D.R. NO. 81-20

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

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Intervenor,

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor,

-and-

NEW JERSEY STATE EMPLOYEES ASSOCIATION, a/w AMERICAN FEDERATION OF TEACHERS,

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative

DOCKET NOS. RE-81-2
RE-81-3
RE-81-4
RE-81-5

D.R. NO. 81-20

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

DOCKET NOS. RO-81-126
RO-81-127
RO-81-128
RO-81-129

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor,

-and-

NEW JERSEY STATE EMPLOYEES ASSOCIATION, a/w AMERICAN FEDERATION OF TEACHERS,

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative

SYNOPSIS

The Director of Representation directs mail ballot elections commencing February 17, 1981, to be conducted among employees in four statewide units to determine their choice of a collective negotiations representative. The employees involved are those included in the Administrative and Clerical Services Unit, the primary Level Supervisors Unit, the Higher Level Supervisors Unit and the Professional Employees Unit. The Director finds that the petitions filed by the State, raising questions concerning the representation of these employees, are supported by objective considerations that it has some reasonable grounds for believing that the current joint representatives of the employee units have lost their majority status.

Independent petitions filed by the Communications Workers of America are sufficient to raise questions concerning representation involving the Administrative and Clerical Services Unit, the Primary Level Supervisors Unit, and the Higher Level Supervisors Unit. The Director further determines that questions concerning the voting eligibility of certain employees are not of a substantial nature to delay the conduct of an election, and, further, that certain conduct of the State, alleged by the New Jersey State Employees Association to constitute unfair practices, is not of a nature that would warrant the blocking of an election. The CWA, AFSCME and NJSEA/AFT are directed to provide the Commission with the names of separate entities which have been created or which are being created to represent supervisory employees. The Director further observes that the election will be conducted at such a time in the future as to permit the AFL-CIO ample time to rule upon certain Article XX proceedings during the intervening period.

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Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

Appearances:

For the State of New Jersey
Frank A. Mason, Director

For Communications Workers of America, AFL-CIO
Kapelsohn, Lerner, Reitman & Maisel, attorneys
(Sidney Reitman, of counsel)

For the American Federation of State, County and Municipal Employees, AFL-CIO
Sterns, Herbert & Weinroth, attorneys
(John M. Donnelly, of counsel)

For the New Jersey State Employees Association, AFT
Fox & Fox, attorneys
(David I. Fox, of counsel)

DECISION AND DIRECTION OF ELECTION

On October 6, 1980, four Petitions for Certification of Public Employee Representative were filed with the Public Employment Relations Commission (the "Commission") by the State of New Jersey with respect to units of employees represented by the New Jersey Civil Service Association/New Jersey State Employees Association ("NJCSA/NJSEA") and their affiliates. NJCSA/NJSEA is the certified joint representative of a unit of administrative and clerical employees of the State and a unit of professional employees of the State. The State Supervisory Employees Association, affiliated with NJCSA/NJSEA is the representative of a unit of primary level supervisory employees of the State. The State Supervisory Employees Association - Higher Level - affiliated with NJCSA/NJSEA represents a unit of higher level supervisory employees of the State. On October 6, 1980, the CWA and AFSCME requested to intervene in the State's petitions and submitted showings of interest in support of their requests.

In its Petitions, the State questioned the majority status of NJCSA/NJSEA, and their affiliates, and requested that the Commission conduct elections among unit employees to ascertain the majority representative in each unit. Pursuant to the undersigned's request, the State submitted certain materials which it claims constitute objective considerations supporting the State's reasonable grounds for believing that the incumbents had lost their majority status.

Prior to the filing of the State petitions, on August 19, 1980, NJCSA/NJSEA had filed unfair practice charges against the State (CO-81-42 & 43) alleging that the State was "encouraging employees on dues checkoff to withdraw from the Association membership roles." These charges were filed with respect to employees in the administrative clerical services unit, the professional unit, and the primary level supervisory employees unit. On September 9, 1980, complaints and notices of hearing were issued in these matters. [1/]

On October 22, 1980, NJCSA/NJSEA and their affiliates filed unfair practice charges [2/] against the State in each unit alleging that the State "has failed and refused to negotiate for the unit in question with the certified representative" and "the State has sought to deal with organizations other than the exclusive representative." The charges contained a request that the processing of the State's representation petitions be blocked by the Charges. In view of this request, the undersigned advised that NJCSA/NJSEA should submit documentary evidence and detailed statements of position specifically addressed to the request that the representation petitions be blocked. NJCSA/NJSEA was further advised that allegations, unsupported by an evidentiary proffer, may not be the basis of a request to block the processing of a representation petition.

1/ Hearings have not been held to date due to requests for adjournments by both parties.

2/ Docket Nos. CO-81-131, 132, 133 & 134

On October 28, 1980, NJCSA/NJSEA filed unfair practice charges [3/] against the State in each unit alleging that the State "has processed approximately 2,500 dues deduction withdrawal cards which were not filed with it after May 15, 1980" and that the State "has regularly met with and communicated with parties other than the exclusive representative." In addition, the charges alleged that "the State knew that another labor organization, during the last six months was publicly and actively seeking to obtain 30% designation cards to support a representation election. Notwithstanding the foregoing the State took actions which were willfully designed to thwart legitimate legal processes under statute and PERC rules for elections and has itself filed a representation petition which has the effect of enabling labor organizations which have sought to obtain but failed to obtain the required 30%, to intervene with an undemocratic and improper 10%."

