

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)
)
)
)
District of Columbia Health and) PERB Case Nos. 97-UM-05
Hospitals Public Benefit Corporation,) and 97-CU-02
)
Agency,) Opinion No. 619
)
and)
)
All Unions Representing Bargaining)
Units in Compensation Units 12, 20,)
21, 22, 23 and 24 and employees)
employed by the Health and Hospitals)
Public Benefit Corporation,)
)
Labor Organizations.)
_____)

**DECISION AND ORDER ON OBJECTIONS
AND CERTIFICATION OF REPRESENTATIVE**

On May 28, 1999, the Board issued a Decision and Order (Opinion No. 589) sustaining objections filed by the American Federation of State, County and Municipal Employees, D.C. Council 20, Local 1033 (AFSCME) to the Board's directed election for the unit of non-professional allied health care employees at the District of Columbia Health and Hospitals Public Benefit Corporation (PBC). The Board ordered that the election be set aside and directed a rerun election.^{1/}

Pursuant to the Board's Order, the parties elected to hold a mail-ballot election. The election was conducted by the League of

^{1/} The first election between AFSCME, American Federation of Government Employees, District 14 (AFGE) and the Licensed Practical Nurses' Association (LPNA), was won by AFGE.

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 2**

Women Voters (LWV), under the auspices of the Board. Ballots were issued by the LWV on July 19, 1999. In accordance with the Board's Order and Board Rule 515.6, the selection on the ballot was limited to the two unions which received the most votes in the first election, i.e., AFSCME and AFGE.

On August 3, 1999, LWV issued a tally of the election results to the parties. The results were as follows:

Total Ballots Mailed:	<u>722</u>
Mailed Ballots Cast:	<u>259</u>
Mailed Ballots Returned for Incorrect Addresses:	<u>79</u>
Duplicate Ballots Issued:	<u>68</u>
Duplicate Ballots Cast:	<u>27</u>
Challenged Ballots:	<u>42</u>
Valid Ballots Counted:	<u>217</u>
AFGE:	<u>81</u>
AFSCME:	<u>136</u>

On August 9, 1999, AFGE filed objections to the rerun election. AFGE's objections are twofold. First, AFGE objects to the addition of 59 names to the voter eligibility list. Second, AFGE objects to an AFSCME campaign flyer which was distributed to eligible voters. AFGE contends that these alleged irregularities gave AFSCME an unfair advantage and affected the outcome of the election.

On August 13, 1999, an investigation of the objections was initiated in accordance with Board Rule 515.4. The purpose of the investigation was to determine whether or not "there was conduct that affected the outcome of the election". See, D.C. Code § 1-

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 3**

618.10(d)(1). All parties to the election proceeding were provided an opportunity to respond to the objections. Responses were filed by AFSCME and the PBC. The objections raised material issues of fact that could affect the outcome of the election. As a result, the objections were referred to a Hearing Examiner. On December 2, 1999, the Hearing Examiner issued his Report and Recommendation. No exceptions were filed. The Hearing Examiner's Report and Recommendation is now before us for review and final action.

Objection 1-Disputed List of Additional Employee Voters.

On July 12, 1999, the PBC provided AFGE and AFSCME with a second eligibility list.^{2/} The PBC requested that AFGE and AFSCME submit and resolve any additions or omissions to this list as soon as possible. (R&R at 2.) On July 13, 1999, AFSCME submitted a list containing the names of 59 additional employees to the PBC. AFSCME informed the PBC that these 59 individuals were eligible employees who were left off the June 23rd eligibility list. On July 16th, the PBC notified AFGE of the oversight and advised AFGE that it believed that the employees were eligible.

AFGE contends that the list of 59 employees provided by AFSCME and added to the eligibility list, violated the Board directed election procedures. Specifically, AFGE asserts that: (1) it did not receive the list until one workday before the ballots were mailed and (2) the list did not contain the employees' work site. As a result, AFGE asserts that it did not agree to the second eligibility list. Therefore, they claim that the prior list should control. However, the Hearing Examiner concluded that AFGE failed to exercise its right to challenge the additional 59 employees during the vote tally, as provided under Board Rules.^{3/} As a result, he reasoned that AFGE cannot now assert the eligibility of

^{2/} The Hearing Examiner found that on June 22, 1999, the PBC provided the first eligibility list, as required by the Board-directed election procedures.

^{3/} The 42 challenged ballots contained in the tally and noted in this Opinion, were apparently unrelated to any of the 59 employees on the disputed list.

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 4**

the 59 additional employees as the basis of an objection. (R&R at 5-6.)

