

COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE OFFICE OF ADMINISTRATION AND FINANCE,
DEPARTMENT OF CORRECTION AND MCOFU AND ALLIANCE, AFSCME/SEIU AFL-CIO, SCR-2194
(9/29/89). DECISION ON OBJECTIONS TO THE ELECTION.

- 43.3 challenges and objections
- 43.321 electioneering
- 43.323 misconduct in voting area
- 43.326 observers at election
- 43.327 employer preference for one of competing unions

Commissioners participating:

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DECISION ON OBJECTIONS TO THE ELECTION

Statement of the Case

This opinion should be read in conjunction with two prior decisions in this case, which concerns a petition filed by the Massachusetts Correction Officers Federated Union (MCOFU) seeking to represent employees in State Bargaining Unit 4.1. The Alliance, AFSCME/SEIU, AFL-CIO (AFSCME), which had represented Unit 4 employees since 1976, challenged MCOFU's status as an "employee organization" as defined in Section 1 of G.L. c.150E (the Law). On January 26, 1989, the Labor Relations Commission (Commission) issued a Decision and Direction of Election ruling that MCOFU is an "employee organization" within the meaning of Section 1 of c.150E, and directing an election to be held to determine whether a majority of the employees in State Bargaining Unit 4 wished to be represented by AFSCME, or by MCOFU, or by another labor organization. See 15 MLC 1380 (1989).

State Bargaining Unit 4 includes the Commonwealth's institutional security employees.



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The election was conducted on May 23, 24 and 25, 1989 at several voting sites across the Commonwealth. When the ballots were tallied on May 26, 1989, the result was 1,148 votes for MCOFU, 1,032 votes for AFSCME, 5 votes for no employee organization, and 99 challenged ballots.²

Pursuant to Commission Rule 456 CMR 14.12(3), all parties had seven days within which to file objections to the conduct of the election or to conduct affecting the election. AFSCME did so on June 1, 1989 and filed an "amended objection" on June 15, 1989.

On July 12, 1989, after investigation of the objections through written submissions from the parties, the Commission issued an Interim Ruling on various objections made by both unions. The Interim Ruling described AFSCME's June 15, 1989 Amended Objection," which MCOFU had moved to strike and/or dismiss and identified the issues that were to be heard in the Hearing on Objections. We need not reiterate all aspects of the seventeen page Interim Ruling. It can be found at 16 MLC 108 (1989).

Pursuant to notice, and in accordance with the terms of the Interim Ruling, hearing was conducted by Hearing Officer Robert B. McCormack on July 19, 20, 21 and 24, 1989. All parties had the opportunity to examine and cross-examine witnesses, to be heard and to participate fully in the hearing. Briefs were filed by MCOFU on August 21 and by AFSCME on August 22, 1989. After careful consideration of the record in the case and the briefs submitted by the parties we make the following findings of fact. The various issues³ are set forth seriatim in the following findings of fact and opinion.

Findings of Fact

The MCOFU Campaign Flier⁴

Pursuant to the provisions of collective bargaining agreements negotiated

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Although the parties had agreed in principle that some of the 99 remaining ballots had been cast by voters who were ineligible to vote (pursuant to a pre-election stipulation by the parties) the Commission did not formally resolve those challenges since their resolution was unnecessary to determine the results of the election.

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Prior to the hearing in this matter AFSCME withdrew its original objection number 118 concerning a newspaper article. Following the hearing on objections, AFSCME withdrew certain allegations concerning the conduct of Jene Ciccone (sic) (AFSCME Post-hearing Brief at 20), and allegations concerning release time which had formed part of the original objection 11A (AFSCME, Post-hearing Brief at 22). Therefore those allegations are not before us.

4 (see page 1294)



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ween the Commonwealth of Massachusetts (Commonwealth or Employer) and AFSCME t 4 employees may receive dental and vision care benefits through the Massachusetts Public Employees Health and Welfare Fund. The Fund is funded by employer contributions and is managed by ten trustees, five of whom are agents of Commonwealth's management, and five others are drawn from several labor organizations representing state employees.⁵

During this representation campaign, Unit 4 employees raised questions concerning their continued eligibility for dental and eye care benefits should AFSCME no longer represent them.⁶ To counter these questions, and to allay employee fears, MCOFU commenced negotiations with Blue Cross/Blue Shield to attempt to secure a similar dental and eye care plan should it be chosen to represent the Unit 4 employees.

Shortly after March 14, 1989, MCOFU prepared and began to distribute a campaign flier entitled "The Big AFSCME Ripoff," which, AFSCME contends, contains misrepresentations of fact that could have improperly affected the outcome of the

⁴ (from page 1293)

The material facts concerning this objection are basically undisputed. Where any conflict in the evidence appears we have credited AFSCME's witnesses for purposes of our ruling in this case.

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Specifically, the labor organizations are the State Police Association, Police Employees International Union Locals 509, 254 and 285, and AFSCME, Council

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The issue of continued health and welfare coverage for correctional officers had been raised in a February 28, 1989 memo from Fund Administrator John Brouder to AFSCME Penal Committee members. In his memo Mr. Brouder emphasized that employees represented by the Alliance were eligible to participate in the plan, but that employees who chose to be represented by another union "would almost certainly not be able to receive benefits from this Fund." Mr. Brouder's letter contained the following:

"The Massachusetts Public Employees Health and Welfare Fund is able to offer a superior package of vision and dental benefits, due to our enormous membership. Employees choosing to affiliate with a smaller organization would be unlikely to enjoy comparable benefits to those employees represented by the Alliance, AFSCME/SEIU."

In addition to State Bargaining Unit 4, the Alliance, AFSCME/SEIU represents several other state bargaining units.

The Penal Committee which received this memo is not fully identified in the record. It appears that the Committee includes Unit 4 employees from several, if not all, penal institutions.