On October 31, 1980, the CWA filed Petitions for Certification of Public Employee Representative with the Commission with respect to each of the four units represented by NJCSA/NJSEA. Two of CWA's petitions, involving the Primary Level Supervisory Unit and the Professional Unit were amended on November 3, 1980. These amendments reflected higher estimates of unit size than originally estimated. AFSCME thereafter requested to intervene in these petitions.

3/ Docket Nos. CO-81-138, 139, 140 & 141

Inasmuch as the questions raised in the employer's petitions were placed before the Commission by CWA, an employee organization, the undersigned advised the parties that the processing of the employer filed petitions would be pended and the employee filed petitions would be processed in accordance with Commission policy. NJCSA/NJSEA was advised that if it desired a blocking effect be accorded to its charges against the State vis-a-vis the CWA Petitions, it should provide the Commission with additional relevant documentary evidence and statements of position. All other parties were provided with an opportunity to brief the "blocking" issue.

The positions of the State, AFSCME, and CWA are that the representation petitions should be processed forthwith.

Although NJCSA/NJSEA initially requested that its charges block the State petitions, the President of the NJCSA, by letter dated November 3 and copied to the Commission, stated to its attorney:

> At no time did we discuss the possibility that the Unfair Labor Practice charge would be construed as a block to an election. If the charge is to constitute a bar to an election, I want the New Jersey Civil Service Association withdrawn from the case. For more than a year I have advocated an election and since I have publicly stated my position on many occasions, I thought everyone was well aware of it.
>
> Further, I think it is in the best interests of the 34,000 people involved to have the elections as soon as possible. In representing the New Jersey Civil Service Association, please do all you can to expedite the procedure.

Further, by letter dated November 17, 1980, from the President of NJCSA to a CWA representative, [4/] the President of NJCSA questioned her authority to authorize the filing of the charge, and further agreed on behalf of NJCSA to an election. NJCSA further stated that it did not desire a position on a ballot with NJSEA, because of NJSEA's affiliation with the American Federation of Teachers. NJCSA requested an additional period of time to ascertain its position with regard to NJCSA's intervention in this matter for the purpose of appearing on the ballot. On December 5, 1980, NJCSA advised the Commission that it did not wish to intervene in the representation matters or the unfair practice charge matters.

On November 12 and 14, 1980, the NJSEA, affiliated with the American Federation of Teachers, Local #4089, AFL-CIO intervened in the CWA filed petitions, citing as support for its intervention, "contract right and showing of interest." NJSEA/AFT stated that it would not consent to an election and in separate correspondence NJSEA/AFT requested that the charges filed by NJCSA/NJSEA block the further processing of the State and the CWA filed petitions.

On December 1, 1980, the undersigned advised the parties of the results of the investigation to date and stated an intention to direct an election on the basis of the investigation. All parties were provided an additional seven day period to submit additional documentary and other

4/ This letter was furnished to the Commission at a conference attended by all parties as part of the Commission's administrative investigation of the representation matter.

evidence as well as statements of position relating to the Petitions. The parties have responded to this request with various submissions. The contents of these submissions have been reviewed and are incorporated in the factual findings and discussions which follow.

On the basis of the administrative investigation herein, the undersigned finds and determines as follows:

1. The disposition of this matter is properly based upon the administrative investigation herein, it appearing that no substantial and material factual issues exist which may more appropriately be resolved at a hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no necessity for a hearing where, as here, no substantial and material factual issues have been placed in dispute by the parties.

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

3. Communications Workers of America, AFL-CIO ("CWA"), American Federation of State, County and Municiapl Employees, AFL-CIO ("AFSCME"), New Jersey State Employees Association affiliated with American Federation of Teachers, Local #4089, AFL-CIO, [5/]

5/ The undersigned has been apprised that matters have been presented before the judiciary and the AFL-CIO which bring into question the NJSEA's affiliation with the AFT. The above finding is not intended to address and affect those proceedings. The Commission acknowledges for purposes of its jurisdiction, that the organizational entity known as NJSEA/AFT is an employee representative which has intervened in proceedings before the Commission and is entitled to the privileges of intervenor status under Commission rules.

and New Jersey Civil Service Association are employee representatives within the meaning of the Act and subject to its provisions.

4. The New Jersey State Employees Association and the New Jersey Civil Service Association, and certain affiliates thereof, are jointly certified by the Commission as the exclusive representative of employees in the following negotiations units: Administrative and Clerical Services Unit; Professional Employees Unit; Primary Level Supervisors Unit; and Higher Level Supervisors Unit.

5. The State has filed timely Petitions for Certification of Public Employee Representative raising a question as to the representation of employees in the above enumerated negotiations units. The State's petitions have been supported by a documentary submission which demonstrates objective considerations that it has some reasonable grounds for believing that the joint representatives of the above employee units have lost their majority status. 6/

6. CWA has filed timely Petitions for Certification of Public Employee Representative seeking to represent the above employees. CWA's petitions are accompanied by adequate showings of interest, pursuant to N.J.A.C. 19:10-1.1 and

6/ In weighing the sufficiency of the "objective considerations," it is important to keep in mind that it is not the fact of the union's majority status that is in question but whether the employer has reasonable cause to believe that the union has lost its majority status. NLRB Casehandling Manual, ¶11042.5

19:11-1.3(8), to support the processing of the petitions respecting the Administrative and Clerical Services Unit, the Primary Level Supervisors and the Higher Level Supervisors Unit. On December 1, 1980, the undersigned advised CWA that the Commission could not verify that a sufficient demonstration of interest to support the filing of the petition for the professional employees unit had been provided. On December 5, 1980, CWA withdrew its petition with respect to the professional employee unit.

