

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

MORRIS RICHARDSON D/B/A
LATTA ROAD NURSING HOME
AND MORRIS RICHARDSON D/B/A
LATTA ROAD NURSING HOME A

Employer

and

Case 03-RD-001590

VIRGINIA K. MILLER

Petitioner

and

1199 SEIU HEALTH CARE WORKERS EAST

Union

**REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND
CERTIFICATION OF RESULTS OF ELECTION**

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region Three on March 23, 2011, an election by secret ballot was conducted on April 13, 2011, under the direction and supervision of the Regional Director for Region Three, among the employees in the unit found appropriate. The tally of ballots showed that there were approximately 91 eligible voters and 89 employees cast ballots. Of the valid votes cast, 41 ballots were cast for the Union and 44 votes were cast against representation.¹ Therefore, the Union did not receive a majority of the votes cast.

¹ There were also 4 challenged ballots. The parties stipulated that the challenged ballots would remain unopened and they have not been the subject of further litigation.

Thereafter, the Union filed timely objections to conduct affecting the results of the election. On September 20, 2011, the Acting Regional Director for Region Three issued an Order Directing Hearing on Objections and Notice of Hearing with respect to the Union's objections. Pursuant to the Acting Regional Director's Order, a hearing was held on October 4, 2011, before a hearing officer of the Board.² The hearing officer's report on objections issued on November 9, 2011, and he recommended that the remaining objections be overruled in their entirety.³ Thereafter, the Union filed timely exceptions to certain aspects of the hearing officer's report and recommendations.⁴ The Employer subsequently filed an answering brief in support of that report.

Specifically, the Union contends that the hearing officer erred in ruling that Sandra Jackson, the Employer's observer at the election, was not a supervisor and, as such, that her presence was per se objectionable conduct. The Union also contends that the hearing officer erred in ruling that the removal of room screens which had been placed between the observers' table and the voting booth was not objectionable conduct which compromised the secrecy of the voting. Finally, the Union asserts that the hearing officer erred in ruling that the mistake on the notices of election was a minor error. Rather, the Union argues that the incorrect time on the notices was a significant error due to the closeness of the final vote count.

The hearing officer's rulings made at the hearing, certain of which are discussed below, are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties on each of the issues raised. As discussed below, I have concluded that I disagree with the arguments advanced by the Union, for the reasons set forth. I have also concluded that the hearing officer's decision is supported by the record and that I am

² On September 26, 2011, the Acting Regional Director for Region Three issued an Erratum to the Order Directing Hearing, informing the parties that the exceptions to the Hearing Officer's Report may be filed with the Regional Director for Region Six.

³ The Union filed objections numbered 1 through 10. At the hearing, the Union withdrew its objections numbered 4, 5, and 6. Therefore, Objections 1, 2, 3, 7, 8, 9, and 10 remained subject to hearing.

⁴ In the absence of exceptions, I adopt pro forma the hearing officer's recommendation to overrule the Union's objections numbered 7, 9 and 10.

in agreement with the hearing officer that all of the Union's objections should be overruled. Accordingly, I find no merit in the Union's exceptions and I am issuing a Certification of Results of Election in this matter. Upon the entire record in this case, I make the following findings.

Objection 1

The Union's objection states as follows:

At the pre-election conference, an observer, Sandra Jackson, informed the Board Agent that she is a supervisor, and that she hires and fires employees in the bargaining unit. As a supervisor with hiring and firing authority over those voting in the election, Sandra Jackson should not have served as an observer.

The Union asserts that its two witnesses both testified that Jackson had declared that she was a supervisor with the authority to hire and fire employees. The hearing officer found that the evidence presented clearly showed that Jackson was employed as a therapy aide and the record did not reveal any evidence that she possesses any supervisory authority. In so doing, the hearing officer relied, inter alia, on Jackson's own denial that she is a supervisor, that she is an incumbent in the position of therapy aide, a position included in the bargaining unit, and, the fact that she voted in the decertification election without challenge by the Union. The hearing officer also stated that the Union abandoned its claim of supervisory status at the hearing to assert that Jackson was closely aligned with management. However, the hearing officer found that there was insufficient evidence to support the Union's belated claim in this regard.