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election.⁷ The flier was distributed to Unit 4 employes by MCOFU agents at MCI Norfolk, Walpole and Bridgewater, the Bay State Correctional Institute, Shattuck Hospital, Southeast Correctional Center and the Longwood Treatment Center. Such distribution occurred from shortly after March 14, 1989 until May 22, the day before the commencement of the election. In addition, it was mailed to the homes of approximately 800 to 900 employees who live in the western parts of the Commonwealth. These mailings were received from or about May 12, 1989 until a day or two before the commencement of the election.⁸

The flier contains, directly and by way of implication, several statements which suggest that since 1986 Fund benefits have not increased despite annual increases in the Employer's contribution to the Fund. The evidence, however, establishes that Fund benefits have increased over the years.⁹ For example, in 1986 the Fund provided an indemnity-type dental plan with a maximum dental benefit of \$400/year. In addition the Fund offered a preferred provider option using the services of forty-one dentists. In 1987, dental benefits were raised to \$600/year, the preferred provider dental panel expanded to fifty-one dentists, and eye care benefits were added. In 1988, the dental care indemnity maximum was raised to \$700/per year and the preferred provider panel expanded to seventy providers.¹⁰ The eye care plan began September 1, 1987, and commencing August 1, 1988, Unit 4 employees were entitled to eye examinations and two pair of glasses very two years.

The MCOFU flier implied that the Fund contributions were being spent by AFSCME on parties, conventions, salaries and "other non-benefit related expenses." Contrary to implications in the MCOFU flier, the Employer's increased contributions to the Fund do not go to AFSCME, but instead are deposited directly into the Fund. In the dental care area, two-thirds of expenditures go to dental care providers and one-third to Fund members in the form of reimbursements. In the eye care area, 90% of the contributions go to providers and 10% to benefit fund members.

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To consider this flier properly, one must view a facsimile of it. Such a facsimile, consisting of three pages, is appended to this decision.

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AFSCME, Local 464 Vice President John Murphy and AFSCME members Charles Gillies and Brian Kelley testified that they received Copies of the flier on or about May 15, 1989.

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There was, however, at least one gap between the date when contributions were increased and the date when benefits were increased. Thus, the contribution rate increased from \$4.00/member to \$5.00/member on July 1, 1987, but benefits did not increase until September 1, 1987.

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Under the closed (preferred provider) dental plan, there is no annual maximum benefit amount. Instead employes receive full coverage for services rendered at participating providers.



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The MCOFU flier further states that Unit 4 employees and their families "are being blindly cheated out of the benefits they should be receiving." The MCOFU flier criticizes AFSCME stating: "AFSCME is about money. Taking your money every week and spending it on expensive parties, multi-million dollar conventions, elaborate salaries of employees and other non-benefit related expenses..." Evidence submitted at the hearing which established that the Fund has not expended money on expensive parties or conventions. Although no evidence was introduced to establish how much Fund employees are paid,¹¹ the evidence demonstrates that Fund employees have received annual salary percentage increases paid pursuant to the Finance collective bargaining agreement. No evidence concerning AFSCME's entertainment, convention or salary expenditures was introduced.

Employees who benefit under the Fund receive a booklet every May which describes their benefits under the health care programs. Those who save and have the information contained in the annual booklets or who are aware of the benefits available each year can readily evaluate their increased annual benefits from the Fund. The latest booklet was mailed to employees during the period between May 7 and May 14, 1989, shortly before the election. Further, the Fund itself is a ready source of information about benefits. It maintains three toll-free 800 number telephone lines, and five persons are employed for the sole purpose of answering questions from employees concerning the Fund and its benefits.

Brian Dawe is the Acting Grievance Coordinator for MCOFU. In June, he advised Fund Administrator Brouder to inquire what the Trustees' reaction would be if MCOFU applied for membership in the Fund. Brouder expressed surprise that MCOFU would want to join the Fund in view of the statements made in the campaign flier. Brouder replied that the flier should be viewed as the result of a tough campaign, and not a really heated and dirty campaign. Brouder said that the Trustees had been given a copy of the flier and that they were angered by it, but that MCOFU could not apply for membership. He cautioned that "I wouldn't want to put myself in your shoes in terms of your chances for admission." Brouder also recalled that during the conversation Dawe told him "[w]e put that literature out because we were scared of stealing \$2,000 at a prison."¹²

About May 23, 1989, there was an employee meeting at the Old Colony

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The MCOFU flier also posed several interrogatories about the Fund and its Administrator, John Brouder. The facts presented at the hearing establish that Brouder is responsible to the fund Trustees, and he receives only a salary for his services.

¹²

Dawe denied the statement, but resolution of this factual discrepancy is irrelevant to our consideration of the merits of the Objection. For the purpose of resolving the Objections we have considered the evidence in the light most favorable to AFSCME.



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Correctional Center. It was arranged by Pat Smith, an AFSCME officer at that institution. Three representatives from each union were present, and the proceedings were conducted as an open forum. Employees could ask questions of either side. Many inquired whether they would lose their dental and eye care benefits if AFSCME ceased to represent them. Dawe, speaking on behalf of MCOFU, assured them that their health care benefits would continue if his side won the election. Daniel O'Neil, acting President of MCOFU, promised employees that Blue Cross/Blue Shield would pick up where the old plan stopped, and their new benefits would be less expensive and better.

Approximately fourteen AFSCME witnesses testified that they received the campaign flier. Some testified that they saved the Fund booklet that explained their benefits, some were aware that they might call the Fund office if they had any questions, some stated they were not confused by the "ripoff" leaflet, some said that they were aware it was false or contained inaccuracies, and some characterized it as propaganda. None indicated that he or she could not independently assess the information in the flier nor did any witness express a belief that MCOFU had special knowledge of the Fund to which AFSCME, for example, would not have had equal or greater access. One president of an AFSCME local admitted that he had a chance to address whatever falsities were contained in the leaflet.

