

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE
UNDER SECTION 55 OF THE TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 1992**

IN THE MATTER OF A COMPLAINT

AGAINST THE UNION OF SHOP, DISTRIBUTIVE AND ALLIED WORKERS

DATE OF DECISION

13 JANUARY 1994

DECISION

Under section 55 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) I am empowered to make, or refuse to make, a declaration on the application of a member who claims that their trade union has failed to comply with any of the requirements contained in Part I of Chapter IV of the Act concerning the need for elections to certain positions within the union.

The application

1. On 2 August 1993 I received two formal complaints (subsequently clarified in correspondence) from a member of the Union of Shop, Distributive and Allied Workers (the union) alleging that in the 1993 election for the post of the union's General Secretary:

- (1) the union had interfered in the procedures for the election contrary to statute and the union's own rules; and
- (2) the election address for the sitting candidate had not been written in his own words as is required by statute

2. I will deal with these two complaints separately as follows:

Application 1: The right to vote without interference

Application 2: Election address.

Decisions

3. After considering all the documentation in regard to Application 1, I decline to make a declaration.

Application 2 was a more complex issue and I have considered all the documentation and listened to representations made by both parties at a hearing on 25 November 1993. I have decided not to make a declaration on Application 2 either.

4. In regard to aspects of the complaints relating solely to alleged breaches of the union's own rules, I am not empowered to decide on these matters except where the union rules have a bearing on the statutory requirements within my jurisdiction. I have therefore not made comment on those aspects of the complaints outside of my jurisdiction.

APPLICATION 1: THE RIGHT TO VOTE WITHOUT INTERFERENCE

Background

1.1 The process for electing the General Secretary of the union started with nominations to be received by 28 June 1993 and was completed on 9 August 1993 when the sitting General Secretary was elected. The General Secretary (Mr Garfield Davies) had been opposed by one other candidate (Mr Terry Savage); it was about the treatment of this other candidate that the complaint had been brought. The complainant emphasised that he had not met the opposing candidate and had brought the complaint personally and as a matter of principle.

The complaint

1.2 The complainant identified a number of instances of alleged interference by the union in the election process for the 1993 General Secretary ballot:

- (i) the process of obtaining branch nominations and the refusal of the Executive Committee to allow the opposing candidate equal opportunity to circulate branches for nominations;
- (ii) the practice of including the number of nominating branches against each candidate on the voting paper (contrary to statute and the union's own rules);
- (iii) the "smearing" of one candidate by the other;
- (iv) the endorsement of one candidate by 10 members of the union's Executive Council which was designed to unfairly influence the result of the election.

The complainant alleged that these instances of interference were contrary to legislation, against the union's own rules and were unfair.

1.3 The complainant took particular exception to the procedure whereby the details of the sitting General Secretary were circulated to branches by the union with a recommendation that he should be nominated but the other candidate was refused this facility by the Executive Council. The other candidate was also refused access to the addresses of union branches in order that he could, if necessary, circulate details to them at his own expense.

1.4 This resulted, it was alleged, in the opposing candidate obtaining only 49 nominations whilst the sitting General Secretary obtained 223; this may have influenced the way members would have voted it was alleged.

1.5 The complainant also pointed out that the election address of the sitting General Secretary candidate was signed by 10 Executive Council members and that it contained a personal smear on the opposing candidate:

"(Garfield [Davies]) has always opposed the activities of political extremists and, sadly, but true, that's what this election is about. He is facing a challenge from a candidate backed by the extreme Left, which embraces supporters of the "Militant Tendency" and other extremist Left Wing political parties."

The requirements of the legislation

1.6 The relevant law on the issue of voting is contained in section 51 of the Act. In particular section 51(3)(a) is pertinent and reads as follows:

"(3) Every person who is entitled to vote at the election must -

- (a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees..."

1.7 Another section of the Act also needs to be considered. Section 48(6) reads:

"The trade union shall, so far as reasonably practicable, secure the same facilities and restrictions with respect to the preparation, submission, length or modification of an election address, and with respect to the incorporation of photographs or other matters not in words, are provided equally to each candidate."

The union's arguments

1.8 The union maintained that the election was in conformity with the Trade Union and Labour Relations (Consolidation) Act 1992. The ballot was conducted by the Electoral Reform Society who acted as independent scrutineers and agents of the union.

1.9 Section 52 requires that the scrutineer shall prepare a report after an election that he is satisfied, inter alia, "that there are no reasonable grounds for believing that there was any contravention of a requirement imposed by or under any enactment in relation to the election" and... "he was able to carry out his functions without such interference". The scrutineer wrote in his report that "we are satisfied as to each of the matters specified in subsection 52(2) with regard to the election".

1.10 On the facts of the matter the union explained that the Executive had issued a circular on 24 May 1993 inviting branches to make nominations and enclosing the appropriate nomination form. That circular also endorsed an Executive Council Statement that the election was not required by union rules but rather by national legislation and recommended that the incumbent General Secretary should be nominated.

1.11 That circular went to branch officials and did not refer to voting. It set out a reasoned recommendation from the Executive Council as to nominations. It did not instruct branches to nominate any particular candidate nor did it apply any pressure on branches which would have the effect of preventing them freely exercising their right to nominate.

1.12 The union further maintained that during the campaign for nomination and election, no member was permitted to use, nor granted access to the Union's postal services, membership records, branch records or other facilities for the purposes of promoting

themselves as a candidate for nomination and/or election. This restriction was applied equally to the incumbent General Secretary as to any other candidate.

1.13 No candidate was prevented from circulating material to the Union branches or members but no candidate was given Union facilities for this purpose.

1.14 On matters of law and of equality of treatment the union argued that section 48(6) related solely to the issue of the distribution of election addresses and its requirements did not extend to material distributed for the purpose of attracting nominations. In any case they contended they had afforded the same facilities to both candidates.

1.15 On the question of interference the union referred to "Harvey on Industrial Relations and Employment Law", quoting a passage now to be found at Part M 1058:

"So a Union does not interfere with a member's right to vote by indicating on the ballot paper, or on the accompanying lists of candidates, the identity of the persons who have nominated each candidate. The voter may well be able to deduce from that information which candidates enjoy "establishment" support or which represent various sectarian interests, and, to that extent, the Union will influence his vote; but that is a long way short of improper interference or constraint"

1.16 The union relied on decisions of my predecessors as Certification Officer in Paul v NALGO [1987] IRLR 43 (D/14/86) and USDAW (D/3/89) in regard to its case. The relevant passage from Paul v NALGO reads:

"The purpose of section 2(6)(a) is to ensure that members are not subject to any pressure which would have the effect of preventing them from freely exercising their right to vote...(the requirement) to allow a person to vote without interference or constraint is intended to exclude such conduct as would intimidate or put a member in fear of voting or amount to physical interference".

(The section 2(6)(a) referred to is that of the Trade Union Act 1984, the terms of which have been consolidated into the 1992 Act in section 51(3)(a)).

Reasons for refusing to make a Declaration

1.17 I accept the union's argument that the requirement for even handedness in section 48(6) relates to election addresses. The words "with respect to the preparation ... of an election address" clearly so restrict it.

1.18 That essentially leaves the question of what constitutes the "interference" forbidden by section 51(3)(a). My predecessor's view of this was put clearly in his decision Paul v NALGO the relevant part of which is quoted in paragraph 1.16 above.

1.19 I have considered this view afresh in the light of this case. I am confirmed in my endorsement of it by the fact that the section appeared in the Act under the heading of "voting". As such it is clearly intended to ensure that each member can cast his or her vote free from any interference in the process of voting. The section does not relate to the many other processes in an election which in general are dealt with separately in other sections of Chapter IV of the Act.

1.20 How do the four allegations of interference stand up to the test applied in Paul v NALGO. Just listing them is sufficient to demonstrate that none of them meet it.

1.21 None of:

- (a) not allowing equal access to all candidates to secure branch nominations; or
- (b) including on the voting paper the number of nominating branches against each candidate; or
- (c) the "smearing" of one candidate by another; or
- (d) the endorsement of a candidate by members of the union's executive (collectively or individually)

can be construed as intimidating or putting members in fear of voting or amount to physical interference.

