

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MARIST COLLEGE

Employer

and

Case 03-RC-127374

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 200 UNITED

Petitioner

DECISION AND DIRECTION

The National Labor Relations Board, by a three-member panel, has considered the objections to and the determinative challenges in a mail-ballot election, in which the ballots were mailed to voters on June 13, 2014, and counted on June 30, 2014, 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 154 for and 165 against the Petitioner, with 87 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions<sup>1</sup> and briefs and has adopted the hearing officer's findings and recommendations.<sup>2</sup>

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<sup>1</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the Petitioner's Objections 1, 2, 3, 4, 5, 6, 9, and 11; to overrule the challenges to the ballots of 39 employees; to sustain the challenges to the ballots of 13 employees; and to declare the ballot of one employee void.

<sup>2</sup> We adopt the hearing officer's recommendations to sustain the Petitioner's Objections 7 and 10. We note that the hearing officer appears to have applied the incorrect standard for determining whether an election should be set aside. At one point in his report, he found "that the results of the election, via any possible mixture of the challenged votes, will not be so lopsided as to meet the Board's 'virtually impossible' exception regarding objectionable conduct." However, the "virtually impossible" standard only applies when there is a specific finding that an employer's conduct violated Sec. 8(a)(1). See *Safeway, Inc.*, 338 NLRB 525, 526 fn. 3 (2002). The correct standard to apply here, which the hearing officer cited earlier in his report, is "whether [the conduct] has 'the tendency to interfere with the employees' freedom

On April 28, 2014, the Employer and the Petitioner entered into a Stipulated Election Agreement, which contains the following bargaining unit description:

All adjunct faculty<sup>1</sup> employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at either the Employer's Poughkeepsie, New York campus or its Fishkill, New York campus, and Student Teaching Supervisors; but excluding all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, administrators, coaches, librarians, directors, managers, guards, supervisors and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities.

<sup>1</sup> The parties agree that for purposes of this election, to be eligible to vote the employees must have taught at least one credit hour in any given semester in the twelve months preceding the eligibility date.

The Union challenged the ballots of 33 dual-function adjuncts who are employed by the Employer both as adjuncts and in other positions. We agree with the hearing officer's recommendation to sustain the challenges.

"When resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board's function is to ascertain and enforce the parties' intent, provided that it is not contrary to any statutory provision or established Board policy."

*Halsted Communications*, 347 NLRB 225, 225 (2006). The Board applies the following three-step test:

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of choice." *Taylor Wharton Division*, 336 NLRB 157, 158 (2001) (quoting *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995)). We find that the Petitioner's Objections 7 and 10, respectively, warrant setting aside the results of the election because the Employer's conduct in regard to both objections had the tendency to interfere with the employees' freedom of choice.

We find it unnecessary to pass on the hearing officer's recommendation to sustain the Petitioner's Objection 8.

The hearing officer inadvertently recommended sustaining the Petitioner's challenge to Christopher Delcampo's ballot. The Petitioner acknowledged, in its brief, that it withdrew its challenge to Delcampo's ballot during the hearing. Therefore, we overrule the challenge to Delcampo's ballot and order that the ballot be opened and counted.

[T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

*Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002).

We agree with the hearing officer that the parties clearly intended the phrase “whether or not they have teaching responsibilities,” which is located in the exclusions portion of the Stipulated Unit, to exclude dual-function adjuncts. A natural reading of “teaching responsibilities” includes adjunct teaching responsibilities, and nothing in the unit description leads us to believe that the parties did not intend to encompass adjunct teaching responsibilities within that term.<sup>3</sup> Thus, we find that the parties unambiguously intended to exclude any employees who hold specifically enumerated non-adjunct positions or any other non-adjunct positions and who also teach as adjuncts.<sup>4</sup>

The Employer argues that the language of the Stipulated Unit suggests that the phrase “whether or not they have teaching responsibilities” modifies only the “all other employees” catchall and not the specifically enumerated positions in the exclusions. We disagree. But even assuming, arguendo, that the meaning of the exclusions is ambiguous, an examination of extrinsic evidence under the second step of the *Caesar's*

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<sup>3</sup> This case is distinguishable from *Columbia College*, 346 NLRB 726, 727–728 (2006), where individual challenged employees held both included and excluded positions, and the Board found that the stipulated unit did not unambiguously indicate whether such employees should be included or excluded.

<sup>4</sup> Any non-adjunct positions that are not specifically enumerated in the exclusions are excluded by the “all other employees” catchall. See *Bell Convalescent Hospital*, 337 NLRB 191, 191 (2001) (“[I]f the classification is not included, and there is an exclusion for ‘all other employees,’ the stipulation will be read to clearly exclude that classification.”).

*Tahoe* test resolves any ambiguity. The Petitioner proposed the following unit description in the petition:

**Included:** All part-time, undergraduate faculty employed by Marist College to teach at Marist College's main campus located at 3399 North Road, Poughkeepsie, NY, including: Adjunct Instructors, Adjunct Professors, Adjuncts, Adjunct Faculty, Adjunct Lecturers and Student Teaching Supervisors.

**Excluded:** All other faculty, including tenured and tenure-eligible faculty, full-time faculty, graduate school faculty, and faculty who teach online only or at another location. Also excluded are all other employees, whether or not they have teaching responsibilities, including administrators, coaches, librarians, directors, managers, guards, and supervisors as defined in the National Labor Relations Act.

The unit description in the petition shows that the Petitioner clearly intended the phrase "whether or not they have teaching responsibilities" to modify both the specifically enumerated positions and the "all other employees" catchall. The record indicates that the Employer disagreed with the Petitioner's proposed exclusion of certain adjuncts, specifically those who teach only online courses, graduate courses, courses at the Employer's Fishkill campus, or courses worth less than three credits. These disagreements explain most of the differences between the Stipulated Unit and the Petitioner's proposed unit. However, the record does not suggest that the Employer expressed any disagreement with dual-function adjuncts being excluded or, more specifically, with the phrase "whether or not they have teaching responsibilities" modifying both the specifically enumerated positions and the "all other employees" catchall. Therefore, we resolve any potential ambiguity regarding the application of the phrase "whether or not they have teaching responsibilities" in accord with our finding as to what the parties intended.

Accordingly, we adopt the hearing officer's recommendations to sustain the Petitioner's challenges to the ballots of the 33 employees who are dual-function adjuncts.<sup>5</sup>

#### DIRECTION

IT IS DIRECTED that the Regional Director for Region 3 open and count the ballots of James Baumann, Jurgis Brakas, Geoffrey Brault, James Coghlan, Sarah Colomello, Anthony Decandia, Katherine Decker, Christopher Delcampo, Stewart Dutfield, Renee Estabrook, Thomas Farruggella, Roberta Kyle, Hsin-Hua Lee, Lawrence Lewis, Perry Liberty, Julie Martyn-Donato, John McAdam, Sharon Murray-Cohen, Sarah Nowlin, Richard Nuzzo, Jane O'Brien, Peter O'Keefe, Renee Pabst, Janice Parker, Theodore Petersen, Thomas Quinn, Douglas Richard, Kevin Ronk, Joseph Ross, Kevin Sheamon, Eric Sheffler, Sasha Shivers, Deborah Stein, Melinda Storey-Weisburg, Robert Tendy, Teresa Tyce, John White, Glenda Williams, Nichole Wolter, and Irene Yozzo, within 14 days from the date of this Decision and Direction, and issue a revised tally of ballots. If the revised tally of ballots shows that the Petitioner received a majority of the eligible votes, the Regional Director shall issue a certification of representative. Alternatively, if the revised tally of ballots shows that the Petitioner has not prevailed in the election, the election shall be set aside and a second election shall be directed.

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<sup>5</sup> Those employees are Ian Becker, Christopher Bowser, Irene Buccieri, Patricia Burns, Stephanie Calvano, Cassie Chapman, Peter Colaizzo, Toni Constantino, Richard Cusano, Kathryn DiCorcia, Joseph Ellman, Justin Giuliano, Amanda Greco, Mary Elana Griffith, John Herring, Julia Hughes, Natalie Jackson, Camilia Jones, Marcia Kennedy, Melissa Lulay, Nicholas Mauro, Colin McCann, Michael Napolitano, Adam Porter, Adam Ritter, William Robelee, Deidre Sepp, Edward Sickler, Timothy Smith, Roberta Staples, Karen Tomkins-Tinch, Laura Toonkel, and Michele Williams.

Dated, Washington, D.C., August 23, 2016.

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD