231425

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEIU Local 49, Petitioner/Union, and Providence Portland Medical Center, Employer.	CASE 19-RC-231425 UNION'S CONDITIONAL REQUEST FOR REVIEW

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Service Employees International Union Local 49 ("SEIU 49" or "Union"), pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), submits this *Conditional* Request for Review of certain portions of the April 11, 2019 Region 19 Regional Director Decision ("Decision") in the above-captioned case. The Union seeks review of certain portions of the Decision *only if* the Board accepts any request for review filed by Providence Portland Medical Center ("PPMC" or "Employer"). In making such request, the Union does not request review of the portions of the Decision concluding that "Ballot 1"[1] should be counted as a vote in favor of unionization, nor does the Union request review of the Certification of Representative. However, only in the event that the Employer files a request for review of the Decision *and* the Board grants that request for review, the Union requests that the Board also review and reverse the Decision to the extent that it concluded: 1) that "Ballot 2" should be counted

[1] "Ballot 1" refers to the ballot marked as Board Exhibit ("BE")-2, which is a yes vote for the Union. "Ballot 2" refers to the ballot marked as BE-3, and is attached as exhibit A.

DOUGLAS DRACHLER MCKEE & GILBROUGH LLP
ATTORNEYS
Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
Fax: 623-1432

as a "no" vote against representation by the Union; and 2) that the validity of "Ballot 2" should be considered despite the Employer's failure to include it in any objection, timely or untimely.

As set forth below, the Union conditionally submits that the Regional Director erred in counting Ballot 2 as a valid vote against representation because Ballot 2 is void and was not properly before the hearing officer or Regional Director. The Regional Director's Decision regarding Ballot 2 represents a departure from Board precedent and contains clearly erroneous factual determinations that affect the rights of the Union. Further, counting Ballot 2 as a valid vote against representation will result in prejudicial error, should the Board accept any Employer-requested review and find Ballot 1 void. The Union does not wish to disturb any findings that secure voter franchisement and the rights of employees to choose whether to be represented by a union. *See, e.g., General Shoe Corp.,* 77 NLRB 124, 127 (1948), *enf'd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). However, the Union requests if the Board grants review of the counting of Ballot 1 because workers' free choice to select their Union would be at stake and the Regional Director's Decision could ultimately prejudice the Union. Thus, if the Employer does not file a request for review and/or the Board does not accept such Employer-requested review, the Union withdraws this request.

II. FACTS, INCLUDING SUMMARY OF EVIDENCE AND RULINGS

Pursuant to a stipulated election agreement, on December 12 and 13, 2018, the Board conducted an in-person election for a unit at the Employer. On December 13, 2018, a tally of ballots issued following the vote count, listing three void ballots and 44 challenged ballots. P-1.[2] That tally indicates challenges were sufficient to affect the results of the election. *Id.* Ballot 1,

[2] Herein, Board Exhibits are referred to as "B-[exhibit number]," Petitioner Exhibits are referred to as "P-[exhibit number], and Employer Exhibits are referred to as "E-[exhibit number]."

DOUGLAS DRACHLER MCKEE & GILBROUGH LLP
ATTORNEYS
Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
Fax: 623-1432

with a clear "X" mark in the "yes" box and an erasure in the "no" box, was tallied by the Board agent as a void ballot. *Id.* The envelope used for that ballot contains the label "challenged ballot," and lists the Union position that the ballot was valid. E-1; RP 14:14-23. Ballot 2 was also tallied by the Board Agent as a void ballot. P-1; B-3. Ballot 2 contains two dark parallel diagonal lines outside the "no" box, and multiple scribble marks in a somewhat oval shape perpendicular to the diagonal lines, which also go well outside the "no" box, and was tallied by the Board Agent as a void ballot. P-1; B-3. The third ballot, with an "X" in both the "yes" and "no" boxes, was declared void by the Board Agent and the parties later stipulated that it was void. B-1(f), ¶ 24.

On December 20, 2018, the Union timely filed and served objections to the conduct of the election, which includes an objection based upon the failure to count one ballot as a yes vote, and instead listing it as a void ballot on the tally of ballots. B-1(e), ¶ 8, 23; RP 10: 13-17. On December 20, 2018, the Employer filed objections, none of which addressed the void ballots. That same day, both parties filed position statements but did not serve those position statements on each other. E-2.

On January 30, 2019, after the parties discussed a stipulation, nearly a month and a half following the due date for objections, the Employer amended its previously-filed objections to add an objection regarding Ballot 1. B-1(d). The Union objected to this untimely amendment. RP 12: 13.

Also on January 30, the parties entered into a Stipulation Resolving Challenged Ballots and Objections, which resolved all challenged ballots except those declared void by the Board Agent. B-1(e), ¶ 23. The Stipulation further provided that the parties withdraw objections, except the Union's objection regarding void ballots and the Employer's untimely objection regarding

DOUGLAS DRACHLER
MCKEE & GILBROUGH
LLP
ATTORNEYS

Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
Fax: 623-1432

one of the void ballots. *Id.,* ¶ 22, 23. The stipulation left for resolution, if necessary, two remaining ballots declared void by the Board Agent at the December 13, 2018, vote count.

Pursuant to the stipulation, fifteen previously-challenged ballots were opened and counted on January 30, 2019, resulting in a revised tally of ballots with 383 votes for representation by the Union and 382 votes against representation by the Union. B-1(f). Given that ballots declared void by the Board Agent became determinative, the hearing officer conducted a hearing on January 31, 2019, regarding those two ballots.

The hearing officer, Judge Eleanor Laws, on February 21, 2019 issued a report and recommendations regarding the two ballots, recommending that both ballots be counted. Both parties filed exceptions to the hearing officer's recommendations, and only the Union filed an answer opposing exceptions.

The Regional Director's Decision affirmed the Hearing Officer's findings and accepted her recommendations that both ballots be counted. The Decision found that while Ballot 2 was not specifically objected to in either parties' remaining objections, because it was raised in hearing and "there is no harm to the parties in so doing," the Regional Direction would address the validity of Ballot 2. He found Ballot 2 valid because it did not contain any identifying mark and it was marked, albeit irregularly, in the "no" box. The Decision included a certification of representative based upon a revised tally of ballots of 384 ballots for the Union and 383 against, certifying the Union as the exclusive bargaining representative for employees in the unit.

III. ARGUMENT

A. Grounds for Review

Pursuant to Section 102.67 of the Board's Rules and Regulations, the Board will grant a request for review where "a substantial question of law or policy is raised because of" "[t]he

DOUGLAS DRACHLER
MCKEE & GILBROUGH
LLP
ATTORNEYS

Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
Fax: 623-1432

absence of" or "[a]departure from officially reported Board precedent. Section 102.67(d)(1)(i) and (ii). The Board will also grant a request for review where "the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party" or "the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error." Section 102.67(d)(2) and (3). Here, should the Employer seek review and the Board grant review, the Board should also consider the issues raised by the Union under the above factors.

B. The Regional Director's Decision finding ballot 2 is not void departs from officially reported board precedent, constitutes a clearly erroneous factual finding, and results in prejudicial error, because the ballot's irregular markings demonstrate an intent to cross out the "no" vote and the ballot contains an identifying mark.

The Regional Director erred in his determination that Ballot 2 should be counted as a valid vote against representation because it contains an unambiguous expression of voter intent. The Regional Director also erred by determining that the markings on the back of Ballot 2 were not identifying marks. Finally, the Regional Director erred by departing from Board precedent regarding obliteration marks.

Ballot 2 is not valid and was properly voided because the irregular markings in and around the "no" box provide no clear indication of the voter's intent as they could reasonably be interpreted as an attempt to void the ballot by obliterating the diagonal mark. In *Kaufman's Bakery*, the Board held that "when a ballot reveals a clear 'X' *almost entirely contained within either the 'Yes' box or the 'No' box, and no irregular markings appear outside the marked box*" the Board will regard the mark, "despite some irregularity, as presumptively a clear indication of the intent of the voter." 264 NLRB 225 (1982) (emphasis added). Thus, *Kaufman's Bakery, Inc.*, should only be applied when an "X" in the voting square is clear. Here, the Regional Director erroneously determined that *Kaufman's Bakery* applied here because the mark in the "no" box

DOUGLAS DRACHLER MCKEE & GILBROUGH LLP
ATTORNEYS
Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
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was in the "general shape of an 'X'." But the *Kaufman's Bakery* presumption only applies when the "X" in the box is clear, and here, the markings on Ballot 2 are far from clear. Ballot 2 contains two dark parallel diagonal lines extending outside the "no" box, and multiple scribble marks in a somewhat oval shape perpendicular to the diagonal lines, which also go well outside the "no" box that appear to be attempts to obliterate the diagonal lines. B-3. In short, the "X" is far from clear. B-3.

The irregular markings on Ballot 2 are remarkably similar to those found on the void ballot in *Hanson Cold Storage Co. v. NLRB,* 860 F.3d 911 (7th Cir. 2017), and similarly should be interpreted as an attempt to void the ballot. In *Hanson Cold Storage Co.,* the Seventh Circuit held that a ballot with irregular marks in and around the "Yes" box, was void because the "markings… give no clear indication of the voter's intent to vote, and the scribbles are not merely stray marks but easily could (and maybe should under the circumstances) be interpreted as an outright attempt to void the voter's vote." *Id.* at 917. That court found that it was an abuse of discretion for the Board to apply the presumption articulated in *Kaufman's Bakery* and cited by the Regional Director here, because the *Kaufman's Bakery* "presumption only applies when the ballot 'reveals a clear 'X' almost entirely contained within' one of the boxes and "no irregular markings appear outside the marked box." *Hanson Cold Storage Co.* 860 F.3d at 917. Like that void ballot, the markings on Ballot 2 give no clear indication of the voter's intent and Ballot 2 was properly voided by the Board Agent.

The Regional Director also made an erroneous factual determination that the markings on the back of Ballot 2 were a "scribble" rather than an identifying mark. The markings on Ballot 2 are a signature, possibly in another language. Ballots which have been signed or otherwise marked so that the identity of the voter could be revealed are invalid. *Ebco Mfg., Co.,* 88 NLRB

DOUGLAS DRACHLER
MCKEE & GILBROUGH
LLP
ATTORNEYS

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983, 985 (1950). "Distinguishing or identifying markings on ballots will render such ballots void because it is inconsistent with the principle of a secret election." *Id.* at 984. It is not necessary to establish the identity of the voter that cast the marked ballot, instead it is "sufficient that, upon an examination of the ballot, the marking in question appears to have been made deliberately, rather than accidentally or inadvertently, and that it may serve to reveal the identity of the voter." *Id.* at 984-985. In *Ebco Mfg.,* the Board found that a ballot containing a capital letter "R" with a circle drawn around it was a distinguishing mark that could identify the voter, and therefore the ballot was void. *Id.*

Here, Ballot 2 shows a signature on the back of the ballot, with two scribble marks above the signature. B-3. The signature is not legible but was clearly made deliberately as indicated by the swooping letter starting at the left side of the signature, followed by additional letters, not unintentional scribbling. The intentional nature of the signature is clear when contrasted with the random scribble marks above the signature, which appear to be the type of scribbles that could result from trying to get a dry pen to write. Like the capital "R" with a circle around it in *Ebco, Mfg.*, the signature on Ballot 2 is an identifying mark and the ballot is void.

C. The Regional Director erroneously ruled ballot two's validity could be considered, even though the employer did not file any objection to the Board Agent's determination that ballot two was void, which could result in prejudice.

Objections may be filed over the validity of ballots, including void ballots, and in resolving such an objection, the ballot is either counted, or not, if ultimately found void. *F. J. Stokes Corp.*, 117 NLRB 951, 954-5 (1957) (where validity of void ballots raised by timely objection, and ballots deemed void by board agent are valid, they must be counted); *Gifford-Hill & Co., Inc.,* 181 NLRB 729, 729 (1970); *see also* NLRB Casehandling Manual, Part 2, Representation Proceedings (Jan. 2017), Sections 11340.7, 11340.8(b)(1), and 11392.1(a).

DOUGLAS DRACHLER
MCKEE & GILBROUGH
LLP
ATTORNEYS

Securities Bldg, Suite 1030
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206-623-0900
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All objections must be filed within seven days after a tally of ballots has been prepared. NLRB Rule Section 102.69(a). That rule explicitly allows for a party to request an extension of time for filing offers of proof in connection with objections, yet no such provision exists for late-filing objections. *Id.* NLRB Rule Section 102.2(b), which allows certain documents to be filed late upon a showing of good cause, also does not mention objections. Section 102.69(a). Thus, parties have no right to file additional objections after the seven-day filing period expires, unless the party demonstrates the evidence was newly discovered and previously unavailable. *Rhone-Poulenc, Inc.*, 271 NLRB 1008, 1008 (1984); *Burns Security Services*, 256 NLRB 959, 960 (1981).

Ballot 2 was treated as a void ballot on the December 13, 2018 tally of ballots. Nonetheless, the Employer never included any reference to Ballot 2 in its timely or untimely objections.[3] The Employer could have timely filed an objection on Ballot 2 – of which it was clearly aware at the vote count – seven days after the tally of ballots but did not do so.[4] Therefore, the validity of Ballot 2 was not properly before either the hearing officer or the Regional Director.[5] Given that this ballot should not have been considered by the hearing officer and Regional Director, doing so would constitute prejudicial error if the Employer requests review of the Regional Director's Decision regarding Ballot 1 and the Board finds that Ballot 1 should not be counted. Notably, the Regional Director indicated a factor in his consideration of

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[3] The Union filed an objection on the void ballots, then withdrew its objections as to all but Ballot 1. The Union did not need to have a pending objection on Ballot 2 because it did not seek to challenge the board agent's characterization of that ballot as void.

[4] In contrast, the Union properly and clearly stated its position on Ballot 1 at the vote count and timely raised an objection to the Board Agent not counting the ballot as a yes. E-1; B-1(e) ¶ 8; RP 10: 13-17.

[5] The Regional Director infers that the Union received notice of the Employer's position on void ballots when the Employer filed its position statement on December 20, 2019 [Decision, 5], but this position statement was not served on the Union. E-2. Further, objections – not a position statement – are the proper vehicle for seeking to validate a ballot declared void by a board agent NLRB Casehandling Manual, Part 2, Representation Proceedings (Jan. 2017), Sections 11340.7, 11340.8(b)(1), and 11392.1(a).

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ATTORNEYS

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Ballot 2 is "that there is no harm to the parties in so doing." Decision, 6. Presumably the Regional Director was referring to the fact that counting the ballot did not affect the results of the election, which would alter the analysis if the Employer files and the Board accepts review on Ballot 1.

IV. CONCLUSION

In the event that the Board grants review of the Regional Director's Decision and Certification of Representative, SEIU 49 requests that the Board also review and reverse the Decision as set forth above.

Respectfully submitted,

Erica B. Askin, OSB #175606
In-House Counsel, SIEU Local 49
ericaa@seiu49.org

s/Jacob Metzger
Jacob Metzger, WSBA #39211
Kristen Kussmann, WSBA #30638
Douglas Drachler McKee & Gilbrough, LLP
1904 Third Ave, Suite 1030
Seattle, WA 98101
206-623-0900 (phone)
206-623-1432 (facsimile)
jmetzger@qwestoffice.net
kkussmann@qwestoffice.net

Attorneys for Union/Petitioner

DOUGLAS DRACHLER MCKEE & GILBROUGH LLP
ATTORNEYS
Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
Fax: 623-1432

CERTIFICATE OF SERVICE

I certify that on the 25th day of April, 2019, a copy of this document is being electronically filed via the NLRB E-Filing system and is being served upon the following persons by electronic mail:

Peter Finch
PeterFinch@dwt.com

Daniel Mueller
Daniel.mueller@providence.org

Dated: April 25, 2019.

s/ Jacob Metzger
Jacob Metzger

DOUGLAS DRACHLER
MCKEE & GILBROUGH
LLP
ATTORNEYS

Securities Bldg, Suite 1030
1904 Third Avenue
Seattle, WA 98101
206-623-0900
Fax: 623-1432

EXHIBIT A

UNITED STATES OF AMERICA
National Labor Relations Board
19-RC-231425

OFFICIAL SECRET BALLOT

For certain employees of

PROVIDENCE HEALTH & SERVICES - OREGON d/b/a
PROVIDENCE PORTLAND MEDICAL CENTER

Do you wish to be represented for purposes of collective bargaining by

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☒

DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box.

If you spoil this ballot, return it to the Board Agent for a new one.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

BE 3, p.1

BE3, p.2

BE3, p.3