COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND FINANCE AND NAGE AND MOSES, SCR-2220 AND 2221. RULING ON OBJECTIONS TO THE ELECTION (UNITS 1 AND 6).

93.14 election challenges

Commissioners Participating:

Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Appearances:

Anna McKeon, Esq. John Marra, Esq.	- Representing the Commonwealth of Massachusetts, Commissioner of Administration an Finance
Joseph Delorey, Esq. Joseph Monahan, Esq.	- Representing the National Association Of Government Employees
James McDonagh, Esq. Ann Looney, Esq.	- Representing the Massachusetts Organization of State Engineers and Scientists

RULING ON OBJECTIONS TO THE ELECTION (UNITS 1 AND 6)

The Labor Relations Commission (Commission) conducted a mail ballot election for Commonwealth of Massachusetts bargaining units 1 and 6 (Units 1 and 6) during the period from July 31, 1995 through August 28, 1995, pursuant to Decisions and Directions of Election issued on May 11, 1995. The results of the counting and tabulation of the mail ballots on August 28 and 29, 1995 were as follows:

UNIT 1

Ballots cast for the Massachusetts Organization of State Engineers and Scientists (MOSES)	952

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Ballots cast for the National Association of Government Employees (NAGE)	2889
Ballots case for neither/no employee organization	56
Blank ballots	3
Void ballots	121
Challenged ballots	118
Total of ballots cast	4139
Protested ballots	2

UNIT 6

Ballots cast for the Massachusetts Organization of State Engineers and Scientists (MOSES	1733
Ballots cast for the National Association of Government Employees (NAGE	2339
Ballots cast for neither/no employee organization	132
Blank ballots	3
Void ballots	78
Challenged ballots	76
Total ballots cast	4361
Protested ballots	4

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Pursuant to Commission Rule 456 CMR 14.12(3),[1] MOSES filed timely Objections to the Election in both Units 1 and 6, challenging the conduct of NAGE during the course of the election campaign. MOSES objected to the elections on the ground that, on several occasions between July 16 and August 28, 1995, "NAGE asserted that the Administration had guaranteed retroactive pay raises for NAGE represented employees but that MOSES represented employees would receive no retroactive pay." On September 8, 1995, the Commission notified the parties that they could submit documentary evidence, testimonial evidence in the form of affidavits from individuals with personal knowledge of the facts relied on, either in support of or in opposition to the objections, and pertinent legal arguments in support of or in opposition to the objections. MOSES filed its submission on September 18, 1995, and NAGE filed its submission on September 25, 1995. On October 2, 1995, after investigating MOSES's objections based on the parties' written submissions, the Commission notified all parties that it would hold a hearing on October 16, 1995 to resolve disputed issues of fact pertinent to the investigation of those objections.

Prior to the hearing on October 16, 1995, MOSES subpoenaed Kenneth Lyons (Lyons), president of NAGE, David Holway (Holway), a NAGE lobbyist, and Richard Anderson, Jr. (Anderson), NAGE's chief negotiator. On October 11, 1995, NAGE filed a Motion for the Revocation of the Subpoenas for Lyons, Holway, and Anderson, and a Motion for a More Definite Statement. On October 12, 1995, after considering the arguments of all parties, the Commission denied NAGE's Motion for the Revocation of the Subpoenas, and granted NAGE's Motion for a More Definite Statement.

At the outset of the hearing on October 16, 1995, NAGE filed a Motion for Summary Judgment, and MOSES filed an opposition to NAGE's Motion for Summary Judgment the following day. On October 18, 1995, the Commission denied NAGE's motion.

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1 456 CMR 14.12(3) provides, in relevant part: "At the conclusion of the election, the Commission shall furnish to the parties a tally of ballots. Within seven (7) days after the tally of the ballots has been furnished, any party may file with the Commission an original and four (4) copies of objections to the conduct of the election or to conduct affecting the result of the election."

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A hearing on the objections to the election was conducted on October 16, 18, 25, November 2, and 3, 1995, before Diane M. Drapeau, a duly-designated administrative law judge of the Commission. All parties had a full and fair opportunity to present any documentary and testimonial evidence they wanted the Commission to consider as part of its investigation of MOSES's objections.

On November 17, 1995, the administrative law judge issued "Recommended Findings of Fact." On December 22, 1995, NAGE and MOSES filed briefs challenging the administrative law judge's findings and presenting arguments in support of, or in opposition to, MOSES's objections.

After carefully considering the evidence adduced at the investigation and the arguments of the parties, we overrule MOSES's objections based on the following facts and for the reasons set forth below.

FINDINGS OF FACT

A. David Holway's Statements of July 16, 1995

On July 16, 1995,[2] between 11:30 a.m. and noon on the NAGE television program "Challenge," aired on Channel 68, David Holway (Holway), chief lobbyist for NAGE,[3] made several statements regarding the election including the following:[4]

> Another matter that was discussed this week is we met with the Administration to talk about what is the process once this election is over. How fast can NAGE

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2 Unless otherwise noted, all dates refer to calendar year 1995.

3 Since 1988, Holway has been registered as a lobbyist. He spends almost 100% of his time with the legislators and their staffs.

4 Although NAGE and MOSES stipulated to certain facts, with no objection from the Commonwealth, the findings of fact include the stipulated facts amplified by the testimonial and documentary evidence admitted into evidence.

> get back to the table? NAGE can go back to the table immediately after the election is over. Once we've won this victory we can get back to the table.
>
> We've been assured by the Administration that there is money set aside for retroactive pay for NAGE members. Those people in Unit 1 and Unit 6 who remain with us will get retroactive pay.
>
> As MOSES knows, because they've been told by the Commonwealth, that not only will the people in Unit 9, their base membership, and the new members in Unit 3, but any other unit that joins MOSES as a result of any election will receive no retroactive pay: not one dollar.
>
> The Administration has made it very clear to MOSES that any union that does not go to the bargaining table to cover a current fiscal year will not receive any retroactive benefits.

Holway explained that when he said "we" had recently met with the Administration that he misspoke because he had not met with anyone from the Administration, and that there had only been a discussion among the NAGE staff. Holway further explained that the only time he had spoken with anyone from the Administration was prior to the filing of MOSES's representation petition on November 4, 1994. Prior to November 4, 1994, Holway was concerned about the impact of the rejection of the NAGE contract by the membership, and he anticipated MOSES would file a representation petition. He had been told by Joseph Delorey (Delorey), one of NAGE's negotiators, that the Administration had said that, if you get to the end of a fiscal year and you do not have an agreement, you lose that year. Holway claimed that he had spoken with Joseph Trainor (Trainor), assistant secretary of administration and finance, prior to November 4, 1994 and asked him if Delorey's opinion was correct. According to Holway, Trainor told him that Delorey was right and that, if there was no agreement within the fiscal year, then that year would be lost.

When Holway learned that MOSES was gathering authorization cards, he became concerned about the impact on raises for NAGE's bargaining units if a representation petition were filed. Again, Holway claimed he spoke with Trainor who purportedly said that if that were to happen, NAGE would still get the FY'95 raises because they would not be at the

bargaining table through no fault of their own and NAGE would not be penalized for any delay because of an election. Holway was not sure when he told Lyons about the conversations with Trainor.

When asked what he meant when he referred to the "Administration" on the "Challenge" program on July 16, Holway explained that, when he first mentioned the word "Administration" he had no idea what he meant. The second time he mentioned the word "Administration" he meant the Legislature. He also said that in his mind "Administration" and "Legislature" are interchangeable words. And the third time he mentioned "Administration," he was referring to the Trainor conversation.[5] He wanted to let the membership know that the money was there and he wanted to respond to MOSES's campaign statements against NAGE and Lyons.

B. MOSES's Reaction to Holway's Statements

Paul Donohue (Donohue), president of MOSES, saw the July 16 program "Challenge,"

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5 The administrative law judge did not credit Holway's testimony concerning his alleged conversation with Trainor, and we do not disturb her credibility finding on this point. As she noted, Trainor denied meeting with Holway either formally or informally before or after November 4, 1994. In addition to Trainor's denial of any conversation with Holway, Holway's credibility is further undermined by his glib use of the word "Administration" when he says he meant the Legislature, or, in another instance, not recalling what he meant when he used the word "Administration." In light of the fact that Holway is an experienced lobbyist, it hardly seems likely that he does not know the difference between the Administration and the Legislature. His explanation that he "misspoke" when he spoke on "Challenge" does not ring true. The terms of a contract for Units 1 and 6, including the possibility of retroactive raises, were of paramount importance to the membership. Because Holway asserts that it was his intent to reassure the membership that the money was available for their contract, it seems logical that Holway deliberately chose the words to deliver this message to convey a particular impression and did not inadvertently use the wrong words.

when Holway made the statements regarding NAGE's assurances from the Administration.[6] Donohue was surprised by Holway's statements because there was supposed to be no communication between either of the competing unions and the Administration.

As a result of the July 16 Holway statements, Donohue sent the following letter to Joseph Daly (Daly), director of the Office of Employee Relations (OER), seeking a response from OER regarding Holway's statements. OER is the Commonwealth's designated representative for collective bargaining.