I find that the hearing officer did not err in overruling this objection. The Union relies on the testimony of two witnesses, in a situation where there were two witnesses who testified contrary to the Union's two witnesses. The Union presented no other evidence to establish that Jackson was a supervisor or that she was perceived as being aligned with management. The Union claims that the hearing officer gave no reason for his findings. I find that this is not accurate, and I note that the hearing officer, in his report, stated:

The facts herein are based on the record as a whole and my careful observation of the witnesses throughout their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, the inherent probabilities in light of other events, corroboration or lack thereof, and the consistencies or inconsistencies with each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied specifically on his or her demeanor and make my findings accordingly. I note that apart from considerations of demeanor, I have taken into account the above-noted credibility considerations in all cases and my failure to detail each of these is not to be deemed a failure on my part to have fully considered them. *Bishop and Malco, Inc. d/b/a Walter's*, 159 NLRB 1159, 1161 (1966). (Hearing Officer's report at footnote 4)

Further, the Union asserts that the hearing officer erred in not finding that a hearsay statement purportedly made by employee Marissa Zeiner should have established substantive evidence that Jackson's presence at the polling place intimidated voters. Zeiner did not testify. The Union quotes only its own objection in support of its exception in this regard. I find that the hearing officer properly disregarded this inherently unreliable evidence.

Finally, the Union argues that Jackson's presence as the observer at the election is per se objectionable as a supervisor with close ties to management. While the Union properly cites cases which stand for this proposition, the hearing officer neither found that Jackson was a supervisor nor that she had close ties to management. Under these circumstances, her presence at the polling site was not objectionable conduct.

Thus it is clear that the hearing officer concluded that the Union witnesses' testimony concerning Jackson's status was not persuasive and he did not credit them. Moreover, the hearing officer noted the absence of other evidence to support the Union's other contentions concerning Jackson. I find that the record as a whole fully supports the hearing officer's conclusions regarding Objection 1 and I agree that it should be overruled.

Objection 2

The Union's objection states as follows:

The Region used a table top voting booth at the election. The Board agent set up screens which hid the voting booth from the observers. With the screens up, a person could walk behind the screen and be sure that he/she was not seen by the observers.

The employer insisted that the screen be removed because the room was small. The union objected to taking down the dividers. The Board agent overruled the union's objections, and took down the screens.

The Union contends that the hearing officer erred in ruling that the removal of the screens that separated the voting booth from the observers' table was not objectionable as the Union contends that the screens would have ensured the privacy of voters. However, in so finding, the hearing officer noted that the Union had presented no evidence that the voters' privacy had, in fact, been compromised. In its exceptions, the Union merely continues to assert that the screens were a better option. The hearing officer noted that in this case the standard Board portable tabletop voting booth was used. As this is standard procedure and equipment, whether or not a screen would be better in the Union's opinion is irrelevant to the instant inquiry.

I find that the hearing officer correctly decided that this conduct was not objectionable. The Union argues that American Medical Response, 356 NLRB No. 42 (2010) supports its position but I find that case to be inapposite to the instant situation. That case discusses the issue of whether the ability to view the voter's *marking* on the ballot before it was deposited in the ballot box would be objectionable conduct. In the instant situation, there is no evidence that the voters' *choices* were seen. The Union is merely hypothesizing that possibly they could have been seen. It is axiomatic that in any election the observers can see the ballots in the voters' hands as they walk to the box to deposit them. This is clearly not objectionable conduct and that is the extent of the evidence in support of this objection by the Union. As noted in American Medical Response, slip. op. at page 2, the Board has never set aside an election on such a basis when the Board-sanctioned voting booths were used. Therefore, I find that the Union has not met its burden of proof with respect to Objection 2 and I agree with the hearing officer that it should be overruled.

