UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

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BLUE SCHOOL : Respondent/Employer, Case No. 02-RC-278139

v. :

TECHNICAL OFFICE AND PROFESSIONAL UNION, LOCAL 2110 : Petitioner/Union.
UAW, AFL-CIO BLUE SCHOOL,

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PETITIONER’S OPPOSITION TO EMPLOYER’S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S REPORT ON DETERMINATIVE CHALLENGED BALLOTS AND ORDER DIRECTING OPENING AND COUNTING OF CHALLENGED BALLOTS

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Pursuant to Section 102.67(f) of the National Labor Relations Board’s rules and Regulations, Local 2110, UAW, Technical, Office & Professional Union (“Local 2110” or “Union”) submits this Opposition to Blue School’s Request for Review (“RFR”) of the Regional Director’s Report on Determinative Challenged Ballots and Order Direction Opening and Counting of Challenged Ballots (“RD Report & Order”). The RFR, which has no basis in law or fact, is the latest in a series of steps by Blue School (“Employer”) to delay Board proceedings and frustrate its employees’ efforts to unionize. Blue School concedes that the RD Report & Order is entirely consistent with existing Board law and policy; it simply argues that the Board should reconsider and revise existing precedent. As discussed in detail below, there is no basis for the Board to do so.

The RD Report & Order overruled the Employer’s challenge to eight (8) ballots based on alleged misconduct during the mail ballot period. Contrary to the Employer’s arguments, and as
the RD correctly determined, the secrecy of those ballots were not destroyed when employees posted images on social media showing their sealed yellow ballot return envelope along with statements supporting the union and/or indicating they had voted “yes” for the union. RD Report & Order at 5-6. While the Employer argues that the Board should revisit its rules regarding ballot secrecy and electioneering due to an increase in the use of social media and/or mail ballot elections, neither social media nor mail ballot elections is a new phenomenon and current Board law fully protects the integrity of the election process in those contexts. There is nothing suddenly different about mail balloting, or unique about communication through social media, that would warrant limiting voters’ right to engage in election-related speech.

The RD Report & Order also overruled the Employer’s challenge to the ballot of an employee who was employed during the period of the mail ballot election but resigned before the ballots were actually opened and counted. Relying on well-established precedent, the RD correctly concluded that this employee is eligible to vote because she was employed on the payroll eligibility date and returned her ballot prior to impoundment. The Employer simply argues that this voter no longer has an interest in the outcome of the election and “questions the merit” of Board precedent that clearly holds her ballot should be counted. The RD rejected that argument and so too should the Board.

**BACKGROUND & PROCEDURAL HISTORY**

On June 7, 2021, Local 2110 filed a petition seeking to represent all full-time and regular part-time professional and non-professional employees of the Employer. Blue School refused to agree to a mail ballot election, sought to delay the election until the start of the following school year, and sought to exclude the School Nurse from the bargaining unit. A hearing was held on these issues and on August 6, 2021 the Region issued a Decision and Direction of Election directing an immediate mail ballot election and determining that the School Nurse is properly
included in the bargaining unit. See Decision and Direction of Election ("DDE"). Ballots were issued on August 23, 2021, with a return date of September 3, 2021. See DDE p. 15-16. The Employer filed a Request for Review ("RFR") of the DDE and the ballots were impounded on September 20, 2021, pending the Board’s ruling on the RFR. On October 19, 2021, the Board denied the RFR in its entirety and the Region thereafter scheduled a ballot count for November 5, 2021. At the November 5 ballot count, the Board Agent first reviewed the professional ballots. The Employer challenged 13 of the professional ballots (including Ballot No. 6 with respect to which the Board Agent made no determination as to whether it was professional or non-professional) — three (3) ballots were challenged as “managers”; one (1) ballot was challenged as “not employed on date of count”; (1) one ballot was challenged as “signature does not match employee” (Ballot No. 6); and eight (8) ballots were challenged as “improper conduct during the election period.” The Union agreed that one of the ballots challenged as “manager” was properly excluded and that challenge was cleared, leaving 12 challenged professional ballots. The Board Agent opened the 18 ballots that were not challenged and tallied the votes for Question No. 1 (whether the voter wished to be in a bargaining unit that included non-professional employees). Of those 18 ballots, 15 were “yes” votes in favor a joint professional and non-professional unit and 3 were “no” votes. See Corrected Tally of Ballots ("TOB"). Accordingly, the challenged ballots were determinative. See TOB.

On December 10, 2021, the Regional Director issued the RD Report & Order in which he overruled the eight (8) challenges based on “improper conduct during the election period” and the one (1) challenge based on “not employed on date of count,” and directed those ballots be opened and counted. He further determined that the two (2) ballots that remained challenged as
“managers” and the one (1) ballot challenged as “signature does not match employee” would best be resolved by a hearing, if those ballots are determinative.

ARGUMENT

A. The Regional Director Correctly Overruled Challenges Based on Alleged Improper Conduct During the Mail Ballot Period.

It is established Board law that a challenge based on employee misconduct does not affect that employee’s eligibility to vote. See, e.g., NLRB v. Certified Testing Lab’ys, Inc., 387 F.2d 275, 277 (3d Cir. 1967); Shoreline Enterprises of America, Inc. v. NLRB, 262 F.2d 933, 69 (5th Cir. 1959); Europa Auto Imports, Inc., 357 NLRB 650, 651 (2011) (noting that ballot challenges are for when there is doubt as to an employee’s eligibly or ineligibly to vote); Farmers Union Creamery Ass’n, 122 NLRB 151, 152-53 (1958). Here, the Employer is not objecting to the employees’ eligibility, but rather argues that eight (8) ballots should be voided because they are no longer secret. The crux of the Employer’s argument is that, by making social media posts showing themselves mailing their sealed yellow ballot envelopes and suggesting that they intended to vote for the Union, these eight (8) employees1 did not keep their ballots secret. As the Regional

1 Ari Bloom and the Union are alleged to have shared a photo of Mr. Bloom holding and mailing his yellow ballot envelope and saying that he planned to vote yes. See RFR. Ex. 9a. Sarah “Sally” Caruso and the Union are alleged to have shared a photo of Ms. Caruso placing her yellow ballot envelope in the mail and suggesting that she voted yes. See RFR. Ex. 9b. Sabina Chan and the Union are alleged to have shared a picture of Ms. Chan’s hand placing her yellow ballot envelope in a mailbox. See RFR. Ex. 9c. Michelle George and the Union are alleged to have shared a photo of Ms. George placing her yellow ballot envelope in the mail and indicating that she supported the Union. See RFR. Ex. 9d. Sarah Konowitz and the Union are alleged to have shared multiple photos of Ms. Konowitz with her yellow ballot envelope, including posts in which she states that she is voting for the Union. See RFR. Ex. 9e. Laurie Beth Seligman and the Union are alleged to have shared a photo of Ms. Seligman’s hand placing her yellow ballot envelope into the mail, and suggesting she planned to vote yes. See RFR. Ex. 9f. Laura Winnick and the Union are alleged to have shared a picture of her yellow ballot envelope in a mailbox and suggesting that Ms. Winnick supported the Union. See RFR. Ex. 9g. Finally, Amy Zola and the Union are alleged to have shared a photo of Ms. Zola placing her yellow ballot envelope in the mailbox. See RFR. Ex. 9h.
Director correctly identified, this fundamentally misstates the Board law. The requirement that ballots remain secret is just that—a requirement that the physical ballot itself remain secret. See *Durham Sch. Servs., Lp & Int'l Bhd. of Teamsters, Loc. 991*, 360 NLRB 851, 852–53 (2014). It is not, however, a requirement that employees keep how they intend to vote, or did vote, secret. See *Luntz Iron & Steel Co.*, 97 NLRB 909, 910 (1951) (“[T]he primary concern of the Board in an election is to guarantee the secrecy of the ballot during the election. The Board cannot, and need not, prevent a voter from voluntarily disclosing how he voted”). Specifically, the Board has refused to set aside an election where employees told the union (and the union publicized) how they intended to vote. *Durham School Services, LP*, 360 NLRB at 852-53. The Board stated that “such conduct is merely free campaign speech” and reiterated that what is important is that the votes on the actual ballots themselves are known only to the voter. *Id.* More notably, in every case where the Board has held a ballot void because the voter failed to keep it secret, the actual marked ballot itself was shown to others. See, e.g., *Sorenson Lighted Controls, Inc.*, 286 NLRB 969. See also *General Photo Products*, 242 NLRB 1371 (1979) (finding a ballot was void not because the employee’s intended vote was known, but because the employee showed their actual ballot to employees waiting to vote).

As the Regional Director correctly concluded the evidence presented by the Employer does not, and cannot, sufficiently demonstrate that any of the eight employees actually showed their ballots to anyone or otherwise made it possible to identify their ballots. Rather, the eight employees and the Union are alleged to have merely shared pictures and videos showing employees’ handling their own yellow ballot envelopes and indicating that they supported the union. None of the posts by the Union or the employees reveal the contents of their ballot envelopes. As the Board has noted, the very purpose of ballot secrecy is that an employee can say one thing about how they
plan to vote, or did vote, but actually vote differently. See Durham Sch. Servs., 360 NLRB at 852-53. The Regional Director also correctly points out that none of the eight voters whose ballots were challenged violated the Board’s mail ballot instructions.

The Board’s rules in this regard strike the proper balance between the maintaining ballot secrecy and protecting employees’ right to free speech during an election campaign. That is, by requiring that a voter’s actual ballot be secret, Board law protects the integrity of the secret ballot election process. And by permitting a voter to discuss how she will (or did) vote, Board law protects workers’ right to engage in campaign speech that is protected by, among other things, Section 7 of the Act. That this election was conducted by mail ballot, or that these voters’ campaign speech occurred via social media, does not call for the Board to revisit or revise this balance. Mail ballot elections have been conducted from the Act’s inception and the Board has consistently applied its rules regarding ballot secrecy and electioneering to mail ballot elections; there is no basis for treating mail ballot elections differently now. Nor can it be credibly argued that, at this point, social media is a new phenomenon that warrants a re-balancing of rights in a way that would curtail employees’ ability to speak freely during an election campaign. The Employer’s challenges show the dangers of any change in this regard. Specifically, by characterizing the actions of public Union supporters as “misconduct,” the Employer has engaged in intimidating and coercive conduct which would have a reasonable and predictable effect of “chilling” all employees’ Section 7 activities.

For the above reasons, the Employer’s RFR with respect to the eight (8) ballots it challenged for “misconduct during the mail ballot period,” should be denied and the RD’s Report & Order should be upheld.
B. The Regional Director Correctly Overruled the Employer’s Challenge Based on Employee’s Resignation of Employment

In determining eligibility to vote, the Board applies a well-established test: anyone employed on the election date is eligible to vote even if the employee intended to quit, and in fact does quit, immediately after voting. See Harold M. Pittman Co., 303 NLRB 655 (1991). More specifically, an individual is eligible to vote in a mail ballot election if they are in the unit on the payroll eligibility date and the date they mail in their ballots to the Board’s regional office. See Dredge Operators, Inc., 306 NLRB 924 (1992); See also Plymouth Towing Co., Inc., 178 NLRB 651 (1969); Personal Products Corp., 114 NLRB 959, 961 (1955) (finding that an employee who gave notice to the employer that she would terminate her employment 2 days after the election was still eligible to vote); Eng. Lumber Co., 106 NLRB 1152, 1154 (1953) (determining the ballot of employee who died after an election should still be counted).

The Employer’s challenge to Abigail Fleischer’s (“Fleischer”) ballot based on her resignation after the election is yet another fruitless attempt to thwart it employees’ efforts to unionize. Fleischer was employed on the payroll eligibility date of August 6 and she remained employed with the Employer through October 15th, significantly after the dates of the mail ballot election (from August 16, 2021, when ballots were mailed, to September 3, 2021, the specified return date). Indeed, the latest date on which Fleischer could have returned her ballot was September 20th – the date on which ballots were impounded – and it is undisputed that she was a Blue School employee as of that date.

As the RD correctly determined, Fleischer is eligible to vote under well-settled Board law. Dredge Operators, Inc., 306 NLRB 924. The Employer argues that the Board should deviate from established precedent, and invalidate the ballots of otherwise eligible voters, in mail ballot elections during COVID-19 times and/or cases that involve ballot impoundment. Not only is there
no basis in law for that position, but it would in fact create a perverse incentive for parties to delay ballot counts to exclude otherwise eligible voters who might, over time, separate from employment – just as the Employer has repeatedly attempted to do here.

Accordingly, the Employer’s RFR regarding its challenge to Fleischer’s eligibility to vote should be denied and the RD’s Report and Order should be upheld.

CONCLUSION

For each and all of the above reasons, the Board should deny Blue School’s RFR and uphold the RD’s Report and Order in its entirety.

Dated: January 7, 2022
New York, New York

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CERTIFICATE OF SERVICE

Employer Name: Blue School  Case No. 02-RC-278139

I, Alexis Stanley, hereby certify that on January 7, 2022, a copy of Local 2110’s Opposition to Employer’s Request for Review of the Regional Director’s Report on Determinative Challenged Ballots and Order Directing Opening and Counting of Challenged Ballots, was served on the following parties:

By E-Filing:

Hon. John J. Walsh, Jr. Regional Director, NLRB Region 2
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January 7, 2022
Date