P.E.R.C. NO. 88-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYEMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WILDWOOD CREST,

Public Employer-Respondent,

-and-

Docket Nos. RO-H-87-108
CO-H-87-241; CO-H-87-243

AFSCME COUNCIL 71,

Petitioner-Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Wildwood Crest violated the New Jersey Employer-Employee Relations Act when a Borough Commissioner made an improper promise of benefits to a group of unit employees the day before a Commission-conducted representation election. The Commission finds this interfered with employee free choice. The Commission, therefore, set aside the election results and ordered a new election.

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AFSCME COUNCIL 71,

Petitioner-Charging Party.

Appearances:

For the Public Employer-Respondent, Fineberg and Rodgers, Chartered (Robert A. Fineberg, of counsel)

For the Petitioner-Charging Party, Robert C. Little, Staff Representative

DECISION AND ORDER

On February 11, 1987, the Commission conducted an election in which AFSCME, Council 71 did not receive a majority of ballots cast. AFSCME filed timely objections to the election, as well as related unfair practice charges. The objections and charges allege that the Borough of Wildwood Crest 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 (7),[1/] when

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or

Footnote Continued on Next Page

it changed employee work hours notwithstanding its knowledge of organizational activity by AFSCME and that the Borough violated subsections 5.4(a)(1),(2) and (7) of the Act when it held a meeting with unit employees within 24 hours of the scheduled election and made statements which had a reasonable tendency to interfere with employee free choice during that meeting. In addition, AFSCME sought to have the election set aside and a new election conducted.

On May 6, 1987, the Director of Representation and Unfair Practices issued Notices of Hearing and an Order consolidating the cases. On May 27, the Borough filed its Answer. It denied that it had made any improper statements to induce employees to vote against union representation; that any meeting started or was intended to start within 24 hours of the time of the election, and that its change in hours was in any way inappropriate.

On June 29, 1987, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties examined witnesses and introduced exhibits. They reserved the right to file post-hearing briefs, but neither party did.

1/ Footnote Continued From Previous Page

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; (7) Violating any of the rules and regulations established by the commission."

On October 29, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-20, 13 NJPER ___(¶____ 1987). He found that a Borough Commissioner had made an improper promise of benefits to a group of unit employees the day before the election, thus interfering with employee free choice. He recommended that the Director of Representation set aside the election and conduct a new election. He also recommended that the Commission find the same conduct violated N.J.S.A. 34:13A-5.4(a)(1); however, he recommended that the charge be dismissed as moot should the election be set aside and a new election conducted. The Hearing Examiner also recommended that the Commission dismiss allegations that the Borough changed employee work hours notwithstanding its knowledge of organizational activity by AFSCME. The Hearing Examiner found that the change took place prior to the AFSCME representation filing and that the Borough agent who ordered the change in hours had no knowledge of AFSCME's organizational activities at that time.

On November 12, 1987, the Borough filed Exceptions to the Hearing Examiner's Report.[2/] The Borough acknowledges that one of its Commissioners promised a raise to employees at a pre-election meeting. The Borough argues that a discussion of a raise, standing alone, is "not sufficient to overcome the burden upon the objecting party to establish that such conduct so interfered or reasonably tended to interfere with employee's freedom of choice." The Borough

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2/ The Borough also requested oral argument. We deny that request.

argues that AFSCME's failure to produce an employee who attended the meeting supports an inference that no one was improperly influenced by the discussion of the raise. The Borough also excepts to the Hearing Examiner's conclusion that the promised raise was neither authorized nor implemented at the time of the meeting, nor could have been implemented prior to the passage of the budget by the Commissioners of the Borough of Wildwood Crest in April 1987. The Borough argues that, under its form of government, "each of its three commissioners has independent authority within his own jurisdiction, and can make independent decisions within his own budgetary constraints." The Borough argues that because the Commissioner had such authority, and had resolved to give the raise prior to organizational activity, his actions fall within an exception to the general rule against promises of benefits during an election campaign.3/ AFSCME did not file a response to the exceptions, nor did it file any of its own exceptions to the Hearing Examiner's recommended decision.

