

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

PATIENT CARE OF PENNSYLVANIA, INC.)
D/B/A PATIENT CARE)
)
Employer)
)
and)
LABORERS LOCAL UNION NO. 1310)
)
Petitioner)
_____)

Case No.: 04-RC-101021

**PATIENT CARE OF PENNSYLVANIA, INC. D/B/A PATIENT CARE'S
MEMORANDUM OF LAW IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION ON OBJECTIONS AND RECOMMENDATIONS**

Submitted August 5, 2013, by:

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I. INTRODUCTION

Pursuant to Section 102.69 of the Board's Rules and Regulations, the Employer, Patient Care of Pennsylvania, Inc. d/b/a Patient Care ("Patient Care" or "Employer"), submits this Memorandum of Law in Support of its Exceptions to Administrative Law Judge Joel Biblowitz's July 23, 2013¹ Decision on Objections and Recommendations. For the reasons stated herein, the Board should sustain the Employer's objections and set aside the election because it is obvious that one (1) determinative voter was disenfranchised in this election. This voter disenfranchisement could have been avoided had the Board agent simply followed the Board's Casehandling Manual.

II. PROCEDURAL HISTORY

Patient Care is a Medicare certified home health agency. (Tr. 13).² The Laborers International Union of North America, Local 1310, ("Union") filed a petition seeking to represent the Employer's RNs, LPNs, CNAs and Physical Therapists on March 22nd. (D. 1). On April 14th, with Regional Director approval, the Employer and the Union entered into a Stipulated Election Agreement,³ which included an Eligibility Agreement through which all eligible voters were identified. (D. 2). *See also Norris-Thermador Corp.*, 119 NLRB 1301 (1958).

Pursuant to these agreements, and through its agent David Rodriguez, the Board conducted a secret ballot election on April 30th. (D. 1, 4-5). The Stipulated Election Agreement provided for the polls to be open from 8:30 a.m. to 9:30 a.m. (D. 1). The tally of ballots

¹ All dates referenced herein are to 2013 unless otherwise indicated.

² References are as follows: Hearing Transcript ("Tr. ___"); Administrative Law Judge's Decision ("D. ___") and Exceptions ("Exc. ___").

³ Pursuant to the Stipulated Election Agreement, there were two voting groups, a professional and a non-professional. (D. 1).

following the election reflected that a majority of professional employees voted for inclusion in a unit with non-professional employees. (D. 1). The votes of the professional employees were counted with the non-professional employees to decide the question concerning representation. (D. 1). Of the eight (8) eligible voters, there were four (4) votes cast for representation and three (3) votes cast against representation. (D. 1). One (1) eligible voter, who arrived at 9:29 a.m. and who was in the polling area, did not vote. (D. 1-2).

Pursuant to Section 102.69(a) of the Board's Rules and Regulations, Patient Care timely filed six objections to the conduct of the election. (D. 1). The first objection was to the Board agent's conduct of closing the polls early. The second, third and fourth objections related to the Board agent's refusal to allow the final eligible voter to vote in the election. The final objection was to the Union's conduct of physically blocking the entrance to the polling place, thus prohibiting the final eligible voter to vote.

On May 22nd, the Regional Director concluded that Patient Care's objections raised a substantial and material question of fact and ordered a hearing to be conducted. After a hearing on the matter, on July 23rd, the Administrative Law Judge issued his Decision overruling all objections, to which the Employer has timely filed these Exceptions.

III. SUMMARY OF THE TESTIMONY

The following individuals offered testimony at the hearing: Patient Care Executive Director, Dina Paolicelli; disenfranchised voter, Roberta Kasmiroski; Employer Observer, Niobe Delp; Union Organizer, Charles Clarke; Union Organizer, Julio Palomo; Union Business Agent, Thomas Borum; and Board agent, David Rodriguez. (D. 2).

Ms. Kasmiroski testified pursuant to a subpoena. (Tr. 63). Board agent Rodriguez and Union Organizer Clarke acted as party representatives and thus, were not sequestered during witness testimony. (Tr. 138).

The election was held in a small conference room located within the Patient Care office. (D. 2). The Patient Care office is approximately thirty six feet by thirty feet with only one entrance. (D. 2). The door to the conference room is located approximately thirty feet from the door to the office. (D. 2). The conference room is approximately fourteen feet by ten feet. (D. 2). At 8:00 a.m. on the day of the election, the parties participated in a pre-election conference in the conference room at the Patient Care office. (D. 2). During that pre-election conference, Board agent Rodriguez designated his iPhone as the official timepiece. (D. 2-5). It is undisputed that Niobe Delp was the sole observer to the election. (D. 2).

