a result, it is sufficient to show that the employer

2/ The decision in Goodyear Tire & Rubber Co. overturned prior Board decisions which held that a union, by entering into a consent election agreement, waived the right to object to any of the employer's conduct which occurred subsequent to the filing of the representation petition but prior to the signing of the election agreement. Great Atlantic & Pacific Tea Co., 31 LRRM 1189 (1952), F.W. Woolworth Co., 34 LRRM 1584 (1954). The consideration of all employer conduct occurring after the filing of a representation petition has been adopted in the public sector. See, for example, Matter of Civil Service Assoc., P.B.C. ¶ 36,508 (1979), where a New York court approved consideration of all employer conduct occurring after a decertification petition had been filed. In accord with the NLRB, the undersigned concludes that the policies of the Act will be fostered by holding that a party's execution of a consent election agreement will not constitute a waiver of its right to object to conduct occurring after the filing of the representation petition which allegedly interfered with the employees' freedom of choice.

engaged in certain actions which could reasonably be calculated as having the natural tendency of interfering with the voter's free choice. As the United State Supreme Court stated in NLRB v. Exchange Parts, which coincidentally involves the subject matter of the objections herein:

> The danger inherent in well timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. 55 LRRM 2098, 2100 (1964)

Although previous Commission decisions have tended to emphasize the need for direct evidence of actual interference with employee free choice, In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970); In re Jersey City Medical Center, P.E.R.C. No. 49 (1970); In re Ocean Cty., D.R. No. 79-34, 5 NJPER 200 (¶ 10121 1979), these decisions do not establish a subjective standard of actual interference as the only basis on which objectionable pre-election conduct would be found. In fact, they confirm the Commission's adoption of the concept that a finding of objectionable conduct can be based on either direct evidence of employer interference or reasonable inferences of interference which may be drawn from the facts. For example, in In re Jersey City Dept. of Public Works, supra, the Commission stated that there must be evidence of conduct which interfers with or has the

reasonable tendency of interfering with the employees' free choice. Further, in In re Jersey City Medical Center, supra, the Commission in considering alleged employer misrepresentation, stated that an election would be set aside only where the misrepresentation was such that it could reasonably be expected to have a significant impact on the election. Finally, in In re Tp. of East Windsor, D.R. No. 79-13, 5 NJPER 445 (¶ 4202, 1978), the undersigned specifically adopted the NLRB's objective standard that any meeting with employees conducted by either an employer or an employee organization within 24 hours of an election and occurring on "company time" constitutes a "per se" interference with the employees' free choice. Accordingly, the undersigned now reaffirms that the Commission has indeed adopted a two tier standard for reviewing election objections. While direct evidence of actual interference with employee free choice is a preferred type of evidence, an objecting party will prevail where such interference can reasonably be inferred from an objective analysis of the circumstances surrounding the election. 3/

The National Labor Relations Act, 24 U.S.C. § 151 et seq. protects the right of employees to select a majority representative of their own choice free from employer interference. Both the NLRB

3/ In view of the Commission's prior emphasis on direct evidence of actual interference with the election process, the Hearing Officer was justified in his observations that Local 1158 did not present any testimony that employees were actually affected by the Sewerage Commission's campaign literature. However, the Hearing Officer did not analyze the facts in order to establish whether this conduct had the reasonable tendency of affecting employee free choice.

and the federal courts have concluded that an employer's bestowing of benefits on his employees during an election campaign can reasonably be calculated as having an inhibiting effect on the employees' freedom of choice and the propriety of the election process. Medo Photo Supply Corp. v. NLRB, 14 LRRM 581 (1944); NLRB v. Exchange Parts Co., supra. The Board will find employer interference where it can reasonably be concluded that the union's filing of a representation petition and its campaign motivated the employer to grant an increase in benefits which he would not have otherwise granted at that time. Ayr-Way Stores, 84 LRRM 1127 (1973); Dynatronics Inc., 75 LRRM 1568 (1970).

The Board presumes that the granting of benefits during an election campaign is causally related to a union's presence and is calculated to affect the outcome of an election. Once the objecting party demonstrates that such benefits have been bestowed during the critical period, the burden is then shifted to the employer to prove the existence of legitimate and sound business considerations which justified the granting of benefit increases during the time of the election process. 4/ Accordingly, when it has been established that the timing of benefit increases coincided with the filing of a representation petition and there has not been

4/ H-P Stores, Inc., 80 LRRM 1539 (1972); W.C.A.R., Inc., 83 LRRM 1414 (1973); Foodfair Stores, Inc., 42 LRRM 1242 (1958); Litton Dental Products, 90 LRRM 1592 (1975); May Department Store Co., 77 LRRM 1859 (1971); and Rotek Inc., 78 LRRM 1685 (1971).

an affirmative showing by the employer that its conduct was governed by factors unrelated to the representation proceeding, it is then reasonable to draw the inference of improper employer motivation and improper interference with the employees' freedom of choice. 5/

In evaluating an employer's proffered reasons for increasing employee benefits during the critical period, the Board has considered whether: (1) the increase in benefits was under consideration prior to the onset of the union's organizational activities; (2) there was any credible explanation for delaying the announcement of a final decision to grant increases, which was made prior to the union's appearance, until after the representation petition had been filed; (3) the final decision to grant the benefit and the announcement of that decision during the ordinary and normal course of business only incidentally coincided with the representation petition and election process; (4) there was an established past practice of granting this type of benefit at this time of the year; (5) there were legitimate tax considerations, market or economic conditions or matters of business competition beyond the employer's control which justified such an increase during the critical period; (6) the dictates of the industry as a whole, and corporate policies with regard to those dictates, served as a basis for the increase; (7) the

5/ See the cases cited in footnote 4. Also see Glosser Brothers, Inc., 42 LRRM 1083 (1958); Bata Shoe Co., Inc., 38 LRRM 1448 (1956); and International Shoe Co., 43 LRRM 1520 (1959).

requirement of or approval by state or federal regulatory agencies delayed the granting of any benefit until after the election process had begun. 6/

These same factors have also been considered by other state public employment relations agencies. In Matter of A.F.S.C.M.E., Wisconsin Council #40, P.B.C. ¶ 40,780 (1978), the Wisconsin Employment Relations Commission found that the employer had an established practice of simultaneously granting unrepresented employees a salary increase roughly equivalent to that received by represented employees. Since the employer was committed to granting a wage increase prior to the union's organizational activities and the increase reflected customary actions, no improper motivation to influence the election was inferred. Similarly, where an employer's decision to grant benefits occurs in the ordinary and normal course of business or is governed by factors not related to the union's organizational activities, no improper motivation will be inferred simply because such actions concided with the election process. Matter of A.F.S.C.M.E., Illinois Office of Collective Bargaining, P.B.C. ¶ 40,850 (1979); A.F.S.C.M.E., Council 74 v. State of Maine, Maine Labor Relations Board, P.B.C. ¶ 40,361 (1977); cf: Polk Cty. P.B.A. v. City of

6/ See the cases cited in footnotes 4 and 5. Also see American Molded Products, 49 LRRM 1373 (1961); Hineline's Meat Plant, 78 LRRM 1387 (1971); Domino of California, 84 LRRM 1540 (1973); Union Camp Corp., 82 LRRM 1765 (1973); North American Aviation Inc., 64 LRRM 1232 (1967); Havatampa Cigar Corp., 71 LRRM 1037 (1969); and Rennie Mfg. Corp., 82 LRRM 1774 (1973).

Lake Alfred, Fla. P.E.R.C., P.B.C. ¶ 40,186 (1977).

The Board, the federal courts, and at least one state employment relations commission have also held that an employer's promise of future benefits made during the election process can also be reasonably calculated as having an inhibiting effect on the employees' freedom of choice and the propriety of the election process. 7/ The Board's treatment of cases involving promises of future benefits parallels its approach to situations where benefits have actually been granted during the election process. Accordingly, the burden is upon the employer to prove that such promises were made pursuant to: (1) past practices; or (2) prior deliberations resulting in decisions made prior to the filing of the representation petition; or (3) legitimate business purposes unrelated to the election process. 8/

An employer's promise of a future benefit does not have to be expressly contingent upon the outcome of the election to be found objectionable. The Board will set aside an election where, from the circumstances surrounding the employer's ostensibly unconditioned promise, it can reasonably be concluded that the

7/ American Dredging Co., 78 LRRM 1113 (1970); Danadyne, Inc., 74 LRRM 1022 (1970); El Rancho Market, supra; NLRB v. Tommy's Spanish Foods Inc., 463 F.2d 116 (C.A. 9 1972); NLRB v. M.H. Brown Co., 77 LRRM 2217 (C.A. 2 1971); W.E.R.C. v. City of Evansville, 80 LRRM 3201 (1972).

8/ See cases cited in footnote 7.

the employees would have good cause to believe that the promise resulted from the union's organizational activity and, therefore, was impliedly conditioned on the results of the election. 9/ For example, in El Rancho Market, supra, the employer stated two days before the election that he was in the process of preparing changes in an existing profit sharing plan under which a large number of employees would begin to participate in the plan for the first time. The Board found that these statements constituted a veiled promise of future benefits calculated to dissuade employees from supporting the union.

There are several factors which the Board will consider in determining whether it is reasonable to infer from the employer's conduct that the promise of future benefits was conditional: (1) the timing of the promise; (2) the absence of a legitimate business justification; (3) promises made in conjunction with either overt solicitations to vote against the union or other employer communications concerning the probable negative impact or effect of unionization; and (4) promises made in conjunction with a pattern of coercive conduct by the employer -- e.g. threats, interrogation, solicitation of greivances. 10/ In summary, the

9/ See the cases cited in footnote 7.

10/ El Rancho Market, supra; Univis Lens Co., 23 LRRM 1679 (1949); Maine Fisheries Corp., 30 LRRM 1102 (1952); The Paymaster Corp., 63 LRRM 1508 (1966); Coca Cola Bottling of Louisville, 40 LRRM 1390 (1957); B.F. Goodrich Co., 90 LRRM 1595 (1975); NLRB v. Drivers Inc., 68 LRRM 1428, enf'd 76 LRRM 2296 (C.A. 7 1977); and NLRB v. Pandel-Bradford Inc., 88 LRRM 1199, enf'd 89 LRRM 3195 (C.A. 1 1975).

juxtaposition of negative statements by the employer concerning unionization and promises of benefits emphasizes to the employees that they would benefit from rejecting the union.

