UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

MVM, INC.,

Employer,

and

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

Petitioner.

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PETITIONER SPFPA’S OPPOSITION TO MVM, INC.’S
REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S DECISION
AND DIRECTION OF SECOND ELECTION

Pursuant to Section 102.67(f) of the Rules and Regulations of the National Labor Relations
Board ("NLRB" or "Board"), the International Union, Security, Police and Fire Professionals of
America (SPFPA) (hereinafter "SPFPA" or "the Union") opposes the Request for Review of
Regional Director’s Decision and Direction of Second Election ("DDE") filed by Respondent
MVM, Inc. ("MVM" or "the Employer") on July 6, 2022.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On January 13, 2022, the SPFPA petitioned for recognition at the Employer’s Phoenix,
Arizona worksite. The parties entered into a stipulated election agreement on February 2, 2022. In
the agreement, the Employer agreed to the following:
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.)

This is consistent with the Employer’s obligation under Board Rule 102.62(d), which states:

Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 5 business days after the approval of an election agreement pursuant to paragraph (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the Regional Director and the parties named in the agreement or 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.

(Emphasis added.)

Notwithstanding its commitments under both the Stipulated Election Agreement and Board Rule 102.62(d), the Employer submitted a voter list to the SPFPA in which it completely omitted the column for eligible voters’ home telephone numbers, although it had collected this information and, as noted in the Employer’s Request for Review of Regional Director’s Decision and Direction of Second Election, some voters had different home and cellular telephone numbers.

MVM’s Program Manager, Joseph Arabit, testified at the objections hearing that MVM “did not include a home phone column on the voter list ‘because the numbers were the same.’” DDE, p. 6. Arabit testified that the Employer subsequently learned that five employees had an additional home telephone number when reviewing the data. The Regional Director wrote: “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.” DDE, p. 6

Between February 15, 2022 and March 2, 2022, a mail ballot election was conducted at the Employer’s Phoenix, Arizona worksite. The ballot count took place on March 10, 2022. The SPFPA lost the election, with 34 employees voting against Union representation and 15 voting in favor of it.

The Union filed timely Objections to the Election on March 17, 2022, in which it objected to the Employer’s failure to include home telephone numbers on the voter list. The Hearing Officer recommended that the RD overrule the objection as to the voter list, finding that the Employer had “substantially complied” with its obligations pursuant to Rule 102.62(d). The SPFPA filed Exceptions to the Hearing Officer’s Report and Recommendation.

The RD sustained the Union’s objection, writing:

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 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.”

1 It also filed another objection, in which it asserted that the Employer improperly polled employees as to how they planned to vote in the election. It did not appeal the Hearing Officer’s recommendation that that objection be overruled. Accordingly, that objection was not before either the Regional Director or the Board at this stage of the proceedings.
The Employer has filed a Request for Review of the Regional Director’s Decision and Direction of Second Election, as well as a Motion for Stay of Election and Expedited Consideration. The SPFPA opposes both.

II. **APPLICABLE GROUNDS FOR REVIEW**

Board regulations provide for review of a Regional Director’s DDE under very rare circumstances. Section 102.67(d) of the Board Rules states:

*Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of:
   
   i. The absence of; or
   
   ii. A departure from, officially reported Board precedent.

2. That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

3. That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

4. That there are compelling reasons for reconsideration of an important Board rule or policy.

None of these grounds are present in the instant case.

III. **APPLICABLE LEGAL STANDARDS**

Section 102.62(d) of the Board rules states:

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 under the provisions of Section 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.

(Emphasis added.)

In *Woodman’s Food Markets*, 332 NLRB 503, 504 (2000), the Board identified three factors when considering whether the Employer properly complied with its obligations under Rule 102.62(d): 1) the percentage of omissions; 2) whether the number of omissions is determinative; and 3) the employer’s explanations for the omissions. The Board has further held 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.

In *Automatic Fire Systems*, 357 NLRB 2340 (2012), the Board applied the *Woodman’s* factors and found that the Stipulated Election Agreement unambiguously stated the *Excelsior* list requirements, and the employer breached a binding agreement by failing to include certain voters. The Board held that the employer’s actions possibly indicated bad faith, or at least gross negligence. The Board held 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.

