P.E.R.C. NO. 81-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Intervenor,

-and-

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

Intervenor,

-and-

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

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Organization.

Docket Nos. RE-81-2
RE-81-3
RE-81-4
RE-81-5

STATE OF NEW JERSEY,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

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

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

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NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Organization.

Docket Nos. RO-81-126
RO-81-127
RO-81-128
RO-81-129

SYNOPSIS

The Commission grants the request of the NJSEA, a/w AFT, to review the decision of the Director of Representation, D.R. No. 81-20, 6 NJPER ____ (¶_____ 1980), which directed mail ballot elections among the employees in four separate units of State employees. The units involved are the Administrative and Clerical Services Unit, the Primary Level Supervisors Unit, the Higher Level Supervisors Unit and the Professional Unit.

The Commission, upon review of the record and the oral and written arguments of the parties, affirms the decision of the Director including his direction that the mail ballot elections shall commence on February 17, 1981. The Commission rejected arguments made by the NJSEA, a/w AFT, that the elections should be blocked by certain unfair practice charges or until the AFL-CIO resolves an appeal of an Article XX umpire's decision received by NJSEA, a/w AFT in proceedings initiated by it before that organization against CWA and AFSCME.

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Employee Organization.

Appearances:

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

For Communications Workers of America, AFL-CIO
Kapelsohn, Lerner, Reitman & Maisel, Esqs.
(Sidney Reitman, of Counsel)

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

For the New Jersey State Employees Association, AFT
Fox and Fox, Esqs.
(David I. Fox, of Counsel)
Miller, Cohen, Martens & Sugarman, Esquires
(Nancy Schiffer, of Counsel)

DECISION AND ORDER

The issue which confronts this Commission in these proceedings is whether secret ballot elections should be held in four separate units of State employees to ascertain the free choice of those employees as to which of three competing employee organizations, if any, shall be their exclusive representative in negotiations with the State of New Jersey.[1/] The four units involved are all state-wide in scope and contain approximately 32,600 employees divided into 1) the Administrative and Clerical Services Unit (approximately 11,800 employees); 2) the Professional Unit (approximately 10,400 employees); 3) the Primary Level Supervisors Unit (approximately 9,000 employees) and 4) the Higher Level Supervisor Unit (approximately 1,400 employees). No dispute exists in these proceedings as to the appropriateness of the four units for collective negotiations. Together they constitute the substantial majority of all State employees eligible to be represented in collective negotiations.

At present, the New Jersey State Employees Association and the New Jersey Civil Service Association (NJSEA/NJCSA) or

1/ N.J.S.A. 34:13A-6(d) provides:

> The Commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees....Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

their supervisory employee affiliates, are jointly certified by the Commission as the representative of the employees in each of the four units. In each unit, the two organizations or their affiliates running as a joint representative have previously won secret ballot elections conducted by this Commission. At present, they and their affiliates are signatory to collective negotiation contracts with the State covering the four units. These contracts will expire on June 30, 1981.

In October of 1980, during the "open period" for these units [2/] both the State of New Jersey and the Communications Workers of America ("CWA") filed timely representation petitions seeking elections in each of the four units. The State's petitions assert that a question concerning representation exists in each of the units because it has reasonable cause for a good faith doubt concerning the continued majority status of NJSEA/NJCSA and their affiliates. N.J.A.C. 19:11-1.1(a)(2). It therefore requests that the Commission conduct elections among the employees in each of the four units. The CWA, through its petitions, seeks to represent the employees in each of the units. N.J.A.C. 19:11-1.1(a)(1).

2/ N.J.A.C. 19:11-2.8(c) provides:

> During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:
>
> 1. In a case involving employees of the State of Jersey, any agency thereof, or any State authority, commission or board, the petition is filed not less than 240 days and not more than 270 days before the expiration or renewal date of such agreement;

Each of its petitions was accompanied by a showing of interest which purported to be from at least 30 percent of the employees in each of the units. See N.J.A.C. 19:11-1.2 (a)(8).

The American Federation of State, County and Municipal Employees ("AFSCME"), moved to intervene in both the State's petitions and the CWA's petitions based upon a ten percent showing of interest in each unit. N.J.A.C. 19:11-2.7(a). The CWA also moved to intervene in the State's petitions. NJSEA/NJCSA originally also moved to intervene in the State's petitions and CWA's petitions on the basis of its current agreements covering these units. As will be discussed later in this decision, NJCSA subsequently advised the Commission that it no longer wishes to intervene in these proceedings. However, NJSEA, in addition to the motion to intervene as part of the joint representative, also moved to intervene under the name NJSEA affiliated with American Federation of Teachers (AFT), Local #4089, AFL-CIO ("NJSEA a/w AFT" or "NJSEA") on the basis of both "contract right" and a ten percent showing of interest.

Pursuant to N.J.A.C. 19:11-2.2 and 19:11-2.6,[3/] the Commission's Director of Representation conducted an administrative

3/ N.J.A.C. 19:11-2.6 provides:

> (a) After a petition has been filed under this subchapter, if no agreement for consent election has been reached pursuant to N.J.A.C. 19:11-4.1, the director of representation shall conduct a further investigation of the matters and allegations set forth therein. The petitioner, the public employer, and any intervenor(s) shall present documentary and other evidence, as well as statements of position, relating to the matters and allegations set forth in the petition.
>
> (continued)

investigation of all the matters raised by the various petitions. As part of that investigation, he conducted several conferences attended by representatives of all parties, solicited statements of position from each party as well as documentary and any other evidence they desired to submit relating to the matters presented by these petitions.

3/ (continued)

(b) After the investigation of such petition, the director of representation shall either:

1. Request the petitioner to withdraw the petition, or in the absence of withdrawal, dismiss the petition, pursuant to section 3 of this subchapter; or

2. Issue a decision dismissing the petition, if it appears to the director of representation that there is not reasonable cause to believe that a valid question concerning representation exists in an appropriate unit; or

3. Issue a decision directing an election in an appropriate unit, if it appears to the director of representation that there is reasonable cause to believe that a valid question concerning representation exists in an appropriate unit, that the policies of the act (N.J.S.A. 34:13A-1 et seq.) will be effectuated thereby, and that an election will reflect the free choice of the employees in the appropriate unit; or

4. Take whatever other measures as the director of representation may deem appropriate under the circumstances.

(c) Action by the director of representation pursuant to subsection (b) of this section may be either on the basis of the administrative investigation or on the basis of a hearing conducted pursuant to N.J.A.C. 19:11-6.1 et seq. (Hearings). A hearing shall be conducted:

1. If it appears to the director of representation that substantial and material factual issues exist which, in the exercise of reasonable discretion, he or she determines may more appropriately be resolved after a hearing; or

2. If it appears to the director of representation that the particular circumstances of the case are such that, in the exercise of reasonable discretion, he or she determines that a hearing will best serve the interests of administrative convenience and efficiency.

On December 16, 1980, on the basis of the information gathered in his administrative investigation, the Director of Representation issued a Decision and Direction of Election, D.R. No. 81-20, 6 NJPER ___ (¶_____ 1980), directing that mail ballot elections be conducted in each of the four units, with the ballots to be mailed to the employees on February 17, 1981, to be returned to the Commission by March 9, 1981 and then to be tallied. On December 30, 1980, the NJSEA a/w AFT filed a request for review of the Director's decision pursuant to N.J.A.C. 19:11-8.1. Its request was accompanied by a supporting memorandum of law and otherwise met the requirements of N.J.A.C. 19:11-8.3.[4/]

CWA and AFSCME filed timely statements in opposition to the request for review pursuant to N.J.A.C. 19:11-8.4. The State filed a statement which did not oppose Commission review of the Director's decision, but urged that the Director's Decision and Direction of Election be affirmed. NJCSA has not submitted any position to the Commission with respect to the Director's decision. Additionally, the State, AFSCME and CWA have filed briefs arguing

4/ The NJSEA a/w AFT also filed a Request for a Stay of the Direction of Election pending the Commission's review of the Director's decision, along with a proposed Order to Show Cause with temporary restraints. By letter dated January 2, 1981, the Chairman advised the parties that the Commission would be meeting on January 20, 1981. Given the early consideration of the request for review by the Commission, he advised them that he was referring the requests for restraints to the full Commission for their consideration along with the request for review.

that the Director's decision be affirmed and that the election proceed as directed.[5/]

By letter dated January 5, 1981, NJSEA a/w AFT requested oral argument before the Commission. This request was granted by the Chairman and oral argument was heard by the full Commission at its meeting on January 20, 1981. All parties participated with the exception of NJCSA.

