

NOT INCLUDED IN
BOUND VOLUMES

LSP
Albuquerque, NM

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KINDRED HEALTHCARE, INC.

Employer

and

Case 28-RC-6644

DISTRICT 1199NM NATIONAL UNION OF
HOSPITAL AND HEALTHCARE EMPLOYEES,
AFSCME, AFL-CIO

Petitioner

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 1 and 3, 2009, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots in the combined professional and nonprofessional unit shows 30 for and 68 against the Petitioner, with no challenged ballots.¹

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations with respect to

¹ The tally of ballots in the professional voting group shows 16 votes for and 8 against inclusion with nonprofessionals.

Petitioner's Objection 2,² and finds that the election must be set aside and a new election held.

² We adopt the hearing officer's recommendation to sustain Petitioner's Objection 2 based on the Employer's posting at the employee time clock of altered sample ballots without including the requisite bilingual disclaimer in the official Board ballot. Contrary to our dissenting colleague, we find no merit in the Employer's argument that the hearing officer lacked authority to consider this conduct and that it was deprived of due process because it did not have notice and opportunity to litigate the matter. As the hearing officer explained, the altered ballots' posting and their markings in the "No" box on the question of union representation were "reasonably encompassed" within the scope of the specific language of Petitioner's Objection 2 alleging an implicit threat based on this conduct. See *Precision Products Group*, 319 NLRB 640, 641 fn. 3 (1995).

Further, once the facts of posting, ballot alteration, and lack of bilingual disclaimer were established---and the Employer does not dispute this---the objectionable nature of the altered ballot was fully litigated. As stated in *Ryder Memorial Hospital*, 351 NLRB 214, 215 fn. 13 (2007), "if a party distributes altered sample ballots from which the disclaimer language has been deleted, we will deem the deletion intentional, and designed to mislead employees. The distribution of such altered ballots will be treated as per se objectionable." Thus, there is no cognizable defense to such conduct.

In any event, at the hearing, the Petitioner asked several witnesses whether they had seen both Spanish and English altered sample ballots, and both the Petitioner and the Employer asked witnesses whether any employees could not read English or spoke only Spanish. The hearing officer also examined the Employer's human resources administrator, Donald Whitney, about differences between the sample ballots provided by the NLRB and the altered sample ballots, as well as about the language capabilities of employees in the bargaining unit. Both the Employer and the Petitioner cross-examined Whitney. There was no purpose for this line of questioning except as it related to the altered sample ballots. Accordingly, the Employer's due process claim lacks merit.

In light of our adoption of the hearing officer's recommendation to sustain Petitioner's Objection 2, we find it unnecessary to pass on the hearing officer's recommendation to sustain Petitioner's Objection 1. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Petitioner's Objection 3.

Unlike his colleagues, Member Schaumber would reverse the hearing officer's recommendation to sustain Objection 2 because the objectionable conduct found by the hearing officer was not reasonably encompassed within the scope of the objection at issue. The objection alleged that the Employer's postings restrained and coerced employees "specifically [because] the Employer in written communications posted at the time clocks, directed employees to vote No. The communications were posted at the time clock to make the implicit threat that employees would lose their jobs if they did not vote against the Union." The objection says nothing about the alteration of sample ballots in violation of the policy established by the Board in *Ryder Memorial Hospital*, supra, 351 NLRB at 215. These are two wholly separate and distinct theories, with neither encompassed by the other. Consequently, the hearing officer lacked authority to consider the unalleged objection. *Precision Products*, supra, 319 NLRB at 641. The ambiguous references to events at the hearing cited by the majority do not show otherwise. Moreover, assuming that evidence "peripherally touched" on the issue, it does not mean the issue was "sufficiently related to the objections set for hearing," which is the touchstone of the inquiry. *Fleet Boston Pavilion*, 333 NLRB 655, 656 (2001). The majority's endorsement of the hearing officer's consideration of matters outside the plain language of the objection contravenes the Board's carefully crafted rules and regulations, which are designed to ensure that election objections will be narrowly tailored and specific to reflect the Board's policy that representation cases be processed and decided as quickly as possible. See NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11365.3 (postelection matters are to be resolved with the utmost dispatch).

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.³ 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 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 District 1199NM National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO.

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

³ In directing a new election, the Regional Director should take all appropriate action consistent with the parties' stipulated election agreement.

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., July 13, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD