

COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND FINANCE AND MASSACHUSETTS NURSES ASSOCIATION AND MASSACHUSETTS HEALTH CARE PROFESSIONALS UNION, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, SCR-2166 (7/15/83). SUPPLEMENTAL RULING ON OBJECTION TO ELECTION.

43.3 challenges and objections
43.328 facsimile ballot

Commissioners participating:

Paul T. Edgar, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

John M. Creane, Esq.	- Representing Massachusetts Health Care
Richard Dorn, Esq.	- Professionals Union, National Union of
Nancy G. B. Lassen, Esq.	- Hospital and Health Care Employees,
Warren H. Pyle, Esq.	- RWDSU, AFL-CIO
Alan J. McDonald, Esq.	- Representing the Massachusetts Nurses Association
William G. Hayward, Esq.	- Representing the Commonwealth of Massachusetts, Commissioner of Administration and Finance

SUPPLEMENTAL RULING ON OBJECTION TO ELECTION

Statement of the Case

The Labor Relations Commission (Commission) conducted a mail ballot election for employees of the Commonwealth of Massachusetts (Commonwealth or Employer) in the health care unit, Unit 7, between February 14 and March 7, 1983. Of a total vote of 2423, the Massachusetts Health Care Professionals Union (MHCPU) received 1265 and the Massachusetts Nurses Association (MNA) 917.¹ Following the ballot tabulation, the MNA filed timely objections to the conduct of the election. The Commission investigated the objections, both parties briefed the issues, and, on May 20, 1983, the Commission issued its Ruling on Objections to Election, 9 MLC ____ (1983). The Commission ruled that the only MNA objection requiring a hearing was the allegation that the MHCPU had distributed a facsimile of the Commission's mail ballot to Unit 7 employees.

On June 13, 1983, a duly designated hearing officer of the Commission conducted a Formal Hearing on the facsimile ballot objection. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present exhibits; both have filed post-hearing briefs.

¹For further details, see Ruling on Objections to Election, 9 MLC ____ (May 20, 1983).



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On the basis of the evidence and argument contained in the record before us, we now conclude that the results of this election must be set aside and a new election ordered.

Statement of the Facts

At the Formal Hearing, the parties stipulated to the salient facts concerning the distribution of the facsimile ballot. The Commission provided its Notices of Election to the Commonwealth for posting on February 3 or 4, 1983, and the Commonwealth posted such notices immediately upon receipt. On or about February 5, 1983, the MHCPU mailed to all Unit 7 employees on the voter eligibility list a packet of materials, which contained, inter alia, the facsimile ballot.

The MHCPU February 5 mailing came in a 6" by 9" envelope. Written across the left front side of the envelope was the word "HELP!" in large red letters and directly beneath that "If you care enough about caring, join the new union that can specifically help you. Because you can't help others if you can't help yourself." Diagonally across the lower right corner of the front of the envelope was written "Don't lose out again. Voting decision details inside."

The envelope contained (a) a button with the words "Caring a Lot Shouldn't Work Against You. Vote MHCPU" and a "union bug"² at the bottom; (b) a six-page letter urging readers to join and vote for MHCPU, dated February 4, 1983 addressed "Dear Colleague," with the MHCP logo on the top of each page, and signed "Jerome Brown, National Union of Hospital and Health Care Employees"; (c) a pamphlet entitled "MHCP 1983 Agenda for Success," with the MHCP logo on its front; and (d) the facsimile ballot. The ballot was separate and distinct, unattached to any other document in the mailing. The "Dear Colleague" letter referred to the sample ballot on page 5:

VITAL: Also with this letter we've enclosed a SAMPLE COPY OF THE BALLOT you'll be getting in the mail from the State.

Study it and be sure to follow directions exactly - as with medicine - because the slightest incorrect marking on your part could invalidate your vote on your ballot.

The sample ballot enclosed in the mailing and referred to in the above text was a slightly reduced reproduction of the Commission's sample ballot contained in the Notice of Election.³ Its proportions (5-1/2" x 3-1/4") were similar to those of the sample in the Commission's Notice (7-1/2" x 4"). It contained the same heading at the top, "Commonwealth of Massachusetts, Labor Relations Commission." It

²A "union bug" is a printer's logo indicating the material was printed by unionized employees.

³See the Appendix, where the MHCPU sample, the sample from the posted Notice of Election, and the ballot mailed to unit employees are reproduced.



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repeated the same instructions: "This is a secret ballot. Do not sign your name. Mark an 'X' on this ballot in one square only. I desire to be represented by:." It then contained three boxes with the names of the choices in the same position as the Commission's sample. Like the Commission's, this specimen had the word "Sample" printed across its front. The typeface of the two was virtually identical. The two shared the same layout, grammar, and capitalization.

The MHCPU specimen differed from the Commission's only in that it was smaller, did not have the Commonwealth's seal in the upper lefthand corner, had a very small "union bug" printed in the lower righthand corner, and had a red "X" in the MHCPU box. The actual ballot mailed to Unit 7 voters differed from the sample contained in the Notice only in that it was printed on yellow paper and did not have "SAMPLE" printed across its front in capital letters.

At the hearing, the MHCPU introduced expert testimony to show that the facsimile ballot did not affect the outcome of the election. Experts testified that voters would have recognized the facsimile ballot as campaign literature and that, even if any had misconstrued it as an official Commission document, it would not have affected their votes.

MHCPU also introduced evidence from approximately thirty unit employees and MHCPU supporters who testified that they had all received the MHCPU mailing with the facsimile ballot, they had all spoken with other Unit 7 employees about the election, and that none had ever heard mention of the facsimile ballot or of any other specific campaign literature during those conversations.

Opinion

Both the Commission and the National Labor Relations Board have addressed the issue of the use of reproduced official documents, and specifically specimen ballots, for partisan campaign purposes. On several occasions we have warned that such practices, which interpose the Commission into campaigns, substantially jeopardize employee free choice. In *Commonwealth of Mass. (Unit 4)*, 2 MLC 1261 (1975), we invalidated an election where the prevailing union had distributed specimen ballots with an "X" marked in that union's box. At that time we stated:

"...it is as important for the Commission, an instrumentality of the Commonwealth, as for the NLRB, an independent federal agency, to jealously guard its mandate to be impartial and avoid even the appearance of departing from neutrality. It follows, that the Commission, like the Board, has a responsibility to protect its processes from partisan uses which may tend to have an impact on an employee's freedom of choice..." *Id.* at 1264.

In *City of Lawrence*, 5 MLC 1301 (1978), where few voters viewed a sample ballot, we let stand the election results but clearly expressed our concerns:

We do not condone [the union's] actions in this regard and we believe the posted ballot was ill-advised. *Id.* at 1303.



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More recently, in Commonwealth of Mass. (Unit 1), 7 MLC 1293 (1980), while that particular sample ballot did not warrant overturning the election we sternly warned future parties:

...we must emphasize that a participant in an election acts at its extreme peril when it duplicates an official Commission document--either in whole or in part--and incorporates that reproduction in its campaign propaganda...we consider the perception of Commission neutrality to be critical to the effectuation of the purposes of G.L. c.150E...Use of Commission documents in campaign propaganda will receive strict scrutiny. Id. at 1294.

We regard not only the reality but also the appearance of strict neutrality as an integral element of the Commission's administration of G.L. c.150E...Accordingly, we reiterate that any party to an election takes a serious risk by reproducing official Commission documents as part of its campaign propaganda. Id. at 1297.

We again confront the use of a specimen ballot. Because the MHCPU's use of this facsimile ballot directly contravenes the principles enunciated above, we have no choice but to set this election aside and order a new one.

