

NOT INCLUDED IN  
BOUND VOLUMES

LPH  
Santa Rita and Oakland, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRISON HEALTH SERVICES, INC.  
Employer

and

Case 32-RC-5675

NATIONAL UNION OF HEALTHCARE WORKERS  
Petitioner

and

UNITED HEALTHCARE WORKERS-WEST, SERVICE  
EMPLOYEES INTERNATIONAL UNION  
Intervenor

DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on April 20, 2010, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 66 votes for Petitioner, 59 votes for Intervenor, 1 vote for neither labor organization, and no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's

findings and recommendations<sup>1</sup> as modified below. The Board finds that the election must be set aside and a new election held.

The hearing officer recommended sustaining Intervenor's Objections 15 and 16, which he construed as alleging that a determinative number of voters may have been disenfranchised because they could not vote while a dispute regarding one of two polling places was ongoing for approximately 15 minutes. Although we agree with his recommendation to sustain the objections, we do so for the following reason.

The hearing officer effectively applied an actual disenfranchisement standard. He credited and relied on testimony that 10-12 voters came to the polls at the Santa Rita Jail during the dispute, were told to wait outside, and did not vote thereafter. In other words, in his view, these 10-12 employees were actually disenfranchised. As explained below, that is not the proper analysis.<sup>2</sup>

An election will be set aside if the objecting party shows that the number of voters possibly disenfranchised by an election irregularity is sufficient to affect the election

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<sup>1</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Intervenor's objection alleging that the Board Agent left the ballot box unsecured in the voting room.

<sup>2</sup> Because we do not rely on the hearing officer's credibility-based analysis, we find it unnecessary to pass on the Petitioner's exception to the hearing officer's crediting of Dona Chatman, the Intervenor's election observer, over Zenaida Gutman, the Petitioner's observer.

outcome. See *Wolverine Dispatch, Inc.*, 321 NLRB 796, 796 (1996); *The Dayton Malleable Iron Co.*, 123 NLRB 1707, 1709 (1959). Election irregularities include the polls being closed or otherwise inaccessible at a time when they should be open. See *Wolverine Dispatch*, 321 NLRB at 796-797; *Whatcom Security Agency, Inc.*, 258 NLRB 985, 985 (1981); cf. *Robert F. Kennedy Medical Center*, 336 NLRB 765, 765 (2001) (declining to set aside election despite main entrance to polls being locked for a period of time because the polling area remained accessible through a second entrance).<sup>3</sup> The Board applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its own election proceedings. *Wolverine Dispatch*, 321 NLRB at 797.

When the election observers told eligible voters at the Santa Rita Jail to wait outside the polling area and the voters complied, the polls became inaccessible even if they were not actually closed. The polls remained inaccessible for a period of approximately 15 minutes. This election irregularity is sufficient to raise disenfranchisement concerns. We therefore look to whether a determinative number of voters were potentially disenfranchised.

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<sup>3</sup> *Robert F. Kennedy Medical Center*, supra, is distinguishable because, as stated, in that case there was another unobstructed entrance to the polling place. Although Chairman Liebman dissented in *Robert F. Kennedy Medical Center*, she agrees that it is distinguishable on its facts.

The approximate number of eligible voters was 152, and 126 ballots were cast. Thus, 26 eligible voters did not vote, and the electoral margin was 7 votes, meaning a determinative number of eligible voters were possibly disenfranchised. Accordingly, we shall sustain Objections 15 and 16, set aside the election, and direct that a new election be held.<sup>4</sup>

#### DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status

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<sup>4</sup> The Intervenor sought to support its claim of potential disenfranchisement by introducing the separate *Excelsior* lists for each polling place. Those lists arguably would have showed whether at least 7 eligible voters at the Santa Rita Jail did not vote. Citing privacy concerns, the hearing officer excluded those lists from the record. Chairman Liebman and Member Pearce perceive no rationale for concluding that privacy concerns would be implicated by the admission of the *Excelsior* lists. Still, they do not reach the propriety of the hearing officer's ruling, as no party has excepted to it and those lists are not necessary to the Board's analysis.

during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by National Union of Healthcare Workers; United Healthcare Workers-West, Service Employees International Union; or neither labor organization.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1996); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon*

*Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C.

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Wilma B. Liebman, Chairman

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Mark Gaston Pearce, Member

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Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD