STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UTICA COMMUNITY SCHOOLS,
Public Employer,

Case No. R06 B-024

-and-

UAW ORGANIZING COMMITTEE,
Petitioner,

-and-

UTICA OFFICE PERSONNEL ASSOCIATION, MEA/NEA,
Incumbent Labor Organization.
_____/

APPEARANCES:

Georgi-Ann Bargamian, Associate General Counsel, UAW International, for Petitioner

Law Offices of Lee & Clark, by Michael K. Lee, for Incumbent

DECISION AND ORDER ON OBJECTIONS

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, a hearing in the above-captioned matter was held on August 1, 2006, by David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. This case involves objections to a mail ballot election filed by the Incumbent labor organization, Utica Office Personnel Association, MEA/NEA, on June 1, 2006 and amended on June 2, 2006. The election was conducted pursuant to a consent election agreement. The tally of ballots shows that of the 194 eligible voters, 83 employees voted for the Petitioner, 72 for the Incumbent, and 5 for neither labor organization, with no challenged ballots. Based upon the entire record, including the exhibits, transcript of hearing and briefs filed by the parties on or before August 30, 2006, the Commission finds as follows:

The Objections:

The objections first allege that the election should be set aside because the Incumbent did not receive from the Employer the list of employees eligible to vote in the election seven

working days prior to the mailing of the ballots as required by Rule 147 of the Commission's General Rules and Regulations, 2002 AACS R423.147. In the second objection, the Incumbent asserts that the ballots were not mailed to members of the bargaining unit on May 9, 2006, as required by the consent agreement. The third objection contends that some eligible voters did not receive mail ballots from the MERC's elections division. Next, the Incumbent contends that the Petitioner sent misleading campaign materials to members of the bargaining unit. The final objection asserts that the election should be set aside because the Petitioner obtained the address of an eligible voter by purportedly inappropriate means.

Findings of Fact:

I. The Petition, Consent Election Agreement and Voter Eligibility List

The United Auto Workers (UAW) Organizing Committee filed a petition on February 21, 2006, seeking to represent a bargaining unit of clerical employees of the Utica Community Schools. The unit is currently represented for purposes of collective bargaining by the Utica Office Personnel Association, MEA/NEA.

On March 14, 2006, the parties entered into an agreement for a consent election to be held by mail ballot. Pursuant to that agreement, the ballots were to be mailed by the Commission to eligible employees within the bargaining unit on Tuesday, May 9, 2006, and returned to MERC offices by the close of business, 5:00 p.m., on May 24, 2006. The ballot count was scheduled to take place on May 25, 2006.

On or about April 7, 2006, the Commission's elections officer, Robert Strassberg, mailed to each of the parties a packet containing sample ballots and a notice of election specifying the date the ballots would be mailed to voters, the deadline for returning ballots to the MERC office, and the date on which the ballots would be counted.[1] The notice indicated that further information regarding the election could be obtained by contacting MERC. In a cover letter included with these documents, Strassberg instructed the Employer to post the notice of election and sample ballots prominently on its premises at least five working days prior to the election. Strassberg also reminded the Employer of the requirement that it supply the labor organizations and the Commission with a list of eligible voters seven working days prior to the election. That list, which contained the names and addresses of 194 bargaining unit members, was provided to Petitioner and the Incumbent by e-mail at approximately 1:34 p.m. on Tuesday, May 2, 2006.

II. Campaign Literature

Prior to the election, Petitioner mailed campaign literature, including an election newsletter, to members of the bargaining unit. At the top of the newsletter was the UAW logo, a registered trademark, displayed prominently next to the heading "UCS Election News." "UCS" is an acronym commonly used by the Employer in correspondence referring to the school district. The body of the newsletter contained language thanking bargaining unit members for

[1] Although we generally do not approve of parties calling Commission agents to testify in matters arising under PERA, the ALJ did not err in permitting Strassberg to testify regarding the conduct of the instant election. See *City of Lathrup Village*, 1976 MERC Lab Op 583, 588 n 1.

attending a recent UAW organizational meeting and provided information on matters pertaining to UAW membership, including dues and legal and lobbying resources available to members.

The Incumbent's vice president, Sandy Donovan, received campaign literature from the Petitioner at her home address. The literature was mailed on or about April 27, 2006 in an envelope affixed with the UAW's return address and logo. At the hearing in this matter, Donovan testified that she was surprised to have received the document at her home because she had recently moved and believed that only the Employer and the Incumbent Union had knowledge of her new address. Donovan did not know how the UAW obtained her address.

III. Distribution and Return of the Ballots

At approximately 3:30 p.m. on Tuesday, May 9, 2006, Strassberg placed envelopes containing the ballots in a box for pickup by the mailroom of the building which houses the MERC offices. He later discovered that the ballots were not actually posted to the U.S. mail until the following day, May 10, 2006.

On May 11, 2006, the president of the Incumbent labor organization, Jan Shelito, began receiving telephone calls indicating that some members of the bargaining unit had received envelopes from MERC which did not contain ballots. Shelito immediately directed the Union's secretary to send an e-mail message to all unit members advising them of the problem and instructing them to contact the MEA office if they received an envelope that was missing a ballot. Included in the May 12, 2006 e-mail message was the Incumbent Union's phone number and e-mail address.

Around the same time, Strassberg also began receiving calls from bargaining unit members who had not received ballots. He soon recognized that a pattern was emerging which indicated that the problem was isolated and appeared to impact only those employees whose last names begin with the letters "C" and "D." Strassberg communicated with Shelito and a UAW representative about the problem, instructing them to advise affected employees to call his office and request that a new ballot be sent out.

Following her conversation with Strassberg, Shelito sent another e-mail to bargaining unit members. This message, which was dated May 16, 2006, stated that any unit member who did not receive a ballot should contact Strassberg and request that a new ballot be issued. The e-mail listed Strassberg's phone number and instructed members to leave a message with their name and address if they got his voicemail. Shelito further indicated that the deadline for voting would not be extended and reminded members that ballots must be received by the Commission no later than 5:00 p.m. on May 24, 2006.

Over the course of approximately five days, Strassberg received calls from several members of the bargaining unit requesting new ballots. Strassberg sent a new ballot to every employee who requested one and maintained a record of the employees to whom the replacement ballots were sent. According to Strassberg, each of those employees returned their ballots in

time to be counted in the election.[2] One of the individuals who requested a new ballot from Strassberg was Sandy Donovan, the Incumbent's vice president. Donovan received her replacement ballot from MERC on May 19, 2006, five calendar days prior to the May 24, 2006 deadline. Donovan subsequently voted in the election by sending her ballot back to MERC in the U.S. mail.

On May 8, 2006, the Incumbent filed conditional objections to the conduct of the election. After the ballots were counted, the Incumbent raised the same issues in objections filed on June 1, 2006, and amended on June 2, 2006. On July 27, 2006, the Incumbent filed a motion for summary disposition asserting that the election should be set aside as a matter of law due to the Employer's failure to timely submit the employee eligibility list to the labor organizations, and because the ballots were not mailed out in compliance with the consent election agreement. The administrative law judge denied the motion for summary disposition at the start of the hearing in this matter.

Discussion and Conclusions of Law:

In construing PERA, this Commission is guided by the construction placed on analogous provisions of the National Labor Relations Act (NLRA), as amended 29 USC § 151. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540 (1998); *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616 (1975). With regard to representation elections conducted by this Commission, we have adopted the National Labor Relations Board's (NLRB) "laboratory conditions" standard, pursuant to which it is our obligation to provide an atmosphere in which an election can be conducted under "conditions as nearly ideal as possible" so that the uninhibited desires of the employees in the proposed bargaining unit may be determined. *Iosco Co Medical Care Facility*, 1999 MERC Lab Op 299; *Huron Co Medical Care Facility*, 1998 MERC Lab Op 670, 677. In an objections proceeding, the burden of proof is on the party filing the objections to establish grounds for setting aside the election; there is no burden on the Commission to show that the election was fairly conducted. *Iosco Co Medical Care Facility*; *City of Detroit*, 1971 MERC Lab Op 892.