Where an employer has made a material misrepresentation of facts, the Board, in evaluating post-election objections, will consider whether the union had an opportunity to effectively reply to the misrepresentation, thereby dissipating its impact on the election. General Knit of California, 99 LRRM 1687 (1978). However, where the employer has granted a benefit and made promises of future benefits during the election process, the Board will not consider whether or not the union has had an opportunity to respond. Under these circumstances, the union's response cannot effectively negate the improper influence on employee free choice which results from the employer's "fist inside the velvet glove" conduct. Accordingly, Local 1158's response to Exhibit J-15 does not negate the objectionable character of that document.[11/] However, with regard to Exhibit J-17 [12/] the undersigned adopts the Hearing Officer's analysis that any misrepresentation in that document regarding the payment of monthly union dues did not constitute interference with the election process. Further, the undersigned notes that

11/ See p. 4 of the Hearing Officer's Report and Recommendations which quotes the exhibit in its entirety.

12/ See pp. 5 and 6 of the Hearing Officer's Report and Recommendations which quote the exhibit in its entirety.

the remaining portions of J-17 are unobjectionable since they constitute an accurate statement of the realities of the collective bargaining process and the possible results of lawful negotiations with the union. Ludwig Motor Corp., 91 LRRM 1199 (1976); Computer-Peripherals, Inc., 88 LRRM 1027 (1974).

After a careful review and analysis of the record, the undersigned declines to adopt certain of the Hearing Officer's findings of fact and conclusions of law with regard to Exhibits J-15 and J-16. Specifically, an analysis of the testimony of Carmine Perrapato, the Sewerage Commission's Executive Director, leads the undersigned to conclude that the sequence of events leading up to the October 16, 1979 election was as follows:

Since 1978, the Sewerage Commission has been in the process of expanding the nature and scope of its operations. This expansion has resulted in a significant influx of additional personnel. Prior to 1978, the Sewerage Commission did not have a written set of rules and regulations, specific job descriptions or classifications, or a salary scale based on job classifications. Employee relations were informally governed by established practices. Accordingly, in 1978, the Sewerage Commission undertook a major overhaul of its employment practices and policies with the intent of upgrading and formalizing them. A management study team was selected as a labor relations consultant. This consultant initially prepared a management study which recommended the adoption

of job classifications, salary scales based on classification and a manual of rules and regulations. The Sewerage Commission adopted these recommendations and retained the study team to further prepare specific proposals for implementing the study in several steps.

The study team formulated a proposed Personnel Policy and Procedure Handbook which was adopted by the Sewerage Commission effective February 1, 1979. Article (E)(3) of the Handbook, entitled Job Specifications, provided for the further establishment of specific job descriptions, classifications, and salary schedules based on classifications. Pursuant to this article the study team subsequently proceeded to audit the various duties of both the professional and nonprofessional employees. From this investigation the study team prepared a survey of job classifications with an attached salary guide for each classification organized into ranges and steps. This recommendation was completed by the study team prior to August 1979 and was adopted by the Sewerage Commission sometime in August.

The salary guide, as initially adopted, called for the "red circling" of approximately 54 employees. For some employees "red circling" meant that they would not receive any salary increases for 1980. The 1979 salaries for these employees were already beyond the projected 1980 salary schedule for their positions. Accordingly, the study team had recommended that these employees be completely bypassed for 1980 so that by the next year

their salaries would be in line with the salary guide. For other employees, "red circling" meant that they would receive less than the 7% increase which the study team had recommended as the generally prevailing increase for 1980. The 1979 salaries for this second group of employees were such that their initial placement on the salary guide would result in less than a 7% increase for 1980. 13/ From its investigation of the Sewerage Commission's employees, the study team had concluded that the professional employees were underpaid in comparision with comparable civil service employment and private industries in the area. However, the nonprofessional employees were comparably overpaid. Accordingly, the "red circling" of some of these 54 employees was intended to correct this imbalance.

The adoption of the August 1979 salary guide had a significant impact on the employees. Many of them,particularly in the lower echelons, were disgruntled by the lower than expected salaries. Immediately after the guide's adoption, in early August 1979, there was a definite upsurge in union organizational activity. Director Perrapato stated that employees at that time advised him that the adoption of the guide had resulted in a significant increase in the signing of union authorization cards. This organizational activity led to the filing of the representation petition by Local 1158 on August 15, 1979.

In response to the negative employee reaction, management personnel met with the various classifications of employees during

13/ It is unclear from the record exactly how many of the 54 employees fell into this latter category as opposed to the former, although it appears that few employees were in the former group.

the period between late August 1979 and September 12, 1979. At these meetings management attempted to respond to the employees' complaints by explaining how the salary guide had been formulated and emphasizing that in the future all salary increases would be in accordance with the guide. However, at its September 12, 1979 meeting, the Sewerage Commission adopted a second resolution (Exhibit J-15) relating to salaries for 1980. This resolution initially noted that under the salary schedule previously adopted in August 1979 for 1980 some employees would receive less than the generally prevailing 7% increase for 1980. The resolution then grants the formerly "red circled" employees a bonus for 1980 which amounted to the difference between 7% of their present salary and the cash increase they would have received under the August 1979 salary guide. In regard to those employees who would receive no increase for 1980, the resolution stated that the Sewerage Commission would examine each case on an individual basis and decide on a final course of action for each employee prior to its November 14, 1979 meeting.

On September 17, 1979, the parties entered into a consent election agreement which scheduled an election for October 16, 1979. Just prior to this election, on October 9, 1979, the Sewerage Commission distributed a circular (Exhibit J-16) to its employees which noted that all the employees, with one exception, who were eligible to vote in the election had received a salary increase for 1980. The circular also notes that all previous "red circles" had been eliminated and further promises that: (1) employees would never be "red circled" in the future; (2) all salary increases

in the future would be accomplished by increasing the salary guide; (3) all employees would receive the 1980 salary increase plus any salary step they would have coming according to the salary guide.

Executive Director Perrapato admitted on direct examination that after the September 12, 1979 and October 9, 1979 circulars were issued there was a noticeable change in the attitude of the employees toward the union. Employees stated to Perrapato that through August 1979 they had been dissatisfied with the Sewerage Commission's decision regarding salaries but by September they were satisfied. Employees who had signed union authorization cards in August 1979 stated that as a result of the Sewerage Commission's decision on September 12, 1979, they had changed their minds about voting for a union.

From this summary of the facts it is clear that long before the appearance of Local 1158 the Sewerage Commission, through its labor consultant, began a major overhaul of its labor relations policies and practices due to its expansion and increase in personnel. The preparation of job classifications and a salary guide with ranges and steps according to classifications was a significant aspect of this long term process which was completed by the Sewerage Commission just prior to the filing of the representation petition on August 15, 1979. It is obvious then that there was a legitimate business justification for the adoption of the salary guide in August 1979 which was unrelated

to the union's organization activity. This guide was adopted in the ordinary and normal course of business which only incidentally coincided with the union's organizational activities. Therefore, those actions which the Sewerage Commission took in accordance with the mangement study team's recommendations by adopting a salary guide in August 1979 did not constitute objectionable conduct.

However, the guide adopted in August 1979 initially called for the "red circling" of 54 employees. Only after there was evidence of employee discontent, an upsurge in union organizational activity, an increase in the number of employees signing union authorization cards, the filing of the representation petition, and the effort by management to calm employee discontent, did the Sewerage Commission, on September 12, 1979, adopt a second resolution regarding salaries for 1980.

It is clear from the very language of the September 12 resolution that it constituted a significant deviation from the salary guide recommended by the management study team and adopted in August 1979. The stated purpose of the recommended "red circling" was to bring overpaid employees in line with the guide and to insure that employees with comparable job classifications and years of service would receive the same salary. The Sewerage Commission initially accepted this concept when it adopted a salary guide in August 1979 but then acted inconsistently by adopting the September 12, 1979 salary resolution which resulted in the granting of bonuses in excess of the guide.

It is obvious from these facts that the September 12, 1979 supplemental salary resolution was not under consideration prior to the filing of the representation petition by Local 1158. It is equally clear that the resolution was not adopted by the Sewerage Commission in the ordinary and normal course of business as part of the management study team's long term recommendations for the overhaul of the Sewerage Commission's labor relations. Nor did the resolution merely coincide with the election process. Finally, there is no evidence in the record to establish any legitimate business considerations which explains why the Sewerage Commission decided to deviate from the recommended salary guide only a few weeks after its initial adoption. Accordingly, it is reasonable to conclude that the September 12, 1979 supplemental salary resolution constituted an increased benefit which the Sewerage Commission would not have otherwise granted at that time but for the union's organizational activities and filing of a representation petition. Considering the nature and chronology of the events which occurred between the adoption of the salary guide in August 1979 and the supplemental salary resolution adopted on September 12, 1979, the timing and substantive provisions of the resolution itself, the presumption in favor of finding employer interference when a benefit is granted during the election process, and the absence of any affirmative showing by the Sewerage Commission that its conduct was governed by legitimate factors unrelated to the election process, it is reasonable to conclude that the

Sewerage Commission's adoption of the resolution was causally related to the filing of the representation petition and was motivated by a calculated desire to improperly interfere with the employees' free choice. Moreover, inasmuch as Executive Director Perrapato forthrightly stated that this bonus actually influenced the potential voters there is direct evidence that the granting of the bonus inhibited the employees' free choice.

While the September 12, 1979 supplemental salary resolution dealt with the Sewerage Commission's decision not to red circle employees for 1980, the October 9, 1979 handbill circular further pledged not to red circle employees in the future. Therefore, the above analysis is equally applicable to the promises contained in this handbill. Accordingly, it is reasonable to conclude that the promises contained in the handbill would not have been made but for the presence of Local 1158, were causally related to the filing of the representation petition and were motivated by a deliberate desire to improperly interfere with the employees' free choice. Moreover, this handbill was circulated just seven days prior to the election and emphasized several times that the promises contained therein were not conditioned on the outcome of the election. However, considering these references to the union in conjunction with the substantive provisions of the handbill, the timing of the handbill, the supplemental salary resolution, and the circumstances surrounding the issuing of these two communications, it is reasonable to conclude that the employees would

not miss the inference that these ostensibly unconditional promises were a response to the union's presence and were conditioned on the results of the election.

Accordingly, the undersigned hereby sets aside the election and pursuant to N.J.A.C. 19:11-9.2(j), directs a second election among the employee herein in the units described below. 14/ The election shall be conducted no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth below who were employed during the payroll period ending September 14, 1979, including employees who did not work during that period because they were ill, on vacation or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired

14/ Voting Unit No. 1 Included: All blue collar employees employed by the Passaic Valley Sewerage Commission.

Excluded: All other employees including craft workers, professionals, managerial executives, confidentials, police and supervisors within the meaning of the Act.

Voting Unit No. 2 Included: All craft employees employed by the Passaic Valley Sewerage Commission.

Excluded: All other employees including noncraft employees, police, professionals, confidentials, managerial executives and supervisors within the meaning of the Act.

or reinstated before the election date. 15/

Those eligible to vote shall vote whether or not they desire to be represented for the purpose of collective negotiations by Local 1158, International Brotherhood of Electrical Workers.

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

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: July 30, 1980
Trenton, New Jersey

15/ The election eligibility list provided to the Commission for utilization during the prior election shall be utilized as the election eligibility list for the election directed herein, as modified by any submissions provided by the Sewerage Commission amending such eligibility list in accordance with the above and reflecting the names of those people who have resigned or were discharged for cause since the designated period. Such lists shall be provided within ten (10) days prior to the election in accordance with the procedure set forth in N.J.A.C. 19:11-9.6.

H. O. NO. 80-14

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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-and-

Docket No. RO-80-23

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Petitioner.

SYNOPSIS

A Commission Hearing Officer in a representation proceeding recommends that objections to Commission conducted representation elections be dismissed, and that appropriate certifications issue based upon the Tally of Ballots. The Hearing Officer found that the Petitioner did not satisfy its burden of proof as required by N.J.A.C. 19:11-9.2(h) regarding certain documents disseminated by PVSC which allegedly interfered with the employees' freedom of choice.

The Hearing Officer reviewed Commission as well as NLRB policy concerning the overturning of representation elections.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC VALLEY SEWERAGE COMMISSION,

Public Employer

-and-

Docket NO. RO-80-23

LOCAL 1158, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,

Petitioner.

Appearances:

For the Public Employer
Ambrosio & Ambrosio, Esqs.
(Gabriel Ambrosio, Of Counsel)

For the Petitioner
Robert Sarcone, Esq.
(Gerald E. Fusella, Of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on August 15, 1979 by Local 1158, International Brotherhood of Electrical Workers, AFL-CIO (the "Petitioner") seeking to represent a unit of employees employed by the Passaic Valley Sewerage Commission ("PVSC"). On September 17, 1979, the parties executed a Consent Election Agreement for two units of employees employed by the PVSC. 1/

On October 16, 1979, elections were held in both units of employees and the Tally of Ballots for each unit revealed that the majority of employees who voted in each unit did not wish to be represented by the Petitioner. By letter dated October 18, 1979, the Petitioner raised objections to the results of the above elections by

1/ The parties agreed upon two units of employees. First, a unit of all blue collar employees employed by PVSC with certain exclusions; and second, a unit of all craft employees employed by PVSC, excluding all other employees.

alleging that PVSC circulated pre-election campaign material to the employees which adversely influenced the voters.

Pursuant to a Notice of Hearing dated November 13, 1979, a hearing was held concerning the objections to the elections on December 17, 1979, before the undersigned Hearing Officer in Newark, New Jersey. All parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of the hearing, only the Petitioner filed a written brief in this matter. 2/ Upon the entire record in this proceeding, the Hearing Officer finds:

1. That PVSC is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, (the "Act") 3/ and is subject to its provisions.

2. That the Petitioner is an employee representative within the meaning of the Act and is subject to its provisions.

3. That the Petitioner has raised timely objections to the results of a Commission conducted representation election which could not be resolved and therefore the matter is appropriately before the undersigned for report and recommendations.

4. That the parties stipulated that the exhibits marked as J-1 through J-14 were documents disseminated by the Petitioner, and that the exhibits marked as J-15, 16 and 17 were documents disseminated by PVSC.

5. That the parties stipulated that the issue herein is "whether the documents labeled J-15, J-16 and J-17 when considered in conjunction with all of the other joint exhibits raise sufficient objections warranting the overturning of the

2/ Due to the parties' late receipt of the transcript herein an extension of time was granted for the receipt of briefs by the undersigned. The Petitioner delivered its brief on February 13, 1980.

3/ N.J.S.A. 34:13A-1 et seq.

instant election."

6. That the Petitioner argues that PVSC, by disseminating J-15, J-16 and J-17, unduly influenced and interfered with the free choice of the voters which resulted in the Petitioner's loss of the elections. The Petitioner seeks to have the elections overturned and have itself certified as the majority representative because it alleges in its brief that the laboratory conditions for another election have been destroyed by the employer's conduct.

7. That PVSC argues that the documents it dessminated were in response to the documents disseminated by the Petitioner, that its documents did not interfere with the free choice of the voters, and that the results of the election should be certified.

Factual Background

The petition was filed in these matters on August 15, 1979, the consent election agreement was reached on September 17, 1979, and the elections were conducted on October 16, 1979. As early as August 16, 1979,and until approximately October 12, 1979, the Petitioner disseminated to the employees through the mail numerous documents concerning the instant election(s). Exhibits J-1 through J-5, for example, were mailed prior to the taking of the consent agreement, while exhibits J-6 through J-14 were mailed in regular intervals until just four days prior to the election. The substance of these documents varied from providing general election and campaign information to making comments concerning PVSC leadership.