Our rules charge the Director of Representation with reviewing election objections. See N.J.A.C. 19:11-9.2. The rules also indicate that we retain, at all times, the authority to perform any function in any case. In view of the prior consolidation of

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3/ In its exceptions, the Borough asserted as facts certain conduct during 1986 and 1987 concerning salary increases for public safety employees. However, these factual assertions were not presented during the hearing, are not part of the record in this case, and cannot be considered by us. See N.J.A.C. 19:14-7.2.

these matters, and to expedite the proceedings, we will review both the election objections and the unfair practice charges in this decision.

The Hearing Examiner's findings of fact (pp. 3-6) are accurate. We adopt and incorporate them here. We also agree with the Hearing Examiner's analysis and conclusions of law. Under the circumstances of the case, AFSCME met its burden of proof by demonstrating that a Borough agent made a promise of benefits to a group of unit employees the day before a scheduled Commission election. We reject the Borough's contention that AFSCME could not meet its burden because it did not present any unit employee who heard the promise and whose vote was affected by it. Such evidence would be relevant, but is not necessary to demonstrate "evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice." Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970) (slip op. at 10), aff'd 114 N.J. Super. 463 (App. Div. 1971). See also Passaic Valley Sewerage Comm., P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1980). We note that this objective standard does not require a finding that the actions taken were intended to interfere with employee free choice. Indeed, the Hearing Examiner did not find that the Borough's agent had such intent, and we also make no finding of improper intent by the Borough.

The Borough also excepts to the Hearing Examiner's conclusion that the promise of benefits was not justified by either prior planning or history. Specifically, the Borough maintains that

the Hearing Examiner erred when he found that the Borough's agent, the Commissioner responsible for public safety, did not have authority to implement the raise which he promised to employees. However, we find that the Borough's position is inconsistent with the record testimony of the Commissioner responsible for public safety, who acknowledged that "if they [a majority of Commissioners] did not approve the salary ordinance, I wouldn't be able to pay any employee ten cents..." (T65). Since it is undisputed that the Commissioners had not passed a budget for 1987 when the Borough's agent made the promise of benefit to employees, we agree that the Borough did not justify its agent's promise of benefit. The simple fact is the employer, within twenty-four hours of the election, advised the employees for the first time that they would receive a substantial pay increase in excess of 15 percent. We find this conduct reasonably tended to interfere with the employees' freedom of choice.[4/] Under the totality of the circumstances, we order that the prior election be set aside, that a new election be conducted, and that the unfair practice charges be dismissed as moot. We remand this matter to the Director of Representation for the purpose of conducting a new election.

4/ As noted above, we cannot consider extra-record factual assertions contained in the Borough's exceptions.

ORDER

Docket Number RO-H-87-108 is remanded to the Director of Representation for proceedings consistent with this opinion. The Complaints in Docket Numbers CO-H-87-241 and CO-H-87-243 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
December 21, 1987
ISSUED: December 22, 1987

H.E. NO. 88-20

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

In the Matter of

BOROUGH OF WILDWOOD CREST,

Public Employer-Respondent,

-and-

Docket Nos. RO-H-87-108
CO-H-87-241; CO-H-87-243

AFSCME COUNCIL 71,

Petitioner-Charging Party.

SYNOPSIS

In a consolidated election objection/unfair practice matter, a Hearing Examiner recommends that the Director of Representation set aside an election conducted by the Public Employment Relations Commission in a unit of blue and white collar employees of the Borough of Wildwood Crest. The Hearing Examiner finds that a Borough agent made an improper promise of benefits to a group of unit employees, thereby interfering with employee free choice. The Hearing Examiner also recommends that the Commission find that the same conduct violates N.J.S.A. 34:13A-5.4(a)(1); however, should the election be set aside and a new election be held by order of the Director, the Hearing Examiner recommends that the related unfair practice charge be dismissed as moot.

The Hearing Examiner also recommends that the Commission dismiss allegations that the Borough changed employee work hours notwithstanding its knowledge of organizational activity by AFSCME. The Hearing Examiner finds that the change took place prior to AFSCME's representation filing, and that the Borough agent who ordered the change in hours had no knowledge of AFSCME's organizational activities at that time.

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.

Those portions of this decision concerning election objections are transferred to the Director of Representation, who will render an administrative determination either setting aside the election and directing a new one, or dismissing the objections and issuing the appropriate certification.

H.E. NO. 88-20

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

In the Matter of

BOROUGH OF WILDWOOD CREST,

Public Employer-Respondent,

-and-

Docket Nos. RO-H-87-108
CO-H-87-241; CO-H-87-243

AFSCME COUNCIL 71,

Petitioner-Charging Party.

Appearances:

For the Public Employer-Respondent
Fineberg and Rodgers, Chartered
(Robert A. Fineberg, Esq.)

For the Petitioner-Charging Party
Robert C. Little, Staff Representative

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

This decision considers election objections and unfair labor practice charges brought by AFSCME Council 71 ("AFSCME") against the Borough of Wildwood Crest ("Borough"). The objections and charges were filed after an election conducted by the Public Employment Relations Commission ("Commission") on February 11, 1987, in which AFSCME did not receive a majority of valid votes cast. The objections and charges allege that the Borough (1) changed employee work hours notwithstanding its knowledge of organizational activity by AFSCME, allegedly in violation of

N.J.S.A. 54:13A-5.4(a)(1), (2), (3), (4) and (7)[1/] (Docket No. CO-87-241) and (2) made misleading and improper statements in meetings held with employees of the petitioned-for unit within 24 hours of a Commission election, allegedly in violation of §5.4(a)(1), (2) and (7) of the Act (Docket No. CO-87-243).

After administrative investigation of the alleged objections under N.J.A.C. 19:11-9.2(i), the Director of Representation and Unfair Practices issued Notices of Hearing and an Order consolidating the representation and unfair practices cases on May 6, 1987. On May 27, 1987, the Borough filed its answer, denying "that any meeting was held during which any untrue statement was made as an inducement to employees to vote in opposition to representation." The Borough also denied that "any meeting was commenced, or intended to be commenced, within (24) hours of the time of the election...," and that any change in hours

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (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; (7) Violating any of the rules and regulations established by the commission."

was "related to the requirements of the Fair Labor Standards Act[2/] and unrelated to any union activities."

On June 29, 1987, I conducted a hearing in Trenton, New Jersey, where the parties examined and cross-examined witnesses, presented evidence, argued orally and reserved the right to file briefs. The record closed when neither party filed a brief by the established date of August 31, 1987.[3/]

FINDINGS OF FACT

1. The Borough of Wildwood Crest is a public employer within the meaning of the Act and is subject to its provisions. The Borough of Wildwood Crest is governed by three Commissioners: Frank McCall is the Mayor and is responsible for public works; Robert Young is responsible for revenue and finance; and George Denham is responsible for public safety (Exhibit J-1).

2. AFSCME Council No. 71 is an employee organization within the meaning of the Act and is subject to its provisions.

3. As early as December 1, 1986, and during the first several weeks of 1987, Robert Little, Staff Representative of AFSCME Council 71, organized and sought authorization and designation cards from blue and white collar employees of the Borough of Wildwood Crest (stipulation of parties--T 42-43).[4/]

2/ The Borough waived this defense on the record (T 100).

3/ The date for filing of briefs was delayed by an untimely transcript.

4/ T refers to Transcript of June 29, 1987.

4. On December 17 or December 18, 1986, Commissioner Robert Young circulated a notice to administrative and clerical employees stating that the workday was being increased by one-half hour per day. Mr. Young credibly testified that this change had been contemplated by the Commissioners for over a year and reflected Commissioners' concern that "a thirty hour work week" was inadequate. Young first learned of the AFSCME petition in January 1987. (T 90-94; Exhibit J-1).

5. On December 23, 1986, the Commission received a Petition for Certification of Public Employee Representative filed by AFSCME and dated December 19, 1986, seeking to represent all blue and white collar employees employed by the Borough of Wildwood Crest. (Exhibit A-1).

6. George Denham, Commissioner of Public Safety, testified that after the filing of the petition, and in response to questions from various Borough employees, he held a number of meetings with different departments within his charge. The last of these meetings was originally scheduled for Monday, February 9, 1987, at 3 p.m., to be attended by all dispatchers employed by the Borough. While Denham and Police Chief Robert Frederick testified that attendance was "voluntary," the notice to the dispatchers stated that "all dispatchers...are to report to headquarters...." I find that dispatchers could draw no other conclusion than that the attendance was mandatory. Due to inclement weather, Denham called police headquarters at approximately 1:30 p.m. on February 9, 1987,

to reschedule the meeting to February 10, 1987 at 3 p.m. Denham originally tried to schedule the meeting with dispatchers in late January or on Friday, February 6; however, the 6th was not a convenient date for all the dispatchers. Denham met with one dispatcher on February 6 since the dispatcher could not attend the February 9 scheduled meeting. Denham had never previously met with the dispatchers as a group (T 21, 45-46, 54, 56, 65 and 70-72; CP-1).

7. Denham convened the meeting with three dispatchers and the secretary to the Police Chief slightly before 3 p.m. on February 10, 1987. He answered questions about working conditions, holidays and pay and called in different Borough employees, including the Borough Clerk, Assistant Treasurer, and the Police Chief to answer certain questions. Denham told the employees that if the union won the election, negotiations might take as long as a year. He attributed that estimate to a statement made by a union supporter at a prior meeting with employees. In response to a question, Denham said that he intended to increase dispatchers' salaries from $10,400 in 1986 to $12,000 in 1987 and that the raise would be retroactive to January 1 upon passage of the budget in April. To verify his intention, Denham called Police Chief Frederick into the meeting. Frederick confirmed that Commissioner Denham had reviewed this planned raise with him several weeks earlier. Denham had planned this raise as early as October, 1986. Denham never previously told dispatchers of this planned increase because "I didn't feel there was any reason to do [so] prior to that

time." Denham also told employees to compare campaign information to actual experience of friends in other municipalities who were represented by AFSCME, and of his belief that unionized employees in surrounding municipalities were receiving raises for 1987 in the neighborhood of 3 to 7 or 8%. The meeting ended between 3:30 and 3:45 p.m. (T 46-48, 51-53, 58, 75-77 and 79).

8. The election was held on February 12, 1987 between 3 and 4:30 p.m. Out of 33 valid ballots cast, 14 were cast for AFSCME, 17 were votes against representation by AFSCME and there were two challenged ballots. Challenges were not of sufficient number to affect results of the election [Exhibit A-5].

Commission Standards On Election Objections

Commission standards for review of election objections have been established by rule and case law. Unlike other representation proceedings, an election objection matter requires the objecting party to "bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election." N.J.A.C. 19:11-2(h).

A review of Commission case law reveals that the objecting party's burden is directly related to the nature of the alleged misconduct. The Commission's standards of review applicable to election objections were originally stated in In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970)(Slip opinion at 10), aff'd sub nom AFSCME Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971):

> The Commission presumes that an election conducted unders its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct, seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. [emphasis supplied]

As the Commission noted in Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1980), the above standard is necessarily flexible:

> The Commission recognize[s]...that election objections can encompass a broad range of abuses. In reviewing the spectrum of possible election campaign misconduct, it would be unrealistic to require the same type of proof or apply any standard in an inflexible manner. To rigorously apply one test would not provide for the varying severity of election abuse and the ability of the parties to counteract certain types of misconduct on their own during the campaign. The latter part of the standard enunciated in Jersey City Dept. of Public Works is intended to provide the flexibility essential to the Commission if it is to meet its responsibility to regulate the conduct of election in a manner which achieves the goal that the tally of ballots is a reflection of the free choice of employees. The standard recognizes the elections should not be easily or routinely overturned but that types of conduct which have a strong tendency to jeopardize the atmosphere necessary for a fair election will not be condoned.

Thus, the Commission held in Passaic Valley Sewerage Commission that where an objecting party alleges that material factual misrepresentations interfered with employee free choice, that party must prove either its inability to effectively reply or direct evidence of interference. This stringent standard was applied in City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982), where an alleged misrepresentation attributed to a representative of an employee organization one day prior to a

representation election did not warrant setting aside the election. In City of Atlantic City a representative of the competing employee organization was present to confront the source of the alleged factual misrepresentation and had an opportunity to rebut it. See also Secaucus Municipal Utilities Authority, P.E.R.C. No. 83-17, 8 NJPER 480 (¶13225 1982).

More severe allegations of election misconduct require a lesser burden of proof; for example, in Passaic Valley Sewerage Commission, the Commission found that pre-election conferral of benefits by the employer "...had such a strong tendency to interfere with the free choice of the employees that the election must be set aside even in the absence of direct evidence [of interference]." 6 NJPER at 505. In so ruling, the Commission cited the United States Supreme Court's ruling in NLRB v. Exchange Parts Co., 375 U.S. 405, 409, 55 LRRM 2098, 2100 (1964):

> The danger inherent in well-timed increases and benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up, if it is not obliged.

At the same time, the Commission held that a conferral or promise of benefits does not compel a new election.

> Even if it is established that the timing of the increases or promise of benefits coincided with the filing of a representation petition, the objections to election may be dismissed if the record also shows that the employer's conduct was governed by factors unrelated to the impending election.... N.J.A.C. 19:11-9.2(h) places the initial burden of proof on the objecting party to come forward with evidence to show that the conduct warrants setting aside the election.

> If the objecting party can establish such a prima facie case the burden would normally shift to the responding party to show that its conduct was governed by considerations unrelated to the representation proceeding. [6 NJPER at 506; footnote omitted]

Similarly, the Commission has adopted the Peerless Plywood[5/] standard of the National Labor Relations Board; campaign meetings and question and answer sessions (see Honeywell, Inc., 162 NLRB 323, 64 LRRM 1002 (1966)) held by management or employee organizations on company time within 24 hours of the election may be grounds for setting aside an election. In re Twp. of East Windsor, D.R. No. 79-13, 4 NJPER 445 (¶4202 1978), cited with approval in Passaic Valley Sewerage Commission. Again, no direct evidence of actual interference need be demonstrated, and the responding party can prove mitigating factors which result in exceptions to the 24 hour rule.[6/]

ANALYSIS

RO-87-108 and CO-H-87-243

The election objections and the unfair practice charges in Docket Number CO-H-87-243 replicate each other and are reviewed together. Procedurally, recommendations on the election objections will be referred to the Director of Representation for an administrative determination (see N.J.A.C. 19:11-9.2(j)), and recommendations on the unfair practice charges will be reviewed by the Commission (see N.J.A.C. 19:14-7.1).

5/ Peerless Plywood Co., 197 NLRB 427, 33 LRRM 115 (1953).

6/ See private sector cases discussed below.

AFSCME objects to the meeting held by Denham with dispatchers on February 10, 1987. Docket No. CO-H-87-243 also alleges that an improper meeting between Borough officials and Public Safety Employees occurred on February 3rd or 4th, 1987; however, no evidence was presented on this latter meeting, and that portion of the charge is dismissed.

The February 10, 1987 meeting raises two issues: 1) Did Denham make an improper promise of benefits to employees? 2) Did the meeting violate the Peerless Plywood/Twp. of East Windsor prohibition against campaign meetings on company time within 24 hours of a Commission election? In addition, the totality of circumstances must be considered to determine whether or not "the tally of ballots [in RO-87-108] is a reflection of the free choice of employees." Passaic Valley Sewerage Commission at 6 NJPER 505.

It is undisputed that, during the February 10 meeting, Denham promised dispatchers for the first time that they would receive $1600 raises in late April or early May. Denham called Chief Frederick into the meeting to confirm that Denham had discussed these exact raises with Frederick approximately two weeks earlier. Denham also told employees that unionized employees in surrounding municipalities received only 3 to 7-8% raises, and encouraged employees to confirm these figures with friends (see Finding of Fact Numbers 6 and 7).