The Commission has reviewed the Director's Decision and Direction of Elections, NJSEA a/w AFT's request for review and the statements in opposition to that request filed by CWA and AFSCME and hereby grants the NJSEA's request for review pursuant to N.J.A.C. 19:11-8.2(a)(1) and (4). NJSEA has raised issues concerning the interpretation and administration of this Act and the Commission's Rules. Additionally, we are not unmindful that these proceedings affect the statutory and constitutional right [6/] of some 33,000 public employees to choose an employee organization

5/ By letter dated December 30, 1980, the Chairman, pursuant to authority delegated to him by the Commission, advised all parties that in an effort to expedite Commission review they should assume, for the purposes of filing additional briefs under N.J.A.C. 19:11-8.6(b), that the request for review would be granted. Therefore, briefs in addition to the request for review or statements in opposition were due on January 13, 1981. The State, CWA and AFSCME filed briefs at that time. NJSEA a/w AFT did not file an additional brief to the one submitted with its request for review, but has submitted additional material in letters dated January 19, 1981.

6/ Article I, Paragraph 19 of the New Jersey Constitution provides: "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

(continued)

to represent them if they so desire, as well as the labor relations stability of the single largest public employer covered by this Act.

Accordingly, pursuant to N.J.A.C. 19:11-8.7, we have proceeded to review the Director's Decision and Direction of Election on the record developed in the administrative investigation and have considered the arguments of the parties made in both their written and oral presentations. After a careful review of all these materials, including the various rulings made by the Director in his decision, it is our determination that the decision of the Director of Representation is affirmed substantially for the reasons stated in his decision.

The Director's investigation has revealed numerous facts which establish that a secret ballot election is required at this time to resolve substantial questions concerning the representation of the public employees in each of the four units involved in these proceedings.

6/ (continued)
N.J.S.A. 34:13A-5.3 provides in part:

> Except as hereinafter provides, 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;...
>
> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of employees voting in an election conducted by the commission as authorized by this Act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit....

See also N.J.S.A. 34:13A-6(d) quoted in footnote 1, supra.

As stated earlier, NJSEA/NJCSA is the incumbent exclusive majority representative of the employees. However, that joint entity no longer even appears in these proceedings and does not desire to be on the ballot. As indicated in the Director's decision NJSEA/NJCSA had originally intervened in both the State's and CWA's petitions. Additionally, NJSEA/NJCSA and its affiliates had filed three separate unfair practice charges against the State in each of the four units.[7/] When the charges were filed in October, the attorney representing NJSEA/NJCSA requested that these unfair practice charges "block" the further processing of the various representation petitions including any elections until all allegations in the charges could be fully litigated. However, by letter dated November 3, 1980, to the attorney and this Commission, the President of NJCSA stated that NJCSA never desired or understood that the unfair practice charges would block an election. The President's letter states in part:

7/ The charges were filed on August 19, 1980, October 22, 1980, and October 28, 1980. The August 19 charges allege that the State had wrongfully encouraged certain employees to withdraw dues checkoff from the Association. The October 28, 1980 charges allege that the State had wrongfully processed certain dues withdrawal cards which had not been timely filed as well as communicated with employee organizations other than NJSEA/NJCSA, the exclusive representative. The October 22 charges allege that the State has wrongfully refused to begin negotiations with NJSEA/NJCSA for a successor contract to the one due to expire on June 30, 1981.

On September 9, 1980, Complaints and Notice of Hearings were issued on the charges filed on August 19, 1980; however, both the State and NJSEA/NJCSA had requested adjournments of the hearing.

The August 19, 1980 charges were only filed in three of the four units.

> If the charge is to constitute a bar to an election, I want the New Jersey Civil Service Association withdrawn from the case. For more than a year I have advocated an election and since I have publicly stated my position on many occasions, I thought everyone was well aware of it.
>
> Further, I think it is in the best interests of the 34,000 people involved to have the election as soon as possible.

On November 17, 1980 at one of the conferences convened by the Director at which all of the parties were present, the Commission was presented with another letter written by the NJCSA President which states in part:

> I agree, on behalf of NJCSA to an election. However, I do not feel I have the authority without sanction of the State Board, to relinquish NJCSA's position on the ballot. I have said that since SEA has affiliated with AFT, CSA cannot be coupled on the ballot with them. Whether CSA is to go on the ballot alone must be decided by the State Board which convenes on December 3.