Observer Conduct at MCI Shirley:

AFSCME has objected to the conduct of Jerel Poh while an MCOFU observer at the MCI Shirley voting site on May 23. Poh carried with him a spiral notebook, approximately two and one-half inches by four inches in size. Patricia Carelli, an AFSCME observer at MCI Shirley, observed Poh jotting something in the notebook during the election, but she did not observe what he wrote.¹³ In the afternoon, Carelli saw Poh leave the voting room and walk down the corridor that led to the polling place where he met with employee Raymond Perry. When the two men were face to face, Poh raised the notebook to eye level and made references to it with his hand. The two conversed for a minute or so.¹⁴ The Commission agent in charge of the voting at MCI Shirley gave no instructions regarding notetaking, and Carelli

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Poh admitted possession of the notebook, and that he entered slash marks in it, in groups of five, indicating the number of persons who voted. There is no evidence that his jottings consisted of other than this. We also accept his uncontroverted testimony that he deliberately made his jottings in a clandestine matter, shielding the notebook with his hand and arms, and making notations only when voters had turned away from him.

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No other witness overheard the conversation. No evidence suggests that the notebook contained anything other than slash marks indicating the number of voters.



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stated that she herself took notes during the voting. AFSCME witness Dan Carr observed Poh taking notes, but never saw the contents of his notebook. Carr stated that Poh left the polling area, but believed that he was gone about fifteen or twenty minutes. However, he affirmed that no voters came into the polling area during that time. Carr too made notes at the poll regarding voter turnout. There was no evidence indicating that any voter had been aware that Poh was making notes in the notebook.

Unit Status of Raymond Perry

MCOFU has denied that Raymond Perry was its agent, making brief findings in this respect necessary.

In our January 26, 1989 Decision and Direction of Election in this matter, we noted that Daniel O'Neil, acting president of MCOFU, had testified that he regarded any Unit 4 employee who signed an authorization card as a member of MCOFU. Perry never signed such a card. Perry admits that he holds the position of vice president of AFSCME, Local 503 at MCI-Bridgewater. On May 15, 1989, AFSCME, Local 503, sent a letter to all members announcing that an election of officers would be held at Warren Hall on June 1, 1989. That letter indicated that Perry was running for "opposed elected" for the position of vice president. Perry remains a dues-paying member of AFSCME, and continues to process grievances for employees at MCI-Bridgewater on behalf of AFSCME. He holds no office in MCOFU. Despite all of this, Perry was designated by MCOFU to be one of its observers, and he acted in that capacity at the MCI-Bridgewater polling site.

Observer Conduct at MCI-Bridgewater

AFSCME has challenged the conduct of Jerel Poh and Raymond Perry while they acted as observers for MCOFU during the polling hours at MCI-Bridgewater. Several witnesses testified as to this aspect of the case, including four agents of the Commission. In making these findings, we have credited the testimony of AFSCME's witnesses, and consider the evidence in the light most favorable to AFSCME.

The Bridgewater election site was the largest of this multi-site election. There were more eligible voters at this site than any other, and more employees actually voted here than at any other site. Those voting came not only from MCI-Bridgewater, but also from the Old Colony Correctional Center and Southeast Correctional Center.

Prior to the opening of the polls on May 25 at MCI-Bridgewater, Shirley DeMarco, the Commission agent in charge of the polling site, asked the observers to read the election procedure rules which the Commission had previously sent to them and to acknowledge that each had read and understood them. Among the rules promulgated by agent DeMarco were directions that observers should not leave the polling area without permission, and that they should not talk with voters.



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Voting was conducted in a room at Warren Hall. To enter Warren Hall, a voter needed to climb several steps to the porch of Warren Hall; he or she then could pass through a door to enter a foyer; from that foyer he or she would pass through another door to the main hallway of Warren Hall. The ballot box was in a classroom at the far end of this hallway.

At the entrance of the classroom there were two tables, about one and one-half feet apart. A Commission agent and two observers (one from each union) staffed each table. Voters had to pass these tables, identify themselves to observers and Commission agents (who crossed off their names from the voting list), and receive their ballots.

Poh was a MCOFU observer, stationed at one of those tables on the morning of May 25. With him at the table was Commission agent Jean Driscoll and AFSCME observer Richard Wernick. According to Wernick, Poh asked Driscoll, early in the morning, whether he might stretch his legs and walk around the room. Driscoll replied that she would rather he remain in the room, but if he wanted to leave he would seek permission from Shirley DeMarco, the Commission agent in charge. Poh inquired of DeMarco, who also responded that she would prefer he did not leave the room. Poh complained, "Well, there's not enough room in here in order to stretch," prompting DeMarco to repeat "Well, you know, I'd rather have you stay in the room."¹⁵ Poh arose from the table, walked about the classroom and into the hallway. He walked all the way to the end of the hallway and stopped at the doorway to the foyer. Then he turned around and returned to the classroom. Poh did not touch or talk to any voter during this walk, and there is no evidence that there were any voters in Warren Hall during this time.

About ten minutes later, there was another lull in the voting. Poh again arose, walked around, and went down the hall. He went through the doors and stepped out on the porch, stood there about thirty seconds, and returned to the voting room. No voters were nearby during this episode, and Commission agent Carmel Nicholson was patrolling the hallway. Upon Poh's return, Wernick complained, "I thought there was no leaving the room?" DeMarco replied, "Well, he can walk down the hallway so long as there are no voters around.

During the morning, the voters tended to come into the polls in groups, and

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In an affidavit given to the Commission during the pre-hearing investigation of the Objections, Wernick's testimony was somewhat different. In his affidavit, he said that DeMarco admonished Poh that she would rather not have him leave the room, but if no voters were around, he might go into the hallway but no further. In his testimony under cross-examination, Wernick did not disavow the version given in this affidavit. For the purpose of this ruling, however, we have relied upon Wernick's testimony at the hearing because it is more favorable to AFSCME.



