P.E.R.C. NO. 88-101

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-87-52-72

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1044,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Burlington County Board of Chosen Freeholders violated the New Jersey Employer-Employee Relations Act when it refused CWA's request for the names and home addresses of representation fee payers. The Commission finds that the names and home addresses are relevant to enable the CWA to communicate with the employees it represents.

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COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1044,

Charging Party.

Appearances:

For the Respondent, Robert M. Strang, Assistant Solicitor
(Evan S. Crook, on the brief)

For the Charging Party, Sweeney & Sweeney, Esqs.
(John A. Sweeney, of counsel)

DECISION AND ORDER

On August 18, 21 and 27, 1986, the Communication Workers of America, Local 1044 ("CWA") filed an unfair practice charge and amendments, respectively, against the Burlington County Board of Chosen Freeholders ("County"). The charge, as amended, alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),(2),(3),(4), and (5),[1/] when it refused CWA's request for the names and home addresses of representation fee payers.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

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On December 18, 1986, a Complaint and Notice of Hearing issued. On January 6 and 13, 1987, the County filed an Answer and amended Answer, respectively. It admitted it declined the union's request, but contends the Complaint is res judicata because of D'Elena v. Burlington Cty., 203 N.J. Super. 109 (App. Div. 1985); CWA has other means of communicating with agency fee payers, and fee payers have the statutory rights to refrain from assisting employee organizations and to privacy.

On October 8, 1987, Hearing Examiner Jonathon Roth conducted a hearing. The parties stipulated some facts, examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On March 2, 1988, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-43, 14 NJPER ___ (¶_____ 1988). He concluded that the County violated the Act when it

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1/ Footnote Continued From Previous Page

> 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

refused to release the fee payers' names and addresses. He concluded that this information was relevant to CWA's responsibilities under both the Act and the representation fee statute and that there was no evidence that the fee payers would be harassed if the addresses were released. He further concluded that the fee paying employees had neither a statutory nor constitutional right to preclude the County from releasing their home addresses.

On March 17, 1988, the County filed exceptions. It excepts to the recommendation that it must release the addresses of agency fee payers who, in response to a County survey, stated that they did not want their addresses released to CWA.[2/] It cites U.S. Dept. of Agriculture v. FLRA., ___ F.2d ___, 127 LRRM 2360 (8th Cir. 1988). That case held that a union is generally entitled to the names and addresses of negotiations unit members, but added that employees who do not wish to have their names and addresses disclosed may have their names removed from the union mailing list. 127 LRRM at 2363. It based that conclusion on the exemptions from disclosures under the federal Freedom of Information Act, 5 U.S.C. §552(b).

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. We adopt and incorporate them here.

2/ It did not, however, except to releasing the addresses of fee payers not objecting.

We reject the contention that D'Elena v. Burlington Cty Bd. bars this unfair practice proceeding. D'Elena held that a list of county employees' names and addresses was not a "public record" under N.J.S.A. 47:1A-2 because it was not "required by law to be made, maintained or kept on file." Id. at 115-116. Therefore, it was not subject to release under the "Right to Know Act." N.J.S.A. 47:1A-1 et seq. The doctrine of res judicata is only applicable when the same parties have fairly litigated the same cause of action to a final judgment on the merits. Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984). This dispute concerns a different cause of action: An employer's duty to supply information under the New Jersey Employer-Employee Relations Act.

We agree with the Hearing Examiner that the County was obligated to release the names and home addresses of representation fee payers. An employer must supply information that may help a majority representative carry out its statutory duties. State of New Jersey (Office of Employee Relations), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), app. pending App. Div. Dkt. No. A-2047-87T7; Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981). Names and home addresses are relevant to enable the majority representative to communicate with the employees it represents. As the Court held in Prudential Ins. Co. of America v. NLRB, 412 F.2d 77, 84, 71 LRRM 2254 (2d. Cir. 1969), cert. den. 396 U.S. 928, 72 LRRM 2695 (1969), "it seems manifest beyond dispute that the union cannot discharge its obligation unless it is able to

communicate with those in whose behalf it acts." See also other cases cited in Hearing Examiner's report at 10-11; Navy Dept. v. FLRA, __ F.2d __, 127 LRRM 3010 (3d Cir. 1988).

We decline to create an exception for employees who objected to the release of their home addresses. The case relied upon by the County, U.S. Dept. of Agriculture, was based on a federal statute not applicable here. In any event, that holding is a minority view. Compare Air Force Dept. v. FLRA, __ F.2d __, 127 LRRM 2710 (7th Cir. 1988); Dept. of Health and Human Services v. FLRA, 833 F.2d 1129, 1131-32, 126 LRRM 3235 (4th Cir. 1987); AFGE, Local 1760 v. FLRA, 786 F.2d 554, 122 LRRM 2137 (2d Cir. 1986). We agree with the later 7th Circuit Court of Appeals case that carving out an exception for objecting employees is not required. Air Force.

