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Patient Care of Pennsylvania, Inc. d/b/a Patient Care and Laborers International Union of North America, Local 1310, Petitioner. Case 04–RC–101021

April 9, 2014

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 30, 2013, and the administrative law judge’s report recommending disposition of them. The dual-ballot election was conducted among the Employer’s professional and nonprofessional employees pursuant to a Stipulated Election Agreement. The ballot for the professional employees contained two questions, concerning (1) inclusion with nonprofessional employees in a unit for collective-bargaining purposes, and (2) representation by the Union for collective-bargaining purposes. A majority of the professional employees voted yes on the first question; accordingly, their ballots were commingled with those of the nonprofessional employees and they were all counted together. The tally of ballots shows 4 for and 3 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, adopts the judge’s findings¹ and recommendations only to the extent consistent with this Decision,² and finds that a certification of representative should be issued.

Pursuant to the Stipulated Election Agreement, the election was conducted in a conference room at the Employer’s facility between 8:30 and 9:30 a.m., in accord with the posted Notice of Election. At the preelection conference, the Board agent instructed the parties’ representatives and the Employer’s observer that his iPhone would be the official timepiece for the election. During the voting period, seven employees voted. At 9:30 a.m., the Board agent announced that the polls were closed.

¹ The judge was sitting as a hearing officer in this representation proceeding. The Employer has excepted to some of the hearing officer’s credibility findings. The Board’s established policy is not to overrule a hearing officer’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings. On that basis, we overrule the Employer’s Objections 1 and 2.

² In the absence of exceptions, we adopt *pro forma* the judge’s recommendation that the Employer’s Objection 5 be overruled.

Shortly thereafter, the parties’ representatives entered the conference room. After the Board agent explained how ballots are counted in a dual-ballot election, he punched open the ballot box. As the Board agent opened the ballot box, someone stated, “[T]he last voter is here.” Roberta Kasmiroski, an eligible voter, was standing outside the conference room. The Board agent replied, “[T]he box is open, [and] she [i]s not going to be able to vote.” Neither party expressed any disagreement with the Board agent or contended that Kasmiroski should be permitted to vote. Kasmiroski herself never entered the conference room or asked to vote. The Board agent proceeded to remove the ballots from the ballot box and count them.

In its objections, the Employer objected to the Board agent’s conduct of the election, contending that Kasmiroski, a determinative voter, was disenfranchised because the Board agent did not seek agreement of the parties to allow her to cast a ballot (Objection 3) or because the Board agent did not allow her to vote under challenge (Objection 4).

As the objecting party, the Employer carries the burden “to prove that there has been misconduct that warrants setting aside the election.” *Consumers Energy Co.*, 337 NLRB 752, 752 (2002). To prevail on that question, the Employer must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). The judge rejected the Employer’s objections and recommended that the Petitioner be certified. For the following reasons, we agree.

Objection 3

Objection 3 alleges that the Board agent erred by failing to inquire whether the parties would agree to allow Kasmiroski to vote. The Employer relies on Section 11324.1 of the Board’s Casehandling Manual (Part Two) Representation Proceedings, which provides:

An employee who arrives at the polling place after the designated polling period has ended is not entitled to have his or her ballot counted, absent extraordinary circumstances, unless the parties agree not to challenge the ballot. *Laidlaw Transit, Inc.*, 327 NLRB 315 (1999); *Monte Vista Disposal Co.*, 307 NLRB 531 (1992). In order to permit an orderly investigation if necessary after the election as to whether there were extraordinary circumstances, the following procedure should be followed when a voter arrives after the designated polling period has ended: the Board agent should determine whether there is agreement of all the parties as to whether such voter should be allowed to cast a ballot; if no such agreement is reached, the Board

agent should permit the voter to cast a ballot, which the Board agent should then challenge.

We recognize that *Monte Vista*, cited in the Casehandling Manual, states that the parties have the option of agreeing to allow late-arriving employees to vote. The decision, however, neither states nor implies that the Board agent is obliged to inform the parties of that possibility. *Monte Vista* itself concerned whether employees who arrived at the polling place after the polls were closed but before the ballot box was opened were entitled to cast ballots.³ It held that they had no such right, but left open the possibility that the parties could agree to permit it. The decision did not discuss how the parties would reach an agreement to allow late-arriving employees to vote, let alone the Board agent's role in that process. The Board has never held that the Board agent has an affirmative obligation to initiate such an inquiry, and we decline to do so here.

Therefore, the only question here is whether the Board agent's conduct warrants setting aside the election because of the alleged failure to comply with Section 11324.1 of the Casehandling Manual. We note that the provisions of the Casehandling Manual are not binding procedural rules; the Casehandling Manual is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. See *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988). Purported noncompliance with those provisions does not warrant setting aside an election, absent a showing that the deviations from the guidelines raised a reasonable doubt as to the fairness and validity of the election. See *Correctional Health Care Solutions*, 303 NLRB 835, 835 fn. 1 (1991); *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990).