Thus, AFSCME has met its burden of establishing that the promise of the $1600 raise occurred after the filing of the

representation petition and prior to the election. The burden thus shifts to the Borough to demonstrate that its conduct was governed by factors unrelated to the representation proceeding. Passaic Valley Sewerage Commission.

Denham testified that he planned the $1600 increase at least two months before the filing of the representation petition. This testimony was not rebutted by AFSCME and I have credited that testimony (Finding of Fact Number 7). However, Denham had never told the dispatchers of the proposed raise prior to the February 10 meeting. Given the form of government in Wildwood Crest and the budgetary process, the raise could not have been authorized nor implemented until the Commissioners passed their budget in April, 1987 (Finding of Fact Numbers 1 and 7).

These facts raise the question of why Denham mentioned plans for an as yet unauthorized raise during a meeting with dispatchers just prior to a PERC election. Denham testified that he told the employees about the planned salary increase because they specifically asked what their salaries would be, and I have credited that testimony (Finding of Fact Number 7). The Borough argues that since the raise was previously planned, and there was no intent to reveal it at the meeting, Denham's comments did not interfere with employee free choice.

However, I find that these defenses are not persuasive. Denham did not have authority to give the raise unilaterally--thus the $1600 raise was not definite even when announced to the

employees in response to their questions. Denham's plan to seek approval of the $1600 from fellow Commissioners in April does not alter that fact. Nor did the Borough establish a prior history of prematurely announcing planned but as yet unauthorized raises to any of its employees. Compare, Louisberg Sportswear Co. v. NLRB, 80 LRRM 2138 (4th Cir. 1972), where wage increases announced prior to a National Labor Relations Board election were planned and settled upon prior to the filing of the representation petition, and were announced ahead of implementation consistent with prior conduct of the employer. See also Litton Dental Products v. NLRB, 93 LRRM 2714 (4th Cir. 1976); Schwab Foods, Inc., 223 NLRB 394, 92 LRRM 1285 (1976); Big G Supermarket, 219 NLRB 1098, 1108, 90 LRRM 1333 (1975); Domino of California, Inc., 205 NLRB 1083, 84 LRRM 1540; Sanford Finishing Corp., 175 NLRB 366, 76 LRRM 1009 (1969); Southbridge Sheet Metal Works, 158 NLRB 819, 62 LRRM 1163 (1966), 65 LRRM 2916 (1st Cir. 1967); NLRB v. Tommy's Spanish Foods, Inc., 80 LRRM 3039 (9th Cir. 1972); and Humana of W. Va., Inc., 265 NLRB 1056, 112 LRRM 1241 (1982).

Instead, the case is more analogous to NLRB v. Arrow Plastics Corp., 98 LRRM 2004 (1st Cir., 1978). There, as here, the benefits promised were not legally binding, and were announced at a time which could effect employee free choice in the representation election. See, also NLRB v. Styletek, 89 LRRM 3195 (1st Cir., 1975). Further, while only four employees attended the session, the votes of those employees could have affected the results of the election (see Exhibit A-5).

In sum, Denham's promise of benefits cannot be justified by either prior planning or history. The remaining defense is that Denham simply did not intend to tell employees of the planned raises, and would not have told them absent their questions. While I have credited Denham's testimony that he only mentioned the raise in answer to questions, it does not follow that he did not intend to tell dispatchers about the raise at the meeting. To the contrary, the record indicates that Denham was prepared to tell employees about comparative raises in other municipalities, and to compare the timing of raises employees would receive from the Borough without union representation as opposed to with union representation. (Finding of Fact Number 7.) These additional comments to employees do not support the argument that Denham did not intend to tell employees at the meeting of the planned raises. Instead, Denham appears to have given the topic of employee raises, with or without union representation, a great deal of thought prior to the meeting with employees, and was fully prepared to relay those thoughts at that time.

Accordingly, I find that the Borough did not meet its burden of proving that, notwithstanding Denham's promise of benefits to employees during the pre-election period, the Borough was motivated by factors unrelated to the pending election. I recommend that the Director set aside the election and order a new election.