We consider all the circumstances of a case in deciding the extent of an employer's duty to supply information, including an employee's privacy interest, the union's need for the information and the employer's business reasons for not supplying requested information. Here the scales tip to the union's needs. The union requires the information to comply with its obligation to notify employees under the representation fee statute, N.J.A.C. 19:17-3.3, as well as to communicate with the employees it represents. Further, there is no indication that the union will use this information for any improper purpose. The intrusion on employees' privacy is minimal: they will receive some mail which will ensure their constitutional right to information concerning representation fee payments and will receive other mail which they may elect not to

read. Therefore, under these circumstances, the public interest in collective negotiations and satisfactory performance of the union's statutory duty outweighs the employee's privacy interests in not disclosing a home address.

ORDER

The Burlington County Board of Chosen Freeholders is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to provide CWA, Local 1044 with home addresses of representation fee payers.

2. Refusing to negotiate in good faith with CWA, Local 1044 concerning terms and conditions of employment, particularly by not disclosing relevant information.

B. Take the following affirmative action:

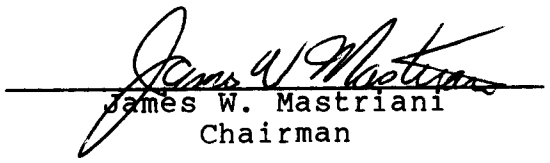
1. Provide CWA, Local 1044 a list of unit agency fee payers together with their home addresses.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "B." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

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

C. The 5.4(a)(2), (3) and (4) allegations are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

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 cease and desist from interfering with, restraining or coercing our employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to provide CWA, Local 1044 with home addresses of representation fee payers.

WE WILL cease and desist from refusing to negotiate in good faith with CWA, Local 1044 concerning terms and conditions of employment, particularly by not disclosing relevant information.

WE WILL provide CWA, Local 1044 a list of unit agency fee payers together with their home addresses.

Docket No. CO-87-52-72

BURLINGTON COUNTY BOARD OF CHOSEN FREEHOLDERS
(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.

H.E. NO. 88-43

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

In the Matter of

BURLINGTON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and-

DOCKET NO. CO-87-52-72

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1044,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that Burlington County violated subsections 5.4(a)(5) and (a)(1) of the Act by refusing to provide the home addresses of agency fee payers to CWA, Local 1044. The Hearing Examiner recommends that the addresses are presumptively relevant to discharge the majority representative's duty of fair representation and duty to personally notify fee payers under the representation fee rules. He also recommends that the addresses should be disclosed under NLRB precedent and that disclosure will not violate subsection 5.3 of the Act and any constitutional right of privacy.

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. 88-43

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

In the Matter of

BURLINGTON COUNTY BOARD OF CHOSEN FREEHOLDERS,

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-and- DOCKET NO. CO-87-52-72

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1044,

Charging Party.

Appearances:

For the Respondent
Robert M. Strang, Assistant Solicitor
(Evan S. Crook, on the brief)

For the Charging Party
Sweeney & Sweeney, Esqs.
(John A. Sweeney, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On August 18, 21 and 27, 1986, the Communication Workers of America, Local 1044 ("CWA" or "Union") filed an unfair practice charge and amended charges against Burlington County Board of Chosen Freeholders ("County" or "Freeholders"). The charge alleged that the Board violated subsections 5.4(a)(1), (2), (3), (4) and (5)[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it refused to comply with CWA's request for a list of names and home addresses of agency fee payers.2/

On December 18, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On January 6 and 13, 1987, the Board filed Answers denying the charge and asserting that D'Elena v. Burlington County Board of Chosen Freeholders ("D'Elena"), 203 N.J. Super 109 (1985), as res judicata, disposed of its duty to provide CWA a list of names and home addresses of agency fee payers.

On October 8, 1987, I conducted a hearing.3/

1/ Footnote Continued From Previous Page

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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ An amended charge contained other allegations which the Union later withdrew.

3/ On January 28, 1987, the parties filed stipulated facts and agreed to waive the hearing and Hearing Examiner's Report and Decision and "send the matter directly to the Commission." On

Footnote Continued on Next Page

Post-hearing briefs were filed by January 11, 1988. Based upon the entire record I make the following:

FINDINGS OF FACT

The parties stipulated:

1. On March 11, 1986, CWA filed a written request with the Freeholders for home addresses of "non-members in the unit...[in order to] communicate directly to these individuals concerning numerous matters..." (J-1). "Non-members" refers to agency fee payers. The Union represents approximately 254 agency fee payers.

2. On March 17, 1986, the County filed a written response denying the March 11 request. The County asserted that it was relying upon D'Elena (J-2).[4/]

3/ Footnote Continued From Previous Page

March 9, 1987, the CWA filed a motion requesting that the Commission vacate the stipulations and issue an order remanding the matter for a plenary hearing before a hearing examiner. Additional statements of position were filed on March 23 and April 7, 1987. The stipulations were vacated and a hearing was scheduled. After granting the parties' alternately requested adjournments, I heard the case on October 7.

4/ Richard D'Elena, "individually and as President of Burlington County Council #16" sought home addresses of all unit employees from the Board (Council #16 later affiliated with CWA). He alleged that as a "citizen" he was refused the list in violation of N.J.S.A. 47:1A-2. The pertinent part of the statute states:

> [A]ll records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission

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I find:

3. CWA represents a unit of about one thousand County employees. The current agreement extends from January 1, 1986 to December 31, 1988 (J-4). Article XVI of the agreement is entitled "Agency Shop." It contains clauses setting the purposes and amount of the fee, deduction and transmission procedures and the demand and

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4/ Footnote Continued From Previous Page

> or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the "custodian" thereof) shall for the purposes of this act, be deemed to be public records. Every citizen of this State, during the regular business hours maintained by the custodian of such records, shall have the right to inspect such records....

In reversing the lower court's granting of D'Elena's motion for summary judgment, the Appellate Division found that "since there is no law or regulation requiring the list of employee home addresses to be kept, [citation omitted], such a list is not a public record and cannot be released under the Act." D'Elena at 116.

The Board contests the Commission's jurisdiction to decide this case because the issues were resolved in D'Elena. Res judicata, the principle asserted, "contemplates that when a controversy between parties is once fairly litigated and determined, it is no longer open to relitigation." Lubliner v. Paterson Alcoholic Bev. Conf. Bd., 33 N.J. 428, 435 (1960). The court and the parties in D'Elena gave no consideration to employee rights under a public employee labor statute. Nor did it reconcile an employer's obligations under the New Jersey Right to Know Act, N.J.S.A. 47:1A-1 et seq., with those under our Act. Finally, the agreement in effect when D'Elena issued contained no agency fee provision, a contractual right which is relevant to CWA's request for home addresses. Accordingly, I reject the res judicata defense.

return system. The Article also includes a "held harmless" clause, and paragraphs conditioning the validity of the Article upon statutory requirements and upon CWA's showing that 60 percent of unit employees are union members.

Article XIV of the agreement gives the Union rights to "place items on existing employee bulletin boards," conduct meetings on County premises during lunch hour, distribute literature on County premises and use County mail delivery service to those offices which "currently occupy or which may occupy in the future a County-owned or leased facility" (J-4).

4. The Freeholders operate approximately eleven facilities throughout the county from its principal office in Mt. Holly. Other offices are in West Hampton, Lumberton and Pemberton Townships, Medford, Cinnaminson, Hainesport, Bordentown and New Gretna (T33-T35).[5/] Most employees work the day shift; some work evening or graveyard shifts (T54).

5. John Lazzarotti has been president of the Union for about three years. The CWA office, open daily from 8 a.m.-5 p.m., is located in Mt. Holly, from which four paid staff agents assist in representing the County employees and about one-thousand others employed elsewhere (T38; T39). CP-1 lists forty-one shop stewards assigned to various job locations in the County. It also lists fifteen departments that have no shop stewards.

5/ "T" refers to the transcript of the hearing.

6. The Union has communicated with agency fee payers by office mail, handbilling, luncheon meetings, notices posted on bulletin boards and literature distributed by shop stewards (T49; T52; T55). Handbilling was ineffective because not enough people volunteered to distribute at all locations and employees generally did not accept literature (T61). CWA did not handbill a solicitation of home addresses of agency fee payers (T77). Although bulletin boards are generally available for union notices, they are not secure and notices are often removed soon after they are posted (T56; T57). CWA posted no notices on bulletin boards requesting home addresses of agency fee payers (T75). The Union held no lunch hour meetings to solicit home addresses (T62). Fee payers do not attend union meetings (T62).

All office mail is distributed by hand from the principal Board office in Mt. Holly. The Union has used office mail twice to communicate with unit members; the first time the mail was not distributed and the second time, mail addressed to the shop stewards was never received (T64; T84). Lazzarotti was unable to establish approximate dates of the two mailings. He deemed the office system "inefficient and not trustworthy..." (T85). CWA did not use office mail to solicit home addresses of agency fee payers. Attendance at union meetings throughout the year is "very, very low" (T62). Finally, Lazzarotti believed that his local is understaffed. He has not sought more employees from the national office in Washington, D.C.

7. Augustus Mosca has been the County's management specialist for labor relations since June 1, 1985 (T118). He reiterated that office mail, handbilling, postings on bulletin boards, shop stewards distributing literature and meetings held during lunch hour were ways the Union could communicate with agency fee payers (T121). He acknowledged that the Union has tried those methods but was unaware of the number of attempts or of the effectiveness of any specific method (T162; T163). Before March 1986, Lazzarotti never communicated with Mosca about efforts to contact agency fee payers (T120). The Union has been provided a list of fee payers (T122). Employee home addresses are in the Freeholders' computer system (T165).

8. On or about September 29, 1987, the Freeholders distributed to all agency fee payers "a survey...to ascertain whether [they] wish the County to provide and/or have the Union know the requested information..." (R-1). The survey, printed on Board stationery, asked agency fee payers: "Do you wish Burlington County to provide C.W.A., 1044 with your home address?"[6/] The Board placed in evidence all of the returned surveys (R-3, R-4). Three surveys were not signed. Approximately sixty-eight agency fee payers did not respond to the survey. One hundred and nine fee payers did not wish the County to provide the Union their home addresses and seventy-six employees wanted the County to provide the

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6/ A copy of the Survey is attached as Appendix A.