In addition, the Hearing Examiner determined that AFGE failed to produce evidence at the hearing which challenged the eligibility of the additional 59 names. Moreover, he found that by failing to challenge the 59 additional names, it precluded the opportunity to determine how many of the 59 employees cast ballots. (R&R at 5.) Therefore, he concluded that AFGE's only basis for claiming that the inclusion of the 59 names affected the outcome of the election, is based on AFGE's speculation. He found that there was no legal basis to rerun the election based on such speculation.

Also, the Hearing Examiner determined that the 59 individuals were employees whose names were on the eligibility list for the first election and inadvertently left off the eligibility list for the rerun election. (R&R at 5.) In addition, he found that AFGE agreed that the additional 59 names should be added to the eligibility list and forwarded to the LWV. (R&R at 4.)

Furthermore, the Hearing Examiner concluded that AFGE failed to establish that it was disadvantaged by receiving the disputed list of employees on the last workday before the ballots were mailed. He based this finding on the fact that AFGE failed to show that it mailed campaign literature to anyone on the eligibility list. Therefore, he reasoned that the timing of the list did not impact on AFGE's campaign.

AFGE also asserts that it was disadvantaged by the absence of 59 employees' work-sites. The Hearing Examiner determined that AFGE failed to show that its distribution of campaign literature was done in such a manner that the 59 employees did not have access to campaign material or did not receive the campaign material. Based on his findings, the Hearing Examiner concluded that there was no legal or factual predicate provided by AFGE, to support a finding that the objectionable conduct interfered with employees freedom of choice and affected the outcome of the election.

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 5**

Objection 2-Misrepresentations

The second objection concerns a campaign flyer mailed by AFSCME. AFGE contends that AFSCME's flyer misrepresented that higher union dues and additional fees for optical and dental benefits would result if AFGE won the election. AFGE contends that these misrepresentations gave AFSCME an unfair advantage and affected the outcome of the election.

The Hearing Examiner determined that there was no dispute that AFSCME mailed the flyer to employees. (R&R at 9.) However, he found that at the time the flyer was issued, AFGE's dues were indeed higher than AFSCME's dues. (R&R at 7.) Moreover, he determined that AFGE had effectively responded to the flyer during the election by issuing a flyer of its own which asserted that: (1) the locals set their dues and (2) AFSCME's dues would be increasing. Also, the Hearing Examiner concluded that AFGE did not demonstrate that employees had reason to believe that AFSCME had "special knowledge" of what AFGE's dues would be if AFGE won the election. Id.

The parties stipulated that optical and dental benefits for PBC employees, whether AFGE or AFSCME, were paid by the employer. As a result, the Hearing Examiner found that the extra payment cited by AFSCME, pertained to additional benefits which AFGE allows its members to obtain. In light of this, he determined that the representations (in AFSCME's flyer) concerning AFGE's dental and optical benefits were "false and misleading." (R&R at 9.) Therefore, he concluded that AFSCME's representations created the impression that if AFGE won, employees would have to pay extra for any optical and dental benefits.

Citing FOP/MPD Labor Committee and Metropolitan Police Dept, 29 DCR 1045, Slip Op. No. 33, PERB Case No. 81-R-05 (1982) and Board Rule 550.14, the Hearing Examiner observed that AFGE failed to demonstrate by a preponderance of the evidence, that laboratory conditions were so disturbed by the flyer that it interfered with the employees' freedom of choice. (R&R at 8.)

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 6**

Also, relying on our opinion in FOP/DOC Labor Committee and Dept of Corrections, Slip Op. No. 374, PERB Case No. 93-R-04, he reasoned that the truth or falsity of the representation contained in AFSCME's campaign flyer did not constitute the basis for setting aside the election. He based his conclusion on the fact that employees had an opportunity to evaluate the statements and AFGE had effectively responded to the flyer during the election. (R&R at 9.) ^{4/}

Based on the above, the Hearing Examiner concluded that AFGE did not meet its burden that the asserted objections so disturbed laboratory conditions that it interfered with employees' freedom of choice or the outcome of the election. The Hearing Examiner recommended that the objections be overruled and the election results be certified.

After reviewing the parties' pleadings and applicable authority, we find, for the reasons discussed below, that even accepting as true AFGE's assertions, we can not reasonably conclude that the alleged conduct affected the outcome of the election.

We have held that "[t]he ultimate objective in a representation proceeding under the CMPA is to effectuate employees' right to 'bargain collectively through representatives of their own choosing' as 'selected by a majority of employees in an appropriate unit who participated in an election'. D.C. Code Sec. 1-618.6(a)(3) and 1-618.10(a)."Fraternal Order of Police/DOC Labor Committee, Teamsters, Local Union No. 1714, et al. and Dept of Corrections, Slip Op. No. 374 at p.4, PERB Case No. 93-R-04 (1994). Furthermore, we have stated that this objective is

^{4/} The precise time that AFSCME distributed the disputed flyer is not established by the record. However, a review of the transcript reveals that the flyer had been distributed by the time it was discussed at AFGE's February 18, 1999 open meeting. AFGE held this meeting for all members of the bargaining unit at the PBC.(Tr. at 71-73.) Officers, members and shop stewards from AFSCME were also in attendance at this meeting. (Tr. at 91-92.) Testimony was presented that AFGE took the opportunity to address any misleading aspects of AFSCME's flyer, including AFGE Local dues determination and employees' optical and dental benefits. The Hearing Examiner also found that AFGE had also responded by issuing a flyer of its own. (R&R at 8.)

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 7**

achieved in a secret ballot election, unless an objecting participant can demonstrate that "laboratory conditions were so disturbed as to interfere with employees' freedom of choice" to the extent that it "affect[s] the outcome of the election". Fraternal Order of Police, Metropolitan Police Department and District of Columbia Metropolitan Police Department and International Brotherhood of Police Officers, 29 DCR 1045, 1046 Slip Op. No. 33 at p. 2, PERB Case No. 81-R-05 (1982). See, also Fraternal Order of Police/DOC Labor Committee, Teamsters, Local Union No. 1714, et al. and Dept of Corrections, Slip Op. No. 374, PERB Case No. 93-R-04 (1994). Cf., N.L.R.B. v. A.J. Tower Co., 329 U.S. 324 (1946) and Midland National Life Insurance Co., 263 NLRB 127 (1982) (The Supreme Court and National Labor Relations Board (NLRB) making a similar observation as to election proceedings under the National Labor Relations Act).

We find that AFGE failed to show that by adding the additional 59 names to the eligibility list, laboratory conditions were so disturbed as to interfere with employees' freedom of choice, thereby undermining the will of the employees to exercise their individual rights to participate in the election. Therefore, AFGE has clearly failed to meet its burden for sustaining objections to an election. As a result, we find that the Hearing Examiner's findings and conclusions are well reasoned and supported by the record.

In their second objection, AFGE claims that AFSCME's campaign flyer contained misrepresentations. The Hearing Examiner determined that as to the matter of union dues, the issue of falsity was unsubstantiated. However, he found that AFSCME's statements about dental and optical benefits were false. We have held that "[t]he misleading nature or truth or falsity of parties' campaign statements do not per se constitute a basis for setting aside an election when... employees are not deprived of an opportunity prior to the election to evaluate the statements." "Fraternal Order of Police/DOC Labor Committee, Teamsters, Local Union No. 1714, et al. and Dept of Corrections, Slip Op. No. 374 at p.10, PERB Case No. 93-R-04 (1994). Also, we have stated that as long as the campaign material is what it purports to be, i.e. mere propaganda of a particular party, the Board would leave the task of

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 8**

evaluating its contents solely to the employees. See, Fraternal Order of Police/DOC Labor Committee, Teamsters, Local Union No. 1714, et al. and Dept of Corrections, Slip Op. No. 374 at p.10, PERB Case No. 93-R-04 (1994). In the instant case, AFGE effectively responded to the flyer during the election by issuing a flyer of its own. In addition, in February 1999 AFGE held an open meeting for members of the bargaining unit. At this meeting there was discussion of the AFSCME flyer. Moreover, this February meeting was held more than five months prior to the mailing of ballots. In light of the above, it is clear that employees had an opportunity to evaluate AFSCME's statements prior to the election. Based on our standard of review, we deny AFGE's objections.

Therefore, we adopt the Hearing Examiner's findings, conclusions and recommendation that AFGE's objections be overruled. Based on our action, the tally of ballots as reported by the LWV is hereby certified. The Certification of Representative is issued as an attachment to our Order.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Objections of the American Federation of Government Employees, District 14 (AFGE) are overruled.
2. The election results, as reported by the District of Columbia League of Women Voters (LWV) is certified.
3. The American Federation of State, County and Municipal Employees, Local 1033, is certified as the exclusive representative for the non-compensation bargaining unit of non-professional and technical allied health care employees at the Health and Hospitals Public Benefit Corporation (PBC), as set forth in the attached Certification of Representative, Certification No. 116.^{5/}

^{5/} This unit was previously placed in Compensation Unit 20 with the unit of all allied health
(continued...)

**Decision and Order on Objections
and Certification of Representative
PERB Case Nos. 97-UM-05 and 97-CU-02
Page 9**

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.**

February 25, 2000

⁵(...continued)
professional employees (excluding medical officers and registered nurses) for purposes of
compensation bargaining. See, Opinion No. 559 in this proceeding.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)
)
)
)
District of Columbia Health and) PERB Case Nos. 97-UM-05
Hospitals Public Benefit Corporation,) and 97-CU-02
)
) Certification No. 116
Agency,)
)
and)
)
All Unions Representing Bargaining)
Unit Employees employed by the)
Health and Hospitals Public Benefit)
Corporation and Bargaining Units in)
Compensation Units 12, 20, 21, 22,)
23 and 24,)
)
Labor Organizations.)
)
)

CERTIFICATION OF REPRESENTATIVE ^{1/}

A representation proceeding having been conducted in the above-captioned matter by the Public Employee Relations Board (Board) in accordance with the District of Columbia Comprehensive Merit Personnel Act of 1978, the Health and Hospitals Public Benefit Corporation Act of 1996, D.C. Law 11-212 (Act), as codified under D.C. Code Sec. 32-262.8(j), and the Rules of the

^{1/} This Certification supersedes the Certification of the American Federation of State County and Municipal Employees, Local 1033 (AFSCME); American Federation of Government Employees, Local Nos. 2978 and 383 (AFGE); and Licensed Practical Nurses Association (LPNA) as the exclusive representatives of the units set forth in , Certification No. 71, PERB Case Nos. 93-R-03 and 0R007 (1993); Certification No. 27, PERB Case No. 84-R-07; Certification No. 48, PERB Case No. 88-R-04 (1988); Amended Certification, BLR Case No. 8R006; Certification No. 45, PERB Case No. 87-R-15; and Certification No. 1, PERB Case No. 80-R-03 (1981), respectively.

Certification of Representative

PERB Case No. 97-UM-05

Page 2

Board and it appearing that an exclusive representative has been designated;

Pursuant to the authority vested in the Board by D.C. Code §§ 1-605.2(1) and (2), 1-618.9(c); Board Rule 504.1(d) and 504.5(e);

IT IS HEREBY CERTIFIED THAT:

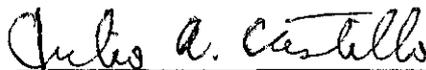
The American Federation of State, County and Municipal Employees, National Union of Hospital and Healthcare Employees, Local 1033 (AFSCME), has been designated by a majority of the employees of the above-named public employer in the consolidated unit described below, as their preference for its exclusive representative for the purpose of collective bargaining concerning both compensation and terms-and-conditions matters with the employer.

Unit Description:

All non-professional and technical allied health care employees employed by the Health and Hospitals Public Benefit Corporation (PBC); but excluding all management officials, confidential employees, supervisors, employees engaged in personnel and labor management relations work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

February 25, 2000



Julio A. Castillo
Executive Director

CERTIFICATE OF SERVICE

This is to certify that the attached Decision On Objections and Certification of Representative in PERB Case No. 97-UM-05 was sent via Fax and U.S. Mail to the following parties on the 25th day of **February**, 2000:

Jonathan Axelrod, Esq. FAX & U.S. MAIL
Beins, Axelrod & Kraft, P.C.
1717 Massachusetts Ave., Ste. 704
Washington, D.C. 20036-2001

Kofi Boakye, National Representative FAX & U.S. MAIL
American Federation of Government
Employees, District 14
80 F. Street, N.W., 11th Floor
Washington, D.C. 20001

Roscoe Ridley FAX & U.S. MAIL
Special Asst, Labor Relations
D.C. Public Benefit Corporation
1900 Massachusetts Avenue, S.E.
Washington, D.C. 20003-2569

Courtesy Copies

Lorreta Owens, President U.S. MAIL
AFSCME, Local 1033
D.C. Public Benefit Corporation
1900 Massachusetts Avenue, S.E.
4th Floor
Washington, D.C. 20003-2569

Ronald Neilly, U.S. MAIL
Lead Organizer
American Federation of State,
County and Municipal Employees
815 157th Street, N.W. Suite 610
Washington, D.C. 20005

Certification of Representative
PERB Case No. 97-UM-05
Page 4

John Word, Executive Director
Licensed Practical Nurses Assoc.
226 Rhode Island Ave., N.W.
Washington, D.C. 20001

U.S. MAIL

Hugh Jascourt, Esq.
Hearing Examiner
18 Maplewood Court
Greenbelt, MD 20770

U.S. MAIL

Michael L. Stevens, Esq.
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

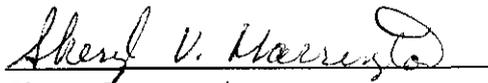
U.S. MAIL

Joanne Robinson, General Counsel
D.C. Health & Hospitals
Public Benefit Corporation
1900 Massachusetts Ave., S.E.
Suite 1505
Washington, D.C. 20003

U.S. MAIL

League of Women Voters of
Washington, D.C.
733 15th Street, N.W.
Suite 432
Washington, D.C. 20005

U.S. MAIL


Sheryl Harrington
Secretary