

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the matter of:)
)
ST. CATHERINE HEALTHCARE AND)
REHABILITATION CENTER, LLC)
)
Employer,)
)
and)
)
DISTRICT 1199NM, NATIONAL UNION)
OF HOSPITAL AND HEALTHCARE)
EMPLOYEES, AFSCME, AFL-CIO)
)
Petitioner.)
)

Case No. 28-RC-6661

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S SUPPLEMENTAL REPORT

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (“Board”), St. Catherine Healthcare and Rehabilitation Center, LLC (“St. Catherine” or “Employer”), by and through its undersigned counsel, hereby files Exceptions to the Administrative Law Judge’s Supplemental Report (“Supplemental Report”) issued on February 24, 2010, as follows:

1. To the conclusion by the Administrative Law Judge (“ALJ”) that the “factual clarification does not alter [his] conclusions concerning the Employer’s objections, because [he] assessed the objections based on these factual findings in [his] original Report.” (SR.1.)¹
2. To the ALJ’s recommendation that Respondent’s Objection Nos. 5 and 9 be dismissed and a rerun election not be conducted. (SR. 1.)
3. To the ALJ’s recommendation that District 1199NM, National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO (“Union”) be certified as the bargaining unit’s collective-bargaining representative . (SR. 1.)

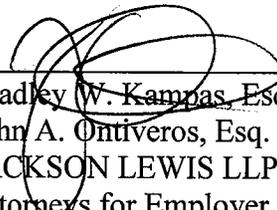
¹“(SR. __)” references the Supplemental Report by page.

Accordingly, for the foregoing reasons, and the reasons set forth in the Employer's Brief in Support of Exceptions to the Supplemental Report, the Employer respectfully requests its Exceptions be sustained.

Respectfully submitted this 10th day of March, 2010.

JACKSON LEWIS LLP

BY: _____



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EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL REPORT

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I. INTRODUCTION

St. Catherine Healthcare and Rehabilitation Center, LLC (“St. Catherine” or “Employer”) submits this Brief in Support of its Exceptions to the Administrative Law Judge’s Supplemental Report (“Supplemental Report”).

Administrative Law Judge William G. Kocol (“ALJ”) issued his original Report on Challenged Ballot and Objections (“Report”) on September 18, 2009.¹ In the Report, the ALJ recommended the Challenged Ballot be counted as a “YES” vote, the Employer’s and Union’s Objections be dismissed, and District 1199NM National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO’s (“Union” or “Petitioner”) be certified as the collective-bargaining representative of the bargaining unit employees.

On October 13, the Employer filed Exceptions to the ALJ’s Report on Challenged Ballot and Objections (“Exceptions”). The Employer excepted, among other things, to the ALJ’s recommendations that the Challenged Ballot be counted as a “YES” vote, the Employer’s Objections 5, 7, 9 and 10 be dismissed, and that the Union be certified as the bargaining unit’s collective bargaining representative.

On February 1, 2010, the National Labor Relations Board (“NLRB” or “Board”) issued a Decision and Order Remanding. (SR. 1.)² More specifically, the NLRB upheld the ALJ’s recommendation that the challenged ballot should be counted as a vote for the Petitioner and Employer Objections 7 and 10, alleging misconduct by the Regional Director, be overruled. However, the NLRB remanded Employer Objections 5³ and 9⁴ to the ALJ. (SR. 1.) The Board

¹ All dates hereafter occurred in 2009 unless otherwise stated.

² “(SR. __)” references the Supplemental Report by page, “(R. __)” references the Report by page and line number, and “(Tr. __)” references cites to the official hearing transcript page.

³ Employer Objection 5 states: The Board Agent interfered with the fair operation of the election process and engaged in conduct affecting the result of the election by failing to properly follow established Board procedure for

specifically requested the ALJ make a credibility resolution regarding the Board Agent's solicitation of the Union's challenge to the voided ballot. (SR. 1.)

On February 24, 2010, the ALJ issued his Supplemental Report. (SR. 1.) The ALJ determined the Board Agent voided the aforementioned ballot and stated, "[A]ny party has a right to challenge [my] determination that the ballot was void." (SR. 1.) The ALJ then found the Board Agent stated to the Union representative, "[I] assume[] that the Petitioner [is] going to challenge the ballot that [I] ha[ve] voided." (SR. 1.) Nevertheless, the ALJ recommended Employer Objections 5 and 9 be dismissed based on his findings in his Report. (R. 1.)

The Employer requests the Board to reject the ALJ's recommendation in his Supplemental Report that Employer Objections 5 and 9 be dismissed and, instead, order a rerun election. The ALJ's credibility resolution further strengthens the Employer's argument the Board Agent was engaged in misconduct when he solicited the Union to challenge the voided ballot. The ALJ improperly rejected Employer Objections 5 and 9 and failed to apply the appropriate legal standard that a rerun election should be ordered when there is the *appearance* of impropriety in the processing of an election.

II. FACTUAL BACKGROUND AND ARGUMENTS IN SUPPORT OF EMPLOYER OBJECTIONS 5 AND 9

The Employer's statement of the facts and arguments in support of Employer Objections 5 and 9 are more fully described in its Brief in Support of Exceptions to the ALJ's Report on Challenged Ballot and Objections filed on October 13. However, in light of the ALJ's renewed

interpreting ballots and for improperly permitting the union to challenge the Board Agent's interpretation of the ballot, and thereafter by failing to follow the Board's procedure for handling the improperly challenged ballot.⁴ Employer Objection 9 states: By the above and other conduct described in paragraph[] [](5), the Board Agent interfered with eligible voters' exercise of their Section 7 rights under the National Labor Relations Act, and violated the Board's established procedure under the NLRB Casehandling Manual ¶¶ 11340.7-11340.9. The above conduct was sufficient to unlawfully affect the results of the election

recommendation in his Supplemental Report that Employer Objections 5 and 9 be dismissed, the relevant portions of that Brief are repeated here.

A. FACTUAL BACKGROUND

St. Catherine is a 178-bed healthcare facility located in Albuquerque, NM. (R. 2:14-16.) It provides long-term care and skilled rehabilitation services. (R. 2:14-16.) St. Catherine employs approximately 132 employees. (R. 2:15-16.)

Jaime Andujo became St. Catherine's Administrator in May 2009. (R. 2:16.) He is in charge of managing the day-to-day operations. (R. 2:16-17.)

On June 19 (the day of the election), at 6:30 a.m., Andujo met with Board Agent Johannes Lauterborn ("Board Agent" or "Lauterborn") for a pre-election conference. (Tr. 29-30.) Also present were Dionne Motal, Vice-President of Human Resources for Skilled Healthcare, and Henry Santana, Union organizer. (Tr. 30.)

The Board Agent counted the ballots after the polls closed. (R. 1.) At one point, the Board Agent held up a ballot, looked at it, and told the parties he was going to put it aside and continue counting. (Tr. 33-34, 86.) At some point during the count, Stephanie Blackburn, Administrative Assistant for Region 28 of the NLRB, entered the room. (Tr. 38-39.)

The Board Agent counted 29 YES votes and 29 NO votes. (R. 1.) He then picked up the ballot he put aside, reviewed it, consulted the NLRB Casehandling Manual several times, and declared the ballot void on the grounds he could not determine the voter's intent. (R. 2:27-28.) The Union did not challenge the Board Agent's decision at that time. (Tr. 35, 86.)

Immediately after Lauterborn announced his decision, Santana shook Andujo's hand and said, "Congratulations," signifying his acknowledgment that the Union had lost the election. (Tr. 35, 86.) Santana then shook Motal's hand and congratulated her. (Tr. 36, 87.) The Board Agent

stated the parties had a right to challenge his determination that the ballot was void. (SR. 1.) He then looked at Santana and stated that he assumed the Petitioner was going to challenge the ballot that he had voided. (SR. 1.) Santana appeared shocked. (Tr. 87.) He paused and responded, “Yes, yes, we will.” (Tr. 87.) The Board Agent then filled out the Tally of Ballots noting there was one void ballot, a majority of valid votes had not been cast for Petitioner, and the challenges were not sufficient to affect the results of the election. (R. 1.)

After completing the count, Lauterborn and the parties went to the copy room and made a copy of the ballot. (Tr. 39.)

The parties went back into the room where the election was held. (Tr. 39.) Lauterborn dismissed them and stated the election was over. (Tr. 39, 92-93.) Approximately five minutes later, Lauterborn placed the challenged ballot in a manila envelope and sealed it with tape. (R. 5:29-36.) The Employer and Union representatives were not present. (R. 5:29-36.) He was about to sign the envelope when Blackburn stopped him and said, “I believe the parties should be signing over that tape as well.” (Tr. 133.) The Board Agent agreed and went to look for them. (Tr. 110; 133.) He left the ballot with Blackburn. (Tr. 111.)

The Board Agent called the Union and asked them to return. (R. 5:30-31.) He then went to Andujo’s office and asked them to come back. (R. 5:30-31.) Motal and Santana returned to the room where the election was held and signed the folds of the manila envelope with the challenged ballot. (R. 5:30-31.) At no point did the Board Agent unseal the envelope and show the parties what was inside. (R. 5:29-36.)

Afterwards, Lauterborn went to the Albuquerque airport and checked luggage for his flight back to Phoenix. (Tr. 122-123.) Lauterborn testified he possibly placed the manila envelope with the challenged ballot in his checked luggage. (Tr. 123.) He clearly did not know

where the ballot was during the flight. (Tr. 123.) When he arrived in Phoenix, he went home with the challenged ballot. (R. 5:32-34.) He did not put it into the Regional Director's safe until the following day. (R. 5:32-34.)

B. LEGAL ARGUMENT

As the employer argued in its brief it filed on October 13, the totality of the Board Agent's conduct gave the appearance of impropriety and requires the Board order a rerun election. Indeed, the ALJ's credibility finding in his Supplemental Report buttresses the Employer's argument that a rerun election be ordered.

When determining whether to set aside an election on the basis of Board Agent conduct, "the Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election." Jakel, Inc., 293 NLRB 615, 616 (1989), citing Polymers, Inc., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2nd Cir. 1969), cert. denied 396 U.S. 1010 (1970). If an irregularity occurs, the Board will set aside the election. Polymers, 174 NLRB at 282. "The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question." New York Telephone Co., 109 NLRB 788, 790 (1954). "Where...the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining [the Board's] standards," a new election must be ordered. Id. at 790-791.

In his Report, the ALJ improperly concluded the Board Agent did not engage in misconduct because he secured the ballot "in a way to assure against tampering, mishandling, or damage." (R. 6:4-14.) The Board does not require a determinative, challenged ballot be "tampered with or mishandled" to order a re-run election. Paprikas Fono, 273 NLRB 1326, 1328

(1984). The Board in Paprikas ordered a new election stating:

Our dissenting colleague, however, like the hearing officer, apparently would require actual evidence that the challenged ballots were tampered with or mishandled before she would reach a similar result. The dissent's approach to this issue, in our view, would detract significantly from the election standards that the Board has promulgated. Our colleague fails to recognize that, if this Agency is to maintain the public's confidence in its election processes, it is imperative that the Board act dutifully to set aside elections whenever there is any *appearance* of irregularity in the handling of ballots.

Id. (Emphasis added.) See also Hook Drugs, Inc., 117 NLRB 846, 848-849 (1957) (Board upheld Regional Director's decision that election should be overturned "[n]otwithstanding the absence of any evidence of impropriety...because there existed the *possibility* of irregularity."). (Emphasis added.)

The Board looks to whether the Board Agent or Regional Director violated the NLRB's established procedures in its Casehandling Manual to determine if they have engaged in misconduct. Madera Enterprises, Inc., 309 NLRB 774, 774 (1994). The Casehandling Manual serves as "procedural and operational guidance for the Agency's staff in the handling of representation cases." Id. The NLRB gives deference to the procedures in the Casehandling Manual noting that it was created by the Board "to assure that its role in the conduct of election is not subject to question." Paprikas, 273 NLRB at 1328, citing Glacier Packing Co., 210 NLRB 571, 573 (1974).

The Board's Casehandling Manual reads, in pertinent part:

Section 11338.2(b): Who May Challenge/Board Agent

...The Board agent will not make challenges for the parties when such parties have observers present. Galli Produce Co., 269 NLRB 478 (1984)....

...

Section 11340.7: Challenge of Board Agent Interpretation

If the intent of the voter is clear, the Board Agent should not allow the ballot to be challenged. However, if a party's challenge to the interpretation of the ballot is based on good cause, the Board agent should segregate the ballot and the ballot should be listed on the tally as a challenged ballot....

...

Section 11340.9(a): Determinative Challenged and Questioned Interpretation Ballots

In the event there are determinative challenged voters...and/or questioned interpretation ballots...the following steps should be part of the tally process.

Information regarding determinative challenged voters or questioned interpretation ballots should be listed on the front of Form NLRB-5126, a large envelope designed for this purpose....The determinative challenged ballot envelopes and/or the questioned interpretation ballot envelopes should then be placed, *in the presence of the parties' representatives*, into the Form NLRB-5126 envelope(s)...After sealing the Form NLRB-5126 envelope(s), the Board agent and the parties' representatives should sign their names across the flap. The flap should then be secured with transparent tape in such a manner as to ensure against accidental opening....

...

Section 11344.1: Determinative Challenged and Questioned Interpretation Ballots

Upon the Board agent's return to the Regional, Resident, or Subregional office, the envelope(s) Form NLRB-5126 containing determinative challenged ballots and/or questioned interpretation ballots *must be stored promptly*....

...

(Emphasis added.)

The ALJ disregarded the aforementioned standard in his Report stating the "provisions of the Casehandling Manual are not binding procedural rules" and cited Correctional Health Care Solutions, 303 NLRB 835 (1991). (R. 6:9-11.) However, the Employer never argued the Casehandling Manual's rules are binding. St. Catherine instead maintained the Board Agent's repeated failure to follow the rules gave the *appearance* of impropriety. The NLRB has

repeatedly overturned elections where the Board Agent's conduct violated the Casehandling Manual and gave doubt as to the fairness and validity of the election. See Fresenius USA Mfg., Inc., 352 NLRB 679, 680 (2008); Paprikas, *supra* at 1328.

In the present matter, the Board Agent repeatedly failed to follow the Board's procedures. First, he solicited the Union's challenge to the ballot he declared void. The ALJ's conclusion in his Report the Employer is only speculating as to whether the Union intended to challenge the ballot is inconsistent with the record evidence. Immediately after Lauterborn declared the ballot void, Santana shook Andujo's and Motal's hands and congratulated them. (Tr. 35, 86.) He did not challenge the Board Agent's interpretation until Lauterborn told him that he assumed the Petitioner was going to challenge ballot he voided. (R. 1.) Santana appeared shocked. (Tr. 87.) His actions were inconsistent with someone who intended to contest the results of an election.

The Board Agent's statement to the Union that he "assumed" the Union was going to challenge his determination violated the Board's long-held rule that parties' must make their own challenges. Solvent Services, Inc., 313 NLRB 645, 645 (1994); Galli Produce Co., Inc., 269 NLRB 478, 478 FN1 (1984). The NLRB incorporated this standard into its Casehandling Manual. See Section 11338.2(b), Section 11340.7.

In addition, when the Board Agent solicited the Union's challenge he abandoned his role as a neutral third party. The ALJ characterized this as the Board Agent "merely stating the obvious." (R. 4:46-48.) His characterization is too simplistic. Lauterborn asked Santana that he "assumed" the Petitioner was going to challenge his decision. (R. 1.) Naturally, Santana would have concluded that Lauterborn—a federal agent in charge of the election process—was signaling him to challenge the decision because he may be successful. As a result, the Board Agent became partial and gave the appearance of impropriety.

In addition, the evidence is uncontested Lauterborn made the critical error of sealing the challenged ballot outside of the parties' presence. (R. 5:29-36.) Indeed, the ALJ recognized this in his Report. (R. 5:29-31.) The Employer is unaware of the ballot's condition when Lauterborn placed it in the envelope.

Moreover, the Board Agent broke the chain of custody on multiple occasions after placing the challenged ballot in the manila envelope. The Board will order a rerun of an election where the Board Agent breaks the chain of custody of determinative challenged ballots. See e.g., Fresenius, supra; Tideland Marine Services, Inc., 116 NLRB 1222 (1956).⁵ First, he left the challenged ballot unattended with Blackburn—who was not a supervisor or Board Agent—for several minutes. (Tr. 111.) He then (possibly) placed the challenged ballot in his checked luggage. (Tr. 123.) When he arrived in Phoenix, he left the ballot at his home overnight before securing it in the Regional Director's safe. (Tr. 114.)

Nevertheless, the ALJ incorrectly found this conduct was not objectionable in his Report. He failed to address the evidence that the Board Agent left the challenged ballot unattended with the administrative secretary. He also glossed over Lauterborn's own testimony that he may have placed the challenged ballot in his checked luggage. Indeed, the ALJ did not address Lauterborn's uncontradicted testimony that he was unsure he maintained the challenged ballot with him at all times when traveling. (Tr. 123.)

In addition, the ALJ failed to analyze whether the aforementioned conduct gave the appearance of impropriety. Instead, he relied on Lauterborn's supposed securing of the ballots to justify the dismissal. (R. 6:9-14.)

⁵ The ALJ went to great lengths to distinguish these cases in his Report. (R. 6:1-27.) However, this case law is still relevant to establish that a break in the chain of custody in the handling of determinative, challenged ballots is grounds for the rerun of an election.

In the end, the Board Agent's conduct raised serious concerns regarding the fairness and validity of the election by soliciting the Union's challenge to the voided ballot, failing to seal the ballot in the parties' presence, and leaving the ballot unattended on multiple occasions.

III. CONCLUSION

Based upon the foregoing, the Employer requests the NLRB dismiss the ALJ's recommendation in his Supplemental Report regarding Employer's Objections Nos. 5 and 9 and order a rerun of the election.

Respectfully submitted this 10th day of March, 2010.

JACKSON LEWIS LLP


BY: _____
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EMPLOYEES, AFSCME, AFL-CIO

PROOF OF SERVICE

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PROOF OF SERVICE

Case Name: ST. CATHERINE HEALTHCARE AND REHABILITATION CENTER, LLC
Case Nos.: 28-RC-6661

I, Cheryl Cleary, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 199 Fremont Street, 10th Floor, San Francisco, California 94105; I am over the age of eighteen (18) years and am not a party to this action.

On March 10, 2010 c.e., I served the attached documents (1) **EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S SUPPLEMENTAL REPORT** and (2) **EMPLOYER’S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S SUPPLEMENTAL REPORT** in this action as follows:

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[X] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, clearyc@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.

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I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on March 10, 2010 c.e., at San Francisco, California.


Cheryl Cleary