

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PHILADELPHIA JOINT BOARD WORKERS	:	
UNITED SEIU	:	
	:	
v.	:	Case No. PERA-C-09-438-E
	:	(PERA-R-09-262-E)
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SCHOOL CAFETERIA EMPLOYEES LOCAL 634	:	
	:	
PHILADELPHIA JOINT BOARD WORKERS	:	
UNITED SEIU	:	
	:	
v.	:	Case No. PERA-C-09-439-E
	:	(PERA-R-09-262-E)
	:	
PHILADELPHIA SCHOOL DISTRICT	:	

**FINAL ORDER**

On April 19, 2010, the Philadelphia Joint Board, affiliated with Workers United, SEIU (Joint Board) filed timely exceptions and a supporting brief to the Proposed Decision and Order (PDO) issued on March 29, 2010.<sup>1</sup> In the PDO, the Hearing Examiner concluded that the School Cafeteria Employees Local No. 634, UNITE HERE (Local 634) did not engage in unfair practices in violation of Section 1201(b)(1) or (4) of the Public Employe Relations Act (PERA), and that the Philadelphia School District (District) did not engage in unfair practices in violation of Section 1201(a)(1), (2) or (7) of PERA, during the conduct of a representation election to determine the exclusive representative of a bargaining unit of cafeteria workers employed by the District. On May 7, 2010, Local 634 filed a reply to the exceptions and a supporting brief and, on May 10, 2010, the District filed its reply to the exceptions and a supporting brief.

On July 9, 2009, the Joint Board filed a petition to represent a unit of cafeteria workers employed by the District and currently represented by Local 634. On September 16, 2009, the Board issued an Order and Notice of Election directing that an election be conducted by United States mail. On October 27, 2009, the Board canvassed the ballots cast in the election. The results of the election were as follows: Local 634 received one thousand one hundred and twenty-one (1121) votes and the Joint Board received five hundred and fifty-one (551) votes. Thus, Local 634 received five-hundred and seventy (570) more votes than the Joint Board.

On November 3, 2009, the Joint Board filed charges of unfair practices in connection with the election against both Local 634 and the District. On November 6, 2009, the Board Secretary issued a Complaint and Notice of Hearing on both charges. Hearings were held before a duly designated Hearing Examiner of the Board on November 16 and 17, 2009, at which time all parties in interest were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence. On March 29, 2010, the Hearing Examiner issued his PDO, the findings of which are summarized as follows:

The District's cafeteria workers are employed at 267 schools, as well as at charter schools and early childhood locations throughout the District. These satellite programs are offered in 230 additional locations. The petitioned-for employes were covered by a collective bargaining agreement between the District and Local 634. That collective bargaining agreement, which was in effect when the Joint Board filed its petition for representation, required the District to allow Local 634 representatives access to

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<sup>1</sup> The Joint Board also filed a request for oral argument. This request is denied because the positions of the parties are thoroughly and adequately addressed in the exceptions, the replies to the exceptions and the supporting briefs.

bargaining unit members on school property to investigate grievances, with certain prior notice requirements. This granting of access included the Shop Steward and Union Officials. The bargaining agreement also allowed the District to grant leaves of absence to five bargaining unit members to conduct union business. The bargaining agreement further allowed Local 634 bargaining unit employees to wear union buttons while performing work.

By memorandum dated July 15, 2009, the District and Local 634 agreed to release ten employees to conduct union business, as a result of the then-ongoing bargaining for a successor agreement. Local 634 and the District had released additional employees in this manner during prior contract negotiations. By letter dated September 3, 2009, the Joint Board accused the District of denying it access to employees in the schools, while granting such access to Local 634 representatives for purposes of election campaigning. This letter set forth with specificity those alleged instances. By letter dated September 8, 2009, the District responded to those specific allegations and indicated that, indeed, while some of the facts were accurate, as soon as the District was aware of the activities it "shut down the activities immediately upon notification."

By letter dated September 24, 2009, the Joint Board again accused the District of illegal assistance to Local 634. This letter went on to recite specific factual allegations. On September 25, 2009, the District responded that it had not been able to confirm the allegations. The District also reminded the Joint Board that Local 634 representatives were contractually entitled to represent bargaining unit members by communicating with them before and after work. Moreover, the District told the Joint Board that it could not, under the law, monitor the content of those meetings. The District further told the Joint Board that it had told Local 634 that the District would "not tolerate any abuse of the contract for electioneering purposes."

Darlene Moton was working on the election as an organizer for the Joint Board. In that capacity, on the evening of October 9, 2009, she visited the home of a cafeteria employe named King. In the King home, she saw some people sitting around a table with ballots and the accompanying envelopes. She did not know any of the people. Some of the people in the house had on "UNITE HERE" shirts.<sup>2</sup> She was asked to leave, and she did so. That same evening, Moton went to another house, and after knocking on the door, was refused admission. Moton then waited outside that house and saw two people exit a vehicle and go into the house. Those two people had on buttons that "said 634." Moton did not know any of the people who answered the door or entered the house from the car.

Local 634 sent out two flyers to employees. The cover of the first flyer showed a pair of hands evidently just having released a white dove, and had the caption "God helps those who help themselves...." That phrase was repeated inside the mailing along with some factual information about custodial job loss and subcontracting purportedly allowed by the Joint Board. Also inside was the following text: "Pray for the custodians. . . but keep your job, keep your union, VOTE FOR LOCAL 634." The cover of the second flyer, under the caption "Deliver us from evil," showed a descending series of smaller hands, each covered by the larger pair above. The cover text was repeated inside, followed by text virtually identical to that of the previous flyer.

In the PDO dated March 29, 2010, the Hearing Examiner rejected the Joint Board's claims that the District and/or Local 634 committed unfair practices in connection with the mail ballot election. In its exceptions, the Joint Board argues that the Examiner erred by failing to find that: 1) the District interfered with the conduct of the election by repeatedly allowing Local 634 to access its facilities for campaign purposes while denying access to Joint Board representatives; 2) the District interfered with the election by attempting to have Joint Board representatives arrested while they were distributing campaign flyers across the street from a school; 3) Local 634 engaged in a course of conduct which coerced and intimidated voters by holding "ballot parties" and assisting employees in completing their ballots; 4) Local 634 unlawfully induced employees to vote for Local 634 by paying for express, priority and courier services for the submission of ballots for numerous employees; and 5) Local 634's use of appeals for Christian solidarity was divisive and an unlawful inducement to vote for Local 634.

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<sup>2</sup> The full name of Local 634 is School Cafeteria Employees Local No. 634, UNITE HERE.

We will first address the exceptions which relate to the Joint Board's allegations that the District committed unfair practices in connection with the mail ballot election. The Joint Board's charges in this regard can be summarized as an allegation that the District treated the Joint Board and Local 634 differently during the period of the mail ballot election. Specifically, the Joint Board alleges that the District provided Local 634 access to school facilities while refusing similar access to the Joint Board.

The relevant case law regarding an employer's treatment of rival unions when those unions are engaged in organizational activity was summarized by a Board hearing examiner in Hotel and Restaurant Employees International Union, Local No. 634 v. Philadelphia School District, 28 PPER ¶ 28038 (PDO, 1996) as follows:

The Board will find an employer in violation of 1201(a)(1) of the PERA if the employer engages in activity which tends to coerce employees in the exercise of their rights guaranteed under the PERA. Northwestern School District, 24 PPER 24142 (Final Order, 1995). An employer does so if it grants access to its premises to one of two rival employe organizations while denying access to its premises to the other. South Park School District, 10 PPER 10262 (Decision and Order, 1979). Absent a showing of disparate treatment, however, no violation of the PERA may be found. Woodland Hills School District, 13 PPER 13298 (Final Order, 1982).

Id. at 82. In South Park, the employer was found to have committed a violation of Section 1201(a)(1) when it allowed a rival union to electioneer on school premises during school hours while it prohibited the incumbent union from engaging in this activity. In Woodland Hills School District, a violation of Section 1201(a)(1) was not found when the employer prepared and mailed a meeting notice for one union because the union filing the unfair practice charge did not make a similar request and testimony at the hearing revealed that, if such a request would have been made by the charging union, the request would have been granted. "Generally, a violation of 1201(a)(1) of PERA may occur despite the Employer's lack of intent to discriminate against competing employe organizations ... South Park ... However, even though there is no specific intent to discriminate or interfere with the exercise of employe rights, the employer must knowingly deprive a competing employe organization equal access." Central Bucks School District, 33 PPER ¶ 33084 (Final Order, 2002).

In this case, the Hearing Examiner found that the Joint Board failed to prove that the District knowingly deprived the Joint Board of access to District buildings to conduct organizational activity while providing such access to Local 634. The District was contractually obligated to provide Local 634 access to District facilities for the purposes of contract administration. The Joint Board argues that Local 634 was instead using this access for organizational purposes rather than contract administration. However, any attempt by the District to "pierce the veil" of Local 634's intentions by monitoring the discussions between Local 634 representatives and employees could have been unlawful and provided Local 634 a basis for filing a charge of unfair practices against the District. As the Board stated in Central Bucks:

Where the record does not establish that the Employer knew that the incumbent union used its facilities for organizational purposes, the Employer does not commit an unfair labor practice by applying a lawful policy or practice to deny a rival union access to its facilities.

Id. at 189. Here, there is no evidence that the District knowingly deprived the Joint Board of equal access to its facilities. In fact, when the District was presented with allegations that Local 634 was on its premises for organizational activity, it remained neutral and took the position that such conduct was not permitted. The Joint Board attempts to bolster its argument that the District supported Local 634 by alleging that the District aggressively stopped the Joint Board from campaigning while allowing Local 634 to conduct such activity. Specifically, the Joint Board points to an incident where the District threatened to have Joint Board representatives arrested for leafletting on a sidewalk, which is public property, across from a school. Although the police were called regarding this incident, the evidence shows, and the Joint Board admits in its brief, that the police determined that the Joint Board representatives were

entitled to be on the sidewalk and were allowed to continue leafletting. Therefore, the Joint Board has failed to show that any unfair practice occurred in this situation.

The Joint Board failed to prove that the District treated Local 634 and the Joint Board differently or knowingly allowed Local 634 to campaign on its property while denying the Joint Board the same privilege. Accordingly, the Hearing Examiner did not err by concluding that the District did not commit any unfair practices in connection with the representation election.

With regard to the Joint Board's charges against Local 634, it first argues that the Hearing Examiner erred by failing to find that Local 634 unlawfully assisted employees in completing their ballots at "ballot parties." However, as noted by the Hearing Examiner, the witness that the Joint Board produced to testify about the "ballot parties" was unable to confirm the identity of any of the people who were in attendance at these gatherings. Further, although the Joint Board's witness testified that she saw two people wearing "Local 634" buttons at one house, she testified that she did not know who these people were. As such, the Joint Board failed to prove that Local 634 organized any "ballot parties" among bargaining unit employees.

Furthermore, pursuant to Western Psychiatric Institute and Clinic v. Commonwealth of Pennsylvania, 330 A.2d 257 (Pa. Cmwlth. 1974), the Board may certify election results even in the face of unfair practices if it concludes that the offending conduct did not affect the outcome of the election. As such, even if the Joint Board would have proven that "ballot parties" took place at these two locations, such conduct, while objectionable, would not have affected the outcome of the election where the Joint Board was defeated by 570 votes.<sup>3</sup>

With regard to the supplying of free, expedited mail delivery by Local 634 to voters, it is undisputed that such conduct did occur. The Joint Board argues that such conduct was a financial benefit that induced voters to cast their ballot for Local 634. The Hearing Examiner likened this conduct to providing free transportation to polling locations, which is not considered to be an unfair labor practice by the Board or the National Labor Relations Board. See New Era Cap Co., 336 NLRB 526 (Decision and Order, 2001) ("Board law is clear that an employer may provide transportation to and from a polling station, provided that the benefit is offered on a nondiscriminatory basis, and the employees are free to accept or reject the offer.") The Joint Board produced no evidence that the expedited mail envelopes were distributed by Local 634 in a discriminatory fashion.

The Board agrees that expedited mailing is akin to providing transportation to the polls and is not an unfair practice. Moreover, even if such conduct was an unfair practice, the ballots that were sent in this manner were challenged by the Joint Board and were not even counted in the election. Furthermore, even if counted, these ballots could not have affected the outcome of the election.<sup>4</sup> Therefore, pursuant to Western Psychiatric Institute and Clinic, supra, the Joint Board would not be entitled to a new election.

Finally, the Joint Board argues that Local 634 used campaign literature with a Christian religious theme that was meant to be divisive and to induce voters to cast their ballots for Local 634. The Joint Board claims that the mailings would be divisive because some of its leading supporters are Muslim and wear Muslim attire. As noted by the Hearing Examiner, the National Labor Relations Board cases relied upon by the Joint Board to support its argument that Local 634 committed an unfair practice all deal with situations where a party was appealing to racial or religious prejudice. See NLRB v.

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<sup>3</sup> The Joint Board attempts to bolster its argument that there were "ballot parties" by pointing out that a large number of ballots were received by the Board on the same day. However, as noted by the Hearing Examiner, that day was a Tuesday that followed a weekend and a Monday holiday where there was no mail delivery. Therefore, it is not unusual that the Board received a large number of ballots on that day.

<sup>4</sup> There were a total of 191 ballots that were challenged, 39 of which were challenges to ballots received in expedited mail envelopes from employees on the list to vote. None of these ballots were counted in the election. Because Local 634's margin of victory was 570 votes, the challenged expedited mail ballots could not affect the outcome of the election.

Silverman's Men's Wear, Inc., (3<sup>rd</sup>. Cir. 1981) ("The general rule to be derived from Sewell Manufacturing Co., 138 NLRB 66 (1962), and the one that we apply, is that an effective appeal to racial or religious prejudice prima facie warrants setting aside an election.") However, as the Hearing Examiner stated, there is no evidence that the mailings in this case appealed to religious prejudice. Although the mailings clearly have a Christian religious theme, they do not denigrate Muslims or their religion in any way. In order to be objectionable, the mailings would have to, on their face, appeal to religious prejudice so that an outside observer could understand that a religious group or a particular religious view was being denigrated. The mailings at issue in this case do not possess this quality, as they do not denigrate any religion or religious view. As such, the Joint Board has failed to prove that Local 634 committed an unfair practice by making and distributing this campaign literature.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this eighteenth day of May, 2010. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.