IV. ARGUMENT

A. MVM did not “substantially comply” with voter list requirements.

The Employer has argued, without citing supporting case law, that it “substantially complied with voter list requirements”, because 87 of the 92 voters had the same home and mobile phone numbers. However, it has offered no case law in support of the proposition that the omission of an entire category from the voter list constitutes “substantial compliance”. The language of Rule 102.62(d) does not allow the Employer to pick and choose which requirements it will comply with. It does not allow the Employer to omit an entire category of its choice. It is
not in any way discretionary. The Employer provided 0% of the available home telephone numbers in its possession; that is 0% compliance with the requirement that it provide home telephone numbers. Accordingly, there was no “substantial compliance”.

B. **The RD properly held that MVM’s actions cannot constitute substantial compliance.**

The Employer has cited case law that it argues supports its assertion that it “substantially complied” with its obligations under the Board rule. It has not addressed the argument that, because it entered into a Stipulated Election Agreement, it should be held to an even higher standard, because it signed a binding contract in which it promised to provide available home telephone numbers.

Setting aside the argument that the Stipulated Election Agreement further undermines its arguments that it “substantially complied” with the voter list requirements, the cases that the Employer has cited are distinguishable from the instant situation. The RD summarized as follows:

The Employer contends that it exercised “reasonable diligence” when compiling the voter list and cited numerous cases. 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 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.

DDE, p. 6.

Therein lies the distinction between the cases that the Employer cites and the instant situation: here, there is no assertion that the Employer’s omission of an entire category was inadvertent or unintentional.

Moreover, the Employer’s reliance on the three factors in Woodman’s Food Markets, Inc., 332 NLRB 503 (2000) are misplaced. In that case, the names of 12 voters were omitted from the voter list because of either “errors within the payroll department” or “the Employer’s admittedly incorrect interpretation of the payroll eligibility requirement.” In other words, the Employer provided an explanation for the omissions that suggested a good-faith mistake.

Here, by contrast, the Regional Director was not satisfied that the Employer’s omission of the entire category was a good-faith mistake. The Employer simply decided that it was unnecessary to provide home telephone numbers. The RD held: “I find the Employer’s intentional omission of information on the voter list, at 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).” (DDE, p. 7) The RD moreover suggested that the Employer’s omission may constitute conduct that goes beyond “gross negligence” and instead represents “bad faith”.

While the Woodman’s decision does refer to three factors for analyzing whether an Employer substantially complied with the Excelsior requirements, it does not suggest that all three factors are to be given equal weight. Indeed, the RD in this case focused on the third
factor—the employer’s explanation for the omissions—because under *Woodman’s*, “if the employer acted in bad faith, that is the end of the inquiry”. (DDE, p. 7)

The Employer failed to explain how the omission of an entire category of required information—information that it had in its possession was something other than either gross negligence or bad faith. Accordingly, the RD correctly determined that the Employer’s actions did not constitute “substantial compliance” with the *Excelsior* requirements.

**C. The RD did not hold that Section 102.62(d) automatically voids election results when the employer makes a mistake with its voter list.**

In its Request for Review, the Employer asserted: “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.” The RD made no such contention. To be clear, the RD did cite Section 102.62(d), which is clear and unambiguous on its face, and which clearly and unambiguously required the Employer to provide the Union with voters’ home telephone numbers (as did the Stipulated Election Agreement).

However, the RD addressed the Employer’s arguments concerning “substantial compliance” through his lengthy analysis of both *Woodman’s* and a variety of other cases concerning whether the Employer had substantially complied with the Section 102.62(d)’s requirements. He rejected the Employer’s arguments, both because he found that the case law was distinguishable from the instant case, and because MVM either engaged in gross negligence or bad faith when it simply decided that it did not need to comply with the requirement that it provide the home telephone numbers of all voters, even though it had this information.
RELIEF REQUESTED

The SPFPA respectfully requests that the Board decline to review the Regional Director’s Decision and Direction of Election.

Respectfully submitted,

GREGORY, MOORE, BROOKS & CLARK, P.C.

/s/ Rachel N. Helton
By: Rachel N. Helton
28 W. Adams Ave., Ste. 300
Detroit, MI 48226
(313) 964-5600
rachel@unionlaw.net

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CERTIFICATE OF SERVICE

The undersigned certifies that she electronically served a copy of these objections on July 7, 2022 upon the following:

Jason Branciforte
Attorney for the Employer
JBranciforte@littler.com

/s/ Rachel N. Helton

Rachel N. Helton
Attorney for the SPFPA