

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

SALEM HOSPITAL CORPORATION	:	
	:	
	:	Case No. 4-RC-21697
Employer	:	
<i>and</i>	:	
	:	
HEALTH PROFESSIONALS AND ALLIED	:	
EMPLOYEES, AFT, AFL-CIO	:	
	:	
Petitioner	:	

**EMPLOYER’S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE EARL E. SHAMWELL, JR.**

As the Employer in the above-referenced case, Salem Hospital Corporation (hereafter, “Salem” or the “Hospital”) hereby submits, pursuant to § 102.69 of the Rules and Regulations of the National Labor Relations Board (hereafter, the “Board”), the following Brief in Support of the Exceptions to the Recommended Decision of Administrative Law Judge Earl E. Shamwell, Jr., dated March 23, 2011 (“the Exceptions”).

BACKGROUND

On or about May 19, 2010, the Health Professionals and Allied Employees, AFT, AFL-CIO (hereafter, the “Union”) filed with Region 4 of the Board a Petition for Certification of Representative (hereafter, the “Petition”), whereby the

Union essentially sought to represent the Registered Nurses employed by the Hospital. In response to the Petition, the Regional Director scheduled a hearing as to the question of whether, inter alia, Salem's Charge Nurses were statutory supervisors. The Region's hearing officer, Mr. Edward Bonnet, opened the record on June 2, 2010. On June 9, 2010, Mr. Bonnet closed the record over the objections of Salem, which had informed Mr. Bonnet of the Hospital's desire and ability to offer additional evidence of the Charge Nurses' supervisory status.

On August 2, 2010, the Regional Director issued a Decision and Direction of Election (hereafter, at times, the "DDE"), whereby she concluded that the record generally did not include sufficient evidence to prove the supervisory status of Salem's Charge Nurses.¹ On August 20, 2010, Salem filed a Request for Review with the Board. On September 1 and 2, 2010, an Election (hereafter, the "Election") took place at Salem's facility. However, due to the pendency of the Hospital's Request for Review, the ballots were impounded temporarily by the Region.

By an Order issued on December 9, 2010, the Board denied Salem's Request for Review. On December 14, 2010, the ballots were opened and counted by the

¹ The Regional Director did conclude that the two Charge Nurses assigned to the Hospital's Surgical Services Department were statutory supervisors. *See* DDE, page 18.

Region, which issued a Tally of Ballots in the Union's favor. On December 21, 2010, Salem filed the Hospital's Objections to the Election (hereafter, at times, the "Objections"), which were comprised of twenty (20) specific objections. Thereafter, on December 30, 2010, Salem filed the Hospital's evidence in support of the Objections.²

On January 10, 2011, the Regional Director issued a Notice of Hearing on Objections (hereafter, at times, the "Notice of Hearing"), whereby she concluded the Objections raised substantial and material issues of fact, and, accordingly, scheduled a hearing on the entirety of the Objections. Ultimately, the hearing was scheduled to commence before Administrative Law Judge Shamwell on February 22, 2011 at 1:00 p.m.

On Tuesday, February 15, 2011, thirty-six days after the Regional Director issued the Notice of Hearing, the Union filed a Request for Special Permission to Appeal and Appeal to the Board of the Notice of Hearing (hereafter, the "Union's Appeal"). In the Union's Appeal, the Union requested that the Board administratively dismiss Objections 1-16. A mere seven days later, just a few hours before the record opened on February 22, 2011, and without even reviewing

² Salem later withdrew Objection No. 17.

the Hospital's response to the Union's Appeal³, the Board issued an Order (hereafter, at times, the "Board's Appeal Order") granting the Appeal.

Critically, the Board did not dismiss Objections 1-16. Instead, it simply ruled that Objections 1-16 did not require any further evidentiary proceedings. Accordingly, the hearing which began (and concluded) later that same day before Judge Shamwell was improperly limited to Objections 18-20.

On February 24, 2011, the Regional Director issued a Supplemental Decision on Objections to Election (hereafter, the "Supplemental Decision"), in which she concluded, for the reasons set forth in the Board's Appeal Order, that Objections 1-16 "lack[ed] merit," and, accordingly, overruled the Objections.⁴

On March 1, 2011, the parties submitted their post-hearing briefs to Judge Shamwell. On March 23, 2011, Judge Shamwell issued his Recommended Decision, to which the instant Brief and the accompanying Exceptions are directed.

³ Salem's Opposition to the Union's Appeal was not e-filed until about an hour *after* the agency issued the Board's Appeal Order. Accordingly, on March 8, 2011, the Hospital filed a Motion for Reconsideration with the Board as concerns the Board's Appeal Order.

⁴ The Hospital filed a Request for Review of the Regional Director's Supplemental Decision on March 10, 2011, and that Request for Review remains pending.

ARGUMENT

1. **The ALJ Erred When He Refused to Consider and/or to Rule On Salem's Objections 1-16.**

The Regional Director initially directed that a hearing take place on *all* of Salem's Objections. More than a month after the Regional Director issued the Notice of Hearing, the Union filed its Appeal, in which it sought dismissal of Objections 1-16. Though the Board ruled that Objections 1-16 did not require the holding of any evidentiary proceedings,⁵ the Board did not *dismiss* Objections 1-16. Those Objections, therefore, remained viable at the time the ALJ hearing commenced on February 22, 2011, and should have been both considered and ruled upon by the ALJ.

Salem respectfully requested in its Post-Hearing Brief that the ALJ take judicial notice of the transcript of the hearings before Mr. Edward Bonnet in this matter, held from June 2-9, 2010, as well as the exhibits received into evidence as part of those hearings. As additional support for its arguments in support of Objections 1-16, Salem referred the ALJ to its Post-Hearing Brief filed with the

⁵ Salem believes the Board erred by granting the Union's Appeal in any respect, and has filed a Motion for Reconsideration with the Board. That Motion remains pending.

Regional Director on June 23, 2010, and e-filed an additional copy of that Brief with the Division of Judges contemporaneously with its Post-Hearing Brief on the Objections.

Despite the facts that the Board did not dismiss Objections 1-16 and that they remained viable at the time of the hearing, the ALJ eschewed his responsibility to consider and rule on Objections 1-16. *See* ALJ Recommended Decision, at p.10, l.6 (“so that the record is crystal clear, . . . I have not treated with or considered in any respects the Respondent’s Objections 1-16”). For these reasons, the ALJ’s Recommended Decision should be rejected.

2. The ALJ Erred In Not Sustaining Objections 18-20.

The ALJ erred in overruling the Hospital’s Objections 18-20, which challenged the fact that the Board Agent who conducted the election destroyed the laboratory conditions of the election by misleading the voters to believe that their votes would at all times remain secret, by failing to identify for them the two scenarios in which their votes, if challenged, could become known, and by failing to comply with the Board’s R Case Manual’s ballot challenge procedures.

The Board routinely represents that its elections, including the one that occurred at the Hospital on September 1 and 2, 2010, are “secret ballot elections.” This description abounds generally in the literature produced by the National Labor Relations Board, and was specifically guaranteed here by at least the DDE and the

Notice of Election. In fact, the National Labor Relations Board touts the secrecy of the balloting process as a key factor in the proper conduct of an election. This description misleads voters into believing that no party could *ever* come to know how an individual voter cast his or her ballot. However, there are two admitted circumstances in which a challenged voter's selection may become known: if the challenges are determinative of an election, the voter's selection will become known if (1) he or she is the only challenged voter, or (2) all the challenged voters voted the same way.

The ALJ erred in not sustaining Objections 18-20 because the record contains evidence that the Board effectively admitted its error in failing to advise the challenged voters that their votes could become public knowledge. The Regional Director's Notice of Hearing expressly states, "Although the Board agent running the election assured these voters that their votes would remain secret, she did not inform them of circumstances under which their identities could be determined." This conclusion appears to have been made after the Regional Director's investigation into the Hospital's Objections. It serves as an acknowledgement of the fact that, during the course of the Election, the Board Agent conducting the Election did not inform any voter whose ballot was being challenged of the two circumstances in which his or her vote could be determined. The ALJ's conclusion that the Regional Director's statement was not an

acknowledgement of the Board Agent's misstep in this regard was pure error and the ALJ's Recommended Decision should be rejected.

The Board's failure to inform voters, including the voters in the case at bar, of the undeniable limitations to the agency's "guarantee" of a secret ballot election destroyed the laboratory conditions necessary for a valid Board election. This information could have had a serious impact on how the voters chose to vote, or whether they chose to participate in the election at all. The Board's current procedure, which was followed here, casts a serious prejudice upon uninformed voters – by the time such voters realize that their votes may in fact be revealed, it is too late to retract or change their vote. This conduct by the Board is highly objectionable, as the Board Agent in this election stated and represented that she would conduct a secret ballot election, but then failed to apprise challenged voters that their vote would not in fact be a secret in at least two possible circumstances.

If the Board feels that the representation that the election will be a secret ballot election is imperative to the proper conduct of such elections, then the Board must be similarly tasked with the obligation to inform voters of the exceptions to that rule. In the absence of these steps, the "laboratory conditions" necessary for a valid Board election do not exist, and did not exist in the election at bar. To that end, Objections 18-20 should have been sustained. The ALJ's conclusion to the contrary is error and his Recommended Decision should be rejected.

The ALJ also erred in finding that the Hospital failed to present sufficient evidence that the Board Agent destroyed the laboratory conditions for the election. The only witness at the hearing, Darneesha Smith, a challenged voter in the election, testified that she did not have a conversation with anyone in the voting room as to whether the way she voted could become known. Recommended Decision, at p.4, l.21-25. If Ms. Smith did not have any conversation with anyone in the voting room as to whether her vote could become known, then it is clear that the Board Agent did not instruct or advise her that the substance of her challenged vote could become known in the two circumstances identified above. Ms. Smith, to the contrary, testified that she was of the impression that her ballot would remain at all times secret. *Id.* The ALJ failed to consider this evidence and, instead, relied on the fact that the Hospital did not call the Board Agent as a witness and concluded from that fact that “the Board agent here maintained and protected the integrity and neutrality of the Board’s election procedures.” *Id.*, at p.11, l.25-26. The ALJ’s failure to consider Ms. Smith’s testimony that she was not advised of the fact that her ballot could be made public was error and his Recommended Decision should be rejected.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Hospital's Post-Hearing Brief, the Hospital excepts to the Recommended Decision of Administrative Law Judge Earl E. Shamwell, Jr., and asks that the Recommended Decision be rejected.

Dated: Glastonbury, Connecticut
 April 6, 2011

Respectfully submitted,

/s/ Bryan T. Carmody
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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify that, pursuant to 28 U.S.C. § 1746, Salem Hospital Corporation’s Brief in Support of its Exceptions to the Recommended Decision of Administrative Law Judge Earl E. Shamwell Jr. (“the Exceptions”) was e-filed on Wednesday, April 6, 2011 through the website of the National Labor Relations Board (www.nlrb.gov).

The Undersigned does hereby further certify that, on April 6, 2011, a copy of the Brief in Support of Exceptions was served by e-mail upon the following:

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Dated: Glastonbury, Connecticut
April 6, 2011

Respectfully submitted,

/s/ Bryan T. Carmody

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