Decision

1.22 For the reasons set out above I decline to make the declaration that the union in taking the actions complained of as set out in paragraphs 1.2 to 1.5 above is in breach of section 51(3)(a) or 48(6) of the Act.

APPLICATION 2: ELECTION ADDRESS

Background

2.1 There were two candidates for the 1993 election of the union's General Secretary post. The election had been called because of the requirement under section 46 of the Act that General Secretaries should not continue in post without being re-elected every five years. Were it not for this statutory requirement, under the union's rules the General Secretary could "remain in office during the will and pleasure of the members" - effectively a job for life. In the previous election the sitting General Secretary had been elected uncontested.

The complaint

2.2 The complaint concerns the election address of the sitting General Secretary which read:

"CANDIDATES' ELECTION ADDRESSES

GARFIELD DAVIES - Nominated by West Midlands Tailoring Branch and 222 others

Fellow Member

The majority of the Union's National Executive Council urge you to put USDAW members first and vote to re-elect Garfield Davies General Secretary.

He has received more Branch nominations than any other candidate ever has, which confirms the support he has from Branch Officers, Shop Stewards and active members who know him.

For seven and a half years he has led the Union through difficult times. Nonetheless, under his stewardship structures enhancing the participation and advancement of women, ethnic minorities, youth and retired members, have been introduced. Conference delegations have become more representative and USDAW's standing increased.

But, above all, Garfield has put USDAW members first. With the introduction of computerisation a more effective service to members has been achieved and this efficiency has resulted in Union contributions being kept among the lowest of any trade union.

He has spearheaded campaigns against low pay, Poll Tax, discrimination against part-time workers, abolition of Wages Councils and Sunday trading without worker protection.

Throughout his 24 years as an Official, Garfield has dealt with employers in nearly all the industries in which our members work, skilfully negotiating to improve the wages and conditions and security of employment of those we represent. His experience and record of service are second to none:

*Branch Secretary	-	5 years	*Shop Steward	-	10 years
*Area Organiser	-	4 years	*Deputy Divisional Officer	-	5 years
*National Officer	-	6 years	*General Secretary	-	7½ years

Married for 33 years, Garfield has four daughters and four grandchildren. For seven and a half years he was a Magistrate, has had a life-long passion for sport, is well respected and is a credit to USDAW.

He has been an active member of the Labour Party for 32 years and although a tough industrial negotiator, Garfield, like us and the vast majority of our membership, is politically moderate.

Garfield has always opposed the activities of political extremists and sadly, but true, that's what this election is about. He is facing a challenge from a candidate backed by the extreme Left, which embraces supporters of the 'Militant Tendency' and other extremist Left Wing, political parties.

THIS ELECTION IS CRUCIAL - SO VOTE

'Put USDAW members first' and re-elect GARFIELD DAVIES General Secretary

Yours sincerely

EXECUTIVE COUNCIL MEMBERS,

Des Andrews, Chris Richardson	-	South Wales and Western
Chris Corish, Renee Dooley	-	North Western
Dorothy Watkinson, Ian Bradley	-	Manchester
Joe Allen, Maureen Blake	-	Midlands
Pat Hunter, Jimmy Burke	-	Scotland"

2.3 It was alleged that this election address had not been written "in his own words" as required by section 48(1)(a) of the Act. The complainant maintained that the election address was actually a statement of ten named Executive Council members rather than the election address of the candidate. In support of this contention he pointed out that the election address was written in the third person, it was on its face a statement written by ten Executive Committee members rather than the candidate and was not signed with the candidate's name or given any indication that it had been adopted by the candidate. Complaint was also made that the election address "smeared" the other candidate and interfered in the election process by unfairly influencing members. These latter complaints are dealt with separately in D/1/94 above. This decision is therefore confined to the alleged breach of section 48.

2.4 The complainant alleged that it was because the existing General Secretary's job was being contested that the EC members had given this support to the favoured sitting candidate. They had not offered equivalent support to the other candidate which was unfair.

The requirements of the legislation

2.5 The relevant law relating to election addresses is contained in section 48 of the Act. This is reproduced in full below:

"Election addresses.