Objection 3

The Union's objection states as follows:

An employee told the Union that when she came in to vote, she felt that Sandra Jackson was looking at her in a sharp manner,

and that Sandra Jackson could see her voting, and she felt intimidated and as if she had better vote "no" because Ms. Jackson told her she was strongly against the Union.

The employee referred to in this objection did not testify. The hearing officer noted in his report that the Union was given multiple opportunities to present evidence pertaining to this objection but declined to do so and failed to present any evidence to prove its assertion. Further, the record indicates that the Union refused to withdraw this objection for which it failed to offer any proof. The hearing officer noted in his report that "It is well settled that representation elections are not lightly set aside. The burden is on the objecting party to show by specific evidence that there has been prejudice to the election. Affiliated Computer Services Inc., 355 NLRB No. 163, slip. op. page 2 (2010) citing NLRB v. Mattison Machine Works, 365 U.S. 123, 123-124 (1961)." Under the circumstances here, I find that the Union has not met its burden of establishing objectionable conduct. Accordingly, I agree with the hearing officer and find that Union's Objection 3 should be overruled.

Objection 8

The Union's objection states as follows:

The election notices posted at the facility gave the incorrect election time of 5:30 a.m. to 7 a.m. The correct time was 5:30 a.m. to 7:30 a.m. This created confusion for voters and may have disenfranchised voters.

The Union asserts that the hearing officer erred in ruling that the notices posted at the facility, which gave an incorrect time for the close of the polls, was a "minor error." In this regard the Union argues that it was a significant error, given the closeness of the vote. This appears to be a reasonable position as a change in time may have the potential to disenfranchise voters. However, as noted by the hearing officer, Board precedent requires more than speculation to overturn an election. An examination of the election results convinces me that the hearing officer correctly concluded that the error herein was a minor error under the circumstances. As detailed above, there were only two voters on the Excelsior list who did not vote. The results of the election showed that 41 ballots were cast for the Union and 44 votes were cast against

continued representation. Therefore, it is clear that even if the two missing eligible voters had voted, and cast their ballots in favor of the Union, the result of the election would be the same. The Union appears to argue that if the preliminary result had been closer, it may not have agreed to sustain the four challenged ballots. This is speculative and not sufficient evidence to overturn the election. The fact remains that any confusion caused by the notices which, in turn, may have caused two voters to not vote would not have changed the ultimate result in this case. As such, the hearing officer did not err in concluding that the incorrect time was a minor error. Based on the foregoing, I agree with the hearing officer's conclusions and find the Union's Objection number 8 should properly be overruled.

In summary, based upon the entire record in this matter and in accordance with my conclusions detailed above, I adopt the recommendations of the hearing officer. I hereby overrule all of the Union's remaining objections to the election, those being Objections 1, 2, 3, 7, 8, 9, and 10. A new election is not warranted. Accordingly, I shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots have not been cast for 1199 SEIU Health Care Workers East, and that it is not the exclusive representative of all the employees in the following bargaining unit involved herein:

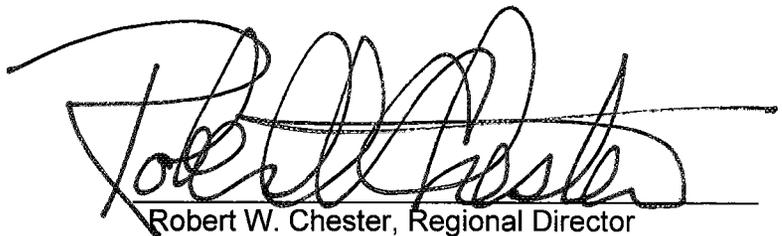
All full-time and regular part-time licensed practical nurses, and service and maintenance employees employed at the Employer's 2100 and 2102 Latta Road, Rochester, New York facilities; excluding all business office employees, clerical employees, managerial employees, guards, all professional employees, including registered nurses, and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Under the provisions of Sections 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, D.C. by December 27, 2011. The request may be filed electronically through the Agency's website, www.nlr.gov,⁵ but may not be filed by facsimile.

Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Dated this 12th day of December, 2011.



Robert W. Chester, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

⁵ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.