UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

Swedish Medical Center

Employer

and Case 19-RC-15245

SEIU Healthcare District 1199NW

Petitioner

SUPPLEMENTAL DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

A Decision and Direction of Election ("Decision") issued on October 30, 2009[1], directing a self-determination election among certain of the Employer's employees. At the time of the Decision, the Petitioner represented a bargaining unit of the Employer's technical employees ("Existing Technical Unit") consisting of:

> All full-time and regular part-time technical employees of Swedish Medical Center at the Employer's facilities in Burien, Edmonds, Renton, and Seattle, Washington in the following job classifications: Cardiovascular Technologist, CPAP Therapist, CT Technologist, Diagnostic Sonographer I, Diagnostic Sonographer II, Dialysis Tech, Diet Tech, Echosonographer, Echosonographer II, EEG Tech, EEG Tech Trainee, Interventional Radiation Technologist, Licensed Practical Nurse, Licensed Practical Nurse HCAP, Mammography Technologist, Mobile Mammogram Technologist CH, MRI Technologist, Neurophysiology Tech I, Neurophysiology Tech II, Nuclear Medicine Technologist, Occupational Therapy Asst Certified, Orthopedic Technologist, Perioperative Support Tech I, Perioperative Support Tech II, PET CT Technologist, Pharmacy Asst, Pharmacy Tech, Pharmacy Tech Sys Coordinator, Physical Therapy Assistant, Pulmonary Function Tech, Radiation Technologist Registered I, Radiation Technologist II, Respiratory Care Practitioner, Respiratory Care Practitioner Neo TRSPT, Respiratory Care Practitioner Coordinator, Respiratory Care Practitioner Coordinator Neo TRSPT, Sleep Tech II, Sleep Tech Non Registered, Sleep Tech Registered, Sleep Tech Trainee, Surgical Facilitator, X-Ray Tech; excluding all other employees, guards and supervisors as defined in the Act.

[1] The dates herein refer to 2009 unless otherwise noted.

The election was directed to determine if the following group of employees ("Dosimetrists and Radiation Therapists Voting Group") wished to be represented by Petitioner as part of the Existing Technical Unit:

> All full-time and regular part-time dosimetrists and radiation therapists employed by Swedish Medical Center at the Employer's facilities in Burien, Edmonds, Renton, and Seattle, Washington who were employed during the last payroll period ending immediately prior to the issuance of the Decision and Direction of Election by the Regional Director (October 30, 2009); excluding all other employees, guards and supervisors as defined in the Act.

On November 13, the Employer timely filed a Request for Review with the National Labor Relations Board ("Board") arguing essentially that the Decision directing the self-determination election was inappropriate as both the Dosimetrists and the Radiation Therapists are professional employees and, thus, could not be included in the Existing Technical Unit.[2]

The Region conducted a secret ballot election on November 24, among the Dosimetrists and Radiation Therapists Voting Group and impounded the ballots. On December 15, the Board issued an Order denying the Employer's Request for Review. As a result, the Region opened and counted the ballots on December 18. At the conclusion of the count, the Board Agent prepared a Tally of Ballots and served the parties with a copy. The Tally listed the following results:

Approximate number of eligible voters	47
Void ballots	0
Votes cast for Petitioner	37
Votes cast against participating labor organization	2
Valid votes counted	39
Challenged ballots	1
Valid votes counted plus challenged ballots	40

The challenged ballot was not sufficient in number to affect the election results.

[2] As the Employer is an acute care hospital, the Board's health care unit rules apply. Accordingly, if the employees in question were professional employees, a *Sonotone* election could not be conducted as such process would create a non-conforming unit under the Board's rules and regulations.

On December 28, the Employer filed two timely Objections to the election and to conduct affecting the election results. Copies of Employer's Objections were served upon the Petitioner. The Objections are attached and incorporated as part of this Report. By letters dated December 29, the Acting Regional Director requested the Employer provide evidence, including a summary of anticipated testimony, in support of its Objections, and that the Petitioner provide a position statement regarding the Objections. On January 4, 2010, the Employer and Petitioner submitted their respective responses to the letter.

Pursuant to the Decision referred to herein and pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional office conducted an investigation of the Objections. As set forth below, I find that the Objections do not warrant setting aside the election.

Objection No. 1

Employer's Objection No. 1 alleges that the Board did not issue "a final and binding" Order with respect to the Employer's Request for Review because the current two-member Board does not have the statutory authority to issue such an order. Consequently, the Employer contends that my reliance on the Order to count the ballots was in error. I find such argument to be without merit.

As the Board stated in its Order, effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, the current Board consisting of Chairman Liebman and Member Schaumber constitutes a proper quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local Union No. 523 v. NLRB*, --- F.3d ----, 2009 WL 4912300 (10th Cir. December 22, 2009); *Narricot Industries, L.P. v. NLRB*, ___F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*,

568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___S.Ct.___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). Accordingly, my reliance on the Board's Order in conducting the ballot count was appropriate and I, therefore, overrule Employer's Objection No. 1.

Objection No. 2

In its second Objection, the Employer argues that because the Board Agents failed to segregate the ballots of the Dosimetrists and Radiation Therapists, the Employer is being denied its right to effectively challenge the ballots and seek review of my determination that the employees in these classifications are technical employees and thus eligible to vote in this election. Further, the Employer argues that the co-mingling of the ballots "constituted an implicit communication that the Board had only the option of granting or denying the Request for Review as a whole, and that the facts and legal issues unique to each separate classification in the Request were without merit."

Section 102.67 of the Board's Rules and Regulations and Sections 11302.1(a), 11338.3, and 11338.8 of the Representation Case Handling Manual provide that when a request for review is pending, the contested ballots should be segregated in an appropriate manner which preserves all contested issues for Board determination. In this instance, the Board agents impounded all the ballots but did not segregate those of the Dosimetrists from those of the Radiation Therapists.

Concededly, the better practice would have been to have segregated the ballots by classification. However, not every deviation from best practices warrants setting aside an election. *Polymer, Inc.*, 174 NLRB 282 (1969). As instructed by the Board in *Polymer*, "[t]hese desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must

decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." *Id.* Here, there is no reasonable doubt as to the fairness or validity of the election as whatever error occurred is harmless since the Board concluded that all members of the Dosimetrists and Radiation Therapists Voting Group were eligible to vote. In analogous circumstances, the Board has found no harm given a failure to segregate. See *National Silver Co.*, 71 NLRB 594, 599-600 (1946) (failure to segregate strikers ballots resulted in "no practical harm").

Moreover, the Employer cites no case law, and I have similarly found none, which stands for the proposition that any deviation from the best practices set forth in the Board's rules or guidelines, no matter how inconsequential, mandates setting aside an election. Indeed, in this case, the issue is moot as the Board agreed that all members of the Voting Group were eligible to vote. Thus, under the well settled principles of the cases described above, the failure to segregate under the instant circumstances provides no basis for overturning the election.

Further, the failure to segregate does not, as the Employer asserts, in and of itself deny or preclude the Employer's right to challenge the ballots and seek review of my determination finding the disputed classifications are technical employees. This follows as any effects of the non-segregation were effectively nullified when the impounded ballots were opened and counted on December 18. In such regard, once the Employer's Request for Review was denied, all the ballots, even had they been previously segregated, would have been combined, opened, and co-mingled into a single group before counting per standard Board procedure. Thereafter, a single, combined tally would have issued, regardless of any previous ballot segregation, with no designation on the tally as to which counted ballots had been cast by which classification. Thus, at the time of the count, any putative effects on the Employer's cited rights which arguably flowed from the Region's failure to previously segregate the disputed ballots were at that point extinguished.

Finally, with respect to the Employer's argument that the co-mingling of the ballots "constituted an implicit communication that the Board had only the option of granting or denying the Request for Review as a whole, and that the facts and legal issues unique to each separate classification in the Request were without merit," I note that the Employer failed to indicate whether this "implicit communication" was directed to the parties or to the employees in the Voting Group. If directed to the parties, any "implicit communication" would be of no consequence as the concern of any objection must be whether employees had the opportunity to vote in a free and untrammeled manner. Assuming *arguendo,* however, that the Employer contends that the "implicit communication" was directed to employees, it failed to provide any evidence to support an inference that the voters had any knowledge of election procedures following a Request for Review. Nor is there any reasonable basis on which to assume the voters would have had any particular expectation that NLRB election procedures in these circumstances might include segregation of the votes by classification. Thus, any assertion that the co-mingling had any impact on the outcome of the election is purely speculative and without merit. Accordingly, I overrule Objection No. 2.

SUMMARY OF CONCLUSION

Based on the above analysis, I find that Employer's Objections 1 and 2 are without merit, and are overruled. Accordingly, I hereby issue the following:[3]

[3] Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. The request for review must be received by the Board in Washington, D.C. by January 22, 2010. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.
The request may be filed through E-Gov on the Board's web site, www.nlrb.gov, but may not be filed by facsimile. To file a request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations among the following employees of the Employer:

> All full-time and regular part-time dosimetrists and radiation therapists employed by Swedish Medical Center at the Employer's facilities in Burien, Edmonds, Renton, and Seattle, Washington who were employed during the last payroll period ending immediately prior to the issuance of the Decision and Direction of Election by the Regional Director (October 30, 2009); excluding all other employees, guards and supervisors as defined in the Act.
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> The Tally of Ballots shows that the Petitioner has been selected by these employees to represent them.
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> As authorized by the National Labor Relations Board, it is hereby certified that
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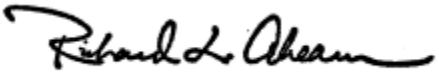
> SEIU Healthcare District 1199NW

may bargain for the above employees as part of the group of employees that it currently represents.

DATED at Seattle, Washington on the 3rd day of February, 2010.



Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

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that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.