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There were frequent lulls in the voting. At 7:25 a.m. Poh arose for a third time, walked down the hallway and out onto the porch. He stayed on the porch approximately thirty-five to sixty seconds, during which time he spoke to another person.¹⁶ Poh then returned to the voting room, and Wernick complained to Driscoll, "Ok, he's outside! I thought he was supposed to stay inside in the hallway and stay away from the voters!" Driscoll conceded that was what DeMarco had said, prompting Wernick to say "I want to put a formal protest in!" Driscoll replied that she couldn't take a formal protest, but that Wernick might speak to DeMarco about it. When Wernick did so, DeMarco told him that he would have to contact his department about any problems with the running of the election. No evidence was offered to establish that Poh conversed with any voter while away from the degwater voting check-in table.

Perry also served as a MCOFU observer at Bridgewater on the morning of May 1988. While he did so, voters often said "Hi" to him or "How are you, Ray?" These meetings were often accompanied by handshakes or "high fives." DeMarco admonished Perry that there was to be no contact with any of the voters, that he was an official observer, and that he was not to communicate with the voters. According to Perry, DeMarco told this to Perry ten or fifteen times. Sometimes Perry would respond with words to the effect that "Oh, I'm so popular. They all love me!" At other times when a voter greeted him or extended his hand, Perry would draw back and say "I can't now, I can't talk to you.... I can't do anything, I've been instructed." These "conversations" with the voters lasted only about five to ten seconds, and were limited to banter such as described above. The number of times Perry spoke with voters in this fashion varies according to different witnesses. Wernick testified that Perry spoke to about a dozen voters, and physically touched voters about ten to fifteen times. AFSCME witness Robert Bergeron essentially corroborated Wernick's testimony. He had lodged an "objection" with DeMarco concerning Perry's conduct. At one point during the morning voting session, DeMarco told Perry that his conduct would only hurt his side. In the afternoon,

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Neither Wernick nor any other AFSCME witness testified concerning the content of Poh's conversation, so we have credited Poh's undisputed testimony concerning his conversation, which witness Steven Alvarez also confirms. Poh testified that as he came out onto the porch he saw Alvarez and Darwin Phillips, who had been campaigning for MCOFU. Poh said, "Hi," which evoked a corresponding "Hi" from Alvarez. "How are you?" asked Poh. "Fine," responded Alvarez. Poh asked, "If you're going to campaign, you're going to have to do it on the gravel driveway or out in front at the main roadway where the other individuals are campaigning." Alvarez replied, "That's OK because I'm not campaigning anyway." There was no one else in the area of the porch at that time. Alvarez's testimony is consistent with Poh's. No voters were in the area. Alvarez was not a member of bargaining Unit 4 at the time of the election, since he had left the employ of the Department of Corrections on December 2, 1988. Similarly, Phillips was not employed in bargaining unit 4 at the time.



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he admonished that if he continued to communicate with voters she would ask him to leave. Bergeron opined that DeMarco should have ousted Perry from the polling site.

he Bolger Memorandum

AFSCME argues that a memorandum dated March 31, 1989, from the Director of Employee Relations for the Department of Corrections, Jeffrey Bolger, to certain managerial personnel in the Department "inaccurately purported to state as the Union's position on increases in compensation that the Union accepted zero." That memorandum is attached as Appendix 2. There is no evidence that the memo was distributed to anyone other than AFSCME and the addressees, none of whom are bargaining unit members.

Opinion

The timeliness of the Amended Objection:

Commission Rule 456 CMR 14.12(3) provides that within seven days after the tally of the ballots has been furnished, any party to an election may file with the Commission objections to the conduct of the election or to conduct affecting the results of the election. The rule further provides that such filing must be timely whether or not challenged ballots are sufficient in number to affect the result of the election.

AFSCME filed its original objections within the required seven-day period. Hereafter, on June 15, 1989, AFSCME filed a document captioned "Amended Objection to Conduct Affecting the Results of the Election and the Amendment to Objection" with the Commission. The "amended objection" alleged that the MCOFU "Big AFSCME Ripoff" letter misrepresented facts, misled voters and affected the outcome of the election. MCOFU seasonably objected to AFSCME's amended objection, and moved that it be dismissed as untimely. The Commission deferred ruling on the Motion until the conclusion of the hearing in order to afford the parties a full opportunity to be heard about the disputed issue. We now address the timeliness of AFSCME's amended objection."

AFSCME argues that its submission of the "amended objection" "complied with the purpose of Rule 14.12(3), although admittedly, not according to a verbatim interpretation," (AFSCME Post-hearing Brief at 6). AFSCME argues that MCOFU has failed to demonstrate any prejudice by AFSCME's submission of the "amended objection"; and that, in any event, AFSCME established that "extraordinary circumstance" warranted the Commission's acceptance of the late-filed "amended objection." The circumstances alleged to be "extraordinary" consist of alleged "revelations" to John Brouder by MCOFU grievance coordinator Brian Dawe that the "misrepresentations and allegations made in [the] document were part of a dirty campaign waged by MCOFU against AFSCME." (AFSCME Post-hearing Brief at 7). AFSCME contends that it did



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know, and could not with reasonable diligence have known, "that issuance of the FU flier] was an intentional calculated move on [MCOFU's] part in retaliation against AFSCME"; nor could AFSCME have known of "[t]he failure of negotiations between MCOFU and Blue Cross/Blue Shield, or complete lack thereof." (AFSCME hearing Brief at 13).

Since the record does not support AFSCME's contention that Negotiations between MCOFU and Blue Cross/Blue Shield had progressed to the point of failure by the time the flier was promulgated,¹⁷ we move directly to AFSCME's suggestion that U's motive should be a material consideration in determining whether the objection is timely.

AFSCME does not dispute that it had access to the MCOFU flier in advance of election. Indeed, some of AFSCME's witnesses, including a local vice president, received the flier on or about May 15, 1989, a full week before the start of election. AFSCME does not contend that it was incapable of ascertaining the truth or falsity of the flier. Instead it argues that it was ignorant of MCOFU's motive for distributing the flier until after the June telephone conversation between Brouder and Dawe. According to the logic of AFSCME's argument, we would be required to conclude that evidence of a bad, or malicious motive is an essential element of proof that false statements are objectionable.

