

NOT INCLUDED
IN BOUND VOLUMES

PMH
Washington, D.C.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GUARDSMARK, LLC

Employer

and

Case 05-RC-143199

INTERNATIONAL UNION, SECURITY, POLICE,
AND FIRE PROFESSIONALS OF AMERICA
(SPFPA)

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to a mail ballot election held from January 28, 2015, to February 11, 2015, and the hearing officer's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 2 against the Petitioner, with 2 void ballots and no challenged ballots.

¹ The Employer filed five objections to the conduct of this election. The Regional Director issued a report in which he set two of the objections for hearing (Objections 3 and 4) and recommended overruling the remaining three (Objections 1, 2, and 5). In a separate Decision and Order issued today, reported at 363 NLRB No. 103 (2016), the Board has adopted the Regional Director's findings and recommendations with respect to Objections 1, 2 and 5. Accordingly, we reject the Employer's argument that the Regional Director improperly limited the scope of the hearing officer's consideration of the two objections pending before us in this proceeding.

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.²

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union, Security, Police, and Fire Professionals of America, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time security officers employed by the Employer at Providence Hospital in Washington, DC, but excluding office clericals, professional employees, managerial employees, and supervisors as defined in the Act.

² We agree with the hearing officer that employees had adequate notice and opportunity to vote in the mail ballot election and that no employee was prevented from voting as a result of unfairness in the scheduling or mechanics of the election. See *Lemco Construction*, 283 NLRB 459, 460 (1987). We note that the Employer consented to the mechanics of the mail ballot election when it entered into the Stipulated Election Agreement, which set forth the timeframe and duplicate-request procedure that the Employer now contends were inadequate. We see no basis for permitting the Employer to attack the election on the basis of conditions to which it previously agreed. See *Community Care Systems*, 284 NLRB 1147, 1147–1148 (1987).

We also reject the Employer's argument that the testimony of employee Chimere Bryant demonstrates deficiencies in the procedure for requesting a duplicate ballot kit. Even assuming, *arguendo*, that Bryant promptly requested and returned a duplicate ballot, her experience provides but one isolated example in a record devoid of any other evidence that the procedure for requesting duplicate ballots prevented employees from voting. It is uncontested that the other five employee witnesses never attempted to avail themselves of that procedure.

To the extent that the Employer contends that the hearing officer did not have a complete record from which to recommend disposition of Objections 3 and 4, we reject this argument as meritless. Prior to the hearing, the Employer sought to procure testimony from the Board agent responsible for carrying out the election and requested that the Region produce documents relevant to the conduct of the election. Ultimately, the General Counsel provided the Employer with most of the requested documentation, but declined to produce the marked voter eligibility list or compel testimony of the election specialist, consistent with well-established Board policy. The Employer has failed to present any sound reason for departing from this policy.

For the foregoing reasons and for the reasons set forth in our separate Decision and Order reported at 363 NLRB No. 103, we disagree with our dissenting colleague's view that the election should be set aside.

Dated, Washington, D.C., January 29, 2016.

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

Member Miscimarra, dissenting:

I find it unnecessary to reach the merits of the Employer’s Objections 3 and 4. As I stated in a companion decision in this case, *Guardsmark, LLC*,³ I would set aside the election based on the Employer’s Objection 2, which concerned the Region’s decision to prohibit the Employer from holding captive-audience speeches beginning 24 hours before the Region mailed the ballots.

In *Peerless Plywood*,⁴ the Board expressed concern that “last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time . . . tend to interfere with . . . a free election.”⁵ Therefore, in the context of a manual election, the Board prohibited campaign speeches, by either party, to massed assemblies of employees on company time within 24 hours of the scheduled start of the election.⁶ In *Oregon Washington Telephone Co.*,⁷ the Board established a parallel captive-audience-speech prohibition applicable to mail-ballot elections. There, the Board held that the speech ban begins at “the time and date on which

³ 363 NLRB No. 103, slip op. at 4-8 (2016) (Member Miscimarra, dissenting).

⁴ 107 NLRB 427 (1953).

⁵ *Id.* at 429.

⁶ *Id.*

⁷ 123 NLRB 339 (1959).

the ‘mail in’ ballots are scheduled to be dispatched by the Regional Office.”⁸ In both *Peerless Plywood* and *Oregon Washington Telephone*, the Board imposed an inflexible consequence when parties deviate from the rules established by those cases: violations “*will cause an election to be set aside* whenever valid objections are filed.”⁹ Accordingly, because the Region improperly set the starting time for the captive-audience speech prohibition as beginning 24 hours *before* the Region dispatched the ballots—rather than when they were dispatched—the election should be set aside for that reason alone.¹⁰

Although I do not pass on the merits of Objections 3 and 4, I am troubled by the possibility that additional procedural irregularities in the mail-balloting process, as alleged in those objections, may have adversely affected employee participation in the election. The Region failed to mail duplicate ballot kits to two employees whose ballots it voided, and two eligible voters whose addresses appeared correctly on the *Excelsior* list testified they did not receive ballots.¹¹ Given this undisputed evidence of irregularities and the low participation rate—only 15 of 33 eligible voters timely cast ballots—I also question the hearing officer’s refusal to enforce subpoenas seeking testimony from two additional employees who the Employer asserts would have also testified that they did not receive ballots.

It is important to recognize what a difficult task regional offices have conducting Board elections, both generally and in this case. Our elections require a great deal of work and involve an enormous amount of detail, complex issues, and very short timetables. Additional demands

⁸ Id. at 341.

⁹ *Peerless Plywood*, 107 NLRB at 429 (emphasis added); *Oregon Washington Telephone*, 123 NLRB at 341 (emphasis added).

¹⁰ See *Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 6-7 (Member Miscimarra, dissenting). I also explained why my colleagues erred in overruling *Oregon Washington Telephone*.

¹¹ A third employee, Taniecia Byrd, whose address was substantially correct on the *Excelsior* List, also testified that she did not receive a ballot.

have been placed on our regional offices by the Board's election rule, adopted in December 2014, which substantially revised our election procedures. Our Regional Directors and the personnel in our regional offices accomplish a lot, working with relatively little. I believe nobody can reasonably question the Region's good-faith efforts. Nonetheless, for the reasons expressed above and in the companion case (see fn. 3 above), I respectfully dissent.

Dated, Washington, D.C., January 29, 2016.

Philip A. Miscimarra, Member