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**Watkins Security Agency of DC, Inc. and United Security and Police Officers of America (USPOA) and International Union, Security, Police, and Fire Professionals of America (SPFPA). Case 5–RC–16618**

January 3, 2012

DECISION AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

The National Labor Relations Board has considered an objection to a mail ballot election held February 1 to 22, 2011, and the hearing officer's report recommending disposition of it.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 votes for the Petitioner, 2 for the Intervenor, and 7 against participating labor organizations, with 2 void ballots 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 only to the extent consistent with this Decision and Direction of Second Election.

The hearing officer recommended overruling the Intervenor's objection alleging that the Employer's failure to post notices of election in accordance with Section 103.20 of the Board's Rules and Regulations requires that the election be set aside. Contrary to the hearing officer, and for the reasons set forth below, we find merit in the Intervenor's objection.

Facts

The Employer provides security services at numerous locations in Washington, D.C. Because the work force is dispersed, the election in this proceeding was conducted by mail. The election involved two competing unions, USPOA and SPFPA, neither of which was the incumbent representative of the employees. Under Board Rule 103.20, the Employer was required to post Board-provided notices of election by 12:01 a.m. on January 27,

<sup>1</sup> The hearing was held pursuant to the Board's June 29, 2011 Decision and Order remanding the case to the Regional Director. In that decision, the Board considered the Regional Director's dismissal of the objection without a hearing and held that the objection raised issues regarding whether the Employer properly posted the election notice, whether the Employer favored either party during the election process, and the relevance, if any, of those considerations.

2011.<sup>2</sup> However, the Employer's Human Resources Director Evelyn Kenley admitted that she did not know if the Employer had received the notices, and she could not verify that the Employer had met the posting requirement. The Intervenor presented testimony from employees at various Employer worksites who stated that they never saw a posted notice.

Kenley also testified that, prior to the election, the Employer did not engage in any campaigning and did not communicate to its supervisors or managers that it favored one union over the other. There was no evidence that the Employer was involved in preparing any of the campaign literature disseminated by either union, and an employee witness testified that no one from management attempted to sway his vote before the election.

The Hearing Officer's Report

The hearing officer found that the Employer failed to timely post the notices of election in accordance with Rule 103.20.<sup>3</sup> Accordingly, she observed, a literal reading of the rule would require that the election be set aside. But the hearing officer noted that the election involved more than one union and that the Employer's objectionable conduct affected both unions in the same way. Under those circumstances, the hearing officer concluded that she was bound by *Maple View Manor, Inc.*, 319 NLRB 85 (1995), to recommend certifying the winning union. In *Maple View Manor*, an election case involving two competing unions, the regional director refused to set aside an election where the employer had failed to post the election notices and the regional director concluded that the employer favored the losing union. In such circumstances, the regional director found that to set aside the election "where more than one union is involved 'invites collusion' because it suggests to any employer who favors one of the competing unions that willful objectionable conduct will result in the favored minority union being able to successfully file objections and secure a second election."<sup>4</sup> The Board denied a request for review of that decision.

Discussion

The Employer did not post the notices of election for 3 days as required by Rule 103.20. If there were any doubt, the Board has made clear that this posting requirement is "mandatory in nature." *Terrace Gardens*

<sup>2</sup> Rule 103.20 requires that "[e]mployers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election." It further provides that the failure to timely post the notices "shall be grounds for setting aside the election" upon proper objection.

<sup>3</sup> There were no exceptions to this finding.

<sup>4</sup> 319 NLRB at 85 (fn. and citations omitted).

*Plaza, Inc.*, 313 NLRB 571, 572 (1993). As explained in *Terrace Gardens*, a single-union election, Rule 103.20 was designed to preclude any analysis of the actual impact of noncompliance on a particular election and to avoid unnecessary and time-consuming case-by-case litigation over compliance with the notice-posting requirement. *Id.* at 571–572. Moreover, the Rule’s provisions “do not provide for any alternative means of compliance.” *Id.* at 572; see also *ELC Electric, Inc.*, 344 NLRB 1200, 1217 (2005) (“The failure to comply with the notice requirement is an ipso facto ground for setting aside an election.”). Thus, Rule 103.20 is a bright-line rule, and we see no convincing reason to apply it any differently to a multiunion election than to a single-union election.

In reaching that conclusion, we recognize that *Maple View Manor* appears to create an exception to Rule 103.20 in multiunion elections. In fact, that case is more properly read as merely interpreting Rule 103.20. Initially, though, we observe that the precedential value of *Maple View Manor* is uncertain. Although the Board may have intended to give guidance to the public by publishing its denial of review of the regional director’s decision, the Board did not effectively make the regional director’s decision its own, which would have required the Board to *grant* review and then to *adopt* the decision. Cf. *Associated Charter Bus Co.*, 261 NLRB 448, 450 fn. 7 (1982) (unpublished decision affirming regional director’s decision after grant of review has “no binding precedential value”).

Even assuming that *Maple View Manor* is binding precedent, we do not read it as creating a new exception, for multiunion elections, to Rule 103.20, which was adopted through notice and comment rulemaking. To do so would suggest that the Board can amend its rules and regulations through adjudication, and not only through rulemaking. That proposition is dubious, particularly where, as here, the Board decision in question squares with the text of the rule itself.

*Maple View Manor* is fully consistent with subsection (c) of Rule 103.20, which provides that a “party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting.” That language easily covers the situation where an employer fails to post an election notice in collusion with a union that is a party to the election. In those circumstances, the union is properly deemed responsible for the nonposting and estopped from objecting. Thus, even in cases where there is evidence of collusion, no exception to Rule 103.20 is necessary; the rule may be applied as written, and it will still have the desirable effect of discouraging collusion. Thus, there is no reason not to apply the rule as written in

multiunion elections where, as here, there is no evidence of collusion between the employer and one of the union parties.

For all of the above reasons, we will set aside the election results and order a second election.

#### 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 that 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 first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). 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 election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by USPOA, SPFPA, 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 (1966); *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 of 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 whenever proper objections are filed.

Dated, Washington, D.C. January 3, 2012

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring.

I join the majority solely for the purpose of setting aside the election. I agree that there is no basis for applying Rule 103.20 any differently in multiunion elections than in single-union elections, and find *Maple View Manor* inapposite to the facts of this case because there is no evidence here that the Employer favored one union over the other.

Dated, Washington, D.C. January 3, 2012

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Brian E. Hayes, Member

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