While evidence that a statement was intentionally made may be required, the Commission does not require proof that the proponent of a misrepresentation had a malicious motive in order to establish that the statement is objectionable. See rally Commonwealth of Massachusetts, 3 MLC 1067, 1070-71 (1976). Instead, the Commission requires proof that

a party has substantially misrepresented a highly material fact the truth of which lies within the special knowledge of the party making the misrepresentation. Even when the Commission so finds, it will not set aside an election if it finds that the voters in general have independent knowledge or intelligence with which to evaluate the misrepresentation or if, in its discretion, it finds that the misrepresentation had no substantial impact on the election. 3 MLC at 1071.

Therefore, we cannot conclude that the subject of AFSCME's "amended objection" did not have been timely raised and alleged within the seven-day period specified in Commission Rule 456 CMR 14.12(3). See Commonwealth of Massachusetts, 7 MLC 1303 (1980).

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MCOFU had contacted Blue Cross/Blue Shield for information concerning an employee benefits plan and had attached to the flier a letter from Blue Cross/Blue Shield expressing interest in establishing a separate health and welfare fund for the correction officers.



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herefore, we cannot conclude that the subject of AFSCME's "amended objection" could not have been timely raised and alleged within the seven-day period specified in Commission Rule 456 CMR 14.12(3). See Commonwealth of Massachusetts, 7 MLC 293, 1303 (1980).

Although AFSCME's "amended objection" is dismissed as untimely, we note that it would not overturn the election even had we reached the merits of this objection. As stated above, a pre-election statement may be objectionable if the statement concerns a highly material fact about which the proponent has specialized knowledge, and which the voters are incapable of independently evaluating. In addition, the Commission may consider whether a pre-election statement was made so close to the time of the election that the unfavorable effects thereof could not be remedied. See Boston Water and Sewer Commission, 13 MLC 1071, 1074 (1986). In the instant case we note that the issue of continuation of dental and vision benefits coverage appears to have been a material issue in the campaign. In fact, John Rouders's February 28, 1989, letter appears to have injected the issue into the campaign. We note further that MCOFU's flier contains some material misrepresentations, including the implication that benefits did not increase between 1986 and 1988, and the suggestion that Fund money was being misspent. We find, however, that AFSCME, through Local 464 vice president Murphy, had knowledge of the flier at least one week prior to the beginning of the election and, therefore, had adequate time to communicate a response to voters. In fact, AFSCME did respond to voters who attended the May 23 meeting at Old Colony Correction Center. Moreover, we conclude that voters in this unit had ready access to factual information with which to evaluate the flier. Shortly before the election bargaining unit members were mailed a copy of the Trust Fund's benefit plan brochure which contained a full description of the plan and the toll-free phone number to which employees could call with questions about the Fund. Fund brochures also had been sent to unit members during all prior years. Finally, the tone and message of the MCOFU flier make it readily recognizable as campaign propaganda. The flier raised as many questions as it purported to answer and demonstrated that MCOFU had no special knowledge about the Trust Fund. We are satisfied that a reasonable bargaining unit member could recognize and evaluate the flier as campaign propaganda, and that the flier therefore did not prevent voters from making informed decisions concerning the ballot choices. Thus we conclude that the MCOFU flier did not materially interfere with the outcome of the election.

1. The Allegations concerning MCI-Shirley

As filed on June 1, 1989, AFSCME's objections made no reference to alleged objectionable conduct at MCI-Shirley. Instead, the objections alleged specific misconduct at the MCI-Bridgewater polling place and concluded with the following statement: "AFSCME Council 93, AFL-CIO, is at present uncertain whether such misconduct as noted was peculiar to the Bridgewater site, or was likewise manifest by MCOFU at other polling places."



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By letter of June 6, 1989, the Commission directed AFSCME to submit documents and affidavit evidence by June 21, 1989 to support its objections. On June 21, AFSCME submitted seven affidavits in support of its objections. Included in the AFSCME affidavits was testimony concerning the alleged conduct of Jerel Poh at MCI-Shirley on May 23, 1989. On July 6, 1989, MCOFU moved to dismiss the AFSCME objection to this conduct. MCOFU argued that the original AFSCME objections filed within the prescribed seven-day period did not encompass alleged misconduct at MCI-Shirley, that AFSCME had failed to justify its omission of the alleged MCI-Shirley misconduct from its original objections, and that AFSCME's submission was, in effect, merely an attempt to circumvent the Commission's seven-day filing rule.

The Commission requires an objecting party to state its objections within seven days of the date when the tally of ballots is furnished, and to include a statement of the reasons for the objections. 456 CMR 14.12(3). Such a statement should identify all conduct alleged to be objectionable in order for both the Commission and the other parties to the election to have prompt notice of the alleged objectionable conduct. Because the parties to an election are permitted to have a representative serve as an election observer at the polls, it should be possible for any party to timely meet the seven-day requirement. AFSCME has offered no reasons to excuse its failure to have made its allegations concerning objectionable conduct at the polls at MCI-Shirley within the seven-day period. Instead, AFSCME argues that alleged misconduct at MCI-Shirley was subsumed in its original objection concerning MCI-Bridgewater. We find that the AFSCME objections filed on June 1 fail to allege with sufficient particularity any other misconduct, therefore that the alleged misconduct at MCI-Shirley is outside the scope of AFSCME's timely filed objections.¹⁸

Moreover, even if we were to consider the allegations concerning MCI-Shirley timely filed, we would not find the alleged conduct objectionable. AFSCME argues that the election rules prohibited note-taking by observers, that MCOFU observer Jerel Poh took "notes" at the MCI-Shirley site, and therefore the election results should be invalidated. It is undisputed that Poh's "note-taking" consisted of making slash marks in a pocket-size notebook in order to calculate the total number of voters at the MCI-Shirley site. There is no evidence that any voter could see Poh's markings, nor were the observers at this site prohibited from making a tally of the voter turnout. Indeed, AFSCME's observer acknowledged participation in identical conduct.¹⁹ While AFSCME correctly notes that election

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As noted above, AFSCME's allegation concerning the MCI-Bridgewater polling site, in its original objections filed on June 1, concluded with the general statement that AFSCME was "uncertain" whether any objectionable polling site misconduct occurred at other locations. The inclusion of this observation in its original objections does not absolve AFSCME of its obligation to file timely and specific objections under Rule 14.12(3).