The Employer concedes the polls opened without incident. Observer Delp testified that she and Board agent Rodriguez were talking towards the end of the polling period when he interrupted her to state that it was almost 9:29 a.m. and he would be closing the polls soon. (Tr. 68, 73; D. 3). Observer Delp testified that just as the Board agent spoke those words, four men from the Union came to the door and motioned to her requesting entry. (Tr. 68, 83; D. 3). Observer Delp turned to the Board agent to confirm his approval and then motioned the Union representatives in. (Tr. 68, 83; D. 3). Patient Care asserts that at the moment Union representatives breached the polling place, at 9:29 a.m. according to the official timepiece, the polls were closed.

Board agent Rodriguez, after hearing all of the testimony offered by Ms. Delp, Ms. Kasmiroski, the Employer and the Union, not surprisingly, offered testimony that he conducted a textbook election. He testified that he watched the clock 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 of the conference room’ stuck [my] head out of the door and said, ‘9:30, polls are closed.’” (D. 5-6). On the contrary, Delp testified that, although the pair were in a conference room which was

approximately fourteen feet by ten feet, she did not hear Board agent Rodriguez announce the polls were closed at any point. (Tr. 68-69). No one testified they heard such an announcement.

None of the witnesses saw Ms. Kasmiroski, the disenfranchised voter, arrive. Ms. Kasmiroski testified that she arrived at 9:29 a.m. (D. 3). Delp and Paolicelli testified that they noticed her less than a minute after the early closing of the polls. (D. 3 and 4). The Union witnesses alleged they noticed Ms. Kasmiroski anywhere from nine (9) minutes to fifteen (15) minutes after the polls closed, with Mr. Palomo committing only to “it was not very long [after the polls closed]” (D. 4-5; Tr. 111-112). Board agent Rodriguez would not estimate how soon after he closed the polls that Ms. Kasmiroski was brought to his attention. (Tr. 131). Accordingly, although there was quite a bit of testimony as to when Ms. Kasmiroski’s presence was noted, only Ms. Kasmiroski testified as to when she actually arrived.

All of the parties do agree, and the Judge found, that when alerted to Ms. Kasmiroski’s presence, Board agent Rodriguez failed to inquire as to whether the parties would agree to allow her to cast a ballot, as directed by Section 11324.1 of the Case Handling Manual. (D. 3-5). When asked why he failed to do so, Board agent Rodriguez responded simply that he had not read that portion of the Casehandling Manual related to conducting elections. (Tr. 139).

IV. QUESTIONS PRESENTED

There is no dispute that Ms. Kasmiroski was eligible to vote, nor is it in dispute that she arrived at the polling place on April 30th to vote but was not allowed to do so by Board agent Rodriguez. The parties further agree that Ms. Kasmiroski’s vote was sufficient to affect the outcome of the election.

Patient Care asserts that there are only two questions at issue. First, whether Board agent Rodriguez closed the polls one minute early. (Exc. 1, 3-4). Patient Care believes the weight of

credible evidence shows that he did. If the Board finds that the polls closed early, it is immaterial what time Ms. Kasmiroski was noticed at the polling place.⁴ The proper standard for determining if an election should be set aside where polls are not open when scheduled is “whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether the number of voters, or any voters at all, *were actually* disenfranchised.” *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996). Thus a showing that the polls closed early demands setting aside the April 30th election and ordering a re-run. (Exc. 5).

The second question at issue before the Board is whether the Board agent’s failure to seek agreement of the parties allowing Ms. Kasmiroski to vote raised reasonable doubt as to the fairness of the election. (Exc. 7-9). Patient Care argues that Ms. Kasmiroski arrived prior to 9:30 a.m. (Exc. 2-3, 6). However, even if Ms. Kasmiroski arrived at 9:30 a.m., Board agent Rodriguez should have, at the very minimum, inquired as to whether the parties, who had previously executed a Norris-Thermador Agreement specifically agreeing to Ms. Kasmiroski eligibility as a voter, would again agree to allow Ms. Kasmiroski to vote in the election. Patient Care asserts that Board agent Rodriguez’s failure to do so affected the outcome of the election thus raising reasonable doubt as to its fairness and validity.

⁴ Patient Care maintains that Kasmiroski did indeed arrive at the polling place on time. (Exc. 2, 3-6).

V. ARGUMENT IN SUPPORT OF EXCEPTIONS

A. Board Agent Rodriguez Closed the Polls One Minute Early, Which Was Sufficient to Affect The Outcome of the Election.

1. Board Agent Rodriguez Closed the Polls One Minute Early.

The Judge misapplied the law when he stated “[w]hat is relevant is that [sic] whether Kasmiroski arrived at the office between 9:29 and 9:30 or after 9:30.” (D. 6). On the contrary, the relevant issue is whether the Board agent closed the polls one minute early.

Patient Care asserts the weight of the evidence indicates Board agent Rodriguez closed the polls one minute early, at 9:29 a.m. Only two people can conclusively testify as to whether Board agent Rodriguez closed the polls early according to the official time piece: (1) Board agent Rodriguez; and (2) Observer Delp, Patient Care’s observer. Observer Delp credibly testified that she and Board agent Rodriguez were talking towards the end of the polling period. Board agent Rodriguez interrupted her to state that it was almost 9:29 and the polls would be closing soon. Within seconds, Union Organizers motioned to be admitted entrance. Board agent Rodriguez agreed to allow them into the polling place. Once the Union representatives entered the polling place, the polls were ostensibly closed.

We note that the Judge’s credibility determinations are based almost completely upon testimony analysis; specifically focusing upon what seems “reasonable” rather than upon witness demeanor. As the Judge has made no adverse findings in regards to the Employer’s witnesses’ demeanor, the Board may review the testimony and make its own determinations of credibility. *Harry Lunstead Designs*, 270 NLRB 1163, 1165 (1984). Observer Delp’s testimony was consistent throughout both direct and cross examination. She had no professional or pecuniary interest in misleading the Judge. There was no accusation that she had engaged in any wrongdoing nor had any reason to lie. In contrast, Board agent Rodriguez stands accused of

professional misconduct (or at least negligence) before his peers and supervisors. It is reasonable to conclude that the Board agent closed the polls early; particularly as it is uncontested that he later violated proper election procedure in failing to inquire whether the parties would agree to allow Ms. Kasmiroski to vote and further failed to offer Ms. Kasmiroski an opportunity to vote under challenge. *See Case NLRB Handling Manual*, Section 11324.1.

The Judge, without finding that Observer's Delp's testimony was not to be believed, credited Board agent Rodriguez's version of events as more reasonable.⁵ (D. 6). However, he came to that credibility determination by focusing not on when the polls closed but rather, when Kasmiroski arrived. (D. 6). Indeed, at one point, the Judge intimated that the outcome would remain the same if he credited the testimony of Delp and Paolicelli over that of Board agent Rodriguez because a "careful examination of their testimony establishes that Kasmiroski appeared at the Employer's office after 9:30." (D. 6). The Judge explained that even if Paolicelli heard the union representatives seek entrance at exactly 9:29 a.m., at least another full minute transpired before Kasmiroski was noticed. Similarly, the Judge found it unnecessary to disregard Delp's testimony as he reasoned that at least a minute must have transpired between the moment that the Union representatives were admitted, which Delp claims was at 9:29 a.m., and the moment Kasmiroski was noticed. (D. 6).

⁵ Patient Care specifically excepts to the weight given to Board agent Rodriguez's testimony in regards to the closing of the polls. The Board has a strong and longstanding policy against Board employees appearing as witnesses in Board proceedings designed to avoid the appearance of partiality. *Laidlaw Transit*, 327 NLRB 315 (1999). Special application must usually be made to the General Counsel in order for the a Board agent to take the stand. See Rules, Section 102.118(a)(1). Generally, unusual circumstances must be present where other witnesses are not available. See generally *Sunol Valley Golf Co.*, 305 NLRB 493 (1991); *Palace Club*, 229 NLRB 1128, fn. 3 (1997). There was no shortage of witnesses in this case, nor any other special circumstances necessitating Board agent participation. The resulting effect of the Board agent's presence coupled with the formulaic content of his testimony calls into question his, and thus the Regions, underlying veracity and impartiality.

The Judge's logic is demonstrative of his failure to focus upon the correct issue, i.e. when Board agent Rodriguez closed the polls, and instead focus on a wholly immaterial issue, i.e. when Kasmiroski was noticed at the polling place. Again, if the Judge credits the testimony of Paolicelli and Delp regarding when the Union representatives sought entrance into the polling place, he must likewise conclude that the Board agent closed the polls early.

