H.O. NO. 83-17

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-83-9

TRENTON FOOD SERVICE ASSOCIATION, NJEA,

Petitioner.

SYNOPSIS

A Commission Hearing Officer, reviewing post election objections filed by the Trenton Food Service Association, NJEA, recommends that the Commission's Director of Representation set aside the election conducted on September 28, 1982. In so ruling, the Hearing Officer recommends a finding that the Trenton Board of Education maintained an unequal access policy which created a glaring imbalance of organizational communications during a campaign period. The Hearing Officer also recommends findings that the Board's conduct at an "Emergency Meeting" held four days before the election went beyond permissible employer free speech, and that the Board's general conduct created an atmosphere which precluded free choice of employees in the representation election.

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, and 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.

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Appearances:

For the Public Employer
Murray & Granello
(Karen Bulsiewicz, of Counsel)

For the Petitioner
Sterns, Herbert & Weinroth
(Mark S. Schorr, of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On July 23, 1982, the Trenton Food Service Association, NJEA (the "Association") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission (the "Commission"), seeking to represent all non-supervisory food service employees, full and part time, employed by the Trenton Board of Education (the "Board"). On September 7, 1982, the parties executed a Consent Election Agreement for the petitioned-for unit. 1/

On September 28, 1982, a secret ballot election was conducted by the Commission. Challenged ballots were sufficient in number to

1/ The parties could not agree to the inclusion or exclusion of four titles in the petitioned-for unit, and agreed that employees in those titles could vote subject to challenge.

affect the results of the election. Accordingly, a post-election conference was held at P.E.R.C. on October 4, 1982, wherein challenged ballots were resolved and a final tally issued. The final tally showed that a majority of valid votes was cast for no representation. On October 5, 1982, the Association raised objections to the results of the election and filed supporting affidavits.

Pursuant to N.J.A.C. 19:11-9.2(j), the Director of Representation issued a Notice of Hearing on November 30, 1982. Hearings were held before the undersigned on January 13, January 17, and March 1, 1983, wherein all parties were given opportunities to examine and cross-examine witnesses, present evidence, and argue orally. Subsequent to the close of the Hearing, both parties submitted briefs and responding briefs and letters of memoranda, the last of which was received on April 21, 1983. Upon the entire record in this proceeding, the undersigned finds that:

1. The Trenton Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (the "Act") 2/ and is subject to its provisions.

2. The Trenton Food Service Association, NJEA is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association has raised timely objections to the results of the Commission's conducted representation election. Specifically, the Association raised five objections, as summarized below:

(a) The Association alleged that the Board misrepresented material facts at a time which did not afford the Association sufficient time for rebuttal.

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

(b) The Association alleged that the Board prevented communication between the Association and Board employees by the removal of posted Association materials.

(c) The Association alleged that in an "Emergency Meeting," the Board improperly alluded to the status of raises and benefits as they would be affected by the results of the election.

(d) The Association alleged that the Board's general conduct created an atmosphere which precluded free choice by employees in the representation election.

(e) The Association alleged that the Board, through management personnel, improperly spoke to individual food service employees and urged them to reject the Association. 3/

4. In the absence of a voluntary resolution of these objections, the matter is appropriately before the undersigned for report and recommendations.

FACTUAL BACKGROUND

The undersigned finds that the events complained of took place on Friday, September 24, 1982, four days before the election on Tuesday, September 28, 1982. Between approximately 10:30 a.m. and 12 noon on

3/ In its post hearing submissions, the Association did not continue to object to this allegedly improper conduct. Moreover, the record reveals that, of the two individuals in question, one held the title of Dispatcher. In the Consent Election Agreement, the parties agreed that all Dispatchers could vote in the election subject to challenge. Accordingly, any comments by the Dispatcher during the campaign must be deemed unobjectionable as an expression of free speech. As to the other individual involved, the record is devoid of any proof of intimidating or otherwise inappropriate statements by that individual. Accordingly, the undersigned recommends a finding that the Association's objections as to the conduct of these two individuals is without merit. This objection will not be addressed further in this report. The remaining objections will be treated in the order presented above.

September 24th, Mr. John Vig (Assistant Commissary Manager), David Brown (Dispatcher) and John Connerton (Board employee, title unclear from record) went to schools throughout the district. At the direction of Ms. Gloria Gibson (Director of Food Services) and Ms. Julie Thomas (Director of Field Services), these three individuals either removed or directed food service workers to remove all election related materials posted by or on behalf of the Association. (T-I p. 127; T-3 p. 69). At the same time, the three individuals distributed three notices to lead servers at each school and directed that these notices be reviewed by all food service workers at each school. (T-3 p. 215).

Two of the notices were Board policies issued on June 25, 1982. These policies (Exhibits R-2 and R-3) concerned appropriate and inappropriate use of school owned equipment. Ms. Gibson and Ms. Thomas testified that these policies were distributed due to the discovery of misuse of Board duplicating equipment by Association sympathizers. (T-2 p. 116; T-3 p. 67).

