

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AVERA MARSHALL, Employer

and

Case 18-RC-233463

AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO, Petitioner

**REQUEST FOR BOARD REVIEW OF DIRECTION OF ELECTION,
DENIAL OF MOTION FOR RECONSIDERATION AND DECISION
AND CERTIFICATION OF REPRESENTATIVE**

COMES NOW EMPLOYER AVERA MARSHALL, pursuant to Sections 102.67(c) and 102.69(c)(2) of the Board's Rules and Regulations, seeking Review of both the Region's Direction of Election (and its associated Decision denying Employer's related Motion for Reconsideration) and its Decision and Certification of Representative in the above-referenced matter.

Background

On January 2, 2019, Petitioner American Federation of State County & Municipal Employees, AFL-CIO, Council 65 ("Union") filed a petition seeking to represent certain Avera employees. See RC Petition, 18-RC-233462 (the "Petition"). The Union proposed that an election be held to resolve the representation question posed by its Petition in "January 2019."

On January 9, 2019, Avera timely filed its Statement of Position in response to the Petition. As relevant here, Avera proposed that any election regarding the Petition should be held on February 1, 2019.

On January 10, 2019, the parties attended a pre-election hearing before a Hearing Officer in the above matter. Aversa stood on its original request for an election on February 1, 2019 as stated in its Statement of Position. Neither party proposed or suggested a February 5, 2019 election date, nor did the Regional Director inquire as to voter schedules or availability on that date.

Regardless, on January 18, 2019, the Regional Director issued her Decision and Direction of Election (“RD Decision”). Therein, she directed: “The election will be held on February 5, 2019, from 4:00 p.m. until 6:00 p.m. at the second floor conference room at [Avera’s] facility on Carlson Street.” RD Decision at 9.

On January 30, 2019, Avera discovered that of the twenty-one (21) eligible voters, as many as six (6) might be unable to vote in a February 5, 2019 election. The next day, therefore, Avera formally moved the Region to Reconsider the Decision and Direction of Election.

Specifically, in a Motion for Reconsideration of the Decision and Direction of Election to Change Election Date to Avoid Disenfranchisement, filed on January 31, 2019 and made pursuant to NLRB Rules and Reg. 102.65(e)(1), Avera sought a direction moving the election to either February 4, 2019 or February 15, 2019—“the only available options that would avoid disenfranchisement of up to 29% of the eligible voters.” In that Motion, Avera identified when and what it had learned about the potential for significant disenfranchisement, and explained that there would be no prejudice to anyone if the date were changed.

In this last regard, Avera explained that it “stands ready to post an amended election notice as soon as it can be prepared and delivered, so as to alleviate any concern the Board may have over the timing of the required such posting.” Moreover, given that one of the two replacement dates offered was actually the day before the date on which the election was originally directed, there could be no suggestion that Avera was somehow attempting to delay the vote to its advantage.

Indeed, as noted in the Motion, moving the date up to February 4, 2019 would have resulted in Avera losing any realistic “opportunity for meaningful speech about the election” under the Board’s *Peerless Plywood* rule.

On the other hand, while there was no foreseeable prejudice in moving the date, it was expected that there would be great prejudice to every disenfranchised voter were the date not changed. Even so, on February 1, 2019, the Region denied Avera’s Motion.

In denying the Motion, the Regional Director did not address the 29% of the voting population that was in jeopardy of being disenfranchised by the selected date or the absence of prejudice that would result to anyone from a date change. Rather, the Regional Director denied the Motion because, “The Employer’s Motion was filed late in the afternoon on January 31, 2019[, and n]o explanation was provided for the delay in filing this Motion.” See February 1, 2019 Letter from Acting Regional Director Ben Mandelman (“Denial”).¹

As a result of the Region’s Denial, the election that it had *sua sponte* scheduled for February 5, 2019 went on as directed. Of the 21 eligible voters, 17 voted. Nine votes were cast for the Petitioner and eight were cast against the participating labor organization.

On February 11, 2019, Avera timely filed an Objection to the Election and Result, along with an accompanying Offer of Proof. Therein, Avera explained that it was prepared to offer proof that: (a) every eligible voter scheduled to work on February 5 voted; (b) all four of the individuals that did not vote were among the six identified by the Employer in its Motion for Reconsideration as likely to be disenfranchised; and (c) three of the four who were deprived of the opportunity to

¹ The Regional Director’s reference to the absence of an explanation for Employer’s “delay” was curious given the that the Motion was filed within (a) 24 hours of the Employer learning of the issue and (b) the 14-day period stated in the Board’s rules.

vote were identified in the Motion for Reconsideration as being “out of town,” while the fourth was identified as “not scheduled to work.”

In other words, Avera explained that the fear outlined in the Motion for Reconsideration had been realized. A significant percentage of the electorate had been disenfranchised by the Region’s unilateral selection of an election date and its subsequent unwillingness to move it. Even though the possibility had been previewed by the Employer and it could have been avoided by simply moving the date, 19% of the eligible voting population was disenfranchised.

On February 21, 2019, the Regional Director overruled Avera’s Objection and issued a Certification of Representative. This Request is made pursuant to Sections 102.67(c) and 102.69(c)(2) of the Board’s Rules and Regulations, and seeks Review of both the Direction of Election (and related Denial) and its subsequent Decision and Certification of Representative in the above-referenced matter.

Authority and Basis for Review

As the Board is aware, when directing an election, the Regional Director is to select “the earliest date practicable” as the election date. *See* NLRB Rules and Regs. §102.67(b). In order to aid the Regional Director in selecting such a date, “prior to the close of [a preelection] hearing” the Hearing Officer is required to “solicit the parties’ positions . . . on the . . . date(s) . . . of the election.” *Description of Representation Case Procedures in Certification and Decertification Cases*, Form NLRB-4812 at 3. Moreover, in selecting an election date, the Regional Director is to “consider the various policies protected by the Act—as well as operational considerations and the relevant preferences of the parties.” *NLRB Representation Casehandling Manual* § 11302.1. To that end, a significant policy protected by the Act is allowing as many eligible voters as possible to vote. *E.g. Tekweld Solutions, Inc.*, 361 NLRB 201 (2014) (entire Board espousing importance

of “an election process that allows for broad employee participation” and expressing “concern about voter disenfranchisement”); c.f. *JVK Ops., Ltd.*, Case 29-RD-192880 (NLRB, Dec. 15, 2017) (majority of Board Members opining and agreeing that “it may be necessary, under certain circumstances, for a Regional Director to modify a stipulated eligibility date *sua sponte* in order to prevent the disenfranchisement” of voters). Ultimately, “where there is a choice, the regional director should avoid scheduling the election . . . **on days that many persons will be away from the facility on company business or on vacation.**” *NLRB Representation Casehandling Manual* § 11302.1 (emphasis added).

In this case, procedural safeguards intended to prevent disenfranchisement were not followed. There was not an inquiry into whether the selection of February 5, 2019 would disenfranchise a large number of eligible employees. It appears unlikely that the Regional Director considered the parties’ prior stated positions on an appropriate election date, since the date and time chosen were not proposed by either party. Ultimately, and perhaps as a result, the Regional Director did not “avoid scheduling the election ... on days that many persons will be away from the facility.”

The Regional Director also ignored advance warning of the eventual outcome. Avera did not rest on the information or its rights, but rather alerted the Region of the potential disenfranchisement within one day of learning of it, and sufficiently in advance to remedy the situation. In the Decision and Certification of Representative, however, the Regional Director notes that the Motion was untimely, “as it was filed 13 days after the issuance [of the Decision and Direction of Election] and after the Notice of Election was already required to be posted. *See* Decision and Certification. But the Motion was not untimely as a matter of law (it was filed immediately after Avera learned of the circumstances and within the 14-day period allotted by the

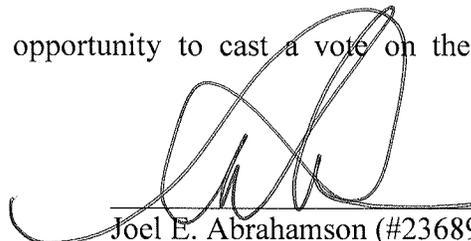
Rules), and more importantly, absolutely nothing would have prevented the posting of a new and revised Notice of Election. As noted, Avera specifically stated in the Motion that it stood ready to immediately post a revised Notice.

It appears that the Region may have placed form over substance; operational considerations ahead of one of the primary policies protected by the Act—employee participation in their representational future. There would have been no prejudice to the parties had the Region moved the election date. But it didn't, and as a direct result, 19% of the voting population was disenfranchised—left with no voice in the critical question of whether or not they would be represented by a union for purposes of bargaining.

Conclusion

For all of those reasons, Avera respectfully request that the Board accept review of both the Direction of Election and its subsequent Decision and Certification of Representative in the above-referenced matter. Ultimately, Avera is seeking a rerun election, at which all of the small population of voters will have an opportunity to cast a vote on the important question of representation.

Dated: March 5, 2019



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