¹⁹ (see page 1305).



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Observers usually are admonished not to take notes at Commission elections, the purpose of that admonishment is not to prevent the observers from keeping a tally of total voter turnout. Rather the purpose of the directive is both to ensure that voters receive no impression that their actions at the election are being recorded and to prevent any party from recording the names of any voter. E.G., Piggly-Wiggly Eagle Food Centers, Inc., 168 NLRB 792 (1967) (applying similar National Labor Relations Board election²⁰ rules). Observer Poh's conduct implicated neither concern.

We accept Observer Carelli's testimony that Poh, on his final walk to the orch, met with Perry²¹ and referred to the notebook. There were no voters in the area, and there is no evidence that the two men discussed anything other than voter turnout. In sum, there was no evidence of objectionable conduct. Accordingly, even were we to consider the allegations concerning MCI-Shirley, we would find no basis for setting aside the results of this election. The alleged conduct of Jerel Poh did not interfere with the results of the election.

11. The Allegations Concerning MCI-Bridgewater

A. Poh's Perambulations

AFSCME alleged that MCOFU observer Jerel Poh engaged in objectionable

¹⁹ (from page 1304)

We do not endorse the practice of note-taking in which the MCI-Shirley observers engaged, however, because it poses a potential for objectionable conduct that all observers should avoid.

²⁰

The NLRB generally discourages an observer's contemporaneous recording of a list or tally of voters' names in the polling area. However, to constitute conduct sufficiently objectionable to set aside an election, the notetaking must involve the recording of voters' names and it must be done in a sufficiently open and notorious manner to support a finding that voters saw, and thus, were aware that their names were being recorded. See Textile Service Industries, 284 NLRB No. 34 (1987) (where observer kept a list of marks but no names this was held not to constitute a violation, especially since she attempted to conceal it from voters). See also Locust Industries, Inc., 218 NLRB 717, n.2 (1975) (where a union agent kept a list of those who voted, the violation was *de minimis* since there was no evidence that any employee knew his or her name was being checked off).

²¹

The parties dispute the representational status of Ray Perry. We decline to engage in extended discussion over whether Perry, a Local AFSCME Vice President, as an "agent" of MCOFU when he was designated to act as a MCOFU observer. For the purpose of ruling on AFSCME's objections, we shall assume that Perry was an agent of MCOFU.



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duct at MCI-Bridgewater when he left the polling place. The evidence is disputed that Poh left the polling place several times. AFSCME observer Richard Nick testified that Poh did so despite the admonishments of Commission agents. CME characterizes its objection to Poh's conduct as "quite simple ... Jerel Poh violated the Commission's rules ... [when] [h]e ventured out of the voting room and onto the porch, where he was instructed not to go. And once there, he conversed with individuals outside." (AFSCME Post-hearing Brief at 15).

Although Poh's departure from the polling place was ill-advised,²² the evidence most favorable to AFSCME reveals no basis for concluding that Poh's conduct could have affected the results of the election. Poh made no contact with a voter during his walks. The two people with whom he had contact on his final walk²³ were ineligible to vote in the election, and his conversation with them was innocuous.

Restrictions on the movement of election observers are imposed to protect the election process. For example, the Commission seeks to secure the full assistance of the observers at the polling place to assist in checking-in voters and monitoring the conduct of the election at the polling site. If an observer leaves the site, he or she can neither assist the Commission agent nor represent his or her party to the election. Similarly, observers are prohibited from campaigning or electioneering in the polling place. An observer who leaves the polling place risks potential contact with a voter in a context that might appear to constitute electioneering.

Poh's sojourn from the polling place, however, brought him into no contact with voters and occurred at times when his presence at the polls was not crucial. Therefore, we find no basis for concluding that Poh's failure to stay in the polling place could have affected the result of the election. See generally L.C. Sider & Son, 745 F.2d 1059, 117 LRRM 2518 (2d Cir. 1984) (NLRB declined to set aside the election in which one observer left the polling place three brief times but there was no evidence of electioneering by the observer).

B. Perry's Conduct

AFSCME objects that MCOFU observer Perry spoke to and shook hands with nervous voters as they approached the voting table at which Perry was seated as an observer. The undisputed evidence established that Perry greeted voters by saying

²² An election observer who departs from strict compliance with the Commission's directives risks participation in objectionable conduct.

²³ Poh's undisputed testimony establishes that he spoke only to Steven Perez in the presence of Darwin Phillips.



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"Hi," "how are you" and similar phrases. It is also undisputed that Perry shook hands with and slapped hands with voters in gestures of greeting. Commission agent LeMarco admonished Perry against conversing or engaging in any prolonged or substantive conversation with voters. AFSCME contends that Perry's behavior constitutes electioneering. We disagree.

We have set aside close elections when voters congregated in the polling area and conversed among themselves, and with observers, about employment benefits and purely social topics for a considerable time during the heaviest period of voting. "The atmosphere created by large numbers [of voters] discussing benefits is inconsistent with the type of 'laboratory conditions' that ought to be maintained in order to ensure free and fair elections." Teamsters, Local 829, 3 MLC 696, 1698 (1977).

