P.E.R.C. NO. 90-114

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (OFFICE OF EMPLOYEE RELATIONS), DEPARTMENT OF TRANSPORTATION,

Respondent,

-and-

Docket No. CO-H-89-359

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Office of Employee Relations), Department of Transportation violated the New Jersey Employer-Employee Relations Act when it denied requests that DOT employees represented by the Communications Workers of America, AFL-CIO be allowed to solicit DOT employees during non-working time in non-working areas about employment conditions.

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General (Stephen M. Schwartz, Deputy Attorney General)

For the Charging Party, David Sherman, attorney

DECISION AND ORDER

On June 1, 1989, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State of New Jersey (Office of Employee Relations), Department of Transportation. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34-13A-1 et seq., specifically subsection 5.4(a)(1),[1/] when it denied CWA's

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1/ This subsection prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. The charge also alleges violations of subsections 5.4(a)(2) and (3), but these allegations were withdrawn at the hearing.

request to set up an information table in the lobby of the Department of Transportation ("DOT") during lunch.

On August 10, 1989, a Complaint and Notice of Hearing issued. On August 18, 1989, the employer filed its Answer. It asserts it had a contractual right to deny this request.

On January 9, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by February 20, 1990.

On April 18, 1990, the Hearing Examiner issued his report. H.E. No. 90-44, 16 NJPER ___ (¶____ 1990). He concluded that the denial violated subsection 5.4(a)(1).

On May 8, 1990, the employer filed exceptions. It asserts that the Hearing Examiner erred in: (1) finding that the table was to be staffed by CWA shop stewards and contacts who were DOT employees; (2) finding that CWA's request was denied because it was partisan; (3) finding that contract articles 26 and 33 did not justify the denial; (4) mischaracterizing the employer's contractual arguments; (5) finding a violation absent proof of interference with the rights of any named employees, and (6) mischaracterizing the matter as a "free speech" case rather than one appropriate for deferral.

On May 21, 1990, CWA filed a response. It urges adoption of the Hearing Examiner's recommendations.

The Hearing Examiner's findings of fact (H.E. at 3-8) are accurate. We incorporate them and add these facts.

We add to finding no. 4 that the Department of Health had proposed the air quality regulation and CWA wanted the Commissioner of Labor to promulgate it. DOT employees had reported many air quality problems to CWA (T28). CWA representative Tarlau told DOT representative Cucchiario that the information table would be staffed by CWA shop stewards and union contacts (T24). These DOT employees would have solicited co-employees during their lunch breaks on May 16, 1990.

We add to finding no. 6 that Employee Relations representative Collins did not know who was going to staff the table (T56). Cucchiario did not testify. We find that he was told DOT employees would staff the table, but he did not tell Collins that.

We add to finding no. 9 the text of Article 26, Section A. That section, entitled Access to Premises, provides in part:

> Union officials and duly authorized Union representatives, whose names and identification have been previously submitted to and acknowledged by the State, shall be admitted to the premises of the State on Union business. Requests for such visits shall be directed with reasonable advance notice to State officials who shall be designated by the State and shall include the purpose of the visit, proposed time and date and specific work areas involved. Permission for such visits shall not be unreasonably withheld. Provided that requests have been made pursuant to this paragraph, such Union Officials shall have the opportunity to consult with employees in the unit before the start of the work shift, during lunch or breaks, or after completion of the work shift. The State will designate appropriate places for such meetings at its facilities. Access to the premises as set forth in this paragraph shall not be given by the State to any employee organization other than to the Union set forth herein or to any officer or representative of such other employee organization for the purpose of communicating with employees in this unit.

This is a narrow dispute. We find a technical violation of subsection 5.4(a)(1), but order no relief besides a cease-and-desist order.

We have found that employer representative Cucchiario was told that CWA shop stewards and union contacts -- DOT employees -- wanted to ask other DOT employees on their lunch breaks about their views on an air quality regulation. We need not canvass all the cases on solicitation and access rules or determine the outer limits of those rules: the facts fit comfortably within the boundaries of the right of employees to communicate with each other about employment conditions. See, e.g., Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983); see also Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). We hold that the denial of this request violated subsection 5.4(a)(1).[2/]

While we find this violation, we recognize OER representative Collins based his denial upon his good faith interpretation of a contractual clause limiting the access of non-employees to State property.[3/] Cucchiario did not tell

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2/ Proof of actual interference with the rights of named employees is not necessary to find a violation. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83). Who filed and prosecuted the charge is also irrelevant: the majority representative may vindicate employee rights.

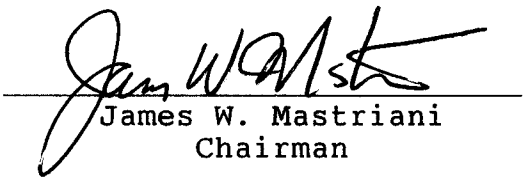
3/ We need not decide whether this interpretation was correct or whether disputes over non-employee access should be deferred to binding arbitration.

Collins that the table was to be staffed by DOT employees on their lunch breaks. Given this miscommunication within the employer ranks and absent any indication of bad faith or repeated misconduct, we see no reason to order any relief besides the mandatory cease and desist order under N.J.S.A. 34:13A-5.4(c).

ORDER

The State of New Jersey (Office of Employee Relations), Department of Transportation is ordered to cease and desist from interfering with its employees in the exercise of the rights guaranteed to them by the Act, particularly by denying requests that DOT employees represented by CWA be allowed to solicit DOT employees during non-working time in non-working areas about employment conditions.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Smith and Ruggiero were not present.

DATED: Trenton, New Jersey
June 25, 1990
ISSUED: June 26, 1990

H.E. NO. 90-44

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

In the Matter of

STATE OF NEW JERSEY (OER),
DEPARTMENT OF TRANSPORTATION,

Respondent,

-and-

Docket No. CO-H-89-359

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent State independently violated N.J.S.A. 34:13A-5.4(a)(1) when its representative, David Collins, on May 11, 1989, denied the request of CWA to set up an informational table in the lobby of the Department of Transportation for the purpose of soliciting signatures upon a petition to the Commissioner of the Department of Labor, urging the promulgation of a pending regulation pertaining to the quality of the air in office buildings. The table was to be staffed by CWA-represented employees of DOT on their lunch hour [nonworking time in a nonworking area]. The Hearing Examiner cited Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 457 (¶14196 1983) but relied principally upon federal precedent: Eastex, Inc. v. NLRB, 437 U.S. 556, 98 LRRM 2717 (1978), Perry Ed. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 112 LRRM 2766 (1983) and Board decisions on "solicitation," beginning with Peyton Packing Co., Inc., 49 NLRB 828, 12 LRRM 183 (1943), enf'd., 142 F.2d 1009, 14 LRRM 792 (5th Cir. 1944). A strong cease and desist order was recommended.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 90-44

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

In the Matter of

STATE OF NEW JERSEY (OER),
DEPARTMENT OF TRANSPORTATION,

Respondent,

-and- Docket No. CO-H-89-359

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Hon. Robert J. Del Tufo, Attorney General
(Stephan M. Schwartz, D.A.G.)

For the Charging Party, David Sherman, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 1, 1989, by the Communications Workers of America, AFL-CIO ("Charging Party" or "CWA") alleging that the State of New Jersey (OER), Department of Transportation ("Respondent," "State" or "DOT") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on or about March 23, 1989 and again on March 30th, the DOT permitted a non-union private organization to set up a table for solicitation/information purposes in the lobby of the main

DOT building; that on a regular basis DOT permits HMO's to set up solicitation/information tables in the DOT lobby; that on a regular basis DOT permits the "DOT-TOT" organization to set up solicitation/information tables in the DOT lobby; that on May 4, 1989, CWA requested permission to set up an information table in the DOT lobby; that on May 11, 1989, this CWA request was denied by a representative of DOT and CWA was informed that the Office of Employee Relations ("OER") was consulted by DOT before denying CWA's request; all of which is alleged in the Unfair Practice Charge to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 10, 1989. Pursuant to the Complaint and Notice of Hearing, and after several adjournments, a hearing was held on January 9, 1990, in Trenton, New Jersey, at which time the parties were given an

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." At the hearing, infra, CWA withdrew the Section 5.4(a)(2) and (3) allegations (Tr 13).

opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by February 26, 1990.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination but only as to the Section 5.4(a)(1) allegation, supra.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The State of New Jersey (OER), Department of Transportation, is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The applicable collective negotiations agreement between the parties is that for the Professional Unit, which was effective during the term July 1, 1986 through June 30, 1989 (R-1; Tr 60). The relevant provisions will be referred to hereinafter.

4. On May 4, 1989, CWA Local 1032 Senior Staff Representative James Tarlau telephoned Kenneth Cucchiario, who is in charge of the Employee Relations Unit at DOT (Tr 23, 24). The

purpose of this call was to obtain permission to set up an informational table in the Engineering and Operations Building lobby, which is the main facility for DOT employees. The lobby area is a thoroughfare for about 1,000 employees and is situated between the main elevators and the cafeteria. [Tr 24, 25]. More specifically, Tarlau testified that the purpose of the informational table was to explain to employees in DOT a new proposed regulation pending in the Department of Labor that would regulate the quality of air inside office buildings.[2/] Further, CWA intended to solicit employees to sign a petition to the Commissioner of Labor, requesting that he "promulgate the standards." [Tr 24, 28, 38, 39]. This informational table was to be staffed by CWA shop stewards and "union contacts" who were DOT employees. The table was to be in operation in the DOT lobby between 11:30 a.m. and 1:00 p.m. during the one-half hour lunch periods of the approximate 1,000 employees in the building, 85% to 90% of whom are represented by CWA. [Tr 24, 25, 29, 39].[3/]

5. Although Tarlau could not testify with certainty that Cucchiario was the proper DOT representative to contact for

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2/ Tarlau testified without contradiction that employees in the Engineering and Operations Building "...had had numerous problems with the quality of air in the building..." (Tr 28).

3/ Tarlau acknowledged that while it was the intent to solicit signatures from CWA-represented employees, it would not have been possible to distinguish between those employees represented by CWA and the remaining 10% to 15%, who were represented by other employee organizations or who were unrepresented (Tr 38, 39).

permission to set an informational table, he did testify without contradiction that in the past Cucchiario was the person that he usually dealt with when there was a CWA request "...to set up a table..." (Tr 37, 38).

6. Cucchiario's response to Tarlau's request of May 4th was that he would have to discuss the matter with his supervisor and probably with the Office of Employee Relations ("OER")[Tr 25]. About one week later, on May 11th, Cucchiario advised Tarlau that his request for an informational table was denied. Cucchiario explained to Tarlau that he had discussed the matter with David Collins of OER and that Collins had taken the position that the table was "...not an appropriate thing for the Union to do..." [Tr 25-27].

7. A few days after Collins told Cucchiario to deny Tarlau's request, John Loos, a CWA International Representative, telephoned Collins and asked him why CWA's request to use the lobby had been denied. Collins told Loos that it was not an appropriate topic for lobby use but that he, Collins, could arrange for CWA to have a room at DOT for a meeting and that CWA might post a notice on its bulletin board announcing the meeting. [Tr 49]. Collins also repeated this offer to Tarlau in the summer of 1989 but Tarlau stated that it was not "...the same thing. We want the lobby..." (Tr 49, 50).

8. Sometime in the summer of 1989, Tarlau and Loos together spoke to Collins about the instant Unfair Practice Charge,

which had been filed on June 1, 1989. According to Tarlau, Collins stated that he "...felt that the nature of our request had been too political...and that the State just couldn't let organizations do that kind of political lobbying on State premises..." [Tr 31, 40]. Collins denied using the word "political" but acknowledged that OER does not permit "...partisan activities to be set up in the lobby..." (Tr 50). Collins also testified that CWA was by this proposed activity "...advocating the union cause..." and that the only position he took was that "the lobby" was not an "...appropriate place under the contract..." (Tr 50).[4/]

9. Collins also testified as to "contract" reasons for OER's not having granted CWA's request of May 4th to set up an informational table:

First -- Collins referred to Article XXVI,[5/] "Union Rights and Representatives," [R-1, pp. 43-47] Section A, "Access to Premises," noting that "...the State has the right to designate appropriate places for such meetings..." (Tr 47). Collins noted further that Section A states, in part: "Access to the premises as set forth in this paragraph shall not be given by the State to any

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4/ The Hearing Examiner finds it unnecessary to make a credibility determination on the apparent discrepancy between the testimony of Tarlau and Collins as to whether Collins used the term "political" or the term "partisan" since the distinction appears to be one without meaning.

5/ Although the various Articles in the Agreement (R-1) are referred to by Roman numerals, the Hearing Examiner will herein substitute the corresponding Arabic numerals as the parties have done for ease of reading.

employee organization other than to the Union set forth herein or to any officer or representative of such other employee organization for the purpose of communicating with employees in this unit" (Tr 47, 48). Since the requested table was for the purpose of talking "...about air quality and health and safety..." Collins concluded that this purpose necessarily related to terms and conditions of employment and, thus, it "...came under the access to premises article..." (Tr 48). Further, according to Collins, since "...all the other unions (i.e., IFPTE) have similar language in their contract(s) with respect to exclusivity to the employees that they represent...it would not be appropriate for them [CWA] to set up a table in the lobby with regard to health and safety." [Tr 48, 55].

Second -- Collins also testified regarding Article 33, "Safety," [R-1, pp. 55-57], stating that while it "...covers safety...it addresses health and safety. It goes essentially to safety guidelines and uses terminology such as safety standards, safety guidelines, health standards, health guidelines. And as far as I was concerned, air quality, which has been the subject of numerous grievances, is something that comes under the health and safety article..." (Tr 48, 49). Collins insisted throughout his testimony that since "health and safety problems" were within the exclusive province of Article 33, the "Access" provision of Article 26 exclusively governed the CWA request of May 4th and afforded the State a contractual basis for its decision to deny this request.

10. Tarlau testified without contradiction that CWA has observed other organizations setting up tables in the DOT lobby such as Deborah Hospital and DOT-TOT. Collins' only response was that they were not "labor relations groups" and were not under contract with the State (Tr 25, 54).

11. Finally, Tarlau testified that in October 1989, when CWA Local 1032, wanted to set up a voter registration table in the DOT lobby, he spoke to Cucchiario and Collins and learned that permission for such a request had already been granted to CWA Local 1033 (Tr 29, 51). Therefore, the same permission was granted to Local 1032 (Tr 29-31, 51).

ANALYSIS

The State Department of Transportation Independently Violated Section 5.4(a)(1) Of The Act When On May 11, 1989, OER Refused The Request Of CWA To Set Up An Informational Table In A DOT Lobby For The Purpose Of Soliciting Signatures On A Petition In Support Of A Proposed Regulation On Air Quality In Office Buildings.

I.

Deferral To The Agreed Upon Grievance Procedure/Contractual Waiver

The position of DOT, both in the testimony adduced at the hearing and in its legal argument, treats the dispute as one governed solely by the agreement between the parties (R-1). In particular, the State points to Article 26, Section A and Article 33, Sections A-C & F (see Finding of Fact No. 9, supra, and State's Brief, pp. 4-7). As to Article 26, Section A, "Access to Premises," the State would apply this provision to bar employees represented in

a CWA unit, some of whom are also shop stewards, from staffing an informational table to solicit signatures on a petition to the Commissioner of the Department of Labor, requesting that he promulgate a regulation on the quality of air inside office buildings. The employee staffing of the informational table was to be done on their one-half lunch hours between 11:30 a.m. and 1:00 p.m. [nonworking time] in the DOT lobby [a nonworking area]. [See Finding of Fact No. 4, supra, and Tr 24, 25, 28].

A plain reading of Article 26, Section A, "Access to Premises" leads ineluctably to the conclusion that the language pertains to non-employee CWA representatives and not to employees of the State, be they shop stewards, union contacts or whatever.

It is instructive to examine the terminology negotiated into Section A. For example, note such phrases as "Union officials" and "duly authorized Union representatives, whose names and identification have been previously submitted..." to the State; that "Requests for such visits...shall include the purpose..."; that "Permission for such visits shall not be unreasonably withheld..."; and, finally, that "...The State will designate appropriate places for such meetings at its facilities..." Because the right of access of employees qua employees is involved herein rather than the rights of non-employee CWA representatives as defined in Section A, the

Hearing Examiner concludes that Article 26, Section A is irrelevant to the resolution of the issue at hand.[6/]

Turning next to the cited provisions in Article 33, "Safety," the State contends that this Article also supports its position that CWA's request is governed by the agreement. The State reasons that since the proposed CWA petition dealt with the quality of air inside office buildings and a proposed regulation before the Commissioner of Labor, the issue was one of "Safety." In other words, because the State has the contractual responsibility for "Safety," which is set forth in broad terms under Article 33,[7/] and since CWA's Charge essentially raises solely a "safety" question, it has waived its right to pursue the matter under the Act. Thus, the doctrine of contractual waiver must be applied.

The doctrine of contractual waiver is specifically discussed in the Charging Party's Brief (pp. 15-17) and is raised by implication in the State's Brief (pp. 6, 7, 10, 11). However, this

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6/ The instant facts are readily distinguishable from those in an earlier dispute between the same parties [see I.R. No. 89-16 (unreported) and I.R. No. 89-20, 15 NJPER 319 (¶20142 1989)].

7/ Inter alia, to "...make reasonable provisions for the safety and health of its employees..."; "...to cooperate in maintaining and improving safe working conditions and health protection for the employees..."; to investigate "...complaints of unsafe or unhealthful conditions..."; to "...establish a Joint Safety and Health Committee for the purpose of discussing safety and health problems..."; and that "...The purpose of the Joint Committee meetings is to provide the Union with an opportunity to raise and discuss important local safety and health matters such as...HVAC..." [see Article 33, Sections A, B, C, F(1) & (2); R-1, pp. 55-57].

doctrine has no application to the case at bar since a close reading of the contractual provisions cited by the State [Article 26, Section A and Article 33][8/] fails to disclose any provision which could conceivably satisfy the well-settled rule that contract language alleged to constitute a waiver must be clearly and unmistakably expressed before a statutorily protected right can be waived: Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 112 LRRM 3265, 3271 (1983); Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636, 111 LRRM 2165, 2168 (2nd Cir. 1982); and State of N.J., P.E.R.C. No. 86-64, 11 NJPER 723, 725 (¶16254 1985). Hence, any express or implied suggestion by the State that CWA has clearly and unmistakably waived its right to a decision on the merits of its Charge, as amended, by virtue of the terms of the 1986-89 collective agreement, is summarily rejected.

The State next proceeds to argue that the instant dispute must be deferred to the parties' agreed upon contractual grievance procedure under State of N.J. (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). According to the State, there is precedent for deferral by reason of CWA having invoked the grievance procedure in 1984 on behalf of an employee who

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8/ Or any other Article in the collective agreement (R-1).

claimed that cigarette smoke from fellow workers contaminated her work space, causing eye irritation and respiratory problems, etc.[9/]

The Hearing Examiner rejects as inapposite the Commission's decision in Human Services because that case dealt essentially with the devising of a test for determining whether an unfair practice charge was "...predominantly related to subsection 5.4(a)(5)'s obligation to negotiate in good faith or is an unrelated breach of contract claim which does not implicate any obligations and policies arising under our Act..." (10 NJPER at 422). CWA has not in the case at bar alleged, even remotely, a breach of contract either under Article 26, Article 33 or any other Article of the collective agreement. It is noted further that CWA's original allegations of violations of the Act referred only to Sections 5.4(a)(1) through (3) and never included Section 5.4(a)(5) of the Act. Since Human Services dealt solely with Section 5.4(a)(5) [and derivatively (a)(1)], the Hearing Examiner fails to see how deferral to arbitration could possibly be embraced within an alleged independent violation of Section 5.4(a)(1).

9/ The State has attached to its Brief the Opinion and Award of the Arbitrator, denying the grievance [State's Brief, Appendix, Exhibit 1].

II.

Solicitation

The Hearing Examiner has concluded that CWA has established an independent violation of Section 5.4(a)(1) of the Act.[10/] While this case may be unique as to the facts presented, the Commission has previously considered the problem raised by an employer's limitation on solicitation: Bergen Cty., H.E. No. 83-44, 9 NJPER 416 (¶14190 1983), adopted in part P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983).

One of the many facets involved in Bergen dealt with the County's action in excluding non-employee representatives of a rival organization from meeting with employees in one of the County's parks, i.e., prior permission was required by regulation (9 NJPER at 420). The Hearing Examiner there cited Perry Ed. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 112 LRRM 2766 (1983) in support of his conclusion that the County's public parks were a public forum. The Supreme Court in Perry had stated as its initial premise that "...[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be

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10/ A public employer independently violates Section 5.4(a)(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Also, the Charging Party need not prove an illegal motive in order to establish an independent violation of Section 5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

evaluated differ depending on the character of the property at issue..." [112 LRRM at 2769]. [Emphasis supplied]. The Court then distinguished among three different categories of public property in the constitutional spectrum, ranked as follows:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Carey v. Brown, 447 U.S. 455, 461 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open alternative channels of communication. United States Postal Service v. Council of Greenburgh, 453 U.S. 114, 132 (1981)...
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> A second category consists of public property which the state has opened for use by the public as a place for expressive activity...Although a state is not required to indefinitely...retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest....
>
> Public property which is not by tradition or designation a forum for public communication is governed by different standards...In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes...as long the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.
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> [12 LRRM at 2769-70]. [Emphasis supplied]

[12 LRRM at 2769-70]. [Emphasis supplied]

Based upon the Hearing Examiner's reading of Perry, and the constitutional protection, which appeared applicable to a public park of the type involved in Bergen County, he held that the County's regulation, limiting the use of its public parks, "...was discriminatorily based, and violates First Amendment rights...once it [the rival organization] had complied with reasonable permit requirements..." (9 NJPER at 428).[11/] However, the Commission disagreed with the Hearing Examiner and concluded that, notwithstanding the County's regulation governing the use of its parks, its conduct did not "impermissibly" interfere with the rival organization's attempt to organize the County employees involved. [9 NJPER at 457].

Although the Commission in Bergen Cty. was confronted with the issue of solicitation on public property and quoted extensively from Perry, supra, its decision is of limited applicability to the instant case since there the facts involved solicitation by non-employee representatives on public property and no violation was found. Thus, given the absence of any clear Commission precedent on the issue at hand, the Hearing Examiner is constrained to resort to federal precedent in the private sector. The New Jersey Supreme Court has approved the use of federal precedent in appropriate cases

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11/ The Hearing Examiner also relied on several NLRB and federal court solicitation/access decisions, e.g., Montgomery Ward & Co., 256 NLRB No. 134, 107 LRRM 1307, enf'd., 692 F.2d 1115, 111 LRRM 3021 (7th Cir. 1982).

since our Act is modeled after the National Labor Relations Act: Lullo v. IAFF, Local 1066, 55 N.J. 409, 424-426 (1970) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1, 10 (1978).

CWA first cites Eastex, Inc. v. NLRB, 437 U.S. 556, 98 LRRM 2717 (1978) where the Supreme Court affirmed the Fifth Circuit, which had enforced an order of the Board, which found that the employer violated Section 8(a)(1) of the NLRA when it barred employees from distributing two of four parts of a union newsletter on nonworking time in a nonworking area because it objected that the content was political was not employment related [550 F.2d 198, 94 LRRM 3201 (1977)].[12/]. The facts in Eastex were these: the Vice-President of the Local Union, an employee of Eastex, asked permission to distribute a newsletter to employees during nonworking time in a nonworking area; this request was ultimately refused by the Personnel Director; the newsletter [reproduced in full at 98 LRRM, pp. 2724-25] was essentially divided into four parts. The first and fourth parts urged employees to support the union and extolled the benefits of union solidarity. The second part encouraged employees to write to their legislators and urge them to oppose incorporating the Texas "right-to-work" statute into the State Constitution and, also, warning that this would weaken unions and strengthen employers at the bargaining table. Finally, the

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12/ See also, Beth Israel Hospital v. NLRB, 437 U.S. 483, 98 LRRM 2727 (1978)[decided on the same date as Eastex].

third part stated that the President of the United States had recently vetoed a minimum wage bill and that "As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today." The employer based its denial of permission to distribute the newsletter upon its objection to the second and third parts of the newsletter because it did not perceive any way in which these two parts "...related to our association with the Union..."[13/]

The Supreme Court in Eastex made two inquiries: first, whether, apart from the location of the Union's activity, the distribution of its newsletter was the kind of concerted activity protected from employer interference by Section 7 of the Act, and second, if so, whether the fact that the distribution activity occurred on the employer's property gave rise to a countervailing employer interest, which outweighed the exercise of Section 7 rights in that location.

Tracking the above questions, the Court first quoted from Section 7 of the NLRA, which provides, in part, that employees have the right "...to engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection..." The Court rejected the employer's contention that an employee is only

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13/ The facts as found in Finding of Act No. 4, supra, bear a marked similarity to the facts in Eastex except that Eastex involved the distribution of a newsletter by employees and this case deals with DOT employees providing explanations prior to soliciting signatures on a petition.

protected in the exercise of activity "...within the scope of the employment relationship..." and that Section 7 should not protect any activity that could be characterized as "political." [98 LRRM at 2719]. The Court went on to state that it found no warrant for the employer's view that employees lose their protection under the "mutual aid or protection" provision of Section 7 when they seek to improve their terms and conditions of employment "...through channels outside the immediate employee-employer relationship..." (98 LRRM at 2720).

The Court stated that Congress knew that the cause of labor was often advanced on fronts other than the immediate employment context. The Board has recognized this fact by protecting employees from retaliation when they seek to improve their working conditions through resort to administrative and judicial forums, and that appeals to legislators to protect their interests as employees are within the scope of Section 7 (footnote citations omitted) [98 LRRM at 2720]. "...To hold that activity of this nature is entirely unprotected...would leave employees open to retaliation for much legitimate activity that could improve their lot as employees..." (98 LRRM at 2720). The Court next noted that it was, of course, true that some activity bears a less immediate relationship to the interests of employees than other activities but delineating the precise boundaries is a task for the Board to perform in the first instance (98 LRRM at 2721).

Continuing with the first area of inquiry, supra, the Court sustained the Board's determination that the distribution of the second and third parts of the Union's newsletter [i.e., urging legislators to oppose incorporating the "right-to-work law" into the State Constitution and criticizing the Presidential veto of the minimum wage law] were protected under Section 7. The Court noted that as to the second part, the Board had concluded that writing to legislators on the "right-to-work" law was protected because union security is "...central to the union concept of strength through solidarity..." (98 LRRM at 2721). In sustaining the Board on the third part of the newsletter, the Court said that the Board was entitled to take cognizance of the widely recognized impact that a rise in the minimum wage might have on the level of negotiated wages generally and that the Union's call for employees to vote for persons who supported an increase in the minimum wage and to oppose those who did not could fairly be "...characterized as concerted activity for the mutual aid or protection..." of Eastex's employees (98 LRRM at 2722).

The final area of inquiry was whether or not "...the Board erred in holding that...(Eastex's)...employees may distribute the newsletter in nonworking areas of...(Eastex's)...property during nonworking time..." (98 LRRM at 2722). Here the Court relied upon Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620 (1945) and found not applicable its holding in NLRB v. Babcock & Wilcox

Co., 351 U.S. 105, 38 LRRM 2001 (1956).[14/] The Court Republic Aviation had upheld the Board's ruling in that case that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas during nonworking time absent a showing by the employer that a ban was necessary to maintain plant discipline or production. However, the Court in Babcock had refused to extend Republic Aviation to non-employees who sought to enter the employer's property to distribute union organizational literature.

In conclusion, the Court found that Eastex had violated Section 8(a)(1) of the NLRA by refusing to permit the Union to distribute the newsletter containing the second and third parts thereof, expressly holding that Eastex had made no attempt to show that its management interests would have been prejudiced in any manner by the distribution. Thus, the Court held that "in its view "...any incremental intrusion..." on the property rights of Eastex from the distribution of the newsletter "...would be minimal..." [98 LRRM at 2724]. [Emphasis supplied]. The Court had earlier found that Eastex had "...made no attempt to show that its management interests would be prejudiced..." (98 LRRM at 2724).

14/ In Hudgens v. NLRB, 424 U.S. 507, 91 LRRM 2489 (1976) the Supreme Court had emphasized the distinction between Republic and Babcock: "...A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved. (Republic)...This difference is 'one of substance.'...Babcock..." (424 U.S. at 521-22, n. 10; 91 LRRM at 2495, n. 10).

In UAW Local 174 v. NLRB, 645 F.2d 1151, 106 LRRM 2561 (DC Cir. 1981), the Court, "guided by Eastex," refused to disturb the Board's decision that a leaflet[15/] planned for distribution by employees in nonworking areas of the plant during nonworking time was not protected activity under Section 7 of the NLRA. The Court observed that the Supreme Court in Eastex had allowed for a future case where "...the relationship of a proposed activity to employees' interests as employees 'becomes so attenuated that [the] activity cannot fairly be deemed to come within'..." the ambit of Section 7's "mutual aid or protection" clause. [437 U.S. at 567-68, 106 LRRM at 2563].

The Court agreed with the Board that the UAW's leaflet, urging a vote for Union-endorsed candidates, had as its principal thrust the inducing of employees to vote for the endorsed candidates and "not to educate them on political issues relevant to their employment..." 106 LRRM at 2563).[16/] Thus, the UAW's leaflet fell "...at the unprotected end of the spectrum..." [Id.]

However, in Union Carbide Corp. v. NLRB, 714 F.2d 657, 114 LRRM 2129 (6th Cir. 1983) the Court enforced that part of the

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15/ The leaflet featured Union-endorsed candidates for Governor and other offices and described these candidates as "committed to working for the best interests of working men and women."

16/ The Court also noted that in Eastex although the Union's members were urged to "elect our friends" and were reminded to register to vote, no particular candidates were named and no election was pending. "The focus of the material was issues, not candidates..." (106 LRRM at 2563).

Board's decision [259 NLRB 974, 109 LRRM 1062 (1982)], which had concluded that when the employer confiscated a "Taxpayer's Petition" from the lunch room of one of its buildings it ran afoul of the Supreme Court's holding in Eastex, supra. The Petition, which had been posted by the chief steward, objected to Union Carbide's use of "our tax dollars for anti-union activities..." It called upon Congress and the President "...to investigate and stop this improper use of our taxes..." (114 LRRM at 2133). The Court deemed the employer's confiscation of the union's Petition unlawful, holding that:

> ...Interference with employee circulation of protected material in nonworking areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interests. Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793... [114 LRRM at 2133]. [Emphasis supplied].

A most significant NLRB case on the law of solicitation is Stoddard-Quirk Mfg. Co., 138 NLRB 615, 51 LRRM 1110 (1962), which is still good law.[17/] The Board in Stoddard traced the development of the principles governing lawful and unlawful solicitation, noting initially that "...a real distinction exists in law and in fact between oral solicitation on the one hand and distribution of literature on the other..." [51 LRRM at 1111]. [Emphasis supplied]. Generally, the development of the law regarding oral solicitation:

17/ See, for example: Vought Corp., 273 NLRB No. 161, 118 LRRM 1271, 1272 (1984); Our Way, Inc., 268 NLRB No. 61, 115 LRRM 1009, 1010 (1983); and NLRB v. Permanent Label Corp., 657 F.2d 512, 106 LRRM 2211, 2215 (3rd Cir. 1981).

> ...has been attended by less travail than that regarding distribution of literature. Almost from the outset the Board has held with court approval that an employer may in the normal situation make and enforce a rule forbidding his employees to engage in such union solicitation during working time ("working time is for work"), but that a broad rule banning such activity during nonworking time is presumptively invalid. Peyton Packing Company, 49 NLRB 828, 843-844, 12 LRRM 183 [1943], cited with approval in Republic Aviation [Corp. v. NLRB], 324 U.S. [793] at 803, 16 LRRM 620 [1945].
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> [51 LRRM at 1112].

Although the facts in Stoddard involved a shop rule that prohibited unauthorized distribution of literature on the employer's premises rather than oral solicitation, the Board used the occasion to state its belief that "...to effectuate organizational rights through the medium of oral solicitation, the right of employees to solicit on plant premises must be afforded subject only to the restriction that it being on nonworking time..." [51 LRRM at 1113]. [Emphasis supplied].

In the seminal case of Peyton Packing Co. Inc.,[18/] cited by the Board in Stoddard, supra, the Board invalidated a broad no-solicitation rule which banned solicitation while on company property or while on company time. After conceding that an employer may promulgate and enforce a rule prohibiting union solicitation during working hours, the Board stated that "...It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he

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18/ 49 NLRB 828, 12 LRRM 183 (1943), enf'd., 142 F.2d 1009, 14 LRRM 792 (5th Cir. 1944).

wishes without unreasonable restraint, although the employee is on company property..." [49 NLRB at 843-44, 12 LRRM at 183].[19/]

In Harolds Club v. NLRB, 758 F.2d 1320, 119 LRRM 2141 (9th Cir. 1985), enforcing 267 NLRB 1167, 114 LRRM 1123 (1983), the employer operated a large casino, which had promulgated and enforced a broad no-solicitation rule. An off-duty games dealer discussed union membership with six other games dealers in a public bar, which is adjacent to, and slightly raised from the casino's gambling area. By practice it was not unusual for off-duty employees to meet in the bar. As part of the off-duty dealer's solicitation, he passed around authorization cards but was interrupted by the floor manager, who instructed him to cease the activity or leave the premises. The dealer left. After a thorough review of the prior history of solicitation decisions by the Supreme Court and the Board, including references to Republic Aviation, Peyton Packing and related cases, the Court found a violation of Section 8(a)(1) of the NLRA and stated:

> The guiding principle the Board applied permits solicitation in a facility, as a restaurant, on an employer's premises so long as the solicitation comports with the normal use of the facility and is not disruptive...Its decision is...consistent with the decisions that have prevented enforcement of a ban on

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19/ In Our Way, Inc., supra, the Board, citing Republic Aviation, Peyton Packing and Stoddard-Quirk, overruled a 1981 decision, which had departed unnecessarily from prior Board precedent by having failed to recognize the Board's longstanding distinction between "working time" and "working hours." The Board in Our Way saw no compelling reason to abandon the prior standard.

> solicitation during off-duty hours where working employees were not the targets of the organizational effort... [119 LRRM at 2143]. [Emphasis supplied].

The Hearing Examiner is cognizant of the fact that the protected activities enumerated in Section 5.3 of our Act are not as broadly drawn as is Section 7 of the NLRA. Thus, Section 5.3 provides that: "...Public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..." However, given the approach taken by the Hearing Examiner and the Commission in Bergen Cty., supra, where the issue of solicitation on public property was addressed, there was no indication given that such activity, in an appropriate case, was not an activity protected by Section 5.3 of the Act. Thus, the Hearing Examiner concludes that the DOT lobby was on May 11, 1989 "public property" which, if not designated as a traditional public forum for public communication, was subject to regulation but only to the extent that any "...regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view...": Perry Ed. Ass'n v. Perry Local Educator's Ass'n, supra (112 LRRM at 2770). Therefore, the DOT lobby was a suitable nonwork area for the conduct of CWA's proposed solicitation activity, there being no regulation purporting to ban such activity as of May 4th.

The decision of Collins to deny CWA's request to set up an informational table on May 11, 1989, on the ground that the activity

was "partisan," constituted a belated promulgation of an overly broad no-solicitation rule, which illegally restricted a lawful activity by CWA-represented employees in a nonworking area on nonworking time.[20/] The alleged "partisan" aspect of the proposed petition-signing activity must fall, particularly in the face of Eastex and Union Carbide, since CWA's concern with the promulgation of a regulation covering the quality of air in office buildings was as much a work-related interest as were the interests of the employees in Eastex or the single employee in Union Carbide.[21/]. Hence, the parameters of protected activity under Section 7 of the NLRA as adjudicated in Eastex and Union Carbide appear broad enough to cover the activity proposed herein.

Several outstanding matters remain to be addressed:

1. Although Collins pleaded ignorance as to when and by whose authority such organizations as Deborah Hospital and DOT-TOT were permitted to solicit in the DOT lobby, he did not deny the fact that such had occurred prior to CWA's request of May 4, 1989. Thus, another defect in Collins' broad no-solicitation rule is that its application resulted in disparate treatment since CWA's proposed solicitation was barred while the solicitation by the above charitable organizations were permitted. Many federal court and Board cases have dealt with disparate treatment in the application of broad no-solicitation rules. See, for example: Lance, Inc., 241

20/ See Peyton Packing, Stoddard-Quirk and subsequent NLRB cases cited above.

21/ Compare the contrary situation in UAW, supra.

NLRB 655, 100 LRRM 1560, 1561 (n.5)[1979], where the employer promulgated a broad no-solicitation rule, following which it condoned soliciting for such charities as the Girls Scouts, United Way and the Blood Bank but discharged an employee for soliciting on behalf of a union.[22/]

2. The fact that Collins subsequently offered Loos and Tarlau a meeting room in the DOT building in no way obviates the Hearing Examiner's conclusion that the instant no-solicitation rule was illegally applied by Collins. Since there was no equivalency in the alternative offered, the offer is deemed irrelevant.

3. Finally, the State has adduced no evidence of a compelling management interest sufficient to rebut the presumptive invalidity of Collins' promulgation of the broad no-solicitation rule of May 11, 1989.[23/] It is noted here that in the private sector employers have on occasion successfully defended the application of a broad no-solicitation rule, i.e., rebutted its

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22/ To the same effect, Restaurant Corp. of Amer. v. NLRB, 827 F.2d 799, 126 LRRM 2129, 2135-36 (D.C. Cir. 1987); NLRB v. Sunnyland Packing Co., 557 F.2d 1157, 96 LRRM 2047, 2050 (5th Cir. 1977); and Daylin, Inc., 198 NLRB 281, 81 LRRM 1145, 1147 (1972); enf'd., 496 F.2d 484, 85 LRRM 2818 (6th Cir. 1974).

23/ In fact, the only argument seriously advanced was that of "contract waiver," which has been rejected. Additionally, Collins registered an objection that the proposed CWA activity was "partisan" in nature but this, too, has previously been rejected.

Recall also that in Eastex the Court stated: "...Yet petitioner made no attempt to show that its management interests would be prejudiced in any manner by distribution of these sections [of the leaflet], and in our view any incremental intrusion on...(Eastex's)...property rights...would be minimal..." [98 LRRM at 2724].

presumed invalidity, where the proven objective was to prevent littering, eliminate fire hazards or prevent the disruption of operations: See Erie Marine, Inc., 192 NLRB 793, 78 LRRM 1041, 1042 (1971) and Genesee Merchants Bank, 206 NLRB 274, 84 LRRM 1237 (1973) -- littering. In Stoddard-Quirk, supra, the employer's defense failed for lack of proof: "...The mere assertion that a...rule has this purpose (controlling litter and fire hazards) hardly proves that it is actually necessary...to 'maintain production or discipline'..." (51 LRRM at 1114).

* * * *

Since no valid reason for the denial of CWA's request of May 4, 1989, has been found, the Hearing Examiner must, based on the above authorities, find and conclude that the State independently violated Section 5.4(a)(1) of the Act. An appropriate remedy will be recommended hereinafter.

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent State independently violated N.J.S.A. 34:13A-5.4(a)(1) when its representative, David Collins, on May 11, 1989, denied the request of CWA to set up an informational table in the lobby of the Department of Transportation for the purpose of soliciting signatures upon a petition to the Commissioner of the Department of Labor, urging the promulgation of a pending regulation pertaining to the quality of the air in office buildings, where the

table was to be staffed by CWA-represented employees of DOT on their lunch hour [nonworking time in a nonworking area].

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent State cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to prevent its representatives from denying requests by CWA on behalf of CWA-represented employees of the Department of Transportation to engage in oral or written solicitation during nonworking time in nonworking areas such as the DOT lobby for the purpose of obtaining signatures on petitions related to the improvement of their working conditions, or orally soliciting or distributing literature related to the improvement of their working conditions or the advancement of their economic interests.

B. That the Respondent State take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Alan R. Howe
Hearing Examiner

Dated: April 18, 1990
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to prevent our representatives from denying requests by CWA on behalf of CWA-represented employees of the Department of Transportation to engage in oral or written solicitation during nonworking time in nonworking areas such as the DOT lobby for the purpose of obtaining signatures on petitions related to the improvement of their working conditions, or orally soliciting or distributing literature related to the improvement of their working conditions or the advancement of their economic interests.

Docket No. CO-H-89-359

STATE OF NEW JERSEY (OER)
DEPARTMENT OF TRANSPORTATION
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.