2. The Administrative Law Judge Failed To Consider Whether The Employer Met The Objective Standard Of Showing That The Number Of Voters Possibly Disenfranchised Was Sufficient To Affect The Outcome Of The Election.

The Judge's confusion regarding the relevant factual issue of determining exactly when the polls closed with the immaterial factual issue of when Kasmiroski was noticed at the polling site, led him to fail to determine whether the Board agent's misconduct was sufficient to affect the outcome of the election. Patient Care asserts that Kasmiroski's vote was, in fact, sufficient to affect the outcome of the election.

The Board in *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996), held that the proper standard for determining if an election should be set aside where polls are not open when scheduled is "whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether that number of voters, or any voters at all, *were actually* disenfranchised." Thus again, the issue is not whether Ms. Kasmiroski was noticed prior to 9:30. Instead, the issue is whether Ms. Kasmiroski's vote could have determined the outcome of the election.

Most recently in *Garda World Security*, 356 NLRB No. 91 (Feb. 2011), the Board specifically rejected the hearing officer's requirement that the employer provide evidence as to whether employees were actually disenfranchised. In that case, the Board ordered a new election where a Board agent began taking down the election equipment, including the voting booth, one

minute prior to the close of the first of two polling periods. *Id.* Three eligible voters arrived to vote and were told that they could either vote under challenge or vote in the second voting session. *Id.* Each voter left without voting. *Id.* All three voters voted in the second session. *Id.* The employer argued that other eligible voters may have been in the hallway outside the polls and might have overheard the Board agent turn away the voters. *Id.* The Hearing Officer found that the Board agent closed the first session of the polls early but did not recommend setting aside the election stating that the Employer's argument of disenfranchisement was based entirely upon speculation. *Id.*

Citing, *inter alia*, *Wolverine Dispatch*, the Board reversed the Hearing Officer's decision and set aside the election. *Id.* According to the Board, the Hearing Officer erred in demanding evidence of voter disenfranchisement. *Id.* The mere possibility that "a unit employee – one would have been enough – about to enter the polls might have overheard the Board agent telling the three to come back in the afternoon, or that the three, immediately upon leaving the polling place, might have told that voter that the polls were closed" sufficed to demonstrate the required possibility of disenfranchisement. *Id.* The Board reiterated that the "objective standard not only safeguards the choice of the majority of employees voting in the election, but also is necessary to protect the integrity of the election process itself." *Id.* See also *Pea Ridge*, 335 NLRB 161 (2001)(Board overturned Regional Director decision and set aside election despite evidence that the five employees who failed to vote offered reasons unrelated to the seven minute delay in the opening of the polls).

In this case, the Judge need only look at the tally of ballots to ascertain that Patient Care has met its burden in establishing that the votes of those employees "possibly excluded" by the early closing of the polls could have been determinative. See *Midwest Canvas Corp.*, 326 NLRB

58 (1998). The tally of ballots reflect a one vote margin which suffices to demonstrate the required possibility of disenfranchisement.

B. The Board Agent's Failure To Seek Agreement Of The Parties Allowing Ms. Kasmiroski To Vote Raised Reasonable Doubt To The Fairness Of The Election.

1. Board Agent Rodriguez Failed To Inquire As To Whether the Parties Would Permit Kasmiroski To Vote As Required.

As mentioned above, there is no dispute that the Board agent failed to inquire as to whether the parties would agree to allow Kasmiroski to vote. Ostensibly in response to Patient Care's objections to that oversight, the Judge, quoting *Atlantic International Corp.*, 228 NLRB 1308 (1977), held that 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." In *Monte Vista Disposal Co.*, 307 NLRB 531, 533-534 (1992), the Board analyzed its reliance on the discretion of regional personnel in handling late voters and, specifically referring to the holding of *Atlantic International Corp.*, overruled this long standing practice due to its inconsistent results and the appearance of Board agent partiality. Finding a bright line rule more useful and, indeed mandated by Section 11324 of the Board's Casehandling Manual, the Board held that late voters who arrive at the polling place after the designated polling period, as Board agent Rodriguez claims Kasmiroski did, shall be entitled to have their vote counted if the parties agree not to challenge the ballot. *Id.* at 533-534. Indeed, it is the Board agent's obligation to inquire as to whether the parties would agree to allow the potentially disenfranchised voter to cast a ballot. *See* Section 11324.1, Casehandling Manual. Part Two, Representation Proceedings (2007). ("[T] Board agent should determine whether there is agreement of all the parties as to whether [a late arriving voter] should be allowed to cast a ballot...).