> With regard to the statements made by NAGE on their July 16, 1995 "Challenge" program, MOSES seeks a statement from OER that contains the following points:
>
> 1) OER is the representative for the Administration on all matters pertaining to collective bargaining and is the only party that would engage in discussions with the unions regarding negotiations;
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> 2) The Administration has had no meetings with NAGE or MOSES during this election period to discuss any matters pertaining to negotiations.
>
> 3) Specifically:
>
> a) The Administration did not meet with NAGE during the election period in which we discussed getting back to the table when the election is over;

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6 NAGE challenged the administrative law judge's finding that Donohue "was watching" the program "Challenge" on July 16 on the basis that it is unsupported by the record. NAGE claims that the evidence reflects that, at some point Donohue "viewed" the program. Because it is undisputed that Donohue saw "Challenge," and it is not relevant how or when he saw it, we have modified the administrative law judge's finding to indicate that Donohue "saw" the program.

b) We have not given assurances to NAGE that there is money set aside for retroactive pay for NAGE members if they remain with NAGE;

c) We have not told MOSES, that Unit 9, Unit 3 or any other Unit that joins MOSES as a result of any election will receive no retroactive pay.

4) The Administration has no interest in whether the employees elect NAGE or MOSES and will deal fairly with whichever representative is elected.

5) It is OER's position that NAGE should correct any misunderstanding caused by the statement made by NAGE on Challenge on July 16th.

On July 18, Daly responded to Donohue's letter and sent a copy to Lyons. Daly's letter stated:

> I am writing in response to your two letters dated July 17th and July 18th in which you request that I state the position of this office regarding contract negotiations that will commence following the pending election in statewide bargaining units 1 and 6. A copy of this letter is also being sent to President Lyons of the National Association of Government Employees (N.A.G.E.).
>
> Whenever two or more competing labor organizations are involved in a representational election, the Employer is obliged to assume a position of strict neutrality. In the case of this pending election, this office has, as always in such cases, maintained a neutral position. Specifically, there have been no representations made to either party to this election relating to future negotiations.

This office has no control over the campaign rhetoric which may take place in a free-wheeling election between two competing labor organizations; nor does it intend to be brought into the campaign by having to refute allegations about its actions. Let me be quite clear on this. The Employer has not, and will not, engage in any discussions with either party to this election until such time as the Labor Relations Commission certifies one of the parties as the exclusive

bargaining agent; at that time, the Employer intends to engage in collective bargaining negotiations for the affected units.

On July 21, 1995, MOSES included Daly's July 18th letter in a periodically published campaign newsletter called the "MOSES ADVISOR," which was mailed to every person on the voter eligibility lists for Units 1 and 6. Donohue did not request a further response from Daly; however, at some point, he may have expressed his dissatisfaction to Daly.[7]

C. Kenneth Lyons's Statements on the NAGE Videotape

On or about July 27, shortly before the Commission mailed ballots to the employees in Units 1 and 6, NAGE sent to all Unit 1 and 6 employees a videotape in a plain brown wrapper, with no outer or inner identification that it was from NAGE. The videotape was labeled "State Employees Your Future Your Contract." President Lyons's statements expressed on the videotape included, among other things, the following:

> ...But here is something I know will be most enlightening to you is the fact that the State together with our organization will go right back to the table with NAGE immediately after we win the election. Immediately. And within a month you can have a new contract, a very important contract and we have guarantees as it relates to this contract. This is something that NAGE can get for you that MOSES cannot. Why? because MOSES had two years and he did not negotiate his contract and the State now says to him no retroactive moneys for MOSES....
>
> ..Here's what your new contract is going to be in your behalf. Effective July 1, 1994, that's right, 1994, for 2.5 percent pay raise. Then effective July 1, 1995

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7 MOSES claims that Donohue testified that "...that's the best I was going to get from Mr. Daly..." and that Donohue "...might have expressed his dissatisfaction...[to Daly]." After reviewing Donohue's testimony, we agree that the administrative law judge's finding does not accurately represent Donohue's testimony, and we modify the administrative law judge's finding accordingly.

another 2.5 percent pay raise. And then July 1, 1996 a 3 percent pay raise.

Retroactive, I said back to 1994. MOSES cannot get it. That's something you're going to receive within a month after NAGE wins the election. I think this is important to you. And that's a big part of their contract as it relates to salaries....

Lyons has been president of NAGE since 1962. His primary duties are overseeing approximately 1,000 locals throughout the country. He participates in collective bargaining, and he was an active participant in the election campaign. NAGE's purpose in creating and distributing the videotape was to make the membership understand what NAGE was all about, what NAGE could do for them, and also to respond to MOSES's campaign statements.

When questioned about the statements he made on the videotape, Lyons said that he did not get any guarantees from any of the Administration's labor relations representatives, nor from Governor Weld or Lieutenant Governor Cellucci. Rather, the guarantees he mentioned about retroactive raises came from his own staff, including Delorey, Richard Anderson, Grace Mucci, Robert Friel, Gary Edwards, Raymond McGrath, Evelyn Ferris, Chris Sullivan, and Holway. Although Lyons said on the videotape that is what the agreement was, he really meant that is what the agreement will be.

Grace Mucci (Mucci) is a national representative for NAGE. She told Lyons that, in her opinion, NAGE could go back to the bargaining table and deal with those issues their members were angry about. On the day Lyons taped the video, she also guaranteed to Lyons that NAGE could get 2.5% wage increase effective July 1, 1994. In addition, she told him to make sure to say that NAGE was going to get a good contract. Mucci also noted that she had no discussions regarding the collective bargaining agreement with anyone from the Administration from November 4, 1994 to the date the videotape was made.

Robert Friel (Friel), is the president of Unit 1, Locals 283 and 290. He guaranteed to Lyons that NAGE could get the same, if not a better, contract than the Alliance had negotiated.

James Farley (Farley) is the president of Unit 6. After the NAGE contract was rejected in 1994, he met with the Unit 6 membership who were unhappy with the bonus offered in the

rejected contract instead of a wage increase, and they were also angry about the give-back on sick leave provisions. He did give Lyons certain guarantees about the contract, but he does not recall assuring Lyons that the collective bargaining agreement could happen within 30 days. However, he did not discuss any matter regarding a future collective bargaining agreement with OER or anyone from the Administration after November 4, 1994.

Evelyn Ferris (Ferris) is Lyons's secretary. She does not participate in collective bargaining and did not give any guarantees to Lyons.

Gary Edwards (Edwards) is a self-employed accountant, and is NAGE's independent accountant. He does not participate in collective bargaining and made no guarantees to Lyons.

Raymond McGrath (McGrath) is the legislative agent for the International Brotherhood of Police Officers (IBPO). Based upon his knowledge of the budgetary and the legislative process, it was his opinion that NAGE could negotiate the contract that was mentioned on the videotape. It was also his opinion that it was possible to obtain the 2.5% retroactive raise to July 1, 1994 and he did express his opinion to Lyons about this. In addition, he thought that NAGE could expedite the negotiations after the election. However, he did not have any discussions with OER or anyone from the Administration regarding the collective bargaining agreement from November 4, 1994 to the date the videotape was made.

Lyons said that Holway told him that he had met with Trainor when they were completing the contract negotiations in the Fall of 1994, prior to the filing of the MOSES representation petition. Holway told Lyons that, even if they were challenged by MOSES, NAGE would get retroactive raises, but MOSES would not, because MOSES was always late coming into negotiate a contract.[8]

Richard Anderson, Jr. (Anderson), the chief negotiator for NAGE,[9] noted that, during

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Although the administrative law judge did not credit Holway's testimony regarding his alleged conversations with Trainor, it is still possible that Holway told Lyons that his information came from Trainor.

9 (see page 1580)

the course of the election campaign, there were numerous discussions taking place among NAGE staff about what kind of contract NAGE could get after the election, and the staff knew that they had to improve the contract terms. Anderson also said that he thought it was possible to get a collective bargaining agreement within 30 days, if there were a limited number of items on the bargaining table. Anderson did not specifically recall guaranteeing 2.5% retroactive pay raises to Lyons. He thought that, if he did say it, it was probably after the Alliance settled its contract with the Administration. With the ratification of the Alliance contract, he and other NAGE staff told Lyons that they would not come away from the bargaining table without getting a wage increase for each year, rather than the bonus. Because the Alliance contract now established the bargaining pattern for the statewide contracts, it was unlikely that NAGE would get less than the Alliance agreement. He also stated that there is no legal preclusion to obtaining the 2.5% retroactive pay at the bargaining table. Anderson did not have any contact with any Administration labor relations representative after November 4, 1994.[10]

D. MOSES's Reaction to Lyons' Statements on the Videotape

On or about July 31, 1995, the day that the Commission mailed the ballots to eligible

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9 (from page 1579)

MOSES challenges the administrative law judge's finding that Anderson was not one of the sources named by Lyons. A review of Lyon's testimony demonstrates that MOSES is correct and that Lyons did name Anderson as one of his sources. Therefore, we have amended the administrative law judge's finding.

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Trainor, assistant secretary of administration and finance and personnel administrator, oversees all of the Commonwealth's human resource functions, including the supervision of collective bargaining functions. Trainor corroborated the testimony of all of the NAGE witnesses that there were no meetings, promises, or assurances given to NAGE by anyone from the Administration or OER for the purpose of guaranteeing NAGE favorable contractual provisions, after MOSES filed its petition on November 4, 1994. Nor did he, or anyone in the Administration, provide any assurances to any NAGE representative, including Holway, that if NAGE were successful in the election that they would have a collective bargaining agreement for Units 1 and 6 within 30 days after the election.

voters, MOSES mailed a campaign flyer to every person on the voter eligibility lists for Units 1 and 6 that included a copy of Daly's July 18 letter on the reverse side. That flyer stated:

OER DENIES
NAGE's 'GUARANTEES'

Dear Unit 1 and 6 Employee:

The video you were sent by NAGE that 'guarantees what will be in your next contract is a blatant lie.

There has been ABSOLUTELY NO COMMUNICATION between the Commonwealth and NAGE or MOSES regarding the next contract.

The Office of Employee Relations (OER) conducts ALL negotiations for the Commonwealth. In a July 18, 1995 letter sent to both NAGE and MOSES, Joseph Daly, the Director of OER states:

'There have been no representations made to either party to this election relating to future negotiations...the Employer has not, and will not, engage in any discussions with either party to this election until such time as the Labor Relations Commission certifies one of the parties as the exclusive bargaining agent...'

No one has talked to NAGE on your next contract.[11] They are counting on you voting and wasting your vote before you discover the truth. They are counting on the fact that many are no longer reading anything.

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11 Donohue testified that when he referred to "no one," he meant no one in the executive branch of the Commonwealth who could have made a commitment on collective bargaining matters.

> We need those of you who take the time to read Mr. Daly's letter on the other side to share this information with your fellow employees. DON'T LET NAGE WIN THIS ELECTION WITH LIES.

On August 1, 1995, MOSES also published an advertisement in the Boston Herald that included the verbatim text of the campaign flyer MOSES had sent to eligible voters the previous day. The July 31 mailing and the August 1 newspaper advertisement were Donohue's first responses to Lyons's statements on the videotape.

On August 3, 1995, MOSES mailed a three-page document to members of Units 1 and 6 addressing certain contractual issues raised in Lyons's letter. That document set out the terms of its proposed contract for Units 1 and 6.[12] Those included: MOSES's proposals for salary increases, access to the MOSES 7-step system effective July 1, 1995, creation of an 8th step effective October 1, 1996, and other cost proposals found in the Alliance contract, such as, seniority, lateral transfer and grievance language. Further, it included the following language responding to Lyons's statements on the videotape NAGE had sent to bargaining unit members:

> ...NAGE has no deal because its against the law and no one in the Weld Administration is going to break the law to help NAGE. It's not against the law for NAGE to lie during this election. The way the Labor Relations Commission sees it, MOSES gets an opportunity to uncover the lie.
>
> ...NAGE has neglected and ignored you for fifteen years and they will say anything to be reelected so they can go back to ignoring you against. They spent more than $100,000 of your dues on the slick video and they're hoping you don't know the difference between the real world and the movies....

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Although MOSES concurs with this finding, it asserts that the finding should emphasize that MOSES clearly noted on its literature that this was a proposed contract, and that it was not offering any guarantee. Because the administrative law judge's finding states that it was a proposed contract and not a guarantee, we need not disturb her finding.

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NAGE ADMITS THEY HAVE NO DEAL

...If you have a copy of the NAGE Reporter called 'The Contract,' you'll see that NAGE is trying to backpedal from their bold video lie that they have a deal. The caption on the salary increases therein is 'Proposed by Unit 1 and 6 members in NAGE surveys during the past six months.'

Why is NAGE 'guaranteeing' you something on the video but only telling you its a 'proposal' in print? The reason is they're hoping you will see and believe the 'guarantee' in the video and vote for them based on the lie. Then, when they don't produce what was promised, they'll use the 'proposed' in the print to explain it away.

lease remember that Joseph Daly, the Director of the Office of Employee Relations, who is responsible for all negotiations has refuted the NAGE 'we got a deal' lie with his statement: 'There have been no representations made to either party to this election relating to future negotiations...the Employer has not, and will not, engage in any discussions with either party to this election until such time as the Labor Relations Commission certifies one of the parties as the exclusive bargaining agent....'

E. Kenneth Lyons's Letter of August 3, 1995 and the Airing of the Videotape on August 20, 1995

On August 3, 1995, the same day that MOSES sent a campaign mailing identifying Daly as being responsible for negotiations, NAGE sent the following letter from Lyons to members of Units 1 and 6:

Dear Member:

Just a few notes in answer to Paul Donohue's latest mudslinging. I will be very brief.

1. Governor Weld met with me and said, 'You beat me on privatization,' and further said, 'I regret not meeting with you earlier.' Our meeting lasted over one hour. Governor Weld did not and would not know Donohue or MOSES.

2. The tape I sent you was accurate and believe me, OER is not NAGE's source. OER has been playing it safe.

3. NAGE's Optical & Dental Program is the best in the State - MOSES, to put it mildly, can hardly get you toothpaste.

4. The legislative record shows MOSES walking out on privatization. All employees NAGE represents are protected. Donohue/MOSES fouled up and most of his people are not protected against privatization.

5. MOSES hasn't offered one new idea for you. Every year they have followed NAGE's lead.

6. MOSES has stalled for over 2-1/2 years and hasn't obtained a contract for his people. They are disgusted.

7. REMEMBER: NAGE will have a good solid contract for you within thirty (30) days after winning the election and with retroactive money back to July 1, 1994 NAGE had the legislature set the money aside to fund this. MOSES failed and did not get to the bargaining table. MOSES did not have the legislature set aside money. MOSES is stuck and mudslinging is all Donohue has left.

8. Mr. and Mrs. Donohue had better save the $5000.00 because the State is coming after him for the illegal $80,000.00 that belongs to the state, or he can use the money for bail purposes.

On August 20, the videotape NAGE had mailed to voters on or about July 27, 1995 was aired

on Channel 68 between 11:30 a.m. and noon on the NAGE television program "Challenge."[13] Neither the videotape nor the August 3 letter names any Administration source for Lyons's guarantees.

F. MOSES's Reaction to Lyons's August 3, 1995 Letter and the Airing of the Videotape on August 20, 1995

During the course of the election campaign, MOSES, like NAGE, used various media to communicate to the membership of Units 1 and 6, including distribution of campaign literature and newspaper ads. Some of the campaign materials took the form of "positive" pieces that would describe each union in a positive manner. Other forms of campaign material would be "attack" pieces that criticized the other union.

MOSES sent a mailing to bargaining unit members on August 7, 1995.[14] In that mailing, MOSES stated: "(By the way, all state employee contracts are negotiated through OER, NAGE lied about that one too!)." Although MOSES's August 7 mailing represented that MOSES would be able to get to the bargaining table before NAGE, it did not explicitly reference retroactive raises.[15]

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13 NAGE claims that the evidence does not support this finding. However, NAGE and MOSES agreed to the following stipulation: "On August, 1995, the videotape referenced in paragraph 5 was aired on channel 68 between 11:30 and 12:00 noon on the NAGE television program 'Challenge.'" Therefore, we adopt the administrative law judge's finding on this point.

14 MOSES had also sent the three-page document referred to in pp. 16-18 to voters the same day that Lyons sent his August 3 letter.

15 NAGE and MOSES challenge the administrative law judge's finding that there was "no further mention in the campaign literature regarding the NAGE contractual guarantees." NAGE argues that documentary evidence supports a finding that several contractual issues

(continued)

Between August 8 and 17, 1995, MOSES did not to send any literature. According to Donohue, it did not to do so because it believed that the ballots had already been mailed and most of the voters would have already voted. Donohue was not absolutely sure that Lyons and Holway were not lying, and he believed that he had no way of rebutting any contract guarantees without knowing the source of the guarantees.

G. The Polling Experts

1. Sean Mullin

Sean Mullin (Mullin) is the president of the Point Group Co., Inc. (Point Group), a research and management consulting firm. He is responsible for overseeing the operations of the entire business. The core part of the business is to conduct polling and surveys. Point Group is the re-organization of a company originally started as Sean Mullin Associates in 1977. Mullin's company has conducted approximately 2,200 public opinion surveys for public and commercial clients. Some of the surveys were: 1) a survey of information technology users for the Anderson Consultant Co.; 2) a survey for the Legislature concerning the impact of postcard voter registration practices; 3) a survey for the Commonwealth's Department of Public Works regarding the reconstruction of the Southeast Expressway and its potential impact on business and individuals; 4) a survey for the Kemper Insurance Co. (Kemper) in order to determine the impact on Kemper policyholders, if Kemper were to discontinue providing car insurance coverage in the Commonwealth, but continue other types of insurance coverage; and 5) other surveys for Digital Equipment Company and the Trial Courts of the Commonwealth.