The Incumbent first contends that the election in the instant case should be set aside because the Employer failed to timely submit a list of eligible voters. Rule 147(2) of the Commission's rules, R 423.147(2), requires the employer to provide to MERC and other interested parties a list of the names and addresses of all eligible voters "[n]ot less than 7 days before the date of an election, or the date of the mailing of the ballots in a mail ballot election, excluding Saturdays, Sundays, and legal holidays." The purpose of Rule 147(2) is to ensure that labor organizations have an opportunity to communicate with all employees and to facilitate early resolution of disputes over voter eligibility. *Northwest Guidance Clinic*, 1986 MERC Lab Op 771, 776; *Monroe Pub Schs*, 1979 MERC Lab Op 50, 52. The employer has a duty to comply with the eligibility list requirement without regard to whether the union actually needs

[2] Donovan testified that one employee, Maria Paddock, did not receive a replacement ballot from MERC until May 24, 2006, the day the ballots were to be returned to the Commission offices. Donovan testified that she learned of the problem with Paddock's ballot from the Incumbent's president, Jan Shelito. However, Shelito did not address this issue at the hearing and Paddock was never called to testify. Thus, Donovan's testimony is clearly hearsay within hearsay which we conclude has little or no probative value in this case.

the names and addresses in a given case. See *Northwest Guidance Clinic*; *Isabella Co*, 1975 MERC Lab Op 809, 812-813; *Delehanty Pontiac Co*, 1975 MERC Lab Op 166, 168.

In the instant case, it is undisputed that the Employer did not submit the voter eligibility list to either labor organization until Tuesday, May 2, 2006, less than seven business days prior to the mailing of the ballots by the Commission. The Incumbent contends that Rule 147(2) must be strictly construed and that any delay in the production of the voter eligibility list should be grounds for setting aside an election. It is well established that furnishing the list of names and addresses of employees is an essential prerequisite to the fairness of the election and that failure to furnish this list, by itself, constitutes a fatal flaw in the election process requiring the ordering of a new election. See e.g. *Grande Gourmet Restaurant*, 1972 MERC Lab Op 812; *City of Detroit*, 1969 MERC Lab Op 231. This Commission has also ordered new elections in cases involving a delay in the submission of the eligibility list. See *Isabella Co*, 1975 MERC Lab Op 809 (objections to election upheld where eligibility list received by union four days prior to election); *Oakland Cmty College*, 1970 MERC Lab Op 1021 (election set aside where union did not receive list until three business days prior to election).

At the same time, we have consistently held that an election will not be set aside where there was "substantial compliance" by the employer with Commission Rule 147(2). For example, in *People's Cmty Hosp Auth*, 1986 MERC Lab Op 449, the employer submitted an initial voter eligibility list to the union on December 2, 1985, exactly seven business days prior to the December 11, 1985 election, in compliance with both the Commission's voter eligibility list rule and the terms of the parties' consent election agreement. Two days later, on December 4, 1985, the employer delivered a second list to the union which added fourteen names and addresses and made one deletion from the list which had been previously submitted. The union filed objections, arguing that the election should be set aside, in part, because a full and complete voter eligibility list was not timely provided. The Commission dismissed the objections, finding that the employer had substantially complied with the eligibility list requirement by providing the Union with a full and complete list five business days prior to the election. See also *Monroe Pub Sch* (substantial compliance requirement met despite the fact that no addresses were included on the eligibility list); *Drawbridge Co*, 1975 MERC Lab Op 183 (the omission of two names from the eligibility list constituted substantial compliance with rule).

The "substantial compliance" requirement is consistent with the NLRB's approach in cases involving a delay in the employer's submission of the voter eligibility list. The Board does not apply the eligibility list rule mechanically, but rather examines the following three factors to determine whether the employer substantially complied with the list rule: (1) the number of days which the list was overdue; (2) the number of days during which the union had the list prior to the election; and (3) the number of employees eligible to vote in the election. *Pole-Lite Indus*, 229 NLRB 196, 197 (1977). Based upon these factors, the NLRB has found substantial compliance with the eligibility list rule, despite an untimely submission of the list, in numerous cases. See e.g. *Bon Appetit Mgmt Co*, 334 NLRB 1042 (2001) (one day delay in providing the union with a complete and accurate list insufficient to warrant setting aside of the election); *Pole-Lite Indus* (employer substantially complied with rule where list was submitted one working day late and union had list in its possession fourteen days prior to election); *Taylor*

Publ'g Co, 167 NLRB 228 (1967) (substantial compliance where the employer filed the list one day late and the list was available to the unions for a nine-day period prior to the election).

In the instant case, the facts clearly establish that the Employer substantially complied with the eligibility list requirement set forth in Rule 147(2). The parties agreed that the Commission would mail the ballots to eligible voters on Tuesday, May 9, 2006. Pursuant to that agreement, the Employer was required under Commission Rule 147(2) to submit the voter eligibility list to the Petitioner and the Incumbent by the close of business on Friday, April 28, 2006. The list was actually provided to the labor organizations by e-mail on Tuesday, May 2, 2006, four calendar days, but only two business days, late. Both labor organizations had the list five business days prior to the date upon which the ballots were scheduled to be mailed to eligible voters, the same amount of time that the union in *People's Cmty Hosp Auth* had the list in its possession before the election in that matter. Moreover, because of the delay in the mailing of the ballots, which is discussed below, the Incumbent in this case actually had the list in its possession one additional business day, or six business days prior to the mailing of the ballots. The voting period did not conclude until May 24, 2006, the date upon which bargaining unit members were required to return their ballots to MERC offices. Given that the employees eligible to vote in the election numbered less than 200, we find that the Petitioner and the Incumbent had ample time to communicate with the eligible voters in this matter despite the delay in the submission of the eligibility list. Accordingly, we find no merit to the Incumbent's first objection.

The Incumbent next objects to various irregularities which occurred in connection with the mailing of the ballots. The Incumbent asserts that the laboratory conditions required for a fair election were destroyed when the ballots were not mailed on the date specified in the consent election agreement. According to the Incumbent, Commission precedent mandates the setting aside of an election where, as here, the mailing of the ballots was delayed.[3] The Incumbent further contends that a new election should be ordered in this case because some eligible voters received envelopes from MERC which did not contain ballots. The Incumbent argues that there is no way to determine how many potential voters were prevented from taking part in the election as a result of the Commission's failure to mail ballots to all eligible employees. Although replacement ballots were made available and bargaining unit members were timely notified about the problem by e-mail, the Incumbent contends that it would be improper to presume that all of the affected employees actually called MERC to request replacement ballots. According to the Incumbent, it is possible that some of the employees who did not receive a ballot did not want to make the effort to contact the Commission or simply forgot to do so.

This Commission considered a similar challenge to the conduct of a mail ballot election in *City of Detroit*, 1971 MERC Lab Op 892. In that case, we conducted an election by mail ballot to determine whether the petitioner or the intervenor would be the exclusive representative for registered nurses employed by the City. Notices and sample ballots were posted in various City facilities. Thirty-seven of the 110 eligible nurses voted in favor of the petitioner and forty voted for the intervenor. After the votes were counted, the petitioner sought to have the election

[3] In support of this contention, the Incumbent cites "*City of Detroit*, 1988 MERC Lab Op 112." However, the case does not stand for the proposition for which it is cited, and we are unaware of any Commission decision standing for the proposition that a delay in the mailing of the ballots is a per se violation of the laboratory conditions standard.

set aside, in part, because some employees did not receive ballots. Of the three nurses who testified at the hearing, two asserted that they had not received ballots at all, and one testified that she received her ballot after the election. We concluded that the petitioner had failed to establish that any employee had been denied the opportunity to vote. Given that notices of election were posted in proper locations, we held that it was incumbent upon the employees who did not receive ballots to communicate with MERC. In so holding, we recognized that neither this Commission nor the parties to an election can "require eligible voters to participate in the democratic process of the selection of a labor representative." *Id.* at 897. In addition, we noted that the petitioner could have resolved the issue itself by advising voters to communicate with the Commission and request a ballot.

The federal courts have taken a nearly identical approach in reviewing challenges to the conduct of mail ballot elections. In *Antelope Valley Bus Co, Inc v NLRB*, 275 F3d 1089 (2002), the union filed a petition with the NLRB seeking to represent the employer's bus drivers. The parties agreed to have the election conducted by mail ballot and the employer posted standard election notices throughout its facility. Following the election, the employer filed timely objections, alleging that four eligible employees had not received ballots during the election period. The NLRB refused to set aside the election, concluding that the four employees had notice and an opportunity to vote. The Court of Appeals agreed, finding that the Board had properly applied the "adequate notice and opportunity to vote" test of *Lemco Constr, Inc*, 283 NLRB 459, 460 (1987).[4] In so holding, the Court emphasized that it is not the duty of the Board to ensure that that all eligible voters participate in the election:

> [T]he Board's responsibility is only to ensure that employees have an *opportunity* to vote; it cannot ensure that any individual employee takes advantage of that opportunity. Even in manual elections, adequate notice of the time and place of voting is all the Board can require; it cannot force an employee to go to the polling place. In this case, the Board provided those Antelope Valley employees who failed to receive mail ballots with the opportunity to vote by replacement ballot. It is true, as the company contends, that if such an employee failed to request a replacement ballot, he or she could not vote. But neither can an employee who, despite adequate notice, fails to go to a manual polling location. As the old adage goes, you can lead a horse to water . . .

Id. at 350 (citation omitted). See also *Nat'l Van Lines*, 120 NLRB 1343 (1958) (employees' failure to cast valid ballots was not due to lack of "an opportunity to vote . . . , but rather was occasioned by their lack of diligence and interest in mailing their ballots on a date which would have assured their timely receipt.")

In the instant case, Strassberg supplied to the parties a notice of election and sample ballots, along with instructions to the Employer to post those documents prominently on its premises at least five working days prior to the election. There is no indication in the record that

[4] In *Lemco*, the NLRB upheld an election despite the fact that a number of eligible voters either did not go to the polls or arrived after the polls were closed. The Board held that it would issue certifications as long as "there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election." *Id.* at 460.

the notice and sample ballots were not in fact posted, nor does the Incumbent allege that the posting requirement was not satisfied. The notice directed persons seeking further information concerning the election to contact MERC. After the ballots were mailed out and it became apparent to the parties that some voters had received empty envelopes, the Incumbent sent an e-mail to unit members advising employees affected by the problem to contact the MEA office. A short time later, the Incumbent sent out a second e-mail directing voters to contact Strassberg if they had not yet received a ballot. That e-mail, which included Strassberg's telephone number, specified that the May 24, 2006, deadline for returning the ballots would not be extended. The Commission promptly provided those employees who had not initially received mail ballots with the opportunity to vote by replacement ballot, and all the affected employees who contacted Strassberg returned their ballots in a timely manner.

There is no credible evidence in the record suggesting that any employee was actually prevented from participating in the election as a result of having received an empty envelope, or that the one day delay in mailing the ballots in any way interfered with the laboratory conditions necessary for a fair election. Pursuant to the *City of Detroit,* 1971 MERC Lab Op 892, and in keeping with *Antelope Valley Bus Co,* 275 F3d 1089 (2002), we conclude based upon these facts that all the eligible voters in this matter had adequate notice of the mail ballot election and an opportunity to vote therein. We further find that it was incumbent upon employees who did not receive ballots to communicate with the Commission and request a replacement ballot. We, therefore, dismiss the Incumbent's second and third objections to the conduct of the election.

The Incumbent's final objections, which pertain to campaign literature disseminated by Petitioner, warrant little discussion. A party seeking to have an election set aside must show "by specific evidence" that improper conduct occurred which interfered with the employees' exercise of free choice. *Waverly Cmty Schs,* 18 MPER 75 (2005); *Safeway, Inc,* 338 NLRB No. 63 (2002). In the instant case, the Incumbent presented no evidence establishing that Petitioner obtained the home address of its vice president by improper or inappropriate means. To reach such a conclusion would require this Commission to engage in speculation and conjecture, and we decline to do so here. Cf. *MERC v Detroit Symphony Orchestra,* 393 Mich 116, 126 (1974) (anti-union animus may not be established by mere suspicion or surmise).

With respect to the substance of the newsletter distributed by Petitioner, we find no basis upon which to conclude that bargaining unit members might have mistaken the document as an official communication from the school district. Nothing in the language of the newsletter even remotely suggests that the literature was produced or endorsed by the Employer, and the Incumbent presented no evidence suggesting that any employee was actually confused or in any way prejudiced as a result of Petitioner's distribution of the document. The newsletter is clearly campaign propaganda from the Petitioner labor organization, a fact which is made all the more obvious by the prominent placement of the UAW logo, a registered trademark, at the top of the document. As we noted in *City of Dearborn,* 1983 MERC Lab Op 121, 129, employees are capable of recognizing campaign propaganda for what it is and discounting it if they so desire.

In summary, we find that none of the objections filed by the Incumbent in this matter, individually or viewed as a whole, warrant the setting aside of the election. Based upon the

foregoing, we dismiss the objections to election and order that an appropriate certification of representative be issued.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____