

**DANBURY HOSPITAL OF THE WESTERN
CONNECTICUT HEALTH NETWORK**

Employer

and

AFT CONNECTICUT

Petitioner

Case 01-RC-153086

DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to the provisions of a Stipulated Election Agreement, an election was conducted on June 19, 2015 among a unit of non-professional employees of the Employer. The tally of ballots shows that of the 866 eligible voters, 346 cast votes for the Petitioner, 390 cast votes against the Petitioner, and there were three challenged ballots, which were not determinative.

The Petitioner subsequently filed four objections to conduct affecting the results of the election. Following a hearing on the objections, the Hearing Officer issued a report recommending that Objection 1 be sustained, that Objection 2 be sustained in part and overruled in part, that Objection 3 be overruled in its entirety, and that a second election be directed.¹ The Employer filed exceptions to the Hearing Officer's findings and recommendations with respect to Objections 1 and 2.²

I have carefully reviewed the Hearing Officer's rulings made at the hearing and find that they are free from prejudicial error.³ Accordingly, the rulings are affirmed. In considering the Employer's exceptions and supporting brief, I affirm the Hearing Officer's findings of fact and recommendations for the reasons discussed below.

¹ Objection 4, alleging that the Employer held an election eve speech, was withdrawn at the hearing.

² No exceptions were filed regarding the Hearing Officer's decision to overrule Objection 2 in part, or Objection 3, which alleged that the Employer solicited grievances and promised remedies if employees rejected the Union. In the absence of any exceptions to those Objections, the Hearing Officer's findings and conclusions are hereby affirmed.

³ The Employer excepts to some of the Hearing Officer's credibility findings, particularly regarding Director of Labor Relations Ken Sommerer and Director of Nursing Operations Maureen Burnett. The Board's established policy is not to overrule a Hearing Officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces that they are incorrect. *Laguna College of Art and Design*, 362 NLRB No. 112 (June 15, 2015), citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the Hearing Officer's credibility resolutions.

OBJECTION 1

In its first Objection, sustained by the Hearing Officer, the Petitioner asserts that the Employer failed to provide a complete voter list that included available personal cell phone numbers and personal e-mail addresses as required by the recently implemented Final Rule.

It is undisputed that the Employer provided a complete list of voter names and addresses culled from “Lawson”, its Human Resources database. Nor is it disputed that the Employer provided a phone number for about 94% of the listed voters, and that it provided all personal e-mail addresses from the Lawson database. The issue before the Hearing Officer, and under review here, is whether the Employer’s provision of the information contained solely in its Human Resources database met its obligation under the Final Rule to provide all “available” personal e-mail addresses and personal cell phone numbers of eligible voters. The Hearing Officer concluded that the voter list did not substantially comply with the Board’s requirement that the Employer exercise reasonable diligence in compiling voter contact information, because it failed to search its other available data sources.

For the reasons set forth in the Hearing Officer’s report, as well as those discussed below, I agree with the recommendation to sustain this Objection.

The Employer asserts that, because it “provided a telephone number for nearly every eligible voter,” and because some of those numbers were actually cell phone numbers, it was in substantial compliance with the rationale of *Excelsior* and the Board’s Final Rule. The Employer further asserts that the record is devoid of any evidence that it possessed a significant number of additional cell phone numbers or e-mail addresses that were not provided to the Union. In my view, the Employer’s argument misses the point.

Under the Final Rule, the Employer was required to provide all “available” personal e-mail addresses and cell phone numbers. The Rule requires the exercise of reasonable diligence, a standard the Employer failed to meet by limiting its data search to only the information contained in Lawson, despite the fact that it utilizes other databases, as well as other non-electronic means, to regularly compile and store employee contact information. For example, as the Hearing Officer found, the Employer’s Nursing Department Staffing Office uses a second database, known as ANSOS, to store contact information for employees working on nursing units.⁴ Yet the Employer made no effort to obtain cell phone numbers or e-mail addresses from ANSOS. Similarly, the Emergency Department uses a database known as Mutare to store employee information in order to send out messages to multiple employees at once when extra

⁴ As the Employer correctly points out in its exceptions, the Hearing Officer’s report sometimes erroneously referred to the Staffing Office as the “Staffing Department.”

shifts are available, but the Employer did not search Mutare for voter contact information.⁵ The Hearing Officer also correctly found that at least one hospital unit maintains an employee phone list, entitled “11 East Staff Phone Numbers”, that is readily available to managers. Once again, the record reflects that the Employer made no effort to obtain the cell phone numbers or e-mail addresses maintained on 11 East, or any other unit of the hospital. Evidence was also introduced showing that employee e-mail addresses are maintained in the Emergency Department – yet the Employer made no effort to compile them or include them on the voter list.⁶ Finally, the Employer uses an Applicant Tracking System (ATS) to process and track candidates for open positions, but once again the Employer failed to search ATS in compiling the voter list. Although the Employer claims that it would be unduly burdensome to sort through the 36,000 contacts contained in ATS in order to locate personal e-mail addresses for the relatively small number of eligible voters included in that number, it is undisputed that ATS differentiates between internal and external candidates, a feature that would likely dramatically reduce the number of employees whose records would need to be searched.

In its exceptions, the Employer points to what is *not* in the record, arguing that there is little evidence regarding the amount and type of contact information that was not on the voter list. This argument is disingenuous, as the Employer itself holds the only key to the information contained in its records and databases. It is impossible to know exactly how many available e-mail addresses and cell phone numbers were omitted from the voter list precisely because the Employer did not satisfy its obligation under the Rule to conduct a reasonably diligent search. No union can possibly produce evidence of exactly what information was available to the Employer but missing from the voter list. What the Rule requires is an Employer’s good faith effort to search its files and databases for the newly required contact information. Clearly, by any standard, the Employer did not do so here.⁷

As the Hearing Officer notes, the Rule itself anticipates the situation arising here, and supports the Hearing Officer’s findings and conclusions. In implementing the Final Rule, the Board anticipated that Employers may maintain employee contact information in more than one location. The Rule makes it “presumptively appropriate to produce multiple versions of the list when the data required is kept in separate databases, thereby reducing the amount of time that Employers might need to comply with the voter list requirement.” 79 Fed. Reg. 74354, at fn.

⁵ The Employer argues that the Hearing Officer erred by concluding that other departments may also use Mutare, although the record does not reflect such evidence. Again, the Employer misses the point: whether Mutare is used by one or many departments, and whether it would have yielded 10 or 100 employee cell numbers, is irrelevant because the Employer made no effort to search it. It is the Employer’s effort – or lack thereof – that precludes a finding of substantial compliance, especially as the Final Rule merely requires that an Employer provide what is available.

⁶ The Employer excepts to the Hearing Officer’s “speculation” regarding the number of e-mail addresses it had access to, noting that the record is devoid of evidence indicating that any department, other than Emergency, maintained employee e-mail addresses. The Employer’s argument would carry more weight if it had searched the Emergency Department’s database for e-mail addresses and included them on the voter list.

⁷ The Employer notes in its exceptions that the Hearing Officer erred in finding that employee Nerval White’s cell phone number was excluded from the voter list, although it is maintained on an ICU phone log. White’s correct cell phone number was, in fact, included in the voter list. However, I find that this error is neither material nor relevant to the ultimate finding in this case.

227. Under the Rule, the Employer could have compiled all its separate contact lists for submission to the Region and the Union, but made no effort to do so.

The Employer repeatedly argues that the absence of complete contact information did not prejudice the Petitioner, an argument the Hearing Officer properly rejected. The Employer points to the Petitioner's year-long organizing campaign, during which it compiled substantial employee contact information, and to a group e-mail provided to the Petitioner by an employee, to show that the Petitioner was not prejudiced by the incomplete contact information. The Employer takes the position that, because the Union was apparently able to communicate with eligible voters and did not claim otherwise, "it cannot be said that the Hospital's conduct 'reasonably interfered with employee free choice.'"

As the Hearing Officer properly concluded, nothing in *Excelsior* or the Final Rule requires a petitioner to show it was prejudiced by the Employer's failure to provide complete employee contact information. In fact, the Board squarely addressed this question in *Mod Interiors*, 324 NLRB 164 (1997), in which it ordered a new election in the absence of both bad faith and actual prejudice. "Evidence of bad faith and actual prejudice is unnecessary because the [*Excelsior*] rule is essentially prophylactic, i.e., the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply." The Board refused to look beyond the issue of substantial compliance into the additional issue of "whether employees were actually informed about election issues," noting it would "spawn an administrative monstrosity."⁸ Nevertheless, the Employer urges that I consider evidence of the Petitioner's lack of reliance on the voter list, its ability to obtain contact information by its own means, and its ability to communicate with eligible voters in determining whether to order a new election.

As the Board admonished, to conduct the inquiry urged by the Employer would create an "administrative monstrosity," negate the "strict rule" required by the Board's rules, and exonerate the Employer's failure to exercise reasonable diligence in preparing its voting list. Moreover, the Board has specifically held that "a union's ability to communicate with employees by means other than the eligibility list does not influence the determination of whether the Employer has substantially complied with its *Excelsior* duty." *Mod Interiors*, *supra*, citing *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

Based on the foregoing, the Hearing Officer's rulings are affirmed.

