UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

DEVON MANOR – DEVON PA, D/B/A DEVON MANOR Employer	)	
and	)	CASE 04-RC-161246
NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES DISTRICT 1199C Petitioner	)	

EMPLOYER'S REQUEST FOR REVIEW

Submitted by:

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March 4, 2016

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Petitioner

EMPLOYER'S REQUEST FOR REVIEW

COMES NOW, Devon Manor-Devon PA, d/b/a Devon Manor (the Employer), and files this Request for Review of the Regional Director's Decision and Certification of Representative, issued on February 12, 2016, in the above-captioned case. This Request is based on the following:

1. The Regional Director's Decision raises substantial questions of law and policy because of both the absence of, and departure from, officially reported Board precedent; and

2. The Regional Director's decisions on multiple substantial factual issues are clearly erroneous on the record, and such error prejudicially affects the rights of the Employer.

I. PROCEEDINGS BELOW

Pursuant to a Decision and Direction of Election issued by Dennis P. Walsh, Regional Director of Region 4, an election in this case was held on October 30, 2015, to determine whether the following Devon Manor employees wished to be represented by the National Union of Hospital and Health Care Employees, District 1199C (hereinafter "Petitioner" or "the Union") for the purposes of collective bargaining:

> All full-time and regular part-time nurse aides, medication technicians, activity assistants, and patient care coordinators employed by the Employer at its facility located in Devon, Pennsylvania; excluding all contracted employees, receptionist, general clerks, medical records clerks, scheduler, central supply clerk, office clerical employees, managerial employees, guards and supervisors as defined in the Act.
>
> Bd. Ex. 1(d).

At the close of voting, the tally of ballots reflected that, of 35 eligible voters, 19 votes were cast for the Petitioner, 11 votes were cast against the Petitioner, and 3 ballots were challenged.

The Employer filed seven (7) Objections to the Conduct Affecting the Election; for reasons outlined in the Objections, it further asked that the matter be transferred to a different Region. This request was granted, and on November 18, 2015, Richard F. Griffin, Jr., General Counsel for the National Labor Relations Board, ordered that the case be transferred to Region 6 for consideration. Bd. Ex. 1(g).

On November 25, 2015, Nancy Wilson, Regional Director of Region 6, issued an Order directing a hearing on the Employer's Objections. Bd. Ex. 1(i). In this Order, RD Wilson concluded that, with respect to Objections 1 through 6, each raised "substantial and material issues of fact" which "could be grounds for overturning the election if introduced at a hearing." Bd. Ex. 1(i).

Thus, pursuant to RD Wilson's Order, a hearing on the Employer's Objections was held on December 15 and 16, 2015, in Philadelphia, Pennsylvania, before Hearing Officer David L. Shepley. At this hearing, the Employer presented substantial documentary and testimonial evidence in support of the following Objections:[1]

[1] The Employer withdrew Objection 7 prior to the hearing, and did not take exception to HO Shepley's recommendation to overrule Objection 6; thus, those Objections are not encompassed within this Request for Review.

Objection 1: The Region failed to provide the Employer with any notice of Petitioner's waiver of the 10 day notice period for receipt of the voter list, thus depriving the Employer with a sufficient and equal opportunity to campaign and prepare for the election. Service of such notice is required by Board rules, and is not merely an optional courtesy. See 29 C.F.R. 102.113(d) and (f). In failing to serve the Employer with notice of the Petitioner's waiver of the 10 day period, the Region gave the Petitioner more advance notice of the date and time of the election than it provided to the Employer.

Objection 2: The Region emailed the Decision and Direction of Election to the Employer's Counsel at 5:16 p.m. on October 26, 2015 – after the close of the business day. This was the Employer's first (and only) notification thereof. The Decision stated that the Employer was to provide the voter list to the Petitioner and the Board within 2 business days – by close of business on October 28, 2015. By failing to provide the Employer with a full 2 business day time period, the Region again failed to comply with the Board's own rules and regulations. The receipt of the Decision and Direction of Election after close of business on Monday, also served to violate the requirement that an employer be provided with sufficient opportunity to post the Board's Election Notices a full three working days prior to the opening of the polls on Friday morning.

