

**PROFESSIONAL STAFF CONGRESS B CUNY  
ELECTIONS COMMITTEE**

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**DECISION OF THE PSC ELECTIONS COMMITTEE  
ON THE CHALLENGE FILED BY THE CUNY ALLIANCE  
AND  
CERTIFICATION OF ELECTION**

**Introduction**

On May 2, 2006 the CUNY Alliance, by its attorney, Jane Lauer Barker, filed a challenge (Exhibit 1) to the PSC CUNY Election, which was counted on April 25, 2006. Under Section V(I) of the Election Rules, the Elections Committee is required to rule on the challenge before certifying the election results to the Delegate Assembly. The Committee met on May 8, 2006, with representatives and attorneys from the CUNY Alliance and from the New Caucus, and asked both slates to be present for a hearing about the challenge.

A hearing was held at the PSC on May 11, 2006. Presentations were made by the CUNY Alliance and the New Caucus, each of which was represented by an attorney. At the conclusion of the hearing, the Committee made several requests of each side for additional information in support of their positions. At the May 11 hearing, the Committee also heard from Jeff Zaino, who ran the PSC balloting on behalf of the American Arbitration Association (AAA), and from Diana Rosato, of the PSC Staff, who was responsible for compiling the eligible voter list which was transmitted to the AAA.

The Elections Committee was assisted in its work by Arthur Z. Schwartz, counsel to the PSC, by Nathaniel Charny, PSC's Director of Legal Affairs, and Barbara Gabriel, PSC's Coordinator of Office Services. Mr. Charny and Ms. Gabriel serve as staff to the Election Committee.

**Procedural Issues**

Although a number of procedural issues were raised by the CUNY Alliance during the course of the two sessions held by the committee with the two slates, only two need be discussed here:

1. The CUNY Alliance asked for a copy of each scanned ballot, which was stored by AAA on a disk. Since there was no allegation that the ballots were miscounted, the Committee felt that it was unnecessary to produce these materials.

2. At the conclusion of the May 11 hearing, after all of the arguments and evidence had been presented, the attorney for the CUNY Alliance, for the first time, asked that all

Elections Committee members who had also been candidates for office recuse themselves. Bill Friedheim, Samuel E. Farrell, II, and Robert Wurman ran for Convention Delegate on the New Caucus Slate. Because their elections could be impacted by the decision of the Elections Committee, all three recused themselves from the Committee ' s vote on the challenge. In addition, Jacob Judd, who identified himself as the author of an article in the Retiree Chapter newsletter which was the subject of one part of the challenge, did not vote on that part of the challenge, and Paul Sheridan, who authored a pro-New Caucus statement on the CLT listserv, which was the subject of another part of the challenge, refrained from voting on the CLT listserv issue.

## **The Challenge**

The CUNY Alliance ' s challenge had numerous parts. The committee decided to issue rulings on each portion of the challenge, and then take one final vote on the challenge as a whole if any violations were found. We review below each subject of the challenge. The Committee applied the following to the facts in order to arrive at a decision: (a) the Election Rules, (b) the PSC Constitution, (c) the AFT Constitution, and, since the AFT Constitution requires that all elections be run in a manner consistent with the Labor Management Reporting and Disclosure Act (the LMRDA)(see Article IV Section 5), the Committee considered the LMRDA and the regulations promulgated by the U.S. Labor Department, which is responsible for enforcing the LMRDA ' s union election provisions.

### **A. Use of PSC and/or CUNY assets**

In general, Section 401(g) of the LMRDA prohibits a union or an employer from using "funds" to "promote" the candidacy of any candidate. This applies to direct as well as indirect expenditures. With respect to union funds, federal regulations prohibit any showing of preference by union-funded publications. Union publications, and union resources, may be used if they are made available to all candidates on an equal basis. Under Section 401(c), unions are required to "refrain from discrimination" with respect to the use of membership lists. A violation must affect the outcome of the election in order for it to require a new election.

**1. Retiree Chapter Newsletter.** On April 13, 2006 the Retiree Chapter mailed a newsletter (Exhibit 1(a)) which encouraged retirees to vote for New Caucus candidates Jim Perlstein and Peter Jonas. This issue was raised to the Elections Committee prior to the vote count. The publication was a violation of Section 401(g). The Elections Committee had AAA segregate every returned retiree ballot whose envelope had a postmark later than April 14, or which did not have a postmark. None of those votes were included in the initial tabulation done by AAA for any position. Those votes were tabulated separately. Only after it was determined that the weighted vote did not affect the outcome of any races were these votes included in the final numbers reported by AAA. Although the Alliance asserted that there was "anecdotal evidence" that some PSC retirees live with active members, thereby tainting a broader pool of votes, it failed to produce any evidence to support this assertion. Nor did the Alliance explain

how the newsletter promoted the candidacies of anyone other than Perlstein and Jonas. The Committee voted 4 to 0, with 4 committee members recusing themselves, to deny this aspect of the challenge.

**2. Welfare Fund Letter.** On or about February 23, Larry Morgan, Executive Director of the PSC-CUNY Welfare Fund, sent a letter (Exhibit 1(b)) to most of the PSC membership responding to a CUNY Alliance website "missive" titled, "Details on the Welfare Fund Coverup" (Exhibit 13). The Welfare Fund is an employer. The Morgan letter does not discuss the election at all. It does state that "the Fund office has worked closely with the PSC leadership to make our financial viability and restoration of benefits a cornerstone of negotiations," and discusses a resolution proposed by Steve London (who is named). The letter does not overtly "promote" anyone's candidacy. It does respond to an attack disseminated among Fund participants. There is a lot of relevant law covering similar publications within union newsletters, whose content is frequently scrutinized under § 401(g). As a rule, unions are allowed to carry on business even in the midst of a heated election. This can involve reporting to members on issues of general concern. To ascertain whether a publication constitutes violation of the statute, the timing, tone and content of the publication must be evaluated. The general circumstances surrounding the publication may also be considered. Here, the Welfare Fund was being accused of fraud, and internal fund documents were being circulated with an inaccurate explanation. While the tone of the letter was emphatic, it said nothing about the election. Its discussion of what occurred was factual. Furthermore, it was published more than two months before the election. The Committee voted 5 to 0, with three recusals, to deny this prong of the challenge.

**3. Howard Prince Letter.** On some date prior to the election, Howard Prince, a retiree and part-time BMCC faculty member who works as a PSC Grievance Officer, circulated a letter, according to the Alliance, via campus mail, endorsing the New Caucus slate of candidates. (See Exhibit 4.) The letter was on BMCC Social Science Department letterhead and had the BMCC logo on it. The BMCC Social Science letterhead was made available electronically to all BMCC Social Science Department faculty and is widely utilized. The Chair of the BMCC Social Science Department, Ronald Doviak, responding to an inquiry from the Committee, stated that the use of the letterhead is considered appropriate "whenever a faculty member is writing on matters related to the college or university" (See Exhibit 14.)

There are several elements to the Committee's ruling on this aspect of the challenge:

*CUNY is not an employer under the LMRDA.* Section 2 of the LMRDA excludes from its definition of "employer" any subdivision of a state or municipality. Technically, a contribution by CUNY would not violate Section 401(g).

*The use of campus mail.* The Alliance alleges that the use of campus mail was an unlawful use of an employer resource. However, historically, candidates have had the option of ordering mailing labels of faculty member's campus addresses, and have utilized campus mail to campaign. The Alliance provided no evidence that campus mail was used.

*The use of the letterhead and logo.* The Committee reviewed case law involving use of union logos. The use of a union logo, by itself, on campaign literature need not violate the LMRDA. A union logo with no market value, to which access was unlimited, is not included within the definition of "money" under Section 401(g). In *Donovan v. Teamsters Local 480*, 1985 WL25637\*4, the Court stated:

"The Court fails to see how an insignia not subject to copyright, and which was regularly used by competing candidates in Union elections can fairly be termed as synonymous with 'moneys.' Even under the relaxed "anything of value" test, it stretches the definition of "moneys" beyond the breaking point to include within its purview an insignia that has no market value and whose access is not limited in any way."

Additionally, the personal nature of the letter must be considered. Nothing in the Prince letter implies that BMCC as an institution was supporting the New Caucus. The Alliance showed nothing more than that Professor Prince used the logo and letterhead; in fact, the New Caucus provided a receipt, which it asserted showed that the photocopies of the letter were paid for by a candidate.

The Alliance also asserted that somehow Professor Prince's status as a part time union employee violated the LMRDA. There was no evidence presented that Professor Prince composed his letter or distributed it while working for the PSC.

The Committee voted 5 to 0, with three recusals, to deny this aspect of the challenge.

**4. Use of the PSC CLT listserv.** The Alliance alleges that the PSC CLT listserv was utilized to post a number of pro-New Caucus statements. The Committee's investigation revealed that a number of pro-Alliance statements were also posted on the listserv, and that the host (PSC Administration) did not discriminate against anyone who wanted to post a position on the listserv, prior to its being shut down by the Administration. The LMRDA rules on the use of membership lists and union publications, makes it clear that use of lists and union publications (and the listserv is either an electronic list or a form of union publication) is permissible as long as it is made available on a non-discriminatory basis. The Committee voted 4 to 0, with four recusals, to deny this aspect of the challenge.