48.-(1) The trade union shall -

- (a) provide every candidate with an opportunity of preparing an election address in his own words and of submitting it to the union to be distributed to the persons accorded entitlement to vote in the election; and
- (b) secure that, so far as reasonably practicable, copies of every election address submitted to it in time are distributed to each of those persons by post with the voting papers for the election.

(2) The trade union may determine the time by which an election address must be submitted to it for distribution; but the time so determined must not be earlier than the latest time at which a person may become a candidate in the election.

(3) The trade union may provide that election addresses submitted to it for distribution -

- (a) must not exceed such length, not being less than one hundred words, as may be determined by the union, and
- (b) may, as regards photographs and other matter not in words, incorporate only such matter as the union may determine.

(4) The trade union shall secure that no modification of an election address submitted to it is made by any person in any copy of the address to be distributed except -

- (a) at the request or with the consent of the candidate, or
- (b) where the modification is necessarily incidental to the method adopted for producing that copy.

(5) The trade union shall secure that the same method of producing copies is applied in the same way to every election address submitted and, so far as reasonably practicable, that no such facility or information as would enable a candidate to gain any benefit from -

- (a) the method by which copies of the election addresses are produced, or
- (b) the modifications which are necessarily incidental to that method,

is provided to any candidate without being provided equally to all the others.

(6) The trade union shall, so far as reasonably practicable, secure that the same facilities and restrictions with respect to the preparation, submission, length or modification of an election address, and with respect to the incorporation of photographs or other matter not in words, are provided or applied equally to each of the candidates.

(7) The arrangements made by the trade union for the production of the copies to be so distributed must be such as to secure that none of the candidates is required to bear any of the expense of producing the copies.

(8) No-one other than the candidate himself shall incur any civil or criminal liability in respect of the publication of a candidate's election address or of any copy required to be made for the purposes of this section."

The union's arguments

2.6 The union maintained that it had complied with the requirements of section 48 of the Act. In compliance with these provisions it had provided both candidates with the opportunity of preparing an election address for distribution. In support it produced letters dated 21 June

1993 giving both that opportunity. It could not unilaterally change an election address as section 48(4) prevented a union from interfering in the chosen words of a candidate. The election addresses circulated to members in this election were as submitted by the candidates themselves in accordance with the statute. Furthermore the election addresses had been reproduced at union expense and had been circulated with the voting paper to members under the auspices of the independent scrutineer also in accordance with the 1992 Act.

2.7 It was further argued that there was nothing in the statute which precluded the endorsement or support by union officers of a particular candidate in an election address.

2.8 The union stated that the General Secretary's election address had been personally written by him ("in his own words") and the text had been informally cleared individually with the ten Executive Committee members concerned before publication.

2.9 The union's opinion in any case was that the interpretation of "in his own words" by the complainant was too narrow. The act of submitting the election address made it the personal address of a candidate. They knew of many examples of election addresses that were not written in the first person and not signed. Moreover it would be legitimate for a candidate to choose to adopt the words of others for his election.

Reasons for refusing to make a Declaration

2.10 This case raises quite complex issues of the interpretation of the relevant legislation. It also involves territory that, in so far as I am aware, has not been argued over before. Before going on to consider these issues it is important to try to clarify the details of what actually happened in this case and in particular of how Mr Davies' election address came to be written and submitted to the union's agent - Electoral Reform Balloting Services.

The Facts

2.11 Given the text of Mr Davies' election address (reproduced in para 2.2) I can fully understand why the complainant questioned whether it was in Mr Davies' "own words". The address is not written as if from Mr Davies and nowhere does it indicate that it has been adopted or endorsed by the candidate. There are ten signatures after the words "yours

sincerely" none of them being that of Mr Davies. There is nothing on the face of the address to suggest it is in Mr Davies' own words, and much to suggest it is not.

2.12 Initially the union appeared to argue that the address did not have to be written word for word by the candidate and that there was nothing to preclude the voluntary adoption by a candidate of the words of others. Subsequently they argued, and Mr Davies stated in his evidence, that every word of the address had been written by Mr Davies who read it over the telephone to each of the ten signatories who agreed it and then Mr Davies sent it to Electoral Reform Balloting Services as directed in the letter of 21 June signed by Mr Walker (the union's Administration Officer).

2.13 Mr Davies' explanation of the, perhaps unusual, form of his election address was that he wished, as the sitting General Secretary, to demonstrably stand apart from the election. This election was not required under union rules, which effectively gave him a 'job for life' but was necessitated by legislation to which the union was opposed. He wished to stay within the law, retain his job but indicate a certain disdain for the whole, as the union saw it, unnecessary process. That was why he wrote his address as if it was a letter from members of the union's executive. He added, and supported with examples, that he issued other election material in the third person for this election and that it was quite common for election addresses to be written in this form. He volunteered however that he had put out one leaflet over his own name in the election in question.

2.14 Thus we have Mr Davies' unequivocal evidence that the election address complained of was literally in his own words. This evidence, which I cannot ignore, is however not backed by any documentary evidence (I specifically asked the union for such evidence some four weeks before the formal hearing). It is also partially contradicted by the election material issued over Mr Davies own name. In the circumstances and on balance I am not inclined to make my decision on the basis that the text was literally in Mr Davies' own words. I leave that as an open question; no more, no less.

The law

2.15 It seems to me that there can be varying interpretations of what the law requires in relation to the production and distribution of election addresses. It is common to all

interpretations that every candidate must be given an opportunity to produce an election address in his own words. It is also common ground in this case that such an opportunity was given to both candidates.

2.16 What though is an election address and what do the words "in his own words" mean? A candidate's election address in my opinion has the following minimum characteristics;

- (a) it is an address to the electors; and
- (b) the wording of the address is that chosen by the candidate.

2.17 Defining an election address in that way takes us only so far. I have also to decide whether the further requirement is imposed that the words used have literally to be those of the candidate. Do the words a candidate chooses to use in his election address have to be, and appear to be, words of which he is personally the author? If such a view is taken where is the line to be drawn? Can a candidate include a text "ghosted" for him or her by endorsing it? If so what constitutes endorsing it; would the mere fact of submitting it to the union be enough or would the candidate be required to sign it?

2.18 These are not easy matters. In forming my view I have taken note of the provisions of section 48(4), which prevent the union from modifying anything in the election address, except in certain specified circumstances without the consent of the candidate or on his request, and section 48(8), which renders no person other than the candidate responsible for any civil or criminal liability in respect of publication of the election address. These provisions steer me to the view that whatever the form of the address the candidate, and the candidate alone is responsible for it.

2.19 It is clear to me that the purpose of the provision is to ensure that the candidate, and no other person, chooses the words which are used in an election address and that it is this, and no more, that is required by "in his own words". I do not find an intention to prevent the candidate choosing someone else's words written on his behalf or as the candidate did in this case, choosing to have published a letter written (on its face) by other persons endorsing his candidature.

Decision

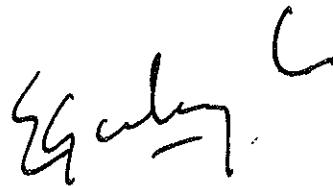
2.20 Against this background I find that the union was required to give each candidate an opportunity to provide an election address in his own words. This they did. I also find that the union was permitted to circulate the address which Mr Davies submitted.

2.21 For the reasons given I decline to make the declaration that, in the matter of the complaint as set out in paras 2.2 to 2.4 the union is in breach of section 48 of the Act.

Observations

3.1 Although I have declined to make a declaration in this case I can fully understand why the complainant brought the case. He clearly felt, and said so on numerous occasions, that the Executive's explicit support for one candidate was unfair. Unfortunately from his point of view, however 'unfair' a member or candidate might feel it to be, the legislation does not prohibit a union's executive seeking to persuade members to nominate and vote for one candidate rather than another. The law does provide that the process of preparing and distributing election addresses, of distributing voting papers, of voting and of counting votes shall be done in an essentially even handed way but it does not prohibit the support of the 'establishment' candidate.

In the circumstances it is not for me to interpret the technical requirements of the election and voting process in a way that seeks to impart a degree of 'fairness' not inherent in the legislative provisions.

A handwritten signature in black ink, appearing to read 'E G Whybrow', with a large, stylized flourish at the end.

E G WHYBREW

13 January 1994