CWA has formally acknowledged its responsibility to create separate entities for the representation of supervisory employees, if elections result in its selection as the representative of units of supervisory and nonsupervisory employees.

Additionally, CWA has moved to intervene in the State filed petitions. CWA has demonstrated sufficient showings of interest as an intervenor in the State petitions respecting all four employee units, and its motion is granted.

CWA seeks the conduct of secret ballot elections among employees in each of the four units in question. 7/

7. The State agrees to the conduct of secret ballot elections among employees in each of the four units enumerated above.

7/ The units petitioned-for are coextensive with the certifications and recognition clauses of the various agreements. Accordingly, there is no dispute as to the appropriateness of the petitioned-for units.

8. AFSCME has moved to intervene in the State and the CWA filed petitions. AFSCME has demonstrated sufficient showings of interest to support its intervenor status in the Administrative and Clerical Services Unit, the Primary Level Supervisors Unit, the Higher Level Supervisory Unit, and the Professional Employees Unit.

AFSCME has formally acknowledged its responsibility to create separate organizational entities for the representation of supervisory employees. AFSCME already is a representative of a statewide nonsupervisory unit of employees not in dispute herein, and would be required to create separate entities for the representation of supervisors if it were designated by supervisory employees as their representative.

Accordingly, AFSCME's intervention herein in the proceedings respecting all four employee units is approved.

AFSCME agrees to the conduct of secret ballot elections among the employees in each of the four units of employees in question.

9. On October 23, 1980, NJCSA/NJSEA and their affiliates, as the incumbent jointly certified representative, intervened in the State filed petitions, on the basis of negotiated agreements covering employees. On November 12, 1980, NJCSA/NJSEA and affiliates sought intervention in the CWA petitions. On December 1, 1980, the undersigned approved the motion of NJCSA/NJSEA to intervene on the basis of its contracts.

Initially, NJCSA/NJSEA indicated its objection to the State filed petitions, and requested that the processing of the State petitions be "blocked" pending the processing of unfair practice charges against the State. However, as noted earlier, the Commission has received correspondence from the President of the New Jersey Civil Service Association indicating that NJCSA does not wish to utilize the charges to "block" elections, that NJCSA does not oppose elections, and that NJCSA's President may not have acted within her authority in authorizing the filing of unfair practice charges. NJSEA, however, opposes the conduct of elections and argues for a "blocking" effect.

In response to the CWA filed petitions, NJCSA/NJSEA's position was not stated jointly. NJCSA/NJSEA did not assert a common position as to CWA's request for elections. NJCSA/NJSEA did not indicate a desire for a joint ballot position if elections are conducted.

At an informal conference convened among the parties on November 17, 1980, the Commission was presented with a document signed by the NJCSA President stating a position that NJCSA did not seek to share a ballot position in an election with NJSEA affiliated with AFT. The attorney for NJCSA confirmed this position and requested an additional period of time for NJCSA to review its position regarding a separate ballot position. This request for an additional period of time, until December 4, 1980, to intervene for the purpose of appearing on the ballots was approved. By letter dated December 5, 1980,

the Executive Director of NJCSA advised the Commission that "the NJCSA wishes not to intervene in the above referenced matters." 8/

On December 8, 1980, the State objected to the grant of intervention status accorded to NJCSA/NJSEA. The State argues that NJCSA/NJSEA no longer exists as a separate entity and that "it seems inappropriate to suggest that NJCSA/NJSEA be granted intervention and a position on the ballot when neither of the component entities desire to be associated with each other in this election, and NJSEA has expressed its desire to be on the ballot alone."

The State's position misconstrues the nature of intervention status granted to NJCSA/NJSEA. NJCSA/NJSEA did not request to intervene for the purpose of appearing on the ballot and was not granted intervention status on this basis. NJCSA/ NJSEA had intervened on the basis of its contract in the representation matter to state its position concerning the employer's petitions and the CWA petitions. By its most recent correspondence, NJCSA has now stated that it does not wish to intervene. Accordingly, there is no longer an intervention by NJCSA/NJSEA, and the undersigned's approval of such intervention is withdrawn.

8/ The "above referenced matters" referred to by the Executive Director were specified as the docket numbers in the representation petitions filed by the State and the CWA and the docket numbers corresponding to all unfair practice charges filed by NJCSA/NJSEA which pertain to the matter under review herein.

10. On November 12 and 14, 1980, NJSEA affiliated with AFT, Local #4089, AFL-CIO, moved to intervene in the State and the CWA filed petitions on the basis of "contract right and showing of interest." NJSEA indicated that it has established separate supervisory affiliates. NJSEA's motion to intervene on the basis of its showings of interest was approved.

NJSEA opposes the conduct of elections and the processing of the representation petitions. First, NJSEA objects to the processing of the State petitions based upon the submission constituting "objective considerations." Second, NJSEA objects to the submission of certain dues deduction records by CWA to support its petitions. Third, NJSEA objects to the processing of CWA petitions, and AFSCME interventions, when these organizations have not already established separate entities for representing supervisory employees. Fourth, NJSEA states that elections should not be held until questions concerning the unit eligibility of certain employees are resolved. Fifth, NJSEA asserts that unfair practice charges filed by NJCSA/NJSEA against the State should "block" the processing of the State and the CWA representation petitions. [9/]

NJSEA's positions shall be discussed *seriatum*.

NJSEA disputes the State's submissions documenting "objective considerations," and has sought access to these

9/ NJSEA's additional arguments relating to most recent events are treated separately, *infra*.

materials. In this regard, the Commission is guided by the procedures of the National Labor Relations Board, [10/] and has accorded such materials confidential status.

NJSEA argues that certain dues records may not be utilized by CWA in support of its petitions. These dues records consist of payroll deductions by State employees which are earmarked to Mercer Council #4, New Jersey Civil Service Association. N.J.A.C. 19:10-1.1 permits the use of current dues records in support of a showing of interest. The payroll deduction lists provided to the Commission are current as of October 22, 1980. The President of Mercer Council #4 has certified to the Commission that Mercer Council #4, NJCSA is affiliated as Local 1040, Communications Workers of America. Accordingly, the undersigned approves such evidence as a demonstration by employees of sufficient support for CWA and its affiliates to constitute an adequate showing of interest in support of CWA.

NJSEA objects to CWA's petitions and AFSCME's intervention because these organizations have not established separate supervisory entities, and therefore, these organizations "do not demonstrate capability to represent Supervisory employees separately and apart from Non-Supervisory employees." NJSEA also objects to the procedure of requiring the establishment of supervisory entities as a condition for certification

10/ Lullo v. IAFF, Local 1066, 55 N.J. 409 (1970)

rather than as a condition for the pre-election processing of the Petitions. NJSEA has not submitted any materials to the Commission which would place in doubt either of these organizations' capability to represent supervisors in a separate entity. In our past experience of requiring a separate supervisory identity in the pre-election processing of a representation matter no organization has demonstrated an inability to meet this responsibility. The undersigned, therefore, has required the organizations to acknowledge their responsibilities as a condition for pre-election processing and will require the NJSEA, CWA and AFSCME to file with the Commission the names of the supervisory entities which have been created or are being created to separately represent supervisors.[11/]

11/ In this regard, the undersigned notes that the State on December 8, 1980, requested clarification of the undersigned's discussion relating to the creation of supervisory entities. N.J.S.A. 35:13A-5.3 states:

> ... nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations.

(Continued)

NJSEA has urged that various outstanding unit eligibility questions "concerning almost 5,000 employees" must be resolved prior to an election. These questions largely involve clarification of unit petitions which fall into two groups: first, employees designated by the State as confidential employees; second, petitions filed by NJCSA/NJSEA or by organizations representing other State units seeking determinations that certain employees should be included or excluded from the units in question.

The Commission has determined that the status of pending clarification of unit petitions will not delay the processing of representation petitions. In re Cty. of Morris Park Commission, D.R. No. 80-17, 6 NJPER 37 (¶ 11018 1980). The Commission's concern in such matters is whether the number of employees in dispute raises substantial issues which should be resolved prior to an election. In re Tp. of North Brunswick, D.R. No. 78-4, 3 NJPER 260 (1977).

11/ (Continued)
The organizations are being required to establish separate entities which meet the statutory requirements. Adequate procedures are available before the Commission to remedy any violation of the statutory requirement.

NJSEA submits that approximately 1,028 employees are subject to the State's claim of confidentiality. The State submits that its petitions concern approximately 1,290 employees. Neither the NJSEA or the State has allocated the above approximations to the relevant units.

The State advises that the Clarification of unit petitions filed by other organizations affect 110 Administrative and Clerical Services employees, 720 Professional employees, 120 Primary Level Supervisors and 0 Higher Level Supervisors. NJCSA/NJSEA-filed petitions involve claims to add 460 employees to the Administrative and Clerical Services Unit and 4 employees to the Primary Level Supervisors Unit. NJSEA asserts that the petitions involve 1,653 employees.

NJSEA also refers to claims by the State that the judiciary employees and "hourly" Intermittent Claims Takers should not be in the units. Lastly, NJSEA submits that certain nonrepresented State college bookstore employees might be appropriately included in the Administrative and Clerical Services Unit.

The Commission's investigation reveals that there are approximately 11,800 Administrative and Clerical Services Unit employees, 9,000 employees in the Primary Level Supervisors Unit, 1,400 Higher Level Supervisors Unit employees, and 10,400 Professional Unit employees. It appears to the undersigned that the number of employees in dispute does not raise a substantial issue and that elections should be

provided where the vast majority of unit members are clearly eligible to vote. In this regard, the NJCSA/NJSEA, the State and the other clarification of unit petitioners have previously agreed to pend the resolution of the second group of clarification of unit petitions until resolution of the instant representation matters and that the employees will remain in their current units pending the elections. Thus, these clarification of unit petitions do not affect voter eligibility.

NJSEA has requested that the unfair practice charges filed by NJCSA/NJSEA, prior and subsequent to the filing of the State's representation petitions, "block" the processing of the State and the CWA petitions. NJSEA claims that "A review of the pending unfair practice charges reveals them to be of a nature which compels application of the blocking policy." The undersigned has in the past considered requests by incumbent employee organizations that unfair practice charges which they have filed against the employer should block the processing of petitions filed by competing employee organizations.

In In re Matawan Reg. School Dist. Bd. of Ed., D.R. No. 78-11, 4 NJPER 37 (¶ 4019 1977), the undersigned stated: "Neither the Act or the rules of the Commission require the Commission to follow a blocking charge procedure." In this decision, the undersigned pointed out that the blocking charge procedure, likewise, was not required by the Labor Management Relations Act nor by the rules of the

National Labor Relations Board. The decision on whether an unfair practice charge should block a representation petition is a matter within the NLRB's discretion. The undersigned stated:

> The NLRB will decline to follow the blocking charge procedure when it is of the opinion that the direction of an immediate election will effectuate the policies of the Act. See Columbia Pictures Corp., 81 NLRB 1313 (1949), 23 LRRM 1504.

In In re City of Newark, D.R. No. 78-43, 4 NJPER 202 (¶ 4102 1978), the undersigned again analyzed the blocking charge procedure, and stated:

> The Supreme Court, in Lullo v. Int'l. Assn. of Fire Fighters, 55 N.J. 409 (1970), noted the similarity of the New Jersey Employer-Employee Relations Act to the National Labor Relations Act, and directed that the Commission seek guidance in its determinations from the federal model. Although not required by statute, the National Labor Relations Board has adopted and maintained a policy under which the filing and consideration of an unfair labor practice charge routinely blocks the processing of a current representation petition raising a question concerning representation. The undersigned has previously recognized the applicability to the Commission's proceedings of the reasons behind blocking charge principles, In re Matawan Reg. Bd. of Ed., 3 NJPER 163 (1977). However, the Commission's unfair practice jurisdiction, which was not extant when Lullo was considered, contemplates a procedure which is significantly unlike Board practice. The Board investigates the allegations of a charge, and where convinced that an unfair practice has been committed, issues and prosecutes the complaint. On the other hand, the Commission assumes the truth of the factual assertions of the charging party, and where satisfied that the allegations may constitute an unfair practice, the Commission issues a complaint which the charging party

> prosecutes. For this, and other reasons which need not be discussed herein, the undersigned is not convinced that the Board's automatic blocking policy and procedure is applicable to all Commission proceedings. Accordingly, the undersigned has not fully embraced the blocking charge procedure adopted by the Board, although it is noted that no situation has yet arisen which would, under the Board standards, have compelled the undersigned to formally assert a block to a representation petition.

Consistent with the above, the undersigned has required that parties asserting unfair practice charges specifically state whether they desire that the charges should block representation proceedings. In addition, the undersigned requires such parties to submit documentary evidence in the representation forum to establish the basis for the claim that the conduct underlying the alleged unfair practices prevents the conduct of a free and fair election. [12/] Where such material has not been furnished, the undersigned has declined to exercise his discretion to block an election. See In re Village of Ridgewood, D.R. No. 81-17, 6 NJPER ___ (¶ _____ 1980).

Where such material has been furnished, the undersigned, in establishing a standard for the exercise of his discretion,

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12/ In Templeton v. Dixie Color Printing Co., 44 F.2d 1064, 77 LRRM 2392 (5th Cir. 1971), the Court stated:

> The union cannot avoid the consequence of the loss of its majority status by the mere filing of unfair labor practice charges against the employer. Nor does the filing of such unproved charges relieve the Board of its statutory duty to consider and act on a petition for decertification. N.L.R.B. v. Minute Maid Corp., 283 F.2d 705, 710, 47 LRRM 2072 (C.A. 5, 1960).

has been guided by the policies and experience of the NLRB and the court decisions in review thereof. 13/ The ultimate consideration is whether the employees could, under the circumstances, exercise their free choice in an election. See N.J.A.C. 19:11-2.6(b)(3). 14/

The NLRB, in exercising its discretion to determine whether a fair election can be conducted notwithstanding the pendency of meritorious charges considers the following factors:

> the character and scope of the charge and its tendency to impair the employees' free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interest of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties

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13/ In Surratt v. NLRB, 463 F.2d 378, 80 LRRM 2804 (5th Cir. 1972), the Court stated:

> More specifically, the Board should not be allowed to apply its "blocking charge practice" as a per se rule without exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the election petition ought to be delayed or dismissed. We are of the view that the record before us clearly demonstrates a failure to give that careful consideration to the petition of the employees for the decertification election.

14/ This rule section provides:

> 3. Issue a decision directing an election in an appropriate unit, if it appears to the director of representation that there is reasonable cause to believe that a valid question concerning representation exists in an appropriate unit, that the policies of the act (N.J.S.A. 34:13A-1.1 et seq.) will be effectuated thereby, and that an election will reflect the free choice of the employees in the appropriate unit.

> to labor organizations involved in the representation case; the showing of interest, if any, presented in the R case by the charging party; and the timing of the charge.

N.L.R.B. Casehandling Manual, ¶11730.5

Accordingly, the charges asserted as a block have been analyzed pursuant to this standard.

In its charges, NJCSA/NJSEA alleges that the employer improperly encouraged employees on dues checkoff to withdraw from the Association membership roles. The NJSEA has submitted no documentation in support of this charge other than a notice to employees purportedly distributed by the State in May 1980, which advised employees who had previously executed dues deauthorizations to refile deauthorizations during a designated period if they desired dues deauthorization. The NJSEA also alleges that the State honored "stale" deauthorizations. The NJSEA alleges, without documentation, that as many as 2,500 untimely deauthorizations were implemented. The undersigned notes the existance of a contractual provision governing the filing and implementation of dues deauthorizations. In addition, it appears that an alleged violation of this contractual provision may be remedied by the use of binding arbitration.

The procedure outlined in the contract would indicate that an arbitration decision would have issued by this date if there had been a prompt filing of a class action grievance. Furthermore, it is noted that although a Complaint and Notice of Hearing issued with regard to the August 10 Charge on September 9, 1980, the charging party has on several occasions

requested adjournments and had not pressed for an expeditious disposition of this Charge prior to filing of the representation proceedings.

It is not alleged by the NJSEA that the State coerced or intimidated or encouraged employees to initially deauthorize dues deductions nor is it alleged that the State's notice constituted coercion or intimidation. There are no allegations of threats or promises of benefit to induce dues deauthorizations. The undersigned notes that the parties' contract provides for the transmission of dues accompanied by a listing of the employees included and the requirement to provide a quarterly listing of dues discontinuations to the Association. Under these circumstances, the Association would be aware of the names of employees who have discontinued dues and the Association would be able to contact such employees in an attempt to encourage resumption of dues checkoff. Thus, while it may be argued that the State's actions deprived the NJSEA of the monetary benefit of dues from some of its prior membership, constituting a small portion of its annual dues income by checkoff, the charges and documentation submitted do not establish that the employer's alleged impropriety has created an atmosphere in which employees cannot express their free choice concerning dues deduction authorization or the selection of NJSEA as a majority representative.

In its second charge, NJCSA/NJSEA alleges that the State "has failed and refused to negotiate for the unit in question with the certified representative" and "the State has

sought to deal with organizations other than the exclusive representative." The charging party supports its refusal to negotiate charges with three letters from the Association to the State. The first letter, dated February 14, 1980, advises the State that this letter should be considered "as notice that the Association desires to modify and or amend the agreement between the parties for the period commencing July 1, 1981, so that a successor agreement may be negotiated." This letter does not request the initiation of negotiations but appears to serve as the notice for modification which the current agreements require to be served by October 1, 1980. The second letter dated September 23, 1980 refers to a previous request that the State contact the Association in order to establish a date for the commencement of negotiations and restates such request. Although NJSEA argues in its statement of position that "the State's refusals to bargain occurred months prior to the filing of the RE petitions, in February, July, September and October," the Association has not provided documentation in support of any earlier request for the commencement of negotiations. In its third letter, dated October 2, 1980, the Association restates its request that the State contact the Association to fix dates for the commencement of negotiations.

On October 2, 1980, the State advised the NJSEA and NJCSA and the Commission that the State had "concluded that a substantial good faith doubt exists as to the status of the organizations previously certified." The State acknowledged the demands for negotiations but indicated that "in face of

doubts as to the status of the certified employee representative it does not appear to be appropriate to enter into negotiations at this time." The State advised that it would file representation petitions with the Commission and offered to undertake negotiations once the exclusive majority representative has been clearly designated by the Commission. In fact, the State filed representation petitions on October 6, 1980, the first day of the "open period," placing the representational question before the Commission. It is conceded that the State has continued to administer the contracts with the NJCSA/NJSEA by processing grievances, Civil Service proceedings, and title reevaluations.

An examination of the showings of interest by CWA and AFSCME reveals that the overwhelming majority of authorization cards were signed and dated before October 2, 1980, the date on which the State declined to negotiate in the face of doubts concerning the status of the incumbent. In addition, the dues deauthorization requests were signed and dated many months before October 2, 1980. On the basis of the above, it appears that the reduction of support for the incumbent and the authorization of support for competing employee organizations took place prior to the alleged refusal to negotiate on the part of the State, and is not attributable to the State's declaration on October 2, 1980.

In support of its charge that the State "has sought to deal with organizations other than the exclusive representative" the Commission has been provided with a copy of a letter sent by the State to the President of NJSEA on July 9, 1980, in which the State expressed a good faith doubt that the Association continued to represent a majority of employees in the four units. The State advised that "the joint representation of employees by the SEA/CSA is not existant." In addition, the State requested that the NJSEA President provide reasons why the State should refrain from seeking a clarification of the representation question by the Commission. Copies of this letter were sent to the President of the NJCSA, to representatives of AFT, AFSCME and CWA, and to the Commission.

Although the above letter questioned the continued viability of the joint representation by NJCSA/NJSEA, it does not by itself constitute an interference with the administration of the exclusive representative. It may be argued that the dissemination of the letter to other employee organizations assisted these organizations in their campaigns to represent State employees by confirming the State's doubts as to NJCSA/NJSEA majority status and its contemplation of the filing of representation petitions. On the other hand, ample time and opportunity have been and will be available to all organizations to inform the unit members of their positions and to dispel any allegedly erroneous impressions created by this letter. On the basis of the documentation submitted to date, it would be pure conjecture to assume that employee free choice could not be expressed because of the State's distribution of this letter.

In its third charge, NJCSA/NJSEA alleges that the State has regularly met with and communicated with parties other than the exclusive representative with regard to the units in question. In its statement of position, the NJSEA restates its protest concerning "the State's unlawful assistance to CWA and AFSCME in their attempts to gain employee support in these bargaining units." Although the NJSEA refers to alleged instances and examples of State assistance to the competing unions, no documentation has been furnished which would support such a claim.

The undersigned notes that the three sets of charges were filed by the NJCSA/NJSEA. However, the President of the NJCSA has advised that she may not have been authorized to file these charges. Furthermore, the NJCSA President has stated that she has been in favor of an election for about a year and "If the charge is to constitute a bar to an election, I want the New Jersey Civil Service Association withdrawn from the case." Moreover, the NJCSA President has instructed her attorney to "do all you can to expedite the procedure [to have the elections as soon as possible]." Only NJSEA has submitted a position urging that the charge block an election. On December 5, 1980, the Executive Director of NJCSA wrote to the Commission, with copies to all parties, advising that "the New Jersey Civil Service Association wishes not to intervene in the above referenced matters," which include all of the unfair practice charges and representation proceedings under review herein.

On the basis of the investigation and the factors discussed above the undersigned believes that the character and scope of the unfair practice charges would not have the tendency to impair the employees' free choice and, therefore, should not be accorded blocking effect. In addition, the number of employees involved in the events upon which the charges are based is small in relation to the size of the working force. The investigation reveals that one of the charging parties is in conflict with the other charging party with regard to the further processing of the representation petition. The large number of employees who have demonstrated a showing of support on behalf of CSA and AFSCME is evidence of the "entitlement and interest of the employees in an expeditious expression of their preference for representation."

Since NJCSA has withdrawn from all charges, the incumbent joint representative has no related charges currently on file with the Commission for processing. Although NJSEA might contend that the charges previously filed by the joint representative should now be considered by the Commission as charges filed by NJSEA alone, NJSEA could independently allege improper employer assistance to rival employee organizations, but it would not have standing to maintain charges alleging contractual violations or a breach of the negotiations obligation. The above findings and conclusions would nonetheless be applicable to any amended filing.

In its statement of position, NJSEA urges that the Commission must make specific findings concerning the basis for the State's good faith doubt which form the basis for its filing of representation petitions. The undersigned, after a careful study of the State's submission, concluded

that the State, in the face of disparate and conflicting conduct by the parties to the joint certification concerning the very nature and form of their continued existence had reasonable grounds for believing, at the time of its filing of the representation petitions, that a substantial question existed concerning the representative status of the joint representative of the four collective negotiations units. The most recent statement of position submitted by NJCSA, quoted above, has the effect of removing one of the partners in the joint certification from involvement in all of these proceedings. The stated request for non-involvement by one of the parties sharing the joint certification in proceedings which may determine the majority representative in the four units is further confirmation of the existence of a substantial question concerning the representation of employees in the petitioned-for units.

The investigation shows that one of the organizations constituting the joint representation has sought affiliation with AFT whereas a major unit of the other partner--housing most State NJCSA members--has affiliated with CWA. These organizations, when initially certified, were independent of any affiliations. The investigation reveals that one of the organizations which constitutes a part of the joint certification seeks an election whereas the other partner in the joint certification seeks to block an election.

In 1973, the Appellate Division of the Superior Court, in sanctioning the appearance of NJCSA and NJSEA as a

joint representative in a Commission conducted election among State employees, stated:

> Should the election result in the selection of C.S.A. and S.E.A. as the joint collective bargaining representative, both organizations will be under the affirmative obligation to those whom they represent to jointly agree upon and to pursue a single, unified policy and position on all issues. And neither the Public Employment Relations Commission nor any other body or agency may today justifiably foretell that this obligation cannot or will not be discharged, with the utmost fidelity. If the day should arise when that obligation is not being so fulfilled, a remedy both satisfactory and sufficient will be at hand.

AFSCME v. PERC, App. Div. Docket No. A-986-72 (1973).

Accordingly, on the basis of the factors discussed above, the undersigned concludes that there is a substantial question concerning the representation of employees in the four units under review herein, and the purposes of the Act in promoting stable and harmonious relationships will best be accomplished by the direction of a mail ballot election.

NJSEA, however, urges that the election should not be directed or held at this time. More specifically, NJSEA has requested "that the processing of the representation petition be suspended to permit operation of the no-raiding procedures contained in Article XX of the AFL-CIO Constitution." NJSEA's reference in this regard is to an Article XX proceeding which is currently on appeal to the Executive Council of the AFL-CIO and to a second Article XX filing which NJSEA/AFT intends to place before an AFL-CIO umpire concerning an NJSEA/AFT

affiliation vote which transpired on December 6, 1980.

Pursuant to Article XX of the AFL-CIO constitution, AFL-CIO affiliates may seek protection from attempts by other AFL-CIO members to disturb their established bargaining relationships. If NJSEA/AFT is successful in an Article XX proceeding, CWA and AFSCME may be required, as a condition for continued AFL-CIO membership, to withdraw from participating in any elections which the Commission may conduct.