By letter dated October 18, 1979, the Petitioner set forth objections to the instant elections. The Petitioner alleged that:

> 1. On September 12, 1979, the Commissioners of Passaic Valley Sewerage Commission adopted a resolution which was hand delivered to all employees. Said resolution stated that the salary scale of all employees would be increased effective January 1, 1980.

Moreover, the Commissioners resolved that individual considerations would be given to certain employees to increase their salaries, and the determination regarding the amount of the increase would be forthcoming to them before November 14, 1979.

2. The Passaic Valley Sewerage Commissioners intentionally misled their employees by circulating a handbill dated October 12, 1979, which stated that if the unions were successful all employees would have to join and pay dues, which would be contra to existing Public Employment Relations Commission Rules.

The first PVSC document that allegedly unduly influenced the voters, Exhibit J-15, was actually a public resolution of the PVSC dated September 12, 1979. The resolution concerned the 1980 salary scale for PVSC employees, and also provided for a review of those PVSC employees who did not receive a salary increase in 1979. 4/ Apparently, PVSC mailed a written explanation of J-15 to its employees.

4/ Exhibit J-15 is as follows:

R E S O L U T I O N

WHEREAS: the Commissioners have adopted a salary scale for 1980, and

WHEREAS: said salary scale still leaves certain employees without an increase or a percentage of increase below 7%,

NOW THEREFORE BE IT RESOLVED: that all employees who will not receive a minimum of 7% increase under the new salary scale, are to be paid a bonus for the difference between 7% of their present salary and the amount that they received as an increase under the salary guide. Those employees who would not receive any salary increase are to receive a 7% bonus of their present salary.

BE IT FURTHER RESOLVED: that this bonus is to be paid quarterly - the first payroll in January, the first payroll in April, the first payroll in July and the first payroll in October.

BE IT FINALLY RESOLVED: that the Commissioners are aware that certain employees did not receive an increase in their salary for 1979 and under the present schedule will not receive an increase for 1980. The Commissioners being cognizant of this problem are committed to examine each case on an individual basis to try to resolve the problem for dedicated employees who have unfortunately, according to their salary classification and guide, not received increases. The Commissioners further resolve that they will have a decision on each individual person prior to the November 14, 1979 Commissioners meeting.

Meeting Date September 12, 1979

The Petitioner also alleged that Exhibits J-16 and J-17 unduly affected the voters' choice. Those documents were mailed by PVSC on October 9 and October 12, 1979 respectively. Exhibit J-16 also concerned salary increases, 5/ and Exhibit J-17 were remarks by PVSC concerning guarantees that allegedly could or could not be made by the Petitioner. 6/

5/ Exhibit J-16 states:

T H E F A C T S

ANOTHER PLEDGE KEPT

We promised earlier this year that all future Salary Increases would be made in advance of the New Year. This pledge was made before any Union was involved.

Everyone eligible to make a determination as to whether PVSC should have a Union or not, with the exception of one person, has received an increase for 1980.

Your previous red-circle has been eliminated. None of you will ever be red-circled in the future.

The new Salary Schedule and future increases have eliminated the possibility of any future red-circling.

THIS IS A FACT - we are putting it in PRINT - not just making an off-the-cuff statement.

ALL SALARY INCREASES IN THE FUTURE WILL BE BY INCREASING THE SALARY GUIDE AS WAS DONE FOR 1980.

ALL EMPLOYEES WILL RECEIVE THIS INCREASE PLUS ANY STEP THEY HAVE COMING ACCORDING TO THEIR GUIDE. IN THIS WAY, ALL WILL BE TREATED EQUALLY.

This was part of our commitment to make PVSC a professional organization and these procedures will be followed WITH OR WITHOUT ANY UNION.

IN THE INTEREST OF TRUTH, WE ARE ISSUING FACT SHEETS SO YOU CAN HONESTLY JUDGE WHAT DECISION YOU WANT TO MAKE.

PASSAIC VALLEY SEWERAGE COMMISSIONERS

10/9/79

6/ Exhibit J-17 states:

T H E F A C T S

Local 1158 International Brotherhood of Electrical Workers does not represent one public agency - (state employees, municipal employees or any public agency such as Passaic Valley). All their experience is in the private sector. Would you hire a gardener to be your pilot?

WHAT CAN THEY GUARANTEE YOU?

1. They CANNOT guarantee you a salary increase.
2. They CANNOT guarantee you a change in your job classification.

(continued)

Analysis

The Commission has established policies and procedures as well as case law regarding objections to an election. N.J.A.C. 19:11-9.2(j) provides that the Director of Representation has the authority to direct that a hearing be conducted into objections to an election where there are substantial and material factual issues in dispute. N.J.A.C. 19:11-9.2(h) provides in pertinent part that

> [t]he 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.

In In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970), the Commission established a standard to be used in matters concerning objections to an election when it held that it:

> 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. At p. 10.

6/ (continued)

3. They CANNOT guarantee you a promotion
4. They CANNOT improve your Pension Fund.
5. They CANNOT improve your Hospitalization and Major Medical.
6. They CANNOT guarantee you an increase in other benefits.
7. They CANNOT even guarantee you to go out on strike, as it is AGAINST THE LAW for a public agency to strike, especially one like Passaic Valley where a strike would create a tremendous health hazard.

THEY CAN GUARANTEE THAT YOU WILL PAY DUES

The dues are now $11.00 each and every month and there is no guarantee that they will not be increased in the future.