Charged with a statutory mandate under Section 4 of the Law to conduct public employee representation elections, the Commission seeks to "ensure...that employees voting in a representation election exercise a free and informed choice." Commonwealth of Massachusetts (Unit 4), supra at 1263. Critical to the effectuation of this goal is the perception of this agency's neutrality in the elections it conducts. Commonwealth of Massachusetts (Unit 1), supra at 1294. The concern in this case is with the appearance that the Commission has been less than strictly neutral in a partisan election campaign. The standard by which we scrutinize the use of sample ballots is whether the reproduction "could have reasonably misled employees to believe that the Commission favored a particular election choice." Comm. of Mass. (Unit 1), supra at 1297. In making this determination we look to objective factors including the ballot itself, when and in what form it was disseminated, and other relevant attendant circumstances. See Ruling on Objections to Election, supra at 16 (slip op.); Comm. of Mass. (Unit 4), supra at 1264.

The appearance that the Commission endorses a party to an election can be of a subtle and subliminal nature. Those least able to detect such appearances on an objective basis may well be those who have experienced them. In this case, MHCPU supporters testified that they were unaffected by the documents at issue here. Such evidence is neither objective nor reliable. It does not persuade us that it was unlikely that Unit 7 voters could reasonably have interpreted this facsimile ballot as expressing the Commission's endorsement of one of the parties to this election. We must therefore examine the document disseminated in this case to determine whether it could reasonably have misled unit employees.

This sample ballot appears quite similar to the one contained in the



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Commission's Notice of Election. The only differences are that the MHCPU's sample is slightly smaller, leaves out the seal of the Commonwealth, and has a small union bug in the lower righthand corner. In addition, there is a red "X" in the box for the MHCPU. The sample was contained in an MHCPU campaign mailing but was not attached to any other document in that mailing. Examination of the case law, both our own and that of the National Labor Relations Board (NLRB or Board), convinces us that this document could reasonably have led employees to believe that the Commission endorsed one of the parties to this election.

Although we have previously refused to adopt the NLRB's self-proclaimed per se rule in analyzing these cases, see Comm. of Mass. (Unit 4), supra at 1264, we have noted that the Board cases have not adhered to such an inflexible approach. See Comm. of Mass. (Unit 1), supra at 1295. In Allied Electric Products, Inc., 109 NLRB 1270 (1954), the Board first enunciated a strict policy of overturning elections where facsimile ballots were used. Examination of the Board cases since then discloses three classes of exceptions to this rule. When the sample ballot contains no reference to the United States government, the National Labor Relations Board, or Board agents its use has been upheld. See Triangle Super Dollar Market, 225 NLRB 403 (1976), Stedman Wholesale Distributors, Inc., 203 NLRB 302 (1973); Glidden Co., 121 NLRB 752 (1958); Paula Shoe, 121 NLRB 673 (1958). A second exception lies in cases where the author of the document is clearly identified on its face. See Associated Lerner Shops of America, Inc., 207 NLRB 348 (1973). Cf. Monier Roof Tiles, 249 NLRB 703 (1980). The third exception is when the document, on its face, appears so unlike the official Board document that it does not even purport to be a duplicate. See Rett Electronics, 169 NLRB 1111 (1968).

Applying the above NLRB criteria to this case, we can state with certainty that this case does not fall within any exception to the Allied Electric Products rule. Neither the deletion of the seal of the Commonwealth nor the addition of a union bug suffices to either identify the ballot's author or remove its official appearance. The document's failure to reveal its maker on its face increases the likelihood of voter confusion and misperception. See Armstrong Cork Co., 250 NLRB 1282 (1980); Building Leasing Corp., 239 NLRB 13 (1978). The fact that it contains a typeface and layout nearly identical to that of the sample ballot in the Commission's notice is particularly significant. See Armstrong Cork Co., supra at 1283. Additionally, the presence of the "X" in the MHCPU box is precisely what we warned against in the Unit 1 case:

The [reproduced] election notice was not altered in any way. Had NAGE altered the document by inserting an "X" within the NAGE box or otherwise written instructions on the document, then we might tend to agree with the Alliance that employees could have been reasonably misled. [citations omitted].
Commonwealth of Mass. (Unit 1), supra at 1297.