However, this example is widely divergent from the facts of the present case. We have long held that where there is no substantial evidence of sustained conversation and campaigning with prospective voters, objections of this type must be dismissed. City of Boston, Department of Health and Hospitals, 2 MLC 1275, 1280 (976). Even under the strict requirements of NLRB's Milchem Rule,²⁴ not all comments between a party to an election and voters are treated as per se grounds for overturning an election. L.C. Cassidy and Son, 745 F.2d 1059, 117 LRRM 2518 (2d Cir. 1984). Perry's interaction with voters may be compared with facts in NLRB v. Osterlen Services for Youth, Inc., 649 F.2d 399, 401, 107 LRRM 3221, 3222 (6th Cir. 1981), cert. denied, 454 U.S. 1031 (1981). There, the union's observer exchanged pleasantries with nearly every voter. During the Board agent's absence, one employee who wished to vote seated herself behind the observer's table and began a conversation with the union observer. The two discussed their work schedule as well as the fact that another employee had worked a full week before deciding to quit. Additionally, the union's observer stated to another employee that he intended to attend the union's organizational meeting later that evening. Finally, in response to a voter's question concerning the turnout at the polls, the union observer stated his belief that "more" employees would probably vote at the shift change. Despite this, it was held that the union observer's conversations with the voters constituted nothing more than "innocuous" conversation that did not amount to electioneering. We consider Perry's conversations and hand contact with the voters as short and innocuous, and thus conclude that it did not amount to electioneering that improperly affected the results of the election.

V. The Employer's Conduct

AFSCME contends that the March 31, 1989 memo from Bolger inaccurately portrayed AFSCME's bargaining position. AFSCME appears to argue that the Bolger

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Milchem, Inc., 170 NLRB 162 (1968). Cited with approval by the Commission, City of Boston, Department of Health and Hospitals, supra at 1279-80.



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It suggested that AFSCME would be willing to agree to a 0% wage increase in the first year of a potential multi-year collective bargaining agreement. The memo is only denominated as the "initial Commonwealth proposal." The memo tells its managerial personnel addressees that the Commonwealth would consider a second and third year wage increase if AFSCME would accept no increase in the first year. The memo does not purport to represent AFSCME's response to the Commonwealth's proposal. Nor was the memo addressed to any unit employee. No evidence was presented at the hearing to establish that the memo was distributed to voters. Therefore, the evidence is insufficient to establish that the memo could have affected the results of the election. Moreover, even if the Bolger memo had been seen by voters, and further assuming that it would be construed as a misrepresentation of AFSCME's bargaining position, no evidence was offered to establish that AFSCME had sufficient time to respond to the memo prior to the election.²⁵

The Status of MCOFU as an Employee Organization

AFSCME's objection 2C had alleged that MCOFU should not be considered an employee organization within the meaning of G.L. c.150E. In the Commission's July 1989 Interim Ruling the Commission declined to order a hearing on this objection because no substantial reason had been presented to warrant reconsideration or reversal of the Commission's earlier ruling²⁶ that MCOFU is an employee organization within the meaning of G.L. c.150E. See Massachusetts Correction Officers Federated Union, 16 MLC _____ (1989) (Interim Ruling sl. op. at 16-17). We continue adhering to the conclusion that MCOFU satisfies the definition of an employee organization for the purposes of G.L. c.150E and thus dismiss this objection.

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AFSCME also argues that the Bolger memo should never have been issued since the Commonwealth had an affirmative duty to refrain from negotiation with Alliance about Bargaining Unit 4 while the petition was pending. AFSCME's post-hearing brief concludes this argument with the following statement: "And considering that the Bolger memo is indicative of a per se violation of G.L. c.150E to negotiate with, the conduct of the employer (Department of Corrections) is all the more egregious." (AFSCME brief p. 23). If we understand this argument correctly AFSCME is complaining that the Commonwealth should not have bargained with AFSCME about Unit 4, did so nonetheless, and thus when the Commonwealth documented its bargaining proposal in the Bolger memo its conduct was all the more "egregious." Since we have already concluded that the record contains no evidence that the Bolger memo was distributed by the Employer to Unit 4 employees we have no need to pursue the claim of AFSCME's argument or to consider whether AFSCME can allege its own participation in bargaining as part of an objection.

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See Massachusetts Correction Officers Federated Union, 15 MLC 1380 (1989).



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Conclusion

For the foregoing reasons, the evidence presented does not warrant invalidation of the results of the election, and the objections are hereby dismissed in their entirety. Accordingly, a certification of the results of the election shall immediately issue reflecting that MCOFU is the certified collective bargaining representative of employees in State Bargaining Unit 4.

COMMONWEALTH OF MASSACHUSETTS
 LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN

MARIA C. WALSH, COMMISSIONER

ELIZABETH K. BOYER, COMMISSIONER



Commonwealth of Massachusetts, Executive Office of Administration and Finance,
Department of Correction and MCOFU and Alliance, AFSCME/SEIU AFL-CIO, 16 MLC 1292

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Massachusetts Correction Officers
Federated Union

The BIG AFSCME RIPOFF!

Greetings unit 4 employees:

ARTICLE 13A
HEALTH AND WELFARE

Section 1. Creation of Trust Agreement
The parties have agreed to establish a Health and Welfare Fund under an Agreement and Declaration of Trust drafted by the Employer and executed by the Union.

Section 2. Funding
For the period April 1, 1986 through June 30, 1987 the Employer agrees to contribute on behalf of each full-time employee equivalent a total of four (4) dollars per calendar week.
Effective July 1, 1987, the Employer agrees to contribute on behalf of each full-time employee equivalent the additional sum of one dollar per calendar week, for a total of five (5) dollars per calendar week.
Effective July 1, 1988, the Employer agrees to contribute an additional one dollar per calendar week per full-time employee equivalent, for a total of six (6) dollars per calendar week.
The contributions made by the Employer to the Health and Welfare Fund shall not be used for any purpose other than to provide health and welfare benefits and to pay the operating and administrative expenses of the fund. The contributions shall be made by the Employer in an aggregate sum within forty-five (45) days following the end of the calendar month during which contributions were collected.

Contrary to what AFSCME reps may have told and would like you to believe, the Health and welfare fund is funded completely by the common AFSCME doesn't pay one red cent (article 13A contract). The Health and Welfare fund is a contractual benefit and will not be negotiated.

In 1986 the commonwealth was contributing dollars (\$4.00) per week per employee into the fund. In 1987 the commonwealth increased it five dollars (\$5.00). Did your benefits increase? **NO!** In 1988 the commonwealth increased it to dollars (\$6.00). Did your benefits increase? **NO!**

For the 40,000 employees represented by AF and who are in this fund, an additional eighty thousand (\$80,000) per week, or about \$4.1 MILLION year is supposed to be going into the fund to benefit the employees but there has been no real increase in benefits.

Where is the extra two dollars (\$2.00) per per employee going? And, why haven't our benefits increased?

This health and welfare plan started out in 1986 as a little over a thr dollar (\$3.00) plan and now, three years later, it's still a little over a thr lar plan. **WHY?** Who or what is benefitting from the additional \$4.1 MILL year if the employees aren't?

John Brouder, fund administrator for the Health and Welfare fund, suppos drafted a letter addressed to the penal committee regarding the fund but di sign it. Why not? What does John Brouder mean by printing "almost certain Doesn't he know for sure? What is John Brouder's interest in this fund? How does John Brouder work for? How can John Brouder claim the Health and Welf plan is superior when other smaller state employee unions, not affiliated w AFSCME, are in a more superior plan.

The bottom line is, unit 4 employees and their families are being blind cheated out of the benefits they should be receiving.

AFSCME is about money. Taking your money every week and spending it on pensive parties, multi-million dollar conventions, elaborate salaries for employees and other non-benefit related expenses, all at your expense.

Now you have the opportunity to say, "I'm not going to take it any more!" Kick the money grabbers and benefit stealers out the door and get men and w in the



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**Massachusetts Correction Office
 Federated Union**

the six dollars (\$6.00) per week per employee that the commonwealth
 tes, the MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION will en
 t 4 employees in a far superior more flexible health and welfare p
 achad)

ASSACHUSETTS CORRECTION OFFICERS FEDERTED UNION's action President
 . O'Neil is currently negotiating with Blue Cross/Blue Sheild, whi
 ady agreed to help implement a Master Dental and Master Vision pla
 4 employees. (see attachad)

aster Dental Plan with BC/BS covers up to \$1,500 per year for memb
 : dependents. The closed plan, under AFSCME, only covers \$600 per
 ily, procedures covered in full under the Master Dental Plan with
)-pay procedures under the AFSCME plan. The BC/BS plan not only co
 our families in full but it provides you with the convenience of
 ver 85% of the dentist's throughout the commonwealth. The plan un
 ily provides 45 dentist's statewide.

s evident that the MASSACHUSETTS CORRECTION OFFICERS FEDERATED UN
 mitted to providing and improving benefits for unit 4 employees
 ilies.

Sincerely and in solidarity,

Daniel J. O'Neil

Daniel J. O'Neil
 Acting President

Jarel M. Poh

Jarel M. Poh
 Acting Vice President

Brian F. Dave

Brian F. Dave (JP)
 Acting Grievance Coordinantor

Richard J. Herrett

Richard J. Herrett (JP)
 Acting Treasurer



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Cross
 Shield
 Massachusetts



Labor Affairs Office
 173 Worcester Street
 Wellesley, Massachusetts 02181
 617/956-3178
 617/956-3169

March 14, 1989

Danny O'Neil
 Sawyer Street
 Framingham, MA 02026

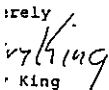
Dear Mr. O'Neil

Thank you for your inquiry regarding Blue Cross Blue Shield
 Dental and Master Vision. I have been directly
 involved in the development of proposals and the implementa-
 tion of dental and vision plans for most of the Health and
 Welfare Funds that were formed for various State Employees
 during the past few years.

As we discussed I have included literature regarding the
 dental and vision plans. These plans can be tailored to
 your needs. For a group your size the typical dental
 plan would cost between \$5.00 and \$6.00 per week per member
 and vision would cost between .45 and .55 per week per member.
 The firm rate would be developed based upon the benefits
 provided, age, sex, and marital status of members and past
 utilization of dental and vision benefits.

The Massachusetts Correction Officers were to establish
 a separate Health and Welfare Fund Blue Cross Blue Shield
 and help in the implementation and administration of the
 plan. We would utilize our statewide network of regional
 offices and representatives to do on-site enrollment and
 administration. Eighty-five percent of all dentists in Massachu-
 setts participate. Dentists file claims directly to us,
 thereby eliminating the need for your members to get involved
 in paperwork.

Please review the enclosed information and call me if you
 have any questions. I look forward to meeting with you and
 your board members.

Sincerely,

 Mark King
 Director

cc



Commonwealth of Massachusetts, Executive Office of Administration and Finance,
 Department of Correction and MCOFU and Alliance, AFSCME/SEIU AFL-CIO, 16 MLC 1292

APPENDIX TJO



The Commonwealth of Massachusetts
 Executive Office of Human Services
 Department of Correction
 Everett Saltonstall Building, Government Center
 100 Cambridge Street, Boston, 02202

TO: Commissioner
 Deputy Commissioner
 Associate Commissioners
 Superintendents

FROM: Jeffrey J. Solger, Director of Employee Relations

RE: Initial Commonwealth Proposal to Alliance

DATE: March 31, 1989

Enclosed you will find a copy of the initial Commonwealth Proposal which was presented to the Alliance on March 30, 1989.

The following is a brief summary of the economic portion of this proposal:

- Wages No increase in first year. Based on Union's acceptance of no increase in first year. OER would consider increase in second and third years.
- Shift Differential No increase
- Leave Earned time to replace vacation, personnel and sick leave.
- Employee expenses No increase
- Health & Welfare Reduce Commonwealth's contribution to \$3.00 per week for each FTE.
- Group Insurance Reduce Commonwealth's contribution to Medical Insurance from 90% to 75%.
- Dependent Care No funding
- Training & Career Ladders No funding