Have they guaranteed to you in writing that there will not be any assessments in the future?

Have they explained to you what benefits you will get from the thousands of dollars they will collect?

THE COMMISSIONERS DO NOT OPPOSE THE UNIONIZATION OF PASSAIC VALLEY, BUT THEY BELIEVE IT SHOULD BE THE DECISION OF EACH EMPLOYEE AFTER HE HAS RECEIVED ALL THE FACTS.

10/12/79 PASSAIC VALLEY SEWERAGE COMMISSIONERS

Shortly thereafter, the Commission was faced with a case, similar to the instant matter, where a union alleged that the employer's handbill created misrepresentations that affected the outcome of the election. The Commission upheld the Hearing Officer who found against the union and held that:

> An election should be set aside only where the alleged misrepresentations involve a substantial departure from the truth and are made at a time that prevents the other party from making an effective reply. In re Jersey City Medical Center, P.E.R.C. No. 49, Hearing Officer Report, p. 15 (1970).

In order to determine the validity of the instant objections an examination of exhibits J-15, J-16 and J-17 must be made in light of the above Commission policy and cases.

J-15 (supra, note 4)

On its face J-15 sets forth the amount of increase in the salary scale for 1980, and also provides that PVSC will reconsider granting increases to those employees who did not receive an increase in 1979. The Petitioner's Business Agent, Gene Sette, testified that his specific objection to J-15 was the final paragraph which indicated that PVSC would review the salaries of certain employees. Sette admitted that this part of J-15 affected only about six employees, but he did not testify on how or whether the document in fact affected the employees in the exercise of their vote in the instant elections. Upon further examination, Sette testified that Exhibit J-6, which was disseminated by the Petitioner to the employees on or about September 20, 1979, specifically addressed the issues raised in J-15. 7/ The Petitioner did not produce the testimony of any PVSC employees concerning the effect of any of the relevant exhibits upon their right to vote. 8/

7/ Transcript(T) p. 33.

8/ At the prehearing conference conducted in this matter on December 12, 1979, the undersigned provided the Petitioner--pursuant to its own request--with subpoenas for two PVSC employees to require them to attend the hearing. At the hearing on December 17, the Petitioner returned the subpoenas to the undersigned and advised the undersigned that it had elected not to serve the subpoenas. The Petitioner's decision not to serve the subpoenas does not relieve it of the burden of proof to establish that the complained of conduct substantially affected the outcome of the election.

Further testimony concerning J-15 was provided by Carmine Perrapato, PVSC's Executive Director, who testified that J-15 was adopted to implement the results of a management study which began in 1978 concerning PVSC's employment practices and policies. 9/ Perrapato testified that a management consultant team recommended the adoption and implementation of various policies and programs which included the establishment of job classifications and salary guides which previously did not exist. In February 1979, PVSC adopted a Personnel Policy and Procedure Handbook as an outgrowth of the management study, and in August 1979 PVSC adopted the recommendations of the management study concerning job classifications and salary guides. 10/ Perrapato testified that the adoption of the handbook and the job classifications occurred prior to the filing of the instant petition. 11/

Regarding J-15, Perrapato testified that that resolution implemented the seven percent raise recommended by the management study and that the last paragraph was only an attempt to equalize the raise for all employees. 12/ Perrapato also testified that the last paragraph of J-15 affected only fourteen PVSC employees and only one of those employees to his knowledge was in either unit in question. 13/

A review of the evidence concerning J-15 reveals that the Petitioner did not satisfy its burden of proof that J-15 interfered with the employee's freedom of choice. The Petitioner's mere allegation that J-15 unduly influenced the voters does not warrant the overturning of a representation election. See In re Jersey City D.P.W., supra. See also In re County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979).

9/ T. pp. 79-87.

10/ T. pp. 80-83.

11/ T. p. 85.

12/ T. p. 86.

13/ T. pp. 87-89.

Moreover, the evidence shows that J-15 was disseminated one month prior to the election and that the Petitioner did in fact specifically respond to that document. Noting the lack of evidence to substantiate the effect of J-15 upon the employees' freedom of choice, and based upon the above discussion, the undersigned recommends that the objection to the instant elections based upon J-15 be dismissed.

J-16 (supra, note 5)

Exhibit J-16 was a memorandum disseminated by PVSC to the employees on or about October 9, 1979, which essentially promised that salary increases would continue in the future. Although the Petitioner did not object to J-16 either in its letter of objections dated October 18, 1979, or in its post-hearing brief, it did raise an objection to this document at the hearing.

However, despite alleging that J-16 interfered with the voters' free choice, the Petitioner failed to substantiate that allegation as required by N.J.A.C. 19:11-9.2, and as required by In re Jersey City D.P.W., supra. The Petitioner's business agent only testified that he knew of one employee who actually saw J-16, [14/] and that he specifically responded to J-16 by issuing the document marked as exhibit J-12. [15/]

As previously discussed, a party filing objections in a Commission conducted election has the burden of proving that the conduct complained of affected the results of the election. The mere submission of a document purported to have affected the election is not enough. The objecting party must substantiate through evidence or testimony that the document(s) complained of actually affected the free choice of the voters.

14/ T. p. 42.

15/ T. p. 41.

