

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

86-050 127

In the Matter of
Professional Guild of Ohio, OFT,
Employee Organization,
and
Hamilton County Board of Mental Retardation
and Developmental Disabilities,
Employer.

CASE NUMBER: 85-RC-07-3960

DIRECTIVE SETTING ASIDE THE RESULTS OF ELECTION AND DIRECTING
RE-RUN ELECTION UNDER OUTLINED CONDITIONS
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix;
October 2, 1986.

On July 15, 1985, the Professional Guild of Ohio, OFT (Employee Organization) filed a Petition for Representation Election with the Board. Following the signing of a consent election agreement by the parties, a Board-conducted election was held on October 15, 1985. It was a self-determination election involving professional and non-professional employees. The official tally of ballots cast indicated that the Employee Organization lost by a majority of votes in both the professional and non-professional unit. On October 23, 1985, the Employee Organization filed objections to the election, pursuant to Ohio Administrative Code Rule 4117-5-10, and this case was directed to hearing.

The Board accepts the Employer's supplement to the exceptions and the Employee Organization's response to this supplement. The Board reviewed the record, the hearing officer's recommended determination, the Employer's exceptions, and the Employee Organization's cross-exceptions and responses. The Board amends the hearing officer's conclusions of law and recommendations by supplementing them to require: a) equal access to preferential audiences; b) equal access on non-working time in non-working areas for activity concerned with representation issues in this case; and, c) all meetings concerning representation issues must be voluntary and every announcement or notice of such meeting must specify that the meeting is voluntary.

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For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the hearing officer's findings of fact, conclusions of law and recommendations as amended but not necessarily the analysis and discussion, sets aside the results of the election held on October 15, 1985, and directs that a new election be conducted in accordance with the guidelines attached as Exhibit A to the Board opinion, incorporated by reference.

No later than December 15, 1986, the Employer shall serve upon the Employee Organization and file with the Board an alphabetized eligibility list stating names and home addresses of all employees eligible to vote as of September 12, 1985.

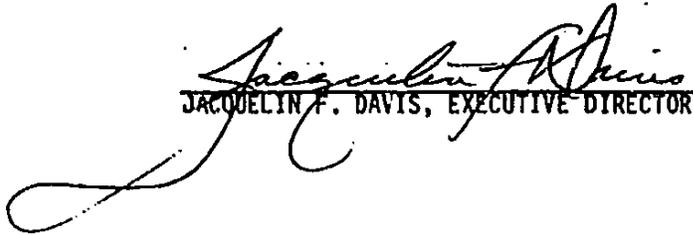
It is so directed.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.



JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 11th day of November, 1986.



JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

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CASE NUMBER: 85-RC-07-3960

OPINION

Day, Chairman:

The present case involves the determination of objections to conduct by the Hamilton County Board of Mental Retardation and Developmental Disabilities (employer or MR/DD Board) in connection with a consent representation election held under the auspices of the State Employment Relations Board (SERB or Board) on October 15, 1985. This conduct is alleged by the Professional Guild of Ohio (union, employee organization or PGO/OFT) to have illegally affected the outcome of the election. A hearing on the objections has been held by a hearing officer of SERB.

The hearing officer's recommended determination (HORD) calls for setting aside the election results and the directing of a new election.

SERB has determined that the results of the election held on October 15, 1985, should be set aside and a new election held under the conditions outlined in the directive accompanying this opinion.

The reasons for this determination are adduced below.

I

A fundamental requirement for a fair representation election is the provision of an election environment which permits a free and untrammelled choice between "union representation" and "no representation" by employees voting in their appropriate unit.

This broad concept touches and conditions a wide variety of actions by the parties to a representation determination. In the present case, those actions are focused on employer conduct. This is necessarily so because no conduct by the union has occasioned an objection.

The vote resulted in substantial majorities for "No Representative" among both professional and non-professional employees.¹ The election objections are in three categories:

- a) Employees at one of the constituent schools of the employer were made a captive audience for the airing of the employer's statement of position against unionization.
- b) The eligibility list for the election was neither timely presented nor accurate.
- c) The employer denied the employee organization equal access to employees for the presentation of its case for unionization.²

¹HORD 2.

²See id.:

"II. ISSUE

"Whether the employee organization's objections, regarding the following allegations, are sufficient to set aside the election:
"A. A 'Captive Audience' meeting was held at the Rost School;
"B. The election eligibility list was not timely presented and not accurate; and
"C. Employer denial of equal access to employee organization."

The categories of objection are sufficiently distinct to warrant separate sections and factual treatment for the disposition of each.

II

Captive Audience

The MR/DD Board has a number of schools in its jurisdiction. Although the union mounts a general claim of "viewpoint discrimination,"³ it focuses on events at Rost School for its captive audience contention.⁴

At the Rost facility, the superintendent called a meeting of employees "to address the details, mechanics and employee concerns regarding the upcoming election."⁵ He also discussed the employer's view of unionization.⁶ The viewpoint was anti-union⁷ but apparently was not coercive.⁸ Nor was attendance compulsory. The management answered that attendance was voluntary.⁹ No attendance was taken.¹⁰ And there was no sign-in.¹¹

³See Union exceptions pp. 2-10.

⁴Id. pp. 10-12.

⁵Findings of Fact (FF) No. 15, see also FF No. 14.

⁶See FF Nos. 9-20, 24, 26, and 28.

⁷FF Nos. 19, 24 and 26.

⁸Cf. FF Nos. 19, 20, and 24.

⁹FF Nos. 16, 17, and 21.

¹⁰FF No. 18.

¹¹Id. Neither at the Rost or Breyer School was attendance 100%. Id. and FF 28-29.

Apparently, the principal union contention in support of the "captive" aspects of the meetings concerns an announcement over the public address system at Rost School. There, it is claimed, the meeting announcement by the school secretary was followed by two additional notifications over the system by the assistant principal.¹² While the secretary's manner of notification was apparently unexceptionable, the assistant principal's notices were given in a voice claimed to be typically strident.¹³ The latter did not specify that attendance was voluntary.

An employer has a right to express its opinion forcefully so long as the delivery is free of threat, coercion, or compelled listening. In this instance, the only evidence advanced to suggest "captivity" is the implicit threat in a voice tone. Even if the quality of the tone is fully credited, it is not enough. Threat or coercion can be established without a showing of heroic opposition, but here the minatory action could hardly frighten the most timid let alone the normally brave.

A captive audience was not proven at Rost School nor at any other facility of the employer. However, the audience was preferential. That is beyond debate.

III

The Eligibility List

The eligibility list for the October 15, 1985, representation election was due September 19, 1985.¹⁴ The list was not provided until October 3,

¹²FF No. 22.

¹³Id. and FF 23.

¹⁴A consent election agreement was approved by the Board on September 12, 1985, FF No. 1; the eligibility list should have been filed with the Board and served on the Union no more than seven days later, Ohio Administrative Code Rule 4117-5-07(A).

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1985.¹⁵ An amended list was filed October 11, 1985;¹⁶ a third list was filed with the Board sometime between October 3 and October 11.¹⁷ It was not served on the union.¹⁸ Another list, the fourth, was presented to the union about forty-five minutes before the election of October 15, 1985 was scheduled to start.¹⁹

The first two lists contained errors. Objections and corrections were made.²⁰ The process reduced the time for electioneering.²¹ The third list, not provided the employee organization, obviously could not be checked.²² The fourth and last list, filed within the hour before the polls opened, had to be corrected by the SERB representative and party observers.²³

One evident purpose of an eligibility list is to provide parties the opportunity to reach and persuade the electorate. This objective is made manifest by the requirement that "service" of an "alphabetized eligibility list" of the names of "all eligible voters" accompanied by home addresses be "not later than seven days after the date of approval of the consent

¹⁵Stipulation 3(B); FF Nos. 1 and 2.

¹⁶FF No. 2.

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰FF Nos. 4-9.

²¹Id.

²²FF No. 2.

²³FF No. 10.

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election agreement or direction of election by the Board."²⁴ It is obvious that legitimate and effective campaigning requires the conjunction of an accurate list of names and addresses with the early filing and service of both.

When there is a shortfall in the accuracy or timeliness of a list, licit electoral processes are impeded. When inaccuracies and delays reach the size of those in this case, the potential for an illicit blocking of the statutory purpose of free choice is plain.

The situation here can hardly be aleatory or inadvertent. The magnitude and complexity of the improprieties negate those possibilities. The employer claims waiver because the union "accepted the eligibility list and agreed to proceed with the election" without advising the SERB agent about its "inability to have communicated with the members of the unit and the resultant disadvantage to the union."²⁵ Waiver under the circumstances here would be tantamount to allowing a malefactor to flout SERB process by exploiting the desire of its opposite number for a prompt election. SERB will not allow processes it deems essential to fairness to be short circuited by a party's waiver.

The only correction for these faults is a new election coupled with timely provision of an accurate list as required by law.

²⁴Administrative Code Rule 4117-5-07-(A).

²⁵Employer's exceptions to the HORD, second page of the inexplicably unpaginated document.

IV

Access

Electioneering access to employees in the unit in this case has three aspects at least.

First, the MR/DD Board had access to the employees on the job. And, in particular, it could and did provide itself with the time to explain its position²⁶ at a work-time meeting. The employees were not required to attend. However, those present were on school time.²⁷ A non-captive, non-coercive, non-threatening gathering was an option of the employer. But in this case and in the future, employer-sponsored voluntary meetings on employer time and premises will constitute a basis for setting aside an election unless (1) voluntariness is specified in the meeting announcement, (2) voluntariness remains unrevoked either directly or implicitly and (3) the employer action is balanced by an opportunity for a similar union-sponsored voluntary meeting at an equivalent time and place. This equation is warranted in the public sector context when it might not be in the private sector where private property is involved.²⁸ For public management no more "owns" public property than the employees do. Therefore, management cannot manipulatively arrogate to itself greater use of public property and work time for anti-union activity than the employee organization is permitted for pro-union affairs. The point is that employer actions must not control access in a way to create an unfair advantage for the opponents of representation.