The third notice (Exhibit P-2) concerned a meeting for food service workers and is set forth in its entirety below:

EMERGENCY MEETING
OF
ALL FOOD SERVICE EMPLOYEES
SUBJECT
DISCUSSION OF UNION ELECTION
'GET THE FACTS'
TODAY AT 1:45 pm
(Friday 9/24/82)
ART CENTER
ART CENTER - BASEMENT ADMINISTRATION BLDG

'ATTENDANCE IS VOLUNTARY'

Gloria B. Gibson, Director

The meeting was conducted with the approval of Dr. Arthur Page, Assistant Superintendent, Personnel (T-3, p. 107). Approximately 50 to 60 people attended the meeting the afternoon of September 24th (T-2 p. 127). Ms. Gibson conducted the meeting; Ms. Thomas was in attendance and in the back of the meeting room (T-1 p. 138). Ms. Gibson indicated that employees who worked two and one-half hours would pay $75.00 annual dues and that the remaining employees would pay approximately $120.00 annual dues (T-1 p. 106 and 172). Ms. Gibson and Ms. Thomas stated that this information was provided by the NJEA and Ms. Gibson counseled employees to confirm these figures with the NJEA. (T-1 p. 138). The amounts cited by Ms. Gibson were not accurate; annual dues for two and one-half hour employees were $44.50 and $79.00 for remaining employees (T-2 pp. 23 and 24; T-1 pp. 139-141).

Ms. Gibson also indicated at the meeting that employees had numerous benefits and could expect negotiations to proceed quickly if the Association lost, but that negotiations might take longer if the Association won. She also indicated that in her experiences as a union member, one had to give up something to get something, and gave an example from her recent union contract where her union had given up two sick days. (T-1 pp. 107-11; T-2 pp. 235 and 236; T-3 pp. 19, 43-54).

COMMISSION STANDARDS ON ELECTION OBJECTIONS

Commission standards for review of election objections have been established by rule and case law. Unlike other representation proceedings, an election objection matter requires the objecting party to "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." N.J.A.C. 19:11-9.2(h).

A review of Commission case law reveals that the objecting party's burden is directly related to the nature of the alleged misconduct. The Commission's standard of review applicable to election objections was originally stated in In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970):

> 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. [emphasis supplied]

As the Commission noted in Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶ 11258 1980), the above standard is necessarily flexible:

> The Commission recognize[s]...that election objections can encompass a broad range of abuses. In reviewing the spectrum of possible election campaign misconduct, it would be unrealistic to require the same type of proof or apply any standard in an inflexible manner. To rigorously apply one test would not provide for the varying severity of election abuse and the ability of the parties to counteract certain types of misconduct on their own during the campaign. The latter part of the standard enunciated in Jersey City Dept. of Public Works is intended to provide the flexibility essential to the Commission if it is to meet its responsibility to regulate the conduct of election in a manner which achieves the goal that the tally of ballots is a reflection of the free choice of employees. The standard recognizes that elections should not be easily or routinely overturned but that types of conduct which have a strong tendency to jeopardize the atmosphere necesssary for a fair election will not be condoned.

Thus, the Commission held in Passaic Valley Sewerage Commission that where an objecting party alleges that material factual misrep-

resentations, at a time which precluded an effective reply, interfered with employee free choice, the objecting party must prove either its inability to effectively reply or direct evidence of interference. 4/ This stringent standard was applied in City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶ 13158 1982), where an alleged misrepresentation attributed to a representative of an employee organization one day prior to a representation election did not warrant setting aside the election. The facts in City of Atlantic City revealed that a representative of the competing employee organization was present to confront the source of the alleged factual misrepresentation and had an opportunity to rebut it.

More severe allegations of election misconduct require a lesser burden of proof; for example, in Passaic Valley Sewerage Commission, the Commission found that pre-election conferral of benefits by the

4/ In establishing standards on election conduct, as well as in reviewing all representation and unfair practice issues, the Commission is guided by decisions of the NLRB and the federal courts interpreting the National Labor Relations Act. Lullo v International Association of Firefighters, 55 N.J. 409 (1970); Galloway Twp. Assn. of Ed. Secs. 78 N.J. 10 (1978). Adopting election objection standards in Jersey City Dept. of Public Works and Passaic Valley Sewerage Commission, the Commission followed existing private sector case law at the time (respectively, Hollywood Ceramics Co., 140 NLRB 221, 51 LRRM 1600 (1962) and General Knit of California, 239 NLRB No. 101, 99 LRRM 1687 (1978)). The undersigned is aware that the NLRB has recently overruled the General Knit/Hollywood Ceramics standard in Midland National Life Ins. Co., 263 NLRB No. 24, 110 LRRM 1489 (1982). The NLRB now will not set aside elections based on factual misrepresentations, unless the misrepresentation is presented in a deceptive manner, e.g. by forged documents. The undersigned cannot speculate on whether or not the Commission will modify its holding in Passaic Valley Sewerage Commission in view of the change by the NLRB policy as expressed in Midland; accordingly, the analysis that follows presumes the continuing viability of Passaic Valley Sewerage Commission. At the same time, the undersigned notes that the recommendations reached infra, if adopted by the Director, should render moot the issue of Commission adoption of the Midland standard in this matter.

employer "...had such a strong tendency to interfere with the free choice of the employees that the election must be set aside even in the absence of direct evidence." 6 NJPER at 505. At the same time, the Commission noted that conferral of benefits was not a per se pre-election interference with employee free choice but could be proper "...if the record also shows that the employer's conduct was governed by factors unrelated to the impending election." 6 NJPER at 507. [footnote omitted]

At the far end of the continuum of election misconduct are instances of per se interference with the employee free choice. Where an objecting party demonstrates an unrebutted prima facie case of per se objectionable conduct, the Commission's Director of Representation will not order a hearing, but will immediately order a new election. No proof of direct evidence of actual interference is required from the objecting party, nor is the responding party offered an opportunity to demonstrate mitigating factors at a hearing. Included in this category are campaign meetings held on company time within twenty-four hours of an election [5/] and alteration of Commission documents by a subsequently successful party to the election so as to suggest Commission endorsement of a particular choice. [6/]

5/ In re Twp. of E. Windsor, D.R. No. 79-13, 4 NJPER 445 (¶ 4202 1978).

6/ Englewood Bd. of Ed., D.R. No. 82-47, 8 NJPER 251 (¶ 13111 1982) reg. for rev. den. P.E.R.C. No. 83-93, 8 NJPER 275 (¶ 13120 1982). In Englewood, the Director noted that the party which allegedly improperly altered and reproduced a Commission document failed to submit rebuttal evidence. It is important to note that the only kind of rebuttal which would have resulted in an order by the Director of a hearing would have been a denial of the conduct; rebuttal acknowledging the conduct but claiming mitigating circumstances cannot result in a hearing where per se objectionable conduct is alleged. See also Atlantic City, supra.

ANALYSIS

A. Alleged Factual Misrepresentation

The Association alleges that factual misrepresentation by the Board of the Association's dues structure, at a time which prevented effective rebuttal, destroyed the laboratory conditions necessary for a fair election. The undersigned finds that the Board did misrepresent the Association's dues structure at the "Emergency Meeting" on September 24, 1982. In its description of the Association's dues structure, the Board included a fee for Mercer County NJEA dues, when, in fact, no such county dues are required in Mercer County (T-2 p. 23 and 82).

There can be no doubt that the factual misrepresentation by the Board of Association dues was a material misrepresentation. In the case of the two and one-half hour per day employees, the Board's estimate of dues nearly doubled the actual dues amount. At the same time, the Association did not present direct evidence linking this misrepresentation to the results of the election; of the unit employees who testified at the hearing, none testified that their votes were affected by the misrepresentation of dues amounts. Accordingly, the undersigned proceeds to consider whether the material factual misrepresentations by the Board of the Association's dues amounts were made at a time which precluded effective rebuttal by the Association. 7/

As noted above, the misrepresentation occurred four days before the election. Preliminarily, the undersigned notes that in

7/ The undersigned does not reach the question of whether or not the Board's misrepresentation was intentional, since intent is not an element of a valid factual misrepresentation election objection. Hollywood Ceramics, supra, at 51 LRRM 1601.

Secaucus Municipal Utilties Authority, D.R. No. 82-57, 8 NJPER 393 (¶ 13179 1982), the Director of Representation found:

> [d]ifferent types of alleged factual misrepresentations may require different amounts of time for effective rebuttal. For example, In Kawneer Co., 119 NLRB 185, 41 LRRM 1333 (1958), the Board found that two days were insufficient for the factual rebuttal of the material misrepresentations where "...one party to a representation proceeding mistates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the knowledge to make possible a proper evaluation of the misstatements..." at p. 1334.

However, the undersigned notes that the alleged factual misrepresentations here did not concern material facts within the special knowledge of the employer. Instead, the Association was in the position to know whether the facts were misstated and would appear to have had ample time within which to effectively rebut such misstatements. Moreover, the record reveals that at least two Association members, including the Association's Acting Treasurer, were in attendance at the meeting when the factual misrepresentation was made. They were aware of the misrepresentation, and could have rebutted it at the meeting or subsequently at an Association rally held the night before the election. While the record indicates that Association members did not rebut the information at either the meeting (T-1 p. 138-139) or the rally (T-1 p. 148-151), nevertheless the undersigned concludes that the opportunity for effective rebuttal did exist. Under similar facts in Atlantic City, supra, the Director dismissed an election objection based on a material factual misrepresentation uttered one day before an election. Accordingly, the undersiged concludes that

the Board's conduct with respect to factual misrepresentation of Association dues does not warrant the setting aside of the election.

B. Alleged Prevention of Communications (No-solicitation/Access Issues)

The Association also contends that the election should be overturned due to the Board's removal of Association's materials from schools on September 24, 1982. The Association argues that the Board, through its written (Exhibits R-10 and R-11) and oral (T-2 p. 248; T-3 p. 141) policies, maintained an invalid no-solicitation rule and applied that policy in a discriminatory fashion with respect to the Association. 8/

The Board denies that it maintained either a written or verbal policy with regard to solicitation (Board brief p. 13; Board reply brief pp. 22-24). In support of this contention, the Board emphasizes the inconsistencies in posting procedures throughout the Trenton School District (Board brief pp. 12-15). Moreover, the Board argues, Association materials were posted throughout the district during September, and were only removed by Board agents when the Board became aware of unauthorized copying of Association documents on Board copiers (Board brief pp. 16-20 and 51-54).

The record supports the Board's contentions as stated above. Lead food servers at different schools had different approaches to the posting of notices. One lead server testified that she does not post any notices in her working area (T-1 pp. 211-213). Another lead

8/ The Board asserts that the Association failed to raise objections to any aspect of employee solicitation in their original post-election objections, and therefore is precluded from raising that argument at this time. The undersigned rejects the Board's position; the Association's original objections, timely filed, state that the Board's removal of Association materials resulted in "...cutting off communications with employees."

food server testified that she posted notices in her section of the cafeteria (T-1 p. 126) and another lead food server testified that she allowed the posting of Board notices, as well as personal notices in her working area (T-1 pp. 182-182). Moreover, the record clearly reveals that the Board knowingly allowed the Association to post materials in working areas throughout the month of September (direct examination of Ms. Gibson, T-2 pp. 253-254). Accordingly, the undersigned concludes the Board did not maintain an invalid no-solicitation policy. 9/

The undersigned now considers whether the removal of all Association materials on September 24th by Board agents otherwise constitutes grounds for the setting aside of the election. The Commission has previously addressed employee organization rights to access to employer facilities for the purpose of organizing employees. The lead

9/ Having found that the Board did not in fact maintain a no-solicitation policy, the undersigned has not reached additional issues relevant to the finding of an invalid no-solicitation rule (i.e. whether the employee organization proved that reasonable alternative methods did not exist for affective communications with petitioned-for employees. See NLRB v Babcock and Wilcox, 351 U.S. 105, 38 LRRM 2001 (1956) and its progeny). The Director of Representation recently reviewed the no-solicitation issue in State of New Jersey and United Public Employees and CWA Supervisors (Higher Level), D.R. No. 83-26, 9 NJPER ___ (¶ _____ 1983), slip opinion at p. 7.

The overlap between the concepts of no-solicitation and access is apparent. Access to employer facilities is a subcategory of a no-solicitation issue. Access to employer facilities is necessary when an employee organization is otherwise unable to effectively communicate with employees; an otherwise valid no-solicitation rule is invalid if such a showing is made. Republic Aviation Corp. v NLRB, 324 U.S. 793, 16 LRRM 620 (1945). At the same time, access to employer facilities may still be at issue even where alternative means of communication with employees are available and/or utilized. It is the latter aspect of access which is reviewed infra.

decision in this area is Union County Regional Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50 (1976). In Union County, the Commission upheld the legality of contractual exclusive access provisions, wherein majority representatives and public employers limited access to school facilities to majority representatives while excluding competing employee organizations. At the same time, the Commission carefully delineated the boundaries of exclusive access:

> It cannot be denied, however, that the exclusive use provisions do grant the incumbent Associations an advantage over any challenging organization in the ability to keep the employees apprised of their activities. During the insulated period of a contract this limited advantage is consistent with the interests already discussed. However, once a timely representation petition is filed or during an open period when such a petition could be filed, the interests of the individual employees is being able to freely choose their representative will outweigh the need for stability. If an incumbent is permitted the use of the employer's facilities for communication with the employees, the employer will have to make provisions to allow the challenging group access to the facilities. The potential for abuse in the exclusive use of facilities is obviously enhanced during such periods.

Union County emphasizes the sanctity of the pre-election period, wherein the Commission encourages the free and equal flow of information. The Commission reiterated this principle in Elizabeth Board of Education, P.E.R.C. No. 83-66, 9 NJPER 21, (¶ 14010 1982). In Elizabeth, the employer aggressively enforced an exclusive access clause during the open period by removing union organizational materials from teacher mailboxes. Even in the absence of the filing of a representation petition by the rival union in Elizabeth, and in the absence of an alleged invalid no-solicitation rule, the Commission found that the employer's denial of access to the rival union violated

the precepts of Union County.

The undersigned recognizes that Union County and Elizabeth arose in the unfair practice context, and concerned the access rights of rival employee organizations in the face of contractual exclusive access provisions between incumbent employee organizations and their respective employers. In contrast, the instant matter arises in the representation forum and concerns the access rights of one petitioning employee organization without a competing employee organization. The undersigned is not aware of any Commission precedent exactly on point with the instant matter. Accordingly, the undersigned looks to the private sector for guidance. Lullo, supra.

There can be no doubt that a private employer has the right to make its views on a representation election known to employees, "... so long as the communications do not contain a threat of reprisal or force or promise of benefit..." and the employer does not otherwise engage in election misconduct as reviewed supra. NLRB v Gissel Packing Company, 395 U.S. 575, 618, 71 LRRM 2481, 2497 (1969); NLRB v Virgina Electric and Power Company, 314 U.S. 469, 9 LRRM 405 (1941). This employer free speech right in the private sector, as quoted above in Gissel, is codified in Section 8(c) of the Labor Management Relations Act of 1947 as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.L.§158(c)

While the Commission has not considered rights of public employees to free speech in a campaign setting, and while the New Jersey

Employer-Employee Relations Act does not contain employer free speech language similar to that cited above, the undersigned believes that the First Amendment United States Constitution establishes the right of public employers to communicate their views on representation elections to their employees. 10/ However, just as employer free speech in the private sector exists within certain boundaries, so must free speech by public employers be bound.

The National Labor Relations Board and the courts have frequently reviewed these boundaries, not only when examining allegations of improper threats or promises, but when balancing the comparative free speech rights of employers and employees. The general rule, as noted in footnote 9, supra, is that a union is not entitled to access to an employer's facilities (i.e. an employer may maintain an otherwise valid no-solicitation rule) unless the union demonstrates that there are no reasonable alternative methods for effective communications with petitioned-for employees. However, even in the absence of such proof, the Board and the courts have taken a different view in cases where an employer maintained an otherwise valid no-solicitation rule, while at the same time, the

10/ The absence of statutory language in the New Jersey Employer-Employee Relations Act is no impediment to the employer right; indeed, as the Supreme Court noted in Gissel, supra at 71 LRRM 2497, "...§8(c)...merely implements the First Amendment..." In the federal sector, where employer free speech is limited by statutes (5 USC 7116(e)), the Federal Labor Relations Authority has determined that management in federal agencies must officially remain neutral during a campaign period. Department of the Air Force, Forth Worth, Texas, 5 FLRA No. 62 (1981). This FLRA decision must be reviewed in the historical context of legislative and judicial limitations on the free speech of federal employees. See Smith, Ralph, "from Virginia Beach to Timken Air Force Base: Free Speech and Representation Elections in the Federal Sector," Labor Law Journal, May, 1983, p. 287, 292.

employer actively engaged in an anti-union campaign.

The United States Supreme Court faced this issue in the unfair labor practice context in NLRB v Steelworkers (Nutone Inc.), 357 U.S. 357, 42 LRRM 2324 (1958) (hereafter "Nutone"). While the Court found that the factual record in Nutone did not support the finding of an unfair labor practice, the Court recognized the viability of such a charge:

> We do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. 42 LRRM at 2327.

The Court noted that relevant to such an inquiry is "...whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication." 42 LRRM at 2327.

Subsequent cases involving similar issues include: Marlene Industries Corp., 166 WLRB No. 58, 65 LRRM 1626, 1631 (1967), sub. nom. Decaturville Sportswear Co. Inc. v NLRB, enf. in part. 406 F 2d 886 70 LRRM 2472 (CA 6, 1969); May Department Stores Co. v NLRB, 316 F2d 797, 53 LRRM 2172 (CA 6, 1963) and Montgomery Ward and Co. v NLRB, 339 F2d 889, 58 LRRM 2115, 2117 (CA 6, 1965). May and Montgomery Ward, as consecutive decisions from the same Circuit Court of Appeals, are particularly instructive.

In May, the Sixth Circuit reversed the NLRB and held that, under the facts presented, the employer did not commit an unfair labor practice. While the employer did make speeches on company premises and time, while at the same time maintaining a valid no-solicitation rule, the Court found that the speeches were not coercive. While the concluding

language of the Court in May would appear to deny a right of access to unions under any circumstance [a proposition which would not be consistent with Nutone], the Court clarified its position in Montgomery Ward, noting that findings of non-coercive employer free speech and a valid no-solicitation rule were central to its decision in May. Accordingly, in the absence of similar findings in Montgomery Ward, the Court upheld the NLRB's unfair practice finding.

Notwithstanding its limited scope, the Nutone doctrine, as applied in May, Montgomery Ward and Marlene Industries, is very much alive, See. e.g. Steelworkers v NLRB, 646 F 2d 616, 106 LRRM 2573, 2581 (CA DC 1981): "Montgomery Ward is thus one of the few instances in which a refusal by an employer to grant a union access to company property has been [held] to violate the Act, absent a showing that alternative means of communications did not exist."

The undersigned recognizes that Montgomery Ward and Marlene Industries are not completely analagous to the instant matter. Both Montgomery Ward and Marlene Industries involved invalid no-solicitation rules, 11/ as well as employer misconduct in addition to anti-union campaign statements; however, the undersigned concludes that the thrust

11/ In Montgomery Ward, the Sixth Circuit found: "There is no question in our instant case that the 'no-solicitation' rule as applied was illegal." 58 LRRM at 2119, emphasis supplied. The undersigned believes that this statement muddles the no-soliciation/access distinction reviewed in footnote 9, supra. An otherwise valid no-solicitation rule will be found invalid where a union proves that there are no alternative methods available for effective communication with employees. Absent such proof, the no-soliciation rule is valid. Consideration of other employer conduct in this context goes not to the no-solicitation issue, but to "...whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication." Nutone, supra, 42 LRRM at 2327.

of those cases, which is to remedy glaring imbalances in organizational activities during the campaign period, is applicable in the public sector as well. Thus, the undersigned concludes that when a public employer exercises its right to express its views on a representation election to its employees, that public employer may not deny access to the petitioning-employee organization in a manner which creates a glaring imbalance in organizational communications. 12/

The facts in the instant matter reveal that Board did utilize its access to its facilities for campaign purposes, particularly on September 24, 1982, when it conducted the "Emergency Meeting" of food service workers wherein "the facts" of the election were reviewed by Board agents. Indeed, the Board's distribution of notices advertising the "Emergency Meeting" constituted utilization of its access to its own facilities for campaign purposes. Absent election misconduct in the timing of meeting and/or in statements made in that meeting (reviewed infra), the Board could have advertised and held the "Emergency Meeting" without violating the sanctity of the campaign period.

12/ Conversely, in the absence of an invalid no solicitation rule, a public employer which does not seek to express its views on an election to its employees is under no obligation to provide access during working hours in work places to a petitioning union. Similarly, where there is a majority representative which has not been accorded on-site access to employees for organizational purposes, the public employer is under no obligation to provide access on-site to a rival union during a pre-election period. It is clear from Perry Education Association, supra, that internal communication systems in public work places are not public fora unless, "...by policy or by practice...," the public employer opens his communication system for "...indiscriminate use by the general public...." Perry Education Association, supra, 74 L.Ed. 2nd 806. See also City of New York, 7 PERB 3011 (1974) and Gates-Chili Central Schools District, 10 PERB 4543, 4544 (1977): "...when an employer has permitted employees to post notices relating to social and religious affairs and meetings of charitable organizations, the denial to the Union of the same privilege would constitute unlawful discrimination." The record reveals that while one lead server allowed the posting of such notices there was no Board policy to this effect (T-1 p. 184).

However, the facts in this matter reveal that the Board maintained an unequal access policy. The inequality of access was created by the Board on September 24, 1982, when its agents removed all Association materials from working areas, and at the same time circulated its own notice (Exhibit P-2) of an "Emergency Meeting" which was held that very afternoon. The unmistakable effect of these Board actions, especially in light of the setting and remarks at the "Emergency Meeting" which are reviewed infra, was to create an extreme organizational communications imbalance to the detriment of the Association and, more importantly, to the free choice of the voters. Surely, the principles of Nutone, Montgomery Ward and Marlene Industries must be applied to these facts; absent compelling justification for the Board's conduct, a new election must be ordered. 13/

The Board maintains that it was justified in the removal of the Association notices due to its discovery of unauthorized copying of Association notices on Board equipment (T-2 p. 16; T-3 p. 67; Board Brief pp. 16-20, 51-54). However, the undersigned finds this explanation does not comport with the record. Ms. Gibson testified that, of the Association's materials which were removed by Board agents at her

13/ Given the Sixth Circuit's decisions in May and Montgomery Ward, the undersigned concludes that the Sixth Circuit would take a different view. At this point in the analysis, the Sixth Circuit would consider whether or not the Board's conduct at the "Emergency Meeting" reviewed infra, was coercive. See Montgomery Ward, 58 LRRM at 2119. The undersigned finds no basis for this in Nutone; while the Court in Nutone indicated that coercive anti-union solicitation would be particularly offensive when added to this factual pattern, a finding of coercive employer conduct is not a necessary element to a finding of the glaring "imbalance" reviewed in Nutone. 42 LRRM at 2327. Nonetheless, the undersigned recognizes the relevance of conduct at the "Emergency Meeting" to the above issues and refers the reader to the discussion of that conduct infra.

direction and returned to Gibson, only approximately 40% were copied on Board equipment. 14/ The remainder of the removed and collected Association notices were clearly not copied on Board machines; instead, these white and red notices were provided by N.J.E.A.

Gibson knew that the white and red notices were posted in the schools before September 24, and knew that these materials were not copied on Board equipment (T-3 pp. 65-70). Two of the Board employees who removed the Association materials on September 24 at Gibson's direction, Brown and Vig, were also familiar with the white and red N.J.E.A. notices since they had received copies of these (Exhibits P-4, 5 and 7) in the mail during September. Brown and Vig knew that those notices had not been improperly copied on Board equipment (T-3 pp. 172, 183, and 224-228).

Despite the fact that Gibson, Vig and Brown all knew that most of the posted Association materials were not copied on Board equipment, Ms. Gibson testified that she instructed Brown, Vig and Connerton to remove all materials posted by or on behalf of the Association (T-3 p. 69-71). Brown and Vig confirmed that they were instructed to remove all Association materials (T-3 pp. 147, 183, and 184 and 226 and 227) and that they did so.15/

In this context, the undersigned rejects the Board's contention that it removed Association materials due to misuse of Board copying

14/ T-3 p. 69. Due to distinguishing marks on paper used in Board copying machines and by demonstrating a chain of possession, the Board convinced the undersigned that Board equipment was in fact used to copy Association materials.

15/ Vig testified that while he misunderstood Gibson's instructions and did not remove Association materials himself, he instructed lead servers to remove all Association materials (T-3 p. 216).

equipment. While misuse of Board equipment did occur, and this misuse may have been an impetus for the removal of Association materials, the record clearly demonstrates that the Board sought to and did remove all Association materials, whether copied on Board equipment or not. By these actions, the Board denied the Association access to Board facilities for organizational purposes. The record also clearly shows that on the very same day that the Board sought to and did deny the Association such access, the Board utilized its access to its own facilities for campaign purposes. Given these facts, and the above analysis regarding the rights and responsibilities of public employers during a campaign period, the undersigned concludes that the Board maintained an unequal access policy which created a glaring imbalance of organizational communications during a campaign period.

In an unfair practice context, the above conclusion would result in a finding of a properly pleaded unfair practice. See private sector case law reviewed supra and Elizabeth, supra.

However, the instant case presents a matter of first impression before P.E.R.C.: Where does a finding of unequal access fall on the continuum of election abuses? As reviewed supra, the continuum begins with conduct, such as a material factual misrepresentation, which requires direct evidence of impact on election results. Further along the continuum is conduct, such as conferral or promise of benefits, which requires a finding of a reasonable tendency to interfere with employee free choice, but not necessarily direct evidence of interference. At the extreme of the continuum lies conduct which is per se violative of employee free choice.

The undersigned does not believe that the failure of an employer to provide equal access during a pre-election period should be a per se violation requiring that an election be set aside. As noted above, per se violations are limited to conduct which affects the integrity of the Commission's election procedures. Englewood, supra, 8 NJPER at 252. However, inequality of access during the campaign period, under the factual pattern presented, unquestionably had "...a strong tendency to interfere with a free choice of employees...." Passaic Valley Sewerage Commission, supra, 6 NJPER at 505. Indeed, the Supreme Court's language in Nutone warns of a similar prospect: "...an imbalance in the opportunities for organizational communication." 42 LRRM at 2327. The comparison is apt; like an improper conferral of benefits during the campaign period, the maintenance of unequal access by a public employer during a campaign period may render an employee organization powerless to offset the actions of the public employer.

Accordingly, the undersigned suggests that the maintenance of unequal access by a public employer during a campaign period has such a strong tendency to interfere with the free choice of employees that it warrants the setting aside of an election even in the absence of direct evidence. As in conferral of benefits, an employer may rebut a showing of unequal access if it proves that "...its conduct was governed by considerations unrelated to the representation proceeding." Passaic Valley Sewerage Commission, supra, 6 NJPER at 505.

As reviewed above, the Board argued that its removal of Association materials from its schools was unrelated to the election; instead, the Board claims that it was reporting the misuse of its copying machines. The undersigned rejects this claim for the reasons set forth

supra. Thus, while the record is devoid of direct evidence of actual effects of the unequal access policy on the votes of food service workers in their election, the undersigned concludes that the election in this matter must be set aside due to the unrebutted, unequal access found above.

C. Alleged Misconduct at "Emergency Meeting"

The undersigned now proceeds to consider the Association's arguments that Board statements at the "Emergency Meeting" with respect to employee benefits should serve to invalidate the election. The Association does not suggest that the Board improperly interrogated or promised benefits to employees at the "Emergency Meeting"; instead, the Association argues that Gibson's comments at the "Emergency Meeting" strongly suggested to employees the futilitiy of selecting the Association as their majority representative. While the Association acknowledges the right of the public employer to communicate its views about a representation election to its employees, the Association argues that the Board's conduct at the "Emergency Meeting" was beyond permissible employer free speech.

The allegedly objectionable comments by Gibson during the "Emergency Meeting" concerned the scope and timing of future employee benefits. With respect to the scope of benefits, Gibson testified that she told employees at the "Emergency Meeting" the following:

> I explained to the employees that they would not lose any of their present benefits whether the Union prevailed or not. They would keep all of their present benefits. I did, however, explain to them that in the process of negotiations you sometimes have to give up a benefit in order to gain another benefit, and I cited as an example that in my

> own particular group we gave up two sick days in a two-year contract in order to get the contract agreement that we wanted. [T-3 p. 93]

Gibson testified that she also addressed the issue of benefits for part-time employees at the "Emergency Meeting":

> I did tell the part-time employees two-and-a-half-hour workers that they were not eligible for benefits, because under state law, and according to our insurance carriers, if you work less than 20 hours a week they would not cover you for the extensive fringe benefits that full-time employees get. [T-3 p. 18]

As to the timing of future benefits, the record reveals the following testimony:

> Attorney for Association: Isn't it true that during the course of that meeting you said that if the Union won the election that wage increases would not follow immediately?
>
> Gibson: I said there was a possibility that they would not follow immediately, because they had to go through the organization. [T-3 p. 89]

As noted above, employer free speech in the private sector is limited to "...expression [which] contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c); Gissel, supra. Surely the cited testimony by Gibson cannot be characterized as overt threats nor as express promises of benefits. Indeed, Gibson's statements may not be accurately compared to conduct found to be objectionable by the National Labor Relations Board in several cases cited by the Association. For example, in Plastronics Inc., 233 NLRB 155, 96 LRRM 1422, 1424 (1977), the employer improperly told employees that bargaining would begin "from scratch" if the union won the election. In La-Z-Boy Chair Co., 241 NLRB 344, 100 LRRM 1499, 1500 (1970), the employer traversed beyond permissible free speech when it linked the implementation of an impending

wage increase to the results of the representation election.

At the same time, all the private sector cases concerning permissible versus impermissible employer free speech during a campaign period emphasize the need to review the context of employer remarks. In Plastronics, supra, at 1424, The National Labor Relations Board noted: "The totality of all the circumstances must be viewed to determine the effect of the statements on the employees." The totality of circumstances to be considered surely includes where, when and by whom the allegedly objectionable comments were made. In addition, the sophistication of the particular employees involved must be considered:

> It is only simple justice that a person who seeks advantage from his elected use of the murky waters of double entendre should be held accountable therefore at the level of his audience rather than of sophisticated tribunals, law professors, scholars of the niceties of labor law, or grammarians. Georgetown Press Corp., 201 N.L.R.B. 102, 116, 82 L.R.R.M. 1318 (1973).

The totality of the circumstances herein reveals that employees were informed of a "Emergency Meeting" between two and three hours of that meeting. The "Emergency Meeting" was to be conducted by the employees' Director. Notices of the meeting were distributed by Central Office Personnel who normally did not distribute such notices (T-1 p. 100; T-3 p. 185). At the same time that the Central Office employees distributed notice of the "Emergency Meeting", those Central Office personnel either removed all Association election materials or directed that they be removed. The notice of the meeting stated that: "ATTENDANCE IS VOLUNTARY"; this phrase was in quotations on the notice. The only other phrase on the notice in quotations stated: "GET THE FACTS".

The meeting was conducted at a time when all part-time employees could attend; approximately 36 employees out of approximately 260 in the petitioned-for unit were scheduled to still be working at the beginning of the meeting (T-3 p. 78). Employees who had not completed their workdays were not to attend the meeting (T-3 p. 80). The Director testified that the meeting was scheduled to conform to the schedules of part-time two and one-half hour employees (T-3 p. 79).

Ms. Julie Thomas, the immediate superior of the Director of Food Services, was in attendance at the emergency meeting, (T-1 p. 138), even though she does not normally attend Food Service meetings (T-1 p. 98). Both Gibson and Thomas gave information to employees (T-1 p. 138). Among the information given to employees were the above cited transcript references, as well as factual misrepresentation with respect to employee dues reviewed supra.

Finally, the undersigned considers the sophistication of the audience. Georgetown Press, supra. Food service workers are not professional employees; there are no educational requirements for food service workers; part-time food service workers, especially two and a half hour a day employees, to whom the timing and many of the comments of the "Emergency Meeting" were directed, appear to have the most tenuous employee status out of the food service workers.

In the totality of these circumstances, the undersigned concludes that the Board's conduct at the "Emergency Meeting" was beyond permissable employer free speech. Gibson's one-sided review of the collective negotiation process, as well as benefits which could be

derived therefrom, 16/ would appear to have had a coercive effect on relatively unsophisticated voters. It is precisely the kind of conduct which would have a strong tendency to interfere with employee free choice, and warrants the setting aside of the election herein.

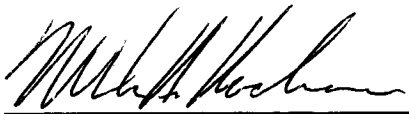
D. Alleged General Conduct

The Association also alleges that the Board's general conduct created an atmosphere which precluded free choice by employees in the representation election. Given the discussions in parts B and C above, the undersigned concludes that the conduct detailed therein, whether or not objectionable individually, had a cumulative effect of creating an atmosphere which precluded free choice by employees in representation elections. See e.g. Jamaica Towing, Inc., 632 F 2d. 208, 105 LRRM 2959, 2964 (CA 2 1980).

RECOMMENDATIONS

For the reasons set forth above, the undersigned recommends that the Commission's Director of Representation set aside the election conducted September 28, 1982 involving the within parties, and order a new election in this matter in accordance with the Commission's rules.

Respectfully submitted,



Mark A. Rosenbaum
Hearing Officer

DATED: May 31, 1983
Trenton, New Jersey

16/ Notwithstanding Board contentions that employees who work less than 20 hours a week are not entitled to health benefits, per its contracts with its insurance carriers, the undersigned is not convinced that this is true as a matter of law. Absent a specific statute or regulation which regulates this area, health benefits are mandatorily negotiable. See e.g., Bd. of Ed. of Essex Cty. Voc. Schools, P.E.R.C. No. 83-71, 9 NJPER 30 (¶ 14015 1982).