Objection 3: Because of his role with the Peggy Browning Fund, including serving as its Chairman until sometime in August of 2015, the Regional Director created an appearance of impropriety and potential bias which permeated the handling of the instant election. Indeed, while the Employer has no evidence of any collusion between the Region and the Petitioner, the Regional Director's role in this organization raises an inference or question of such potential misconduct.

Objection 4: The Regional Director further raised a question regarding the impartiality of the government in these proceedings by failing to recuse himself from any involvement in the handling of this case. The fact that Petitioner has arguably donated money to the Peggy Browning Fund and Petitioner and Petitioner's counsel have ties to and/or participate in the organization required such a result, at a minimum.

Objection 5: Both before and during the pre-election conference on October 30th, Employees and agents of the Petitioner attempted to "force" Jeneba Janneh to serve as their observer in the morning vote – against her wishes. Ms. Janneh's reaction to the Petitioner's open and notorious efforts to solicit her participation was so adverse that she emotionally broke down and openly expressed fear of what the Petitioner might do to her for

> turning them down. Discussion of this incident was widespread amongst employees who had not yet voted and they, too, became upset. The entire incident served to chill employee expression of free choice and destroyed the laboratory conditions surrounding the election.

In support of its Objections 1 through 4, the Employer sought approval from the NLRB's Office of the General Counsel to call RD Walsh to testify about his activities on behalf of the Peggy Browning Fund (PBF) and the handling of the petition by his Region; in response, the Associate General Counsel deferred the matter to the discretion of the Hearing Officer. Bd. Ex. 1(k), Bd. Ex. 1(l). Following an offer of proof by the Employer, HO Shepley denied the Employer's request, and accordingly, RD Walsh did not testify in the proceedings. Subsequently, on January 5, 2016, HO Shepley issued a Report recommending that each of the Employer's Objections be overruled.

Pursuant to the Board's Rules and Regulations, the Employer filed Exceptions to the Hearing Officer's Report with RD Wilson on January 26, 2016, arguing that the HO erred in overruling Objections 1 through 6. The Employer also excepted to a number of incorrect factual and legal conclusions made by HO Shepley, including his erroneous credibility determinations, and his improper refusal to allow the Employer to question RD Walsh about his involvement with the PBF. Finally, the Employer alleged that HO Shepley failed to give appropriate legal weight to the Employer's offer of proof; that he applied the incorrect legal standard to the facts; and that his ultimate recommendations were therefore erroneous as a matter of law.

On February 12, 2016, RD Wilson issued a Decision and Certification of Representative in which she agreed with HO Shepley that the Employer's Objections should be overruled. Decision, 2. While RD Wilson acknowledged errors in HO Shepley's analysis, and while she further recognized the validity of some of the Employer's Exceptions, she nevertheless concluded that RD Walsh's previous role of Chairman of the Peggy Browning Fund did not create the appearance of impropriety, and did not warrant his recusal. She further held that no prejudice to the Employer

occurred, despite the fact that Region 4 repeatedly mishandled the processing of the petition, violated its own rules and procedures, and failed to notify the Employer of material ex parte communications. Finally, turning to the election itself, RD Wilson found that the facts alleged at the hearing were beyond the scope of the language of the Objection and that, even if such facts had been considered, the actions of the Union and its agents would not warrant setting the election aside.[2]

For the reasons described below, the Employer requests review of RD Wilson's Decision, on the grounds that her conclusions constitute error as a matter of law. Simply put, this Decision demonstrates a fundamental failure to consider the evidence as a whole, thereby constituting a departure from established Board law, and resulting in manifest injustice to the Employer. Moreover, the Decision creates a dangerous new precedent, in that it effectively ignores the glaring appearance of impropriety that was created by RD Walsh simultaneously occupying the incompatible roles of public servant and political activist – something that runs contrary to well-established Board law and the Regulations governing public officials, and which strikes directly at the Act's core principles of fairness and neutrality. And, finally, the Employer submits that – in addition to the election process in this case being fatally undermined by the cumulative conduct of Region 4 and the agents of the Union in this case – the initial unit determination was also in error, and thus, it requests review of that determination, as well.

[2] RD Wilson also sustained HO Shepley's erroneous credibility determinations, which were contrary to the bulk of the record evidence, as well as his improper refusal to allow the Employer to question RD Walsh; the Employer alleges that both of these conclusions constitute further error supporting the necessity for review by the Board.

II. REGIONAL DIRECTOR WILSON'S DECISION AND CERTIFICATION OF REPRESENTATIVE IN THIS CASE IGNORED RECORD EVIDENCE AND IS CONTRARY TO ESTABLISHED LAW.

> The Board, through its entire history, consistently has gone to great lengths to assure that its role in the conduct of elections is not subject to question.
>
> *Paprikas Fono*, 273 NLRB 1326, 1328 (1984).

For over 80 years, the National Labor Relations Board has been entrusted with the tremendous responsibility of ensuring fairness in representation elections. While this responsibility begins with the Board, it extends to every member of the agency; as such, each NLRB employee is charged with protecting the integrity and neutrality of the Act, and ensuring that the carefully formulated safeguards of the election process are maintained. *Alco Iron & Metal Co*., 269 NLRB 590, 591 (1984)(noting that "[t]here is well established precedent that the Board in conducting elections must maintain and protect the integrity and neutrality of its procedures").

This case serves as an unfortunate example of what happens when those safeguards are not followed, and where the integrity of the election process – and the NLRB's fiercely guarded neutrality – are called into question. Here, the Board is faced with a situation where a Region, operating under the control of a Regional Director with a recognized conflict of interest, commits repeated, egregious errors in the processing of a representation petition and the handling of a representation election. Even more concerning, the Board is faced with a case where *every single mistake* – from the questions that went unasked at the Representation hearing, to the transmission of the Regional Director's Decision and Direction of Election – resulted in material prejudice against only one party: the Employer. In sum, the Board is faced with a case where the fairness of the entire election process must necessarily be called into question.

Given this blunt reality, the Employer submits that if the Decision and Certification are affirmed by the Board, this case will serve to fundamentally undermine a guiding mandate of the

agency, and will stand in stark contrast to the NLRB's "entire history" of promoting fairness in representation elections. It will harm the reputation of the agency, and it will set a dangerous precedent in direct contradiction of both Federal Regulations and Board law. And, it will prove the old adage that bad facts make for bad law; given the highly unusual facts presented here, the Employer submits that this is simply not the vehicle by which the Board should stray from existing law, or call into question its obligations to the public trust. Accordingly, for these reasons, the Employer respectfully requests that the Board vacate the Decision; that it recognize the facts here for what they are; and that it holds that, in this particular circumstance, reasonable doubt exists regarding the fairness of these proceedings.

A. Issues Presented

1. Whether Regional Director Wilson ignored record evidence and acted contrary to established Board precedent in overruling the Employer's Objections 1 and 2.

2. Whether Regional Director Wilson ignored record evidence and acted contrary to established Board precedent in overruling the Employer's Objections 3 and 4.

3. Whether Regional Director Wilson ignored record evidence and acted contrary to established Board precedent in overruling the Employer's Objection 5.

B. Argument

1. Regional Director Walsh's Long-Term Leadership Of A Partisan, Pro-Union Charitable Organization Constituted An Impermissible Conflict Of Interest, And Raised A Reasonable Doubt As To The Fairness Of The Election At Devon Manor.

As described in detail at the Hearing (and as summarized in the Employer's Brief in Support of Its Exceptions), the bulk of the Employer's Objections in this case relate to something known as the "Peggy Browning Fund." The Peggy Browning Fund is a nonprofit charitable organization that "educates and inspires the next generation of advocates for workplace justice through fellowships, workers' rights conferences, networking and other programs" by providing "unique opportunities

for law students to work for economic and social justice." Emp. Ex. 1(l). To this end, PBF is viewed as a "preeminent training ground and recruiting source of legal advocates for social and economic justice for workers." *Id.* In short, the Peggy Browning Fund exists for a very specific purpose – it exists to help unions, and to promote the unionization of workers across the country.