²⁶FF Nos. 14-21, 24, 26, 28, 29, and 31; tr. 96-131.

²⁷FF Nos. 22, 28, cf. 29.

²⁸Cf. NLRB v. Babcock & Wilcox Co., Supreme Court of U.S. (1956), 38 LRRM 2001, 2003-2004.

Second, the MR/DD Board had regular, untrammelled opportunities during the work day and in the work place to announce its views and distribute literature.²⁹ It did both.³⁰

Third, the employer impeded union access to employees both by repeated, faulty provision of lists and by effectively screening out non-employee unionists with an employee-only solicitation/distribution rule.³¹ The rule allowed solicitation only by employees between employees during non-working time in non-working areas.³²

The consequence of the employer's actions is to distort both the letter and the spirit of the statutory purpose.

V

A new election is directed in accordance with the guidelines attached as Exhibit A and incorporated here by reference as though fully rewritten. Sheehan, Vice Chairman, and Fix, Board Member, concur.

²⁹FF Nos. 24 and 26; see also fn. 26, supra.

³⁰Id. and Tr. 69, 117; cf. tr. 96 -131

³¹FF No. 30.

³²Id. and Jt. Ex. 4 p. 111.

EXHIBIT A

Solicitation and Distribution

For non-employees:

1. The organization or its non-employee agent which intends a S/D visit to the interior premises of the employer's facility shall give the employer not less than 24 hours notice of each visit.
2. The notice shall be accompanied
 - (a) by a list of persons and alternates intending access, and
 - (b) a designated time.
3. The employer will designate at least two, but no more than five, non-work areas for employee organization S/D activity.¹ All S/D shall be confined to non-work time in non-work areas.
4. The employee organization and its agents, whether non-employees or employees, shall be permitted access to each bulletin board. Notices shall be no larger than 8-1/2" by 11" and placed so as not to obstruct other notices. A list of the locations of bulletin boards will be supplied the employee organization by the employer on request.
5. The employee organization or non-employee representative shall have access to parking lots without advance notice to the employer.
6. Any disagreements over the application of these rules shall be submitted to the administrator of elections and subject to review by the State Employment Relations Board after the election unless the dispute is mooted at that time.

¹"No representation" activity, uninspired by the employer, is permitted individual employees. An assumption of the employer's permissiveness on this score is warranted by the history of its own activity. No person has raised any question of lack of access for self-motivated individuals with standing who desire to campaign for "no representation."

For employees:

1. Employees may conduct S/D activity in both work and non-work areas, but only if the employees are on non-working time.

General Rules:

The employer may regulate any S/D activity by any employee or non-employee which disputes or interferes with the normal work on the employer's premises. However, if the employer conducts meetings of employees in the bargaining unit on work time in the workplace to express its views on representation, the employee organization must be permitted to conduct a like meeting at the workplace on work time. Attendance at all meetings shall be voluntary, attendance unrecorded, and the conduct must be non-coercive and non-threatening.

Definitions:

(A) "Designated area" - means a facility location to be determined by the facility administrator.

(B) "Designated parking lot" - means an area to be determined by the facility administrator where employees and/or visitors park motor vehicles.

(C) "Organization" - means a body of persons established for a specific purpose.

(D) "Facility" - means any work or non-work areas comprising one worksite which is governed by and under the control of a state agency, department, board, commission or other political subdivision.

(E) "Facility administrator" - means persons designated by an employer to be contacted regarding solicitation or distribution activities conducted at any facility under the jurisdiction of the employer.

(F) "Non-employee" - means any person not employed at the facility where solicitation is conducted, or any person not in an active work status.

(G) "Non-work area" - means areas to be determined by the facility administrator, and generally includes lobbies, cafeterias, public areas or designated parking lots.

(H) "Non-working time" - means approved leaves, lunch periods, and before and after scheduled working hours.

(I) "Solicitation" - means any activity conducted for the purpose of advertising, promoting, or selling any product or service, or encouraging membership in any group, association or organization.

(J) "Work area" - means areas to be determined by the facility administrator, and generally includes offices, work stations, conference rooms and corridors leading directly thereto which are used as an integral part of performing work and any area where the employee performs his/her official duties. In agencies where services are being delivered to the public, the entire public area is considered a work area. In hospitals, generally patient-care areas and areas where visitors have access and patient care is involved are work areas.

(K) "Working time" - means that time when an employee's duties require he or she be engaged in work tasks, but does not include an employee's own time, such as meal periods, vacations, time before or after a shift.