Point Group was hired by CSC, a public strategy firm located in Plymouth,

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15 (continued)
were raised. MOSES alleges that the finding is not completely accurate because the documentary evidence shows that MOSES stated in its campaign literature: "(By the way, all state employee contracts are negotiated through OER, NAGE lied about that one too !)." We have modified the administrative law judge's findings to more accurately describe the contents of MOSES's August 8, 1995 mailing.

Massachusetts, that had been hired by MOSES. The contract with CSC was for a flat fee. Point Group was contacted by CSC a few days before the survey began. The standard practice at Point Group, before accepting an assignment, is to check if the research director and the director of telephone operations are available for a specific period of time. In this particular case, the first draft of the sample survey was designed by Kevin O'Riley (O'Riley),[16] president of CSC, and Point Group's research director, and Mullin wrote the final draft.

Depending on the type of survey, Point Group recruits its interviewers from college students or newspaper ads. For this survey, Mullin primarily used college students who were paid $15.00 per hour.

On September 2 and 3, 1995, Point Group conducted a survey of the members of Units 1 and 6. The purpose of the poll was to determine the influence on voters regarding the information they had received on the videotape and campaign literature during the course of balloting.[17] The key to the methodology to determining the accuracy of such polling was to ensure that the sample population be accurately and properly represented in the final sampling. In order to accomplish this, Point Group used the voter eligibility list for Units 1 and 6 bargaining unit members that had been distributed by the Commonwealth, and randomly distributed the 12,000 plus names and phone numbers of the members of Units 1 and 6.[18]

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16 O'Riley was an individual consultant prior to forming CSC. CSC was created in 1990, but effective May 10, 1995, O'Riley became the whole company, as Mullin is the whole company for Point Group.

17 NAGE challenges the administrative law judge's finding that the purpose of the poll was to seek the "opinion" of the eligible voters, and asserts that the purpose of the poll was to determine whether the campaign literature and video had influenced the voters in the election. We agree with NAGE and modify this fact accordingly.

18 NAGE objects to the use of the phrase "in order to accomplish this" because it implies that the Point Group did, as a matter of fact, "accomplish this." We will not amend this phrase because it is simply a transitional phrase that does not draw any conclusions regarding the survey.

Point Group operates an eight-phone research center. The phones are digitized through personal computers that are part of a larger network. The database containing the 12,000 plus names of the members of Units 1 and 6 was entered into the central computer. Five out of the eight phone stations were specifically designated for Unit 1, and three stations for Unit 6. The underlying program, which brings up the interview questions on the computer screen, also provides a random generation of Units 1 and 6 members' names and phone numbers. The program works in this manner for two reasons: 1) for the geographic distribution, thereby ensuring the accuracy of the sampling selection; and 2) to ensure that the survey covers a broad cross-section of a population or universe. The application randomly jumps through the database selecting the next available respondent. It displays that respondent's name and phone number, and then one at a time, it displays the questions to be asked. Those questions are asked in the precise order and wording as they are presented on the screen. For purposes of quality control and quality assurance, the supervision of the process includes a supervisor sitting with a headset, who can listen, but cannot interrupt, any of the conversations.

The first question that was asked was: "Did you vote in the recent election?" This is commonly referred to as a screening question. The reason for this question appearing first is that if an individual did not vote in the election, their opinion is excluded in measuring whether or not the information they received had any impact on their vote. The second question was: "Did the knowledge that you obtained from the video or campaign literature indicating the administration would give retroactive pay raises to NAGE influence your vote in this election?"[19] This question was specifically designed and asked of the respondents to determine whether or not the information they received had an impact on how they had voted. The third question was: "Did the knowledge cause you to vote for NAGE or MOSES?"

The list of names for Units 1 and 6 provided by the Commonwealth contained approximately 12,000 plus names of bargaining unit members. Point Group completed approximately 3,800 phone calls in order to obtain 1,255 respondents. The company's

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19 NAGE claims that the hearing officer did not accurately quote this survey question in her findings, and we have modified the findings of fact to include the correct language of that question.

standard practice for this type of survey research is not to leave a message on an answering machine so that it is not recorded as a "dial." If a bargaining unit member were not at home, or if a member decided they did not want to participate, or if the phone number is wrong, those "dials" are not included in the tally. Referring to the survey, Mullin explained that 489 respondents said that the knowledge they had received from the video and campaign literature had influenced their vote and that represented 39.0% of the overall survey. It is a fairly typical practice to report these results in two ways: 1) report the overall percentage where you take the entire 1,255 responses which gives you the raw percentage which is 39%; 2) the second way is to include refusals (individuals who did not want to answer that question); in this case, there were 31 respondents out of 1,255 who refused to respond or 2.5%. If you then look at the adjusted, or what is called the valid percentage, 39.95% of the population said that the knowledge they had received had influenced their vote.

Point Group uses SPSS which is an industry-leading statistical package for the social sciences that has existed for over twenty years. It was developed primarily for use in analyzing survey and statistical data. It is a software package that allows the individual researcher to analyze the data using all of the common industry wide measuring instruments.

"Frequency tables" are the very basics of reporting statistical findings. It is simply counting the number of respondents that answered a particular question in a specific manner. Listing the individual response numbers and dividing them by the number of total responses. It is a simple listing of straight percentages and the easiest way to understand it is if 100 is the total possible respondents, and 25 actually respond, then the percentage is 25%. That is a straight frequency table and the frequency of occurrence of a given response.

The "cumulative percentage" column in Tables 1, 2, and 3 does not have any relevance in this type of survey.[20] It is generally used for seeing cutoff points in frequency tables. For

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NAGE challenges this finding because the administrative law judge states this as a fact, when it actually represents only Mullin's opinion. We disagree with NAGE's assertion. The sections of the facts dealing with the experts' opinions are labelled as "Polling Experts," and the findings in these sections reflect the expert opinions of Mullin and Williams

example, if you ask "on a scale of 1 to 10 with 1 being 'very good' and 10 being 'horrible'" - it would indicate the respondents' intensity of feelings which does not have any relevance in this type of survey.

Table 4, 5, and 6 are the cross-tabulations for Question 1, 2, and 3 respectively. Cross-tabulation is the next layer of analysis. For example, in this survey, one of the variables is the bargaining unit (either Unit 1 or 6) from which the respondents were drawn. In this poll, we are comparing the responses from Units 1 and 6 to the whole. These cross-tabulations - a format that SPSS generates - shows the cross-tabulation between Question 1, 2, and 3 respectively. It gives the calling percentage, and the final total gives the percentage to the overall survey.

Mullin explained that you validate the data by running a number of tests beginning with the sampling design to ensure that no errors have occurred in the sampling process or the methodology. For example, at the end of each phone shift, the company runs a test on the data to ensure that the random selection process that is programmed to select individual names has not broken down. You have to ensure that the number of names, the number of phone numbers, and the questions that appeared on the screen are the same and that there is no skewing. As a standard practice, the company also runs a distribution sample to check to make sure that within area codes and geographical locations, there has been no error in the sampling population. Point Group also looks at the data by bringing it up on a spreadsheet and looking visually at the data to make sure there are not any excessive amounts of blanks in any given area, or that a pattern has not emerged with any of the interviewers having any difficulty. When they review the spreadsheet, they check to see if there are any anomalies.

After the data has been collected, the company does a number of tests. They run a cross-tabulation by individual interviewers to ensure that the percentage variation among all of the interviewers to ensure that there are no major deviations from the results of one interviewer versus another. They run this test at the end of each shift, as well, to make sure that no problems are developing in any of the scripting and that there is no variation in the scripting used by the various interviewers.

KMO (within the SPSS program) is a widely-accepted means of measuring the competency and accuracy of the data. It compares the magnitude of the observations and the

correlation between each of the co-variants to the magnitude of any partial sub-sample. In other words, the company takes one sub-segment of the overall sample, i.e., one interviewer during a 4-hour shift who may have completed 16 surveys and compare it to the overall survey to see if there is a correlation, or if there is any major deviation between the two. There should not be a deviation of more than 3.35% within the sample, commonly referred to as the plus or minus error factor.[21]

This particular survey is a much larger poll than those he has previously conducted because the total universe or population is 12,000 plus bargaining unit members and 10% of this sampling is a fairly large sampling. A typical nationwide survey of 1,000 voters is generally considered adequate, so 10% of 12,000 plus is more than adequate.

Mullin stated that no respondent indicated that they thought that NAGE or MOSES was conducting the poll; nor did anyone say that they were not aware of the video.

Mullin was not aware of the results of the election until he saw a draft of the sample survey. He acknowledged that he had read a great deal of research that says that voters will tell you that they voted when they did not vote. The key for accuracy is the sample size and the methodology. The diskettes he received had the Commonwealth's database. It contained only the names, addresses, and phone numbers of members of Units 1 and 6.

The company's standard call-back routine is that, if asked, the interviewer will give the respondent the 800 number for Point Group. The supervisor would answer the 800 line. In the instant case, no one called back. If anyone had called back, they would have been told that the poll was being conducted on behalf of CSC.[22, 23]

21

NAGE claims that Mullin testified that the plus or minus error factor was 3.35%, and not 3.5%. A review of Mullin's survey indicates that he noted that the "confidence interval means that the results obtained should not deviate from the results which would be obtained by sampling the entire population by more than 3.35 cases in every 100 cases examined." Mullin's conclusion supports NAGE's assertion, and therefore, we will modify this fact.

22, 23 (see page 1592)

Mullin was not present when the survey document was pre-tested. He did not know if it was in fact done. However, it is standard practice for his company to pre-test and it has always been done. The way it is accomplished is for the interviewers to read through the questions, and then the methodology is explained to them, and any questions they may have, are answered. The interviewers will then sit down at the terminals and go through the interview. The process takes one to one-and-a-half hours. Each interviewer will then do five questionnaires to make sure everything is running smoothly. All of this is monitored by a supervisor and it is standard operating procedure.

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22 (from page 1591)

NAGE offered the testimony of Janine Lebeau (Lebeau), Elena Aubertine (Aubertine), and Charlene Cabral (Cabral) to discredit the manner in which the poll was conducted. All three individuals are employees of the Department of Social Services in New Bedford and members of either Unit 1 or 6. Lebeau testified that she did not recall if she was asked whether she voted, but she did recall being asked about the videotape. She also did not recall being told the results of the election, or whether the interviewer identified who was taking the poll. Aubertine testified that the questions were asked in an open-ended manner, and not the way indicated on the survey. She did not recall anyone mentioning campaign literature, or identifying who was taking the poll. Cabral also did not recall anyone identifying who was taking the poll, but did recall that she was told the results of the Unit 6 election, asked how she voted, and asked if the video or campaign literature had influenced her vote. She thought NAGE was sponsoring the poll because she did not think MOSES had her phone number. However, she conceded that she would not have answered the interviewer's questions any differently if MOSES had been identified as the sponsor of the poll.

The testimony of these three witnesses does not discredit the testimony of Mullin regarding the manner in which the poll was conducted because their recollections were not consistent with each other, with the exception that they did not remember the interviewer identifying himself or herself. At best, these three witnesses represent only 3 out of 1,255 respondents involved in the survey, and, therefore, are statistically irrelevant.

23 (from page 1591)

NAGE challenges the administrative law judge's findings in the previous footnote, claiming that her findings discredit Mullin's testimony. However, we do not find that the testimony of Lebeau, Auvertine, and Cabral is inherently inconsistent with Mullin's testimony.

2. David Williams

David Williams (Williams) established his own company, Williams and Associates, a research and consulting firm, in 1989. He has done polling and opinion research for approximately 18 years. He was the senior vice president of Cambridge Reports, Inc. until he established his own company. His company specializes in political research, but also has corporate clients. His political clients include: Congressman Peter Torkildson, Congressman Peter Blute, Governor William Weld, Janis Berry, Peter Forman, and other high-profile Republicans. His private clients have been Hydro-Quebec[24] and numerous public relations firms. He is also a member of the American Association for Public Opinion Research.

At the request of NAGE, he reviewed Point Group's survey results, MOSES's objections and NAGE's response to MOSES's objections. However, Williams did not have access to all of the data contained in the survey; nor did he request the data. He only reviewed the information contained in Mullin's affidavit. Prior to preparing his assessment, he did not have a statement of the precise sampling methodology used in Mullin's survey. Williams stated that it is difficult to make a complete and thorough analysis of the poll without the information noted above.[25] He also noted that it is impossible to say in any definitive way

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24 Hydro-Quebec was involved in reviewing contracts in the six New England states. A few years ago, he did a major New England sample of 800 people. He was trying to find out attitudes towards hydro-electric power, some economic data, and the impact of the high cost of electricity on businesses staying in New England or moving someplace else, and the environmental impact. The 800 residents represented an accurate sample of six New England states because it yielded a margin of error that was acceptable. The questionnaire he used was approximately 15-20 minutes long. There is always a trade-off on how long a survey is going to be, or what sample size you are going to use, but it usually depends upon an acceptable margin of error. In his survey, the margin of error was 3.5%. He used Yes/No questions and "open-ended" questions. With a sample of 800, it gave him an accurate survey result.

25 NAGE claims that Williams testified that it was "polling data" and not the "poll." (continued)

whether errors were made in the sampling procedure. However, it is also possible to look at other elements in the survey. For example, a lot of his comments are based on the actual wording of the questionnaire.[26]

Williams explained that he had several overall criticisms regarding the manner in which the survey was conducted. The preamble of a survey usually contains a statement of confidentiality. Most survey companies make such a statement prior to conducting the survey, and most professional societies require this as an ethical standard.[27] However, the Point Group survey did not include any confidentiality statement.

Every survey should contain an assessment of the "cooperation rate." Different companies may use different criteria in assessing the cooperation rate. However, Williams's practice is to not include an individual who terminates the conversation when he/she answers the phone, and who do not want to be interviewed, and/or people who refuse to answer, and those who terminate the conversation in the middle of survey. However, Williams also stated

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25 (continued)
However, NAGE does not specifically cite to the official record of the proceedings to support its position, but rather to an unverified transcript. We therefore affirm the administrative law judge's finding.

26 NAGE claims that the administrative law judge's reference to demographic questions implies that there were demographic questions included in the survey when there were none. A review of Mullin's survey demonstrates that there were no demographic questions, and we have modified the administrative law judge's finding by eliminating the reference to demographic questions.

27 NAGE contends that the administrative law judge failed to make a finding that Mullin's survey did not include a confidentiality statement. NAGE is correct and we, therefore, modify the findings to reflect this fact. MOSES also challenges this finding on the basis that it should be specifically noted that this is only Williams's opinion and does not constitute an undisputed fact. As noted previously, the findings contained in the section dealing with the "polling experts" reflect their opinions.

that the industry has no clear-cut standard for what an acceptable cooperation rate is. But a cooperation rate of less than 70% is cause for concern. The refusal rate is the inverse of the cooperation rate. The refusal rate for Unit 6 (27%) and for Unit 1 (24%) means that the cooperation rate for Unit 6 was 73% and for Unit 1 was 76%.[28]

The mentioning of the results of the election at the beginning of the survey may skew the statistics. It is known by researchers that 10 to 15% of respondents will identify with the winner and sometimes people forget for whom they voted.[29]

You should not provide too much information because by mentioning, as in this case, the video and the campaign literature, it heightened those elements in the respondents' minds. There should have been more questions for a sounder survey.[30] Gallup says you have to ask at

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NAGE objects that the findings in this paragraph are too limited and quotes additional testimony from Mullin and Williams to support adding more findings. However, NAGE fails to specify were in the official record their testimony may be found. Therefore, we will not amend the administrative law judge's findings.

29

NAGE concedes that this finding is accurate, but challenges the breadth of the finding. In one of the NAGE exhibits admitted into evidence, Williams notes that "The Point Group also violates two cardinal rules in questionnaire design by using introductory statements and these questions are both leading and ambiguous." NAGE asserts that this statement is a more accurate description than the words "may skew" as used by the administrative law judge. Although NAGE is correct about William's statement, the finding of fact that NAGE challenges refers to a more specific point. It relates to Point Group's mention of the results of the election at the beginning of the survey, and the administrative law judge's finding is correct on this point. MOSES also objects to the finding on the basis that it should be clarified that this is only Williams's opinion. As noted previously, the section of the facts dealing with the polling experts is intended to reflect their opinions only.

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NAGE objects to the use of the word "sounder," and claims that there is sufficient evidence to find that the survey is "unsound." However, this finding only reflects Williams's

(continued)

least five questions. There is no way of knowing whether any of the respondents actually saw any of the information. There was no cross-check of whether those who responded that they had voted actually did vote.[31, 32]

In reviewing Table 2, Williams stated that the question asked has an implied alternative.[33] Point Group should have asked: Did it influence your vote or not? It is a technical flaw, but not potentially a big one, but could become one if you look at minor flaws

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30 (continued)
testimony. Furthermore, NAGE does not allege that the finding is unsupported by the record. Therefore, we will not disturb the administrative law judge's finding.

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The administrative law judge took administrative notice of the Commission's mail ballot election practices. In order to ensure the secrecy of the ballot, the outside mailing envelope, revealing the identity of the voter, is discarded prior to removing the ballot. In addition, the lists used by all parties, except the Commission, for verification purposes, is retrieved by the Commission at the end of the verification process, and is not available to the parties to the election after the counting and tabulation of the ballots. In addition, the parties stipulated that it is not possible to conduct a cross-check of those members of Units 1 and 6 who actually voted.

32

NAGE claims that Williams's statement was offered as a criticism of the survey, and was not offered as an independent statement of the industry standard as it is found here. In addition, NAGE claims that the administrative law judge takes credit for the conclusions drawn in the last two sentences, rather than crediting Williams's opinion. Again, NAGE does not support its first objection by citing specifically to the official record of the proceedings. Furthermore, the findings included in this section refer to the expert opinions of Mullin and Williams. We, therefore, will not amend the administrative law judge's findings.

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NAGE claims that this sentence does not reflect Williams complete testimony. However, NAGE does not indicate specifically where in the official record this testimony appears. Therefore, we will affirm the administrative law judge's finding.

cumulatively along with some of the larger errors.[34] The way the question is written it has a way of coloring the responses. For instance, it did not allow for a "don't know" category. That alternative has to be offered if the data is going to be accurate and valid. Williams said that these are stylistic criticisms, but can have an impact on results.[35]

In comparing Table 2 with Table 3, there must be either a calculation error or coding error. You cannot have more respondents on one table than the other. Williams thinks that the 31 persons who refused to respond were lumped together with "did not influence" category. When asked if this was an appropriate technique, Williams responded that it was not a problem because the survey is not concerned about these people.[36]

Williams also noted that there were too many leading questions.[37] Williams was asked what was leading about the question seeking voter's response to whether the voter had

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NAGE claims that this is an inaccurate representation of Williams's testimony, but does not cite to the official record of the hearing. Therefore, we will not disturb the administrative law judge's finding.

35

NAGE asserts that these findings are accurate, but are too limited, and should be amplified by additional testimony from Williams. Again, NAGE does not specifically identify the portions of the official record upon which it relies, and, therefore, we will not amend the administrative law judge's findings.

36

NAGE claims that this fact should be amplified by additional testimony from Williams, but fails to cite to the official record of the hearing. Therefore, we will not disturb the administrative law judge's findings.

37

NAGE and MOSES object to this finding claiming that it does not fully represent Williams's testimony on this point. After reviewing the record, we conclude that Williams explained in more detail why the questions were leading, and, therefore, we modify the administrative law judge's finding.

knowledge from the campaign literature or the video. Williams responded that it is a leading question because it highlights the video and campaign literature. If a person is asked if they were influenced by the video and the campaign literature and they answer "yes," we do not know whether it is the campaign literature or the video.[38] However, Williams noted that the majority of respondents answered "no" to this question. There was also no question asked as to whether the voters received the video or campaign literature. There was also no question asked if they saw it, read it, or understood it. Nor do we know if they understood who it was from and what it said. All of these things materially affect how one is going to answer a questionnaire and materially affect the analysis on the back-end of the questionnaire. As constructed, the questions are ambiguous. The way it should be done is to say: "Tell me, of all the elements out there, which one determined how you were going to vote."

The two ways of measuring an error in a poll are: the "confidence level" and the "confidence interval."[39] The confidence level has three levels: 68%, 90%, or 95%. Any kind of scientific inquiry using scientific methods where you are calculating probability, the standard is usually the 95% confidence level. He calculated that the standard error on this poll was at the 95% confidence level, but it was not 2.8% as noted on the poll.

Another problem with the survey is that there is no demographic calculation. There is no information regarding the number of respondents who were male or female, or the number of respondents in particular job titles, or the number of respondents and their years of service. Without the demographic information regarding age, sex, income, length of service, you

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38 NAGE alleges that this finding is accurate, but argues that it should be amplified by additional testimony from Williams. However, again, NAGE does not cite to the official record in support of its allegation, and, therefore, we will not amend the administrative law judge's finding.

39 NAGE agrees that this is an accurate statement, but that it is taken out of context, and requires amplification by Williams's testimony. However, NAGE does not support its position by citing to the official record, and we will not amend the administrative law judge's finding.

cannot say this is a representative sample.[40] However, Williams conceded that the sample polled by Point Group was a nice sample size.

Williams believes that there may be a "self-selection" bias in the survey. Self-selection bias means that certain individuals with particular attributes will respond to certain questions more frequently than other people with different attributes. Because there is no confidentiality statement and the respondents were asked for by name, respondents could logically conclude that their names and their responses could be given to someone else.[41] However, Williams had no knowledge that Point Group violated any voter's confidentiality.

Williams explained that he would have constructed the survey differently. In the introductory statement, he would have given an assurance of confidentiality. He would not have provided, in the lead-in statement, the results of the election. He thinks that this pre-

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40 MOSES and NAGE object to the administrative law judge's finding. Although NAGE does not disagree with the accuracy of the findings contained in this paragraph, it argues that the findings should be further amplified by Williams's testimony. On the other hand, MOSES asserts that the facts should reflect that Williams conceded on cross-examination that the sample polled by the Point Group was a nice sample size. A review of the record indicates that the administrative law judge's finding should be modified.

41 MOSES objects to the administrative law judge's finding on the basis that Williams testified that he was aware of no objective evidence that the lack of a confidentiality statement had any substantive impact upon the results of a survey. Furthermore, Williams testified that he had no knowledge that Point Group breached the confidentiality of any of the respondents to the poll. With respect to the first objection, it should be noted that the administrative law judge did find, in another section of the facts, that: "Williams also noted that the absence of a confidentiality statement does not affect the accuracy of a survey." Since this finding is already included in the facts, we need not amend the administrative law judge's finding on this point. However, MOSES is correct that Williams testified that he had no knowledge that Point Group violated any respondent's confidentiality. Therefore, we will amend the administrative law judge's findings to include this fact.

disposes people to want to go with the winner. He also would not have clumped questions together. First, he would have asked if people had voted, and, to a certain extent, you have to take it on faith that they were being honest, and in the aggregate they probably were. He would then have asked "Have you seen any of the literature?" or "Were you aware that there was an election going on?" He would have included "Don't know" categories in all of the questions. He would also have used the Lykert Scale which is a technique that assigns intensity to the responses - were you extremely influenced, a little influenced, not influenced, or tell me on a scale from 1 to 5 how you were influenced?

There are a number of different ways the sampling could have been done. Williams noted that Point Group's way is not the only way. However, it is probably the most cost-efficient way and it is not unacceptable.[42]

When asked what was the impact of the mistake in Table 3, Williams responded that the impact is relatively minimal. It goes from rounding up from 59% to 61%. It is an obvious mistake that should have been caught. Even if it has a minor impact, it leads one to think that there may have been other mistakes in the process.[43]

"Skip patterns" take a list of the entire universe[44] and you take the number of people that you want to interview divide it into the entire list, and you come up with a product and

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42 NAGE concedes that the findings contained in this paragraph are accurate, but contends that additional facts should be added from Williams's testimony. However, NAGE does not refer to the official record in support of its position, and, therefore, we will not amend the administrative law judge's findings.

43 NAGE claims that these findings are taken out of context, and requests that certain portions of Williams's testimony should be substituted for these statements. However, NAGE does not specifically note where in the official record Williams's testimony may be found. Therefore, we will not amend the administrative law judge's findings.

44 The "entire universe" consists of all employee in Units 1 and 6. The "subject universe of population" are all those who voted in Units 1 and 6.

that product is the "nth" number that you select. You start at a random location on the list, and you skip down that number to the next person, and then you skip the next number, and take the next one. Williams assumed that Point Group used "skip patterns" based on Mullin's testimony.[45] However, there should have been an indication on the questionnaire that there was a "skip" and there is none on the questionnaire. If he had been doing the survey, on Table 2, he would have said, as a direction to interviewer, "skip question 3," and it would have been labelled on frequency table that a sub-sample was asked, not entire sample.

He uses the same version of SPSS as the Point Group.[46] It automatically calculates frequency tables displaying the raw percentage and the valid percentage. The use of the word valid percentage is somewhat misleading. The researcher has the ability to decide what elements are being calculated in the table to come up with the valid percentage. The word valid does not mean it is any more valid than the other percentages. It depends on what the researcher wants to include in the calculations that determines the valid percentage.

In response to the question "isn't it true that it is a valid, accurate and correct practice to calculate overall raw percentages, and not the valid percentages, which excludes missing responses in standard frequency tables?" Williams answered "yes." However, he added that a "refuse vote" is not a missing case. Someone who refuses to answer is not a missing case when there is a "refuse" category.[47]

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NAGE claims that this statement is taken out of context, and requests that another portion of Williams's testimony should be substituted for these findings. However, NAGE does not specifically cite to the official record, and, therefore, we will not disturb the administrative law judge's findings.

46

NAGE does not challenge the accuracy of the finding, but asserts that it should not be inferred that the use of SPSS constitutes an endorsement of the Point Group's findings and of Point Group 's use of SPSS. The administrative law judge's finding is simply a statement of fact, and does not draw any inference regarding the conclusions of the Point Group survey or its use of SPSS. Therefore, we will not disturb her finding.

47 (see page 1602)

Williams also noted that the absence of a confidentiality statement does not affect the accuracy of a survey. He believes every major firm, such as, Gallup, Harris, Roper, and others use a statement of confidentiality, but he does not know, in fact, that they do. Most of the criticisms he has are a matter of style and some of them have greater impact than others.[48]

Williams noted that it is true that "open-ended" questions have to be edited down to smaller, similar categories. The editing is done by individuals who do the coding and keypunching, usually employees of the company. A number of different people in the company select the categories. Usually edited responses fall into certain clear categories, but there is some exercise of discretion. It does not necessarily lend itself to "researcher bias," but it could. The potential for bias is there more so if there are open-ended questions than just "yes or no" answers.[49] Williams stated that he could neither refute the Point Group's conclusions, nor validate them.[50]

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47 (from page 1601)

Although NAGE claims that the question asked of Williams is not accurately quoted, NAGE does not cite the specific portion of the official record where Williams's testimony can be found. Therefore, we will not disturb the administrative law judge's finding.

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NAGE claims that this paragraph does not completely describe Williams's testimony. However, NAGE does not cite to the official record of the proceedings to support its contention, and, therefore, we will not amend the administrative law judge's findings.

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NAGE asserts that the findings in this paragraph do not reflect all of Williams's testimony and, furthermore, are not supported by the record. However, NAGE does not support its allegation by citing to the official record, and, therefore, we will not disturb the administrative law judge's findings.

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Although NAGE admits that this is an accurate reflection of Williams's testimony, NAGE urges the Commission to consider all of Williams's criticisms of the survey when determining the facts. In reaching its decision, the Commission has reviewed all of the findings of fact, the challenges to those findings, and the parties' legal arguments.

Commonwealth of Massachusetts, Commissioner of Administration and Finance and NAGE and MOSES, 22 MLC 1569

Opinion

he issue before us is whether NAGE made misrepresentations between July 16 and August 28, 1995 that would justify setting aside the elections in SCR-2220 and SCR-2221.[51] MOSES identifies four separate communications from NAGE to the voters in Units 1 and 6 as the basis for its objections: 1) David Holway's statements of July 16, 1995; 2) Kenneth Lyons's statement on a videotape captioned "State Employees Your Future Your Contract" mailed to voters on or about July 27, 1995; 3) Kenneth Lyons's letter of August 3, 1995; and 4) Kenneth Lyons's statements on "State Employees Your Future Your Contract," which was broadcast on the television program "Challenge" on August 20, 1995.

When considering whether alleged misrepresentations warrant setting aside a representation election, the Commission has applied the following test:

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51 MOSES initially had argued that the Commission should set aside the elections in SCR-2220 and SCR-2221 based on statements and correspondence issued by representatives of NAGE between July 16, 1995 and August 28, 1995. According to MOSES, NAGE represented to eligible voters during that period that the Commonwealth had guaranteed NAGE collective bargaining agreements including retroactive pay raises for employees represented by NAGE in Units 1 and 6. Therefore, MOSES advanced alternative arguments why the Commission should set aside the elections in SCR-2220 and SCR-2221: 1) if the Commonwealth had made the guarantees represented by NAGE, the Commonwealth had failed to remain neutral during the elections; and 2) if the Commonwealth had not made the guarantees represented by NAGE, NAGE had substantially misrepresented a highly material fact to which MOSES could not effectively respond. However, in its post-hearing brief, MOSES concedes that there was no evidence suggesting that the Commonwealth had failed to remain neutral during the elections in SCR-2220 and SCR-2221, and the hearing record reflects that no representative of the Commonwealth had given NAGE promises or assurances concerning favorable contract provisions.

> The Commission will not overturn an election on the grounds of misrepresentation unless a party has substantially misrepresented a highly material fact the truth of which lies within the special knowledge of the party making the representation. 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. Quincy School Committee, 20 MLC 1306, 1310; Commonwealth of Massachusetts (Unit 5), 3 MLC 1067, 1071 (1976).

Further, the Commission will overturn an election because of misrepresentations only if either the timing or the nature of the statement precludes an effective response by another party and the statement is likely to have interfered with the outcome of the election. Commonwealth of Massachusetts, 16 MLC 1293, 1303 (1989); Boston Water and Sewer Commission, 13 MLC 1071, 1073-1074 (1986). In applying this standard, the Commission has recognized that union election campaigns between competing unions, which are "rough-and-tumble, pugnacious affairs in any event, are likely to be even more vigorous and heated when two labor organizations are competing for the favor of employees." Commonwealth of Massachusetts, 3 MLC at 1071. Therefore, the Commission's role is not to protect the competing union's ability to respond to one another, but to ensure that voters have the opportunity to evaluate alleged campaign misrepresentations and to make reasoned choices based on their evaluations.[52]

David Holway's Statements of July 16, 1995

Between 11:30 a.m. and noon on July 16, 1995, Channel 68 aired the television

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52 NAGE has directed our attention to several decisions of the National Labor Relations Board (NLRB) holding that the NLRB will not set aside representation elections solely on the basis of misleading campaign statements. See, e.g., Midland National Life Insurance Company, 263 NLRB 24 (1982). However, because NAGE has not explicitly requested that we reconsider our standard for reviewing alleged campaign misrepresentations, we need not do so in this case. Therefore, we will consider the four communications on which MOSES bases its objections in light of the principles set out above.

program "Challenge," which is produced by NAGE. During that broadcast, NAGE's chief lobbyist, David Holway, made several statements concerning what would occur after the election. For example, he stated, "...we met with the Administration to talk about what is the process once this election is over...[w]e've been assured by the Administration that there is money set aside for retroactive pay for NAGE members. Those people in Unit 1 and Unit 6 who remain with us will get retroactive pay." Finally, Holway represented that, "[t]he Administration has made it very clear to MOSES that any union that does not go to the bargaining table to cover a current fiscal year will not receive any retroactive benefits."

When questioned about these statements at the hearing, Holway conceded that he had misspoken on "Challenge" when he stated that "we had recently met with the Administration," and that the only discussion had been among NAGE staff members. Although Holway also testified that he had spoken with Joseph Trainor, assistant secretary of administration and finance, who had assured him that the representation petition would not preclude employees in the units represented by NAGE from receiving wage increases for FY 1995, the administrative law judge explicitly discredited that testimony. Finally, Holway acknowledged that he did not know what he meant by his first reference to the "Administration," his second reference was to the Legislature, and his third reference was to conversations with Trainor, which the hearing officer did not credit.

Therefore, the record reflects that Holway's statements during the July 16, 1995 broadcast of "Challenge" misrepresented that NAGE had had discussions with any representatives of the Administration and that NAGE had received any assurances from representatives of the Administration concerning the availability of monies for retroactive pay for employees represented by NAGE. The effect of Holway's statements was to mislead members of Units 1 and 6 to believe that NAGE had obtained assurances about the availability of monies for retroactive pay, a subject that goes to the heart of the employment relationship and would be highly material to any employee. Further, at the time that Holway made his statements, only he and NAGE knew whether they were true, and the employees in Units 1 and 6 had no independent source of information about whether NAGE had received assurances from the Commonwealth, as Holway had represented.

Even if Holway's statement can be characterized as a substantial misrepresentation of a material fact within NAGE's specialized knowledge, however, MOSES had an opportunity to

effectively respond to it. After watching the July 16, 1995 broadcast of "Challenge," MOSES president Paul Donohue wrote to Joseph Daly, the director of the Commonwealth's Office of Employee Relations (OER), requesting Daly in effect to disavow Holway's statements. In response, Daly wrote to Donohue on July 18, 1995, reassuring Donohue that OER had remained neutral concerning MOSES's representation petition and that there had "been no representations made to either party to [the] election relating to future negotiations." Further, Daly emphasized that:

> ...The Employer has not, and will not, engage in any discussions with either party to this election until such time as the Labor Relations Commission certifies one of the parties as the exclusive bargaining agent...

Donohue included the full text of Daly's July 18, 1995 letter in the MOSES "Advisor," which MOSES sent to every eligible voter in Units 1 and 6 on July 21, 1995. As MOSES acknowledges in its brief, after it distributed Daly's response to Holway's statements on July 16, the voters could evaluate Holway's statement against MOSES's response and determine for themselves that Holway's statements that they were little more than campaign rhetoric. Therefore, we find that MOSES effectively responded to Holway's July 16 statements and those statements did not prevent the voters from making an informed decision about the ballot choices. See, e.g., Commonwealth of Massachusetts, 16 MLC 1292, 1303 (1989).

Kenneth Lyons's Statements On The Videotape Captioned "State Employees Your Future Your Contract" NAGE Mailed To Eligible Voters

On or about July 27, 1995, NAGE mailed a twelve minute videotape to all employees in Units 1 and 6. A portion of that videotape included a statement by NAGE president Lyons.

MOSES alleges that portions of Lyons's statement constituted an objectionable misrepresentation by NAGE. Specifically, MOSES points to Lyons's statements that "...we have guarantees as it relates to this contract,...here is what your new contract is going to be...effective July 1, 1994...2.5 percent pay raise...effective July 1, 1995 another 2.5 percent pay raise...then July 1, 1996 a 3 percent pay raise. Retroactive to 1994. MOSES cannot get it. That's something you're going to receive after NAGE wins the election...." MOSES contends that these statements were absolute, declaratory statements, with no qualifying language,

which misrepresented that NAGE had been guaranteed retroactive wage increases for employees in Units 1 and 6.

Lyons's statements were not as definitive as MOSES has characterized them. In addition to the portions of Lyons's statement identified by MOSES, Lyons said that "the State together with our organization will go right back to the table with NAGE immediately after we win the election...And within a month you can have a new contract." Nevertheless, taken as a whole, a reasonable person could conclude from Lyons's statements that NAGE had obtained a commitment from the Employer concerning retroactive wage increases for employees in Units 1 and 6. In contrast, both Lyons's own testimony and the testimony of Trainor show that NAGE had never received any assurances that employees in Units 1 and 6 would receive retroactive salary increases. Therefore, like Holway's statements on July 16, 1995, eligible voters might have interpreted Lyons's statements on the videotape NAGE mailed on July 27 as an assurance that they would receive retroactive raises, a working condition of central concern to virtually every employee in Units 1 and 6.

However, even if they were substantial misrepresentations, the evidence before us demonstrates that MOSES had an opportunity to respond to Lyons's videotaped statements, and MOSES took full advantage of that opportunity. First, on July 31, MOSES mailed to every eligible voter a copy of Daly's July 18 letter, which disavowed Lyons's misrepresentation by stating, "there have been no representations made to either party to this election relating to future negotiations." Along with the copy of Daly's letter, MOSES sent a flyer captioned "OER denied NAGE's Guarantees." That flyer included the following language: "The video that you were sent by NAGE that 'guarantees' what will be in your next contract is a blatant lie...[N]o one has talked to NAGE on your next contract." Second, MOSES placed an advertisement in the August 1, 1995 edition of the Boston Herald quoting the same language from Daly's July 18 letter and including the same statements in the campaign flyers MOSES had sent to eligible voters. Accordingly, by the time the Commission had mailed the ballots to eligible voters on July 31, 1995, both MOSES and the Employer had rebutted Lyons's statements and corrected any misimpressions that eligible voters may have had concerning retroactive salary guarantees, thereby permitting them to make a reasoned election choice.

Commonwealth of Massachusetts, Commissioner of Administration and Finance and NAGE and MOSES, 22 MLC 1569

Kenneth Lyons's August 3, 1995 Letter and the Airing of the Videotape On August 20, 1995

Finally, MOSES argues that a letter that Lyons sent to members of Units 1 and 6 on August 3, 1995 and a broadcast of "State Employees Your Future Your Contract" on the August 20, 1995 edition of "Challenge" contained substantial misrepresentations to which MOSES did not have an effective opportunity to respond prior to the time that voters submitted their ballots to the Commission. In his August 3 letter to voters, Lyons set out eight separately numbered paragraphs, which he described as "[j]ust a few notes in answer to Paul Donohue's latest mudslinging." MOSES directs our attention to the following three paragraphs:

> 1. Governor Weld met with me and said, 'You beat me on privatization,' and further said, I regret not meeting with you earlier.' Our meeting lasted over one hour. Governor Weld did not and would not know Donohue or MOSES.
>
> 2. The tape I sent you was accurate and believe me, OER is not NAGE's source. OER has been playing it safe.
>
> 7. REMEMBER: NAGE will have a good solid contract for you within thirty (30) days after winning the election and with retroactive money back to July 1, 1994. NAGE had the legislature set the money aside to fund this. MOSES failed and did not get to the bargaining table. MOSES did not have the legislature set aside money. MOSES is stuck and mudslinging is all Donohue has left.

According to MOSES, this letter informed voters of a meeting with Governor Weld, the party ultimately responsible for establishing the parameters through which OER negotiates collective bargaining agreements and reinforced NAGE's earlier misrepresentations by asserting that "OER is playing it safe." MOSES contends that these statements, when read in light of Holway's July 16 statements on "Challenge" and Lyons's statements about guarantees on the videotape, effectively misrepresented that a secret source other than OER had guaranteed NAGE a collective bargaining agreement containing retroactive salary increases.

Similarly, MOSES contends that the broadcast of the videotape on August 20, 1995 effectively renewed the earlier misrepresentations of Holway and Lyons. Accordingly, MOSES's position is that it did not have an opportunity to respond effectively to these new misrepresentations before voters began returning their ballots to the Commission.

Contrary to MOSES's argument, we do not find that Lyons's statements in his August 3 letter were, on their face, substantial misrepresentations of highly material fact. Paragraph 1 referenced a meeting that Lyons had with the Governor and suggested that, unlike Donohue, the Governor recognized Lyons as a determined adversary. Paragraph 2 contains an oblique statement that "OER is not NAGE's source. OER has been playing it safe." Although MOSES argues that this statement effectively misrepresents that a secret Employer source other than OER gave NAGE salary guarantees, MOSES's interpretation requires the average voter to make a quantum leap from the ambiguous language in paragraph 2 to the conclusion that NAGE had received guarantees from a secret Employer source other than OER. There is nothing in the explicit language of that paragraph representing that NAGE had received particular guarantees from any Employer source. Further, the reference to OER playing it safe could be construed to mean nothing more than the Employer had recognized its obligation to remain neutral throughout the election campaign. Finally, in paragraph 7, NAGE asserts that it will have a good solid contract within thirty days and that it had the Legislature set aside money for retroactive pay increases. Again, there is nothing inherent in the language of that paragraph to suggest that NAGE had received any guarantees or assurances from the Employer concerning retroactive increases. Rather, it does nothing more than state there was a sufficient legislative appropriation to fund retroactive increases.

Even if the statement in Lyons's August 3 letter could be viewed as a substantial misrepresentation, we conclude that it was effectively rebutted by MOSES. MOSES argues that the reference in the August 3 letter back to the videotape re-published earlier misrepresentations and that MOSES was unable to respond effectively to the re-published misrepresentations. If all we had before us was the original statements of Holway and Lyons that had been re-published during the period after the Commission had sent ballots to eligible voters, there might be some merit to MOSES's argument. However, in evaluating charges of objectionable campaign misrepresentations, we must consider the alleged misrepresentations in light of all of the information available to the voters. Commonwealth of Massachusetts, 16 MLC 1292, 1302 (1989).

Commonwealth of Massachusetts, Commissioner of Administration and Finance and NAGE and MOSES, 22 MLC 1569

Here, we have found that MOSES had the opportunity to and did respond to Holway's July 16 statements and Lyons's statements on the videotape mailed in late July. In its brief, MOSES acknowledges that, after disseminating Daly's July 18 letter in response to the July 16 Holway statements and sending out that disavowal again on August 1, in response to the videotape, the voters were able to recognize the statements of Holway and Lyons as campaign propaganda that would not prevent voters from making an informed decision. Therefore, Lyons's August 3 letter and the August 20 broadcast of the videotape were merely another volley in an exchange of repetitive campaign rhetoric between the two competing unions. The very statements in the August 3 letter and August 20 broadcast to which MOSES objects, were already disavowed by the Employer on July 18 and brought to the voters' attention by MOSES on at least three prior occasions. Therefore, the voters already had had an opportunity to evaluate the merits of NAGE's campaign propaganda concerning retroactive salary increases in light of a clearly-stated disavowal, and the re-publication of that campaign propaganda did not materially alter the information before the voters.

Further, on August 3, the very same day that Lyons sent his letter, MOSES sent a mailing to all eligible voters, which included an article captioned "NAGE ADMITS THEY HAVE NO DEAL." In that article, MOSES informed voters that, in a NAGE publication after the video was first mailed, NAGE had backed away from its language concerning guarantees and described any salary increases for Units 1 and 6 as proposed increases. Further, the article clearly identified Daly as the person responsible for negotiating on behalf of the Employer and reiterated that Daly had refuted NAGE's misrepresentations about guarantees. Therefore, MOSES had provided voters with a contemporaneous disavowal of any alleged misrepresentations in Lyons's August 3 letter. MOSES reinforced its position with a second mailing on August 7, 1995 reiterating once again that "all state employee contracts are negotiated through OER."

Any arguable misrepresentations in the August 3 letter or the August 20 broadcast must be viewed in light of four separate mailings and a newspaper advertisement disavowing that the Employer had ever made any guarantees to NAGE concerning retroactive increases. Similarly, they must be viewed in light of two contemporaneous mailings from MOSES emphasizing that OER is the bargaining representative for the Employer. Finally, they have to be viewed in light of general knowledge among employees in Units 1 and 6 about how their collective bargaining agreements are negotiated. Employees in those units have been

represented for purposes of collective bargaining for at least the past twenty years, and it is widely known that OER represents the Employer in collective bargaining matters. Accordingly, we conclude that the information available to the eligible voters both before and after Lyons's August 3 letter and the August 20 broadcast of the videotape was sufficient for them to weigh the campaign propaganda before them and to make a reasoned choice of whether to be represented by MOSES, NAGE, or no employee organization.[53]

CONCLUSION

For the reasons we have set out above, we dismiss MOSES's Objections to the Election in Case Nos. SCR-2220 and SCR-2221 in their entirety. Accordingly, a certification of the results of those elections shall immediately issue reflecting that NAGE is the certified collective bargaining representative of employees in State bargaining units 1 and 6.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

ROBERT C. DUMONT, CHAIRMAN

WILLIAM J. DALTON, COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER

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53 Because our investigation has revealed that MOSES had ample opportunity to respond to NAGE's campaign statements, we need not consider the significance of the polling data submitted b y MOSES. Therefore, we do not decide in this case whether polling data of this kind is a useful indicia of how voters in union representation elections respond to specific campaign conduct or statements.

Commonwealth of Massachusetts, Commissioner of Administration and Finance and NAGE and MOSES, 22 MLC 1569