

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**ORANGE COUNTY CHAPTER, NYSARC, INC.
Employer**

and

Case No. 2-RC-23222

**SEIU LOCAL 200, UNITED
Petitioner**

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Petitioner

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O'Brien, Esq.*, Counsel for the
Employer

Robert Guerra, Esq., Counsel for the
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DECISION ON OBJECTIONS

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York on April 2, 2008. The petition in this case was filed on October 5, 2007 and pursuant to an approved Stipulated Election Agreement dated October 25, 2007 a secret ballot election was held on November 15, 2007 in a unit including all full-time and regular part-time non-professional employees employed by the Employer at all of its facilities in Orange County New York.¹ The election was held at four separate polling areas; these being at 28 Ingrassia Road, Middletown, New York, 28 Bull Road, Campbell Hall, New York, 379 Mount Hope Road, Middletown, New York and 1145 Little Britain Road, New Windsor, New York. The polls were scheduled to open at each of these locations from 6:00 a.m. to 10:00 a.m. and from 1:30 p.m. to 5:30 p.m.

The tally of ballots stated that of approximately 498 eligible voters, there were 2 void ballots, 158 votes cast for the Union, 203 votes against union representation and 15 challenged ballots. The challenged ballots were not sufficient in number to affect the results of the election and therefore a majority of the valid votes counted plus challenged ballots were cast against the Union.

On November 21, 2007, the Petitioner filed objections to the election and on February 20, 2008, the Regional Director of Region 2, concluding that Objections 1, 4 and 7 raise substantial issues, issued this present Notice of Hearing. Nevertheless, by the opening of the

¹ Subsequent to the approval of the Stipulated Election Agreement, the parties modified the unit description to add to the classifications already excluded, the jobs classifications of Secretary, Bookkeeper Cash Receipts, Bookkeeper AP and Bookkeeper AR.

hearing, the Petitioner had withdrawn all objections except for Objection No. 1. This alleged, in substance, that on the day of the election, Board agents failed to open two of the polls at the scheduled time and that at one location, the Board agent left the polling area on several occasions during the morning session to make phone calls. It is alleged that these actions thereby possibly disenfranchised individuals who attempted to vote.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

Subsequent to the execution of the Stipulated Election Agreement, the Employer, on November 1, 2007, submitted a list of the names and addresses of those employees whom it believed were eligible to vote under the eligibility definitions of the Agreement. (The Excelsior List). This was then transmitted to the Union.²

Before the date of the election, the Employer and the Union made efforts to narrow their differences regarding eligibility. For one thing, they agreed to modify the Stipulated Election Agreement to exclude certain positions that are listed in footnote 1 and thereby reduced the number of eligible voters. In addition, the parties agreed to the eligibility of certain individuals and to the ineligibility of certain others.

By November 14, 2007, the parties had agreed to remove 33 people from the original Excelsior list and to add seven others to the list. In accordance with this agreement, the number on the Employer's revised list was reduced to approximately 441 eligible voters. However, as the Union maintains that even with the modified list, there were about a dozen other employees who were not on the list but who nevertheless were eligible to vote, the total number of potentially eligible voters ranged from 441 to 453. Therefore, since 378 people voted, (including the 2 void ballots and 15 challenged ballots), the approximate number of eligible employees who did not vote was somewhere between 63 and 75. Depending on how these people might have voted, the outcome could have been reversed and resulted on a vote against union representation.

Sometime during the afternoon of November 14, 2007, a newly revised Excelsior list was transmitted to the Regional Office with the expectation that it would be used at the election as the eligibility list. It seems that not enough copies were made so that one of the Board agents did not have the revised list when he arrived at the assigned election site.

On November 15, 2007, the weather was inclement and the polls were supposed to open before sunrise. (Yes, it was a dark and stormy night). In addition, the evidence shows that during a period between sometime between 5:50 a.m. and about 6:10 a.m., there was a dispute regarding which Excelsior/eligibility list to use. This dispute resulted in a number of phone calls being made between and among union representatives and Board agents. Although it was suggested at one point that a copy of the new list be faxed to the poll that didn't have it, agent Stephen Berger, (in charge of the election), determined that this was not practical and decided to use the original Excelsior list as the eligibility list.

² The parties agreed on which employees should vote at each voting location. However, it also was agreed that if an employee showed up at the wrong poll, he or she would be allowed to vote subject to challenge.

At the Campbell Hall site, the observers and the Board agent arrived at the location before 6:00 a.m. The parties stipulated that the morning polling session at this location opened at 6:10 a.m., plus or minus five minutes. The evidence shows that the reason for the delay was that Union attorney Deidre Fitzpatrick told Board agent Coleen Breslin that one of the other
 5 locations did not have the revised Excelsior list. Between about 5:50 a.m. and 6:10 a.m., a number of phone calls were made to agent Berger over this issue while Breslin was setting up the voting place. According to the credited evidence, when Berger decided to go with the original list, Breslin told everybody other than the observers to leave, but that the opening of the poll was slightly delayed because the Union's agent had to spend a few minutes giving her
 10 observer new instructions about which people to challenge.³ The evidence further shows that at some point between 6:00 a.m. and 6:15 a.m., four persons came to vote. The Employer's observer credibly testified that all four of these individuals voted at some point during the election. There is no evidence that anyone other than these four individuals showed up at this polling place between 6:00 a.m. and 6:15 a.m.

15 Because of the confusion about which list to use, agent Berger was forced to leave the polling place at the George Robinson Center between two and six times after 6:00 a.m. in order to get reception to use his cell phone. On each occasion, he carried the ballot box out with him so that it would not be left unattended. (According to the Union's witness, Berger, on one
 20 occasion did not seal the ballot box when he took it out, but that he did so on the other occasions). The evidence shows that the eligibility list issue was resolved by no later than about 6:10 a.m. There is no evidence that any person showed up to vote and left during Berger's brief absences from the poll. Hypothetically, had some voters showed up when Berger was outside the polling place, the observers were present and could have asked the
 25 voters to wait a few minutes for his return.

At the New Windsor election site, there was testimony by the Union's witness that the Board agent arrived at the location at 6:07 a.m. However, the Employer's witnesses credibly testified that Board agent Wilfredo Perez arrived at 5:50 a.m. In either event, the poll at this site
 30 did not actually open until 6:30 a.m., largely because of a series of phone conversations relating to the eligibility list issue. (He did not have the list that had been revised on November 14). The Employer's observer, Amy O'Connor, testified that there was only one person who arrived to vote during this period of time and that he was asked to wait after which he voted.

35 There were no reported problems at the fourth location and the poll there seems to have opened on time.

The Board has issued a number of decisions relating to the late opening of polls. The most recent is *Ryder Memorial Hospital*, 351 NLRB No. 26 (2007), where the Board held that
 40 where the number of voters potentially affected by the late opening of polls is insufficient to affect the outcome of the election, an objection based on that fact will be overruled. The Board adopted the hearing officer's report in which he stated *inter alia*;

45 The proper standard for determining whether delays caused by Board Agent conduct in the opening of polls warrant setting aside an election is whether the number of employees possibly disenfranchised is sufficient to affect the election outcome, not whether those voters, or any voters at all, were actually disenfranchised. *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996); *Pea Ridge Iron*

50 ³ Because the revised eligibility list contained fewer employees than the original one, the observer had to be told which people on the original list should be challenged.

Ore Company, 335 NLRB 161 (2001). The Board has made it clear that this objective standard not only safeguards the choice of the majority of employees voting in the election, but also is necessary to protect the integrity of the election process itself. *Midwest Canvas Corp.*, 326 NLRB 58, 59 (1998).

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Consequently, the Petitioner received 35 more votes than the 30 potentially disenfranchised voters. Accordingly, as the number of potentially disenfranchised voters is insufficient to affect the outcome of the election in Units C or E, I recommend that Objections 1 and 5 be overruled. *Wolverine Dispatch, Inc., supra*; *Pea Ridge Iron Ore Company supra*.

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For better or worse, this case presents the unlikely hypothetical situation where the number of people who did not vote could have theoretically affected the outcome of the election. The reason why this is so extraordinarily unlikely is that all or a significant proportion of the 63 to 75 non-voters, would have had to have shown up, *without being seen*, at the New Windsor, Campbell Hall or George Robinson Center polling sites between 6:00 and 6:30 in the morning. On the other hand, the credible evidence is that at most, five people showed up to vote during this period of time and that all of them voted.

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The fact is that the Board agents and the parties' observers arrived before the scheduled opening times for the polls. The main reason that the polls in New Windsor and Campbell Hall did not open promptly at 6:00 a.m. was because there was a problem regarding which eligibility list to use; this being the result of the "last minute" revision of the list by the parties. This in no way is meant to imply that either the Union or the Employer were at fault. On the contrary, they should be complimented for their efforts to reduce the number of eligibility issues and any concomitant challenges. This also is not meant to imply that the Regional Office was at fault. It is clear that given the circumstances and the late filing of a revised eligibility list, the people involved in handling this election did their best. This election required four different board agents to go to four separate polling places and run a relatively large election. That sufficient copies of a revised eligibility list, submitted on the afternoon before the election, were not made and given to all of the Board agents is almost predictable. (A social science analog to the law of entropy).

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In any event, it is my conclusion that the late opening of the polling places at New Windsor and Campbell Hall were caused by the confusion involving which eligibility list should be used and not because the Board agents arrived too late to open the polls on time. I further conclude that this was also the cause of the two to six times that agent Berger left the polling area at the George Robinson Center to make or receive phone calls between 6:00 a.m. and 6:31 a.m. On each of those occasions, Berger took the ballot box with him and returned on each occasion within a few minutes. Cf. *Sawyer Lumber Co.*, 326 NLRB 1331 (1998).

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The evidence shows that only five individuals showed up to vote at these locations during the period from 6:00 a.m. to 6:30 p.m. and that all of them voted. No one testified that any of the 63 to 75 non-voters showed up to vote during this limited period of time. And it is obvious to me that given the number of party agents and observers who were either inside the polling places or outside the buildings, that their failure to notice these non-voters demonstrates that they did not, in fact, show up.

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Because I conclude that the late opening of the polls in this particular case, could not have affected the outcome of the election, I shall recommend that the Union's Objections be overruled and the Board issue a Certification of Results.

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ORDER

The representation case should be remanded to the Regional Director of Region 2 for the purpose of issuing the appropriate Certification.⁴

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Dated, Washington, D.C. April 22, 2008

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Raymond P. Green
Administrative Law Judge

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⁴ Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington D.C. within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by May 6, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

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