Union their addresses (R-3, R-4).[7/] Mosca confirmed that the survey was prepared in anticipation of the hearing (T156).

ANALYSIS

The Freeholders rely on case law, the Act and the U.S. Constitution in defense of its refusal to comply with CWA's demand for the home addresses of agency fee payers. Citing National Labor Relations Board ("NLRB") precedent, the Freeholders contend that CWA has adequate alternate means of communication which outweigh the necessity for disclosure. It also argues that subsection 5.3's guarantee that public employees may choose to refrain from forming, joining or assisting employee organizations, protects its fee payers (who answered "no" in the survey asking their preference) from disclosure. Finally, the Board argues that its release of the addresses would violate the agency fee payers' constitutional rights to personal privacy.

I. LABOR LAW PRECEDENT REQUIRES THE FREEHOLDERS TO DISCLOSE AGENCY FEE PAYER HOME ADDRESSES TO CWA

A public employer must supply information on request if it is "potentially relevant and will be of use to the union in carrying out its statutory duties." Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981), citing NLRB v. Acme

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7/ At hearing the County represented that one-hundred and six employees did not wish the CWA to obtain home addresses and seventy-nine wished the Union to have home addresses (T154).

Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967);[8/] State of New Jersey (Office of Employee Relations), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), mot. for recon. den., P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), app. pending App. Div. Dkt. No. A-2047-87T7.

> Relevance in this context is determined under a discovery-type standard, not a trial-type standard, and therefore a broad range of potentially useful information should be allowed the union for the purpose of effectuating the bargaining process. 13 NJPER at 754 (other citations omitted).

An employer is not obligated to disclose irrelevant or confidential information, (See Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979), holding that results of employee psychological aptitude tests were within the employer's legitimate and substantial interest in employee confidentiality and in preserving employee confidence in the testing program) or information which results in harassment of or violence against its employees (United Aircraft Corp. v. NLRB, 434 F.2d 1198, 75 LRRM 2692 (2nd Cir.), cert. den. 401 U.S. 993, 76 LRRM 2867 (1971); Shell Oil Co. v. NLRB, 457 F.2d 615, 80 LRRM 3015 (9th Cir. 1972)). An employer's duty depends on the circumstances of the particular case. Office of Employee Relations; NJ Transit Bus Operations, P.E.R.C. No. 88-12, 13 NJPER 661 (¶18249 1987).

Subsection 5.3 of the Act requires majority representatives to be "responsible for representing the interests of all [public]

8/ The N.J. Supreme Court has determined that experiences and adjudications under the National Labor Relations Act ("NLRA"), 29 USCA 151 et seq., should be a guide in the public sector. Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409, 424 (1970).

employees without discrimination and without regard to employee organization membership." A union cannot discharge its duty of fair representation "unless it can communicate with those in whose behalf it acts." Prudential Insurance Co. of America, 412 F.2d 77, 71 LRRM 2254 (2nd Cir.), cert. den. 396 U.S. 928, 72 LRRM 2695 (1969) (holding that an employer violated §§ 8(a)(1) and (5) of the NLRA when it refused a union request for employee names and addresses; they were considered relevant to collective bargaining in the private sector).

> ...[I]n order to administer an existing agreement effectively, a union must be able to apprise the employees of the benefits to which they are entitled under the contract and of its readiness to enforce compliance with the agreement for their protection.
>
> 412 F.2d at 84.

Court opinions and NLRB decisions have required private employers to provide majority representatives the names and home addresses of unit members when relevant and necessary to discharge the union's duty of fair representation. Prudential; Standard Oil Co. of California v. NLRB, 399 F.2d 639, 69 LRRM 2014 (9th Cir. 1968); United Aircraft Corp. v. NLRB; NLRB v. Pearl Bookbinding Co., Inc., 517 F.2d 1108, 89 LRRM 2614 (2nd Cir. 1975); Harco Laboratories, 271 NLRB No. 220, 117 LRRM 1232 (1984); Monsanto Co., 268 NLRB No. 213, 116 LRRM 1053 (1984); Georgetown Associates, 235 NLRB No. 62, 98 LRRM 1163 (1978); Wellington Hall Nursing Home, 240 NLRB No. 93, 100 LRRM 1480 (1979); Masillon Community Hospital, 282 NLRB No. 98, 124 LRRM 1125 (1987); Burkart Foam Inc., 283 NLRB No. 58, 124 LRRM 1394

(1987). Relevance is presumed; the cases turn on the "necessity" for disclosure compared to the adequacy of alternate means of communication.

Relevance and necessity are presumed in federal labor relations law. In Dept. of Health and Human Services v. Federal Labor Relations Authority ("FLRA"), ___ F.2d ___, 126 LRRM 3235 (4th Cir. 1987), the court held that an agency's refusal to supply home addresses of unit employees violated 5 U.S.C. § 7114(b)(4)(B) (requiring federal agencies to negotiate in good faith by providing the authorized union "data which is reasonably available and necessary for full and proper discussion, understanding and negotiations of subjects within the scope of collective bargaining") and was an unfair labor practice. Relying upon Prudential to affirm the presumptive relevance of home addresses, the court found the "desirability of direct communication and resulting need for names and addresses sufficiently connected to support the [FLRA]'s presumption that such information is necessary [under the statute]." Accordingly, the court approved the Authority's decision not to review the "necessity" for home addresses on a case-by-case basis. The judges cautioned that the presumption is rebutted when a union's past actions "supports a conclusion that employees would be in imminent danger if their home addresses were released to the union." Id. at 126 LRRM 3239. See also American Federation of Government Employees, Local 1760 v. FLRA, 786 F.2d 554, 122 LRRM 2137 (2nd Cir. 1986). Compare U.S. Dept. of Agriculture v. FLRA, ___ F.2d ___, 127 LRRM 2360 (8th Cir. 1988).

N.J.A.C. 19:17-3.3[9/] distinguishes New Jersey public employment (at least in this case) from private sector and federal employment. It requires a majority representative to "provide" its

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9/ N.J.A.C. 19:17-3.3 states:

> (a) Prior to the commencement of payroll deductions of the representation fee in lieu of dues for any dues year, the majority representative shall provide all persons subject to the fee with an adequate explanation of the basis of the fee, which shall include:
>
> (1) A statement, verified by an independent auditor or by some other suitable method of the expenditures of the majority representative for its most recently completed fiscal year. The statement shall set forth the major categories or expenditures and shall also identify expenditures of majority representative and its affiliates which are in aid of activities or causes of partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of benefits only available to members of the majority representative.
>
> (2) A copy of the demand and return system established by the majority representative pursuant to N.J.S.A. 34:13A-5.6, including instructions to persons paying the representation fee in lieu of dues as to how to request review of the amounts assessed as a representation fee in lieu of dues.
>
> (3) The name and address of the financial institution where the majority representative maintains an account in which to escrow portions of representation fees in lieu of dues which are reasonably in dispute. The interest rate of the account in effect on the date the notice required by 3.3(a) is issued shall also be disclosed.
>
> (4) The amount of the annual representation fee in lieu of dues, or an explanation of the formula by which the representation fee is set, and the schedule by which the fee will be deducted from pay.
>
> (b) The majority representative shall provide a copy of the demand and return system referred to in (a)(2) to the public employer.

agency fee payers an annual written "explanation of the basis of the fee," including a "statement...of [its] expenditures...for its most recently completed fiscal year" and a copy of the demand and return system. The Commission adopted the rule to comply with Chicago Teach. Union v. Hudson, 475 U.S. 292, 121 LRRM 2793 (1986),[10/] and with Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), 99 N.J. 523 (1985), cert. den. ___ U.S. ___, 106 S. Ct. 1388 (1986). In holding that a majority representative violated N.J.S.A. 34:13A-5.6 and 5.4(b)(1) of the Act[11/] by failing to notify agency fee payers of their rights under and demand and return system, the

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10/ The Court stated that, "[b]asic considerations of fairness as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." Id. at 121 LRRM 2798-99.

11/ Subsection 5.6 provides in pertinent part:

> ...a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative; provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2(c).

Subsection 5.4(b)(1) prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

Commission expressly rejected a posting of the information on employee bulletin boards as adequate notice to nonmembers. It found that

> ...majority representatives collecting representation fees have an affirmative obligation to inform nonmembers personally of the pertinent rights and procedures concerning representation fee challenges. The statutory rights afforded by N.J.S.A. 34:13A-5.6 may be meaningless if an affected non-member never learns in the first place of those rights and the applicable procedures. The burden on the majority representative of personally notifying each non-member of such rights and procedures is minimal compared to the amount of representation fees paid by each non-member and is outweighed by the risk that non-members will not learn of their rights in the absence of personal notification.
>
> Boonton at 9 NJPER 480.

In commending New York Public Employment Relations Board case law as a "polestar for determining what types of procedural protection are appropriate or required", the Commission cited Public Employees Federation and Kahn, 15 PERB 3016 (¶3011 1982), for its holding that a majority representative must mail each nonmember notice of the refund procedure.

Given the responsibility to personally notify nonmembers of their rights, a majority representative may violate the Act if its handbills and office mailings fail to reach agency fee payers. Adequate notification by these methods may hinge on variables outside a majority representative's control - the number of shop stewards or volunteers willing to distribute literature, the size and layout of an employer's physical plant, the willingness of

agency fee payers to accept notices from a union representative, and employer cooperation.

An employer has no general duty to distribute or assist in distribution of union notices to nonmembers required by N.J.A.C. 19:17-3.3. An employer's duty depends upon the access provision(s) of the contract it signs with the union. (An employer "held harmless" clause may protect an employer from some liability and encourage it to yield access to the majority representative). Collective negotiations does not assure a majority representative the means to personally notify agency fee payers of their rights.

Only by finding in subsection (a)(5) a duty to provide fee payer home addresses can the Commission realize a means by which a majority representative can fulfill its obligations. Such a duty is consistent with an employer's obligation under Boonton and the representation fee rules not to deduct fees unless it first receives a copy of the majority representative's demand and return system. By delineating the rights and responsibilities of majority representatives and public employers, the Commission guarantees the viability of the fee system and the inviolability of nonmember rights.

I recommend that the need for direct communication (established in Boonton and the representation fee rules) and the attendant need for names and addresses creates a presumption that agency fee payer home addresses are relevant and necessary to discharge a majority representative's duty of fair representation.

No other method of communication dispenses with employer participation in the notifications, eliminates disparities in access provisions of contracts, and virtually assures personal notice. The presumption applies when a majority representative which has negotiated a payroll deduction/agency fee provision with the pubic employer requests the fee payers' home addresses. The presumption may be rebutted when a majority representative's past actions show that employees would be harassed or in danger if their addresses were released. Applying the presumption to the facts, I find that CWA's request for agency fee payer home addresses was timely (i.e., requested shortly after negotiating an agency fee provision in the 1986-88 contract) and that the Freeholders failed to show that the fee payers would be harrassed or in danger if their addresses were released. Accordingly, I hold that the Freeholders violated subsection (a)(5) and derivatively (a)(1) when it failed to provide CWA the home addresses of agency fee payers in the unit.

NLRB cases concern the release of home addresses of all unit members. CWA seeks the narrower disclosure of home addresses of agency fee payers. In light of the Act's agency fee provision and accompanying representation fee rules, I find that home addresses of fee payers have even greater relevance to the discharge of a majority representative's duty of fair representation than the presumptive relevance of unit member addresses in private sector cases. I disagree with the County's position that a majority representative must exhaust alternate means of communication before it is entitled to home addresses of agency fee payers.

Assuming that the NLRB test for disclosure applies to a majority representative seeking home addresses of agency fee payers, I find that the current means of communication are inadequate to discharge CWA's duty of fair representation. The union established in unrebutted testimony that handbilling was not feasible because employees generally refused the literature and not enough people volunteered to distribute at all work sites. No shop stewards work at a significant number of work sites. Union postings are removed prematurely and its office mailings are not always received. Agency fee payers do not attend Union meetings. Although the Board is willing to facilitate office mailings and CWA has not solicited home addresses through available means, I find under all the circumstances that direct mailing is the best means of communication. Direct mailing will leave the timing and frequency of communication to the Union's discretion. It will also cure the unauthorized removal and/or disposal of union notices (nothwithstanding the Boonton finding that postings are inadequate notice) and office mailings. Finally, direct mailing is the least confrontational method to disseminate information to agency fee payers who otherwise resist CWA's attempts to communicate at the workplace. Accordingly, I find under NLRB precedent that the Freeholders violated subsection (a)(5) and derivatively (a)(1) when it refused to provide CWA the home addresses of agency fee payers.

The NLRB has also held that an employer violates section 8(a)(1) and (5) of the NLRA by refusing to provide the certified

bargaining agent home addresses of all unit employees even when a majority of them petitions the employer not to disclose their addresses. In Wellington Hall Nursing Home, the employer refused to provide the union home addresses six months after the certification and during collective bargaining. After the union request, the employer notified the employees that it may be required to provide their home addresses to the union. A majority of employees then petitioned the employer to withhold the information. The employer agreed, relying upon the will of the "overwhelming majority." The NLRB affirmed an administrative law judge's decision which ordered the employer to furnish the union the names and addresses of all its unit employees. The judge, citing the Prudential finding that home addresses are more than presumptively relevant to fulfill a union's duty of fair representation, noted that as an employee complement expands and changes, the old Excelsior list (eligible voter names and home addresses in representation elections) becomes "inadequate to satisfy the statutory requirement that the company give [the addresses] on request." 240 NLRB No. 93, at 641. The NLRB reached the same conclusion in Masillon Community Hospital, 282 NLRB No. 98, slip op. at 8, 9, where an employer refused to supply home addresses because it was "protecting the privacy rights of those employees who objected to the disclosure...."

NLRB precedent requires the Freeholders to provide CWA the home addresses of at least all agency fee payers, including those who object to disclosure. The mere possibility that a union will

abuse the opportunity to communicate with employees at their homes is insufficient to deny the opportunity altogether. Excelsior Underwear, Inc., 156 NLRB No. 111, 61 LRRM 1217 (1966). That a union may use the information to solicit new members within the unit is inconsequential where the union is already the majority representative of the employees it is soliciting. Prudential, United Aircraft.

II. THE ACT AND THE CONSTITUTION DO NOT PROHIBIT DISCLOSURE OF AGENCY FEE PAYER HOME ADDRESSES

The County raises statutory and constitutional objections to disclosure. Subsection 5.3 of the Act guarantees public employees, "...the right, freely and without fear of penalty of reprisal, to form, join and assist any employee organization or to refrain from such activity...." The Freeholders assert that disclosure of addresses of fee payers answering "no" in the survey will violate their right to refrain from "assisting" CWA.