In In re Cty. of Middlesex, E.D. No. 25 (1971), for example, the Executive Director (now referred to as the Director of Representation) overruled certain objections to a Commission conducted election because of a lack of substantiating evidence. One objection concerned remarks by a foreman which allegedly intimidated voters. The Director dismissed that objection and found that the names of voters alleged to be intimidated were not provided. Another objection concerned the allegation of list keeping at the election site. The Director dismissed that objection because the union failed to prove that the results of the election were affected by this conduct.

By applying Middlesex to the instant matter, the undersigned finds that there is insufficient evidence to establish the affect of either J-15 or J-16 on the results of the elections. 16/ Accordingly, based upon the above discussion it is recommended that the objection raised at the hearing regarding J-16 be dismissed.

J-17 (supra, n. 6)

The Petitioner raised its strongest objection to exhibit J-17 which was disseminated to the employees just four days prior to the election. That document itemized several areas which the union could not guarantee or improve upon, and concluded with a statement concerning the payment of union dues.

Business agent Sette testified that the most objectionable part of J-17 was the following phrase: "They can guarantee that you will pay dues." 17/ Sette admitted that he only knew of one employee who received that document but later testified that J-17 influenced the vote of six people.

16/ The undersigned acknowledges that J-16 could be construed as promising a benefit. However, the Petitioner was unable to show that it had any affect on the employees' free choice. In addition, the Petitioner responded to J-16 by issuing J-12, and it does not appear that J-16 had any real impact on the election.

17/ T. p. 43.

However, when pressed further Sette admitted that he did not know whether J-17 influenced anyone. [18] When Sette was questioned on whether the Petitioner made any attempt to respond to J-17 he testified that there was not enough time to respond to that document by mail -- which was his preferred method -- and, therefore, he made a conscious decision not to respond to that document. [19]

The record reveals that the objectionable language of J-17 actually included the following sentences:

> THEY CAN GUARANTEE THAT YOU WILL PAY DUES.
>
> The dues are now $11.00 each and every month and there is no guarantee that they will not be increased in the future.

The undersigned believes that that language eminates from and is similar to the Petitioner's document exhibit J-14 which was disseminated to the employees on or about September 20, 1979. The pertinent part of J-14 is as follows:

> Speaking of being conned we understand there are also many rumors being spread around about how much dues you will be paying when you join our Union. The dues are currently $11.00 per month, WHICH IS ALL YOU WILL BEGIN PAYING WHEN WE HAVE AN APPROVED CONTRACT WITH THE PASSAIC VALLEY SEWERAGE COMMISSIONERS.

Although the Petitioner objects to the PVSC language in J-17 on the grounds that it misleads the employees into believing that all of them must pay dues, the undersigned believes that the above language in J-14 is equally misleading. One reasonable reading of the pertinent part of J-14 is that all employees must pay dues once the Petitioner reaches a contract

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18/ T. p. 51

19/ T. p. 55

with PVSC. Although one could infer a similar result from reading J-17, it certainly does nothing more than reiterate what the Petitioner has already conveyed.

The National Labor Relations Board (the "NLRB") held in Essex Wire Corp., 188 NLRB 397, 77 LRRM 1016 (1971), that the employer did not interfere with a representation election despite inaccuracies that appeared in its handbill, because it was in reply to a handbill previously circulated by the union which was also inaccurate. The NLRB has also held that employers who merely advise their employees of the monthly cost of union dues do not necessarily interfere with the employees' free choice in representation elections. See Coco Palms Resort Hotel (Island Holidays Ltd.), 208 NLRB 966, 85 LRRM 1225 (1974); William Carter Co., 208 NLRB 1, 85 LRRM 1017 (1973); TRW Credit Data, 205 NLRB 866, 84 LRRM 1077 (1973).

The undersigned has carefully reviewed the evidence regarding J-17 and is convinced that said document did not interfere with the employees' free choice in the instant elections. The Petitioner failed to satisfy its burden of proof pursuant to N.J.A.C. 19:11-9.2(h) that J-17 actually influenced the employees' free choice. Moreover, exhibit J-14 may have contributed as much -- if not more -- confusion to the employees concerning the payment of union dues than did J-17. Accordingly, based upon the above discussion, the undersigned recommends that the objection to exhibit J-17 be dismissed.

CONCLUSION

The leading rule for setting aside representation elections because of employer interference or misrepresentations was reaffirmed by the

NLRB in General Knit of Calif., 239 NLRB No. 101, 99 LRRM 1687, 1688 (1978), as follows:

> An election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation whether deliberate or not, may reasonably be expected to have a significant impact on the election. Hollywood Ceramics Co., 140 NLRB 221, 224, 51 LRRM 1600, 1601 (1962).

In the instant matter, the Petitioner was unable to prove that exhibits J-15, J-16 or J-17 actually impacted upon the free choice of the voters. Moreover, the Petitioner actually responded to exhibits J-15 and J-16, and had the opportunity to respond to exhibit J-17 (except by mail) but did not. The fact that the Petitioner could not respond to J-17 by mail does not negate the opportunity it had to meet with the employees prior to the election and rebut that document.

RECOMMENDATIONS

Based upon the entire record herein, and for the above stated reasons, the undersigned recommends the following:

1. That the objections to the instant elections, and specifically to exhibits J-15, J-16 and J-17 be dismissed.

2. That an appropriate certification be issued for each election.

Respectfully submitted

Arnold H. Zudick
Hearing Officer

DATED: March 25, 1980
Trenton, New Jersey