State of Maryland
State Higher Education Labor Relations Board

IN THE MATTER OF:	)	
	)	
American Federation of State, County and Municipal Employees,	)	
	)	
Petitioner	)	
	)	
and	)	SHELRB Case No. 2002-04
	)	*and* EL 2001-15/01
Salisbury University,	)	
	)	Opinion No. 14
Respondent	)	
	)	
and	)	
	)	
Maryland Classified Employee's Association,	)	
	)	
Intervenor.	)	
	)	

DECISION AND ORDER ON OBJECTIONS AND CERTIFICATION OF ELECTION RESULTS

I. Procedural History

On November 15, 2001, the State Higher Education Labor Relations Board (Board) issued an Order of Election directing that an election be held among the non-exempt employees at Salisbury University (SU) to determine whether the employees desired to be represented by: the Petitioner, American Federation of State County and Municipal Employees (AFSCME), the intervener, Maryland Classified Employees Association (MCEA), or no exclusive representative. In the first election, none of these three choices on the ballot collected a majority of votes. This failure to reach a majority necessitated a run-off election between the choices receiving the two highest numbers of votes, AFSCME and MCEA. Title 3 of the State Personnel and Pension Article, Annotated Code of Maryland (SPP), §3-405(d). The

Board conducted a run-off election on February 6, 2002, between AFSCME and MCEA in which MCEA received the most votes, 114, a majority of the total of 225 possible ballots. AFSCME received 106 votes. Five challenged ballots were not opened because they could not have been determinative of the outcome.

On February 14, 2002, AFSCME filed ten Objections to the run-off election.[1]/ On April 15, 2002, the Board issued a Notice of Hearing and on April 25, 2002, heard oral arguments on AFSCME's objections. Because of the numerous material issues of fact with respect to alleged interference with the employees' right to a free and fair election, on May 9, 2002 the Board issued a delegation of hearing authorizing the Office of Administrative Hearings (OAH) to hear the Objections and make proposed factual findings and recommended conclusions of law.[2]/

On December 13, 2002, the OAH Administrative Law Judge (ALJ) issued a Recommended Decision on Motions which, in addition to ruling on certain procedural matters raised by the parties, recommended the dismissal of Objection 1, portions of Objection 2 related to the reprimand and suspension of Donald Pryor, those portions of Objection Nos. 3-10 that address conduct occurring prior to December 12, 2001, and any portion of other objections challenging SU's shared governance program. During the course of the

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[1]/ This filing was based upon §14.30.05.17 of the Board's draft regulations. A number of cases were filed regarding the election and various other issues in the non exempt employee unit at SU, including SHELRB case numbers ULP 2001-02 (Shared Governance), ULP 2001-03 (Discrimination against D. Pryor), ULP 2002-01 (Unlawful Assistance to MCEA), and ULP 2002-03 (Progressive Discipline Policy). Due to the interrelatedness of these cases, the SHELRB consolidated three of these cases with the instant case at its February 28, 2002 Board meeting, the exception being ULP 2001-03, which the Board delegated to the Office of Administrative Hearings (OAH) for a fact finding hearing. MCEA filed its response to the AFSCME Objections on April 22, 2002, which was followed by the response from SU, filed on April 25, 2002.

[2]/ The Board issued a supplemental order on May 17, 2002, deferring to OAH's discretion not to consolidate the Objections case (and three related ULP cases delegated at the same time) with another related ULP case, i.e., ULP 2001-03, which was already pending before OAH at that time. Ultimately, following a series of subsequent orders on motions and cross motions by the parties, the Board revoked its delegation to OAH with respect to the related ULP cases (except ULP 2001-03), leaving only the Objections case for a hearing and report of findings and conclusions before OAH. *See* SHELRB Opinion No. 3, issued July 3, 2002 (revoking delegation to OAH of ULP 2001-02 and ULP 2002-01).

hearing, the issues in this case were further reduced when AFSCME withdrew Objections 3, 6, 7, 9 and 10.[3]/

Following the parties' submission of post-hearing briefs, the ALJ issued her proposed findings of fact and proposed conclusions of law on the remainder of the Objections, including notice of the parties' right to file exceptions to the Board (a copy of which is attached). The ALJ found that AFSCME failed to carry its burden of proof to establish the validity of Objections 2, 4, 5 and 8 and found the Objections to be without merit.[4]/

On May 15, 2003, AFSCME filed exceptions with the Board to the ALJ's proposed conclusions of law. On May 30 and June 2, respectively, SU and MCEA filed responses to the exceptions. The Board heard oral arguments from the parties after its June 19, 2003 meeting. Pursuant to Board Regulation 14.30.11.24, we have reviewed the record and the ALJ's proposed findings of fact[5]/, proposed conclusions of law and recommendation with respect to AFSCME's objections to the run-off election.

AFSCME makes no specific exception to the ALJ's proposed findings of fact which we indeed find to be thorough, reasonable, and fully supported by the record and hereby adopt. AFSCME makes two general exceptions to the ALJ's proposed conclusions of law based on its contention that the ALJ failed to: (1) apply a heightened scrutiny standard in her evaluation of the alleged objectionable conduct in a close election and (2) accord inferences to certain circumstantial evidence relating to AFSCME's objection to the issuance of SU's new "progressive

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[3]/ SU's motion to dismiss all objections on the ground that it was not a party to the February 6, 2002 election was denied by ALJ Brady. SU's motion to dismiss Objection 8 and any portion of other objections related to SU's issuance of a Progressive Discipline Policy was also denied by ALJ Brady.

[4]/ Following AFSCME's presentation of its case, MCEA had filed a motion for judgment moving for the dismissal of the remaining objections based on AFSCME's failure to meet its burden of proof. The ALJ adjudged that making such a ruling would preclude making findings and conclusions based on the evidence from all parties. Since the Board's delegation did not expressly contemplate OAH making its findings and conclusion on anything less than all the parties' evidence, the ALJ proceeded to take evidence from MCEA and SU. In the proposed findings and conclusions, the ALJ concluded that AFSCME had failed to carry its burden of proof with respect to the remaining objection based on the evidence as a whole and did not meet its burden of proof based on the evidence it presented at the conclusion of its case.

[5]/ The Board's delegation of authority had provided for final findings of fact. However, an omission in the Board's regulations limited our delegation to OAH to proposed findings of fact. This has had no significant effect on these proceedings since AFSCME has no specific exception to the ALJ's proposed findings of fact.

discipline" policy, and its alleged effect on the integrity and results of the February 6, 2002 runoff election.

II. Discussion and Analysis

Through its oral arguments presented to the Board on June 19, 2003, AFSCME claims that the ALJ erred in her determination that AFSCME was required to produce "specific" evidence to show that the imposition of the Progressive Discipline Policy actually affected the outcome of the run-off election. AFSCME claims that the proper standard should have been whether SU's imposition of its progressive discipline policy directly before the runoff election "*could have affected* the outcome of the election by tainting the laboratory conditions necessary to ensure that the employees had the opportunity to make a free and fair choice of their bargaining representative." (AFSCME Objections, p. 4, emphasis added) AFSCME claims that under the proper objective standard, circumstantial evidence may be used to infer wrongful conduct on the part of SU. AFSCME references certain National Labor Relations Board (NLRB) case law in support of its contention.[6]/

AFSCME's presentation and arguments were disputed by SU and MCEA in their responses to the Exceptions as well as through their oral arguments to the Board. SU argues that the closeness of the election is irrelevant to determine whether there was misconduct in the first place, and that circumstantial evidence presented by AFSCME, while potentially relevant, did not support an inference of interference with a fair election. MCEA agrees with SU's points and notes that, although AFSCME disagrees with the ALJ's use of a subjective standard of review that requires more specific evidence of actual interference with laboratory conditions, AFSCME fails to give examples of how the ALJ failed to examine the evidence presented of objectively wrongful conduct, even under the standard

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[6]/ AFSCME cites the following cases for the point that close elections should bring greater scrutiny: *Robert Orr-Sysco Food Services*, 388 NLRB No. 74 ("Objections must be carefully scrutinized in close elections."), *Methodist Home v. NLRB*, 596 F.2d 1173 (noting that even minor misconduct cannot be summarily excluded from consideration when election results are close). AFSCME argues for the inference of objectionable conduct with the following: *NLRB v. Gulf States Canners, Inc.*, 585 F.2d 757(5th Cir. 1978) (noting that it is not necessary for employees to show how conduct affected how they voted since their subjective reactions are not relevant to the question of whether the conduct could have affected the election outcome), *Queen* Mary, 317 NLRB 1303 (1995), *Special Mine Services, Inc.*, 308 NLRB 711, and *NLRB v. Main Street Terrace Care* Center, 218 F.3rd 531 (6th Cir. 2000) (each noting the significance of certain circumstantial evidence in showing animus, timing, and disparate treatment).

AFSCME proffers. Additionally, MCEA states that AFSCME has failed to show how SU's conduct *could have* affected the results of a runoff election between two unions in theory, much less how it actually worked specifically to the benefit of MCEA over AFSCME in an election presenting employees with a choice between them.[7]/

We are persuaded through review of the ALJ's recommendations, as well as the written and oral presentations of the parties, that far more specific evidence of interference with the employees' free choice would be needed in order to support valid objections to this run-off election and overturn its results. AFSCME's allegations about laboratory conditions being undermined by the issuance of SU's progressive discipline policy have not been specifically proven and no conduct, sufficiently egregious and damaging, has been alleged from which we would be willing to infer objective material interference with the fairness of this election. Furthermore, the issue is not whether alleged objectionable conduct could have had an effect on laboratory conditions in a representation election, but rather, whether in the context of this run-off election, the conduct by SU materially advantaged one union or the other such that it interfered with employees' freedom of choice and affected the outcome of the election. This is the heart of the issue that is ignored by AFSCME.

The Board notes that the percentage of employees in the bargaining unit turning out to vote was nearly the same in both the original representation election and the February 6 run-off election. This fact strongly undermines any argument that laboratory conditions have been materially affected by the progressive discipline policy.

AFSCME insists that this case presents us with two different theories of what the standard should be for overturning an election. We are invited to determine whether petitioners must show how alleged wrongful conduct specifically caused interference with a free election, or whether it is sufficient to merely identify certain actions and then to infer from them that laboratory conditions were destroyed.

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[7]/ "No exclusive representative" was not a choice on the ballot in the run-off election, having received the fewest number of votes in the first election.

We do not need to decide here whether this is a proper formulation of the legal issue in this case. We recognize that case law tends to polarize these two standards. However, we believe that there must be both subjective and objective elements in the appropriate analysis of the integrity of an election. In any event, it is unnecessary for us to choose today, because if we were to adopt either the purely objective or subjective approaches, it is clear to us that AFSCME has failed to meet its burden of proving that the laboratory conditions were so affected as to alter the outcome of this particular run-off election. AFSCME simply did not present evidence that allows us to make the leap from the imperfectly accomplished release[8]/ of the Discipline Policy days before the runoff election to any effect it may have had on the outcome of the election. We do not find that a valid theory, much less specific evidence, has been presented by AFSCME to support AFSCME's proffered conclusion on this record that the outcome of the election was affected by the university's announcement of the policy, however ill timed it may have been.

We acknowledge that there may be situations in which the laboratory conditions of an election are so corrupted by an employer's policy or actions that we would overturn results of an election without being given more concrete evidence of how the misconduct actually affected employees. However, such a case would have to involve far more egregious and wrongful conduct than that which has even been alleged in this case.

Finally, we are aware of how much time has elapsed since the run-off election. Due to the extraordinary delay in designating a collective bargaining representative for the employees in the non-exempt bargaining unit at SU, we are moved to reach our decision expeditiously. Based on the entire record, we find that AFSCME has not remotely met its burden of proof to establish that the issuance of SU's progressive discipline policy materially compromised the secret ballot process, effectively disenfranchised eligible voters, or otherwise substantially interfered with a free and fair run-off election as provided for in COMAR 14.30.05.17(B). We therefore find no basis for setting aside the election.

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[8]/ We do note that arguments indicating that the progressive discipline policy was truly "released" to employees tend to be undermined by further evidence showing that only a few employees in fact actually saw the policy before the run-off election.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of State County and Municipal Employees' Exceptions to the Proposed Findings of Fact and Proposed Conclusions of Law of the Administrative Law Judge are denied.

2. The Proposed Findings of Fact and Proposed Conclusions of Law of the Administrative Law Judge are adopted as final.

3. The results of the February 6, 2002 run-off election, as reported, are certified.

4. The Maryland Classified Employees Association is certified as the exclusive representative of the non-exempt employee unit at Salisbury University (certification attached).