## **B. Failure of the AAA to Comply with USDOL regulations**

This aspect of the challenge had several elements:

- The AAA did not account for all ballots printed, mailed and received.

- The AAA did not report on how many ballots were returned as undeliverable.
- The AAA did not maintain a log of requests for duplicate ballots.
- The AAA did not allow observers to be present for the eligibility check, which occurred the day before the vote count.
- The AAA reprogrammed its scanner mid-count in order to change the way it counted CUNY Alliance delegate votes.

The Committee ' s investigation showed that these allegations were without factual foundation:

- The AAA presented a printer's receipt, and presented, in its certification, a statement of the number of ballots mailed and received.
- The AAA maintained a record of how many ballots were returned as undeliverable. (That number was 94.)
- The AAA maintained a log of requests for duplicate ballots. (331 duplicates were requested.)
- The AAA advised the Alliance, at a candidates ' meeting, that the eligibility check would be done several days before the election count. The Alliance did not call until the afternoon before the election to check on the time the eligibility check would be done. By the time they called, it was completed.
- The AAA did not reprogram its scanner. A problem arose concerning the way the computer, reading the scanned images, would deal with the use of a slate box for CUNY Alliance delegate slate; that slate only had 96 candidates for 100 positions. Several voters marked the slate box and chose 4 (or fewer) additional candidates from the New Caucus slate and/or designated write-in candidates. After the count began, at the request of the CUNY Alliance, the AAA programmed the computer, which reported what the scanner read, so that these individual marks would count. The Elections Committee reversed AAA ' s decision since the ballot expressly forbid counting votes for individuals if the slate box was marked, and AAA adjusted its computer to read only 96 votes from ballots marked with the CUNY Alliance slate box.

The Committee voted 5 to 0, with three recusals, to deny this aspect of the challenge.

### **C. Failure of the PSC to Maintain Accurate Membership Records.**

The Alliance bases this claim on the fact that the list it received in January 2006 to do mailings resulted in 129 returned letters. It also complained that adjuncts on the January list were included who were not employed in the spring semester and therefore ineligible to vote.

Diana Rosato reviewed the process for compiling the final eligibility list. Generally, this involved having NYSUT, which maintained the membership list, flag the file of any member who joined PSC prior to December 5, 2005 (the cutoff date under the PSC Constitution), and then adjust that list to reflect changes in that individual 's employment and dues paying status prior to April 3, 2006, the day the eligibility list was created. For example, the December list had 827 part-timers who were not rehired for the spring semester; they had to be deleted from the list. Further research by Diana resulted in the addition of 54 individuals to the eligibility list who CUNY had listed as agency fee payers, but who were, in fact, dues paying members, and the addition of 136 names of persons who were PSC members prior to December 5, 2005, who had become employed during LaGuardia 's and Kingsborough 's third trimester. Ms. Rosato made many other corrections, updates and changes to the membership file prior to April 3 in order to produce the most accurate list possible.

On the day of the count, 24 voters were checked for eligibility at the request of the CUNY Alliance. All were eligible.

As for bad addresses, Diana explained that changes come in, and are processed, on a daily basis.

The Alliance, which was allowed to review the final eligibility list, was asked to produce the names of ineligible persons who voted. It supplied the union with a list of approximately 295 people whose names were on the final list, but whose names were not on the list purchased by the Alliance in January. Eligible voters were added to the list for various reasons between January and April 3, as Diana Rosato worked to develop the most accurate list possible. The 24 people checked by the Alliance on the day of the count were in this group and each checked out as a member. Ms. Rosato spot-checked an additional ten names and found that each was an eligible voter whose name had been left off the January list for one reason or another related to CUNY 's payroll practices.

The Committee vote 5 to 0, with three recusals, to deny this aspect of the challenge.

## **Conclusion**

The Committee only found one violation of the rules, namely the use of the Retiree newsletter to promote the campaign of two candidates. The Committee concluded that the remedy put into place on the day of the count cured the violation.

Since the Committee found no other violations of the rules governing the election, it was not necessary to determine whether any particular violation may have affected the outcome of the vote.

**Certification**

Since the Committee found no merit to the challenge, it voted 5 to 0, with three recusals, to certify the results of the election as reported by the American Arbitration Association on April 27, 2006.

Dated: May 15, 2006

Paul Sheridan  
Chairman