In any event, we find that the Employer failed even to show a deviation from the guidelines. Section 11324.1 concerns employees who "arrive[] at the polling place after the designated polling period has ended" Here, the judge found that after the Board agent announced the closing of the polls and punched open the ballot box in the conference room, which was the official polling place, Kasmiroski appeared "in the office"—an area outside the conference room. In fact, Kasmiroski admitted that she never entered the conference room, spoke to the Board agent, or otherwise attempted to cast

a ballot. By its terms, Section 11324.1 does not apply to these circumstances.

In *Rosewood Care Center, Inc.*, 315 NLRB 746 (1994), enfd. 83 F.3d 1028 (8th Cir. 1996), the Board overruled a similar election objection alleging that the Board agent acted improperly by failing to seek the parties' agreement to allow employees who did not appear at the polls an opportunity to vote. There, an employer's representative asked at the preelection conference if there were any provisions allowing three employees who could not come during the voting period to cast their ballots. Id. at 746. Replying "no," the Board agent did not advise him that the parties could agree to permit them to vote. Id. Two employees arrived at the employer's facility 3 minutes after the end of the polling period, but they did not go to the polling place or speak to the Board agent. Id. Under these circumstances, the Board held that the Board agent could not be faulted for failing to seek the parties' agreement not to challenge ballots of employees who did not "appear[] at the polls in an attempt to vote." Id. (Emphasis in original.). We conclude, as in *Rosewood Care Center*, that the Board agent cannot be faulted for failing to explore the possibility of the parties' consenting to permit Kasmiroski to vote. Accordingly, we adopt the judge's recommendation to overrule the Employer's Objection 3.

Objection 4

Objection 4 alleges that the Board agent improperly denied Kasmiroski an opportunity to vote under challenge. We agree with the Employer that, as a general matter, the better practice is to provide a voter who arrives late at the polls with an opportunity to cast a challenged ballot. See *Monte Vista Disposal Co.*, 307 NLRB at 533 fn. 5 ("Late-arriving employees should be permitted to cast challenged ballots to preserve their votes[.]"). However, as stated above, Kasmiroski was not a late-arriving voter: she never "arrived" at the polls or presented herself to the Board agent in an attempt to vote. Thus, the Board agent did not deny Kasmiroski the opportunity to cast a challenged ballot. Accordingly, we adopt the judge's recommendation to overrule the Employer's Objection 4.

Because the Employer has failed to establish that the Board agent engaged in any misconduct or departure from procedure that could constitute a basis for setting aside the election, we agree with the judge that a certification of representative should issue.⁴

³ Pre-*Monte Vista* case law dealing with the question of late-arriving voters was "at best confusing." 307 NLRB at 533. *Monte Vista* was an attempt to create "something close[] to a bright-line rule terminating the balloting at the conclusion of the voting period." 307 NLRB at 533.

⁴ Member Miscimarra agrees that Objections 3 and 4 should be overruled and a certification of representative should issue, although the "better practice" (as stated in the text) is for late-arriving voters to be handled as described in Casehandling Manual Sec. 11324.1: the Board agent should explore whether the parties agree that they can vote; ab-

PATIENT CARE OF PENNSYLVANIA

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers International Union of North America, Local 1310, and that it is the exclusive collec-

sent such an agreement, they should be permitted to vote under challenge. Because the record establishes that Roberta Kasmiroski appeared at the polling area and was prevented from voting only because she was late, Member Miscimarra disagrees with the majority's statement that Kasmiroski "was not a late-arriving voter." In the instant case, however, Member Miscimarra believes the failure to permit Kasmiroski to vote was appropriate because the ballot box had already been opened when Kasmiroski arrived. See, e.g., *Monte Vista Disposal Co.*, 307 NLRB 531, 533 (1992) (adopting "something closer to a bright-line rule terminating the balloting at the conclusion of the voting period"); *New England Oyster House*, 225 NLRB 682, 682 (1976) (employee arriving at the polls a few minutes late should be allowed to vote "if the polls were not closed and/or the ballot box had not been opened"). Although the Board majority in *Monte Vista* overruled *New England Oyster House* without expressly reaffirming that opening the ballot box should terminate all balloting, Member Miscimarra believes this is a "bright-line rule" consistent with *Monte Vista* that "can be readily understood and easily applied." 307 NLRB at 533. Although the Board favors participation in elections by the largest number of eligible voters, parties have an equally important interest in preserving the integrity of the Board's election procedures. Therefore, because the ballot box had been opened, Member Miscimarra finds that the Board agent did not err by failing to seek the agreement of the parties to allow Kasmiroski to cast a ballot and by failing to permit Kasmiroski to cast a challenged ballot.

tive-bargaining representative of the employees in the following appropriate unit:

All full-time and part-time Registered Nurses, Occupational Therapists, Speech Therapists, Home Health Aides, Licensed Practical Nurses, and Clinical Team Assistant, employed by the Employer from its facility located at 4949 Liberty Lane, Suite 5, Allentown, PA, excluding all other employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. April 9, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD