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**Republic Silver State Disposal, Inc., d/b/a Republic Services of Southern Nevada, and Republic Dumpco, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Local 631, Petitioner.** Case 28–RC–192859

October 30, 2017

ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE  
AND MCFERRAN

The National Labor Relations Board has carefully considered the Employers’ request for review of the Regional Director’s Decision and Direction of Election, as well as the Petitioner’s opposition to Employer’s request for review. The request for review is denied as it raises no substantial issues warranting review.<sup>1</sup>

<sup>1</sup> Contrary to the Employers’ contentions, direction of a self-determination election in a voting group broader than what the petitioner initially sought does not require a showing that the employees added to the voting group via a regional director’s direction share an “overwhelming community of interest” with the petitioned-for voting group, nor must it be shown that the petitioned-for voting group was “fractured.” Neither *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 942 (2011), enfd. sub nom *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), nor *Odwalla, Inc.*, 357 NLRB 1608, 1612 (2011), cited by the Employer, involved a self-determination election, nor did either case purport to change the Board’s longstanding standard for determining whether a self-determination election is appropriate. In this case, the Regional Director found, consistent with established self-determination election principles, that the petitioned-for voting group was not an “identifiable, distinct segment” for the purposes of a self-determination election, see *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990), but went on to find that a self-determination election in a voting group of all unrepresented production and maintenance-related employees was appropriate. In denying review, we do not pass on the Regional Director’s alternative finding that, under the *Specialty Healthcare* framework, the petitioned-for voting group would not constitute an “identifiable, distinct segment” for the purposes of a self-determination election.

We do not find merit in the Employers’ contention that, under *Ward Baking Co.*, 139 NLRB 1344 (1962), a self-determination election is not appropriate when the unrepresented employees also constitute a separate appropriate unit. No party in *Ward Baking* requested a self-determination election, nor did the Board find in that case a self-determination election not to be appropriate when the unrepresented employees constitute a separate appropriate unit. Further, the comment by an administrative law judge in *Beverly Manor-San Francisco*, 322 NLRB 968, 971 fn. 12 (1997), enfd. mem. 152 F.3d 928 (9th Cir. 1998), concerning *Ward Baking*, on which the Employers also rely, is dictum which the Board did not adopt.

Finally, we observe, contrary to the Chairman, that the Regional Director clearly acted appropriately in issuing the certification when he did. Sec. 3(b) of the National Labor Relations Act expressly authorizes, and Sec. 102.69 of the final rule expressly requires, that regional directors issue certifications even though a party may file a request for

Dated, Washington, D.C. October 30, 2017

Philip A. Miscimarra,

Chairman

review of that (or any other) regional director action. See 29 U.S.C. §153(b) (“The Board is . . . authorized to delegate to its regional directors its powers . . . to direct an election . . . and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.”); 29 C.F.R. § 102.69(b) (If no timely objections are filed, or if the challenged ballots are not determinative, “regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.”) Thus, the Regional Director acted in accord with the requirements of the final rule.

Chairman Miscimarra agrees with his colleagues that the “overwhelming community of interest” test articulated in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), does not apply in self-determination elections. More generally, Chairman Miscimarra disagrees with *Specialty Healthcare* for the reasons he articulated in *Macy’s, Inc.*, 361 NLRB No. 4, slip op. at 22–33 (2014) (Member Miscimarra, dissenting). This case also involves the Board’s final rule regarding representation-case procedures (Election Rule), with which Chairman Miscimarra disagrees for the reasons expressed in his and former Member Johnson’s dissenting views in the Election Rule. 79 Fed. Reg. 74308, at 74430-74460 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson). In this regard, Chairman Miscimarra believes it is objectionable and ill-advised as a matter of policy for regional directors to issue a certification before the Board has had an opportunity to address issues raised by the parties regarding the election. To the extent that the Election Rule contains language that may appear to permit regional directors to do so—i.e., by stating that the pendency of a request for review shall not stay “any action” by a regional director unless the Board orders otherwise (79 Fed. Reg. at 74485, discussing Sec. 102.67)—Chairman Miscimarra believes such language appropriately contemplates that regional directors may proceed to conduct elections while a request for review remains pending, but he believes issuance of a certification by the regional director should not be permitted by the Board in such circumstances. In Chairman Miscimarra’s view, the Board’s primary function of fostering labor-management stability is necessarily frustrated if union certification precedes the Board’s final resolution of election-related issues, and this problem is magnified by the fact that the Election Rule increases the likelihood that elections will be conducted before requests for review of a regional director’s decision and direction of election have even been filed with the Board. In this case, however, the Employers have not specifically challenged or attempted to stay the Regional Director’s certification of the union while election-related issues remained unresolved by the Board, and Chairman Miscimarra otherwise agrees with the majority’s denial of the Employers’ request for review.

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD