

H.O. NO. 90-3

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

In the Matter of

BERGEN COMMUNITY COLLEGE,

Public Employer,

-and-

Docket No. RO-H-89-133

BERGEN COMMUNITY COLLEGE STAFF ASSOCIATION,

Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 804,

Intervenor.

SYNOPSIS

A Hearing Officer recommends dismissal of election objections filed by Teamsters, Local 804. The Hearing Officer finds that a flyer distributed by the Bergen Community College Staff Association around 36 hours before the start of the election did not contain material factual misrepresentations. She further finds that Local 804 had enough time to effectively reply to any minor factual or legal mistakes in the campaign propaganda. The Hearing Officer recommends that the Director of Representation certify the Staff Association as the exclusive representative.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Director of Representation pursuant to N.J.A.C. 19:11-9.2(j).

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Appearances:

For the Public Employer, Schepisi & McLaughlin, P.A.
(Paris P. Eliades, Esq.)

For the Petitioner, Loccke & Correia
(Michael J. Rappa, Esq.)

For the Intervenor, Cohen, Weiss & Simon
(Earl R. Pfeffer, Esq.)

HEARING OFFICER'S REPORT AND RECOMMENDATION

On June 5, 1989 the Bergen Community College Staff Association ("Staff Association") filed a Petition for Certification with the Public Employment Relations Commission ("Commission") seeking to represent a collective negotiation unit of full and part-time non-professional employees employed by Bergen Community College ("College"). The unit was represented by the International Brotherhood of Teamsters, Local 804 ("Local 804"). On June 15,

1989, Local 804 intervened and on June 21, 1989 the parties consented to a secret ballot election.

An election was conducted on July 13, 1989. Ninety-one (91) ballots were cast for the Staff Association, eighty-two (82) ballots were cast for Local 804 and one vote was cast for no representation. (C-2).^{1/}

On July 20, 1989, Local 804 filed post-election objections alleging that within 48 hours before the election, the Staff Association distributed campaign literature containing factual misrepresentations. N.J.A.C. 19:11-9.2(h) The alleged factual misrepresentations were about Local 804's dues structure and its contract negotiations with the College. Local 804 further alleges that it did not have enough time to effectively reply to the Staff Association's literature.

On August 4, 1989 the Staff Association filed a response arguing that Local 804 has not met its burden of proof because it has not supplied sufficient evidence to support a prima facie case. N.J.A.C. 19:11-9.4(h). The Staff Association argues that its pre-election flyer did not contain misrepresentations and was distributed in a timely fashion.

After an administrative investigation of the objections, the Director of Representation issued a Notice of Hearing on

^{1/} Citations to the transcript of the October 11, 1989 hearing are 1T__. Citations to the transcript of the October 12, 1989 hearing are 2T__. Commission exhibits are C. Petitioner's exhibits are P and Intervenor's exhibits are I.

September 14, 1989. N.J.A.C. 19:11-9.2(i). I conducted a hearing on October 11 and 12, 1989. Local 804 and the Staff Association examined witnesses, introduced exhibits and argued orally.^{2/} Briefs were filed by November 28, 1989.

Findings of Fact

1. Bergen Community College is a public employer within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et. seq. The Bergen Community College Staff Association and the International Brotherhood of Teamsters, Local 804 are employee organizations within the meaning of the Act.

2. Local 804 has been the majority representative of a unit of full and part-time non-professional employees of the College since November 23, 1982.^{3/} The agreement between the College and Local 804 expired in July 1988 (1T93). When the Staff Association filed the Petition, the College and Local 804 had received a factfinder's recommendation. The factfinder recommended a \$1500 increase for each employee in each year of a three-year contract (1T96). Pat Pagnanella, secretary-treasurer of Local 804, and shop stewards John Tarrant, William Burns and Inge Hawley negotiated for Local 804 (1T61). Barbara Mikolajczyk, an administrative secretary and Staff Association organizer, and Dolores Shanahan, an administrative secretary, attended the factfinding sessions with

^{2/} The College did not participate in this proceeding.

^{3/} Pursuant to the parties' agreement, I take administrative notice of the Commission's certification (1T90).

Local 804. (2T79). David Braddish, the president's assistant and Gayle Hannah, the personnel director, negotiated for the College (1T61).

Mikolajczyk, Charles Neilley and Daniel Artymiak organized the Staff Association.

3. Both unions circulated flyers during the election campaign. Early in the campaign, Local 804 distributed a memo from Pagnanella dated June 12, 1989 announcing that the Staff Association had filed a petition (P-9). It also notified the unit members that the College had suspended negotiations pending the outcome of an election (1T155, P-9). The flyer noted that if the Staff Association won, it would have to start negotiations from scratch.

Local 804's steering committee also circulated a flyer about a week after the petition was filed (P-1, 2T48). This flyer accused the Association of trying to block the factfinder's report and ridiculed the Association's assertion that it would charge dues of only \$5.00 per month.

The Staff Association responded in a flyer dated June 16, 1989. It stated that no new negotiations had occurred since April 1989 and defended the its \$5.00 dues (P-2). Replying to Local 804's assertion that the Staff Association wanted to block the factfinder's report, the flyer provided:

Block a fact finder report? -- This report is not binding. The administration can line their bird cages with it if they choose. The contract does not have binding arbitration, therefore, administration does not have to accept the report. Don't allow yourself to be told otherwise. (P-2) (emphasis in original).

In a flyer captioned "REBUTTAL FROM TEAMSTER LOCAL 804," Pagnanella replied to the Staff Association's assertions about the factfinder's report:

Barbara^{4/} now wants you to believe that the Administration would defy the fact finders decision. In all the history of the College, the Administration has never defied an arbitrators' decision, so why would they now defy a fact finder's decision. (P-8).

This flyer was distributed early in the campaign (1T168, 2T50).^{5/}

In a June 27, 1989 memo to all employees, Pagnanella questioned the motives of Staff Association organizers and urged employees to vote for Local 804. (CP-6). The Staff Association replied with a memo in early July (2T50, P-7) asserting that, during mediation by the factfinder, Pagnanella refused an offer \$1700, \$1600 and \$1500 for each year of a three-year contract.^{6/}

During the factfinding proceeding, the factfinder caucused with Pagnanella, Hannah and Braddish. The factfinder asked Pagnanella if Local 804 would take \$1700, \$1600 and \$1500 and drop

^{4/} Barbara is Barbara Mikolajczyk, a Staff Association organizer.

^{5/} Dolores Shanahan, an administrative secretary at the College testified that she received P-8 about a week before the election. (2T30). Neilley testified that he received it early in the campaign. Based upon its content, I find that P-8 is a response to P-2, a flyer dated June 16, 1989. P-2 circulated early in the campaign. It is likely that Local 804's response (P-8) was distributed shortly after P-2. I therefore credit Neilley's testimony.

^{6/} The memo actually reads "\$17,000, \$16,000 and \$15,000." Mikolajczyk admitted the correct amounts were \$1700, \$1600 and \$1500 (1T165).

its agency shop proposal (2T77). Pagnanella refused because he wanted both items. Braddish said if Pagnanella refused that offer, he would deny ever making it and stick with \$1500 for each year of a three-year contract. At the factfinder's request, Pagnanella permitted him to propose the offer to Local 804's negotiations team. The factfinder phrased the proposal as a hypothetical. Mikolajczyk, who sat on on Local 804's negotiations team during factfinding, refused the proposal (1T165, 2T77-78). Local 804's negotiations team and the College agreed to wait for the factfinder's recommendation.

4. On July 7, 1989, Pagnanella's secretarial staff mailed a flyer to Local 804 members (1T109, 1T121). Pagnanella wrote the flyer and captioned it: "Questions that you must give serious consideration to before you vote on July 13, 1989." (P-3). The flyer included several boxes with questions, Local 804's response and the Staff Association's position. Portions of P-3 follow:

<u>QUESTION</u>	<u>TEAMSTER LOCAL 804</u>	<u>BCC STAFF ASSOCIATION</u>
WHAT WILL YOUR WAGE OFFER BE?	\$1500 PER YEAR HAS ALREADY BEEN OFFERED. \$4500 FOR THREE YEARS. WE CAN TRY FOR STILL MORE.	MUST BE NEGOTIATED FROM SCRATCH.
WILL WE HAVE A CONTRACT SETTLEMENT SOON?	EVERYTHING IS IN PLACE FOR A SETTLEMENT INCLUDING THE FACT FINDERS REPORT.	THEIR LAWYER SAID MAYBE IN TWO OR THREE MONTHS.
WHO WILL HANDLE GRIEVANCES?	AS USUAL: THE THREE SHOP STEWARDS AND MYSELF.	THEIR LAWYER SAID IF HE HANDLES GRIEVANCES. HE WOULD HAVE TO CHARGE \$95 PER HOUR.

Local 804 members received P-3 in the mail over the weekend of July 8 and 9 (2T5). Mikolajczyk saw a copy on July 10 (1T156). Pagnanella hand-delivered additional copies of P-3 to Tarrant and Burns and asked them to hand them out to insure that everyone received a copy (1T109).

Pagnanella also gave Tarrant a flyer urging employees to vote for Local 804 and cautioned him not to distribute anything on July 12, the day before the election (1T122). The literature Tarrant distributed on July 11 included an open letter from June Selders, a former College employee and Local 804 shop steward, urging employees to vote for Local 804 and a memo titled "FYI" (P-4, P-5, 2T51). The latter memo listed ten statements rebutting Staff Association campaign statements. Tarrant left the documents in two piles on a file cabinet in the public safety office at about 1 or 2 p.m. on the afternoon of July 11. (2T44-46, 2T51, 2T67, 2T68).

Neilley took a copy of the letter from June Selders and circled several words on the letter. He wrote: "Is this woman a narcissist?"; and changed "Love, June" to "in Love with June." (2T69). Neilley made copies of his version of Selders' letter and distributed it by hand between 1 and 2 p.m. on July 11 (1T69). Neilley did not respond to the FYI document accompanying Selders' letter.

Neilley and Mikolajczyk also distributed copies of a final flyer which they drafted in response to P-3 (1T157). On the morning

of July 11, Mikolajczyk came to work and spent the morning drafting the Staff Association's response to P-3 (I-1, 1T156, 1T189). She worked at her desk in the office of the Dean of Students on the third floor (1T189). Neilley, who works in the public safety office on the first floor, came up to her office a few times and they discussed the flyer over the phone (1T191). Mikolajczyk cut and pasted boxes from P-3 and added the Staff Association's response on the front. Neilley supplied the dues receipts copied on the back (2T37, 2T57). Mikolajczyk added the text on the back (1T183, 2T57). The final flyer (I-1), was a two-sided document. One of the boxes reproduced from P-3 and the Staff Association's response in I-1 follows:

<u>QUESTION</u>	<u>TEAMSTER LOCAL 804</u>	<u>BCC STAFF ASSOCIATION</u>
WHAT WILL YOUR WAGE OFFER BE?	\$1500 PER YEAR HAS ALREADY BEEN OFFERED. \$4500 FOR THREE YEARS. WE CAN TRY FOR STILL MORE.	MUST BE NEGOTIATED FROM SCRATCH.

Isn't it amazing. NOW Pat Pagnanella is willing to try to get more money for you. Why the sudden change of heart? It's too late for you Pat, you can't pick and choose from the fact finders report but the College can. They have the advantage over you now.

The College has been living with the contract language for 20 years. Why would they suddenly wish to change it from scratch. Negotiations begin with proposals presented from both sides. Common sense tells you that the College will not propose 40 pages of changes. (I-1) (Emphasis in original).

Neilley and Mikolajczyk believed that Pagnanella had a change of heart because Pagnanella's willingness to settle for the

factfinder's report seemed to contradict his statement "we can still try for more." (1T177, 2T62). I-1 was the first flyer where the Staff Association told the employees that Pagnanella was trying to get more money now that a petition was filed (1T176, 2T18).

Mikolajczyk believed that once the factfinder issued a recommendation it could be accepted or rejected, but the union would not have the option to go back to the bargaining table and try to get more money (1T178). Mikolajczyk also believed that the union could accept all of the factfinder's recommendations or reject the whole package but it could not accept part and reject part (1T177). Based upon the advice of a College faculty union representative, she believed the College could pick and choose from the fact finder's report, but Local 804 could not (1T179).

The Staff Association flyer also discussed when the unit could expect a contract and who would handle grievances if the Staff Association won (I-1).

Dues receipts from three anonymous employees were reproduced on the back of I-1. The dues slip on the top of the page indicated that the employee paid \$10 per month in dues. Next to the slip I-1 read; "Some employees are making \$24,000 per year and are paying \$10.00 per month in dues." The dues receipt in the middle of the page indicated that the employee paid \$13.00 per month in dues. The captions next to that receipt provided:

Some employees are making #15,000.00 per year and are paying \$13.00 per month in dues.

Some employees are making \$15,000.00 per year and are paying \$10.00 per month in dues. (I-1).

The final dues receipt indicated that the employee paid \$17.00 per month in dues. The caption next to that receipt provided: "Some employees are making \$20,000.00 per year and are paying \$17.00 per month in dues." (I-1).

"IS THIS FAIR??" was handwritten at the top of the page. Though the employees' names were cut off, Pat Pagnanella's name and title appeared on the dues receipts (I-1, 1T103).

Neilley does not remember who told him about the dues discrepancies (2T72). He and Mikolajczyk decided to put out a flyer describing the problem (2T74). About a week before the election, Neilley told Burns that the Staff Association was going to distribute a flyer concerning the dues inequity (1T157, 2T73).^{7/} Though I-1 suggests that more than one employee making \$24,000 per year pays \$10 per month dues, Mikolajczyk knows of no one other than the individual whose dues receipt appears on I-1 in that situation (1T183). When Mikolajczyk wrote "IS THIS FAIR?" across the top of the back page of I-1 she meant to imply, "is it fair that someone who is making so much money as \$24,000 is paying less dues than an employee who is making \$13, 000 and paying \$13 a month in dues." (1T183).

Early on the morning of the election, William Nutto, the only individual who earns \$24,000 per year and pays dues of \$10 per month approached Pagnanella (1T105). Nutto told Pagnanella that

^{7/} In the absence of Burns' testimony, I credit Neilley.

employees were angry because the dues structure was "way out of line." (1T105). Nutto was hired at a lower rate, and as his salary increased, his dues were not increased proportionally (1T105).^{8/} After the election, Pagnanella investigated and learned that some employees were not paying dues in accordance with the schedule, but no one was overpaying dues according to the schedule (1T106). Pagnanella investigated the dues discrepancies by examining the dues remittances the College sent Local 804 periodically (1T105, 1T119). The shop stewards told Pagnanella about the dues discrepancies the previous winter and they were discussed at negotiations (1T94, 1T106). At negotiations, Pagnanella told Hannah that not everyone's dues were properly deducted according to the schedule (1T94). Hannah promised to look into the problem (1T94).

Mikolajczyk made one hundred copies of I-1 (1T157, 2T52). Mikolajczyk and Neilley thought one hundred copies was enough because many are placed on bulletin boards and tables where many employees see each copy (2T53). Mikolajczyk gave half to Neilley and distributed the other half on her lunch hour between one and two on July 11 (1T157). Mikolajczyk distributed flyers primarily throughout the administrative section of the College (1T55). She did not leave copies of I-1 in the public safety office (1T200).

^{8/} The dues deduction schedule provided that employees earning between \$10,000 and \$13,499 per year pay \$10 per month. Employees earning between \$13,500 and \$14,500 per year pay \$13 per month. Employees earning between \$14,501 and \$17,500 per year pay \$14 per month. Employees earning over \$17,501 per year pay \$17 per month (I-2).

Donna Koch, a senior secretary at the College for the last four years, received a copy of I-1 on July 11 (2T3, 2T4). Koch was at lunch between one and two that day (2T12). When Koch returned from lunch, Yvette Valentin handed her a copy of I-1 and told her it was from Mikolajczyk (2T13). Mikolajczyk brought a copy of I-1 to Shanahan's office between 12 and 1 on July 11 (2T14). Mikolajczyk delivered I-1 before Shanahan went to lunch at one. ^{9/}

Neilley also distributed his copies of I-1 (2T47). Neilley placed copies of I-1 near time clocks (2T55). He left a copy near the time clock in the buildings and grounds area where about 70 people punch out (2T55). Neilley left a flyer by the time clock in the public safety office (2T56). All of the public safety employees except the secretaries use the time clock (2T56). Neilley also left a few copies on the counter in the admissions office (2T56).

Constance Casulli, senior office assistant, and Mary Johnson, public safety coordinator, work in the public safety office. They did not see copies of I-1 in the office until after ten o'clock on the morning of July 12 (1T20, 1T31, 1T48). Casulli came to work that morning and, as is her custom, visually scanned the office for new information (1T18, 1T29). She did not see I-1.

^{9/} I recognize that Mikolajczyk testified that she distributed I-1 between 1 and 2 and that Shanahan testified that she received I-1 before one. Its probable that Mikoljczyk began distributing I-1 before one. I do not find the inconsistency material.

Shortly after ten o'clock, Johnson went to the ladies room where she met Madeline Ciocca and Connie Stickel in the hallway (1T19). They asked Johnson if she had seen a copy of the new flyer concerning dues discrepancies. Johnson replied that she hadn't. Ciocca said that she would get a copy. At this point, Casulli joined the conversation and Johnson went into the ladies room and then went back to the office. Ciocca and Stickel then asked Casulli if she had seen the new flyer (I-1) and if she knew anything about discrepancies in the amount of dues employees paid (1T19). Casulli said she had not seen the flyer and suggested that they ask the personnel office about dues discrepancies (1T20).

When Johnson returned to the office, she walked around and looked at the counters (1T44). She noticed I-1 on top of one of the file cabinets on the other side of the room (1T44). The file cabinet was in an area of the room designated for current items. Current events are generally posted on the bulletin board above the file cabinet (1T51). When Casulli returned from the ladies room, Johnson had discovered a copy of I-1 (1T31, 1T49). Ciocca then came into the office with a copy (1T49).

John Tarrant is a maintenance repair-person and a Local 804 shop steward. He works from 7 a.m. until 3:30 p.m. (1T85). He works all around the College and did not see copies of I-1 on July 11, but saw copies all over the College on July 12 (1T79-80). Burns showed Tarrant I-1 early on July 12 (1T77). About ten employees discussed I-1 with Tarrant (1T78). They were puzzled by the dues receipts on the back of I-1 (1T166).

Tarrant punches out at the time clock in the basement (1T81). Flyers and brochures left for the custodians are usually left on the bulletin board and table near the time clock (1T90). Tarrant did not see copies of I-1 near the time clock when he waited to punch out on July 11. (1T82)

John Brennan, an HVAC mechanic also punches out at the time clock in the basement (2T85). Brennan did not see I-1 on the bulletin board or table when he waited to punch out at 2:45 p.m. on July 11, but it was laying on the table when he punched in before 6 a.m. on July 12 (1T85, 1T88).

Harry DeVine works in an office separate from the main building. His door has a mail chute in it. DeVine's shift ends at 3:30 p.m. He usually returns to his office at about 3 p.m. to complete paper work. He usually checks the mail chute at that time. Since he was busy on July 11, DeVine asked one of his men to check the chute for him. That man found I-1 in the slot and brought it to DeVine (1T214).

I find that Neilley distributed copies of I-1 throughout the College after 3 o'clock on July 11.^{10/}

^{10/} Neilley testified that he distributed I-1 between one and two o'clock on July 11 (2T39). He also testified that he distributed the defaced copy of June Selders' letter between one and two o'clock on July 11 (2T69). No employee, other than administrative employees who received I-1 from Mikolajczyk, received I-1 before 3:30 on July 11. Brennan specifically recalled seeing the defaced copy of Selders'

Burns told Pagnanella about I-1 on the morning of the election (July 13) (1T110, 1T126). Burns believed that the Staff Association illegally distributed the flyer because he did not see it until the day before the election (July 12). On July 10, Pagnanella explained the "24 hour" rule to Tarrant and instructed him to distribute literature asking unit members to vote (1T64, 1T122). Pagnanella told Tarrant to distribute that flyer before July 12:

...And I personally instructed him that on the 12th nothing goes out, we stop on Tuesday night. (1T122-123).

10/ Footnote Continued From Previous Page

letter before he saw I-1 (2T96). Neilley saw Tarrant deliver Selders' letter to the public safety office between one and two on July 11. He then took the time to deface it and copy the defaced version and distribute it between one and two that afternoon (2T68). Since Neilley did not testify that he distributed the defaced version of Selders' letter and I-1 at the same time, I conclude that he distributed I-1 after he completed distribution of the defaced version of Selders' letter. Neilley left a copy in the public safety office near the time clock which Casulli and Johnson do not use. Therefore, I find that Neilley delivered a copy of I-1 to the public safety office late in the afternoon of July 11 and that Casulli and Johnson did not notice the flyer until July 12. In discrediting Neilley's testimony concerning when he delivered I-1, I consider his amendment of the affidavit he submitted to the Director of Representation in response to Local 804's objections. Neilley's affidavit originally stated that no literature was distributed by the Staff Association within "48 hours" of the election (2T46). At the hearing Neilley testified, "I counted the full day of the election, not 48 hours previous to six a.m. of the 13th." (2T47).

Analysis

Review of election objections requires the objecting party, in this case Local 804, 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).

The Commission's standard for review of election objections was originally stated in Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970), aff'd sub nom AFSCME Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971):

The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct, seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election.^{11/}

^{11/} Parties filing objections to private sector elections must meet a similarly stringent burden. Thus, in NLRB v. Golden Age Beverage Co., 71 LRRM 2924, 2926 (5th Cir. 1969), the Court observed that the objecting party has the burden of proving that there has been prejudice to the fairness of the election. The Court further stated:

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

That Commission recognized that the standard should be applied flexibly:

...[e]lections should not be easily or routinely overturned but that types of conduct which have a strong tendency to jeopardize the atmosphere necessary for a fair election will not be condoned. Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980), ("Passaic").

In Passaic, the Commission articulated the standard under which it reviews statements made in the course of a representation election campaign. It held that a representation election will be set aside where there has been a misrepresentation or similar campaign trickery which involves a substantial departure from the truth and which is made at a time which prevents other parties from making an effective reply. The misrepresentations, whether intentional or not, must reasonably be expected to have a

11/ Footnote Continued From Previous Page

In AFSCME, Local 1959 v. P.E.R.C., supra, at 468-469, our Superior Court, Appellate Division, quoted this language with approval. See also, e.g., NLRB v. Whitney Museum of American Art, 105 LRRM 3239 (2nd Cir. 1980); NLRB v. Dobbs House Inc., 103 LRRM 2889 (5th Cir. 1980); NLRB v. Spring Road Corp., 98 LRRM 3309 (9th Cir. 1978); Magnolia Screw Products v. NLRB, 94 LRRM 3255 (6th Cir. 1976); NLRB v. O.S. Walker, 81 LRRM 2726 (1st Cir. 1972); Richardson Engineering Co., 248 NLRB No. 73 (1980).

significant impact on the election. Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1987).^{12/}

Flexible review of election objections extends to the timing of misrepresentations. In Secaucus Municipal Utilities Authority, D.R. No. 82-57, 8 NJPER 393, 394, n.4 (¶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 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 misstates 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

^{12/} In establishing standards on election conduct, the Commission has been guided by private sector precedent. Lullo v. International Association of Firefighters, 55 N.J. 409 (1970). When the Commission adopted election objection standards, in Jersey City Dept. of Public Works and Passaic, it followed existing private sector precedent (Hollywood Ceramics Co., 140 NLRB 221, 51 LRRM 1600 (1962) and General Knit of California, 239 NLRB No. 101, 99 LRRM 1687(1978)). The NLRB has since overruled the Hollywood Ceramics/General Knit standard. Under Midland National Life Ins. Co., 263 NLRB No.24, 110 LRRM 1489 (1982), the NLRB will not set aside an election based upon factual misrepresentation unless the misrepresentation was presented in a deceptive manner--by forged documents. The Commission has not adopted that standard. See Borough of Wildwood Crest. In Middlesex County Utilities Authority, D.R. No. 90-2, 15 NJPER 501 (¶20207 1989), the Director of Representation dismissed election objections based upon a letter the employer distributed to employees with their paychecks within twelve hours of the election. Though the Director compared the facts in Midland National Life Ins. to that case, he applied the Passaic standard.

proper evaluation of the misstatements..." 41
LRRM at p. 1334.

When an objecting party alleges that material factual misrepresentations interfered with the free choice of employees, that party must prove either its inability to effectively reply or direct evidence of interference. City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982).

Initially, I must determine whether the Staff Association made material factual misrepresentations in its final flyer (I-1). If I find that the flyer contained misrepresentations, I must then determine whether Local 804 did not have time to make an effective reply.^{13/}

Local 804 asserts that the statements in I-1 that Pagnanella is only "now" trying to "get more money" for bargaining unit members and that he had a "change of heart" are factual misrepresentations. These statements appeared directly under a question and answer box cut and pasted from Local 804 campaign literature. The box from Local 804's flyer states that \$1500 a year or \$4500 for three years has already been offered. It notes that Local 804 can try to get more and that the Staff Association would have to begin negotiations from scratch.

In Baker Canning Co. v. NLRB, 505 F.2d 574, 87 LRRM 3142, 3143 (7th Cir. 1977), the Seventh Circuit Court of Appeals

^{13/} Local 804 does not assert that there is direct evidence of interference with the election.

considered when alleged misrepresentations in a representation election campaign required setting aside an election:

In a case like this the guiding principle is not to police or censor propaganda used by the parties at Board elections, but to leave "to the good sense of the voters the appraisal of such matters...." Linn v. Plant Guard Workers, 383 U.S. 53, 60, 61 LRRM 2345, 2347, quoting with approval from Stewart-Warner Corp., 102 NLRB 1153, 1158, 31 LRRM 1397 (1953). Intemperate, abusive and inaccurate statements made by a union during an attempt to organize employees are to be tolerated under the Act, although neither party is permitted to injure the other "by circulating defamatory or insulting material known to be false." 383 U.S. at 61, 61 LRRM at 2347. We applied these considerations in Follett Corp. v. National Labor Relations Board, 397 F.2d 91, 95, 68 LRRM 2474 (7th Cir, 1968), noting that the Board should not overlook glaring untruths in campaign material, but at the same time stating that not every inaccuracy in campaign propaganda requires an election to be set aside. 87 LRRM at 3143.

Arguments concerning the factfinder's report and a potential wage settlement appeared in most campaign flyers published by Local 804 and the Staff Association. In Local 804's flyer, (P-3) Pagnanella clearly states the terms of the factfinder's recommendation and asserts that Local 804 can try to negotiate a better agreement. The text of Pagnanella's flyer appears directly above the Staff Association's statements. The unit members are able to evaluate both and determine whether or not Pagnanella's statements constitute a change of heart. The unit members can determine whether Pagnanella is only "now" trying to "get more money." These statements are the type of personal attacks permitted in campaign propaganda. The Staff Association's interpretation of

Pagnanella's statements may be an opinionated characterization, but it is not a factual misrepresentation.

Local 804 also asserts that the Staff Association's statement, "Its too late for you Pat, you can't pick and choose from the factfinders report but the College can. They have the advantage over you now" misrepresents the situation after factfinding. It argues that the Staff Association's statement that the College can "pick and choose" but Local 804 cannot mislead unit members.

After factfinding, both parties may accept or reject the factfinder's recommendations and are required to return to the negotiations table. N.J.A.C. 19:12-4.3(f). Neither side has a greater right than the other to "pick and choose."^{14/}

Even though the Staff Association's flyer misstates the law, I find it is not a material misrepresentation that would influence unit members' free choice.^{15/} Assuming that unit members who read I-1 believed that the College had a right to pick and choose from the factfinders report that Local 804 did not have, unit members would logically assume that the College had a similar advantage over the Staff Association. See Baker Canning Co. Additionally, campaign literature had already informed unit members

^{14/} The College has the right to implement its final offer after impasse resolution procedures have been exhausted. City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977).

^{15/} c.f. Furrs, Inc. 265 NLRB 1300, 112 LRRM 1034 (1982) holding there is no basis for treating misrepresentations of law differently from other misrepresentations.

that the factfinder's recommendation is not binding and that the College had always followed arbitrator's decisions, so it would probably follow the factfinder's recommendation.

There is no evidence that employees voted for the Staff Association because they believed the College had an advantage over Local 804. Rather, I-1 clearly stated that if the Staff Association won it would have to start negotiations with the College from scratch. The voters are able to evaluate any perceived advantage that might give the College and compare it to any perceived advantage the College may have over Local 804.

Finally, Local 804 asserts that the dues receipts reproduced on the back of I-1 misled unit members and caused them to believe that dues discrepancies were unfair and were Local 804's fault. The dues receipts reproduced on the back of I-1 were accurate except that the employees' names were omitted. The only inaccuracy in the text of I-1 is that only one employee earning \$24,000 per year pays \$10 dues per month. I-1 suggests that more than one employee is in that situation. Local 804 was aware that dues were not being deducted properly from employees paychecks. Pagnanella knew that when employees' salaries increased their dues deduction did not always increase. Pagnanella raised the problem at negotiations last winter. Though Hannah agreed to look into it, the problem persisted. Local 804 never informed the membership of the problem. Local 804 did not contact the College after the negotiations session to see if the problem had been corrected.

Pagnanella received monthly summaries of dues deductions from the College. No misrepresentation will be found when a union raises a legitimate question based upon information available to all of the parties. Gulf & Western Mfg. Co., 221 NLRB No. 215, 91 LRRM 1181, 1182 (1976). The Staff Association did not misrepresent the facts. It presented a legitimate problem to unit members.

Local 804 also asserts that misrepresentations were made at a time that did not permit an effective response. Even assuming that I-1 contained material factual misrepresentations, I find that Local 804 had time to respond.

The Commission has held that meetings conducted within 24 hours of an election by either party are grounds for setting aside an election. Borough of Wildwood Crest; Tp. of East Windsor, D.R. No. 79-13, 4 NJPER 445 (¶4202 1979). It has not extended this rule to campaign activities other than meetings conducted within 24 hours of an election; nor has it applied the rule to situations where no nexus between alleged electioneering and employee free choice has been demonstrated. County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979); Middletown Tp. Sewerage Auth., D.R. No. 84-14, 10 NJPER 2 (¶15001 1983); County of Camden, E.D. No. 9 (1970); City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982).

A flexible standard applies to alleged factual misrepresentations. More time is necessary to reply to factual misrepresentations that are within the special knowledge of only one party where employees lack knowledge required to properly evaluate

misrepresentations. Secaucus Municipal Utilities Authority; City of Atlantic City. Applying the Commission's standards flexibly, I find these circumstances do not warrant extension of the 24 hour rule to activities other than meetings. Pagnanella instructed his shop stewards not to distribute campaign literature after Tuesday night. I-1 was distributed about the same time that Tarrant distributed the letter from June Selders and the accompanying FYI flyer. Had those flyers contained misrepresentations, the Staff Association would have had the same amount of time to reply as Local 804.

Employees were aware of the factfinder's recommendation and Local 804's position on its merits. The factfinder's recommendation was debated throughout the campaign. The Staff Association's statement that the College could pick and choose from the recommendation, but Local 804 could not is not a misstatement within the special knowledge of one party. It is a misstatement of the law which appears to effect the Staff Association and Local 804 in the same manner. The College is most likely to benefit from the statement. Additional time to rebut the statement, would not have changed its effect.

The only new issue raised by I-1 is the dues discrepancies. The only minor factual mistake in the dues receipts is that I-1 implies that more than one employee earning \$24,000 per year pays \$10 per month in dues. About one week before the election, Neilley told Burns that the Staff Association planned to raise the issue in a flyer. Before I-1 was distributed, Local 804

was aware of the dues discrepancies and that the Staff Association planned to raise the issue. I-1 was circulated, though not throughout the College, early on the afternoon of July 11. I-1 was distributed throughout the College by the end of the day on July 11. I find that the 36 hours between the time that I-1 was distributed throughout the College and the start of the election was enough time for Local 804 to correct the misimpression that more than one employee earning \$24,000 per year paid \$10 per month dues.^{16/}

Local 804 asserts that it did not respond to I-1 because its response would fall within 24 hours before the election. Local 804's defense is a sound campaign tactic. Had it responded to I-1 it would have risked objections. At issue, however, is whether it had enough time to correct alleged material factual misrepresentations. Little time or effort is required to inform employees that only one employee, rather than "some employees" earn \$24,000 per year and pay \$10 per month dues.

^{16/} The tactic of distributing a flyer containing new information at the close of the workday so that employees will receive it in the morning the day before the election may have been designed to prohibit a reply. While this is not illegal campaigning because the voters are capable of evaluating campaign propaganda, I do not condone it.

For these reasons, I recommend the Director of Representation dismiss Local 804's objections and issue a certification of representative.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Joyce M. Klein".

Joyce M. Klein
Hearing Officer

DATED: January 5, 1990
Trenton, New Jersey