Finally, the reference to the specimen ballot in the "Dear Colleague" letter to employees causes us additional concern. Stating that the MHCPU's specimen, with the red "X" in its box, is a "SAMPLE COPY OF THE BALLOT you'll be getting from the State" only magnifies the potential for voter confusion over the Commission's



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election role. Presenting a ballot marked for the MHCPU and warning voters to "Study it...because the slightest incorrect marking on your part could invalidate your vote" impermissibly suggests that the Commission would count only ballots cast for the MHCPU.

Mindful of the effect on employees of further postponing the certification of a bargaining representative, we do not lightly overturn an election and order a new one. Nevertheless, the public perception of the neutrality of this agency is critical to the integrity of the election process. As the MNA points out, this perception is even more crucial in elections involving Commonwealth employees. Where the employer and the neutral agency conducting the election are both arms of the same entity the potential for voter confusion is only increased. We must again state what we have stressed before: parties to an election who duplicate official Commission documents as part of their election campaigns do so at their peril. We will not allow the integrity of the election process to be compromised for partisan campaign purposes. Accordingly, we set aside the results of this election and order that a new one be conducted.

ORDER

Wherefore, on the basis of the foregoing, the Commission orders:

1. That the results of the Unit 7 election held from February 14 to March 7, 1983 pursuant to the Consent Election in Case SCR-2166 dated January 3, 1983, be set aside; and
2. That, pursuant to the power vested in the Commission by Chapter 150E of the General Laws as aforesaid, a new election by secret mail ballot be conducted under the direction and supervision of representatives of the Commission among employees in the aforesaid bargaining unit at such time and under such conditions as are contained in the Notice of election issued by this Commission.
3. That five (5) copies of an election eligibility list containing the names and addresses of all the eligible voters in the unit set forth in the Agreement for Consent Election approved January 21, 1983 must be filed by the Employer with the Executive Secretary of the Commission, Leverett Saltonstall Building, 100 Cambridge Street, Room 1604, Boston, Massachusetts 02202, no later than fourteen (14) days from the date of this decision. The list of eligible voters shall consist of all those persons included within the above-described unit whose names appear upon the payroll of the Employer on June 25, 1983 and who have not since quit or been discharged for cause.

The Executive Secretary shall make the list available to all the parties to the election. Since failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties, no extension



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of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner



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APPENDIX

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

THIS IS A SECRET BALLOT.
DO NOT SIGN YOUR NAME.

Mark an "X" on this ballot in one square only.
I desire to be represented by:


MASSACHUSETTS HEALTH CARE PROFESSIONALS UNION S X A	NO ORGANIZATION M P	MASSACHUSETTS NURSES ASSOCIATION L E
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MHCPU Sample Ballot

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

THIS IS A SECRET BALLOT.
DO NOT SIGN YOUR NAME.

Mark an "X" on this ballot in one square only.
I desire to be represented by:

 MHCP MASSACHUSETTS HEALTH CARE PROFESSIONALS UNION S A	NO ORGANIZATION M P	MASSACHUSETTS NURSES ASSOCIATION L E
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Sample Ballot Posted in Official Commission Notice of Election



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THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

THIS IS A SECRET BALLOT.
DO NOT SIGN YOUR NAME.

Mark an "X" on this ballot in one square only.
I desire to be represented by:

MHCP
MASSACHUSETTS
HEALTH CARE
PROFESSIONALS UNION

NO ORGANIZATION

MASSACHUSETTS
NURSES ASSOCIATION

Official Commission Ballot Mailed to Unit Employees