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD
Annapolis, MD

July 7, 2003

Karl K. Pence, Executive Director,
On behalf of Jamin B. Raskin, Esq., Board Chairman

Appeal Rights

Any party aggrieved by this action of the Board may seek review in accordance with Board Regulation 14.30.11.24C and as prescribed under Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222.

ROBERT L. EHRLICH, JR.
GOVERNOR

THOMAS E. DEWBERRY
CHIEF ADMINISTRATIVE LAW JUDGE

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April 25, 2003

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EL 01-15

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RE: AFSCME v. Salisbury University and
Maryland Classified Employees Association
OAH No.: HELRB-LRB-02-200200001
HELRB No.: 2002-04 (EL 01-15/01)

Dear Counsel:

Enclosed is a copy of my Proposed Decision in the above captioned case.

Any party aggrieved by the proposed decision may file written exceptions thereto and request an opportunity to present oral argument. Such exceptions and any request for argument must be made within twenty (20) days from the date of receipt of the proposed decision. A response to the exceptions may be filed within fifteen (15) days from the filing of the exceptions. The written exceptions must contain the legal and factual basis for the exceptions or response, and be accompanied by copies of any portions of the record referred to in the exceptions. COMAR 14.30.11.23. The written exceptions and request for argument, if any, should be directed to Karl K. Pence, Executive Director, Maryland State Higher Education Labor Relations Board, 839 Bestgate Road, Suite 400, Annapolis, MD 21401. The Office of Administrative Hearings is not a party to any exceptions or appeal process.

Sincerely,

Georgia Brady
Administrative Law Judge

GB/ab
Enclosure
Karl Pence, HELRB
AFSCME
Salisbury University
MCEA

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, Complainant/Petitioner	*	BEFORE GEORGIA BRADY
	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
	*	OF ADMINISTRATIVE HEARINGS
SALISBURY UNIVERSITY, Respondent	*	OAH No.: HELRB-LRB-02-200200001 HELRB No.: 2002-04 (EL 01-15/01)
and	*	
MARYLAND CLASSIFIED EMPLOYEES ASSOCIATION, Intervenor	*	EL 01-15

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PROPOSED FINDINGS OF FACT AND PROPOSED CONCLUSIONS OF LAW

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On February 6, 2003, the non-exempt employees of Salisbury University ("the University") voted in a run-off representation election. The election was held to permit these employees to choose whether they wished to have the American Federation of State, County, and Municipal Employees ("AFSCME") or the Maryland Classified Employees Association ("MCEA") represent them in collective bargaining with University. The election was supervised by the Higher Education Labor Relations Board ("HELRB"). The HELRB determined that the majority of the votes cast on February 6, 2002 were for the MCEA and on

February 14, 2002, AFSCME filed Objections to the election ("the Objections") with the HELRB.

The HELRB held a preliminary meeting/hearing on the Objections on April 25, 2002; as a result of that meeting, on May 9, 2002 the HELRB delegated to the Office of Administrative Hearings ("OAH") the authority to make Proposed Findings of Fact and Proposed Conclusions of Law in the election Objections case.[1] On September 20, 2002, I held a prehearing conference in this case. During that conference, the parties agreed that the legal standard governing this case was that set out in the HELRB's January 16, 2002 Election Order. *See* ALJ Ex. # 1. Also during that conference, I clarified the specific Objections at issue.[2]

On December 13, 2002, I issued an Order recommending that the HELRB dismiss Objection Number 1. In this Order, I also ruled that AFSCME had waived the right to use any pre-December 12, 2001 disciplinary actions as the basis to object to the second election on February 6, 2002. *See* December 13, 2002 Order at 7. I did permit the parties to testify to the fact that discipline occurred, the alleged basis for the discipline, and the fact that Mr. Pryor had challenged its appropriateness, as admissible background evidence. *Id.* at n.11. The Objections were further reduced during the hearing on this matter when AFSCME withdrew Objections Number 3, 6, 7, 9, and 10.[3] *See* ALJ Letter dated February 4, 2003. Attached as Appendix A to this Decision is a list of the outstanding Objections at issue in this case.

On January 21, 2003 I convened the hearing in this case on the University's campus in Salisbury Maryland. The hearing was continued to January 22, 24, and February 3, 2003. Linda

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[1] The HELRB's regulations permit it to delegate authority to the Office of Administrative Hearings to issue proposed findings of fact, proposed conclusions of law, or a proposed disposition. COMAR 14.30.11.03B.
[2] *See* Prehearing Conference Report, dated July 24, 2002, and Decision on Motion for Leave to Amend, dated September 20, 2002.
[3] AFSCME also withdrew during the hearing the unfair labor practice charge consolidated with this action. OAH Case No. HELRB-LRB-01-200200009, HELRB Case No. 2002-01 (unfair labor practice charge alleging unlawful assistance by Salisbury University to MCEA.)

McKeegan, Esq., appeared on behalf of AFSCME. Anne Donahue, Assistant Attorney General, appeared on behalf of the University. Hillary Galloway Davis, Esq., appeared on behalf of MCEA.

At the conclusion of AFSCME's case, counsel for the University and counsel for MCEA made a Motion for Judgment on the grounds that AFSCME had failed to carry its burden of proof. AFSCME opposed this motion. I ruled that because my delegation in this case only permitted me to issue proposed findings of fact and conclusions of law, and because granting the motion and having my decision reversed would only further delay an already lengthy proceeding, I would defer ruling on the motion and hear the remainder of the case. I agreed that, if the University and MCEA chose to go forward, I would render a decision on this motion in this Recommended Decision, considering the evidence admitted as of the time of the motion. The University and MCEA proceeded to present their case.[4]

At the conclusion of testimony, the parties asked to submit their closing arguments in writing. A briefing schedule was established, with the final reply argument to be submitted by March 24, 2003. A two day extension due to illness was granted and the record closed on March 26, 2003.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings and the Procedures for Administrative Hearings concerning matters before the Higher Education Labor

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[4] AFSCME opposed my decision to defer ruling and to still permit the University and MCEA to present evidence without withdrawing their motion. I overruled AFSCME's objection and expressly permitted the University and MCEA to proceed with the understanding that they were NOT withdrawing their motions. I did so pursuant to my authority under OAH Rules of Procedure published at COMAR 28.02.01.08, in particular 28.02.01.08B(10) and (11), and under the HELRB's Rules of Procedure published at COMAR 14.30.11.13A(5).

Relations Board. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2002); COMAR 28.02.01; and COMAR 14.30.11.

ISSUES

I. Did University employees commit the actions alleged in Objections 2, 4, 5, and 8?

The specific conduct alleged is as follows:

A) Did the University improperly issue a three-day disciplinary suspension to Donald Ray Pryor, Jr. on January 25, 2002? (Objection No. 2)

B) Did the University perform surveillance on Donald Ray Pryor, through its employee Michael Shenton? (Objection No. 2)

C) Did the University, through its employee Cheryl Twilley, engage in surveillance of AFSCME organizers and University employees or interrogation of University employees between January 24, 2002 and January 27, 2002? (Objection No. 4)

D) Did the University engage in surveillance/interrogation of James Brittingham and/or Donald Ray Pryor, Jr., through its employee Michael Taylor, between January 24, 2002 and January 27, 2002? (Objection No. 4)

E) Did the University discipline Donald Ray Pryor, Jr. and James Brittingham on or about January 24, 2002, and if so, did that conduct intimidate AFSCME organizers and supporters? (Objection No. 5)

F) Did the University, through its employee Michael Taylor, make statements to James Brittingham on January 24, 2003 that intimidated AFSCME organizers and supporters? (Objection No. 5)

G) Did the University bring forth before the campus Staff Senate a new "Progressive Discipline and Attendance Policy" in January 2002? (Objection No. 8)

H) Did the University generally release the "Progressive Discipline and Attendance Policy" to the work force on or just after February 1, 2002? (Objection No. 8)

I) Did the University begin on-campus orientation sessions about the "Progressive Discipline and Attendance Policy" for employees eligible to vote in the days immediately before the February 6, 2003 election? (Objection No. 8)

J) Did the University implement the "Progressive Discipline and Attendance Policy" in the days immediately before the February 6, 2003 election? (Objection No. 8)

II. If the alleged conduct occurred, did it substantially interfere with the laboratory conditions of a free and fair election?

SUMMARY OF THE EVIDENCE

A. Exhibits.

AFSCME offered ten exhibits[5] which were admitted into evidence:

AFSCME Ex. # 1 - Main Campus Map
AFSCME Ex. # 8 - Pryor Disciplinary Suspension, dated January 25, 2002
AFSCME Ex. # 9 - University President's Note to Donna Keener, dated January 14, 2002
AFSCME Ex. # 11 - Email from Mary Luke to Staff Senators, dated January 30, 2002
AFSCME Ex. # 12 - Email from Linda Beall to Donna Keener, dated January 30, 2002
AFSCME Ex. # 14 - Progressive Discipline Policy, dated February 4, 2002
AFSCME Ex. # 15 - Attendance Policy, dated February 4, 2002
AFSCME Ex. # 16 - University Employee Handbook
AFSCME Ex. # 17 - Email from Linda Beall to Staff Senators, dated March 13, 2002
AFSCME Ex. A - Email from Donna Keener to supervisors, undated

The University submitted four exhibits which were admitted into evidence:

Univ. Ex. # 13 - Email from Donna Keener to Linda Beall, dated January 15, 2002, with attachments
Univ. Ex. # 23 - HELRB Notice for February 4, 2002 Forum
Univ. Ex. # 24 - Email from Donna Keener to "Everyone," dated February 4, 2002
Univ. Ex. # 34 - December 2001 Election Results

The MCEA did not submit any exhibits.

I deemed the following documents essential to my ability to make a determination in this case and, although the parties did not specifically offer them as evidence, I admitted them on my own motion:

ALJ Ex. # 1 - Election Order for Run-off Election on February 6, 2002
ALJ Ex. # 2 - Objections to the Election, dated February 14, 2002
ALJ Ex. # 3 - *In the matter of American Federation of State, County and Municipal Employees v. Salisbury University and Maryland Classified Employees Association*, HELRB Op. No. 1 (May 9, 2002)

[5] All parties presented binders of premarked exhibits, as instructed in the Prehearing Orders. Because not all the exhibits contained in these binders were offered, the exhibits are numbered in nonsequential fashion.

ALJ Ex. # 4 - *In the matter of American Federation of State, County and Municipal Employees v. Salisbury University and Maryland Classified Employees Association*, HELRB Op. No. 3 (July 3, 2002)

ALJ Ex. # 5 - Report of Election Results, dated February 26, 2002

B. Witnesses.

AFSCME called nine witnesses on its behalf:

Donald Ray Pryor, Jr.	Earnest Maurice Jones
Joyce Krawczyk	Mary Louise Luke
Linda Beall	Beulah Ayres
Eugene "Pete" Marion Baugh, Jr.	Donna L. Keener
James "Brit" N. Brittingham	

The University called two witnesses on its behalf: John Michael Taylor and Donna L. Keener.

MCEA called two witnesses on its behalf: Robert A. Meigel and Jack C. Nelson.

PROPOSED FINDINGS OF FACT[6]

I find the following facts by a preponderance of the evidence:

1. On December 6, 2001, a representation election was held on Salisbury University's campus to permit its non-exempt employees, a bargaining unit of approximately 247 employees, to vote on whether they wished to be represented by AFSCME, MCEA, or no union. Tr. 625.

2. By the end of the December 6, 2001 election, 73 votes had been cast for MCEA, 93 votes had been cast for AFSCME, and 61 votes had been cast for No Union. Univ. Ex. 34.

[6] The HELRB's May 9, 2002 Decision delegating this case to the OAH stated that it was giving the OAH "the authority to make findings of fact and proposed conclusions of law...." *See* ALJ Ex. 3. However, because the HELRB's regulations only provide it with the authority to delegate to the OAH the authority to make Proposed Findings of Fact, I have interpreted the May 9, 2002 Decision as delegating this authority and so title this section accordingly. COMAR 14.30.11.03B.

3. Because neither AFSCME nor MCEA received a majority of the votes, the HELRB scheduled a run-off election for February 6, 2002 during which the University's non-exempt employees would have the opportunity to choose AFSCME or MCEA as their exclusive representative. *See* ALJ Ex. 1.

4. MCEA had a presence on the University's campus prior to the union organizational campaign that began in the Fall of 2001. Tr. 260; *see* tr. 48, 104.

