

800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center and 1199 SEIU, United Healthcare Workers East, Petitioner.
Case 22–RC–073078

January 9, 2013

DECISION AND CERTIFICATION OF
REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The National Labor Relations Board has considered objections to an election held on March 9, 2012, and the hearing officer’s report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 122 for and 81 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer’s findings and recommendations, and finds that a certification of representative should be issued.¹

In its two objections at issue here (1 and 2), the Employer alleged that four of its supervisors interfered with employee free choice by soliciting authorization cards for or actively supporting the Petitioner, or both. In its exceptions, the Employer urges the Board to direct a second election, arguing that the hearing officer erred in refusing to issue the Employer six requested subpoenas and in denying the Employer sufficient latitude to present exploratory testimony in support of its objections.²

The hearing was held on Thursday, May 10; Friday, May 11; and Monday, May 14, 2012. By midday on Friday, the Employer had called seven witnesses, some of whom it had subpoenaed; none of them possessed firsthand knowledge of facts relevant to the alleged objectionable conduct. The Employer had also requested and been issued more than eight other subpoenas for witnesses whom the Employer had not yet called to testify. At that point, the Employer made an ex parte request for six additional subpoenas. In response, the hearing officer made clear to the Employer that he did not intend to hear

any additional witnesses who lacked firsthand knowledge of objectionable conduct, and he directed the Employer to make an offer of proof on the record as to the relevant testimony of the rest of its witnesses, including the six individuals it sought to subpoena. The Employer admitted that it could not make an offer of proof as to any of the six additional witnesses or eight of the already subpoenaed witnesses whom it planned to call. The Employer represented, however, that three of the four witnesses it intended to call that afternoon and five unsubpoenaed individuals—whom it refused to identify—did have firsthand knowledge of objectionable conduct. The hearing then resumed, and the Employer offered testimony from the first three witnesses slated for that afternoon. But, contrary to its representation, the Employer failed to adduce any testimony supporting its objections.

At the end of that day, the hearing officer ruled that he would not issue the six additional subpoenas or allow the eight already subpoenaed witnesses to testify, as these witnesses would be “exploratory in nature.” The hearing officer directed the Employer to produce on Monday the five unnamed individuals whom the Employer claimed had firsthand knowledge of the alleged misconduct. On Monday morning, however, the Employer announced that it was withdrawing from the hearing because of the hearing officer’s ruling on the additional subpoenas. The Employer withdrew without offering any testimony from the five unnamed individuals whom it claimed would prove its objections.

Under Section 11(1) of the Act as construed by the Supreme Court, the Board is required to perform the ministerial act of issuing a subpoena upon application by a party. *Lewis v. NLRB*, 357 U.S. 10, 14–15 (1958). The hearing officer erred by failing to automatically issue the six additional subpoenas requested by the Employer. See Board’s Rules & Regulations Section 102.66(c) (“Applications for subpoenas may be made ex parte. The Regional Director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested.”). We find, however, that this error was harmless because the Employer was not prejudiced by the hearing officer’s ruling. See *Canova v. NLRB*, 708 F.2d 1498, 1502–1503 (9th Cir. 1983) (“Refusal to issue a subpoena may not, however, be grounds for refusing to enforce a Board order if the action was not prejudicial to the requesting party.”); *NLRB v. Central Oklahoma Milk Producers Assn.*, 285 F.2d 495, 498 (10th Cir. 1960) (“[E]ven though refusal to issue the subpoena was erroneous, no prejudice resulted to the [employer].”).

The Employer—given significant leeway by the hearing officer—called 10 witnesses to the stand, none of whom presented competent evidence of objectionable

¹ Before the objections hearing was held, the Acting Regional Director recommended overruling Employer Objections 3 through 12. The Employer filed exceptions, and in an unpublished decision dated July 2, 2012, the Board adopted the Acting Regional Director’s recommendation to overrule those objections.

² The Employer has effectively 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.

conduct. Under the circumstances, the hearing officer acted reasonably to halt the Employer's manifest fishing expedition. See *Mid-Con Cables, Inc.*, 256 NLRB 720, 720 (1981). The hearing officer acted well within his authority to preclude from testifying the eight already subpoenaed witnesses for whom the Employer could not make an offer of proof. See, e.g., *Burns Security Services*, 278 NLRB 565, 565-566 (1986) (affirming hearing officer's quashing of subpoenas where employer introduced no relevant evidence and subpoenas were "a mere fishing expedition"); *Sears, Roebuck & Co.*, 112 NLRB 559, 559 fn. 1 (1955) (affirming hearing officer's refusal to allow intervenor to call three additional witnesses after the testimony of its five witnesses provided no evidence in support of allegations, and intervenor acknowledged not knowing what the remaining three would testify). As the Employer likewise admitted that it could not make an offer of proof concerning the six not yet subpoenaed individuals, it is reasonable to conclude that even had the hearing officer issued the requested subpoenas, he would have refused to permit the witnesses to testify or, if presented with a petition, would have revoked those subpoenas.³ Consequently, the hearing

³ However, even after the hearing officer refused to issue the subpoenas, he was still willing to hear testimony from the five additional witnesses purported to have firsthand knowledge of the alleged misconduct.

officer's error was harmless, and we find no merit in the Employer's exceptions.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for 1199 SEIU, United Healthcare Workers East, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.