

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**PATIENT CARE OF PENNSYLVANIA, INC.,  
d/b/a PATIENT CARE**

**Employer**

**and**

**Case No. 4-RC-101021**

**LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 1310**

**Petitioner**

*Emily DeSa, Esq.*, for the Regional Office.  
*Ira Weinstock, Esq.*, *Law Offices of Ira Weinstock, P.C.*, Counsel for the Petitioner.  
*Thomas Birchfield, Esq.* and *Claire Vujanovic, Esq.*, *Fisher & Phillips, LLP*, Counsel for the Employer.

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** This matter, which was initiated by objections filed by the Employer and a Notice of Hearing on Objections to Election dated May 22, 2013<sup>1</sup>, was heard by me on June 20, 2013 in Allentown, Pennsylvania. Pursuant to a Stipulated Election Agreement approved by the Regional Director on April 4, 2013, an election by secret ballot was conducted on April 30, 2013, from 8:30 to 9:30 a.m. in Unit A (professional unit) and Unit B (non-professional unit) as set forth in paragraph 5 of the Agreement. The ballot for voters in Unit A contained two questions, concerning (1) inclusion with non-professional employees in a unit for the purposes of collective bargaining, and (2) representation for purposes of collective bargaining by the Petitioner. The Tallies of Ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

**Voting Unit A—Ballot Question 1—Inclusion with Non-Professional Employees**

Approximate number of eligible voters.....	5
Void Ballots	0
Votes cast for Inclusion	4
Votes cast for Exclusion	0
Valid Vote Counted	4
Challenged Ballots	0
Valid votes counted plus challenged ballots	4

Because a majority of the professional employees voting in Unit A voted for inclusion in a unit with non-professional employees, their votes on ballot Question 2, concerning representation by the Petitioner, were counted together with the votes of the non-professional employees in Unit B to decide the question concerning representation for the overall unit consisting of the employees

<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2013.

in Units A and B.

**Voting Units A and B—Representation by the Petitioner**

5	Approximate number of eligible voters	8
	Void Ballots	0
	Votes cast for Petitioner	4
	Votes cast against participating labor organizations	3
	Valid votes counted	7
10	Challenged Ballots	0
	Valid votes counted plus challenged ballots	7

On May 3, 2013, the Employer timely filed Objections to conduct affecting the results of the election.

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The Stipulated Election Agreement executed by the parties and approved by the Regional Director included a *Norris Thermador* list of eight eligible voters. Of these eight, seven cast their ballots as set forth above in the Tally of Ballots. The eighth eligible voter, Roberta Kasmiroski, did not. The Board Agent conducting the election did not allow her to vote because, as he and the Petitioner’s witnesses testified, she arrived after the polls were closed at 9:30. Kasmiroski and the other witnesses of the Employer, however, testified that she appeared in the voting area shortly before 9:30. The Employer’s objection is that she was improperly denied the opportunity to vote because the Board agent closed the polls early, prior to the 9:30 scheduled time<sup>2</sup>.

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**I. The Facts**

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Three witnesses testified for the Employer, Dina Paolicelli, its executive director, Kasmiroski, and Niobe Delp, who was the observer for the Employer; the Petitioner did not have an observer. The witnesses for the Petitioner were Charles Clark and Julio Palomo, organizers, and Thomas Borum, business manager. In addition, David Rodriguez, the Board Agent who conducted the election, testified. The election was conducted in a room, herein called the conference room, in a basement office of the Employer. The office is approximately thirty six feet by thirty five feet with an entrance at one end of the room. People entering the office walk about five feet straight ahead after entering the office and left for about twenty five feet to the entrance to the conference room, which is about fourteen feet by ten feet. The only door into the conference room is on the right side of the fourteen foot wall (facing out from the room) closest to the entrance to the office. Adjacent, and to the left of the room (facing out from the room) is an empty office and the room adjacent to that is Paolicelli’s office.

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Paolicelli testified that there was a pre-election conference at about 8:00 a.m. at which the Board agent discussed the rules of the election and showed those present where the voting booth and the ballot box would be. He also said that his cell phone would be the official time for the election; there was no clock in the conference room. He said that the polls would be open from 8:30 to 9:30 and he told everybody not to return before 9:30. She testified that he also said that if all the voters had voted, he would close the polls early. Shortly before the polls opened at

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<sup>2</sup> An additional objection of the Employer was that the Petitioner’s representatives at the election were “four large men” whose presence and statements in or near the polling area restrained and coerced employees in the exercise of their Section 7 rights, but there was no evidence to support this objection, and I therefore recommend that it be overruled.