5. Between Fall 2001 and February 6, 2002, Donald Ray Pryor, Jr. was employed by the University as a maintenance mechanic senior. Transcript at 24 (hereinafter referred to as Tr.).[7]

6. Mr. Pryor was the most active University-employed AFSCME supporter. Tr. 165.

7. University management was aware of Pryor's AFSCME affiliation as early as October 2001. Tr. 599-600.

8. Mr. Pryor was supervised by Michael Shenton, Lead Mechanic. Tr. 26-27; **571.**

9. Mr. Shenton supervised both Mr. Pryor and Jerry Classing. Mr. Classing is a maintenance mechanic senior who worked the second shift, from 2:00 p.m. to 10:30 p.m. Tr. 76; **572.**

10. Mr. Shenton reported to Robert Maddux, Multiphase Chief 3, who reported to Michael Taylor, Assistant Director of Building Trades. Mr. Taylor reported to Kevin Mann, Director of the Physical Plant. Tr. 27.

[7] This Decision contains a ruling on the suffficiency of the evidence submitted prior to the beginning of the University's and MCEA's case and on the sufficiency of all the evidence. For ease of reference, all transcript references to testimony submitted after the close of AFSCME's case are in bold typeface. Where findings on the same issue conflict, the findings in bold reflect my final conclusion after listening to all the evidence.

11. Cheryl Twilley is a secretary whose desk was situated in the Maintenance Building. Ms. Twilley's job during the relevant time period primarily revolved around timecard accounting. Tr. 45; 263.

12. Mr. Pryor's work hours were 7:00 a.m. to 3:30 p.m. The University scheduled a morning break for him from 9:15 to 9:30 a.m. and a lunch break from 11:45 – 12:30 p.m. Tr. 35; 37-38; AFSCME Ex. 8.

13. Mr. Pryor began his job each morning by punching a timeclock in the Maintenance Building. Tr. 25.

14. Mr. Pryor's job duties included performing routine and emergency maintenance on the HVAC, plumbing, electrical, and kitchen equipment in the Commons Building and the Guerrieri Center (also known as the University Center or Building). *Id.*; Tr. 25-26.

15. Mr. Pryor and Mr. Shenton determined their work assignments each day by reviewing the work orders delivered to the Maintenance Building. Each work order was labeled with a priority code of one, two or three. Tr. 29.

16. In addition to his duties as a maintenance mechanic, Mr. Pryor also served as a Senator in the University's Staff Senate. Tr. 30.

17. On October 16, 2001, Michael Taylor issued Mr. Pryor a verbal reprimand for "talking to his co-workers" while he was on the clock. Tr. 52-53; **573-74**

18. Mr. Pryor frequently talked to his coworkers during the course of his workday. These conversations were initiated both by Mr. Pryor and by his co-workers. Some of these conversations centered around Mr. Pryor's position on the Staff Senate. Tr. 30-33.

19. Mr. Taylor informed Mr. Pryor that he had received complaints about him talking to co-workers when both they and Mr. Pryor were supposed to be working. Tr. 106; **574**

20. Mr. Taylor did not prohibit Mr. Pryor from addressing specific subjects with his co-workers. *Id.*

21. On November 12, 2001, Mr. Taylor issued Mr. Pryor a written reprimand for being away from his work station without permission because he allegedly returned late from lunch. Tr. 66; ***see* Tr. 576.**

22. On November 30, 2001, Mr. Taylor issued Mr. Pryor a one-day suspension for being away from his work station without permission because he allegedly returned to the Maintenance Building thirty minutes before the close of his workday without seeking the prior approval of his supervisor. Tr. 71-74; 106; ***see* Tr. 576-77.**

23. Mr. Pryor disagreed with the bases for these disciplinary actions and has appealed them through the State personnel process. These disciplinary actions are also the subjects of unfair labor practice charges. As of the close of the evidentiary record in this case, no decision had been issued on these issues in either forum.[8]

24. After December 12, 2001, and after Mr. Pryor was disciplined twice for being away from his work station without permission, Mr. Shenton began to exercise more supervision over Mr. Pryor. This additional supervision included giving Mr. Pryor specific assignments rather than allowing him to choose which work order he wished to work on, and requiring him to note the exact time of day he started and completed work orders. Tr. 74-75; 125-26. Mr. Shenton also increased the numbers of times he called Mr. Pryor on the radio to check his location on the campus. Tr. 77.

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[8] As noted in the Summary of the Case section of this decision, admission of evidence on pre-December 12, 2001 disciplinary actions was limited to (a) that a disciplinary action was issued; (b) the alleged basis for the disciplinary action; (c) the date of the disciplinary action; and (d) that the Appellant disagreed with the basis of the disciplinary action and had appealed it. This information was admitted only for background in accordance with my earlier ruling.

25. Prior to December 12, 2001, Mr. Pryor was only required to log the total number of hours it took him to complete work orders, rather than the exact starting and ending times. *Id.*

26. Maintenance employees working in other areas of the University campus were required to note the exact time of day they started and completed work orders. Because Mr. Taylor had been receiving complaints that maintenance work in the Commons Building and the University Center was not being timely completed, and because the time-logging requirement was not being followed by the maintenance mechanic crew in the Commons Building and the University Center, Mr. Taylor directed Mr. Shenton to note the exact time of day he started and completed work orders and to ensure that Mr. Pryor and Mr. Classing did so also. Tr. 589.

27. Mr. Taylor issued this direction to Mr. Shenton during the early winter of 2000. *Id.*

28. The requirement that Mr. Pryor record the exact starting and ending times of his work assignments was not differential treatment and was not motivated by anti-union animus.

29. Mr. Pryor complained to Mr. Shenton about increased supervision. Mr. Shenton allegedly shook his fist at Mr. Pryor and told him to shut up. This incident took place after the election, on or about February 19, 2003. Tr. 77; 108.

30. On January 22, 2002 at sometime prior to 2:15 p.m., Ray Pryor met up with Joyce Krawczyk as he was approaching the Commons Building loading dock. Tr. 174, 191-92, 269.

31. The following group of people quickly gathered at that location at approximately 2:15 p.m.: Joyce Krawczyk and Arlene Diaz, AFSCME organizers, Ray Pryor, Steve Blum, Richard Westfall, Ryan Kelly, and James Brittingham. Tr. 174, 191-92, 269; **accord Tr. 578**

32. Ms. Krawczyk was at the loading dock in an attempt to start a conversation with Mr. Blum. Between 2:00 and 2:15 Ms. Krawczyk began a conversation with Mr. Westfall and shortly thereafter with Mr. Brittingham. Tr. 173-74; 191, 269.

33. Mr. Brittingham remained at the loading dock until at least 2:35 p.m. **(2:45 p.m.)** Tr. 269.

34. Mr. Brittingham remained at the loading dock until 2:45 p.m. Tr. 580.

35. Mr. Blum remained at the loading dock until approximately 2:30 when he left to get some tools and a van. He returned to the loading docket at approximately 2:40. Mr. Pryor was there when Mr. Blum left to get the van and was still there when he returned. Tr. 583-585.

36. Mr. Pryor observed and participated in Ms. Krawczyk's conversation with Mr. Brittingham. Tr. 78; 269; 293.

37. On January 22, 2002, **(at sometime between 2:30 p.m. and 2:40 p.m.)** Skip Vandenburgh, a dining services supervisor, reported to Mr. Taylor that he had seen Mr. Pryor talking outside the Commons Building near the loading dock **(at approximately 2:15 p.m.)**. Tr. 148; **578-79**.

38. Michael Taylor and Tim Jones observed Mr. Pryor and Mr. Brittingham at the loading dock at approximately 2:45 p.m. Tr. 79-80; 269; **580**; AFSCME Ex. 8. Mr. Taylor could not hear Mr. Pryor's or Mr. Brittingham's conversation from where Mr. Taylor observed Mr. Pryor. Tr. 146; **592-93.**

39. Mr. Pryor was at the loading dock when Mr. Taylor and Mr. Jones approached it, but exited the area before Mr. Taylor and Mr. Jones actually arrived there. Tr. 580-81.

40. **Mr. Taylor investigated the January 22, 2002 loading dock incident by personal direct observation, and through interviews with Mr. Vandenburg, Mr. Blum, Mr. Pryor, and Mr. Brittingham. He concluded that Mr. Pryor had been on the loading dock from approximately 2:15 to 2:45 p.m., that he had not been performing work duties during this time, and that Mr. Pryor was not on an authorized break during this period. Tr. 578-87.**

41. Mr. Taylor performed a reasonable investigation of the January 22, 2002 loading dock incident.

42. Mr. Pryor was on the loading dock from 2:15 through 2:45 on the afternoon of January 22, 2003.

43. Mr. Brittingham was on the loading dock from 2:15 through 2:45 p.m. on the afternoon of January 22, 2003.

44. On January 25, 2002, Mr. Taylor issued Mr. Pryor a three-day suspension based on this incident on the grounds that he had been away from his work station for thirty minutes, without his supervisor's permission, during a time that was not a scheduled break. AFSCME Ex. 8; Tr. 81; 114.

45. The incident on January 22, 2002 was the third time within a sixty-day period that Mr. Pryor had been issued a disciplinary action based on the same reason, namely being away from his work area without permission. Tr. 588.

46. Mr. Pryor would have had to have his supervisor's permission to leave his work station for thirty minutes or more even if he was tending to Staff Senate business during that time. Tr. 114.

47. Non-work related conversations, occurring during work hours, that lasted more than five to ten minutes were generally considered to be inappropriate at the University. Tr. 241; **701.**

48. University employees talked about the union during their workday and did not get disciplined for this behavior unless these discussions, regardless of their content, exceeded a short amount of time. *See* Tr. 242.

49. Mr. Pryor told Earnest Maurice Jones, a plumber's apprentice employed by the University, that he had been suspended for three days. Tr. 342; 353.

50. On January 23(**24**), 2001, Mr. Taylor met with Mr. Brittingham and asked him why he was at the loading dock the previous day. Mr. Taylor informed him that he and Ryan Kelly had been thirsty and had come to the Commons Building to buy a soda. Tr. 270; **585**.

51. Mr. Brittingham explained that he had gone to the Commons Building to buy a soda rather than buying a soda in the building in which he was working because it was cheaper in the Commons Building. Mr. Taylor informed him that if he needed to leave his work area because he was thirsty, he should inform his supervisor. *Id.;* **586**

52. Mr. Brittingham actually left his work area and traveled to the Commons Building in an effort to find Mr. Pryor. Tr. 293.

53. Mr. Taylor told Mr. Brittingham that he "needed to be more careful who he was seen with." *Id.*

54. The University does not prohibit employees from going to the Commons Building or to any other location on campus where there are vending machines to get a soda, however, the employees are not permitted to use this as a break and must drink the drink they have obtained while they are on their way back to their assigned job. *See* Tr. 353.

55. The University has a long-standing policy of requiring employees to inform their supervisor when they leave their work station for lunch or for break. Tr. 133-34.

56. The University does not have a long-standing policy of requiring employees to inform their supervisor when they leave their work station for lunch or for break. Tr. 610.

57. The University has a long-standing policy of requiring employees to report back to their workstation when they return from lunch or break. Tr. 133-34.

58. Within a week of the January 22, 2002 incident **(on or about January 25, 2002)**, Maurice Jones, James Brittingham, and Ryan Kelly approached the rear of the Maintenance Building in their truck where they saw Steve Blum working outside. The men began to kid each other about the incident and about Mr. Taylor's conversation with Mr. Brittingham about the incident, when Cheryl Twilley came into an internal hall near the outside door. Tr. 272, 273; 356-57; **see tr. 585.**

59. Ms. Twilley came into the internal hall to get some ice for her drink. The men yelled at Ms. Twilley and she left. *Id.*

60. Shortly after this incident, Mr. Brittingham was called into Michael Taylor's office where Mr. Taylor informed him that he should consider their earlier conversation a verbal reprimand. Tr. 273.

61. Mr. Taylor then ran through with Mr. Brittingham the progressive discipline process, namely that if he was caught being away from his workplace without permission again, he would be subject to a written reprimand, then a suspension, and ultimately termination. *Id.*

62. The University Employee Handbook instructs supervisors that whenever they impose any form of discipline they should instruct the employee about what might happen to them if there is a subsequent incident of misconduct. Tr. 296; AFSCME Ex. 16 at 24.

63. Mr. Brittingham informed Maurice Jones that Mr. Taylor had given him a verbal reprimand. Tr. 357-58.

64. On January 24, 2002, Mr. Brittingham attended a lunchtime AFSCME meeting at the University Building. Tr. 274, 318-319.

65. Ms. Twilley attended this meeting as well and spent the entire meeting talking to the AFSCME representative. Tr. 320.

66. Ms. Twilley was a nonexempt employee whose name was on the eligible voter list. Tr. 297.

67. Sometime during 2001, the University issued an Employee Handbook that contained a section entitled "Progressive Corrective Discipline." Tr. 84; *see* AFSCME Ex. 16.

68. In October 2001, Donna Keener, the newly hired University Director of Human Resources began work on revising the University's discipline and attendance policy. Tr. 638-40. Ms. Keener began revising the policy because she believed that it was not sufficient specific to give supervisors clear guidance on how to apply the policy. ***Id.***

69. Work on the project was delayed due to Ms. Keener's need to orient herself to her new job and due to other duties, including tasks arising as a result of the representation campaign, and a complete draft was not finished until early January 2002. Tr. 643.

70. On January 15, 2002, Ms. Keener asked Linda Beall, President of the Staff Senate, if she would inform the Senate during their regular meeting on January 17, 2002 that the Human Resources department was working on developing further clarification of an attendance and discipline policy and that this work was expected to be completed within the next couple of weeks. Univ. Ex. 13.

71. On January 29, 2002, a special session of the Staff Senate was called to address the implementation of the discipline and attendance policy. During the meeting, Ms. Keener and

Richard Pusey, Vice-President for Finance and Administration distributed the policy and asked the Senators to provide their comments on it. Tr. 86-88, 207; *see* AFSCME Ex. 11; **Tr. 659-60.**

72. Ms. Keener initially asked that the Senators provide their comments within twenty-four hours, but later extended the deadline to seventy-two hours, at the request of the Senators. Tr. 88; **647.**

73. Comments were submitted to Ms. Keener and she made changes in the policy because of those comments. Tr. 647.

74. Ms. Keener asked the Senators to keep the policy confidential. Tr. 115-16; AFSCME Ex. 17.

75. Despite this instruction, Mr. Pryor began telling his co-workers about the policy within the week following his receipt of it. Tr. 91; 115-16.

76. The week following Mr. Pryor's receipt of the policy was the same week as the February 6, 2002 election.

77. Mr. Pryor told his co-workers that he thought the University was wrong to send out a new discipline and attendance policy right before the election. Tr. 117

78. The revised discipline and attendance policy lists offenses and the consequences for those offenses in a fashion that is much more detailed than the "Progressive Corrective Discipline" list included in the 2001 Employee Handbook. Tr. 94; *compare* AFSCME Ex. 16 at 22-23 *with* AFSCME Ex. 14 at 27-33.

79. One employee, Beulah Ayres, saw a disciplinary and attendance policy before the election, lying on a table in the dining room. She reviewed the policy and became concerned because she thought it required a doctor's excuse ("sick slip") after three days of illness rather than after the previous time-period of five days. Tr. 404.

80. Ms. Ayres was also concerned about the anti-solicitation policy in the new policy because the University had permitted a variety of forms of solicitation for several years, including permitting employees to sell Girl Scout cookies, Avon and Home Interior products. Tr. 404-05.

81. Ms. Ayres talked to her colleagues in Dining Services about the new policy but did not complain about it to management because she did not believe that any changes would adversely affect her. Tr. 404-06.

82. Neither the University's 2002 nor the University's 2001 Disciplinary and Attendance Policy state that "sick slips" will be required after a specific period of time out on sick leave; both policies leave the requirement of "sick slips" up to the employee's supervisor. *Compare* AFSCME Ex. 15 at 25 *with* AFSCME Ex. 16 at 31; **See Tr. 650.**

83. The University's 2002 Disciplinary and Attendance Policy prohibits unauthorized solicitation on the campus. *See* AFSCME Ex. 13 at 28. The University's 2001 Disciplinary and Attendance Policy lists "examples" of conduct which will be subject to Progressive Discipline, but there is no specific prohibition against solicitation. *See* AFSCME Ex. 16; **Tr. 650**.

84. The University's President, Janet Dudley-Eshbach, approved Ms. Keener's draft of the new policy on January 14, 2002, and, on the same day, encouraged Ms. Keener to have it "finalized promptly" because "the timing is right." AFSCME Ex. 9 (emphasis in original).

85. The University's 2002 Disciplinary and Attendance Policy was effective on February 4, 2002. *See* AFSCME Ex. 14.

86. On February 4, 2002, the University's 2002 Disciplinary and Attendance Policy was e-mailed to all supervisors and managers who had employees affected by the policy. Tr. 649; see AFSCME Ex. A.

87. The training for employees on the policy occurred between February 8, 2002 and February 13, 2002. Tr. 652.

88. The training for supervisors on the policy occurred from the middle to the end of February 2002. Tr. 669.

89. As of the day of the election, February 6, 2002, few non-exempt employees had seen the 2002 Disciplinary and Attendance Policy. *See id.*

90. As of March 13, 2002, the Disciplinary and Attendance Policy had still not been distributed to all non-exempt employees. *See* AFSCME Ex. 17.

91. On February 4, 2002, the University sponsored a forum to enable AFSCME and MCEA to provide information to University nonexempt employees. Univ. Ex. 23; Tr. 630-32.

92. On February 6, 2002, 229 votes were cast in the run-off election. Of those, five were unopened. Four ballots were excluded. ALJ Ex. # 5; **Tr. 653.**

93. The five unopened ballots were unopened because they were challenged by AFSCME. Tr. 703.

94. On February 6, 2002, the polls were only open from 6:00 a.m through 3:30 p.m., through the agreement of AFSCME, MCEA, and the HELRB. Tr. 653.

95. On February 6, 2002, 106 votes were cast in favor of AFSCME and 114 votes were cast in favor of MCEA. *Id.*

96. A majority of the votes cast on February 6, 2002 would have equaled 113 votes. *Id.*

97. **The eligible voter list for the February 6, 2002 election included maintenance mechanics, plumbers, HVAC personnel, and dining services employees other than supervisors. Tr. 656.**

98. Salisbury University's employees work in numerous buildings spread out over a wide area. See AFSCME Ex. 1.

DISCUSSION

I. Standard of Law.

The parties agree that I should use the HELRB's January 16, 2002 Election Order (ALJ Ex. 1) as the standard to determine the validity of the Objections are :[9]

> Activities of a party to an election which materially compromise the secret ballot process, effectively disenfranchise eligible voters, or otherwise substantially interfere with laboratory conditions of a free and fair election are grounds for such an objection.

The parties disagree, however, with the level of evidence necessary to meet this standard.

AFSCME argues that if conduct by a party to the election "reasonably tends to interfere with employees' free and uncoerced choice in an election," the Objections should be sustained and the election overturned. *See Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991), citing *Baja's Place*, 268 NLRB 868 (1984); *see also Intercontinental Manufacturing Co.*, 167 NLRB 105 (1967); *G. H. Hess, Inc.*, 82 NLRB 463 (1949).[10]

The federal labor board, the National Labor Relations Board ("NLRB"), set forth a thorough list of the factors it considers in determining whether employees can "freely and fairly exercise their choice" in *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16, 16 (1991):

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[9] The HELRB's regulations, COMAR 14.30.05, contain a slightly different standard for objections to an election. The parties agreed that these regulations do not govern this case because they were not effective until December 23, 2002, nearly a year after the date of the instant election. The current standard for objections to the conduct of a party can be found at COMAR 14.30.05.17B: "Activities of a party to an election which materially compromise the secret ballot process, effectively disenfranchise eligible voters, or otherwise substantially interfere with a free and fair election are grounds for an objection."

[10] All parties provided citations to National Labor Relations Board ("NLRB") cases as persuasive authority. Although these decisions are not binding precedent for cases before the HELRB, I accept them as persuasive authority and note the HELRB's encouragement that I do so. *See* ALJ Ex. 3, HELRB Opinion No. 1 (May 9, 2002) at 5, n.4.

> In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Id. (citing *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986)).

AFSCME further argues that it is not bound to prove that the alleged conduct *actually* interfered with the employee's choice. Instead, it contends that I may infer such interference. AFSCME asserts that because the test does not hinge on an employee(s) "subjective" belief about whether he or she felt coerced or intimidated, but rather whether a "reasonable" employee would have felt coerced or intimidated, no specific proof of impact on employees is necessary. It cites *Hopkins Nursing Care Center*, 309 NLRB 958 (1992), *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970), *Intercontinental Mfg. Co.*, 167 NLRB 105 (1967), *G. H. Hess, Inc.*, 82 NLRB 463 (1949) for this proposition. AFSCME further contends that dissemination of knowledge about the misconduct among the employees also can be inferred, citing *Garvey Marine*, 328 NLRB 991 (1999) and *Hopkins Nursing Care Center, supra.*

Salisbury University and MCEA urge me to find that the party who objects to an election bears a heavy burden to produce *specific* evidence that the alleged acts occurred and *specific* evidence that this conduct actually affected the election. The University cited a recent decision by the Fourth Circuit Court of Appeals, *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257 (4th Cir. 2000), in which the court held:

> Where pre-election conduct is alleged to have invalidated a representation election, the party seeking to overturn the election – in this case the Gas Company

> – bears a heavy burden. The challenging party must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election. *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987). Thus, it is not enough that the Gas Company demonstrates an NLRB failure to follow its own policies: "We did not intend that the election be set aside merely on the basis that it was possible that the choice had been corrupted or that there was an opportunity to corrupt the choice." *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 608 F.2d 108, 111 (4th Cir. 1979).

Elizabethtown Gas Co., 212 F.3d at 262. The University and MCEA also pointed to *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001 (4th Cir. 1997) in which the Fourth Circuit stated:

> In seeking to have an election set aside, the objecting party bears a "heavy burden." *See NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). To succeed it must be shown by specific evidence that (1) the alleged acts did in fact occur and (2) such acts "sufficiently inhibited the free choice of employees" so as to affect materially the results of the election. *NLRB v. Hydro-therm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987) (quoting *NLRB v. Handy Hardware Wholesale, Inc.*, 542 F.2d 935, 938 (5th Cir. 1976), *cert. denied*, 431 U.S. 954 (1977)).

In considering which of these standards to apply, I have looked first to whether the cases cited arise in the context of an unfair labor practice charge or in the context of an objection to an election. I note the NLRB's long-standing view that the criteria for whether an unfair labor practice has occurred versus whether an objection is valid are not identical. *See General Shoe Corp.*, 77 NLRB 124, 127 (1948). Second, I cannot ignore that had any of these opinions stood as precedential authority over the HELRB, the Fourth Circuit cases would trump the NLRB decisions. Finally, I also cannot ignore that many of the cases cited by AFSCME involve threats of extreme violence,[11] loss of jobs,[12] or they occurred in contained environments where all

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[11] *See e.g. The Methodist Home v. NLRB*, 596 F.2d 1173 (1979)(threat to disembowel pro-company employee); *Robert Orr-Sysco Food Services, LLC*, 338 NLRB No. 74 (2002); *Garvey Marine*, 328 NLRB 991 (1999) (threats to arrange fatal accidents, threats with a gun, threats to beat up union supporters); Picoma Indus. Inc., 296 NLRB 498 (1989) (threat to blow up company and beat up pro-company employees); *R.J.R. Archer, Inc.* 274 NLRB 335 (1985) (threat to blow up employee's van and house and hurt family); *Beaird-Poulan Div., Emerson Elec. Co.*, 247 NLRB 1365 (1980) (threat of violence with gun); *G.H. Hess, Inc.*, 82 NLRB 463 (1949) (threats of violence if employee voted at all).

[12] *See e.g. Robert Orr-Sysco Food Services, LLC*, 338 NLRB No. 74 (2002); *Garvey Marine*, 328 NLRB 991 (1999) (pervasive and severe threats of loss of jobs); *Waste Automation & Waste Management of Pennsylvania*, 314 NLRB

employees worked in one building.[13] Particularly in small bargaining units,[14] such circumstances would lend themselves to a determination that dissemination could be inferred[15] even without specific testimony to that fact, and further that a nervous employee might unreasonably deny that the threats had intimidated her.[16] There is no dispute that this case did not involve threats of extreme (or indeed any) violence, loss of jobs, or a small bargaining unit contained in one location.

After careful consideration of the parties' arguments and their authorities, I conclude that the appropriate test is that set out in the most recent Fourth Circuit election objections case, *Elizabethtown Gas Co.*, 212 F.3d 257, 262 (2000), adapted to work under the election objection standard set out by the HELRB. The Petitioner, in this case AFSCME, must produce specific evidence that campaign improprieties occurred, and produce specific evidence that these improprieties "substantially interfered with the laboratory conditions of a free and fair election." The requirement of specific evidence does not necessarily bar the taking of inferences in appropriate circumstances; but it is also clear that the inferences AFSCME urges me to take have been taken by the NLRB only in fact-specific circumstances that do not exist in this case, e.g., threats of extreme violence or loss of jobs, a small bargaining unit, and containment of the entire

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376 (1994)(threat to close plant); *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970) (threat of loss of jobs); *Intercontinental Mfg. Co.*, 167 NLRB 105 (1967).

[13] *See e.g. Intercontinental Mfg. Co.*, 167 NLRB 105 (1967) (in industrial plant, during preelection campaign, employer interrogation and threats likely to receive prompt and wide circulation).

[14] *See e.g. NLRB v. Talsol Corp.*, 155 F.3d 785 (6th Cir. 1998) (36 employees in bargaining unit); *Garvey Marine*, 328 NLRB 991 (1999) (22 employees in bargaining unit); *Hopkins Nursing Care Center*, 309 NLRB 958 (1992) (67 employees in bargaining unit); *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991) (10 employees in bargaining unit); *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970) (42 employees in bargaining unit); *G. H. Hess, Inc.*, 82 NLRB 463 (1949) (36 employees in bargaining unit).

[15] *See e.g., Hopkins Nursing Care Center*, 309 NLRB 958 (1992) (shouted threat to make nursing assistant "float all over the building" likely heard by several employees standing nearby); *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991)(incident in employee work area where management had a shouting match with union advocates likely to have been known by all employees, even in absence of employee testimony); *Intercontinental Mfg., Co.*, 167 NLRB 105 (1967).

[16] *See e.g. The Methodist Home v. NLRB*, 596 F.2d 1173 (1979)(in which employee disclaimed that she was intimidated by threat to disembowel her while holding a knife to her throat)

bargaining unit in one building. In the absence of these special circumstances, I am not persuaded to, nor do I find legal authority to infer, without specific evidence, dissemination of improprieties or to infer, without specific evidence, that employees' ability to make a free choice was compromised. Moreover, although the NLRB does use an objective test to determine whether an employee felt coerced, the cases presented typically contained *some* evidence of the impact on the employees. This evidence was evaluated under the "reasonableness" standard. *See* n. 9, 10 *supra.*

I agree with AFSCME that it is imperative to consider the extremely close results of this election.[17] *See Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991). Further, it is clear from the NLRB cases cited by both sides that the factors collated in *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991) are widely considered and applied, when appropriate, in a totality of the circumstances test.

With these tests in mind, I will proceed to evaluate the evidence presented.

II. Motion for Judgment.

At the end of AFSCME's case, the University and MCEA moved to dismiss[18] the Objections, arguing that AFSCME had failed to present specific evidence to establish that the alleged misconduct occurred and that if it did, that it "substantially interfered with the laboratory

[17] Neither party offered the Report of Election Results for the February 6, 2002 election. Prior to the beginning of the University's and MCEA's cases, I admitted on my own motion, the documents I identified as the core documents in this case, ALJ Ex. 1 – 4. I also admitted, on my own motion, and over the objection of the University and MCEA, ALJ Ex. 5, the Report of Election Results. I did so on the grounds that it would be impossible for me to consider objections to an election without taking into account the actual election results. COMAR 14.30.11.15C; 28.02.01.08A(1), .08B(11); *accord* NLRB Case Handling Manual § 11424.3(b).

[18] Counsel for the University and MCEA both moved for judgment. Their arguments were in lock-step with each other and thus I rule on their motions jointly.

conditions of a free and fair election." ALJ Ex. 1, HELRB's January 16, 2002 Election Order.[19] The University and MCEA asked that I rule on their Motion prior to the resumption of the hearing on February 3, 2003. AFSCME presented argument in opposition to the Motion.[20]

I deferred ruling on the Motion chiefly because I only have proposed decision-making authority in this case. If I ruled on the Motion and ultimately recommended that it be granted, and the HELRB, as the final decisionmaker, disagreed, this case would be remanded for a resumption of the hearing and an additional decision by me. I noted that the hearing in this case was being held approximately one year after the election took place, and well over one year after the representation campaign had begun on the University's campus. I noted the tenuous situation all parties are placed in when an election is challenged and that further extension of that situation should be avoided if at all possible. I also noted the fact that this hearing could be delayed for months by ruling on the motion at this time, whereas continuing the hearing for an extra few days to hear the University's and MCEA's evidence could potentially save months of time. I concluded that the parties had an obvious disagreement about applicable legal standards and that this conflict made an opportunity for research and briefing essential. Suspending the hearing in mid-stride to wait for such research would further extend the process. I rested my authority for the decision to defer on COMAR 14.30.11.13A(5) and 28.02.01.16B(7) and 28.02.01.16E(2)(b) and 28.02.01.08.

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[19] By the time the motions were made on January 24, 2003, AFSCME had withdrawn several of its Objections. The only remaining Objections were numbers 2, 4, 5, 8, and 10. AFSCME subsequently withdrew Objection number 10 on February 3, 2003. Because any consideration of whether AFSCME had presented sufficient evidence to support Objection number 10 was mooted by its subsequent withdrawal, I have only considered Objections 2, 4, 5, and 8 for purposes of this Discussion.

[20] AFSCME argued that it had presented sufficient evidence to carry its burden but also argued that I did not have the authority to grant a Motion for Judgment because I was obligated to hold a "full hearing." AFSCME submitted several cases to support its proposition that I was obligated to proceed in this case beyond its own initial presentation; however, all of the authorities submitted actually addressed when the NLRB should hold a hearing in a case rather than summarily dismiss objections *without* any hearing. I find that AFSCME's cases do not support its position and decline to address this issue further.

I recognized however, that failure to rule on the motion at this time placed an extra burden on the University and MCEA, and potentially violated their right not to have to present a case when they believed the evidence was insufficient. In order to protect their rights and still balance efficiency for the hearing as a whole, I informed the parties that I would issue a decision on the Motion for Judgment in this Proposed Decision, relying on the evidence admitted prior to the beginning of the Respondent's and the Intervenor's cases. AFSCME objected, noting that, pursuant to OAH Rules governing Motions for Judgment, if a party moving for judgment then proceeds to offer evidence, it is considered to have withdrawn its motion.[21] I overruled AFSCME's objection, relying on my authority to defer ruling on a motion, on my duty to take action to avoid unnecessary delay in the disposition of the proceedings, COMAR 28.02.01.08A(2), and on my power "to issue orders as are necessary to secure procedural simplicity and administrative fairness, and to eliminate unjustifiable expense and delay." COMAR 28.02.01.08B(10); s*ee also* COMAR 28.02.01.08B(11).

In accordance with this decision, I have set forth below, beginning in section II.B. an analysis of the evidence admitted prior to the beginning of the University's case, for the motion for judgment, and an analysis of the additional evidence submitted by the University and MCEA, as if the motion had been denied. As will be seen below, I will recommend that the HELRB grant the University's Motion. If the HELRB disagrees with my recommendation to grant the University's and MCEA's Motion for Judgment, I recommend that it find, based upon all the evidence, that there is insufficient evidence to establish misconduct, with the exception of Mr.

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[21] COMAR 28.02.01.16E states in pertinent part:
(2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:
(a) Proceed to determine the facts and to render judgment against an opposing party; or
(b) Decline to render judgment until the close of all evidence.
(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

Taylor's statement to Mr. Brittingham that he be careful who he hangs around with, and that there is insufficient evidence to establish substantial interference with the laboratory conditions of a free and fair election. I will recommend that the HELRB find the Objections invalid and that it certify the results of the February 6, 2003 election.

A. Standard for Motion for Judgment.

HELRB regulations specifically provide for two types of dispositive motions: a Motion to Dismiss, under which a request for hearing may be dismissed if it "fails to state a claim for which the Board may grant relief," COMAR 14.30.11.13.B.; and a Motion for Summary Decision, under which a request for hearing may be dismissed if the Board, the Executive Director, or I find that "(a) there is no genuine issue as to any material fact; and (b) the moving party is entitled to prevail as a matter of law." COMAR 14.30.11.13.C. The regulations further provide that a party "may move for *appropriate* relief before or during a hearing," COMAR 14.30.11.13A(1)(a) (emphasis added).

OAH Rules of Procedure contain identical standards but also provide for the third form of motion referred to above, namely, a Motion for Judgment. *See* COMAR 28.02.01.16. This rule states as follows:

> (1) A party may move for judgment on any or all issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion for judgment is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation
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> (2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:
>
> (a) Proceed to determine the facts and to render judgment against an opposing party; or
>
> (b) Decline to render judgment until the close of all evidence.
>
> (3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without

having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

COMAR 28.02.01.16E. Although the HELRB rules do not specifically refer to a Motion for Judgment, they do not prohibit it. Neither a Motion to Dismiss for failure to state a claim, nor a Motion for Summary Decision fit the procedural circumstances here[22] where the University and MCEA are arguing that AFSCME failed to meet its burden of proof in its case in chief. As neither of the specifically identified motions in the HELRB rules apply, I find that the University and MCEA were permitted to make a Motion for Judgment, as a form of "appropriate relief" permitted by HELRB regulations.

The OAH Rule permitting Motions for Judgment is based upon Maryland Rule 2-519 which distinguishes motions made at any time other than at the end of an opposing party's case from motions made at that time. *See* Md. Rule 2-519(b).[23] The Court of Appeals recently considered the application of this rule in an administrative law case. In *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 704 A.2d 433 (1998), the court reviewed a decision by the Board of Contract Appeals ("the BCA") in which the BCA applied an earlier version of what

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[22] Motions to Dismiss typically apply solely to whether a claim has been stated. See COMAR 28.02.01.16B. Motions for Summary Decision, akin to Motions for Summary Judgment, typically rely on documents outside the pleadings; such motions are filed before the end of a case, for the purpose of determining whether a trial is even necessary. *Brewer v. Mele*, 267 Md. 437, 298 A.2d 156 (1972); *Hill v. Lewis*, 21 Md. App. 121, 318 A.2d 850, *cert. denied*, 272 Md. 7421 (1974).

[23] Maryland Rule 2-519 states as follows:

Rule 2-519 Motion for Judgment.

(a) **Generally**. A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(b) **Disposition**. When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made . . . .

is now Rule 2-519. In applying the rule, the BCA stated that they would view the evidence

> "in the light most favorable to the party against whom the motion is directed, and will resolve reasonable inferences from conflicts in the oral and written testimony comprising the record compiled to the date of the motion. It will resolve such inferences in the favor of the party against whom the motion is directed, and if, having done so, there is lacking a factual predicate pursuant to which, as a matter of law, the moving party is entitled to prevail, the motion will be denied."

The court noted that this explication of the standard of review was in reality a Motion to Dismiss of a type used *prior* to the publication of Rule 2-519. In ruling on *this* pre-Rule 2-519 motion, the fact-finder was required to determine

> whether, as a matter of law, the evidence produced in A's case, viewed in a light most favorable to A, is legally sufficient to permit a trier of fact to find that the elements required to be proved by A in order to recover have been established by whatever standard of proof is applicable. To frame the legal issue, the court must accept the evidence, and all inferences fairly deducible from that evidence, in a light most favorable to A: it is not permitted to make credibility determinations, to weigh evidence that is in dispute, or to resolve conflicts in the evidence.

Driggs Corp., 348 Md. at 402, 704 A.2d at 440. However, after Rule 2-519 was adopted in 1984, it was made clear that, in a non-jury case,

> the Rule no longer requires the court to view the evidence in a light most favorable to A and to consider only the legal sufficiency of the evidence, so viewed, but allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence and to make ultimate findings of fact.

Id. at n.4. As all OAH cases are non-jury cases where the Administrative Law Judge is the trier of fact, and as the OAH Rule permitting Motions for Judgment was proposed in September 2000,[24] I conclude that its drafters relied on the new interpretation of a Motion for Judgment as described in footnote 4 of the *Driggs* case. I proceed to rule on the University and MCEA's Motion under this standard, without viewing the evidence in a light most favorable to AFSCME.

[24] See 27:18 Md. Reg. 1678 (Sept. 8, 2000).

and with credibility determinations based upon the evidence admitted prior to the initiation of the University's case.[25]

B. Did AFSCME carry its burden to establish that the alleged acts occurred and that they substantially interfered with the laboratory conditions of a free and fair election?

1. Disciplinary actions.

a. January 25, 2002 three-day disciplinary suspension to Donald Ray Pryor (Objections No. 2, 5)[26]

i. Motion for Judgment Analysis

The University issued Mr. Pryor a three-day suspension on January 25, 2002. The grounds for the suspension were that on January 22, 2002 Mr. Pryor spent approximately thirty minutes talking with union representatives during a time when he was supposed to be working, in a location where he did not have assigned work duties. There is no dispute that the suspension was issued. There is also no dispute that the University was aware Mr. Pryor was an active AFSCME supporter. What is in dispute is whether the suspension was issued for legitimate reasons or whether it was actually intended to intimidate or retaliate against Mr. Pryor because of his standing as an AFSCME activist.

The testimony from AFSCME's witnesses about this incident was extremely scattered. Mr. Pryor testified that he was walking between work assignments in different buildings, that he stopped briefly, for two to three minutes, to speak with other employees gathered at a loading

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[25] I note that AFSCME urges me to use the older standard of viewing the evidence in the light most favorable to the nonmoving party. It cited an NLRB case, *Overnite Transportation Co.*, 335 NLRB No. 33 (2001) in which this standard was used. I find the OAH Rules of Procedure standard, based on Maryland Rules, to be more applicable.

[26] In Objection No. 2, AFSCME alleges that the University "engaged in unfair labor practices directed at Donald Pryor, Jr. . . . includ[ing] . . . a three-day suspension of Pryor issued on January 25, 2002 of an incident on January 22, 2002." *See* Appendix 1. The issue of whether this suspension constituted an unfair labor practice is currently pending in another case delegated by the HELRB to the OAH. Because the issue in this case is whether there was objectionable conduct which substantially interfered with the laboratory conditions of a free and fair election, I specifically decline to address whether the alleged conduct constituted an unfair labor practice and instead interpret the objection as alleging that the University's conduct in issuing the suspension violated the terms of the January 16, 2002 Election Order.

dock at the back of the University Center, and that he lit up a cigarette while he was there. He later testified he had already lit the cigarette before his arrival, thus explaining his alleged short stop at the loading dock. Mr. Pryor testified that when he arrived he saw a union organizer, Ms. Krawczyk, involved in a "heavy" conversation with Mr. Brittingham. He testified that he also saw University employee Steve Blum, and student helper Ryan Kelly there. Mr. Pryor testified that he first talked to Mr. Blum about a cooler, and that he then joined an ongoing conversation between Ms. Krawczyk and Mr. Brittingham. Notably, Mr. Pryor did not testify as to the exact time he arrived at the loading dock, but asserted only that he was there two to three minutes before he saw Mr. Taylor coming over the hill.

Ms. Krawczyk testified that she and another organizer, Arlene Diaz, were present at the loading dock between 2:00 and 2:15 p.m. She further testified that Mr. Brittingham, Mr. Pryor, Mr. Blum, and Ryan Kelly were present at that time. Ms. Krawczyk testified that she began a conversation with another University employee, Mr. Westfall, and then another with Mr. Brittingham.

In contrast, Mr. Brittingham testified that he arrived and then saw Mr. Pryor and Ms. Krawczyk walking down the sidewalk toward him talking with each other. Both Mr. Brittingham and Mr. Pryor testified that they had been at the loading dock only a short time before they saw Mike Taylor and Tim Jones coming over the hill toward them. When Mr. Pryor saw Mr. Taylor, he left the area. Mr. Pryor's suspension notice, AFSCME Ex. 8, alleges that he was there until 2:45 p.m.

Mr. Pryor testified that when Mr. Taylor gave him his reprimand, Mr. Taylor told him that he had been observed at the loading dock at 2:15 by Skip Vandenburg, the Dining Services supervisor.

The conflicts in AFSCME's witnesses' testimony on this incident make it impossible to accept all their statements as entirely truthful. Mr. Pryor's and Mr. Brittingham's testimony at this hearing even conflicted with their own prior testimony given another hearing. With this in mind, I must consider the self-interest of the witnesses, the reasonableness of their testimony, and any motive to deceive or at least shade the facts. Ms. Krawczyk is a paid employee of AFSCME and clearly has an interest both in protecting Mr. Pryor, AFSCME's lead employee activist in this campaign and advancing development of this record for the upcoming unfair labor practice hearings which will also address this issue. Mr. Pryor has similar interests. Mr. Brittingham has an interest in aligning his statements with those he has previously made, but more than likely is less aligned with Mr. Pryor's and Ms. Krawczyk's interests because he is no longer employed by the University and presumably less involved in union activities.

With this in mind, I credit Mr. Brittingham's testimony that he saw Ms. Krawczyk and Mr. Pryor walking toward him at the loading dock – he saw their arrival. This contrasts with Ms. Krawczyk's and Mr. Pryor's testimony that Ms. Krawczyk was already present and talking to Mr. Brittingham when Mr. Pryor arrived. I see no reason for Mr. Brittingham to have lied about this observation; moreover, he stuck with this testimony even after it had been revealed that he had testified differently about other details in this incident. I credit Ms. Krawczyk's testimony that she was at the loading dock between 2:00 and 2:15 p.m. because I find she had no reason to lie about this earlier timeframe, because it was elicited by her own counsel, and because it is reasonable considering the number and intensity of the conversations she testified she engaged in that afternoon. I do not credit Mr. Brittingham's testimony that he arrived at the loading dock at 2:30 for two reasons: first, it is in his self-interest to stick with his prior statements that he was only there for five minutes, and second I do not believe it is reasonable that the "heavy"

conversation Mr. Brittingham was alleged to have been observed having could have been initiated and completed within the five period period alleged by Mr. Brittingham. When piecing together Mr. Brittingham's earlier statement that he observed Ms. Krawczyk's arrival, Ms. Krawczyk's testimony of when she arrived and Mr. Brittingham's "heavy conversation," I believe it most likely that both Mr. Brittingham, Ms. Krawczyk, and Mr. Pryor arrived on the loading dock at no later than 2:15 p.m. I therefore find, by a preponderance of the evidence, that Mr. Pryor was at the loading dock for far more than the two or three minutes he asserts and that he was there prior to the beginning of Mr. Brittingham's conversation with Mr. Krawczyk.

Mr. Pryor admits that he saw Mr. Taylor and Mr. Jones approaching the loading dock. The reprimand states that this occurred at approximately 2:45 p.m. I conclude that the group on the loading dock began to break up upon sight of Mr. Taylor and Mr. Jones.

The first issue then is whether the University's issuance of this reprimand was justified or if their reasoning was pretextual and intended as intimidation. The evidence submitted during AFSCME's case demonstrates, by a preponderance that the University had justification for issuing Mr. Pryor a reprimand. There is no dispute that this was the third disciplinary action issued to him for the same reason. Although AFSCME contended that Pryor should not have been disciplined for talking or being away from his work station, even Pryor admitted that spending 30 minutes away from work (or even less) during work time, was not appropriate. I find that the University issued this discipline because it believed Pryor was doing just that.

AFSCME further argued that no other employee was ever disciplined for a similar infraction. However, no evidence was presented to establish that other employees were free to stay away from their assigned job for thirty minutes. To the contrary, at least one of AFSCME's witnesses testified that although he did talk with other employees, he believed a conversation of

more than five or ten minutes would be inappropriate. AFSCME also failed to present evidence that any other employee with a similar disciplinary history had escaped discipline for similar conduct. AFSCME failed to present relevant evidence to demonstrate that the real reason for Pryor's discipline was AFSCME-animus.

Because I find that issuance of the January 25, 2002 suspension was not discriminatory or otherwise improper, I do not need to reach the question of whether this suspension "substantially interfered with the laboratory conditions of a free and fair election."

AFSCME continues to argue however, that I should infer that this suspension "substantially interfered with the laboratory conditions of a free and fair election" because of the closeness of the vote: MCEA received only one vote more than the majority cutoff (113). The evidence establishes that AFSCME would have had to gain seven votes (113-106) in order to gain a majority of the votes.

Although the closeness of the vote is undeniably relevant to the processing of this case, even if I agreed with AFSCME's assertion that the suspension could have adversely impacted the election, AFSCME cannot carry its burden merely by pointing out the vote count. First, I have found that issuance of the three-day suspension was not misconduct and second, even if this discipline, albeit proper, could have intimidated other voters, the test is not whether it *could* have had an impact on the election but whether it did. *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000); *see also NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987). Although AFSCME did establish that employees knew of this discipline, there was absolutely no evidence that any employee changed his or her mind from voting for AFSCME to voting for MCEA because of it. Not even Mr. Pryor testified that he did so. Moreover the issuance of discipline for admittedly inappropriate behavior is a far cry from the cases in which the NLRB

has inferred an impact on the election. *See* n. 9, 10 *supra* for cases involving extreme acts of violence or threats of job loss. Because by the end of AFSCME's case the evidence was insufficient to establish that issuance of this discipline was a "campaign impropriety" or that it "substantially interfered with a free and fair election," or even that it reasonably was likely to have, or did intimidate an employee, I will recommend that the HELRB grant the University and MCEA's Motion for Judgment regarding the portions of Objections 2 and 5 that address discipline to Mr. Pryor.

ii. Analysis of All Evidence Submitted in the Hearing.

In the University's case, Mr. Taylor testified that he first became aware of the gathering of employees when he received a call from Mrs. Fandrey of Dining Services at approximately 2:30 p.m. on January 22, 2002. Mrs. Fandrey informed Mr. Taylor that her subordinate, Skip Vanderburgh had reported seeing Mr. Pryor and two non-University employee union organizers hanging out on the loading dock. Mr. Taylor then called Mr. Vanderburgh who confirmed Mrs. Fandrey's information. As it was not during the assigned lunch or morning break time, and as Mr. Pryor had already been disciplined twice for similar behavior, Mr. Taylor and Tim Jones then set out to see for themselves if Mr. Pryor was still on the loading dock. As Mr. Taylor rounded the crest of the hill he saw the gathering of employees, including Mr. Pryor and Steve Blum. Mr. Jones also saw Mr. Brittingham there. Mr. Taylor confirmed that he could not hear the employees' conversations.

Mr. Taylor investigated the incident by speaking with Mr. Pryor, Mr. Brittingham, and Mr. Blum. Mr. Blum provided some additional timing, noting that he had left the loading dock at approximately 2:30, and returned at 2:40. Mr. Pryor was present at both times.

This additional evidence supports the conclusions I reached that the discipline meted out to Mr. Pryor on January 25, 2002 was justified and not based upon union animus.

b. Verbal Reprimand to James Brittingham.

i. Motion for Judgment Analysis.

The facts establish that Mr. Taylor spoke with Mr. Brittingham after the January 22, 2002 loading dock incident and informed him that if he needed to leave his work area, he should notify his supervisor. A few days later, Mr. Taylor again spoke with Mr. Brittingham and informed him that their earlier conversation, should be considered a verbal reprimand. Mr. Taylor then proceeded to inform Mr. Brittingham of the disciplinary consequences should he be found to have committed a similar offense in the future. Mr. Brittingham testified that this summary of future consequences made him feel that his job was at stake.

As discussed above, there really was no dispute that Mr. Brittingham could have gotten his drink in the building within which he was working; yet, he left to go to the Commons Building. He testified at one point that he went to the Commons Building to get a cheaper drink than he could get in his assigned building. In another hearing,[27] Mr. Brittingham testified that he went to the Commons Building to find Mr. Pryor because he wanted to ask him a question. Indeed, when he arrived, he got into a "heavy" conversation with Ms. Krawczyk about a union question. I find it most likely that Mr. Brittingham did leave his assigned work area solely so that he could talk about union business. I also find it likely that he was there for more than the five minutes Mr. Brittingham claimed because, as he himself testified, he saw Mr. Pryor and Ms. Krawczyk arrive. Because their arrival was timed at sometime between 2:00 and 2:15, and Mr. Brittingham was still there when Mr. Taylor and Mr. Jones walked through at approximately

2:45, there is no question that a verbal reprimand was appropriate discipline for taking an unauthorized break during work hours.

Accordingly, there is no evidence that the University's issuance of this reprimand was inappropriate or that it constitutes misconduct.

Mr. Brittingham further asserted that Mr. Taylor's run-down of potential future disciplinary consequences was intimidating to him; however, it is clear that supervisors are required to provide such a run-down to the employees they discipline so that the employee is aware of the consequences of future misbehavior. I cannot find Mr. Brittingham's testimony that he was intimidated by this conversation to be reasonable under these circumstances. *See Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

Similarly, there is no evidence that this conversation substantially interfered with the laboratory conditions of a free and fair election. Because I find insufficient evidence to conclude that either Mr. Brittingham or any other employee was reasonably intimidated by this verbal reprimand, I will recommend that the HELRB grant MCEA and the University's Motion for Judgment on Objections 2 and 5 as they pertain to the verbal reprimand against Mr. Brittingham.

ii. Analysis of All Evidence Submitted in the Hearing.

The only additional evidence submitted in the University's and MCEA's case on this reprimand was that described above in relation to Mr. Taylor's investigation. For the same reasons, I find that AFSCME has failed to establish that the reprimand was motivated by anti-union animus or that it constituted misconduct for purposes of the election Objections.

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[27] Although it was not made clear exactly what hearing this was, I presume that it was a personnel hearing in which Mr. Pryor challenged disciplinary actions taken against him by the University. As noted earlier, as of the close of evidence in this case, no ruling had been issued in this matter.

Mr. Taylor explained that he ran through future disciplinary consequences with Mr. Brittingham because he was required to do so when issuing a disciplinary action. This testimony is consistent with the evidence submitted in AFSCME's case and, even if the HELRB decides not to grant the Motion for Judgment, is reliable evidence upon which to conclude that the conversation was appropriate, and for the reasons described above, not intimidating.

2. Mr. Taylor's Statement to Mr. Brittingham (Objection No. 5).

a. Motion for Judgment Analysis.

Mr. Brittingham testified that, during Mr. Taylor's initial investigatory conference with him, Mr. Taylor informed him "You need to be more careful who you are seen with." There was no evidence presented during AFSCME's case to refute this statement. To the contrary, the evidence established that this statement initiated the incident behind the Maintenance Building, when Mr. Blum and Mr. Brittingham's co-workers were joking about "who they were seen with." Standing on its own, the statement has a ring of intimidation to it, though it does not state why Mr. Brittingham needed to be careful, nor what would happen if he did not.

I find that this statement stands as unrefuted specific evidence of misconduct by Mr. Taylor against Mr. Brittingham. I must now consider whether sufficient factors exist to conclude that this statement was likely to have materially affected the election results. *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001 (4th Cir. 1997). To do so, I consider the factors set out above in *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16, 16 (1991):

> In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the

> effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Id. (citing *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986)).

As will be seen below, as of the end of AFSCME's case, I conclude that this was the only incident of misconduct. This incident was likely to have made a reasonable employee uncomfortable, but is far from the serious threats of violence or job loss seen in other cases that are likely to cause fear among employees. There was only one employee subjected to the misconduct, Mr. Brittingham; however, there is evidence that he informed at least three other employees of this statement. There was evidence that these employees found this statement to be a joking matter. I decline to infer that this statement was more widely disseminated. The basis for such inference, a small bargaining unit, employees enclosed in one area, or the serious nature of the violation, simply do not exist in this case. *See* n. 9-13 *supra*. There is no evidence that this statement "persisted" in the minds of even these employees on the date of the election – it took place approximately two weeks prior to the election date. The statement was made by a University supervisor and so must be attributed to the University and there is no evidence of misconduct on the part of the opposing party. The election results were close: MCEA only won by one vote; AFSCME would have needed only seven more votes to have won the election.

All in all, I do not find sufficient evidence to conclude that this singular incident of relatively minor misconduct against a single employee nearly two weeks before the election, narrowly disseminated through the bargaining unit, was sufficient to have substantially interfered with the laboratory conditsions of an election in which AFSCME would have needed to gain seven votes. I find it to be a *de minimis* violation under the caselaw cited above and will

recommend that the HELRB grant the University's and MCEA's Motion for Judgment against this objection.

b. Analysis of All Evidence Submitted in the Hearing.

During the University's case, Mr. Taylor denied telling Mr. Brittingham that he should be careful who he hung out with. Although I found Mr. Taylor to be a credible, straightforward witness, it was obviously in his self-interest to deny making this statement. The fact that Mr. Blum, Mr. Jones, and Mr. Brittingham were joking around about it, however, makes it likely that Mr. Taylor indeed made the statement. Although he may have done so with the intent of just providing "friendly" advice, it is quite likely that any employee hearing it would be intimidated by it. I stand by the analysis I made of this statement above and my conclusion that it was a *de minimis* violation and recommend that the HELRB find these portions of the Objections without merit.

3. Surveillance by Michael Shenton, Cheryl Twilley, and Michael Taylor (Objection No. 2, 4)[28].

Unlawful surveillance, in the context of an unfair labor practice charge, can be sufficient to justify overturning an election even where Management has simply created an impression of surveillance. *See Sage Dining Services, Inc.*, 312 NLRB 845 (1993). However, Management is still permitted to supervise its employees and "to legally keep a close eye on the union representatives when they manage to gain entrance" on to company property. *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 938 (4th Cir. 1990). The test of whether management has created an impression of surveillance is an objective one: "whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with

[28] Objection number 4 included a claim that the University had unlawfully interrogated employees; however no evidence or argument was presented on this allegation. I consider that this claim was withdrawn.

employees' rights guaranteed under the Act." *Sage*, at 846 (quoting *Sunnyside Home Care Project*, 308 NLRB 346 n.1 (1992)).

In *Sage Dining Services, Inc.*, 312 NLRB 845 (1993) the NLRB found that a supervisor could create an impression of surveillance by informing an employee that other employees had seen him riding around with union representatives. However, in that case, the employee made no secret of his union activities and the supervisor gave no indication that she had solicited the reports about the employee's union activities. The NLRB found that under these circumstances, in the absence of any other objective evidence, there were no grounds that would support a reasonable belief that the Respondent had the employee under surveillance.

In *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (4th Cir. 1990), management employees actually sat down at the table in the hospital cafeteria with union representatives, changing seats so that management could be even closer to the union representatives. In its decision, the Fourth Circuit noted that management officials may observe public union activity, without violating employee rights, particularly when such activity occurs on company premises. *Id.* at 938 (citing *Metal Industries, Inc.*, 251 NLRB 1523 (1980)). The court then listed several cases in which management had been found to have unlawfully surveilled employees, but noted that in all of these, the union representative possessed the right to engage in the particular organizational activity. Where the activity occurred on management's property, it retained greater rights to observe behavior. *See id.* and cases cited therein. With this standard in mind, I review the allegations of surveillance in this case.

a. Michael Shenton

i. Motion for Judgment Analysis.

Mr. Pryor testified that after December 12, 2001, his direct supervisor, Michael Shenton, Lead Mechanic, began to exert more supervision over him. Mr. Pryor did not believe that Mr. Shenton was similarly scrutinizing other employees, but did admit that he did not really have any knowledge about how Mr. Shenton was treating other employees under his supervision. There was no evidence that Mr. Shenton was listening to any of Mr. Pryor's conversations about AFSCME or that he was seen to be spying on Mr. Pryor, only that he required Mr. Pryor to document when he began and ended each job and that Mr. Pryor was required to notify him where he was on campus. There was also no evidence that Mr. Shenton was reporting any information he might have accumulated about Mr. Pryor to University management. Considering that as of December 12, 2001, Mr. Pryor had already received two disciplinary actions for being away from his work assignments during work time, such supervision does not seem extraordinary and certainly does not rise to the level of misconduct. There was also no evidence that this increased supervision impacted Mr. Pryor's or any other employees' ability to exercise a free and uncoerced choice in the February 6, 2003 election, nor that a reasonable employee would believe that Shenton's scrutiny constituted surveillance of union activity. Because the evidence is insufficient to show that surveillance occurred, I will recommend that the HELRB grant MCEA's and the University's Motion for Judgment as it relates to this claim in Objection No. 2.

ii. Analysis of All Evidence Submitted in the Hearing.

Mr. Taylor testified that he directed Mr. Shenton to follow the University-wide practice of recording starting and ending times for work assignments, and to ensure that Mr. Pryor and

Mr. Classing did so as well. Mr. Taylor testified that this was standard practice and moreover, that the need for it in Mr. Shenton's buildings had increased because of complaints that work was not being timely completed there. Mr. Taylor did not testify that he used this information for surveillance purposes, nor was there any evidence during this hearing that it was collated or used to determine the existence of union-related activities. Mr. Taylor had no additional testimony about Mr. Shenton's calls to Mr. Pryor on the radio. The evidence submitted during the University and MCEA's cases supports the conclusion that Mr. Shenton's logging directions were not generated by anti-union animus nor where they imposed for union surveillance purposes. I recommend that the HELRB find this Objection without merit.

b. Cheryl Twilley.

i. Motion for Judgment Analysis.

AFSCME argued that Cheryl Twilley, a secretary who worked in the Maintenance Building, conducted surveillance on Mr. Brittingham.[29] The evidence established that within one week of the January 22, 2002 incident at the loading dock, Mr. Brittingham and two other University employees, Maurice Jones and Ryan Kelly, pulled up to the back of the Maintenance Building in their work truck where they saw Steve Blum working outside. The men began to kid each other about the January 22, 2002 incident when they noticed that Ms. Twilley had entered the opposite end of a hall which led to the outside of the building near Mr. Blum. Ms. Twilley

[29] In Objection number 4, AFSCME alleged that Ms. Twilley was a "Physical Plant confidential secretary." This argument was presumably based upon Ms. Twilley's job dealing with timecards. No legal argument to support this theory was presented in AFSCME's closing argument. A "confidential employee is a person who assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). The NLRB has held that "the mere handling of or access to confidential business or labor relations information, including personnel and financial records, is insufficient by itself to render an employee 'confidential.'" *Ernst & Ernst Nat'l Warehouse*, 228 NLRB 590 (1977). I know of no authority which renders employees who handle timecards "confidential employees" and, particularly in the absence of legal argument that Ms. Twilley meets this definition, decline to find that she is a "confidential employee."

had come into the hall to get ice from an ice machine and as soon as the men yelled at her, she retreated into the building. There was no evidence that Ms. Twilley heard or attempted to hear the men's conversation, nor that she was anywhere near the men for longer than it took to retrieve ice from an ice machine. There is also no evidence that Ms. Twilley could even see who was in the truck, much less that Mr. Brittingham was there. AFSCME alleges that Ms. Twilley spied on the group because shortly after she exited the hallway, Mr. Brittingham was called into Mr. Taylor's office to discuss the January 22nd incident.

Once again, there is no evidence that Ms. Twilley's conduct was improper. Even if Ms. Twilley did inform Mr. Taylor that Mr. Brittingham was outside, there was no explanation as to how this conduct would be improper, how it could have constituted surveillance, or how it reasonably could have given employees the impression that they were under surveillance. There was certainly no evidence that Ms. Twilley's brief trip to the ice machine "substantially interfered" with the laboratory conditions of a free and fair election.

AFSCME also alleged that Ms. Twilley appeared at a lunchtime AFSCME union meeting on January 24, 2002 and that this conduct constituted surveillance. The evidence established that Ms. Twilley did attend this lunchtime meeting on the University's campus. The evidence also established that Ms. Twilley was a nonexempt employee whose name was on the eligible voter list and that she had every right to attend the meeting. There was no evidence that the University management asked Ms. Twilley to attend the meeting to gather information or to report back about its attendees. To the contrary, the only information about this event came from Mr. Brittingham who seemed primarily annoyed that Ms. Twilley had monopolized the union organizer's time during this meeting.

Once again, this evidence is woefully insufficient to establish surveillance or the creation of an impression of surveillance. AFSCME has failed even to establish that Ms. Twilley voluntarily disclosed facts to Management, much less succeeded in establishing that a reasonable employee would have believed himself to be under surveillance in these circumstances. *See Sage Dining Services, Inc.*, 312 NLRB 845 (1993). I will recommend that the HELRB grant MCEA's and the University's Motion for Judgment as it relates to Ms. Twilley in Objection number 4.

ii. Analysis of All the Evidence Submitted in the Hearing.

There was no additional new evidence submitted in the University's or MCEA's case regarding this allegation. I stand by my conclusions and recommendations discussed above.

c. Michael Taylor.

i. Motion for Judgment Analysis.

AFSCME alleges that Michael Taylor conducted surveillance on the employees at the loading dock on January 22, 2002. The evidence established that Mr. Taylor and Tim Jones walked over a hill and down the sidewalk near the loading dock at a time when several employees, including Mr. Pryor and Mr. Brittingham, as well as two union organizers were holding an informal meeting during the employee's workhours. There was no evidence that Taylor or Jones could hear the employees' conversations, or were trying to, or that they had been observing the employees from a distance for any more than the length of time it took to walk over the hill and down the sidewalk.

As the Fourth Circuit noted in *Southern Maryland Hospital Center*, management has the right to keep a close eye on union organizers who manage to come on to their property. More to the point, representation campaigns do not eliminate management's rights to discourage its

employees from taking lengthy unauthorized breaks. Under these circumstances, when Mr. Taylor and Mr. Jones had no way to hear the employees' conversations, and as they made no attempt to "demonstrate observation," or to conduct "unreasonably close" observation, there are insufficient grounds for a reasonable belief that Taylor and Jones had placed these employees under surveillance. *See Arrow Automotive Industries*, 258 NLRB 860, 861 (1981)(employer's surveillance of public handbilling was "deliberately calculated plan to show and demonstrate observation"); *Montgomery Ward & Co.*, 256 NLRB 800, 812 (1981) (employer interfered with organizers during meeting and engaged in "unreasonably close" observation of organizers as they finished their lunches). I will recommend that the HELRB grant MCEA's and the University's Motions for Judgment regarding Objection number 4.

ii. Analysis of All Evidence Submitted in the Hearing.

During his testimony for the University, Mr. Taylor simply confirmed evidence presented by AFSCME's witnesses: namely, he could not hear the conversations of any of the employees at the loading dock. Although AFSCME argued that Mr. Taylor's receipt of information from Mrs. Fandrey and Mr. Vandenburgh was evidence that Mr. Pryor was under surveillance, I find it unlikely that this was the case. One call from a supervisor does not indicate anything other than a singular observation. It simply does not amount to surveillance under the caselaw discussed above. For the same reasons discussed earlier, I recommend that the HELRB find this portion of the Objection without merit.

4. Progressive Discipline Policy (Objection number 8).

a. Motion for Judgment Analysis.

AFSCME argues that the issuance of a new disciplinary policy in the days immediately preceding the February 6, 2003 election is in and of itself a *per se* violation which mandates

overturning the election. It cites *Garvey Marine*, 328 NLRB 991 (1999), *Airstream Inc.*, 304 NLRB 151 (1991), and *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1333 (7th Cir. 1978). For the reasons cited below, none of these cases support AFSCME's position.

In *Garvey Marine*, the NLRB was faced with a representation campaign in which management made repeated, serious, pervasive threats of physical and economic harm to its employees and to union organizers. Management also had a long history of a "laid-back" disciplinary style with very infrequent and irregular disciplinary actions. Suddenly, during the representation campaign, management instituted a written warning system without presenting any legitimate business reason for doing so. In addition to finding numerous other violations of employee rights, the NLRB concluded that the institution of the written warning system was an unfair labor practice.

In *Airstream Inc.*, the NLRB found that management had implemented a change in break policies shortly before the election, but that it had done so with the intent of trying to influence the election. This conduct, intended as an inducement to employees to vote against the union, was sufficient grounds to overturn the election.

In the third case, *Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (1978), the NLRB concluded that the implementation of a more structured disciplinary policy was a "new" policy. In this case, the policy was implemented *after* an election, but before the union was certified as the employee's exclusive representative. The implementation of this "new" policy was found to be an unfair labor practice. To determine whether the policy was simply restated or indeed a "new" policy, the NLRB looked to the significant increase in reprimands that occurred after issuance of the policy.

None of these cases support AFSCME's argument that the University's Disciplinary Policy was "new" and that it substantially interfered with the laboratory conditions of a free and fair election. In *Garvey Marine*, unlike the University in this case, the employer essentially had no disciplinary policy; its implementation of the policy was unexplained and accompanied by threats of fatal accidents and assaults. In *Airstream,* unlike the University in this case, the employer essentially offered improper inducements to its employees to vote against the union. And, in *Electri-Flex*, the determination that a policy was new (and thus a subject of mandatory bargaining because it was issued *after* the election) was based on the sharp increase in disciplinary actions.

The evidence presented in AFSCME's case established that Donna Keener drafted a "new" Disciplinary Policy which set out specific examples of conduct for which employees could be disciplined and the discipline that would be meted out for each offense. She presented the policy to the University's Senate on January 29, 2002 and asked the Senators to keep the policy confidential. The "new" policy was effective February 4, 2003, two days before the February 6, 2003 election; however, even as of March 13, 2002, many employees had still not seen the policy.

The critical issues necessary to sustain this objection have simply not been supported: there is no evidence that the University's actions with regard to this Policy constituted misconduct and there is even less evidence that a sufficient number of employees in the bargaining unit had even seen it. There was insufficient evidence that there were non-exempt employees in the University's Staff Senate who saw the policy, other than Mr. Pryor, so merely providing a copy to this body cannot be construed as intimidating or substantial interference with the election. Mr. Pryor admitted that he did not distribute the policy, although he did state that

he gave his oral version of it to an undetermined number of employees. Some employees testified that they did not understand why a new policy had to be issued at this time, but they did not testify, nor can any inference be drawn, that the presence of the policy encouraged them to vote for MCEA as opposed to AFSCME. Unlike the *Airstream, Inc.* case, in which only two parties, including management were present on the ballot, the new policy did not encourage employees to vote for one candidate or the other. Unlike the *Electri-Flex* case, there is no evidence of increased disciplinary actions between February 4 and February 6 that would indicate that the 2002 Policy was indeed a different policy that was having an improper affect on the laboratory conditions of the election. Finally, although Objection number 8 claims that the University began on-campus orientation sessions about the policy prior to the election, there was no evidence in AFSCME's case to support this determination, nor was there evidence that the policy was actually implemented prior to the election. Although the policy carried an implement date of February 4, the mere existence of this date does not establish implementation, particularly in the absence of testimony from employees that they were aware of it.

Under these circumstances, I cannot find specific evidence that misconduct occurred; nor can I find specific evidence that the issuance and implementation date of this policy substantially interfered with the laboratory conditions of a free and fair election. I will recommend that the HELRB grant MCEA's and the University's Motion for Judgment with regard to Objection number 8.

b. Analysis of All the Evidence Submitted in the Hearing.

During the University's case, Ms. Keener testified that she had begun work on the Disciplinary and Attendance policy shortly after she became employed by the University. She testified that based upon her long experience in Human Resources, the Progressive Discipline

Policy was vague and provided insufficient guidelines to supervisors to ensure uniform and consistent application of discipline on the University's campus. She intended to create a more specific document and to draft what she called "templates" for supervisors to use when issuing discipline to their employees. There was no evidence submitted by AFSCME to rebut Ms. Keener's testimony that this plan had been in the works for some time and that it had been delayed due to Ms. Keener's orientation to her new job and the multitude of tasks that arose during the representation campaign. Ms. Keener's testimony on this point was unshaken on cross-examination. Ms. Keener further testified that she finally finished the draft policy in January and that she asked Ms. Beall to alert the Staff Senate that the policy was on its way to them.

While there can be no doubt that issuance of this policy two days before the election is suspect, the critical facts establishing that its issuance was improper were missing. First, there was no evidence that the University intended the issuance of this document to influence whether employees voted for MCEA or for AFSCME. Second, there was no evidence that the issuance of this document actually influenced how employees voted. Third, there was no evidence or even any testimony as to *how* this document could have made such a difference. Certainly, if the choice of "No Union" was on the ballot, the issuance of this document would weigh more heavily: I would have to evaluate whether the document promised benefits to the employees or contained threats to the employees for voting in favor of a union. But "No Union" was not on the ballot in this election.

Moreover, there was very little evidence that bargaining unit employees were even aware of the document at the time of the election. Ms. Keener credibly testified that employee and

supervisor trainings did not begin until well after the election concluded. AFSCME did not put on any rebuttal evidence to refute this testimony.

Accordingly, I find no more evidence upon which to support the validity of AFSCME's Objection number 8 and will recommend that the HELRB find it to be without merit.

PROPOSED CONCLUSIONS OF LAW

Based upon the Proposed Findings of Fact and Discussion above, I recommend that the HELRB conclude, as a matter of law:

(1) that AFSCME failed to carry its burden to provide specific evidence to prove the allegations in Objection Number 2, namely, that the January 25, 2002 three-day suspension of Donald Ray Pryor, Jr. constituted misconduct or substantially interfered with the laboratory conditions of a free and fair election. *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000); *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987);

(2) that AFSCME failed to carry its burden to provide specific evidence to prove the allegations in Objection Number 4, namely, that Salisbury University, through Cheryl Twilley, Michael Shenton, and Michael Taylor, engaged in surveillance of AFSCME organizers and University employees. *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (4th Cir. 1990); *Sage Dining Services, Inc.* 312 NLRB 845 (1993);

(3) that AFSCME failed to carry its burden to provide specific evidence to prove the allegations in Objection Number 5, namely, that Salisbury University intimidated AFSCME organizers and supporters by disciplining Donald Ray Pryor, Jr. and James Brittingham on or about January 25, 2003. *See Hopkins Nursing Care Center*, 309 NLRB 958 (1992);

(4) that AFSCME carried its burden to prove, in Objection Number 5, that Michael Taylor intimidated James Brittingham on or about January 24, 2002 by telling him that he should be more care of the people he hangs around with on campus, but that AFSCME failed to prove that this isolated incident of misconduct substantially interfered with the laboratory conditions of a free and fair election. *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001 (4th Cir. 1997); *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991); *Avis Rent-A-Car System*, 280 NLRB 580 (1986);

(5) that AFSCME failed to carry its burden to provide specific evidence to prove the allegations in Objection Number 8, namely, that Salisbury University made threats of penalties that substantially interfered with the laboratory conditions of a free and fair

election by introducing, releasing, orienting, or implementing its 2002 Progressive Discipline and Attendance Policy. *See Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (7th Cir. 1978); *Garvey Marine*, 328 NLRB 991 (1999); *Airstream Inc.*, 304 NLRB 151 (1991);

(6) that AFSCME failed to carry its burden of proof to establish the validity of Objections 2, 4, 5, and 8 and that Salisbury University's and MCEA's Motion for Judgment should be granted; or that, in the alternative, that, considering all the evidence, AFSCME failed to carry its burden of proof;

(7) that Objections 2, 4, 5, and 8 are without merit; and

(8) that the results of the February 6, 2002 run-off election should be certified.

April 25, 2003
Date

Georgia Brady
Administrative Law Judge

REVIEW RIGHTS

Any party aggrieved by the proposed decision may file written exceptions thereto and request an opportunity to present oral argument. Such exceptions and any request for argument must be made within twenty (20) days from the date of receipt of the proposed decision. A response to the exceptions may be filed within fifteen (15) days from the filing of the exceptions. The written exceptions must contain the legal and factual basis for the exceptions or response, and be accompanied by copies of any portions of the record referred to in the exceptions. COMAR 14.30.11.23. The written exceptions and request for argument, if any, should be directed to Karl K. Pence, Executive Director, Maryland State Higher Education Labor Relations Board, 839 Bestgate Road, Suite 400, Annapolis, MD 21401. The Office of Administrative Hearings is not a party to any exceptions or appeal process.

APPENDIX A

01-15

OBJECTION No. 1

Recommended dismissal in Decision, dated December 1, 2002.

OBJECTION NO. 2

Salisbury University, through its agents, representatives and employees, engaged in unfair labor practices directed at Donald Pryor, Jr., an AFSCME supporter at Salisbury University, which substantially interfered with a free and fair election; those unfair labor practices include, inter alia, a three-day suspension of Pryor issued on January 25, 2002 of an incident on January 22, 2002.

OBJECTION NO. 3

Withdrawn.

OBJECTION NO. 4

Salisbury University, through its agents, representatives and employees, engaged in surveillance of AFSCME organizers and University employees, which substantially interfered with a free and fair election; which activities included surveillance and/or interrogation of employees who were widely known to support AFSCME, including (i) surveillance of AFSCME supporters on and between January 24, 2002 and January 27, 2002 by Cheryl Twilley, Physical Plant confidential secretary; which surveillance, it is believed, Twilley reported to Supervisor Michael Taylor; (ii) surveillance of James Brittingham and/or Donald Pryor, Jr. by Michael Taylor, Assistant Director of Physical Plant.

OBJECTION NO. 5

Salisbury University, through its agents, representatives, and employees, intimidated AFSCME organizers and supporters, which substantially interfered with a free and fair election; which activities included discipline during the "critical period" before the runoff election of Donald Ray Pryor, Jr. and James Brittingham because of their statements and conduct in support of AFSCME; and statements made by supervisor Michael Taylor to James Brittingham on or about January 24, 2002 that Brittingham "should be more careful of the people [he] hangs around with on campus. . ."

OBJECTION NO. 6

Withdrawn.

OBJECTION NO. 7

Withdrawn.

OBJECTION NO. 8

Salisbury University, through its agents, representatives, and employees, made additional threats of penalties five days before the re-run election, which action substantially interfered with a free and fair election; by (i) bringing forth before the campus Staff Senate a brand-new "Progressive Discipline and Attendance Policy" in January 2002; (ii) by releasing generally to the work force on or just after February 1, 2002, the "Progressive Discipline and Attendance Policy;" (iii) by beginning on-campus orientation sessions about the "Progressive Discipline and Attendance Policy" for employees eligible to vote in the runoff election in the days immediately prior to the runoff election; (iv) by implementation of the "Progressive Discipline and Attendance Policy" for employees eligible to vote in the runoff election in the days immediately prior to the runoff election.

OBJECTION NO. 9

Withdrawn.

OBJECTION NO. 10

Withdrawn.