2. The Board Agent's Failure To Comply With The Board's Casehandling Manual Raised Reasonable Doubt As To The Fairness And Validity Of The Election.

The Casehandling Manual provides “operational guidance” which is “intended to safeguard a free and fair election.” *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn. 5 (1995); *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990). Indeed, the Board has implemented the aforementioned guidelines to balance two conflicting policy considerations: (1) allowing employees the broadest electoral participation; and (2) allowing prompt determinations of representation. *Monte Vista Disposal*, 307 NLRB at 533. The Board agent's admitted ignorance of his responsibility in dealing with an alleged late voter thwarted each of these laudable policy considerations. Kasmiroski was denied the opportunity to vote by agreement of the parties. In addition, the parties were denied the possibility of a speedy resolution to her disenfranchisement.

It has long been established that “[t]he Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question.” *New York Telephone Co.*, 109 NLRB 788, 790 (1954). Further, the Board will set aside an election on the basis of Board agent misconduct if the manner in which an election was conducted, “raises reasonable doubt as to the fairness and validity of the election.” *Jakel, Inc.*, 293 NLRB 615, 616 (1989) (citing *Polymers, Inc.*, 175 NLRB 282 (1969), *enfd.* 414 F. 2d 999 (2nd Cir. 1969).

The Board, in *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008), set aside an election, in part, because the Board agent failed to display ballots for inspection as required by the Board's Casehandling Manual. The Board held that this irregularity coupled with two mistakes in ballot identification, although cured, cast doubt upon the fairness and validity of the election. *Id.* at 681. Likewise, in *Madera Enterprises, Inc.*, 309 NLRB 774 (1992), the Board held that the integrity of the Board's election procedure was compromised when two Board

agents opened a sealed envelope containing impounded ballots outside the presence of the parties. In each of these cases, there was no evidence that the Board agents actually tampered with the ballots. Despite this, the Board held that “considering the closeness of the election where even one mistake ...could have altered the election outcome” these irregularities warranted setting aside the election. *Fresenius*, 352 NLRB at 681.

In this case, it is clear that Kasmiroski came to the polls intending to vote only to find the Union representatives in the polling place, effectively closing the polls. Even assuming that the polls closed in a timely manner, the Board agent’s failure to follow appropriate Board procedure prohibited Kasmiroski from voting either by consent or by agreement. Because the Board agent did not follow the proper procedure for handling a late arriving voter, we do not know if the parties would have reached an agreement regarding Kasmiroski’s eligibility to vote, thus resolving this matter prior to the counting of the ballots.

The Judge briefly points to *Consumers Energy Co.*, 337 NLRB 752, (2002), in which the Board refrained from overturning an election in the face of an objection that the board agent failed to follow proper procedure for handling late arriving voters. However unlike *Consumer Energy, Co.*, in which the hearing officer found that it was “mere speculation to assume that the parties would have agreed to permit [the employee] to vote,” in this case, the parties had once before specifically agreed to Kasmiroski’s eligibility to vote. *Id.* at 755. As mentioned previously, the Stipulated Election Agreement executed by the parties included a *Norris Thermador* list of all eligible voters, including Kasmiroski. (D. 2) There is no reason to believe that the parties would not similarly agree to allow Kasmiroski to cast a ballot. Prior to the counting of the ballots, the Union presumably had no idea that there would be a one vote margin leaning in their favor. In addition, there is no evidence that the Union had any idea as to how

Kasmiroski would vote. It was in the best interest of both parties to allow Kasmiroski to vote in order to effectuate the will of the employees and ensure a speedy conclusion to the election process.

VI. CONCLUSION

The Board has been presented with an election in which Petitioner prevailed by only one (1) vote. Patient Care respectfully asserts a determinative voter has been improperly disenfranchised by Board agent misconduct in closing the polls one minute early and then failing to offer the parties an opportunity to allow her to vote by agreement. The Judge simply failed to adequately consider whether Board agent misconduct affected the outcome of the election or caused reasonable doubt as to the fairness and validity of the election. Patient Care requests that the Board sustain the Employer's objections and order that the election be set aside and a new election directed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Section 102.69(j)(2) of the Board's Rules and Regulations, I hereby certify that on August 5, 2013, I electronically filed the foregoing with the Office of the Executive Secretary and caused it to be served upon the following via email:

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