In July 1980, various Article XX complaints were filed with the AFL-CIO involving the AFT, CWA, and AFSCME. These matters were heard by an umpire in September 1980, and decisions of the umpire were received on October 28, 1980. Several days before, on October 24, 1980, AFL-CIO President Lane Kirkland requested that action by the Commission be held in abeyance due to the proceedings before the AFL-CIO. In light of the umpire's decisions, which held that AFSCME and CWA were not in violation of Article XX, the latter organizations did not agree to any postponement of Commission proceedings. Further, the State did not agree to the requested postponement. Accordingly, the undersigned advised the AFL-CIO and all other parties that the Commission was proceeding with the processing of the representation petitions.

NJSEA claims that a vote recorded on December 6, 1980, at its convention has put to rest any doubts about the legitimacy of its affiliation with the AFT. On December 8, 1980, NJSEA moved before the Chancery Division of the Superior

Court to restrain the Commission from ordering an election and to restrain CWA and AFSCME from continuing to place representation questions before the Commission. NJSEA states that it intends to place the events of December 6, 1980, before the AFL-CIO umpire soon after December 22, 1980, when it anticipates that the "cloud" of litigation concerning the propriety of any affiliation with the AFT will be removed by the Chancery Division.

Although the Chancery Division denied NJSEA's restraints, and the Commission has been removed as a party-defendant to NJSEA's action, NJSEA has requested that the Commission consider the Court's statements in entertaining the NJSEA request for a suspension of proceedings. The undersigned therefore granted NJSEA an opportunity to present to the Commission the transcript of the December 8 proceedings before the Court and a statement in support of its position. These materials were provided to the Commission on December 12, 1980. The undersigned has considered these materials and has considered the statements of the Court that the Commission evaluate NJSEA's request.

Initially, the undersigned observes that the Commission posesses the jurisdiction to consider NJSEA's request, inasmuch as the legislature has vested the Commission with the authority to develop the procedures and policies for the proper effectuation of representation proceedings consistent with the purposes of the Act. The Commission's

policy requires that representation matters shall be processed as expeditiously as possible in order to afford employees their choice as to representation, and to provide meaningful opportunities to negotiate, if collective representation is chosen. Although there is a possibility that CWA, or AFSCME, or both might be required to withdraw from an election which they seek or to disclaim representation due to internal agreements within the AFL-CIO, this must be balanced by the Commission's concern that employees make a meaningful choice at an election conducted expeditiously. Furthermore, the Commission is not without the ability to provide for these contingencies. In any event, to permit the private dispute resolution procedures of the AFL-CIO to dictate the procedures of the Commission would certainly be an impermissive abdication of Commission authority.

The National Labor Relations Board has applied a policy which provides an adequate opportunity to the AFL-CIO to resolve its internal disputes, and which does not unduly frustrate the rights of employees. This procedure, reflected in the Board's casehandling manual commencing at ¶11050, essentially provides for a thirty day period for the AFL-CIO to dispose of an Article XX claim.

The Umpire's decisions, received on October 28, 1980, found that AFSCME and CWA were not in violation of Article XX and afforded AFT no protection. These decisions are currently on appeal before the AFL/CIO. NJSEA/AFT has yet to initiate the Article XX claim before the AFL/CIO based on the December 6, 1980 events. In any event, the undersigned need not determine whether the threshhold conditions for invocation of the Board policy of deferral to Article XX proceedings are present inasmuch as such deferral would be granted for a maximum of thirty days.

After careful consideration, the undersigned concludes that the policies of the Act can be best effectuated by the direction of an election at this time while providing a reasonable opportunity for the operation of the internal private dispute resolution mechanism before the AFL-CIO. The preparation of a mail ballot election necessarily entails a time delay substantially in excess of the time normally allocated to the AFL-CIO to reach its determination. The elections shall commence on February 17, 1981 with the mailing of ballots to eligible employees. It is not unreasonable to anticipate that the AFL-CIO will have ample opportunity during the intermediate period to conclude its disposition of the Article XX issues and for its affiliates to act in accordance therewith. 15/

15/ President Kirkland of the AFL-CIO and the Article XX umpire are being served with a copy of the decision and direction of election herein.

Accordingly, pursuant to N.J.A.C. 19:2.6(b)(3), the undersigned directs that an election be conducted and that ballots be mailed to employees in each of the four units involved on February 17, 1981 and that the ballots shall be returned to the Commission's postal address on March 9, 1981. Thereafter, the ballots will be tallied.

Those eligible to vote are those unit members who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid-off, including those in military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

CWA, AFSCME, and NJSEA/AFT are directed to file with the Commission the names of the supervisory entities which have been created or which are being created to separately represent supervisors no later than January 19, 1981.

The State is directed to file with the undersigned and with NJSEA/AFT, CWA, and AFSCME, election eligibility lists by unit, consisting of an alphabetical listing by title of the names of eligible voters together with their last known mailing addresses. In order to be timely filed, the eligibility lists must be received by the undersigned no later than January 23, 1981. The eligibility lists shall be simultaneously filed with NJSEA/AFT, CWA and AFSCME with statement of service to the undersigned.

A majority of valid ballots cast by all employees in each unit shall determine the results of the elections. The elections directed herein shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR OF REPRESENTATION

Carl Kurtzman, Director

DATED: December 16, 1980
Trenton, New Jersey