OBJECTION 2

In Objection 2, the Petitioner alleges that the Employer created the impression that Stan Wilk's and Jessica Ellul's union activities were under surveillance, and that it restricted the movement of Wilk by directing him to remain in the Emergency Department on June 12, 2015. For the reasons set forth in the Hearing Officer's report, I agree with the recommendation to

⁸ Quoting *Sonjarel, Inc.*, 188 NLRB 969, 970 (1971).

overrule this objection with respect to Jessica Ellul, and to sustain it with respect to Stan Wilk.⁹ The isolation of Wilk from his fellow employees, even if it lasted only one night, could have affected the results of the election.

Wilk works the night shift as a “multi-assistant”, a multi-faceted position that involves patient transport, nursing assistant duties, lab runs, and responding to various calls from units throughout the hospital. It is undisputed that he was a vocal union supporter during the campaign, and that he made his support known to the Employer. The Hearing Officer found, and I agree, that the Employer changed his job duties on June 12, thereby restricting his movement throughout the hospital in order to isolate him from other eligible voters.

The Employer’s exception regarding Wilk’s “sequestration” centers on two issues. First, the Employer contends that Wilk was not strictly confined to the Emergency Department on the night of June 12. Second, the Employer takes the position that, even if he was sequestered, this conduct does not warrant setting the election aside. With regard to the first issue, it is undisputed that Wilk was permitted to – and did – respond to calls from various units as he had previously been doing. However, the Employer appears to ignore the obvious fact that Wilk’s job *was* different on June 12, the evening following his meeting with Employer president Daniel DeBarba, in which Wilk affirmed his strong support for the Petitioner. With regard to the second issue raised by the Employer, the Hearing Officer correctly determined that Wilk’s sudden and unexplained disappearance from his usual rounds throughout the hospital could have affected the results of the election. As explained below, these exceptions have no merit.

As discussed at length in the Hearing Officer’s report, the Employer implemented a “patient placement initiative” on June 4, 2015, which was intended to facilitate the placement of patients in the appropriate beds as quickly and accurately as possible. In connection with that pilot program, Wilk was told on June 4 that he would be stationed in the Emergency Department, but because of patient care needs, he actually continued to perform his long-standing job in the usual manner. For several shifts, Wilk performed his usual duties, including “rounding” throughout the hospital. The only difference was an instruction from his supervisor to check in with the Emergency Department with greater frequency than he normally would.

However, on June 12, only hours after meeting with president DeBarba, Wilk received a significantly different – and more restrictive – instruction: to remain in the Emergency Department unless called out to provide services elsewhere in the hospital. Although he left the Department approximately four times during his shift, that represented a sharp departure from his prior duties, which included repeated rounds of the entire hospital. The directive to remain in the Emergency Department was conveyed by House Manager Maggio, who told Wilk it came directly from Maureen Burnett, the Director of Nursing Operations and a participant in the earlier meeting with DeBarba.

In its exceptions, the Employer asserts that Wilk was not “sequestered” in the Emergency Department because he was permitted to respond to calls. In this regard, the Employer attempts

⁹ Because no exceptions were filed regarding Jessica Ellul, the Hearing Officer’s findings and conclusions are affirmed, and that portion of Objection 2 will not be discussed herein.

to gloss over the incontrovertible fact that Wilk's job was substantially altered on June 12, when he was specifically prevented from performing his usual rounds – the work that put him in regular contact with virtually every unit in the hospital. Although the Employer attempted to portray this restriction as related to its pilot program, the Hearing Officer correctly concluded that there was no real nexus between the program's goals and the restriction of Wilk's activities.

Accordingly, the Hearing Officer's conclusions regarding Wilk are affirmed and the objection sustained as to Wilk.

RULING ON OBJECTIONS

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 Employer, I affirm the Hearing Officer's findings and adopt her conclusions as to Objections 1, 2, and 3.

IT IS HEREBY ORDERED that the election conducted on June 19, 2015 is set aside and a new election shall be conducted.

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 AFT CONNECTICUT. 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 on June 19, 2015 was set aside because the National Labor Relations Board found that the Employer's failure to provide a complete Voter List, as well as its surveillance and restriction of a prominent union supporter, 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

Within two business days after the issuance of the Notice of Second Election, the Employer must provide to the Regional Director and the 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.

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.nlr.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.nlr.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 which will be set forth in the Notice of Second Election, and must also distribute the Notice of Election electronically to any employees in the unit with whom it customarily communicates electronically. 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.

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.nlr.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: October 16, 2015



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