MVM, INC.,

Respondent, Case No. 28-RC-288965

and

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA),

Union.

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MVM, INC.'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF SECOND ELECTION

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Pursuant to Sections 102.67 and 102.69 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Respondent MVM, Inc. ("MVM" or "Company") respectfully requests review of the Region 28 (the "Region") Regional Director’s (the "RD") Decision and Direction of Second Election ("DDE") dated June 23, 2022.

I. INTRODUCTION

On January 13, 2022, the International Union, Security, Police and Fire Professionals of America (the "Union") petitioned for recognition at MVM’s Phoenix, Arizona worksite. The Region subsequently conducted a mail ballot election, counting ballots on March 10, 2022. Approximately fifty eligible voters exercised their Section 7 rights under the National Labor Relations Act (the "NLRA" or the "Act"), with a majority of eligible voters declining union representation. The Union filed objections to the outcome of the election, including one objection...
regarding MVM’s voter list, which the Hearing Officer’s Report on Objections ("Hearing Officer’s Report") recommended that the RD overrule.

Nevertheless, the RD’s DDE reverses the Hearing Officer’s Report in contravention of reported Board precedent, sustaining the Union’s objection relating to MVM’s voter list, even though MVM substantially complied with voter list requirements under current Board law. Accordingly, MVM respectfully requests that the Board review and reverse the RD’s DDE, affirm the Hearing Officer’s Report, and direct the RD to certify the results of the mail ballot election conducted in this proceeding.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

On January 13, 2022, the Union petitioned for recognition at MVM’s Phoenix, Arizona worksite. (See Hearing Officer’s Report, at 1, attached hereto as Exhibit 1). The parties waived their right to a representation hearing and entered into a Stipulated Election Agreement, which the Board approved on February 3, 2022. (See id. at 7). On February 7, 2022, MVM served its voter list on the parties; the voter list identified approximately ninety-two eligible voters. (See id.). Joseph Arabit, MVM’s Program Manager, testified during the hearing that MVM compiled the information for its voter list by using its human resources information system, “Workday.” (See id.). Mr. Arabit further testified that in preparing the voter list, MVM asked supervisors to contact each employee and verify that the phone number MVM had on record for the employee was a good phone number.

Mr. Arabit explained that MVM “did not include a home phone column on the voter list ‘because the numbers were the same.’” (See DDE, at 6, attached hereto as Exhibit 2) (quoting Hearing Tr. 16:15-17). And indeed, consistent with Mr. Arabit’s testimony, “[t]he record reflects that the majority of the eligible voters have the same telephone number listed in Workday for mobile phone number and home phone number.” (See Hearing Officer’s Report, at 7). Specifically,
only five eligible voters listed an additional phone number in Workday. (See id.). Mr. Arabit did not testify that he became aware of the additional phone numbers before the election. (See DDE, at 6).\(^1\)

Between February 15, 2022, and March 2, 2022, a mail ballot election was conducted at MVM’s Phoenix, Arizona site. (See Union’s Exceptions, at 4, attached hereto as Exhibit 3). The ballot count took place on March 10, 2022; thirty-four employees voted against the Union and only fifteen employees voted for the Union. (See id. at 1). “Thus, a majority of valid ballots were not cast in favor of representation by the [Union].” (See Hearing Officer’s Report, at 4). The Union subsequently objected to the outcome of the election, contending that MVM polled employees and that MVM’s voter list did not contain home telephone numbers. (See Union’s Exceptions, at 1-2). The Hearing Officer recommended that the RD overrule the Union’s objections. (Hearing Officer’s Report, at 1). The Union subsequently “appeal[ed] only the second objection,” relating to MVM’s voter list. (See Union’s Exceptions, at 2). The RD sustained the Union’s objection relating to MVM’s voter list and ordered that “a new election shall be conducted.” (See DDE, at 8).

III. APPLICABLE GROUNDS FOR REVIEW

Under Section 102.67(d), the Board may grant a request for review where “a substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from officially reported Board precedent,” among other grounds. See 29 C.F.R. § 102.67(d)(1).

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\(^1\) MVM also located other documents that contained alternate phone numbers for approximately twelve different eligible voters. (See Hearing Officer’s Report, at 7). Although the additional documents contained phone numbers, the documents only specifically listed “home” phone numbers for six employees: Sergio Cabrera Padron, Nora Carrizosa, Claudia Cervantes, Marybel Garcia, Armando Vasquez, and Gustavo Vasquez Ramos. (See Petitioner’s Exhibit 12, at 10, 12, 16, 24, 60, 61, attached hereto as Exhibit 4). And for those six employees, the “home” phone numbers listed in Petitioner’s Exhibit 12 are the same as the mobile phone numbers listed in Workday. (See Joint Mot. to Supplement the Record, Ex. A, attached hereto as Exhibit 5).
IV. **APPLICABLE LEGAL STANDARDS**


As the Hearing Officer correctly noted, “[i]t is well-settled that ‘representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.’” See Hearing Officer’s Report, at 2 (quoting *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000)). When a party challenges election results, that party “carries a heavy burden” and must present evidence “overcoming the presumption that ‘ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees.’” *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1130 (9th Cir. 1973) (internal citations omitted); see also Hearing Officer’s Report, at 9 (noting that it is a petitioner’s “burden to establish...objectionable conduct warranting setting aside [an] election”).

Election results should not be overruled where an employer exercised “reasonable diligence” in compiling its voter list and substantially complies with voter list regulations. See *RHCG Safety Corp*, 365 NLRB No. 88 (2017); *Danbury Hosp.*, 2015 NLRB Reg. Dir. Dec. LEXIS 209, at *3; see also *Global Cooling*, 2021 NLRB Reg. Dir. Dec. LEXIS 99, *15 (concluding that where an employer left an employee’s name off the voter list, the omission did not warrant setting aside election results “because the Employer substantially complied with the voter list requirements and there was no evidence that the Employer acted in bad faith”); *Telonic Instruments*, 173 NLRB 588, 589 (1968) (not setting aside election where omissions in *Excelsior* list were limited to about four out of one hundred eleven voters); *General Time Corp.*, 195 NLRB 343, 344-45 (1972) (overruling objection where *Excelsior* list contained 44 inaccurate addresses
out of 980 employees and no evidence of bad faith); *Pacific Beach Corp.*, 344 NLRB 1160, 1163 (2005) (“Under the appropriate analysis, the 4.8 percent inaccuracy rate in this case and the Employer’s good-faith attempt to correct the inaccuracies require a finding that the Employer substantially complied with the *Excelsior* list rule.”).

Board precedent is less than clear on whether an employer’s subjective intent in preparing its voter list matters. *See RHCG Safety Corp.*, 365 NLRB No. 88, at *25 (“The voter-list rule, like the predecessor *Excelsior* list rule, ‘is not intended to test employer good faith.’”). That said, to the extent an employer’s intent matters, it is at most only “a factor” for the Board to consider, absent circumstances that preclude a finding of substantial compliance. *See Woodman’s Food Markets, Inc.*, 332 NLRB 503, 505 n.12 (2000) (hereinafter “*Woodman’s*”) (emphasis in original). Indeed, under *Woodman’s*, the Board considered three factors in assessing an employer’s substantial compliance: “(1) the percentage of omissions; (2) whether the number of omissions is determinative (i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election); and (3) the employer’s explanation for the omissions.” *See DDE*, at 4. Where the percentage of omissions from a voter list is low and omissions are not outcome determinative, the Board ruled that “the results of the election should be certified.” *See Woodman’s*, 332 NLRB at 505. In other words, where two out of three of the *Woodman’s* factors favor substantial compliance, the regional director should certify election results. *See id.*

Importantly, although bad faith or gross negligence by an employer preclude a finding that an employer substantially complied with voter list requirements, an “imperfect voter list” does not equal “gross negligence.” *See North Macon Health Care Facility*, 315 NLRB 359, 359, 363 (1994). Rather, a misinterpretation of voter list requirements and other errors by an employer do
not preclude a finding that the employer substantially complied with voter list requirements. See Woodman’s, 332 NLRB at 504-05 & n.9; Mountaineer Park, Inc., 343 NLRB 1473, 1485 (2004).

V. ARGUMENT

A. MVM substantially complied with voter list requirements.

Here, MVM substantially complied with voter list requirements. As the Hearing Officer recognized, MVM provided 92 mobile phone numbers. See Hearing Officer’s Report, at 8. Considering that 87 out of 92 employees provided the same number as their home telephone number and mobile telephone number in Workday, the Union ultimately received 87 out of 92, or about 95%, of “home” telephone numbers. Indeed, even the Union has even acknowledged that “[t]he record established that the majority of the eligible voters had the same telephone number listed in Workday for their mobile phone and home phone number.” See Union’s Exceptions, at 5.

Further, nothing prevents a finding of substantial compliance here. MVM attempted to comply in good faith with voter list requirements. Indeed, as Mr. Arabit explained during his testimony, MVM asked supervisors to contact each employee and verify that the phone number MVM had on record for the employee was a good phone number. See supra, Part II. Further, although MVM did not provide a separate home phone number column, MVM believed that the mobile and home phone numbers in Workday were all the same; except for five phone numbers, it was correct. See supra, Part II. Accordingly, MVM substantially complied with voter list requirements.

B. The RD erred in concluding that MVM’s actions preclude a finding of substantial compliance.

Board precedent does not support a conclusion that MVM’s formatting of its voter list precludes a finding of substantial compliance. MVM’s actions to confirm eligible voters’ phone numbers, as well as the RD’s admission that MVM may have believed that omitting the home
phone numbers column was “harmless,” belies any conclusion of bad faith. See DDE, at 6-7. And although the RD concludes that MVM’s formatting “indicates gross negligence,” as noted above, the Board has concluded that an “imperfect voter list” does not equal “gross negligence.” See North Macon Health Care Facility, 315 NLRB at 363. Indeed, the Board has found gross negligence where an employer knowingly supplied inaccurate addresses to a union. See Merchants Transfer Co., 330 NLRB 1165, 1166 (2000). In contrast, here, MVM believed that its employees used the same phone number for their home and mobile numbers and did not become aware of its mistake until later. See supra, Part II. And although the RD notes that the record does not reflect that MVM corrected the omission with the Union, the record also does not reflect that MVM knew in advance of the election that it had omitted any phone numbers. Contra Laidlaw Medical Transp., 326 NLRB 925 (1998) (finding gross negligence where employer became aware of errors before the election and failed to correct them).

The RD further concludes that MVM’s omission of a home phone numbers column was “intentional” and its explanation for not including a home phone number column was legally insufficient. See DDE, at 6-7. Yet, MVM did not intentionally omit any phone numbers—as noted above, MVM believed the eligible voters’ home and mobile phone numbers were the same and was not aware of the five additional phone numbers when it prepared its voter list. See supra, Part II. In any event, whether MVM’s conduct was intentional and whether MVM’s explanation is sufficient under Board law are not the correct standards for determining whether an employer is precluded from demonstrating substantial compliance. Rather, as noted above, the Board has specifically concluded that an employer’s misinterpretation of Board requirements or other errors—like MVM’s minor mistakes here—do not preclude a finding of substantial compliance. See Woodman’s, 332 NLRB at 504-05 & n.9. Thus, nothing precludes MVM from demonstrating
substantial compliance here and the RD deviated from reported Board precedent in concluding otherwise.

C. The RD misapplied Woodman’s in concluding that MVM did not substantially comply with voter list requirements.

Although the RD cites to Woodman’s to support his conclusion that MVM did not substantially comply with the Board’s voter list requirements, see DDE, at 4, his analysis nevertheless departs from Woodman’s. As the RD notes, Woodman’s outlines “three factors when determining if the employer has substantially complied with the Excelsior requirements: (1) the percentage of omissions; (2) whether the number of omissions is determinative (i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election); and (3) the employer’s explanation for the omissions.” See DDE, at 4. Yet, as noted above, the Board in Woodman’s concluded that absent a showing of bad faith, a second election is warranted only where two of the three factors weigh in favor of rerunning an election. See Woodman's, 332 NLRB at 504-05 & n.9. Here, as discussed above, Board precedent does not support a conclusion that MVM acted in bad faith or with gross negligence. See supra, Part V.B. As such, the RD departed from Board precedent and clearly erred in “choos[ing] to focus on the third factor” in his analysis and “find[ing] no reason to evaluate the other two factors.” See DDE, at 6-7.

Starting with the first Woodman’s factor (as the RD should have done), the percentage of omissions weighs in favor of affirming the Hearing Officer’s Report. As noted above, MVM’s compliance percentage was approximately 95%; a 95% compliance rate is analogous to the

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2 Specifically, the Board in Woodman’s concluded that the first factor “might not warrant setting aside the election” because “the percentage of omissions was relatively small.” See Woodman's, 332 NLRB at 505. The Board next concluded that although the employer did not act in bad faith, it did not use diligence in preparing its voter list. See id. And finally, the Board concluded that the omissions may have been outcome determinative. See id. But importantly, the Board explained that if it turned out the omissions were not outcome determinative, “the results of the election should be certified.” See id.
compliance rate in *Telonic Instruments*. See *Telonic Instruments*, 173 NLRB at 589 (finding substantial compliance where compliance rate was 96%).

Looking next to the second *Woodman’s* factor (as the RD also should have done), the number of omissions is not determinative. Even if MVM had provided the five additional phone numbers that appeared in Workday, the Union still would not have won the election if it received five additional votes. As discussed above, fifteen employees voted in favor of the Union and thirty-four employees voted against. See *supra*, Part IV.B. Even if five of the employees who voted against the Union were the same five employees whose home phone numbers did not appear on the voter list, and even if those five employees would have changed their votes had the Union been able to access their home phone numbers, these contingencies would still only change the vote count to twenty-one votes in favor of the Union and twenty-nine votes against the Union. Thus, given that the Union still would have lost the election even if it had the additional five phone numbers, the second *Woodman’s* factor does not support the RD’s DDE.

Finally, upon focusing on the third factor, the RD concluded that MVM “has not provided any legally sufficient justification for its omission of an entire category/column of contact information.” See DDE, at 6. Yet, even if the RD is correct that MVM has not provided a sufficient justification for its mistake here, MVM’s justification is only “a factor” under *Woodman’s*. See *Woodman’s*, 332 NLRB at 505 n.12 (emphasis in original).

Given that two of the three *Woodman’s* factors weigh in favor of overruling the Union’s objection and certifying the results of the election, *Woodman’s* dictates that the RD should have affirmed the Hearing Officer’s Report and certified the results of the election. See *Woodman’s*, 332 NLRB at 505. Thus, in concluding that MVM did not substantially comply with voter list requirements solely because of the third *Woodman’s* factor, the RD departed from the reported
Board precedent upon which he expressly based his decision. This departure warrants Board review.

D. **The language of Section 102.62(d) does not automatically void election results when an employer makes a mistake with its voter list.**

Finally, the RD appears to contend that the language of Section 102.62(d) somehow frees him from evaluating all three factors under *Woodman’s* or otherwise justifies his decision to order a second election. *See DDE, at 7.* Specifically, the RD notes that Section 102.62(d) requires that employers must serve the voter list “in proper format.” *See id.* Yet, the RD once again departs from Board precedent through this argument. If any deviation from voter list requirements rendered election results void, the substantial compliance standard would not exist. Yet, the Board has recognized the substantial compliance standard in analyzing voter list issues as recently as 2017. *See RHCG Safety Corp.,* 365 NLRB No. 88, at *3. Thus, in contending that any formatting error with a voter list voids election results, the RD, once again, deviates from reported Board precedent. This departure, like the RD’s other departures, warrants Board review.

VI. **CONCLUSION**

MVM’s eligible voters exercised their rights under Section 7 of the Act to decline union representation; the Region should have respected that choice. For all the foregoing reasons, MVM respectfully requests that the Board grant review and reverse the DDE, affirm the Hearing Officer’s Report, and certify the results of the mail ballot election.
Dated: July 6, 2022

Respectfully submitted,

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I hereby declare and certify under penalty of perjury that I caused the foregoing to be e-filed with the National Labor Relations Board and served on the below in the following manner on July 6, 2022:

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EXHIBIT 1
I. PROCEDURAL HISTORY

The Petitioner filed the petition on January 13, 2022. The parties agreed to the terms of an election and the Region approved their agreement on February 3, 2022. The mail ballot election was conducted between February 15, 2022, and March 2, 2022, and the ballot count
occurred on March 10, 2022. The employees in the following unit voted on whether they wished to be represented by the Petitioner (Unit employees):

**INCLUDED:** All full-time and regular part-time Child and Family Protection Care Specialists performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, employed by the Employer in Phoenix, Arizona.

**EXCLUDED:** All other employees, office clerical employees, confidential employees professional employees, managers, and supervisors as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 15 ballots were cast for the Petitioner, and that 34 ballots were cast against representation. There were zero non-determinative challenged ballots. Thus, a majority of the valid ballots were not cast in favor of representation by the Petitioner.

Objections were timely filed. The Regional Director for Region 28 (Regional Director) ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Petitioner’s objections are warranted, I heard and fully considered the testimony, received into evidence relevant documents as well as the parties’ arguments, including case law in support of their positions, on March 31, 2022, and April 4, 2022.

After the close of the hearing, on April 11, 2022, the Employer filed a Joint Motion to Supplement the Record (Joint Motion) with the Regional Director “to include an updated chart of employee home and mobile phone numbers for eligible voters that contains information for former MVM employee Stephany Hernandez,” attached to the Joint Motion as Exhibit A. On April 13, 2022, the Regional Director issued an Order referring the Joint Motion to the Hearing Officer to rule on this Joint Motion in accordance with Section 102.69(d)(1)(i) of the Board’s Rules and Regulations.

**II. THE BURDEN OF PROOF AND THE BOARD’S STANDARD FOR SETTING ASIDE ELECTIONS**

It is well settled that “[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enf’d. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).
In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). Thus, under the Board’s test the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

III. THE EMPLOYER’S OPERATION

The Employer is a California corporation engaged in the business of providing security services, with its principal office in Ashburn, Virginia, and a place of business in Phoenix, Arizona (Phoenix facility). The evidence reflects that Unit employees employed out of the Employer’s Phoenix facility transport unaccompanied minors in family units apprehended by United States Customs and Border Patrol officers along the southwest border of the United States to emergency influx sites located in Echo and El Paso, Texas, and to licensed care facilities throughout the United States.

IV. THE PETITIONER’S OBJECTIONS AND MY RECOMMENDATIONS

The Order directing a hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses’ testimony.

A. Objection 1: During the critical period, the Employer sent an email to Unit employees polling them about how they planned to vote in the upcoming election.

1. Record Evidence

It is undisputed that during the critical period, the Employer sent emails to Unit employees about the NLRB election. Objection 1, however, asserts that the Employer sent an email to Unit employees polling them about how they planned to vote in the NLRB election. I find Petitioner failed to meet its burden by providing any credible, admissible evidence in support of Objection 1 and I therefore recommend that Objection 1 be overruled.

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1 I note that there is an error in the record with respect to the admitted Petitioner’s Exhibits, as Petitioner’s Exhibit 5 was not admitted due to a lack of authentication. However, Petitioner’s request to place Petitioner’s Exhibit 5 in the rejected exhibit files was granted. (Tr. 35). Accordingly, I will disregard and will not consider Petitioner’s Exhibit 5 for this Hearing Officer’s Report on Objections.
At the hearing, Petitioner’s Exhibits 6, 7, and 8 were admitted as demonstrative exhibits supporting Petitioner’s arguments in support of Objection 1, as they contain the same content as certain emails from the Employer to Unit employees set forth at Petitioner’s Exhibits 11, 9, and 10, respectively. By seeking the admission of pictures of screenshots of certain emails sent to a Gmail account at Petitioner’s Exhibits 6, 7, and 8, Petitioner apparently sought to demonstrate that by inserting verbatim the same content of the Employer’s emails set forth at Petitioner’s Exhibits 11, 9, and 10, respectively, a Gmail email recipient opening such emails would see, purportedly automatically generated by the Gmail system itself, three separate boxes at the bottom of such emails. Each of the three boxes contains a separate, apparently pre-populated predictive text, in blue font, from left to right, as follows (collectively, predictive responses):

I vote yes. Yes, I approve. No for me.

The record reflects that Petitioner’s Exhibit 7, admitted as a demonstrative exhibit, contains an excerpt of the Employer’s February 28, 2022 email to Unit employees in English and the entire email in Spanish set forth at Petitioner’s Exhibit 9. Petitioner’s Exhibit 7 contains the predictive responses described above, but there is no record evidence reflecting that Petitioner’s Exhibit 7 was sent to Unit employees.

Petitioner failed to meet its burden by providing any admitted evidence showing what Petitioner contends at Objection 1---that the Employer sent an email to Unit employees polling them about how they planned to vote in the NLRB election. None of the admitted exhibits from the Employer to Unit employees contain the predictive responses, any other evidence showing that the Employer polled eligible voters about how they were going to vote in the NLRB election, or anything similar. Further, the Employer’s Program Manager’s uncontroversed testimony is that the Employer never sent out any communication to Unit employees or had any conversations with Unit employees asking how Unit employees were going to vote in the NLRB election.

To be clear, there is no record evidence, such as testimony from any eligible voter at the hearing, about receiving an email containing the predictive responses or any other similar polling language sent to their email accounts, including but not limited to their Gmail accounts, or production of any such documents supporting Objection 1. The record reveals there was an ample source for such evidence, as the voter list served by the Employer on the parties on February 7, 2022, shows that approximately 49 eligible voters have Gmail home email accounts. Likewise, there is no record evidence of any email replies from eligible voters, including but not limited to eligible voters with Gmail home email accounts, to such Employer emails containing such predictive responses or any other purported polling content, to meet Petitioner’s burden to prove that the Employer sent such emails to Unit employees as asserted at Objection 1.

2. Board Law

The conduct of directly inquiring of employees whether they support the union, and recording their responses is objectionable conduct. Springfield Hosp., 281 NLRB 643 (1986), as is polling employees as to how they will vote. J.C. Penney, 195 NLRB 921 (1972). Employer polling of employee sentiment is generally assumed to be coercive and elections will be set aside

3. Recommendation

Based on the foregoing and the record as a whole, I find that Petitioner failed to meet its burden to present any record evidence showing the Employer sent an email to Unit employees polling how they planned to vote in the NLRB election, and I therefore overrule Objection 1.

B. Objection 2: The voter list that the Employer served on the parties failed to provide eligible voters’ home telephone numbers as required by 29 CFR 102.62(d).

1. Record Evidence

On February 3, 2022, the Regional Director of Region 28 approved the parties’ Stipulated Election Agreement containing the following requirement, in relevant part (emphasis added):

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters.

On February 7, 2022, the Employer served the voter list on the parties, containing approximately 92 eligible voters. It is undisputed that the voter list the Employer served on the parties on February 7, 2022, does not contain eligible voters’ personal home telephone numbers, but it does contain eligible voters’ cellular telephone numbers.

The Employer’s Program Manager testified that the Employer obtained the information for the voter list from its human resources information system called Workday (Workday). Petitioner’s Exhibit 14 and Exhibit A of the Employer’s Joint Motion to Supplement the Record shows the Employer’s Workday report, containing a column for mobile phone and home phone for each eligible voter. The record reflects that the majority of the eligible voters have the same telephone number listed in Workday for mobile phone number and home phone number. However, approximately five of the eligible voters have home phone numbers listed in Workday that are different from their mobile phone numbers. Likewise, Petitioner’s Exhibit 12 shows that approximately 12 eligible voters have different telephone numbers than those reflected as their mobile numbers on the voter’s list.

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2 In accordance with Section 102.69(d)(1)(i) of the Board’s Rules and Regulations, I grant the Employer’s Joint Motion to Supplement the Record and designate the Joint Motion to Supplement the Record, including its attachment, Exhibit A, as part of the record.
2. Board Law

Sections 102.62(d) and 102.67(l) of the Board’s Rules and Regulations, as amended in 2019, provide that within 2 business days after issuance of a direction of election, or approval of an election agreement, unless a longer time is specified or granted, the employer shall “provide to the regional director and the parties . . . a list of the full names, work locations, shifts, job classifications, and contact information . . . of all eligible voters.” The contact information to be provided by the employer includes home addresses, available personal email addresses, and available home and personal cellular “cell” telephone numbers of all eligible voters. 29 CFR 102.62(d) and 102.67(l) (emphasis added).

The Board often considers situations in which the employer has submitted a list, but in doing so has submitted an inaccurate or incomplete list. In deciding whether such noncompliance requires setting aside an election, the Board has emphasized that the rule is not to be “mechanically applied.” Telonic Instruments, 173 NLRB 588, 589 (1969) (not setting aside election where omissions in Excelsior list were limited to about four out of 111 voters); General Time Corp., 195 NLRB 343, 344 (1972) (overruling objection where Excelsior list contained 44 inaccurate addresses out of 980 employees and no evidence of bad faith); see also Program Aids Co., 163 NLRB 145, 146 (1967); Thrifty Auto Parts, 295 NLRB 1118 (1989).

Balancing this against the need to encourage conscientious efforts to comply, the Board accordingly considers whether, under the circumstances of a particular case, the employer has “substantially complied” with the requirements. Gamble Robinson Co., 180 NLRB 532 (1970); Sonfarrel, Inc., 188 NLRB 969 (1971). Danbury Hosp., 2015 NLRB Reg. Dir. Dec. LEXIS 209, at *3 (2015); see also Global Cooling, 2021 NLRB Reg. Dir. Dec. LEXIS 99, *15 (2021) (concluding that where an employer left an employee’s name off the voter list, the omission did not warrant setting aside election results “because the Employer substantially complied with the voter list requirements and there was no evidence that the Employer acted in bad faith”).

With respect to the added requirement of providing available phone numbers, the Board has set aside an election where the employer did not provide any phone numbers for any of its employees on the list, and in doing so rejected an argument that an employer is not obligated to include available phone numbers that are not maintained in the employer’s computer database. RHCG Safety Corp., 365 NLRB No. 88, slip op. at 5–7 (2017). See 79 Fed. Reg. 74338 fn. 146 (“the fact that an employer may not possess the . . . personal phone numbers for each and every one of its employees does not demonstrate that it is not worthwhile to require the employers to disclose those employees’ . . . personal phone numbers that it does possess.”) Id. at 6.

3. Recommendation

Consistent with the Board precedent set forth above, I find that although the Employer omitted approximately five home telephone numbers maintained in its Workday system and maintained records containing approximately 12 additional telephone numbers for its approximately 92 Unit employees, I find that the Employer substantially complied with the Board’s “available home and personal cellular telephone numbers” requirement set forth at Rules secs. 102.62(d) and 102.67(l). 29 CFR 102.62(d) and 102.67(l). As noted above, there were approximately 92 eligible voters in the election, the majority of which had the same telephone number listed for mobile phone and home phone. The Employer provided all of the approximately 92 eligible voters’ mobile phone numbers. Based on the foregoing and the record as a whole, I find that the Employer substantially complied with the Board’s voter list “available
home and personal cellular telephone numbers” requirement. See *Gamble Robinson Co.*, 180 NLRB 532 (1970); *Sonfarrel, Inc.*, 188 NLRB 969 (1971).

Contrary to Petitioner’s assertion, citing *URS Federal Servs.*, 365 NLRB No. 1 (2016), the Employer’s omission of a column for eligible voters’ home phone numbers is not a *per se* violation of voter list regulations. Rather, the Board concluded in *URS Federal Servs.* that the failure to *serve* a voter list is a *per se* violation of voter list regulations, but the Board continues to apply the substantial compliance standard in reviewing the contents of a voter list following *URS Federal Servs.*, as is the issue with Petitioner’s Objection 2 here. See *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 2 (2017).

I find that Petitioner failed to meet its burden to establish that the Employer’s failure to include available home telephone numbers for its eligible voters on the voter list constituted objectionable conduct warranting setting aside the election, as the Employer substantially complied with the Board’s voter list requirements by providing available cellular phone numbers for all of the approximately 92 eligible voters and the majority of these eligible voters have the same numbers listed in the Employer’s records for their mobile number and cellular telephone numbers. Based on the foregoing and the record as a whole, I therefore overrule Objection 2.

V. CONCLUSION

I recommend that the Petitioner’s objections be overruled in their entirety. The Petitioner has failed to establish that its objections to the mail ballot election held between February 15, 2022 and March 2, 2022 reasonably tended to interfere with employee free choice. Therefore, I recommend that an appropriate certification issue.

VI. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board’s Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 28 by May 23, 2022. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Pursuant to Section 102.5 of the Board’s Rules and Regulations, exceptions must be filed by electronically submitting (E-Filing) through the Agency’s website (www.nlrb.gov), unless the party filing exceptions does not have access to the means for filing electronically or filing electronically would impose an undue burden. Exceptions filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board’s Rules do not permit a request for review to be filed by facsimile transmission.

Pursuant to Sections 102.111 – 102.114 of the Board’s Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 4:45 p.m. (Arizona local time) on the due date. If filed electronically, it will be considered timely if the
transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated this 9th day of May, 2022.

/s/ Lisa J. Dunn
Lisa J. Dunn, Hearing Officer
EXHIBIT 2
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

MVM, INC.
Employer

and

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA
(SPFP)A)

Petitioner

DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to the provisions of a Stipulated Election Agreement, a mail ballot election was conducted between February 15, and March 2, 2022, among a unit of all full-time and regular part-time Child and Family Protection Care Specialists performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act (the Act), employed by MVM, Inc. (Employer) in Phoenix, Arizona; excluding all other employees, office clerical employees, confidential employees, professional employees, managers, and supervisors as defined in the Act. The tally of ballots shows that of the 92 eligible voters, 15 cast votes for International Union, Security, Police and Fire Professionals of America (SPFP) (Petitioner), 34 cast votes against the Petitioner, and there were 0 challenged ballots.

On March 17, the Petitioner timely filed two objections. The first objection contends that the Employer sent an email to eligible voters polling them as to how they will vote. The second objection contends that the voter list that the Employer served on the parties failed to provide eligible voters’ home telephone numbers as required by Sections 102.62(d) and 102.67(l) of the National Labor Relations Board’s (the Board) Rules and Regulations, as amended in 2019. Following a hearing on the objections, the Hearing Officer issued a report on May 9 recommending that both objections be overruled and that a certification of results be issued.

On May 23, the Petitioner timely filed with me exceptions to the Hearing Officer’s report. The Petitioner withdrew its first objection related to the Employer polling employees. The Petitioner contends that the Hearing Officer erred on its second objection by concluding that the Employer “substantially complied” with the Board’s Rules and Regulations. The Petitioner argues that substantial compliance could be when one or two items are missing from a particular category. However, excluding eligible voters’ home telephone numbers was an abject and complete failure which omitted an entire category on the voters’ list. On May 26, the Employer timely filed an answering brief to the Petitioner’s exceptions.

1 All dates occur in 2022 unless indicated otherwise.
2 There were 3 ballots marked as Void.
3 The objections hearing was held on March 31 and April 4.
I have carefully reviewed the Hearing Officer’s rulings made at the hearing and find that they are free from prejudicial error. Accordingly, the Hearing Officer’s rulings are affirmed. In considering the Petitioner’s exceptions, I rely on the Hearing Officer’s factual findings and credibility resolutions, which I adopt as fully supported in the record.

After a review of the record in light of the exceptions and the parties’ briefs, and for the reasons described below, I approve the Petitioner’s request to withdraw Objection 1 and I reverse the Hearing Officer’s recommendation to overrule Objection 2. I find merit to the Petitioner’s exceptions regarding Objection 2, and I sustain that objection. Accordingly, I am directing the election held from February 15 through March 2 be set aside and a rerun election be conducted.

I. RELEVANT LEGAL PRECEDENT

In *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966), the Board established the requirement that the employer must file an election eligibility list which contains the names and home addresses of all eligible voters and that the regional director would make the list available to all parties. This *Excelsior* requirement was approved by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767–68 (1969).

In 2014, the Board stated that the provision of only a physical home address no longer serves the primary purpose of the *Excelsior* list. Citing a need to update the voter list requirements to better recognize how individuals, employees, employers, and institutions now communicate with one another, the Board made several changes to Section 102.62(d) of the Rules and Regulations. The most significant change was the addition of language which requires employers to provide “a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers) of all eligible voters.” The Board made a conscious and calculated decision to include both home and personal cell phone numbers in the voter list “because the use of telephones to convey information orally and via texting is an integral part of the communications evolution that has taken place in our country since *Excelsior* was decided.”

The Board cited numerous reasons for the inclusion of home and cell phone numbers. First, the Board stated that requiring mobile and home phone numbers in addition to email is necessary to reach individuals who rely on phone calls and not emails. Second, the Board argued that those without smart phones would not receive last minute emails responding to campaign issues, and therefore, disclosure of personal phone numbers is a practical necessity if a significant portion of eligible voters is going to have access to late breaking developments. Third, the Board cited comments that many low wage workers may not remain at one address for long or may not even have a fixed home. Thus, the addition of phone numbers is necessary to

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5 *Id.* at 74341.
6 *Id.* at 74338.
7 *Id.* at 74339-74340.
ensure that messages concerning representation are able to reach the lowest paid sectors of our national workforce. Fourth, the Board believed that by requiring additional forms of contact information, there will be an increase in the likelihood that nonemployer petitioners will receive at least one piece of up-to-date contact information, if not more, for eligible voters. Fifth, the Board stated that disclosing home and personal cell phone numbers will allow the nonemployer parties to promptly convey their information concerning question of representation to the eligible voters. This makes it more likely that nonemployer parties can both respond to employee questions prior to the election and share those responses with other employees, thus making it more likely that employees can make an informed choice in the election.

In addition, the Board’s rationale for making the changes to Section 102.62(d) addressed comments made by concerned parties regarding the new requirements. Specifically, the Board clarified:

[T]he amendments merely require an employer to furnish its employees’ “available personal email addresses” (and “available home and personal cellular (“cell”) telephone numbers”). Accordingly, if the employer does not maintain those addresses and numbers, it does not need to ask its employees for them. As discussed below, the Board recognizes that delays in conducting elections would result if employers (or the Board) were required to collect personal information directly from employees after the parties entered into an election agreement or the regional director directed an election. However, the fact that some employers may not maintain records of their employees’ personal email addresses and personal phone numbers does not demonstrate that it is not worthwhile to require those employers who do maintain such information to disclose it in the interests of fair elections and more efficient administrative proceedings. Similarly, the fact that an employer may not possess the personal email addresses and personal phone numbers for each and every one of its employees does not demonstrate that it is not worthwhile to require the employers to disclose those employees’ personal email addresses and personal phone numbers that it does possess.8

Therefore, the Board clearly intended for the employer to include both personal home and cell phone numbers on the voter list, when available. In fact, the Board even considered requiring the employer to provide petitioners with employees’ work phone numbers, work email addresses, and social media accounts, but ultimately decided against it.

Another change the Board made to Section 102.62(d) of the Rules and Regulations in 2014 was related to non-compliance with the voter list requirements. The Board elected to track the language from pre-existing Section 103.20 which covered the consequences for non-compliance with the obligation to post the Notice of Election. Specifically, the new language stated that “the employer’s failure to file or serve the list within the specified time or in the proper format shall be grounds for setting aside the election whenever proper and timely objections are filed.”9 In addition, the new language of Section 102.62(d) clarified that

8 Id. at 74338.
9 Id. at 74357.
employers will be “estopped from objecting to the failure to file or serve the list within the specified time or in the proper format” if the employers are responsible for the failure.10

In *Woodman’s Food Markets, Inc.*, 332 NLRB 503, 504 (2000), the Board stated that “focusing solely on the percentage of omissions relative to the number of employees in the unit fails to adequately effectuate the purposes of the *Excelsior* rule.” Accordingly, the Board identified the following three factors when determining if the employer has substantially complied with the *Excelsior* requirements: (1) the percentage of omissions; (2) whether the number of omissions is determinative (i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election); and (3) the employer’s explanation for the omissions. When discussing the third factor, the Board stated that “omissions may occur, notwithstanding an employer’s reasonable good-faith efforts to comply, due to uncertainties about who is an eligible unit employee or other factors.” However, the Board noted that “if the employer acted in bad faith, that is the end of the inquiry, and the election will be set aside.” *Id.* at 504-505.

The Board applied the *Woodman’s* factors in *Automatic Fire Systems*, 357 NLRB 2340 (2012). In that case, the Board found that the Stipulated Election Agreement unambiguously stated the *Excelsior* list requirements, and that the employer breached a binding agreement by failing to include certain voters. The Board noted the employer’s actions raise a serious question of bad faith, and, at the least, indicate gross negligence. The Board clarified that “[a]lthough bad faith is not a prerequisite to finding that an employer has failed to substantially comply with the *Excelsior* rule, as stated above, it does preclude a finding of substantial compliance.” *Id.* at 2341.

II. THE OBJECTIONS

Objection 1: The Employer sent an email correspondence to employees in which it asked them how they planned to vote in the upcoming election. The conduct of directly inquiring of employees whether they support the union, and recording their responses is objectionable conduct. *Springfield Hosp.*, 281 NLRB 643 (1986), as is polling employees as to how they will vote. *J.C. Penney*, 195 NLRB 921 (1972).

The Petitioner has requested, and I approve, withdrawal of Objection 1. Accordingly, this objection does not need to be addressed in this decision.

Objection 2: The voter list that the Employer served on the parties failed to provide eligible voters’ home telephone numbers as required by 29 CFR 102.62d and by the NLRB Casehandling Manual for R cases:

Absent agreement of the parties to the contrary specified in the election agreement (Secs. 11086.3 and 11094) or extraordinary circumstances specified in the direction of election (Sec. 11273.1), within 2 business days after the approval of an election agreement or issuance of a direction of election, the employer shall provide to the Regional Director and the parties named in the agreement or

10 *Id.* at 74336.
direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (‘‘cell’’) telephone numbers) of all eligible voters.

This is per se grounds for setting aside an election and a regional director has no discretion to excuse such a failure. *URS Federal Services*, 365 NLRB 1 (2016).

On May 9, the Hearing Officer ruled that the Petitioner failed to meet its burden to establish that the Employer’s failure to include available home telephone numbers for its eligible voters constituted objectionable conduct which, warranted the setting aside of the election. The Hearing Officer also stated that the Petitioner has failed to establish that the Employer’s actions referenced in the Petitioner’s objections reasonably tended to interfere with employee free choice. Therefore, the Hearing Officer overruled Petitioner’s Objection 2.

On May 23, the Petitioner filed the following exceptions to the Hearing Officer’s Report related to Objection 2.12

- The Employer did not “substantially comply” with the requirement that it provide eligible voters’ home telephone numbers; there was an abject and complete failure to include this item on the voters’ list.

- The Rules specifically state that available home phone numbers are to be provided in addition to available cell phone numbers. Thus, providing cell phone numbers only is not substantial compliance with providing what is required.

- There was not substantial compliance, as the Employer had phone numbers in its records, including employee records, and did not provide them. Thus, this is not a situation in which the Employer provided 50% or even 10% of what it had. 0% compliance, which is what there was here, is not “substantial” compliance.

- “Substantial compliance” could be when one or two items in a particular category are omitted, not when an entire category is omitted.

- Even if the Board accepts that there was “substantial compliance” under its rules, the parties entered into a stipulated election agreement, which is a written contract. In the contract, the Employer promised to provide both home and cell numbers. Written contracts require full compliance, not substantial compliance. Petitioner would not have entered into this contract if it had been told that the Employer did not have to comply with all of its terms, but instead only had to comply with some of them. This is different from a Rules-only obligation case, where the election is directed as opposed to stipulated. While the Board may determine that it is satisfied with “substantial compliance” for following the Rules, it cannot retroactively modify the terms of a written stipulation, or contract, signed by all parties.

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11 See Hearing Officer’s Report, Page 7.

12 See Petitioner’s Exception to Hearing Officer’s Report and Recommendation on Objections and Brief, Pages 2-3.
For the reasons set forth below, I reverse the Hearing Officer’s ruling and sustain the Petitioner’s Objection 2.

Many of the arguments made by the parties are focused on the first factor identified by the Board when determining if the employer has substantially complied with the *Excelsior* requirements. *Woodman’s Food Markets, Inc.*, 332 NLRB 503, 504 (2000). Conversely, I choose to focus on the third factor related to the employer’s explanation for the omissions. The record shows that the Employer maintained two separate columns for *Mobile Phone* and *Home Phones* for employees in its Workday system.\(^{13}\) Even where the mobile phone number was the same as the home phone number, the Employer has the number entered in both columns. This shows that the Employer did have the information “available” for both home and cellular telephone numbers. According to testimony by the Employer’s Program Manager, Joseph Arabit (Arabit), he did not include a home phone column on the voter list “because the numbers were the same.”\(^{14}\) Arabit also testified that the Employer subsequently learned that five employees had an additional number when reviewing the data.\(^{15}\) The Employer has not provided any legally sufficient justification for its omission of an entire category/column of contact information. Furthermore, the record does not show that the Employer notified the Union prior to the election that the numbers were the same for 87 of the 92 eligible voters.

The Employer contends that it exercised “reasonable diligence” when compiling the voter list and cited numerous cases.\(^{16}\) However, many of the cases cited are distinguishable from the instant case. In *Telonic Instruments*, 173 NLRB 588 (1968), the employer erred and left four employees off the *Excelsior* list out of 111 eligible voters because the personnel files of those employees were not available at the time the list was being compiled. Moreover, “upon discovery of the omissions by its supervisory personnel, the Employer took the first opportunity available to inform the Region and Union that the list was not complete.” *Id* at 589. In *General Time Corp.*, 195 NLRB 343, 345 (1972), the *Excelsior* list contained 44 inaccurate mailing addresses out of 980 eligible voters because the employer did not have up-to-date addresses for those employees even though it obtained the information from its payroll data. In *RHCG Safety Corp.*, 365 NLRB No. 88 (2017), the Board determined that the election should be set aside for three reasons, “each of which constitutes an independent basis for setting aside the election.” *Id.* at 4. In that case, 90 percent of the addresses on the list were inaccurate, the list omitted at least 15 eligible voters, and the employer did not provide phone numbers for any of its employees. The Board specifically stated that it was not persuaded “by the Respondent’s contention that we should refrain from setting aside the election because any shortcomings or inaccuracies in the list were ‘inadvertent’ or ‘unintentional.’” *Id.* at 5.

In both *Telonic Instruments* and *General Time Corp.*, the employer inadvertently omitted the information on the *Excelsior* list. Conversely, in the instant case, the Employer’s omission was not inadvertent or unintentional. The Employer may have believed removing the home phone column was inconsequential or harmless, but the Employer’s omission of the entire

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\(^{13}\) See Petitioner’s Exhibit 14.

\(^{14}\) See Hearing Transcript, Page 16, Lines 15-17.

\(^{15}\) See Hearing Transcript, Page 17, Lines 3-18.

\(^{16}\) See Employer’s Answering Brief, Page 4; and Hearing Transcript, Page 63, Lines 6-7.
column on the voter list was nonetheless intentional. Furthermore, the Board has been clear about what “available” information needs to be produced and nowhere in the Rules and Regulations or case law does the Board grant discretion to an employer to pick and choose which contact information to include on the voter list. Section 102.62(d) and the Stipulated Election Agreement signed by the parties in this matter both unambiguously state that available home and personal telephone numbers are to be included on the voter list. Like the Board in *Automatic Fire Systems*, 357 NLRB 2340, 2341 (2012), I find the Employer’s intentional omission of information on the voter list, at the least, constitutes gross negligence and precludes me from finding that the Employer substantially complied with voter list requirements set forth in Section 102.62(d). In addition, the Board specifically noted in *Woodman’s Food Markets, Inc.*, 332 NLRB 503, 504-505 (2000) that “if the employer acted in bad faith, that is the end of the inquiry, and the election will be set aside.” Even assuming the case law does not properly address the factors in the instant case, the language the Board included in Section 102.62(d) clearly states:

The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

Accordingly, I find no reason to evaluate the other two factors set forth in *Woodman’s* regarding the percentage of omissions or whether the number of omissions is determinative (i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election). *Id.* at 504.

The evidence shows that: (1) the Board was thorough and deliberate when updating Section 102.62(d) in 2014;17 (2) the language of section 102.62(d) and the Stipulated Election Agreement are clear and unambiguous that the employer shall provide the available home and personal cellular telephone numbers of all eligible voters; (3) the Employer maintained separate columns for home and mobile telephone numbers in its Workday system, even where the numbers were the same; (4) the Employer agreed to the Voter List terms and entered into a contract when it signed the Stipulated Election Agreement; (5) the Employer consciously and intentionally omitted the home telephone column on the Voter List; (6) on March 17, the Petitioner filed timely objections to election; (7) on May 23, the Petitioner filed timely exceptions to the Hearing Officer’s Report; (8) *Automatic Fire Systems*18 states that a finding of bad-faith precludes a finding of substantial compliance; (9) *Woodman’s Food Markets*19, states that “if the employer acted in bad faith, that is the end of the inquiry, and the election will be set aside;” and (10) Section 102.62(d) states the employer’s failure to service the list in the proper format shall be grounds for setting aside the election when timely objections are filed, and the employer shall be estopped from objecting to the failure to serve the list in the proper format if it is responsible for the failure.

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18 See *Automatic Fire Systems*, 357 NLRB 2340, 2341 (2012).
Under all these circumstances, I sustain Petitioner’s Objection 2.

III. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer’s report and recommendations, and the exceptions and arguments made by the Petitioner, I sustain Objection 2 and I am setting aside the election and ordering a new election.

IT IS HEREBY ORDERED that the mail ballot election conducted between February 15, and March 2 is set aside, and a new election shall be conducted.

IV. DIRECTION OF SECOND ELECTION

The National Labor Relations Board will conduct a second secret ballot election among the employees in the same unit as in the first election. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union, Security, Police and Fire Professionals of America (SPFPA). The date, time and place of the election will be specified in the Notice of Second Election that will issue shortly. That Notice shall also contain the following language:

NOTICE TO ALL VOTERS

The election conducted between February 15, 2022, and March 2, 2022, was set aside because the National Labor Relations Board found that MVM Inc. failed to include available home telephone numbers for all eligible voters in compliance with Section 102.62(d) of the Board’s Rules and Regulations and thus interfered with the employees’ exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Second Election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Eligible to vote in the second election are those employees in the unit who were employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)
employees who are engaged in an economic strike that began more than 12 months before the
date of the first election and who have been permanently replaced.

**Voter List**

The Employer must provide the Regional Director and parties named in the
decision an alphabetized list of the full names, work locations, shifts, job classifications, and
contact information (including home addresses, available personal email addresses, and
available home and personal cell telephone numbers) of all eligible voters, accompanied by
a **certificate of service on all parties**. When feasible, the Employer must electronically file the
list with the regional director and electronically serve the list on the other parties.

To be timely filed and served, the list must be **received** by the regional director and the
parties by **June 27, 2022**. The list must be accompanied by a certificate of service showing
service on all parties. **The Region will no longer serve the voter list.** The Employer’s failure
to file or serve the list within the specified time or in the proper format is grounds for setting
aside the election whenever proper and timely objections are filed. However, the Employer may
not object to the failure to file or serve the list in the specified time or in the proper format if it is
responsible for the failure.

Unless the Employer certifies that it does not possess the capacity to produce the list in
the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a
file that is compatible with Microsoft Word (.doc or docx). The first column of the list must
begin with each employee’s last name and the list must be alphabetized (overall or by
department) by last name. Because the list will be used during the election, the font size of the
list must be the equivalent of Times New Roman 10 or larger. That font does not need to be
used but the font must be that size or larger. A sample, optional form for the list is provided on
the NLRB website at [www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-
effective-april-14-2015](http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-
effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served
electronically on the other parties named in this decision. The list may be electronically filed
with the Region by using the E-filing system on the Agency’s website at [www.nlrb.gov](http://www.nlrb.gov). Once
the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow
the detailed instructions.

No party shall use the voter list for purposes other than the representation proceeding,
Board proceedings arising from it, and related matters.

**Notice Posting**

The Employer must post copies of the Notice of Election in conspicuous places,
including all places where notices to employees in the unit are customarily posted, at least 3 full
working days prior to 12:01 a.m. on the day of the election and must also distribute the Notice of
Election electronically to any employees in the unit with whom it customarily communicates
electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on
July 7, 2022**. The Employer’s failure to timely post or distribute the election notices is grounds
for setting aside the election if proper and timely objections are filed. However, a party is
stopped from objecting to the nonposting or nondistribution of notices if it is responsible for the nonposting or nondistribution.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.69(c)(2) of the Board’s Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision, which may be combined with a request for review of the regional director’s decision to direct an election as provided in Sections 102.67(c) and 102.69(c)(2), if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board’s Rules and may be filed at any time following this decision until 14 days after a final disposition of the proceeding by the regional director. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Phoenix, Arizona this 23rd day of June 2022.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
EXHIBIT 3
In the Matter Of:

MVM, INC.,

Employer,

-and-

INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS OF
AMERICA (SPFPA),

Petioner.

PETITIONER’S EXCEPTION TO HEARING OFFICER’S REPORT AND
RECOMMENDATION ON OBJECTIONS AND BRIEF

Introduction

The Petitioner International Union, Security, Police and Fire Professionals of America (SPFPA) (hereinafter the Union or SPFPA) filed objections to the election held in the instant case on March 17, 2022. Of the approximately 92 eligible voters, 49 voted in the election. There were 3 void ballots and 0 challenged ballots. Of the 49 counted ballots, 15 were cast in favor of the SPFPA, while 34 were cast against it.

The SPFPA filed objections citing conduct by the Employer which was sufficient to affect the outcome of the election. The SPFPA’s Objections were as follows:

- During the critical period, the Employer sent an email to Unit employees polling them about how they planned to vote in the upcoming election; and
The voter list that the Employer served on the parties failed to provide eligible voters’ home telephone numbers as required by 29 CFR 102.62(d).

On March 31, 2022 and April 4, 2022 a hearing was held before Hearing Officer Lisa J. Dunn. On May 9, 2022, the Hearing Officer issued her Report on Objections. The Report on Objections recommended to the Board that the objections be overruled in their entirety and the Board issue a certification of election results. The Hearing Officer recommended that the Objections be dismissed as she concluded that the conduct complained of was not objectionable and the Union failed to meet its burden.

Contrary to the findings of the Hearing Officer, the record validated the SPFPA’s Objection Number 2. The Petitioner SPFPA is appealing only the second objection, which relates to the Employer’s failure to provide eligible voters’ home telephone numbers as required by 29 CFR 102.62(d).

EXCEPTIONS

The International Union, SPFPA files these exceptions to the Hearing Officer’s Report Objections on Objection 2:

- The Employer did not “substantially comply” with the requirement that it provide eligible voters’ home telephone numbers; there was an abject and complete failure to include this item on the voters’ list.

- The Rules specifically state that available home phone numbers are to be provided in addition to available cell phone numbers. Thus, providing cell phone numbers only is not substantial compliance with providing what is required.
There was not substantial compliance, as the Employer had phone numbers in its records, including employee records, and did not provide them. Thus, this is not a situation in which the Employer provided 50% or even 10% of what it had. 0% compliance, which is what there was here, is not “substantial” compliance.

“Substantial compliance” could be when one or two items in a particular category are omitted, not when an entire category is omitted.

Even if the Board accepts that there was “substantial compliance” under its rules, the parties entered into a stipulated election agreement, which is a written contract. In the contract, the Employer promised to provide both home and cell numbers. Written contracts require full compliance, not substantial compliance. Petitioner would not have entered into this contract if it had been told that the Employer did not have to comply with all of its terms, but instead only had to comply with some of them. This is different from a Rules-only obligation case, where the election is directed as opposed to stipulated. While the Board may determine that it is satisfied with “substantial compliance” for following the Rules, it cannot retroactively modify the terms of a written stipulation, or contract, signed by all parties.

The International Union, SPFPA excepts to the Hearing Officer’s recommendations that Objection 2 be overruled. Petitioner withdraws Objection 1.

Statement of Facts

The Employer is a California corporation engaged in the business of providing security services, with its principal office in Ashburn, Virginia, and a place of business in Phoenix,
Arizona (Phoenix facility). The evidence established at the hearing was that unit employees employed at the Phoenix facility transport unaccompanied minors in family units apprehended by United States Customs and Border Patrol officers along the southwest border of the United States to emergency influx sites located in the State of Texas, and the licensed care facilities throughout the United States.

Employees included in the unit are full-time and regular part-time Child and Family Protection Care specialists performing guard duties as defined in Section 9(b)(3) of the Act, employed at the Phoenix facility.

The Petitioner filed the petition on January 13, 2022. The parties agreed to the terms of an election and the Region approved their Stipulated Election Agreement on February 3, 2022. The parties agreed to a mail ballot election. The mail ballot election was conducted between February 15, 2022 and March 2, 2022. The ballot count was held on March 10, 2022.

In the February 3, 2022 Stipulated Election Agreement, the following language was included:

6. **VOTER LIST.** Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters.

(Emphasis added.)

On February 7, 2022, the Employer served the voter list on the parties. It is undisputed that the voter list the Employer served on the parties does not contain eligible voters’ personal home telephone numbers, while it does contain their cellular telephone numbers. Indeed, the Employer’s list did not even contain a column designated for home telephone numbers.
At the hearing, the Employer’s program manager testified that the Employer obtained information for the voter list from its human resources information system, called Workday. Petitioner’s Exhibit 14 and Exhibit A of the Employer’s Joint Motion to Supplement the Record shows the Workday report, containing a column for mobile phone and home phone numbers for each eligible voter.

The record established that the majority of the eligible voters had the same telephone number listed in Workday for their mobile phone and home phone number. However, approximately five of the eligible voters have home phone numbers listed in Workday that are different from their mobile phone numbers. Petitioner’s Exhibit 12 shows that approximately 12 eligible voters have different home telephone numbers than those reflected as their mobile numbers on the voters’ list.

In her Report on Objections, the Hearing Officer held: “…I find that although the Employer omitted approximately five home telephone numbers maintained in its Workday system and maintained records containing approximately 12 additional telephone numbers for its approximately 92 Unit employees, I find that the Employer substantially complied with the Board’s ‘available home and personal cellular telephone numbers’ requirement set forth at Rules secs. 102.62(d) and 102.67(l).”

**Argument:**

Sections 102.62(d) and 102.67(l) of the Board’s Rules and Regulations provide that within 2 days after approval of an election agreement, the employer shall “provide to the regional director and the parties…a list of the full names, work locations, shifts, job classifications, and contact information…of all eligible voters.” The contact information to be provided by the
employer includes home addresses, available personal email addresses, and available home and personal cellular “cell” telephone numbers of all eligible voters. 29 CFR 102.62(d) and 102.67(l) (emphasis added).

The hearing officer cited case law in which the Board has excused inaccuracies or omissions from the voter list where there is “substantial compliance” with the Board Rules. However, none of the cases cited involve a situation where an employer omitted an entire category from the voter list. For example, in Telonic Instruments, 173 NLRB 588, 589 (1969), the election would have been set aside where omissions from the list were limited to about four out of 111 voters.

Here, by contrast, there were omissions from the list for all 94 employees in the bargaining unit. This was not a situation in which there was 50% or even 10% compliance; there was 0% compliance with the requirement that the Employer provide home telephone numbers.

To excuse the requirement that the Employer provide home telephone numbers, the Board would need to conclude that the language requiring an Employer to provide this information is meaningless. The United States Supreme Court has held: “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant…” Hibbs v. Winn, 542 US 88, 101 (2004). Interpreting the Board Rules to conclude that the Employer is not required to provide home telephone numbers at all would render this requirement “inoperative, superfluous, void and insignificant.”

There is another important principle at work here. This was not a directed election; it was a stipulated election, in which the Employer signed a Stipulated Election Agreement wherein it promised to provide home telephone numbers. Thus, the Employer should be held to a higher standard in this case because it entered into a contract, and then simply decided to ignore one of
its terms. Similar to the principle of statutory interpretation articulated in *Hibbs, supra*, there is a principle of contract interpretation which holds that an interpretation of contract language will be rejected if it leaves portions of the contract language useless, inexplicable, inoperative, meaningless, or superfluous. *Ball State Univ. v. United States*, 488 F.2d 1014 (Ct. Cl. 1973).

The hearing officer erred when it concluded that the Employer “substantially complied” with its obligation to provide home phone numbers consistent with its obligations under the Rules and under the terms of the Stipulated Election Agreement. Accordingly, Petitioner SPFPA respectfully requests that Objection 2 be granted and a new election be held.

**CONCLUSION**

Petitioner SPFPA respectfully requests the Board to grant the Objection to the Election Number 2 as described above and direct that a new election be held without delay.

Respectfully submitted,

Gregory, Moore, Brooks & Clark, P.C.

/s/ Rachel N. Helton
Rachel N. Helton
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Date: May 23, 2022
[REDACTED]
NAME: [REDACTED]

Daytime Phone: [REDACTED]

DATE: [REDACTED]

Evening Phone: [REDACTED]

Date of Birth: [REDACTED]
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CELAYA, Lisa
255 N Florence St
Florence, AZ 85132
Phone: (480) 652-7018
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Delpar, Gua
DELPARDO SALAIS, Guadalupe
1915 S 39th St
Mesa, AZ 85206
Phone: (480) 326-3859
Hernan, Ste

HERNANDEZ, Stephany

2934 W Cactus Rd
Phoenix, AZ 85029

Phone: (602) 908-9432
Daytime Phone: 602-425-1192

[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Daytime Phone: (823) 237-2080 Evening Phone: (623) 237-2080
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[REDACTED] Cristian A. Marmolejo [REDACTED]

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pre-employment, I also authorize release of the results of these tests to my employer or prospective employer and/or their authorized medical care providers.

Signed: [REDACTED]  Hannah F. Sanchez [REDACTED]

Daytime Phone: (602) 620-1839  Evening Phone: (602) 620-6309  Date of Birth [REDACTED]
Patient: Segura, Liliana
Phone: 602-875-5423
Cell Phone: [REDACTED]
Email: [REDACTED]
Address: 18250 N Cave Creek
Phoenix AZ 85032
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Home Address: 16112 W LATHAM ST GOODYEAR, AZ 85338-2744
Home Phone: (480) 815-2159
Email Address:
| First Name: | Gustavo |
| Home Phone: | (602) 516-9434 |
| Home Address: | 3719 W Vernon Ave |
| City: | Phoenix |
| State: | AZ |
| Zip Code: | 85009 |

Last Name: Vazquez Ramos
EXHIBIT 5
MVM, INC.,

Respondent,

and

INTERNATIONAL UNION,
SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA
(SPFPA),

Union.

JOINT MOTION TO SUPPLEMENT THE RECORD

MVM, Inc. (“MVM”) and the International Union, Security, Police and Fire Professionals of America (“Union”) have conferred and hereby submit this Joint Motion to Supplement the Record. During the April 4, 2022 objections hearing, the Union stated that a chart that MVM produced to the Union in response to the Union's Subpoena, containing home and mobile phone numbers for eligible voters, was missing one eligible voter. MVM and the Union now move to supplement the record to include an updated chart of employee home and mobile phone numbers for eligible voters that contains information for former MVM employee Stephany Hernandez, attached hereto as Exhibit A.
Dated: April 11, 2022

Respectfully submitted,

/s/ Jason M. Branciforte
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Emily J. Carapella
Littler Mendelson, P.C.
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Washington, DC 20006
Telephone: 202.842.3400
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MVM, Inc.

/s/ Scott Brooks
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Attorney for International Union, Security, Police and Fire Professionals of America
AFFIDAVIT OF SERVICE

I hereby declare and certify under penalty of perjury that I caused the foregoing to be e-filed with the National Labor Relations Board and served on the below in the following manner on April 11, 2022:

VIA ELECTRONIC MAIL

Scott Brooks, Esq.
Gregory, Moore, Brooks and Clark
28 W. Adams, Ste. 300
Detroit, MI 48226
scott@unionlaw.net

VIA E-FILE

Cornele Overstreet
Regional Director
2600 North Central Ave., Ste. 1400
Phoenix, AZ 85004-3099

/s/ Emily Carapella
Emily Carapella
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