Following that convention, the Executive Director of NJCSA notified the Commission, by letter dated December 5, 1980, that NJCSA no longer desired to intervene in any of the petitions involved in these proceedings or to pursue the unfair practice charges previously filed. The Director in his decision therefore deemed NJSEA/NJCSA intervention in these proceedings as a joint representative withdrawn. This finding is not in dispute. Additionally, pursuant to the desires expressed in these letters, NJCSA will not appear on the ballot in the elections to be conducted in any of the four units, either individually or jointly.[8/]

8/ As indicated earlier, consistent with its December 5, 1980 letter, NJCSA has not chosen to participate in any of the proceedings which have occurred before this Commission since that date. The Commission has continued to serve it with all decisions and notices pertaining to the case.

The Director's investigation has also established that Mercer Council #4 of NJCSA, which is the specific local Council to which most State employees who belong to NJCSA have their dues deducted, has affiliated with the CWA as Local 1040, Communications Workers of America. Thus, the two employee organizations who jointly constitute the currently certified majority representative of these units of employees not only take opposite positions on the need for an election, but are now affiliated, at least to some degree,[9/] with opposing parties in these representation proceedings.

In 1973, this agency conducted the representation election in the administrative and clerical unit (PERC Docket No. RO-496). It was the first of the elections in any of these four units. At that time, AFSCME, which was the other employee organization

9/ The reservation as to the degree to which either organization has fully affiliated stems from several factors. Mercer Council #4 is only one local council of NJCSA and while it is the one to which most State employees belong, it was NJCSA and not Mercer Council #4 of NJCSA which constitutes half of the joint certification.

Additionally, NJSEA is currently engaged in litigation before the Superior Court, Chancery Division, Mercer County, in which the validity of its affiliation with AFT is being challenged on grounds that it was not carried out properly under its own internal constitution and by-laws. It should be specifically noted that this Commission's acceptance of NJSEA as affiliated with AFT/AFL-CIO is for the purposes of the proceeding before this agency only and is not intended to have any influence on that litigation, nor does it constitute a finding of fact or conclusion of law on the validity of the affiliation.

The Commission has acknowledged, for the purposes of its jurisdiction, that the entity which has chosen to call itself NJSEA affiliated with AFT, Local #4089, AFL-CIO, is an employee organization within the meaning of this Act.

on the ballot with NJSEA/NJCSA, challenged the legality of two organizations appearing as a joint representative in a PERC election and their ability to represent the employees in the unit without conflict if they should win the election. The question was ultimately resolved in favor of NJSEA/NJCSA and PERC by the Appellate Division of the Superior Court in an unpublished opinion, following AFSCME's interlocutory appeal of PERC's decision directing an election. AFSCME v. PERC, App. Div. Docket No. A-986-72 (1973). However, in its opinion, the Court stated:

> Should the election result in the selection of C.S.A. and S.E.A. as the joint collective bargaining representative, both organizations will be under the affirmative obligation to those whom they represent to jointly agree upon and to pursue a single, unified policy and position on all issues. And neither the Public Employment Relations Commission nor any other body or agency may today justifiably foretell that this obligation cannot or will not be discharged, with the utmost fidelity. If the day should arise when that obligation is not being so fulfilled, a remedy both satisfactory and sufficient will be at hand.
> (Slip opinion pg. 3)

It is with these facts as background that the Commission has reviewed the Director's decision that there is reasonable cause to believe that a valid question concerning representation exists and that the policies of this Act will be effectuated by conducting a secret ballot election to ascertain the free choice of the employees in the four units. See N.J.A.C. 19:11-2.6(b)(3). Footnote 3 supra.[10/]

10/ The facts set forth in the preceding section of this decision are not disputed by any of the parties, including NJSEA a/w AFT.

The Director found that both the State's petitions and those of CWA were timely filed. He verified that the showing of interest which accompanied CWA's petitions in the administrative and clerical unit, the primary level supervisors unit, and the higher level supervisors unit were from at least 30% of the employees in each unit and satisfied the definition of an acceptable showing in N.J.A.C. 19:10-1.1. However on December 1, 1980 the Director advised CWA, along with all other parties, that he could not verify that a sufficiently large showing of interest existed to support the petition in the professional unit. 11/ On December 5, 1980 CWA withdrew its petition in the professional unit. Additionally the Director found that both AFSCME and NJSEA a/w AFT had submitted sufficient showings of interest from

11/ The notification was contained in a detailed letter of that date sent to all parties advising them of the results of the investigation to that point, and providing them with a seven-day period in which to submit additional evidence or statements of position on the issues raised in these proceedings. Additional showings of interest could not have been submitted at that time by the petitioner.

employees in each of the four units to meet the 10% requirement for intervention in these proceedings, including participation in the elections which have been directed.

NJSEA a/w AFT has made a limited challenge to the CWA's showing of interest by arguing that to the extent that CWA has utilized dues deduction records from Mercer Council No. 4, NJCSA, its showing of interest is invalid. The Director rejected the argument. He indicated that he would accept such records since to the extent they were utilized by CWA, they were current as of October 22, 1980, and the President of Mercer Council #4 certified to the Commission that Mercer Council #4, NJCSA had been affiliated as Local 1040, CWA, and this fact was not disputed by NJSEA. N.J.A.C. 19:10-1.1 specifically permits the use of current dues records as a showing of interest.[12/]

It must be emphasized that the purpose of a showing of interest is to satisfy the Commission that sufficient support exists for the petitioner to warrant the further processing of the petition. It is an administrative device designed for the convenience of the agency.[13/] See In re City of Jersey City, E.D. No. 76-19, 2 NJPER 30 (1976), aff'd P.E.R.C. No. 76-21, 2 NJPER 58 (1976). Because of this purpose, attacks on the showing serve

12/ The bulk of CWA's showing of interest consisted of authorization cards for CWA, signed within the last six months as required by N.J.A.C. 19:10-1.1.

13/ In order to protect the employees' right to freely join and assist any employee organization or to refrain therefrom and to insure the anonimity of the secret ballot, the Commission, like the National Labor Relations Board and the other state labor agencies, provides by rule that showings of interest are confidential. The determination of the adequacy of the showing of interest is therefore made solely by the agency and is not subject to attack in the representation proceeding or in any collateral proceeding. N.J.A.C. 19: 11-2.1.

a very limited function, that being to convince the Director or the Commission that its processes are being abused and that the further processing of the petition will result in needless expenditure of Commission resources. The petitioner does not establish its claim that it is the majority representative through the showing of interest. That decision is tested in the secret ballot election among the employees. See In re Jersey City, supra; In re Woodbridge Township Board of Education, D.R. No. 77-9, 3 NJPER 26 (1977). Similarly, any error that the Director may make in determining that the petitioner's showing of interest was adequate will also be remedied by the employees in the election.[14/]

We have reviewed NJSEA's argument and the Director's determination of that argument and agree with him that the showing of interest accompanying CWA's petitions in the administrative and clerical unit, the primary level supervisory unit, the higher level supervisory unit were adequate and warranted further processing. Thus, even if the State had never filed its petitions, these proceedings would have gone forward in three of the four units in question based solely on CWA's petitions. AFSCME and NJSEA a/w AFT, as intervenors, and the State, as the employer, would still have been the parties.

Notwithstanding this NJSEA a/w AFT has also attacked the

14/ Other disputes as to whether the petition presents a question concerning representation requiring an election are also not resolved by the showing of interest but rather by the further processing of the petition.

Director's decision to process the State's petitions. Following the filing of the State's petitions, the Director advised the State that it would have to submit documentary evidence, affidavits or other material demonstrating by "objective consideration" that it has some reasonable grounds for believing that a question concerning representation existed. NJSEA argues that the Director has not applied NLRB or PERC law on reviewing the sufficiency of the State's objective considerations,[15/] and has sought to litigate the sufficiency of the objective considerations.

These arguments are without merit. The purpose of requiring objective consideration of an employer who questions the continued majority status of an incumbent organization through a timely filed petition is the same as that discussed above for requiring a showing of interest from a petitioning employee organization. It is an administrative determination not subject to litigation for the sole purpose of satisfying the agency that sufficient cause exists to warrant the expenditure of its resources. As long as the petition is timely filed, and the Director is administratively satisfied that objective considerations exist, then the further processing of the petition and the election will provide the forum to dispute the employer's

15/ In requesting documentation to demonstrate the objective considerations, the Director in his letter indicated that PERC was guided by NLRB practice on employer's petitions, as developed in U.S. Gypsum Co., 157 NLRB 652, 61 LRRM 1384 (1966).

The New Jersey Supreme Court has specifically noted that the National Labor Relations Act was the model for this Act, particularly in the area of representation procedures and has indicated that decisions and policies of the NLRB should serve as a guide for interpreting this Act in that area. Lullo v. International Assn of Firefighters, Local 1066, 55 N.J. 409 (1970).

claim.[16/]

We find that the Director's determination that the sufficiency of the State's objective considerations is a non-litigable administrative decision is consistent with NLRB decisions and policy, the policy of this Act, and our delegation of administrative authority to him.[17/] In United States Gypsum Co., 161 NLRB 601, 63 LRRM 1308 (1966) (sometimes referred to as U.S. Gypsum II), the NLRB states:

> Thus the determination by administrative action protects the confidentiality of data submitted in support of the petition, and also permits an expeditious resolution of issues concerning employee choice of a bargaining representative whenever an election for such purposes is otherwise timely.

Similarly in Milwaukee Independent Meat Packers Ass'n, 223 NLRB No. 155, 92 LRRM 1138 at 1140 (197_), the Board states:

> The Regional Director's finding that objective considerations exist, like the showing of interest in a petition for certification, is an administrative determination not subject to litigation.

It is the facts developed in the Director's subsequent investigation which are reviewed by the Commission.

NJSEA a/w AFT's remaining arguments basically involve two main points. First, it argues that the Director was in error when he refused to permit the existence of the unfair practice charges discussed earlier to block the election in these cases. Again, NJSEA argues that his decision misapplies NLRB policy

16/ As pointed out by the Director, the NLRB's own case handling manual emphasizes that in weighing the sufficiency of the "objective considerations", it is not the fact of the union's majority status that is in question, but whether the employer has reasonable cause to believe that the employee organization has lost its majority status. NLRB Casehandling Manual, ¶11042.5.

17/ It should be emphasized that neither the Employer-Employee Relations Act nor the Commission's Rules require that an employer submit "objective considerations in support of its claim to have a good faith doubt. While adoption of this practice is not an issue herein, nevertheless, we uphold his adoption of this practice.

in this area. Second, NJSEA argues that this Commission should defer any further processing of these petitions and any election until a final decision has been received from the AFL-CIO Executive Council in Washington on NJSEA a/w AFT's charge before that body that CWA and AFSCME have violated the no-raid provision of Article XX of the AFL-CIO Constitution.

As to the question of whether the unfair practice charges originally filed by NJSEA/NJCSA should block the elections which have been directed, we affirm the Director's refusal to give them that effect for all the reasons cited in his decision.

As discussed earlier, NJCSA has now withdrawn from the prosecution of these charges. A serious question exists as to whether these charges are still viable since it is not clear at all that NJSEA can maintain these charges once the joint entity which was the charging party no longer seeks to litigate them. This question is a particularly difficult obstacle for NJSEA a/w AFT to overcome with regard to the October 22, 1980 charges that the State has refused to commence negotiations with NJSEA/NJCSA for the successor contracts.[18/] The obligation to negotiate runs only to the NJSEA/NJCSA as the jointly certified majority representative. NJSEA's status as one of the two parties to that joint certification

18/ The State does not dispute that it has refused to enter into these negotiations, however it maintains it cannot begin such negotiations until the question concerning representation over which organization, if any, is the majority representative is resolved. The State's response to NJSEA/NJCSA's demand to begin negotiations on October 1, 1980 was the filing of the instant petitions.

does not give it any legal claim to incumbency status for the purposes of negotiations. The employees in these units voted for NJSEA/NJCSA and their affiliates and it was those entities which were certified by the Commission. Since the State has no obligation to negotiate with NJSEA a/w AFT, it is questionable if NJSEA a/w AFT has standing to maintain these charges.19/

Assuming arguendo that NJSEA a/w AFT will be able to maintain the charges filed by NJSEA/NJCSA, the fact that NJCSA did not want the charges to block the election certainly weakens NJSEA's position. NJSEA argues that the Director's decision is incorrect because he failed to follow NLRB policy on blocking. NJSEA attempts to create the impression that the mere existence of an unfair practice charge filed by a party to a representation

19/ The other two sets of charges involve allegations that the State first improperly encouraged employees to withdraw their dues checkoff authorizations from the Association, and then honored untimely deauthorizations. The Director pointed out in his decision that, with respect to the August 19 charges of improperly encouraging withdrawals, a complaint and notice of hearing was issued on September 9, 1980 and the Charging Party itself sought adjournments of the hearings. It was only after the representation petitions were being processed that NJSEA began to urge that the charges be litigated.

More importantly, the Director indicated that based on the allegations in the charge, the number of employees involved in these two sets of related charges is small in relation to the size of the units involved in the election. The limited documentation submitted by NJSEA to the Director to support its request that they block the election pertains only to a few employees. Under such circumstances, the results of even a successfully litigated complaint would be unlikely to warrant the delay necessary to hold hearings on what action the State took, for what reasons, and what motivated each individual employee to withdraw his or her dues authorization.

election will cause the NLRB to hold the election in abeyance. While the NLRB will frequently block an election in the face of unresolved unfair labor practices, the policy is far from a per se one. The policy is a discretionary one which must be applied as the facts warrant. For example, in American Metal Products Company, 139 NLRB No. 60, 51 LRRM 1338, 1340 (1962), the NLRB decided to direct an election despite pending unfair labor practice charges filed by the union. The Board stated:

> We are cognizant of our usual practice of declining to direct an election in the face of unresolved unfair labor practice charges affecting the units involved in the representation proceeding, especially where violations of section 8(a)(5) are alleged. Nevertheless, it is well settled that this practice is a matter which lies within the discretion of the Board as part of its function of determining whether an election will effectuate the policies of the Act.

See also, Columbia Pictures Corporation, 81 NLRB No. 207, 23 LRRM 1504 (1949). In fact, in those cases where the NLRB has blocked an election without evaluating the specific facts of a case, it has been criticized by the federal Appellate Courts:

> ...the Board should not be allowed to apply its "blocking charge practice" as a per se rule without exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the alleged petition ought to be delayed or dismissed. Surrat v. NLRB, 463 F.2d 378, 80 LRRM 2804, 2806 (5th Cir. 1972).

In the instant case, the Director was aware of all the facts set forth in this opinion as to the opposite positions of the two entities making up the Charging Party. Additionally, he

analyzed in detail the nature of the charges and their potential for interfering with the free choice of the employees in the elections. Moreover, he specifically made reference to and was guided by the factors set forth in the NLRB's own policy, which states:

> The character and the scope of the charge(s) and its tendency to impair the employee's free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interests of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; a showing of interest, if any, presented in the R case by the charging party; and the timing of the charge.
> NLRB Case Handling Manual, Section 11730.5.

We agree with the Director's conclusion that the charges should not block and that an election should be directed for the reasons stated in his decision. We note that the Director's inquiry into the particular facts of this matter is precisely the kind of balanced examination which administrative discretion requires. It is also consistent with the application of his policy in previously decided matters.[20/] See, e.g., In re Matawan Reg. School Dist. Bd of Ed, DR No. 78-11, 4 NJPER 37 (¶4019 1977).

20/ While we agree with the Director's analysis and application of NLRB policy, we note that there are differences in the unfair practice procedures under this Act and federal law which may require that even more discretion be applied herein. The NLRB investigates and prosecutes the charges filed with it, whereas PERC assumes the truth of the allegations of charges filed with it and issues a complaint if those allegations might constitute an unfair practice. See N.J.A.C. 19:14-2.1(a). Additionally, the Charging Party before PERC prosecutes its own complaint. N.J.S.A. 34:13A-5.4(c). Under these circumstances, the potential for abuse of the blocking policy is greater since a party who desires to hold up an election could file a frivolous but serious sounding charge. Under the NLRB practice, such a charge would be investigated by Board staff and dismissed. Under PERC practice a complaint might issue and Charging Party could drag out the hearing just to delay the election. Thus the need for careful scrutiny in the representation proceeding before the charge is given blocking effect is greater before PERC.

Lastly, the Commission affirms the Director's decision to proceed with the election as scheduled on February 17, 1981. This affirmation is not without due regard for the internal private dispute resolution mechanism provided by the AFL-CIO. The three employee representatives herein all state an affiliation with the AFL-CIO. The NJSEA has sought to have this election deferred until such time as a definitive ruling is rendered by the AFL-CIO concerning the protection it has sought from the representation efforts of both CWA and AFSCME.[21/] The State, CWA, and AFSCME (both AFL-CIO affiliates), object to such deferral of the election. We find that under the circumstances herein, the Director concisely articulated an appropriate balance between the statutory rights of the employees and the internal dispute settlement mechanism procedure of the AFL-CIO. On balance, he found, and we agree, that sufficient time and opportunity have been given to resolve NJSEA's effort to seek AFL-CIO protection and we find that an additional extension might serve to deprive the employees herein of a prompt choice of representative, if any, and to negotiate a new contract. The Article XX proceeding commenced on July 7, 1980 and a decision, which did not grant NJSEA protection, was issued by an AFL-CIO umpire on October 28, 1980. NJSEA has sought to appeal that decision to the AFL-CIO Executive Council. A hearing as to whether the appeal will be heard by the Executive

21/ The request of NJSEA to defer is substantially similar to a request made before the Director on December 10, 1980 to permit a resolution of the aforementioned "affiliation" suit before Judge Dieir, as well as the pending Article XX proceedings. Litigation of these suits continues as of this date.

Council was held by a Council sub-committee on January 7, 1981. As yet, no decision has been rendered as to whether further consideration will be given to the appeal.

In a supplemental statement to its request for review, the NJSEA again requested that the commencement date of the election be delayed until such future time that the Article XX proceeding is finally terminated. While postulating that the Executive Council of the AFL-CIO will meet during February 16-20, 1981, it concedes that no decision has yet been made by the Council's sub-committee which met on January 7, 1981 to decide whether NJSEA's appeal will even be referred to the Council. Assuming, arguendo, that the Council's sub-committee refers the appeal to the Council, there is no evidence that the appeal will be disposed of with a minimum of delay as asserted by the NJSEA. There is simply no definitive guarantee provided by any party that a final decision in the Article XX proceeding, which commenced on July 7, 1980, three months prior to any representation petition filed herein, is imminent and the spectre of continued litigation exists.

At oral argument of this case, NJSEA a/w AFT modified its position on its previous request to stay the mailing of the ballots from an indefinite period to March 3, 1981.[22/] If the Article XX proceedings were not fully resolved by that time,

22/ While it pledged not to raise Article XX proceedings as a basis for delay beyond that date with this agency, it would continue to pursue Article XX protection before the AFL-CIO, if a decision was not rendered by March 3, 1981. In asserting this new position the NJSEA has preserved its argument on the pending unfair practice charges which seek a delay of the election until hearings were held and Hearing Examiner and Commission decisions were issued on all charges.

the NJSEA stated that it would not oppose the mailing of the ballots on that date.

At present, the only AFL-CIO decision in the matter does not afford NJSEA a/w AFT protection. We cannot and will not speculate on the likelihood of having that decision modified, on appeal, when the appeal will be heard, or even whether the appeal will be heard. We have no assurance that the situation will change by February 17 or March 3, 1981. CWA and AFSCME have indicated that even were the NJSEA to be successful in its appeal, the matter would not be finally resolved and that CWA and AFSCME would pursue additional remedies with the AFL-CIO. This Commission is neither a party to nor an enforcer of Article XX proceedings. We could only remove CWA and AFSCME from the ballot if they requested to withdraw. Therefore, based upon the various pledges made, it seems a certainty that we would be mailing out ballots which included all three organizations on either February 17, 1981 or March 3, 1981. Accordingly, under these circumstances, we will not upset the status quo of the February 17, 1981 date for the election as set by the Director on December 16, 1980.

Ample provisions in the Commission's representation rules exist to provide protection against the negative effects which NJSEA argues are possible from a future decision in the Article XX proceeding.[23/] Under any circumstances which could

23/ We do not find the alleged administrative burden on the agency for the conduct of an election to be a relevant or valid basis to delay the election process nor do we agree that the conduct of an election at this time will deprive employees of a clear choice among eligible employee representatives or to choose against representation.

take place as a result of this election, there will be a new exclusive representative of the employees involved if they so choose inasmuch as the previously certified joint representative is not an intervenor in these proceedings.

Perhaps the most fundamental responsibility of this Commission is to insure that public employees shall have the right to select the majority representatives of their choice. This responsibility must also be carried out in a manner which is least disruptive to the labor peace of the employer so that the delivery of governmental services is not unduly inconvenienced or jeopardized. The current agreements expire on June 30, 1981 and the election should be conducted as expeditiously as possible to permit negotiations to begin if a new representative is chosen.

Our review of the record in this case establishes that a question concerning representation does exist which requires the expeditious conduct of a secret ballot election in each of the four units to ascertain the desires of the employees.

Accordingly, the Commission, upon thorough review of the entire record of this proceeding, affirms the decision of the Director and directs an election pursuant to his decision dated December 16, 1980.[24/]

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
January 23, 1981
ISSUED: January 23, 1981

24/ With respect to any matters and issues which have not been specifically discussed and decided above, the Commission affirms the Director's decision for the reasons so stated in his Decision and Direction of Election.