

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

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

Employer

and

Case 3-RD-1590

VIRGINIA K. MILLER, an Individual

Petitioner

and

1199 SEIU HEALTH CARE WORKERS EAST

Union

**UNION'S REQUEST FOR BOARD REVIEW OF REGIONAL DIRECTOR'S
SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION**

Pursuant to Sections 102.69 and 102.67 of the Rules and Regulations of the National Labor Relations Board ("Board"), the Union, 1199 SEIU Health Care Workers East, ("Union"), by and through its undersigned counsel, hereby files a Request for Review of the Regional Director's Supplemental Decision and Certification of Election ("Decision") issued on December 12, 2011. The Union contends that the Regional Director's Decision presents a substantial question of law due to a departure from officially reported Board precedent regarding the legitimacy of representation elections where a voter's ballot could be seen before being placed in

the ballot box. The Union also contends that the Regional Director's decision as to the presence of a person closely aligned with management being in the voting room is clearly erroneous on the record and that such error prejudicially affected the right of the Union not to have such persons present during an election.

FACTS

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 3 on March 23, 2011, an election was conducted on April 13, 2011 among employees in the unit found appropriate in the Decision and Direction of Election. Of 91 eligible voters, 89 votes were cast, with 41 votes for the Union, 44 against the Union. Of the total votes rendered, 5 of the 89 ballots were challenged (with one challenge being resolved before the Hearing); the challenged ballots thus determined the outcome of the election. The parties later stipulated that the challenged ballots would remain unopened and they have not been the subject of further litigation. This election was observed by a supervisor who is closely identified with the employer; during the election, screens that hid the voting booth from observers were taken down over the objections of the Union; finally, the election notices posted at the facility incorrectly stated that the election was scheduled to end 30 minutes before its actual scheduled end time. 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. On November 9, the Hearing Officer issued a Report on Objections (hereafter "Report") in which he recommended that all of the Union's remaining

objections be overruled in their entirety.¹ On November 23, 2011, the Union filed timely exceptions to the hearing officer's recommendation that the aforementioned facts did not affect the outcome of the election. On December 12, 2011, the Regional Director for Region Six issued a Supplemental Decision (hereafter "Decision") in which he adopted all of the Hearing Officer's findings and certified the results of the election.²

ARGUMENT

The Union takes specific exception to the Regional Director's Supplemental Decision and Certification of Results of Election for the following reasons:

I. The Regional Director erred in adopting the Hearing Officer's finding that Sandra Jackson was not a supervisor and was not closely identified with the employer, and that "the evidence presented clearly showed that Jackson was employed as a therapy aide and did not reveal any indicia of supervisory authority." Report at 7-11. Two witnesses for the Union testified that Sandra Jackson specifically identified herself as a supervisor at a pre-election conference and that, when asked by a Board Agent if she had the authority to hire and fire, she answered "yes." Report at 7. Ms. Jackson and another witness for the Employer testified that Ms. Jackson had not claimed to be a supervisor, and that she was not asked whether she had the authority to hire and fire. Report at 8-9. The Hearing Officer ruled that Ms. Jackson's first language was not English, and that it was therefore "reasonable to conclude either that Jackson misunderstood the Board Agent's questions during the pre election hearing, or that [the two witnesses for the Union] misunderstood

¹ The Hearing Officer's November 9, 2011 Report on Objections and Recommendations to the Board is appended to this Request pursuant to Board Rule 102.67(d) and is hereby made a part of the Union's Request for Review.

² The Regional Director's December 12, 2011 Supplemental Decision and Certification of Results of Election is appended to this Request pursuant to Board Rule 102.67(d) and is hereby made a part of the Union's Request for Review.

her answer.” Report at 10. The Hearing Officer did not give any explanation as to how the fact that English is not Ms. Jackson’s native language caused her to understand and answer questions incorrectly at the pre-election conference, or how she then suddenly overcame her language gap to understand and answer questions correctly at the hearing.

The Hearing officer gave no reason why he believed Ms. Jackson’s answers at the hearing (that she was not a supervisor and that she was not asked about her authority) were accurate and that she understood the questions to which she responded, although she somehow misunderstood the questions and gave incorrect or misunderstood answers at the pre-election hearing. The Hearing Officer gave no reason why the opposite conclusion should not be reached- that Ms. Jackson understood and correctly answered the questions at the pre-election hearing, and then mistakenly answered “no” when asked about her supervisory role and authority at the hearing. Nor did the Hearing Officer give any reason why the testimony of the Employer’s witnesses should be given more credit than the opposite testimony of the Union’s witnesses. This is especially curious given that the only other witness for the Employer who was present at the pre-election conference, David Morton, gave testimony about which he claimed to be “certain” that was in fact disproved and shown to be incorrect in at least one other instance during the hearing. Report at 16.

In agreeing with the Hearing Officer’s conclusions regarding Ms. Jackson’s status as a representative of the Employer, the Regional Director stated that the Union’s contention that the hearing officer gave no reason for his finding was “not accurate.” Decision at 3. However, the Director’s only stated reason for this position is a footnote in the Hearing Officer’s Report in which the Officer claims that “my failure to detail each of these (credibility considerations) is not

to be deemed a failure on my part to have fully considered them.” Decision at 4. The Director gives no other reason for his adaptation of the Hearing Officer’s recommendation on this issue.

While the Board has held that “a Trial Examiner is not compelled to annotate to each finding the evidence supporting it,” the Union contends that in this case, where a trial examiner believed the testimony of one witness whom he has admitted may not understand questions posed in English and another who was not in the room at the time Ms. Jackson identified herself as a supervisory authority over two witnesses who were in the room at said time and who do understand English, the Trial Examiner is required to provide more of an explanation than the one given here, which amounted to little more than an appeal from the Hearing Officer to the reader to trust his judgment on a very peculiar decision despite his total failure to provide any reason for it. Bishop and Malco, 159 NLRB 1159 (1966). The Union further contends that such an insufficient and unexplained examination of witnesses resulted in a factual error which prejudiced the right of the Union and the nursing home’s employees not to have a person closely aligned with management present during a representation election. Having such a person present at an election is a per se violation which warrants the setting aside of the election. The Board has long held that the presence of a supervisor or a person closely aligned with management at an election is a per se violation that voids an election even without a demonstration of “actual interference, or alternatively, a showing that no interference took place.” Mid Continent Spring Company of Kentucky, 273 NLRB 884 (1985), citing International Stamping Co., 97 NLRB 921, 923 (1951) and Peabody Engineering Co., 95 NLRB 952, 954 (1951). Ms. Jackson is a supervisor with close ties to management, and her presence at the election, which demonstrably interfered with the election as she influenced at least one employee to vote against the Union, is a per se violation that warrants the setting aside of the election.

II. The Regional Director also erred in ruling that the removal of screens that would have ensured the privacy of voters was not objectionable. Decision at 5. The Board Agent initially placed room screens between the observer’s table and the voting booth. These screens blocked the observer’s sight of the voting booth. Report at 12. During the pre-election conference the Employer demanded that the screens be removed; the Board Agent acquiesced to the Employer’s demand over objections from the Union. Report at 12. The removal of the screens allowed the observers to see the voters as they were voting, and allowed the observers to see the ballots before they were placed in the ballot box.

The Union asserts that the removal of the screens over the objections of the Union and the resulting decrease in voter privacy presents a “reasonable doubt as to the fairness and validity of the objection,” the presence of which has long been held to justify the overturning of an election. Polymers, Inc., 174 NLRB 282 (1969). The Hearing Officer ruled that the Union “failed to provide evidence that voter’s ballot choices were seen by the observers,” and that the removal of the screens was therefore not objectionable. Report at 15. However, the Union stated in its objections that an employee “felt that Sandra Jackson (an observer) 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.” Report at 3. The Hearing Officer stated that one of the Union’s witnesses, when presented with a rough reconstruction of the booth, “conceded that the observers would have been unable to see the ballot as it was being marked.” Report at 12. However, the Union contends that this reconstruction may not have been accurate, and that even if it was, the absence of the

screens allowed observers to see the ballots before they were deposited in the ballot box, which was on the observers' table. In his Decision, the Regional Director stated that "in any election the observers can see the ballots in the voters' hands as they walk to the box to deposit them." Decision at 5. The Director suggests that the ability of observers to see voters' choices is of no consequence, in direct contravention of Board precedent. The ability of observers to see ballots before they were placed in the ballot box is within the proper scope of analysis here. The Board has held that where a Board sanctioned booth is used, "the Board's analysis is limited to whether a voter's ballot marking was observed by others while voting, *or before the ballot was deposited in the ballot box.*" American Medical Response, 356 NLRB 42 (2010) *emphasis added*. The Regional Director and the Hearing Officer erred in making a determination as to whether the secrecy of voting was compromised based solely on whether the ballots could be seen as they were being marked without considering the fact that the observers could very well see the ballots before they were placed in the ballot box.

CONCLUSION

Based on the above Exceptions, the Union respectfully requests that the Board reject the Regional Director's Supplemental Decision, stay the Director's Certification of Election, and order a new representation election. The election was observed by a supervisor or someone with close ties to management, which is a per se violation of the Board's rules governing de-certification elections. The removal of screens in the election room raises a reasonable doubt as to the fairness of the election; both of these decisions represent significant errors that affected the outcome of the election.

Respectfully submitted this 22nd day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, December 22, 2011, I served a copy of the foregoing UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF ELECTION upon the following individuals by email:

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/s/ Catherine Creighton
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