The survey raises more problems than it resolves.[12/] Implicit is the assumption that the survey accurately gauged fee payer "wishes" to have or not have the union know home addresses to fulfill the duty of fair representation. The Board's question permitted fee payers (who already have some reservation about union

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12/ Under some circumstances, an employer's questioning of employees to investigate facts raised in a complaint may be an unfair practice. See Johnnie's Poultry Co., 146 NLRB No. 98, 55 LRRM 1403 (1964), cert. den. 334 F.2d 617, 59 LRRM 2117 (8th Cir. 1965). Those circumstances do not exist here.

membership) to speculate about CWA's motives for the request. I assume that the survey is accurate.

If the Board is arguing that the circumstance of a majority of fee payers expressing their unwillingness to have their addresses released justifies its decision, then it has no defense to its refusal to supply the addresses between March 17, 1986 (the date it denied CWA's request) and September 29, 1987 (the date it polled fee payers). If the Board is arguing that the circumstance of named employees expressing their unwillingness to have their addresses releases justifies its decision, then it has no defense to its refusal to provide the addresses of those favoring disclosure. (And how may the Board properly speak for fee payers not responding to the survey?)

The Board's substantive argument has been raised by challengers to agency fee provisions and rejected by the U.S. Supreme Court. While recognizing that an agency fee provision affects an employee's First Amendment interests, the Supreme Court has affirmed the validity of such provisions subject to certain constitutional limitations. For example, Abood v. Detroit Bd. of Ed., 431 U.S. 209, 95 LRRM 2411 (1977), sustained a public sector agency fee provision and established the right of objecting fee payers to prevent the use of their money for ideological or political purposes. The union's right to the fee was based on the doctrine of exclusive representation of a bargaining unit, the duty of fair representation and the need to prohibit "free riders." The

New Jersey agency fee provision, N.J.S.A. 34:13A-5.5, permits a public employer to negotiate an agency fee clause with a majority representative, and has withstood constitutional scrutiny. Boonton. The provision does not violate subsection 5.3 of the Act. Cf. N.J. Turnpike Employees Union Local 194 v. N.J. Turnpike Authority, 64 N.J. 579 (1974). See also Chicago Teach. Union; Robinson v. N.J., 741 F.2d 598, 117 LRRM 2001 (3rd Cir. 1984), pet. for rehearing en banc den. ___ F.2d ___ (1984), cert. den. ___ U.S. ___, 105 S. Ct. 1228, 84 L.Ed.2d 366 (1985), 806 F.2d 442, 123 LRRM 3193 (3rd Cir. 1986), cert. den. 95 L.Ed.2d 872 (1987).

The Freeholders and CWA have negotiated an agency fee clause in their current agreement which permits the "deduction and transmission of [the] fee" (J-4). Fee collecting (money deducted from a nonmember's wages and paid to the majority representative) is a more personally instrusive form of "assistance" than the disclosure of that nonmember's address to CWA. Further, subsection 5.4(e) enables the Commission to adopt rules to "regulate the conduct of representation elections..." and it adopted N.J.A.C. 19:11-9.6(a), which requires employers to provide employee organizations in representation elections "an alphabetical listing of the names of all eligible voters with their last known mailing addresses...." Such a rule is constitutional. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 70 LRRM 3345 (1969).

Words and phrases in a statute are considered with reference to policy considerations of the whole act and with regard

for the balance of the statute. Matter of Hotel and Restaurant Employees and Bartenders Intern. Union, Local 54, 203 N.J. Super 297, certif. den. 102 N.J. 352 (1985). When subsections 5.5 and 5.4(e) are read together with subsection 5.3's admonition against discrimination without regard to union membership, disclosure of nonmember home addresses cannot be viewed as unlawful assistance to CWA.

The Board also argues that the addresses are constitutionally protected from disclosure under a right of personal privacy. It underscores the "recognition of personal privacy" in the Freedom of Information Act ("FOIA"), 5 USCA § 552(b)(6), which exempts "personal and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Courts balance an employee's right to privacy against the public interest in disclosure. Dept. of the Air Force v. Rose, 425 U.S. 352 (1976).

Privacy interests have prevailed when federal employee unions have sought disclosure of home addresses under the FOIA. American Federation of Gov't Employees, Local 1923 v. U.S. Dept. of Health and Human Services, 712 F.2d 931, 113 LRRM 3537 (4th Cir. 1983); National Treasury Employees Union v. Federal Deposit Ins. Corp., ___ F. Supp. ___, (D.DC. Cir. 1987). Disclosure interests have generally prevailed when federal employee unions have sought the release of home addresses under the Federal Labor Service Management Relations Act ("FLSMRA"), 5 USCA § 7101 et seq. Dept. of

Health and Human Services, AFGE, Local 1760. In sustaining federal employee privacy interests under the FOIA, the Fourth Circuit Court of Appeals acknowledged in a footnote: "[The union] may be entitled to the [addresses] under some other federal law. See Prudential, [citation omitted]. We hold only that the [FOIA] is not a proper vehicle for the disclosure of that information." AFGE, Local 1923 at 113 LRRM 3539.

CWA seeks disclosure under our Act, which requires an application of principles unique to a system of collective negotiations. The doctrine of exclusive representation and the duty of fair representation attenuate rights an employee may otherwise retain under the FOIA or similar state statute.

In U.S. Dept of Agriculture v. FLRA, ___ F.2d ___, 127 LRRM 2360 (8th Cir. 1988), the court affirmed the presumptive necessity of federal employee home addresses to collective bargaining and sustained privacy interests of employees in their home addresses under the FOIA. In ordering the employer to release the addresses to the union, the court ruled that "employees who do not wish to have their names and addresses disclosed may have their names removed from the union mailing list." Id. at 127 LRRM 2363. The majority found a strong privacy interest in an employee's home address, citing Rowan v. Post Office Dept., 397 U.S. 728 (1970) as requiring that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." (This finding contradicts the Second Circuit's view in AFGE, Local 1760, that "the privacy

interest of the average employee in his address is not particularly compelling." Id. at 122 LRRM 2138). The Court also found a substantial interest in disclosure but reasoned that the FLSMRA's declaration that the public interest in protecting "the right of employees to organize, bargain collectively and participate through labor organizations of their own choosing..." would not be served by imposing disclosure on "employees who regard that information as private and who do not choose to receive union communications at home." U.S. Dept. of Agriculture at 127 LRRM 2363.

Rowan concerned the constitutionality of a federal statute permitting the Postmaster General, upon an individual's request, to halt mailings of "pandering advertisement[s] which offer for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." Id. at 397 U.S. 730. See 39 USCA § 4009(a). The Court also noted that the legislative history revealed congressional concern "over the impact of the materials on the development of children." While the Court acknowledged the right of a householder to bar "advertisers" from his property, it also pronounced: "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit...."

Considering the statutory duties which a majority representative (not an advertiser) has to its unit members and an agency fee payer's right to be informed of the basis of the fee and a means to secure a refund, I find that the Eighth Circuit's

analysis, relying upon Rowan, is inapposite to the facts. By adopting a similar rule leaving the ultimate decision on disclosure to New Jersey agency fee payers, the Commission may undermine the rationales for requiring disclosure in the first place - the union's need to fulfill its statutory duties and the employer's obligation to provide necessary information to the majority representative. In requiring disclosure of agency fee payer home addresses to the majority representative, the Commission will also fulfill part of the Act's declared public policy to prevent labor disputes. N.J.A.C. 34:14A-2.[13/]

I conclude that the Freeholders violated § 5.4(a)(5) and derivatively (a)(1) of the Act when it refused to supply the home addresses of unit agency fee payers to CWA.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. Respondent County cease from

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to provide Communications Workers of America Local 1044 with home addresses of agency fee payers.

13/ The Commission may find a strong privacy interest in agency fee payers' home addresses. If fee payers wish to preserve the confidentiality of their addresses by notifying the majority representative in writing to delete their names from the list, I recommend that they waive their notice rights under the representation fee rules.

2. Refusing to negotiate in good faith with Communications Workers of America Local 1044 concerning terms and conditions of employment, particularly by not disclosing relevant information.

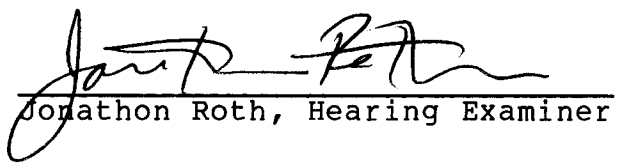
B. That the County take the following affirmative action:

1. Provide CWA, Local 1044 a list of unit agency fee payers together with their home addresses.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "B." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

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

C. That the 5.4(a)(2), (3) and (4) allegations be dismissed.[14/]



Jonathon Roth, Hearing Examiner

DATED: March 2, 1988
Trenton, New Jersey

14/ The union alleged no facts which prove that the Board violated subsection 5.4(a)(2), (3) and (4) of the Act.

Appendix "A"

Board of Chosen Freeholders
Of The County of Burlington

MOUNT HOLLY, NEW JERSEY
08060

OFFICE OF THE
BOARD OF CHOSEN FREEHOLDERS
Martha W. Bark
Francis L. Bodine
Michael J. Conda
Bradford S. Smith
Eugene W. Stafford

Charles T. Juliana
Clerk/Administrator

609-265-5020

WE HAVE BEEN REQUESTED BY CWA 1044 TO PROVIDE YOUR HOME ADDRESS TO CWA 1044.

DO YOU WISH BURLINGTON COUNTY TO PROVIDE CWA 1044 WITH YOUR HOME ADDRESS?

YES _____ NO _____

NAME: _____
Please Print

DEPARTMENT: _____

DATE: _____

I have voluntarily, and of my own free will answered the above question and signed this document.

_____
(Signature)

Appendix "B"

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 rights guaranteed to them by the Act, particularly by refusing to provide Communications Workers of America, Local 1044 with home addresses of agency fee payers.

WE WILL NOT refuse to negotiate in good faith with Communications Workers of America Local 1044 concerning terms and conditions of employment, particularly by not disclosing relevant information.

WE WILL provide CWA, Local 1044 a list of unit agency fee payers together with their home addresses.

Docket No. CO-87-52-72 BURLINGTON COUNTY BOARD OF CHOSEN FREEHOLDERS
(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.