AFSCME also argues that the February 10, 1987 meeting between Denham and the dispatchers violated the Commission's

prohibition against campaign meetings on company time within 24 hours of a Commission election. As noted above, the Commission has adopted this policy of the National Labor Relations Board, known as the Peerless Plywood Rule, in Passaic Valley Sewerage Commission.

While the Borough concedes that the meeting intruded into the 24 hour period, it argues the following mitigating factors:

1. The meeting was originally scheduled to occur 48 hours prior to the election.

2. Inclement weather forced the cancellation of the meeting.

3. The intrusion into the 24 hour period was only for one-half to three-quarters of an hour.7/

I agree that mitigating factors are sufficient to find that the meeting, by its timing alone, did not violate the Act and/or require a new election. The Borough is not responsible for inclement weather, and the meeting when held did not significantly intrude into the 24 hour period. Further, the Borough did not show deliberate disregard for the Commission's rules; Compare, Rodac Corp., 231 NLRB 261, 95 LRRM 1608 (1977) and Granite State Veneer Inc., 123 NLRB 497, 44 LRRM 1154 (1959).

7/ The Borough also argues that the meeting was not mandatory; however, I have found that the notice to employees is contrary and conveyed to employees that the meeting was mandatory (Finding of Fact Number 6). I have also previously rejected the Borough's theory that the meeting was not substantial because of the small number of employees involved.

However, having already recommended a finding that Denham made an improper promise of benefit, I believe that the timing of the promise, even if not violative of Peerless Plywood, supports the recommendation that the election be set aside. The timing of the promise, while not objectionable alone, was very close to the election, and served to reinforce the negative effect of the promise of benefits on employee free choice. Under the totality of the circumstances, the election should be set aside.

Accordingly, I recommend that the Director of Representation order that the election of February 11, 1987 (Docket Number RO-87-108) be set aside and that a new election be scheduled. I recommend that the Commission find in Docket Number CO-H-87-243 that the Borough violated N.J.S.A. 34:13A-5.4(a)(1) by the same conduct reviewed above; however, should the parties proceed to a new election by order of the Director of Representation in Docket No. RO-87-108, I recommend that the unfair practice charges in Docket Number CO-H-87-243 be found moot and be dismissed.

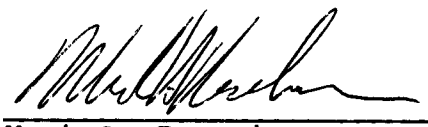
CO-H-87-241

In this charge, AFSCME alleges that the Borough changed employee work hours notwithstanding its knowledge of organizational activity by AFSCME. The parties stipulated that AFSCME representative Robert Little sought to organize employees and solicited authorization and designation cards as early as December 1, 1987 (Finding of Fact Number 3). It is also undisputed that the change in hours was announced by memo of Commissioner Young dated

December 17, 1986, to take effect January 2, 1987 (Finding of Fact Number 4; Exhibit J-1). The representation petition was dated December 19, 1986 and received by the Commission on December 23, 1986. The Commission notified the Borough of the petition by letter of December 29, 1986 (Exhibits A-1 and A-7).

To prove violations of N.J.S.A. 34:13A-1, 2, 3, 4 and 7 as alleged, AFSCME must preliminarily demonstrate a nexus between its organizational activities and the Borough's actions. However, AFSCME presented no evidence of such nexus. Instead, the documents indicate that the change in hours was directed by Commissioner Young prior to the date of AFSCME's representation petition. The unrebutted and credited testimony of Commissioner Young establishes that the change in hours was ordered after repeated consideration by the Commissioners, and that Young had no personal knowledge of AFSCME organizational efforts until after he issued the memo on changing work hours. The record simply does not support AFSCME's allegations of improper conduct.

Accordingly, I recommend that the Commission dismiss Docket Number CO-H-87-241.



Mark A. Rosenbaum
Hearing Examiner

Dated: October 29, 1987
Trenton, New Jersey