8:30, he told Paolicelli to go to her office and keep the door closed during the voting period, and told all other non-voters to leave the area. She didn't leave her office until she heard some male voices outside of her office, and looked at her computer screen which said that it was 9:29. She opened the blinds on her door and saw two of the Petitioner's agents in the office and she left  
 5 her office; at that time she did not see Kasmiroski. She then went into the conference room, where she saw the other two agents of the Petitioner speaking with the Board agent and the Employer's observer. The Board agent then said that he was going to break the ballot box and count the ballots, and he took the ballot box from the table, punched the top of the box and broke the seal. Although her testimony on the following event was not very clear, she testified  
 10 that just as he hit the ballot box, Delp said that the one employee who had not voted was in the office, but the Board agent said that because the seal on the ballot box had been broken, she could not vote. In answer to a question from counsel for the Employer, she testified that she saw Kasmiroski about twenty to forty seconds after she left her office and Kasmiroski was standing  
 15 at a desk about fifteen feet from the door to the election room. She believes that Kasmiroski said that she thought that the polls opened at 9:30. The Board agent did not ask the parties if they would agree to allow Kasmiroski to vote, nor did he offer to allow her to vote under challenge.

Kasmiroski is employed by the Employer as a speech therapist and was one of the  
 20 employees listed on the *Norris Thermador* list. She sees patients in her home and reports to the Employer's office only about once every six weeks. She testified that she was aware that the time of the election was 8:30 to 9:30 a.m., but was busy that morning at her home office on paperwork for another job that she has. She completed the work at 9:00 a.m. and left at that  
 25 time to drive to the Employer's office; she testified that she drives from her home to the office frequently and knows that it usually takes twenty minutes, which would leave her ten minutes to vote. When she walked through the door into the office she saw a group of people standing outside the door to the conference room, with the conference room door open, and there  
 30 seemed to be a "commotion going on." Delp was not in the conference room when she walked in the office, she was sitting at the first desk in the office. She looked at her cell phone at that moment and it said 9:29; there was a clock on the wall in the office and it also said 9:29. She then heard a female voice in the area of the conference room say that there was another eligible  
 35 voter present followed by some confusion and then the Board agent said that because he had broken the seal of the ballot box, the poll was closed. She testified that she never said that she thought the polls closed at 10:00; she said that she thought that the polls closed at 9:30, and that she had a minute or so to vote. She never spoke to the Board agent.

Delp attended the pre-election conference and testified that the Board agent told her of her responsibilities as an observer, said that his cell phone would be the official time, and that if  
 40 all the voters voted, he would close the polls early. He told everyone but Delp to leave the room shortly before 8:30 and opened the polls at 8:30. Later, the Board agent said, "It's almost 9:29<sup>3</sup>, and I'm going to be closing the polls soon." At that point, one of the Petitioner's representatives was at the door of the conference room asking if he could come in to the room. She asked the Board agent if it was alright for them to come in, he said that it was, and she motioned for them to come in; Paolicelli came into the room right behind them. She testified:

45 And while that was going on the board agent was coming around the table with the box that he was punching in. As soon as he punched it in [I] turned around and there was Ms. Kasmiroski waiting to vote. I let him know that she was here and he said it's too late the box has already been opened.  
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<sup>3</sup> In the affidavit she gave to the Employer, she states that the Board agent said: "It's 9:29."

At that point, the ballot box had been opened, but the ballots were not all out of the box. She testified that from the time that the Board agent said that it was 9:29 until she saw Kasmiroski, “No more than thirty five seconds” elapsed. The Board agent did not ask the parties if they  
5 would agree to allow her to vote and he did not offer to let her vote a challenged ballot.

Clarke testified that at the pre-election conference the Board agent spoke of the election procedures, that the poll would be open from 8:30 to 9:30, gave instructions to the Employer’s observer, and said that his cell phone would be the official time piece of the election. Sometime  
10 after 8:20 he asked everyone to leave and he and the representatives of the Petitioner went to Dunkin Donuts, about a mile away. They left Dunkin Donuts at about 9:20, drove back to the building where the election was taking place and parked at a location about one hundred yards from the entrance to the building. They walked into the building and down the stairwell to the office. When they walked into the office, he checked his watch and it was 9:31. When they  
15 entered the office he saw the Board agent and the observer in the conference room, and a secretary sitting at her desk at the entrance to the office; just as they entered the office, Paolicelli walked out of her office. The Board agent said that the polls were closed and that they would wait for the Employer’s representatives before counting the ballots. He then closed up the voting booth and punched in the ballot box. At that point, which Clarke testified was 9:39,  
20 Paolicelli said that there was another voter in the office and the Board agent said that he could not allow her to vote because he had already opened the ballot box; because he was outside the conference room, he couldn’t see the ballot box, but he heard him punch the box. He testified that the only thing he heard Kasmiroski say was: “I thought that I had until 10:00.”

Palomo testified that at the conclusion of the pre-election conference, the Petitioner’s representatives left the office and went to Dunkin Donuts. They left Dunkin Donuts at about 9:00 and drove to the building where the election was being conducted and parked the car: by this time it was “after 9:15.” They waited in the cars until about 9:27 and walked into the building, at  
30 which time it was 9:30. They walked downstairs to the office and when they entered the office he, again, checked his watch and it was 9:31. He asked the observer if they could come in, and she asked the Board agent and he said that as it was after 9:30, they could and he walked into the conference room. He and one other of Petitioner’s representatives were in the conference room; the other two remained outside the conference room. Paolicelli and the Employer’s representatives were also in the conference room. The Board agent said that as it was after  
35 9:30, the polls were closed and he removed the tape from the ballot box and opened the box and removed some ballots from the box. At that point, Paolicelli said that another voter had arrived although as he was in the conference room and she was in the office he could not see her. The Board agent said that the ballot box was already open and that nobody else could vote and he asked both sides to acknowledge that the box was already open and that he could not  
40 allow anyone else to vote, and they did so.

Borum testified that he and the other of representatives of the Petitioner waited in their car in the parking lot at the office building from about 9:00, and entered the building at about 9:30, walked downstairs and entered the Employer’s office at about 9:31, the time that he saw  
45 on his cell phone. He remained outside the conference room with Clarke. When the Employer’s representatives arrived, the Board agent removed the tape from the ballot box and opened the ballot box and a voter “walked in to vote.” Borum testified that it was then between 9:40 and 9:45. The Board agent told her that because he had already opened the ballot box, she couldn’t vote. She said that she thought that she had until 10:00 to vote and he told her that voting  
50 concluded at 9:30.

David Rodriguez, an attorney for the Board, was the Board agent conducting this

election. He testified that he has worked for the Board for about three years and, during that period he has conducted between twenty and forty elections and has never said at any election that he would close the polls early if all eligible voters had voted. When he arrived at the voting area, he was met by the Employer’s representatives, who took him to the Employer’s office and the conference room where the election was to be conducted. He then conducted the pre-election conference with the Employer’s representatives, Delp and Paolicelli, as well as the Petitioner’s representatives. He told those present that the conference room was a no electioneering area and that the observer was not allowed to speak to voters, other than saying hello. He also said that he and the observer would be there until 9:30. He showed them the *Excelsior* list and said that his iPhone was the official timer of the election, showed them the ballot box, sealed it in their presence and set up the election booth. At about 8:25, he asked everyone but the Employer’s observer to leave, which they did. As there were only seven voters during the voting period, there was a lot of down time and he, periodically told the observer how much time remained before the polls would be closed. In addition, a few minutes prior to the closing of the polls, he told Delp that normally he would take down the voting booth at that time, but as one voter had not voted, he would leave it up until he tallied the ballots.

He testified that as it got close to 9:30, he was checking his cell phone regularly because he likes to close the polls at exactly the closing time, and “...when I saw it turn 9:30, I went to the front door which was open to the conference room,” stuck his head out the door and said, “9:30, polls are closed.” At that point neither the representatives of the Employer nor the Petitioner had entered the office or the conference room, nor did he see or hear Kasmiroski; the observer did not object to him closing the polls, nor did anybody say that it wasn’t 9:30. After announcing that the polls were closed, he went back to the table in the conference room and stood behind the ballot box, waiting for everybody to come in to the room. The Petitioner’s representatives entered the conference room first, shortly after he announced that the polls were closed, closely followed by Paolicelli, and Rodriguez said that they would wait for the other representatives of the Employer prior to counting the ballots. They entered shortly thereafter, and Rodriguez explained the mechanics of counting the ballots in a *Sonotone* election. He then said that he would take each ballot out of the ballot box, identify how the voter had voted, and show the ballot to all those present, and place the ballot on the table. He then placed the ballot box on its side on the table, and punched his fist through the side of the box. He opened the flaps of the ballot box and placed his hands in the box to remove the ballots when he heard somebody say, “Oh, the last voter is here,” and he replied, “I’m sorry, the box is open, she’s not going to be able to vote.” He did not look at his cell phone or watch to see what time it was at that time. The voter never entered the conference room and never demanded to vote and neither party contended at that time that she should be permitted to vote or to vote subject to a challenge ballot. He then removed the ballots from the ballot box and counted the ballots.

## II. Analysis

We begin the analysis with the longstanding proposition that the party alleging the misconduct, the Employer herein, bears the burden of proof for setting aside the election. *Consumers Energy Company*, 337 NLRB 752 (2002). Further, as counsel for the Employer states in his Brief, when an election is close, such as in the instant situation where the vote was 4 to 3, the mechanics of the election should be more closely scrutinized, *First Student, Inc.*, 359 NLRB No. 120 (2013); further, an election should be set aside only when a determinative number of voters were possibly disenfranchised by an election irregularity of an early closing of the polls. *Garda World Security Corp.*, 356 NLRB No. 91 (2011).

There are numerous differences in the testimony of the witnesses herein and that is not surprising as the conflict involves a minute, or two, or three. I need not decide whether

Rodriguez stated that he would close the polls early if all the eligible voters had voted<sup>4</sup>, as not all the eligible voters voted prior to the closing of the polls, and I need not decide whether Kasmiroski said that she thought that the polls closed at 10:00, as that is also not determinative herein. What is relevant is that whether Kasmiroski arrived at the office between 9:29 and 9:30, or after 9:30; I find the latter more believable and that her “late” arrival was not due to any of the parties herein; rather it was caused by the fact she left her home office too late to arrive in time for the election. *Sahuaro Petroleum*, 306 NLRB 586, 587 (1992). Even if I were to credit the testimony of Paolicelli and Delp, a careful examination of their testimony establishes that Kasmiroski appeared at the Employer’s office after 9:30. Paolicelli testified that when she heard male voices outside her office she checked her computer screen and it said 9:29; but, of course, it could have been anytime from exactly 9:29 to 9:29 and 59 seconds. I find it more likely that it was actually 9:30, or thereafter, as it would have been foolish for the Petitioner’s representatives to arrive earlier than the requested time; they would have nothing to gain and a lot to lose. But even if Paolicelli’s computer did say 9:29 plus, by the time that she left her office, followed the Petitioner’s representatives into the conference room, heard the Board agent say that he was going to break the ballot box, and begin to do so, at least another minute must have passed, making the time 9:30 plus, before anybody recognized Kasmiroski’s presence in the office. Delp testified that Rodriguez either said, “It’s 9:29 and I’m going to be closing the polls soon” or “It’s almost 9:29 and I’m going to be closing the polls soon.” She testified that, at that point, Petitioner’s representatives came to the door of the conference room asking if they could come in. She asked Rodriguez if they could come in, he said that they could, and they walked into the room with Paolicelli right behind them. Rodriguez then came around the table with the ballot box, and as he began to punch in the box, she saw Kasmiroski. Like the situation with Paolicelli, I cannot believe that all this took less than a minute from the time that Rodriguez said that it was 9:29 and that he was closing the polls soon.

I found Rodriguez’ testimony the most reasonable and credible. At exactly 9:30, he stuck his head out of the conference room door and said that it was 9:30 and the polls were closed. Neither the Petitioner or the Employer’s representatives were in the area at that moment. It wasn’t until after they came into the office, that he explained the procedure in a dual-ballot election, the mechanics and rules of counting the ballots, placed the ballot box on its side, and punched in the ballot box that Kasmiroski’s presence was made known. Anyone familiar with the conduct of a Board conducted election knows that Rodriguez’ post closing activities had to take at least a few minutes, not twenty to forty seconds or thirty five seconds. The fact that nobody protested his refusal to allow Kasmiroski to vote reinforces this finding. *Consumers Energy Company, supra*. As the Board stated in *Atlantic International Corporation*, 228 NLRB 1308 (1977):

It has long been the Board’s standard practice in late voter situations to rely upon the reasonable and sound discretion of the Board agent conducting the election as to whether a particular employee should be permitted to cast a ballot. Here, by the time Pandya arrived at the polling area, the Board agents had dismantled the voting booth, taped the ballot box, and were awaiting the start of the ballot count. The placing of the tape on the slot in the box signaled the close of the election, and this fact was understood by all present; no one, including the potential voter, objected to the decision to preclude him from voting. We are unable to say in the circumstances of this case, and particularly where the box had been taped, that the Board agents abused their discretion when they refused Pandya a ballot.

<sup>4</sup> As he told the representatives of the Employer and the Petitioner to return at 9:30, it seems highly unlikely that he would have said this.

In the instant matter, the ballot box had been broken open by the time Kasmiroski's presence was made known; that is a more apparent reason to not allow her to vote than having tape on the ballot box.

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I therefore recommend that the Employer's objections be overruled in their entirety.

**Conclusions**

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Based upon the above, I recommend that the Employer's Objections be overruled in their entirety, and that the Board's Regional Office issue an appropriate certification certifying the Petitioner as the collective bargaining representative of the Employer's employees in the appropriate unit herein.<sup>5</sup>

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**Dated, Washington, D.C. July 23, 2013**

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**Joel P. Biblowitz**  
**Administrative Law Judge**

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<sup>5</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C. within 14 days from the date of this Decision and Recommendation. Exceptions must be received by the Board in Washington by August 6, 2013.