

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEEB OPINION 92-001

In the Matter of

District 1199, National Union of Hospital and Health Care Employees,
Employee Organization,

and

Montgomery County Combined Health District,

Employer.

CASE NUMBER: 89-REP-08-0196

OPINION AND DIRECTION TO RERUN ELECTION

Before Chairman Owens, Vice Chairman Pottenger and Board Member Sheehan: January 9, 1992

On August 30, 1989, District 1199, National Union of Hospital and Health Care Employees (Employee Organization) filed a Petition for Representation Election seeking to represent certain professional and non-professional employees of the Montgomery County Combined Health District (Employer). On December 8, 1989, a secret ballot election was held.

On December 18, 1989, the Employee Organization filed objections to the election. The case was directed to hearing to determine whether the Employer engaged in conduct which prevented the holding of a fair election.

On March 21, 1991, the Board, in its public meeting, took action on this case and reversed the hearing officer's recommended determination. No directive had been issued. Upon further reviewing the record, the hearing officer's recommended determination, exceptions, cross-exceptions and reply, the Board sua sponte vacates its action of March 21, 1991, adopts the Stipulations and the Findings of Fact, adopts Conclusions of Law Nos. 1 and 2, deletes Conclusion of Law No. 4, amends and combines Conclusions of Law Nos. 3, 5 and 6 to read:

The totality of the Employer's conduct during the election campaign period including threats of loss of benefits, promises timed to influence the vote of employees combined with the questioning of employees as to their union sentiments, prevented a free and untrammelled election on December 8, 1989.

and adopts this new Conclusion of Law No. 3.

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OWENS, Chairman:

A short comment is warranted. Few things are more sacred in our society than elections. They need to be conducted under fair and equitable conditions. Moreover, any balancing of the rights of the employees with those of the employer regarding campaign activities "must take into account the economic dependency of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." NLRB v. Gissel Packing Co. 395 U.S. 575, 71 LRRM 2481 at 2497 (1969). However, this does not mean that employers cannot conduct a vigorous campaign for "no representation." The elections at issue were hard fought between two well equipped opponents.

We do not agree with the allegations that the Employee Organization was handicapped by having less than "equal access" to the employees compared to the Employer. Employee access cannot be measured in terms of precise mathematical formula. Employers might have more access to employees at the workplace, while Unions have more access to employees after working hours. The critical question is whether access by the respective parties is "fair," as required by Rule 4117-5-06(D), so that neither party gains an unfair advantage in communicating with employees.

In the case at issue the record clearly shows that the Employee Organization had fair access to the employees to conduct a good, well informed election campaign. Thus, we do not find any violation of the required fair and equitable election conditions regarding the access issue. However, we do find that in the totality of the circumstances, even though some specific actions viewed alone might not support the findings of a misconduct, the totality of the Employer's conduct constituted coercive action and prevented a free and untrammelled election.

The December 8, 1989, election results are set aside and a rerun election is directed pursuant to O.A.C. Rules 4117-5-09(B) and 4117-5-10(B).

The time and place of the rerun election shall be determined by the Administrator of Representation in consultation with the parties.

It is so directed.

OWENS, Chairman; POTTENGER, Vice Chairman; and SHEEHAN, Board Member, concur.

SHEEHAN, Board Member concurring:

I concur with the direction to rerun the election but I do not agree with the majority that no violation regarding the access issue occurred.

Ohio Administrative Code Rule 4117-5-06 states in pertinent part:

...no party should be given advantage over any other party in gaining access to employees during organizational or campaign activity.

The majority's determination of "fair" access in finding parity with the Employer's unlimited access during working time and the union's access after working hours doesn't achieve the Rule's mandate. In fact, it falls way short of that goal. Access at the workplace is much more easily available, quick, effective, and with no cost (telephone, mail, etc.) than after working hours where contact is more complicated because it means an interruption of personal activities, household responsibilities and family obligations. Furthermore, contact during working hours is often done by supervisors, as in the instant case, which normally commands greater attention. Moreover, the Employer has the same opportunity to access employees after working hours as does the union.

To hold with the majority's acceptance of what is "fair" access will create an unfair advantage for the Employer and will fail to achieve the need for fair and equitable conditions in respect to the access issue.

In this case, the Employer's unlimited use of work time to distribute its anti-union message while denying additional workplace access to the union gave the Employer advantage over the union in gaining access to the employees in violation of the above-cited rule.


DONNA OWENS, CHAIRMAN

While not conceding that Ohio Revised Code Section 119.12 applies in this instance, the Board hereby notifies you that an appeal may be perfected by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas Court within fifteen days after the mailing of the Board's directive.

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I certify that this document was filed and a copy served upon each party
by certified mail, return receipt requested, on this 23rd day
of JANUARY, 1992.

Cynthia L. Spanski
CYNTHIA L. SPANSKI, CLERK

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