D.R. No. 2006-18

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 105 OF THE NEW JERSEY STATE PBA,

Docket No. RO-2006-034

Petitioner,

-and-

NJ STATE CORRECTIONS ASSOCIATION AFFILIATED WITH THE FOP LODGE 200,

Intervenor.

SYNOPSIS

The Director of Representation dismisses election objections filed by the FOP and certifies PBA 105 as the exclusive majority representative of certain non-supervisory law enforcement officers employed by the State of New Jersey. The evidence did not demonstrate that the PBA had an unfair advantage in campaigning or that the voters were unable to make a free and informed decision when casting their ballots.

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Appearances:

For the Respondent, Zulima V. Farber, Attorney General
(Geri Benedetto, Deputy Attorney General, of counsel)

For the Petitioner, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys
(Robert A. Fagella, of counsel)

For the Intervenor, Joseph Carmen, attorney

DECISION

Pursuant to a direction of election in State of New Jersey (Department of Corrections), D.R. No. 2006-6, 31 NJPER 389 (¶151 2005)(State of New Jersey No. 2), a mail ballot representation election was conducted between the incumbent representative New Jersey State Corrections Association, Inc., affiliated with the

Fraternal Order of Police Lodge 200 (FOP or Intervenor) and the petitioning Policeman's Benevolent Association, Local 105 of the New Jersey State PBA (PBA or Petitioner). The PBA obtained a majority of the votes cast in the election. Timely objections were filed by the FOP seeking to nullify the election as a matter of law.

On October 26, 2005, the PBA filed a representation petition seeking to represent law enforcement officers in particular titles employed by the State of New Jersey (State). On November 16, 2005, the FOP requested to intervene in this matter on the basis that it currently represents the petitioned-for employees. The FOP submitted a fully executed memorandum of agreement and a copy of its collective negotiations agreement covering the period July 1, 2003 through June 30, 2007 evidencing that it, in fact, currently represents the petitioned-for employees. Since the FOP's request conformed to the requirements of N.J.A.C. 19:11-2.7, I granted its intervention on November 16, 2005.

The petitioned-for historical unit is comprised of the following titles:

> Included: All law enforcement employees including full-time permanent and provisional employees of the State of New Jersey in the following titles: 12041-Aeronautical Operation Specialist, 32271-Campus Police Officer, 32081-Conservation Officer 3, 32641-Correction Officer Recruit, 40804-Correction Officer Recruit, Juvenile Justice, 32991-Inspector ABC, 61769-Parole Officer, Recruit, 40803-Parole Officer Recruit, Juvenile

> Justice, 32332-Police Officer Health Care Facility, 32352-Police Officer PIP, 32090-Ranger Trainee, 32092-Ranger 1, 32642-Senior Correction Officer, 40808-Senior Correction Officer, Juvenile Justice, 32992-Senior Inspector ABC, 32662-Senior Interstate Escort Officer, 61773-Senior Parole Officer, 40806-Senior Parole Officer, Juvenile Justice, 51342-Special Agent Trainee, 51344-Special Agent 2, 51343-Special Agent 3, 33083-Weights and Measures Inspector I, 33082-Weights and Measures Inspector II, and 33081-Weights and Measures Inspector II.
>
> Excluded: Managerial Executives, Supervisors, State Troopers, employees represented in other certified bargaining units, classifications within the Department of Higher Education except those in the State College System, all other employees of the State of New Jersey not included within the Statewide Law Enforcement Unit, confidential employees and non-police employees.

On December 2, 2005, I issued State of New Jersey No. 2 directing an election for the above-described unit. I ordered that a mail ballot election be conducted among eligible voters with ballot mailing beginning on January 19, 2006. I also ordered the following: "[e]mployees described in the unit who were on the payroll during the pay period immediately preceding the date of this decision shall be eligible to vote in the election." According to the State of New Jersey payroll calendar for 2005, the payroll period for eligibility was pay period 24, which ran from November 12 through November 25, 2005. The decision also required the State to provide the Commission as well as the two competing employee organizations with an

alphabetized list of all eligible employees including their last known mailing addresses and job titles no later than December 22, 2005. The decision directed that service of the eligibility list on both the PBA and the FOP be simultaneous.

Under cover of correspondence dated December 21, 2005, the State timely delivered the voter eligibility list to the Commission. Both the FOP and PBA were copied on this correspondence with the list enclosed. Included on the list were employees' names, addresses, job titles and assigned work facility. On December 23, 2005, Perry Lehrer, Assistant to the Director of Representation, sent a letter to the State, the FOP, and the PBA which read in part:

> By now, you should be in receipt of the voter eligibility list for the above-captioned election. Any proposed changes to the list should be submitted to me with a hard copy to all other interested parties. Any and all modifications to the voter list that are agreed to by all of the parties by January 13, 2006 will serve to amend the voter list, and the initial mailing of original ballots will be made accordingly.

No response was received from any party with respect to the December 23 correspondence from Mr. Lehrer.

On January 10, 2006, Joseph Carmen, Esq., attorney for the FOP, advised the Commission of the following:

> I enclose a letter to you dated December 21, 2005 from Ms. Camille Warner wherein she indicates that the alphabetized list of the names, addresses, job titles, and work sites of all eligible voters are enclosed with

> copies of same sent to Robert Fagella, Esq., attorney for PBA 105 and myself. The problem is, the package was never delivered to our office. Early last week, I received a call from the Governor's Office of Employee Relations indicating that my office had 'refused a package' and said package was returned to the State not once but twice.

In the same correspondence, the FOP advised that the package containing the e-list was hand-delivered to the office of Joseph Carmen at 6:00 pm on January 9, 2006, stating:

> At 6:00 pm yesterday evening, the package was hand delivered to our office and we finally came into possession of the list almost three weeks after our opponents had received same. This sets back our efforts in campaigning almost three weeks and threatens to cloud the results of the election if not rectified.

The January 10, 2006 correspondence from the FOP marked the first time the FOP advised the Commission that it had not received the eligibility list. In advising the Commission of its late receipt of the eligibility list, the FOP requested that I delay the election for a period of three weeks.

The State responded to the FOP's letter on January 10, 2006. The State explained that it had sent the list to all parties on December 21, 2005 by UPS overnight delivery, but had inadvertently used a partially incorrect address for the FOP as a result of a computer malfunction. The State took no position as to whether the Commission should delay the election.

The PBA responded to the FOP's letter on January 11, 2006. The PBA opposed the request for a three-week delay in the

election. In support of its opposition, the PBA argued that the FOP failed to make any effort to secure the eligibility list once the State advised the FOP that the list had been returned as undelivered, that despite the late receipt, the FOP had the list 10 days prior to the ballots being mailed as required by N.J.A.C. 19:11-10.1, and that any delay in receiving the list was harmless error since the FOP had addresses of its members, as well as addresses of non-members. The PBA noted that on December 20, 2005, Mr. Carmen advised the Commission that a copy of the FOP's demand and return system had been mailed to every non-member of the bargaining unit.[1/] On January 11, 2006, the FOP advised the Commission that it was withdrawing its request to delay the election.

In accordance with State of New Jersey No. 2, ballots were mailed to eligible voters on January 19, 2006, and were counted

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1/ By letter dated December 20, 2005, Joseph Carmen, Esquire, on behalf of the FOP, stated the following: "The Fair Share Report was completed immediately after the work with the Prosecutor's Office was completed and the Fair Share Report, the Demand and Return System have been mailed out to all non-members." The letter was submitted as part of an unfair practice charge filed by the PBA against the State and the FOP, Commission Docket No. CO-2006-084, on September 23, 2005. The charge alleges that the FOP did not distribute a copy of its demand and return system to non-FOP members. In State Corrections Officers PBA Local 105 and the New Jersey State PBA and Individuals v. State of New Jersey and New Jersey State Corrections Officers Association/FOP Lodge 200, P.E.R.C. No. 2006-49, 32 NJPER 10 (¶4 2006), the Commission found the FOP to be in violation of N.J.A.C. 19:17-3.3.

on March 7, 2006. A total of 4,164 ballots were cast out of approximately 7,000 eligible voters. Of the 4,164 ballots cast, 1,980 votes were cast for the FOP; 2,171 votes were cast for the PBA; 13 votes were cast for having no representative and 131 ballots cast were voided for a variety of reasons. The PBA had garnered 191 more valid votes than the FOP and a majority of the valid votes cast.

On March 14, the FOP filed timely election objections asserting that the State failed to provide a timely eligibility list as required pursuant to N.J.A.C. 19:11-10.1. In particular, the FOP contended that the State mailed the list to the PBA in a timely manner on or about December 22, 2005, but failed to simultaneously provide the list to the FOP. The FOP stated that it did not receive the eligibility list until January 9, 2006. The FOP claimed that since the PBA was in possession of the eligibility list prior to the FOP, the PBA had an unfair advantage in the election arguing that the FOP was denied equal access to eligible voters.

The FOP also raises the following objections:

1. In the fall of 2004, the State distributed approximately 7,000 prescription cards to unit members erroneously including a PBA rather than an FOP imprint;

2. On or around December 14, 2005, after an election was ordered in this matter, copies of the collective negotiations

agreement between the FOP and the State were printed with the name of the state PBA on the cover instead of the FOP, which caused confusion amongst unit members and undermined the FOP's status as the exclusive majority representative of the negotiations unit;

3. The State Department of Corrections incorrectly identified the FOP as having filed a grievance regarding reciprocal days when the grievance had been filed by PBA 105. As a result, the FOP was blamed for a change in the reciprocal day policy and had to take time to correct the situation;

4. The PBA engaged in electioneering on State property in violation of the State policy prohibiting same, including the posting of signs and stickers and the use of State vehicles outfitted with PBA campaign signs, which gave the PBA an advantage in the election; and,

5. The State changed its policy regarding the majority representative's ability to address recruit classes at the Sea Girt Police Academy when the FOP became the majority representative. As a result, the FOP was prohibited from addressing recruit classes, despite the fact that the PBA had been able to do so while it was the majority representative.

* * *

As a remedy, the FOP requests that I order a new election in this matter.

On March 15, 2006, I acknowledged receipt of the FOP's objections and requested that any additional information or evidence be submitted by March 27, 2006. No additional submissions were made by the FOP.

* * *

I opened an investigation into the election objection alleging that the State did not provide a timely voter eligibility list to the FOP as required by N.J.A.C. 19:11-10.1. I did not open an investigation into the remaining objections raised by the FOP. I directed the PBA and the State to respond to the allegation that the State did not substantially comply with N.J.A.C. 19:11-10.1. I gave them until April 7, 2006 to submit their respective facts and legal positions on this issue. After an extension of time to file its submissions, I gave both the State and the PBA until April 13, 2006 to file their submissions. The PBA and the State filed their respective submissions by April 12, 2006. The FOP submitted a reply brief on April 21, 2006.

Our investigation reveals the following:

In its submission, the State provided the following information supported by the attached certifications of Kevin McGovern, Camille Warner, Lawrence Fox, Cecilia Ashbock, and Eileen F. Gittens. Kevin McGovern is the Director of the Governor's Office of Employee Relations (OER). Camille Warner,

Employee Relations Coordinator at OER, was designated as the primary OER contact person for the representation election, with Lawrence Fox, Employee Relations Coordinator at OER, designated as Warner's back-up. On December 21, 2005, Warner directed OER secretary Cecilia Ashbock to send to PERC, Joseph Carmen, Esquire, and Robert Fagella, Esquire, the eligibility list via UPS overnight mail.

However, on December 23, 2005, the package sent to Mr. Carmen containing the eligibility list was returned to OER with a return label marked "Refused." UPS had placed the return label over the delivery address on the package so Warner did not suspect that the package had been incorrectly addressed. On December 23, 2005, Warner called Carmen to inquire as to why the package had been refused. She left a voice mail for Carmen, who was unavailable, and requested that he return her call. Carmen did not return the call on December 23 and Warner, who was going on vacation, instructed Lawrence Fox to try to contact Carmen regarding the returned package. The next business day was December 27, 2005, at which time Fox called Carmen regarding the returned package and left another message for Carmen. Carmen did not return Fox's call on December 27.

Also on December 27, McGovern, who was on vacation, called into the office and spoke with Fox. Fox advised McGovern of the events regarding the returned list. McGovern instructed Fox to

find out why delivery had been refused and to immediately resend the list.

On December 28, 2005, Fox advised Carmen by telephone that the package that was sent on December 21 had been refused and returned to OER. Carmen asked that the package be re-sent to his office. That same day, Fox directed Ashbock to resend the package. At this time, Fox did not realize that the address on the package was incorrect.

On January 9, 2006, the list was again returned to OER marked "refused." Warner advised McGovern that the list had been returned. UPS had again placed a sticker over the delivery address on the package. McGovern then directed Warner to hand-deliver the list to Carmen's office and to inquire as to the reason why the list had again been returned. On January 9, 2006, the list was hand-delivered to Carmen's office.

After looking into the matter further, Warner discovered that both times the list had been addressed to Carmen at Pennington Road in Ewing, N.J., and that UPS had indicated that it attempted delivery on a "Jose Carmen, Esq." in Pennington. It then became apparent that OER had used an incorrect address for Joseph Carmen.

In addressing the packages containing the list, Ashbock used a computer file of addresses maintained and used by OER in its normal course of business. Ashbock did not regularly correspond

with Joseph Carmen or the FOP as part of her duties. Sharon Gallagher was the OER secretary who routinely corresponded with Carmen and the FOP. However, Gallagher was on vacation on December 21, 2005. As a result, Ashbock relied solely on the information in the address file on her computer.

On or around December 5, 2005, Ashbock began experiencing problems with the address file on her computer and contacted the State Office of Information Technology for assistance. OIT attempted to fix the problem on December 13, 2005 by manually reformatting the information contained in the file.

On January 9, when OER was advised that the list that was sent to Carmen was returned as undelivered a second time, it was determined that, as a result of the manual reformatting, lines of information had been inadvertently deleted or replaced by other addresses on the list or were improperly merged with other addresses on the list. Somehow the name and address for Joseph Carmen had been combined with an address in Ewing, N.J. for the College of New Jersey. As a result, an incorrect address was generated for Carmen when Ashbock addressed the package containing the list to be sent to the FOP.

Due to reliance on the commonly used address file and the indications by UPS that the package had been refused as opposed to incorrectly addressed, OER did not suspect or surmise that an incorrect address had been used until the second mailing was

returned on January 9. However, between December 23, 2005 and January 9, 2006, neither Carmen, nor any other representative of the FOP, contacted OER or the Commission staff agent to advise that the FOP had not received the list as ordered by the Director of Representation.

The State, in its post-objections submission, also provided information regarding lists of both dues paying and non-dues paying unit members which the FOP had in its possession prior to December 22, 2005 due to its status as majority representative. On November 9, 2005, at the request of the FOP, John Cipriano of the State Office of Information Technology sent to FOP's designee four compact disks containing FOP's members' names, addresses, payroll numbers, whether employees had full FOP membership or agency shop status, deduction amounts, and pay status. The information was organized statewide, and also broken down geographically into northern, central, and southern regions of Department of Corrections employees. The employee information contained on the disks was current as of payroll period 22, which covered October 15, 2005 through October 28, 2005. This effort was coordinated between the OER, Eileen F. Gittens, Manager of Centralized Payroll at the Department of Treasury, Cipriano, and Russell Leak, then-president of FOP 200. Gittens' job responsibilities include oversight of the remittance of biweekly union dues deductions for unions, and to provide informational

files to unions that contain member information such as employees' names, addresses, payroll numbers, full union membership or agency shop status, deductions amounts, and pay status.

On December 13, 2005, at the request of the FOP, an additional compact disk was provided to the FOP containing the names and home addresses of all non-members of the unit. This information was picked up by Russell Leak on or about December 13 or 14, 2005. The information regarding non-FOP members reflected current information as of pay period 24, covering November 12, 2005 through November 25, 2005.

The State also noted that on December 20, 2005, Carmen represented in a letter to the Commission that a copy of the demand and return system had been mailed to all non-FOP members of the bargaining unit. The State further noted that Dennis Mooney, FOP secretary, submitted an affidavit dated January 30, 2006, indicating that as part of the litigation related to the PBA charge, (Docket No. CO-2006-084), Mooney reviewed the FOP's membership list provided by the New Jersey Department of Treasury. The State argues that this demonstrates that the FOP was already in possession of the names and addresses of both members and non-members.

Regarding the FOP's status as majority representative, the State has indicated that the FOP has institutional vice

presidents for every shift at every institution around the clock, every day of the week. The FOP also has use of telephones, fax machines, copy machines, bulletin boards, intra-office mail, and centrally located space from which to conduct FOP business.

Relying on the above information, the State essentially argues the following: 1) that it substantially complied with its duty to provide the eligibility list to the FOP, 2) that any delay in the FOP's receipt of the list was simply a mistake, not bad faith or gross negligence, 3) that the FOP failed to make efforts to obtain the eligibility list when it did not receive same by December 22, 2005, 4) that the FOP did not take any action to obtain the eligibility list because it already had in its possession names and addresses of both its members and non-members, 5) that OER has no stake or interest in the outcome of the election, and 6) that the FOP has not established a nexus between the objections it raises and any interference with the voters' freedom of choice.

On April 11, 2006, the PBA submitted its position statement and set forth the following arguments: 1) that the FOP already had the names and addresses of the bargaining unit members in advance of December 22, 2005; 2) the FOP acknowledged on December 20, 2005, that it had mailed copies of the demand and return system to all non-FOP members as part of the pending PBA unfair practice charge; 3) the FOP made no efforts to obtain the

eligibility list because it already possessed the information necessary to reach potential voters in the unit, and 4) since the FOP was in possession of the list on January 9, 2006, the State substantially complied with N.J.A.C. 19:11-10.1.

ANALYSIS

N.J.A.C. 19:11-10.3(h) sets forth the initial standard for review of election objections:

> A party filing objections must furnish evidence, such as affidavits or other documentation, that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence supporting its claim of irregularity in the election process.

Pursuant to N.J.A.C. 19:11-10.3(i), the Director of Representation must then review the objections and supporting evidence to determine "if the party filing objections has furnished sufficient evidence to support a prima facie case." The truth of the specific evidence offered by the objecting party is assumed. If the evidence submitted is not enough to support a prima facie case, the Director may dismiss the objections immediately. If sufficient evidence is submitted, then, and only then, will the Director investigate the objections. See State of

New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd NJPER Supp.2d 123 (¶104 App. Div. 1982).

The standard of review of election objections contemplated by N.J.A.C. 19:11-10.3(i) was discussed in Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986). There, the Director of Representation explained:

> This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present in order for an investigation to be initiated. If this two-prong test is not met, the objections will be dismissed. [Id. at 314.]

See also Essex County Probation Department, D.R. No. 87-20, 13 NJPER 170 (¶18076 1987).

Applying the above standards, I initiated an investigation into whether the State had provided a timely election eligibility list to the FOP as required by N.J.A.C. 19:11-10.1.

Objection #1: Whether the FOP has demonstrated by a preponderance of the evidence that its late receipt of the list hampered its ability to effectively communicate with voters and interfered with voters' free choice?

The FOP asserts that the State did not provide a timely voter eligibility list by December 22, 2005 as ordered, and that such failure was bad faith on the part of the State. The FOP

argues that the failure of the State to simultaneously serve the eligibility list constituted a complete omission of the names of eligible voters.[2/] Regarding the impact on its ability to campaign, the FOP argues:

> So here, the list of almost 7,000 members was omitted for almost three weeks and was only omitted from one employee organization. Just how many of the 7000 voters decided to vote for the first union to communicate with them is virtually impossible to know due to the sheer size of the list. This only emphasizes the importance of simultaneous receipt of the list.

The FOP emphasizes that while the PBA had the official eligibility list for one month prior to the start of voting, the FOP had the list for only nine days prior, which denied the FOP equal access to unit members.

Both the State and the PBA contend that this election objection should be dismissed because the State substantially complied with the requirement to provide the voter eligibility list. Moreover, the FOP was already in possession of the names and addresses of its members and non-members by December 13, 2005. Therefore, it possessed sufficient voter information to be able to communicate with unit members.

* * *

2/ In making this argument, the FOP relies on the decision in State of New Jersey (Department of Corrections), D.R. No. 2004-8, 29 NJPER 531, 535 (¶171 2003) (State of New Jersey No. 1), in which the Director discussed the NLRB's treatment of omissions.

The FOP relies on N.J.A.C. 19:11-10.1 in arguing that the State failed to provide a timely eligibility list, which resulted in unequal access to voters for the FOP.[3/]

It is not disputed by any party that the PBA received the eligibility list on or about December 22, 2005 and the FOP did not receive the list until January 9, 2006. Therefore, this case

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3/ N.J.A.C. 19:11-10.1 states, in pertinent part:

> (a) In all representation elections conducted pursuant to this subchapter, unless otherwise directed by the Director of Representation, the public employer is required to file simultaneously with the Director of Representation and with the employee organization(s) an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters and their last known mailing addresses and job titles. In addition, the public employer shall file a statement of service with the Director of Representation. In order to be timely filed, the eligibility list must be received by the Director of Representation no later than 10 days before the date of the election. The Director of Representation shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.
>
> (b) Failure to comply with the requirements of this section may be grounds for setting aside the election whenever proper objections are filed pursuant to N.J.A.C. 19:11-10.3(h).
>
> In reviewing objections which allege employer non-compliance with this rule, the Commission has analyzed whether an employer has substantially complied with the requirements of 10.1(a). County of Monmouth, P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982); Trenton Board of Education, D.R. No. 2000-7, 26 NJPER 148 (¶31058 2000). The substantial compliance standard is applicable to both the completeness of a list and the timeliness of its transmittal. Jersey City Medical Center, D.R. No. 83-37, 9 NJPER 411 (¶14188 1983).

does not present a question of compliance with N.J.A.C. 19:11-10.1. Rather, the question that must be decided is what harm resulted from the delay in the FOP's receipt of the list. The driving issue in the case is whether the FOP had substantially the same ability as the PBA to communicate with voters so that they could make an informed choice when voting for their preference to be the majority representative. Alternatively, how, if at all, was the FOP harmed by receiving the official Excelsior list later than the PBA?

Based on the analysis as set forth below, the FOP has failed to demonstrate how it was harmed, i.e. ,not afforded sufficient opportunity to communicate with employees prior to the election as a result of the late receipt of the list. The FOP did not demonstrate that the late receipt of the eligibility list interfered with the employees' exercise of free choice or that it materially affected the results of the election.

* * *

The question of whether a party has been harmed as a result of failure to simultaneously receive the eligibility list has been addressed numerous times over the years. In Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970), our Supreme Court recommended that the decisions of the NLRB (Board) serve as a model for decisions and policies interpreting the New Jersey Employer-Employee Relations Act, especially in the area of

representation proceedings. In Excelsior Underwear, Inc., 156 NLRB 1236, 61 LRRM 1217 (1966), the Board established its requirement that, within seven days after the parties entered into a consent election agreement, or after the Regional Director or Board directs an election, the employer must file with the Regional Director an election eligibility list containing the names and mailing addresses of all eligible voters.

The purpose of the Excelsior rule is to afford eligible employees an opportunity to hear the arguments concerning representation. The Board reasoned that having had this opportunity, the employees would be in a better position to make a more fully informed choice. The ultimate result would be a fair and free election. The Commission has adopted this policy and the reasoning expressed. See Monmouth County, P.E.R.C. No. 82-80, 8 NJPER 134 (¶13058 1982). Since Excelsior, the Board has decided numerous cases in which an employer has not completely complied with the requirements to provide an election eligibility list. In Program Aids, Co. Inc., 163 NLRB 54, 65 LRRM 1244, 1244-1245, (1967), the Board stated:

> . . . we find nothing in our Decision in Excelsior which would require the rule stated therein to be mechanically applied. The principal underlying rationale of Excelsior, requiring the Employer to disclose the names and addresses of eligible voters to the Union, is to provide the Union with an opportunity to inform the employees of its position so that they, the employees, will be able to vote intelligently.

The Board in Program Aids Co. found that the union received the list four days late, but had the list for ten days prior to the election and concluded:

> In these circumstances, we find that the Union was afforded sufficient opportunity to communicate with employees prior to the election and therefore the Employer-Petitioner has substantially complied with the requirements of the Excelsior rule. Id. at 1245.

In alleging a violation of the Excelsior requirements, the objecting party has the burden to show that the failure to comply with Excelsior has resulted in prejudice to the fairness of an election. In AFSCME Local 1959 v. PERC at al, 114 N.J. Super. 463 (App. Div. 1971), the Appellate Division, citing NLRB v. Golden Age Beverage Co., 415 F.2d 26, 71 LRRM 2924 (5th Cir. 1969), cautioned:

> . . . it must be kept in mind that the burden is on the party objecting to the conduct of the representation election to prove that there has been prejudice to the fairness of the election." Southwestern Portland Cement Co. v. N.L.R.B., 407 F.2d 131, 134 (5th Cir. 1969), cert. denied, 396 U.S. 820, 90 S. Ct. 59, 24 L.Ed.2d 71 (1969). See also N.L.R.B. v. Ortronix, Inc., 380 F.2d 737, 740 (5th Cir. 1967); N.L.R.B. v. O.K. Van Storage, Inc., 297 F.2d 74, 75 (5th Cir. 1961). This is a heavy burden; it is not met by proof of mere representations of 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. Cf. Southwestern Portland Cement Co. v. N.L.R.B.,

> 407 F.2d at 134; Anchor Manufacturing Co. v. N.L.R.B., supra 300 F.2d at 303. [415 F.2d at 29-30]
> 114 N.J. Super. at 469.

The Court in AFSCME Local 1959 noted that the Commission adopted a policy that elections will not be set aside unless the objector carries the burden of proving that there was conduct which interfered with or reasonably tended to interfere with the employees' freedom of choice. AFSCME Local 1959 at 470.

In Taylor Publishing, 167 NLRB 228, 66 LRRM 1049 (1967), the objecting party's burden was once again set forth as the Board held that ". . . we are unwilling, absent an affirmative showing to the contrary, to find that the Petitioners were not afforded sufficient opportunity to communicate with employees prior to the election. . . ." 167 NLRB at 229.

The Board has also looked at whether the objecting party is an incumbent organization with an in-plant presence among eligible employees. In Kent Corp., 228 NLRB 72, 77-78, 96 LRRM 1606 (1977), the intervenor-incumbent complained that it did not timely receive a supplement to the Excelsior list. The Board once again noted that:

> ". . . it may be deemed appropriate to consider the facts in this case in their total context and in the light of the purpose of the Excelsior rule, which was to accord unions an opportunity to have access to and present their views by contacting unit employees. The intervenor, whose alleged nonreceipt of a supplement to the original Excelsior list is complained of in this

> objection, was . . . the incumbent union with its officers working on the premises. This factor . . . further weakens the significance of any such omission as a factor affecting the fairness of the election."

See Ben Pearson Plant, Consumer Division, Brunswick Corporation, 206 NLRB 532, 84 LRRM 1338 (1973).

The Commission's standard of review of the conduct of elections was established in City of Jersey City, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd sub. nom. AFSCME Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971), and held in pertinent part:

> The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct, seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence. [NJPER Supp. at 156].

We also addressed the issue of late receipt of an eligibility list in Trenton Board of Education, D.R. No. 2000-7, 26 NJPER 148 (¶31058 2000). In Trenton, the incumbent-intervenor after losing an election to the petitioner, filed objections claiming that "the voter eligibility list required by N.J.A.C. 19:11-10.1 was untimely filed with its designated representative

and that such untimely filing is grounds for setting aside the election." 26 NJPER at 149.

In Trenton, the eligibility list was due on November 8, 1999. However, on November 9, 1999, the employer filed a defective list. On November 10, 1999, upon notification that the list was defective, the employer immediately corrected the problem and acted to avoid further delay by making the list available to both the incumbent and the petitioner. While the petitioner promptly picked up the list, the incumbent had designated only one individual to receive the list. As it turned out, that individual was on vacation when the employer attempted hand-delivery to her home.

In analyzing the facts, the Director of Representation noted the accountability of the incumbent in contributing to its own delay in getting the list. The Director explained that had the incumbent made arrangements for someone other than the designated individual to receive the list, it would have had the list for a longer time period prior to the election.

Relying on Board (NLRB) precedent, we discussed several factors in Trenton, including the following three factors relevant in the instant case, that we would take into consideration in determining whether the employer had substantially complied with N.J.A.C. 19:11-10.1: 1) whether there was a showing that the union essentially was unable to

communicate with employees because of the failure to provide the list, McGraw Edison, 234 NLRB 630, 97 LRRM 1262 (1978); 2) whether there was a showing that the delay in obtaining the list adversely affected the union's campaign, or that the union did not have enough time to reach employees, Wedgewood Industries, 243 NLRB 1190, 101 LRRM 1597 (1979); and 3) whether the objecting party had an in-plant presence, Kent Corp., 26 NJPER at 150.

In applying these factors, we found that the employer had substantially complied with the eligibility list rule since the incumbent failed to demonstrate that the delay in delivery precluded it from affording voters the opportunity to hear arguments concerning representation prior to the election and their right to participate in a free and fair election. Trenton.

The Board has also addressed the issue of whether the objecting party has met its burden to present specific evidence that the complained of conduct interfered with the employees' exercise of free choice to such an extent that it materially affected the results of the election. In Wedgewood Industries, pursuant to the Regional Director's decision directing an election, the employer was required to provide the eligibility list by June 29, 1978. The union did not receive the list until July 6, 1978. The Board observed that the union made no inquiry to the Board as to the late delivery of the list. The union

filed objections after the election was conducted. 101 LRRM 1597-1598.

In overruling the union's objection, the Board in Wedgewood stated that ". . . an employer's failure to submit the list within the prescribed period does not automatically mean that the Employer has failed to comply substantially with the rule. 243 NLRB at 1191, 101 LRRM at 1598. Citing McGraw Edison, the Board in Wedgewood further stated:

> The Board has not applied the rule mechanically, but rather considers the following several factors in determining whether compliance has been substantial: (1) the number of days the list was overdue; (2) the number of days the union had the list prior to the election; and (3) the number of eligible voters in the unit. The Board has stated that: The first factor obviously derives directly from the Excelsior rule as literally stated, while the second and third factors derive from the policy behind the rule—to afford the union sufficient opportunity to communicate with employees prior to an election so that all of the eligible voters will be exposed to the arguments for, as well as against, union representation. And as noted in Commercial Air Conditioning Company, Inc. d/b/a Sprayking, Inc., 226 NLRB 1044 (1976), **the Board, in determining whether the union has had sufficient opportunity to communicate with employees, takes into account a union's failure to take any action when it becomes aware the list has not arrived as expected.** [emphasis added] 243 NLRB at 1191, 101 LRRM at 1598. [footnotes omitted]

In finding that the employer substantially complied with the Excelsior rule, the Board in Wedgewood also found that ". . . the

Union's failure to inquire as to the lateness of the list is an indication that it did not really need the list prior to the time it actually received it." 101 LRRM at 1599.

In this case, the FOP lost the election and now seeks to have it overturned as a matter of law based on the State's failure to timely submit the eligibility list as ordered. It is not disputed that the FOP received the State's eligibility list later than the PBA.

The facts have shown, however, that the FOP was in possession of a list of unit members, including home addresses by December 13, 2005. The information the FOP had in its possession by that date reflected virtually identical contact information to that on the State's eligibility list, which was to have been supplied to the FOP by December 22, 2005. Therefore, the FOP was in possession of current voter information approximately one week prior to the date the eligibility list was due. The FOP does not dispute this fact, nor does it raise any arguments concerning the adequacy of the list it had on December 13, 2005. The FOP has not demonstrated any disparity in content between the list already in its possession and the eligibility list provided by the State.

Additionally, no evidence was presented that the late receipt of the list compromised the FOP's ability to effectively campaign. As the objecting party, the FOP did not meet its

burden to establish by a preponderance of the evidence a direct relationship between the delay in receiving the list and interference with employee freedom of choice. There has been no showing of harm, supported by specific evidence. Accordingly, the FOP has not proved a nexus between the late receipt of the list and its ability to campaign among the voters.

While the Commission is the guardian of the election process, the free and fair conduct of a representation election is not just the Commission's responsibility. All parties to the election are obligated to do their part and act reasonably in ensuring the appropriate conduct of the election. The State knew it had erred in the delivery of the list to the FOP, and it acted quickly and reasonably to correct its mistakes.

The FOP, however, failed to take any action to inquire as to the whereabouts of the list when it was not received in a timely manner, and it failed to promptly advise the Commission's staff that it was not in receipt of the list as ordered. Accordingly, as in Wedgewood Industries, I draw the inference that the FOP's failure to inquire as to the lateness of the list or advise the Commission of the same was an indication that the FOP already had the appropriate list of names as the facts show, and it did not really need the Excelsior list prior to the time it was actually received.

Finally, as the incumbent, the FOP had an in-plant presence. They had representatives on site at each DOC facility 24 hours a day, seven days a week. In addition, they enjoyed unfettered access to several means of communicating with employees including phone, fax, bulletin boards, and intra-office mail. The FOP has not refuted that it had such access as the majority representative or shown that its in-house ability to communicate with voters was in any way adversely affected by the late receipt of the eligibility list.

The FOP relies on State of New Jersey No. 1 in which the 2003 election between the FOP and the PBA for the same employees as in this case was overturned. However, the facts of that matter are readily distinguishable from the facts in this case.

In the previous election, the basis for overturning the election was voter disenfranchisement. The Director found that as many as 166 eligible voters were disenfranchised as a result of the State's failure to substantially comply with its obligation to provide an accurate eligibility list. The Director also found that the State's failure to provide correct voter addresses was proven to have affected the outcome of the election as numerous voters were deprived of the opportunity to exercise their right to vote.

The FOP raises different arguments in its objections in this matter. Here, the FOP argues that it did not have the same

ability as the PBA to campaign because it did not receive a timely eligibility list, not that the information contained therein was substantially flawed. The FOP did not produce evidence that voters were disenfranchised as a result of the State's failure to provide a timely list. Accordingly, the decision to overturn the previous election is inapposite to this case.

Based on the above, the objection by the FOP as to the late receipt of the eligibility list is dismissed. I find that these facts do not warrant the setting aside of the election as a matter of law.

* * *

The FOP next argues that objections 2 through 6 constitute a pattern of gross negligence which interfered with the ability of the FOP to convey its message regarding representation so unit members could make a fully informed choice when casting their ballots:

Objection #2: The Prescription Cards

The FOP claims that in the fall of 2004, the State distributed approximately 7,000 prescription cards bearing the name of the PBA instead of the FOP, and that, to date, no remailing of corrected prescription cards has occurred. In his affidavit, Larry Evans, President of the FOP, states that this outraged FOP members and that PBA members made such comments as

"[e]ven the State knows you guys will be gone." However, in its objections, the FOP concedes that this event is remote in time to the election at issue. Since the misprinting of the prescription cards is too removed from the date of election to have created an unfair advantage to the PBA, this objection is dismissed.

Objection #3: The Collective Bargaining Agreements with PBA Printed on the Cover

The FOP contends that the PBA gained an unfair advantage when copies of the current collective negotiations agreement between the State and the FOP were printed with the name of the PBA as the majority representative instead of the FOP. The misprinting and alleged distribution of the agreement occurred during early December of 2005 and on January 12, 2006. In his certification, FOP President Evans, states that the misprint made the FOP "appear weak and negligent." Evans further states, "[e]ven worse, while during the campaign period, it created much wasted time in using members of my Executive Board for damage control, thus greatly limits [sic] their ability to campaign." Evans contends that the misprinted books caused the FOP embarrassment.

The FOP first notified PERC of this situation on December 14, 2005 and asked for a delay in the mailing of the ballots so that the FOP could address the problem of the incorrectly printed agreements. On that same day, I denied the FOP's request for a delay in the election process having determined that there was a

significant amount of time before the mailing of ballots and the ballot receipt date for the misprint to be corrected and for any impact of the error to be minimized.

On January 12, 2006, Joseph Carmen again advised that contract books still bore the name of the PBA instead of the FOP. Carmen indicated that the parties had agreed to rectify the incorrect printing by placing a sticker over the PBA name. Carmen indicated that misprinted contract books were distributed at the Division of Parole, Bayside State Prison and Southern State Prison without the corrective stickers as agreed upon by the parties.

On January 12, 2006, OER Director McGovern responded to Carmen's letter and stated the following:

> Of the 8,000 contracts delivered to the Department of Corrections for distribution to members of this unit, 1,000 were sent to Southwoods State Prison, all of which had the correct union on the cover. Another 750 were sent to Bayside State Prison, of which all but 17 had the correct union on the cover. Another 700 were sent to Southern State Prison, of which all but 1 had the correct union on the cover. Of the 6,000 contracts remaining at Central Office, all but 112 are correct, and those that are incorrect will not be distributed further. Thus, of the 2,450 contracts delivered to these three institutions, only 18 had the wrong cover. Note that none of the inaccurate contracts were actually distributed to the members, and all are being returned to Central Office.

In its objections, the FOP failed to present any independent evidence that the misprinted contract books were actually

distributed to unit members contrary to McGovern's letter. The fact that the agreements were misprinted is not disputed by the State. Accordingly, the FOP has not demonstrated what, if any, impact the misprint had on the election since it has not shown by any competent evidence that the misprinted agreements actually made it into the hands of potential voters. Since the FOP has not demonstrated any harm caused by the misprint, this objection is dismissed.

Objection #4: Reciprocal Days Grievance

The FOP argues that they were erroneously identified as having brought about a change in the policy on reciprocal days.[4/] On January 6, 2006, FOP President Larry Evans received a letter from John Nuttall, Director of the Office of Employee Relations for the Department of Corrections, identifying "members of FOP 200" as the individuals by whom grievances regarding reciprocal days were filed. Nuttall's letter indicated that as a result of the grievances, the Department would "end the practice of allowing officers to enter into long-term reciprocal agreements".

4/ According to Larry Evans affidavit: "reciprocal days are days which are taken as a temporary assignment between two employees within the same job title who are employed within the same organizational unit. In short, officers can exchange shifts to suit their personal needs as a savings to the State, since it does not have to pay overtime." Affidavit of Larry Evans, paragraph 5(D), submitted March 14, 2006.

Evans argues, however, that these grievances were actually filed by James Goff, former President of PBA 105. Evans further argues that reciprocal days are a long-standing benefit enjoyed by unit members and Nuttall's letter created the impression among unit members that the FOP was responsible for the loss of that benefit. As Evans states in his affidavit, "It took me from January 6, 2006 to January 20, 2006 to obtain from Karen Willoughby, Director of Custody Operations, a hold on the change of policy." FOP argues that the misrepresentation by Nuttall affected the employees' exercise of free choice since it resulted in outrage against the FOP by unit members.

Absent supporting evidence, however, the FOP has not demonstrated how this issue actually influenced voters during the relevant time period. Evans's certification sets forth only his opinion as to how he believed the FOP was perceived by unit members with respect to the reciprocal day policy. Any actual effect which this may have had on voters is purely speculative. Thus, the FOP has not met its burden of proof with respect to this objection. The objection is dismissed.

Objection #5: Electioneering by the PBA on State Property

The FOP contends that the conduct of the PBA in campaigning on State property interfered with the voters' free choice. The FOP cites an incident that occurred on the grounds of the Albert C. Wagner Youth Correctional Facility in which a State truck

drove around the Wagner campus bearing a "Vote PBA" sign. The FOP also argues that the PBA posted signs at the various corrections institutions throughout the State. The FOP argues that these materials were seen by several employees at the institutions, which resulted in an unfair advantage to the PBA by giving them increased exposure among the potential voters. The FOP contends that it did not have the same opportunity for exposure because it refrained from electioneering pursuant to the State policy.

In County of Monmouth, D.R. 92-24, 18 NJPER 201 (¶23090 1992), the intervenor, after losing the election, filed objections claiming that the employer permitted one union to campaign during work hours despite a policy that restricted all union campaigning during work time. Citing Ocean Cty Judiciary, D.R. No. 86-25, 12 NJPER 511 (¶17191 1986), we noted that an objection regarding a claim of employer-sanctioned electioneering is an unequal access claim, in which the objecting party must show that the employer permitted access to one union while denying similar access to the other.

In dismissing the objection, we found first that the union merely asserted, but did not demonstrate, that the employer in fact had a policy prohibiting campaigning during work time. Moreover, the union failed to produce sufficient evidence that the employer knew about or permitted the petitioner to violate

the no-campaigning policy. Accordingly, the objecting party failed to demonstrate that the employer granted campaign privileges to one union while discriminatorily denying them to the other. County of Monmouth; See also Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986); City of Newark, D.R. No. 95-2, 20 NJPER 342 (¶25176 1994) (even assuming that rival campaign posters were displayed, the union's election objection, based on denial of equal access, was dismissed where evidence failed to establish that the City actually permitted rival access while denying same to the union).

In this case, the FOP merely claims that the State policy prohibits such electioneering. The FOP did not present any evidence that the State sanctioned or in any way approved of the electioneering by the PBA and denied the same privilege to the FOP. It appears that the PBA engaged in electioneering of its own volition, without the approval of the State. Furthermore, the FOP acknowledges that the State acted to remove any campaign signs from State property when it was made aware of the problem. Absent evidence of the State's collusion with, or even its acquiescence of the PBA's actions, I dismiss the objection.

Objection #6: Policy Regarding Addressing the Recruit Classes

The FOP argues that the Department of Corrections had a long-standing policy of allowing the majority representative to address recruits at the training academy. The FOP further argues

that the State ended this practice when it became the majority representative in 2004. The FOP claims that this is evidence of the State's prejudice toward the FOP. However, the FOP does not allege that the PBA was given the opportunity to address recruit classes.

As stated above, in raising an election objection regarding denial of access to voters, the key inquiry is whether there was denial of similar access between competing unions. To meet its burden, the objecting party must show that it requested and was denied similar privileges. In LaPointe Machine Tool Company, 113 NLRB 171, 173, 36 LRRM 1273, 1274 (1955), the Board held:

> . . . it is not interference with an election to permit one of two labor organizations to solicit support on company property and time where there is no showing that the other labor organization involved had requested, and been denied, similar privileges.

See Ocean County Judiciary, supra; (the Director found that no evidence was presented which supported the objecting party's claim that the employer had granted access to either employee organization during the campaign); See also Essex County Probation Department, D.R. No. 87-20, 13 NJPER 170 (¶18076 1987); (citing Ocean County Judiciary, permitting one organization to engage in certain campaign activity where there is no showing that the other organization made a similar request and was denied similar privileges does not constitute unequal access; denial of similar access is the crucial element of unequal access).

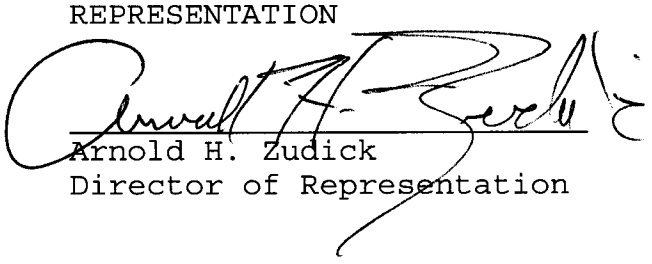
The FOP became the certified majority representative on June 4, 2004. The FOP has not provided any evidence that it took action to challenge the alleged change in the policy regarding addressing recruits at that time. Furthermore, the FOP failed to supply independent evidence as to what the exact policy was, if, in fact, there was a change in the policy, and any purported reason for the change. Finally, the FOP has not met its burden to show that it requested and was denied such access. Consequently, this objection is dismissed.

Accordingly, based upon the above facts and analysis, I issue the following:

ORDER AND CERTIFICATION OF MAJORITY REPRESENTATIVE

I **ORDER** that the election objections filed by the FOP are dismissed. They do not warrant setting aside the election as a matter of law. Therefore, I further **ORDER** that the PBA be certified by separate document as the majority representative. A Certification of Representative is attached.

BY ORDER OF THE DIRECTOR OF REPRESENTATION



Arnold H. Zudick
Director of Representation

DATED: May 22, 2006
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by June 5, 2006.