

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

MEMORIAL HOSPITAL OF SALEM	:	
COUNTY,	:	
	:	Case 4-RC-21697
	:	
Employer,	:	
and	:	
	:	
HEALTH PROFESSIONALS AND	:	
ALLIED EMPLOYEES (HPAE),	:	
	:	
Petitioner.	:	

UNION’S BRIEF IN OPPOSITION TO THE EMPLOYER’S EXCEPTIONS

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Dated: April 13, 2011

I. INTRODUCTION

The Health Professionals and Allied Employees (“HPAE” or “Union” or “Petitioner”), hereby submits this brief in opposition to the exceptions filed in this matter by the Employer, Memorial Hospital of Salem County (“MHSC” or “Employer” or “Hospital” or “Respondent”), an acute care hospital located in Salem, New Jersey.

On March 23, 2011, Administrative Law Judge Earl Shamwell issued a decision recommending that the Board overrule the Respondent’s objections in their entirety and direct the Regional Director for Region Four (“RD”) to certify the results of the union election. On April 6, 2011, the Employer filed seven exceptions to Judge Shamwell’s decision.

The procedural history of this case is lengthy. On May 19, 2010, the Union petitioned to represent all full-time, part-time and per diem registered nurses at the Hospital. The Employer challenged the eligibility of all charge nurses and a multi-day hearing was held in June 2010. On August 2, 2010, the Regional Director for Region Four (“RD”) issued her Decision and Direction of Election (“DDE”) in the above-captioned matter, finding that all of the charge nurses were employees eligible to vote in the election, with the exception of two nurses. Pursuant to the DDE, the employees voted on September 1 and 2, 2010, and the ballots were impounded pending a Request for Review filed by the Employer. The Board denied the Employer’s Request for Review on December 9, 2010. On December 14, 2010, the ballots were opened and the Union prevailed in the election. There were unresolved challenged ballots but they were not determinative. On December 21, 2010, the Employer filed 20 objections to the election. Objections 1-16 concern issues addressed specifically by the RD in her DDE. Objection 17 was subsequently withdrawn by the Employer. Objections 18-20 concern alleged Board agent misconduct.

On January 10, 2011, the RD issued a Notice of Hearing on Objections 1-16 and 18-20. In the Notice of Hearing the RD summarized the evidence submitted by the Employer. With respect to objections 3-16, the summary of evidence states that the Employer relies solely on the pre-election record. Objections 1 and 2 concern the issue of supervisory taint by employees who had been found by the RD in the DDE not to be supervisors. With respect to Objections 18-20, the Employer alleged Board Agent misconduct and claimed that several voters had expressed concern about the secrecy of the ballot, and that one voter believed that the Board agent had seen her vote. On January 19, 2011, this case was scheduled to be heard in the NLRB Region Four offices on February 22, 2011.

On February 15, 2011, the Union filed a Request for Special Permission to Appeal and Appeal of the RD's decision not to administratively dismiss Objections 1-16. Prior to the start of the hearing on February 22, 2011, the Board granted the Union's Request and Appeal, finding that the Employer was raising as election objections matters, which had previously been raised and decided by the RD in her DDE and reviewed by the Board when it denied the Employer's Request for Review of the DDE. The Board found that there were no substantial and material factual issues that would warrant a hearing on Objections 1-16, and issued an Order granting the Petitioner's Request for Special Appeal and Appeal. The Board remanded the proceeding to the RD for further consideration consistent with the Order.

On February 24, 2011, the RD issued a Supplemental Decision on Objections to the Election, finding that the Employer's Objections 1-16 lacked merit and were overruled, and that only Objections 18-20 were pending. The Employer has requested review of the RD's Supplemental decision, which is still pending.

The Petitioner respectfully asks that the Board DENY the Employer's exceptions to Judge Shamwell's March 23, 2011, decision in which Judge Shamwell recommended that the

Board overrule the Respondent's objections in their entirety and direct the RD to certify the results of the union election.

II. ARGUMENT

The burden on the Respondent, to set aside the results of the election, is substantial. There is a strong presumption that "ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Safeway, Inc., 338 NLRB 525 (2002). Moreover, "An objecting party must show *by specific evidence* not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice." Werthan Packaging, Inc., 345 NLRB 343 (2005) (emphasis added). In addition to a showing of specific evidence that improper conduct occurred, this conduct must be shown to have "interfered with the employees' exercise of free choice to such an extent that it materially affected the results of the election." Sonoma Healthcare Center, 342 NLRB 933 (2004). The Respondent, therefore, has the burden not only of introducing specific evidence of improper conduct but it must also prove that this conduct affected the election results. The Respondent did not satisfy this burden of proof in the proceeding before Judge Shamwell.

A. Response to Exceptions 1-3: Judge Shamwell properly took judicial notice of the Board's Order overruling the RD and finding that Objections 1-16 should have been administratively dismissed

Judge Shamwell did not err in failing to consider and rule upon Objections 1-16.

Objections 1-16 were not before him for consideration.

Prior to the start of the Objections hearing, the Board issued an Order granting the Petitioner's Request for Special Permission to Appeal and Appeal to the Board of the RD's failure to administratively dismiss Objections 1-16. The Union had argued that Objections 1-16

concerned matters, which had previously been litigated and disposed of in the RD's DDE, including allegations of supervisory taint by employees whom the RD had deemed were not supervisors. The Board's Order states "we therefore reverse the Regional Director's determination to set the Employer's Objections 1-16 for hearing and remand the proceeding for further determination." The RD subsequently issued a supplemental decision finding that for the reasons given by the Board, the Employer's Objections 1-16 lacked merit and were overruled.¹

Judge Shamwell properly noted in his decision on the Objections that in light of the Board's Order concerning Objections 1-16 that he took judicial notice at the hearing of the Order and consequently did not take evidence on those Objections. He further noted that in his view the RD's supplemental decision, which essentially states that pursuant to the Board's Order the Employer's Objections 1-16 are overruled, should be given retroactive effect to February 22, 2011.²

From a practical standpoint, it did not make sense for Judge Shamwell to conduct a hearing on Objections 1-16. To do so, and to allow the Employer to relitigate issues, which the Board had determined should have been administratively disposed of by the RD and not set for hearing, would have been contrary to the Order issued by the Board. In this case, the Board reviewed the RD's notice of hearing on Objections 1-16 and overruled the Objections, essentially finding that they should have been administratively dismissed. The Board is authorized to delegate to its regional directors its powers under Section 9 of the Act, namely the authority to investigate and provide for hearings. The statute provides that the *Board may review any action of a regional director delegated to him under this paragraph.* 29 U.S.C. § 153(b) (2011).

¹ The RD's supplemental decision dated February 24, 2011, is attached as Exhibit 1.

² Judge Shamwell stated on the record at the objections hearing (Transcript page 6) that he would have dismissed Objections 1-16 had the union made a motion to dismiss, absent dismissal by the Board.

Furthermore, in its Order granting the Union's Special Permission to Appeal and Appeal, the Board stated that the Employer was improperly using the objections process.

The Employer in the instant case filed numerous frivolous objections to an election fairly won by the union. The Employer's battle plan is to create endless litigation in an attempt to ensure that its employees never have an opportunity to sit down and negotiate a collective bargaining agreement with their employer. In fact, this Employer has informed its employees that it will not bargain with the Union. It has created a mockery of the process.

Putting aside the Board's Order and the reasons for it, it would have been an utter waste of resources for the agency and the parties to have participated in a hearing on Objections 1-16 because of the Employer's contention that the Objections were still "viable" procedurally. The Board overruled the RD's determination that a hearing should take place on Objections 1-16.

B. Response to Exceptions 4-7: Judge Shamwell did not err in finding that Objections 18-20 should be overruled.

The Respondent alleges Board Agent misconduct in the handling of the challenged ballot procedure. No evidence of misconduct was presented. Respondent is basing at least some of the allegations it has made in Objections 18-20 on a failure to follow an NLRB rule that, by its own admission, does not exist. (Tr. 36-39.)³ Respondent would impose additional requirements on Board Agents in administering the challenged ballot procedures to deal with certain hypothetical scenarios.

In order to set aside an election based on Board Agent misconduct, there must be evidence that "raises a reasonable doubt as to the fairness and validity of the election." Polymers, Inc., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010

³ "Tr." refers to the transcript of the hearing conducted by Judge Shamwell.

(1970). If there is an allegation made that the alleged misconduct is the Board agent's failure to ensure the secrecy of voter balloting, the Board will not set aside the election under the Polymers standard absent evidence that someone witnessed how a voter marked his or her ballot. Avante at Boca Raton, 323 NLRB 555, 558 (1997). NLRB Chairman Wilma Liebman has observed that “setting aside an election based on a hypothetical possibility of disenfranchisement risks upsetting employees' validly expressed desires.” Garda World Security Corp., 356 NLRB No. 91, n. 4 (2011).

No evidence whatsoever was produced that could raise a reasonable doubt as to the fairness and validity of the election.

1. Exception 4: The Employer mischaracterizes a sentence in the RD’s Notice of Hearing, which stated the Employer’s position, as an admission by the RD of information given to voters

The Employer contends that Judge Shamwell erred in finding that the objections should be overruled on the basis that the Employer believes that voters should have been informed of the ways in which their identities might have been determined and they were not so informed, namely the additional rule that Respondent would like to see imposed upon Board Agents. First, the Employer submitted no evidentiary proof as to what voters were told. Consequently, the Employer has to argue that a statement in the Notice of Hearing is some sort of admission by the RD. This argument was properly rejected by Judge Shamwell. The Employer submitted to the Board, prior to the Notice of Hearing, that the Board agent did not inform voters that their identities could be determined. The RD summarized the Employer’s Objection and offer of proof in the Notice of Hearing. The RD in no way acknowledged this statement at any time as some sort of admission. (See Exhibit 3). No other evidence was presented to support this Objection. Second, there is no obligation on the part of the Board agent to explain to each voter

the circumstances under which his or her vote may potentially be revealed. It is not required and certainly should not be the basis here for overturning the election. The employer's argument that the board agent was required to inform voters of a hypothetical situation, pursuant to a non-existent Board rule, is novel, but not persuasive and should certainly not be the basis for overturning this election. Moreover, the challenged ballots were not determinative.

2. Exceptions 5, 6, 7: No evidence was produced of Board Agent misconduct.

The Employer offered one witness to support Objections 18-20. As noted by Judge Shamwell, the only witness called by the Respondent, Darneesha Smith, did not establish any objectionable conduct by the Board Agent. Judge Shamwell found that “[w]hile Smith did not testify at any particular length, she did in my view supply sufficient evidence for me to conclude that the Board agent did not engage in any conduct that could be reasonably said to have undermined ballot secrecy or caused Smith any discomfort in participating in the election.”

In the absence of any supporting testimony by an employee witness, the only other potential witness was the Board agent. Judge Shamwell noted that the Employer did not attempt to call the Board Agent. The Employer takes one sentence in Judge Shamwell’s decision out of context, stating that Judge Shamwell found that the Employer had to call the Board Agent in order for the Employer’s objections to be sustained. Judge Shamwell merely stated that in light of the fact that the Respondent’s only witness presented no evidence to support its objections that perhaps calling the Board Agent would have provided some proof to support the Employer’s position. The Employer did not attempt to do that, however, instead choosing to rely on a recounting of its own statement in a hearing notice as an admission by the RD.

III. CONCLUSION

For all of the reasons set forth above, HPAE respectfully requests that the Board DENY the Employer's exceptions to Judge Shamwell's March 23, 2011, decision recommending that the Board overrule the Respondent's objections in their entirety and direct the RD to certify the results of the union election.

Respectfully submitted,

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Certificate of Service

I, Lisa Leshinski, do certify that on the date below I caused a true and correct copy of the Union's Opposition to the Employer's Exceptions, on Behalf of the Petitioner, Health Professionals and Allied Employees, Case No. 4-RC-21697, to be served on the following individuals:

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Date: April 13, 2011



Lisa Leshinski, Esq.