The PBF carries out its mission in various ways. The bulk of its efforts involve placing law students in summer fellowships with union-side law firms, and with unions themselves. Additionally, it sponsors classes in organizing techniques and other subjects of interest to organizers and attorneys representing labor. Finally, it holds large networking and social events, including a national conference, regional workshops, and annual award ceremonies in various cities, where it honors the contributions of hand-picked labor leaders.

As a nonprofit, the PBF is dependent on donations to survive; and, as explained by the PBF, these donations come almost entirely from the labor community:

> As in previous years, PBF's work was greatly aided by in-kind contributions and by the support of 350 volunteers, most of whom are attorneys actively involved in the labor movement. They served as members of our Board of Directors, Advisory Board, Conference Planning Committee, Development Committee, Alumni Committee, Host Committees for various events, mentors in our fellowship program, speakers, panelists, and workshop facilitators at our conference and regional workshops, and in many other supportive roles. Our fellowship was greatly strengthened by unions and union-side law firms that covered the stipends and related costs for the fellows placed with them. We also received in-kind donations of space, audio-technical support, design and printing services, photography, professional services, clerical support, and postage. Such generosity and extensive support from the labor community enabled us to extend the reach of our services significantly and to offer more opportunities to students than ever before.
>
> Emp. Ex. 1(l).[3]

[3] The fact that the majority of PBF's support comes from unions and union-side law firms, and the fact that one of the goals of the PBF is the strengthening of labor unions in America, was not debated by PBF Executive Director Mary Moffa; Moffa testified at the hearing, and characterized

While management-side law firms and attorneys are free to make donations, they are explicitly excluded from involvement in the PBF's programs or its governing boards; no PBF "fellows" are placed with management-side interests, and indeed, such firms would not be eligible to hold a mentorship role. In sum, from its mission statement to its daily operations, the PBF exists as an undeniably political organization, with the stated agenda of promoting the interests of labor over the interests of management – and, for four years, the Chairman of the PBF was Dennis Walsh, Regional Director of Region 4.

RD Walsh's commitment to the PBF's cause cannot be understated. From his election in 2011 until his resignation in 2015, RD Walsh served as Chairman of the Board of Directors of the PBF. Tr. 52. In this role, RD Walsh attended the annual conference; he spoke at a regional workshop; he served as the "host" at Awards dinners; he published articles in the PBF newsletters; and he generally acted as the visible, esteemed head of the organization. According to the PBF's federal IRS filings, Walsh worked an average of 2.5 hours a week on PBF business, though he was unpaid for his time; to the contrary, RD Walsh was also a major monetary donor, and was repeatedly named a member of the PBF Leadership Circle. Emp. Ex. 1(l); Emp. Ex. 1(a). As a designated "Patron," Walsh contributed at least $1,000 to the PBF every year. Emp. Ex. 1(a).

Meanwhile, in March of 2013, Walsh was appointed as Regional Director of Region 4 of the NLRB. Rather than resigning from the PBF, RD Walsh continued to serve in both roles simultaneously. Inexplicably, this obvious conflict was allowed to continue for over two years, until RD Walsh's involvement with the Fund was finally called into question by a management-side attorney who noted the overt partiality of the organization, and suggested that RD Walsh's involvement constituted a violation of his obligations under federal law. Evidently agreeing that

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the filings above as being "absolutely" accurate. Tr. 50; 86-87.

this duality posed a problem, in the Summer of 2015, the National Labor Relations Board issued an ultimatum to RD Walsh – in order to maintain his position as Regional Director of Region 4, he would have to resign his position with the PBF. RD Walsh did so by email in August, 2015; still, he made it abundantly clear that the choice to leave was not his own:

> I am writing to inform you that I must resign from the Board of the Peggy Browning Fund, effective immediately. I am compelled to take this action because the National Labor Relations Board, my employer, has revoked their permission for me to participate in the Fund as a Board Member, and permission to engage in such an outside activity is a condition of my employment. The NLRB's Designated Agency Ethics Officer has also directed me to instruct the Fund not to use my name and/or title as Regional Director to endorse the Fund or any of its activities, so I am requesting that that you refrain from doing so. This resignation is effective immediately. I regret that I am compelled to take this action. Thank you very much.
>
> Bd. Ex. 3.

The Fund did not issue any statement regarding RD Walsh's resignation, and several months later, the position of PBF Chairman was filled by Richard Brean – General Counsel for the USW. Tr. 89, 57.

Approximately six weeks after RD Walsh's "compelled" resignation, the petition in the instant case was filed with his Region. The petition itself concerned 1199C – a Union that contributed to the PBF and attended its annual award banquets. The law firm representing the Union was Freedman & Lorry – an esteemed union-side firm which was well-known to the PBF through its donations and annual attendance at the award banquets; on top of that, Freedman & Lorry had most recently distinguished itself by providing a $5,000 paid fellowship to a PBF fellow in the summer of 2015. Emp. Exh. 1(a). The petition in this case itself was signed by Lance Geren – a partner at Freedman & Lorry, and a former PBF Fellow. And, when the pre-election hearing on the appropriate unit composition was held, the Petitioner was represented in person by Gail

Lopez-Henriquez – another Freedman & Lorry partner, and former PBF Host Committee member. Indeed, with the exception of the Employer, virtually every individual involved with this petition had a significant, monetary connection to the Peggy Browning Fund.[4] And yet, this fact was never disclosed to the Employer, and RD Walsh made no attempt to either recuse himself from the matter, or to curb the obvious appearance of impropriety that such blatant conflict would necessarily create.

Faced with what appeared to be a fundamental question of fairness, the Employer filed two Objections to the election, on the grounds that RD Walsh's leadership of a pro-union organization, and his leadership of the Region, deprived the Employer of the right to have a neutral tribunal process an election involving its employees. Specifically, the Employer asserted that a Regional Director of the National Labor Relations Board should not be involved with organizing campaigns. A Regional Director should not be the public face of an organization that specifically teaches law students organizing tactics, or provides training for shop stewards, or bestows awards on union leaders. And a Regional Director certainly should not be overseeing cases involving parties who have aligned with him on that organization's behalf, by volunteering their time, or by accepting the PBF's invitation to contribute monetarily to its cause.

With these principles in mind, the Employer argued that the mere appearance of impropriety in this case – both in RD Walsh's involvement with the PBF, as well as his failure to

[4] Both the transcript and the stipulations entered into evidence at the Objections hearing demonstrate the extent of the parties' support of the PBF; however, it should be noted that their support has also been publically shared as well, and the PBF website has published photographs of Lopez-Hernandez, Geren, and the President of 1199C among a gallery of Award dinner attendees; this gallery also shows multiple images of RD Walsh himself, acting as the apparent master of ceremonies, and wearing a nametag which designates him as both the Chair of the PBF, and the Regional Director of Region 4. *See,* PBF Photo Gallery – Philadelphia Awards Reception 2014, *available at* https://www.peggybrowningfund.org/photo-galleries/2014-philadelphia-reception.

recuse himself when overseeing matters involving known contributors to the PBF – constituted a reasonable basis for the Employer to believe that the election at Devon Manor was not "fair." Moreover, the Employer noted, allowing RD Walsh to process the petition, in spite of an acknowledged conflict of interest, would contravene both well-established Board precedent, as well as the federal Regulations relating to the neutrality obligations of public officials. *See, Indianapolis Glove Co.,* 88 NLRB 986, 988 (1950)(vacating opinion where there was no proof of an ALJ's bias, but where his conduct could create the appearance of impropriety, and holding that "we feel that it is essential not only to avoid actual partiality and prejudgment, and intimidation of witnesses in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal"); *see also, Standards of Ethical Conduct for Employees of the Executive Branch: General Principles,* 5 CFR 2635.101(b)(14)(providing that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts"). Thus, bolstered by judicial and legislative support for its position, as well as its justifiable rationale behind its concern, the Employer argued that its Objections should be sustained, and the election results vacated.

The Hearing Officer, however, apparently saw no cause for concern whatsoever, and overruled the entirety of the Employer's Objections relating to the PBF. While he acknowledged that the PBF was, in fact, a partisan organization that encouraged unionization, he declared that any speculation regarding RD Walsh's partiality would be "inappropriate and wholly unnecessary[,]" and categorically refused to engage in such inquiry.

RD Wilson – to her credit – was somewhat less dismissive in her analysis. She

acknowledged that she "agree[d] with the Employer that during the period when Regional Director Walsh served as Chairperson on the Peggy Browning Fund [this] arguably created the impression of union partiality[;]" she also found merit in the Employer's Exception to HO Shepley applying the incorrect legal standard to the facts. Ultimately, however, RD Wilson also sought to sidestep the core issue of her colleague's potential prejudice. And, to accomplish this, she effectively ignored the bulk of the record and skipped to the end of the story, recounting that, "on August 19, about six weeks prior to the filing of the petition in this case, Regional Director Walsh resigned as Chairperson of the Peggy Browning Fund." Decision, 9. Moreover, relying on this "significant" fact, she neatly concluded that there was "no evidence" that RD Walsh's prior involvement with the PBF impacted the handling of the case.[5] Decision, 9-10. Thus, without actually considering whether the appearance of impropriety existed in this case, or whether the tribunal was compromised, RD Wilson disposed of the issue by simply finding that the conduct occurred outside the critical period, and therefore, could not serve as a basis for overturning the election – effectively allowing RD Walsh off on a technicality. But, as demonstrated below, RD Wilson's findings ignore both the relevant case law, and the true due process implications raised in this case.

a. The Appropriate Inquiry Here Was Whether The Appearance Of Impropriety Could Create The Reasonable Belief That The Election Was Not Fair.

Typically, a case on objections to the conduct of an election will involve an analysis of

[5] Notably, this conclusion underscores the fact that both HO Shepley and RD Wilson erred in refusing the Employer's request to call RD Walsh to testify at the hearing, as that ruling foreclosed the Employer from the opportunity of exploring the very questions which RD Wilson deemed relevant in determining whether impropriety existed in this case. Decision, 9. Indeed, it is fundamentally unfair to claim that the Employer failed to show it was affected by prejudice, while simultaneously ruling that it may not ask whether the prejudice exists.

whether the necessary laboratory conditions were destroyed, thereby rendering free choice impossible; in cases involving a potential conflict of interest, however, the inquiry takes a different approach.

To this end, where procedural irregularities occur, or there are other indicators that fairness has been compromised, the Board must consult the rule described in *Guardsmark, LLC*, 363 NLRB No. 103 (2016). In that case, the Board explained that the question of whether an election should be set aside hinges on whether the irregularity could raise a "reasonable doubt" as to the fairness of the election as a whole:

> The goal of the Board's election procedure is to establish "those safeguards of accuracy and security thought to be optimal in typical election situations." The Board acknowledges both that "strict compliance with its election procedures does not guarantee the validity of an election," and that "deviation from these procedures does not necessarily require setting aside an election." There is no "'per se rule that … elections must be set aside following any procedural irregularity." The test for setting aside an election based on regional office conduct is whether the alleged irregularity raised "a reasonable doubt as to the fairness and validity of the election." The objecting party's showing of prejudicial harm must be more than speculative to establish that a new election is required.
>
> *Guardsmark, LLC*, 363 NLRB No. 103 at 4 (2016).

In engaging in this analysis, each case must be considered on its facts; nevertheless, the Board must always remain cognizant that fairness is a core principle of the Act; that the Board's neutrality is required by the Regulations; and that hearings held pursuant to the NLRA must be conducted in a manner that does not create the appearance of impropriety, and which affords due process to all parties.

In the instant case, RD Wilson specifically noted that her analysis was controlled by *Guardsmark*; nevertheless, she failed to actually apply the analysis that case requires. Indeed, had she considered all of the facts to determine whether a reasonable party would have doubt as to

the fairness of the election, she would have come to a different conclusion. Even more importantly, however, she would have recognized that her conclusory findings are based on a faulty premise – namely, the idea that RD Walsh's support of the PBF can be reduced to a discrete event, with a beginning and an end. The problems here, however, are much more complex, and speak to a fundamental prejudice that is not so easily dismissed.

Recognizing that RD Walsh resigned six weeks before the petition was filed does nothing to explain how, precisely, this served to remove the taint from the proceedings. Conventional wisdom holds that change does not happen overnight, and deeply held beliefs are not so easily abandoned; thus, removing the conflict did not remove RD Walsh's partiality, and the entirety of the election process was tainted by his affiliation.

Moreover, if the full facts had been considered, it would have been equally important to note that RD Walsh did not quit his work for the Peggy Browning Fund because he had a change of heart – he did so because he was "compelled" to do so, by his employer, under the threat of losing his job. Furthermore, that instruction only came about because a management-side attorney alerted the Board to the impropriety, sparking an ethics investigation – indeed, more facts which were unlikely to soften his position on the management-side bar.[6]

Ultimately, being forced to resign did not force RD Walsh to abandon his principles – and six weeks later, he did not suddenly forget those donors who generously supported his cause for so many years. Thus, the date of his resignation is a red herring; RD Walsh's preference for unions and union-side causes created an ongoing conflict, and it was not one that could be extinguished

[6] Again, these are issues that the Employer should have been entitled to explore by questioning RD Walsh.

by a single email.[7]

RD Wilson approached this issue with blinders on, and as a result, her narrow scope of review meant that these facts never even came into play. Still, they should have been, and an appropriate analysis must consider the entirety of the circumstances. Moreover, the analysis should have been conducted with the ultimate goal of ensuring the NLRB's overwhelming interest in maintaining neutrality and the fairness of elections was protected. And, finally, the appropriate analysis should have considered both Board law and the federal regulations that control these situations, as they lend further dimension to the character of RD Walsh's conduct, and the consequences of his associations. Given these requirements, because RD Wilson's analysis did not consider any of these factors, the Employer submits that her Decision was in error, and should be vacated by the Board.

b. Even If RD Walsh's Activity Was Classified As "Pre-Petition" Conduct, His Association Would Still Be Relevant In Analyzing The Employer's Objections.

Finally, to the extent that RD Walsh's official involvement with the PBF *could* be viewed narrowly as a discrete event occurring prior to the Petition being filed in this case, this also would not preclude it from being taken into account in conjunction with the Employer's Objections.

[7] By way of comparison, it should be noted that, in seeking to avoid other instances of potential conflict, the law recognizes that allegiances don't change overnight; thus, the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635) sets forth the minimum amount of time that must pass before a conflict is alleviated. For example, a covered employee is precluded from participating in any case involving a party for which the employee previously served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee within the last year. Similarly, Executive Order 13490 (Jan. 21, 2009) prohibits participation in any matter involving parties that are directly and substantially related to an executive employee's former employer or former clients for a period of two years following appointment. By contrast. To counsel's knowledge, there is no rule that suggests six weeks constitutes sufficient time to overcome years' worth of alliances.

Rather, it is well-settled that prepetition conduct may be considered where it "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74, 74 (1979). In this regard, the fact of RD Walsh's leadership of a pro-union organization must necessarily inform the fairness of any election he oversees; moreover, as discussed below, his role at the PBF and his pre-existing relationship with the Union and its counsel also raises significant – and troubling – questions about the repeated deviations from official Board election procedure in this case. Thus, for this reason as well, there was no basis for excluding this evidence, and it should have been considered as a component of any meaningful review.

2. Regional Director Wilson Ignored Record Evidence And Misapplied Board Precedent In Finding That The Irregularities In The Election Did Not Create Reasonable Doubt As To The Fairness Of The Election.

While the Employer submits that the tangled relationship between donors and RD Walsh, standing alone, was sufficient to set the election aside, when this history is considered in conjunction with the repeated irregularities in the manner the election was processed by Region 4, the appearance of impropriety becomes even more troubling.

Briefly, as described in the record, on the morning after the close of the Representation hearing, the Petitioner sent an ex parte email communication to Region 4, purporting to waive the Union's right to have 10 days with the eligibility list prior to the election. The Employer was not informed of this Waiver by the Union or by the Region; nevertheless, this Waiver was somehow incorporated into the record, and was then transferred to RD Walsh, who relied upon it in calculating the election date of October 30th.

As the Employer pointed out in its Objections, and again in its Exceptions, the fact that the Union knew about the Waiver, while the Employer did not, gave the Union an obvious advantage

in this election. It allowed the Union to secure a radically abbreviated election period intended to blindside the Employer and disrupt the order of its campaign; it also allowed the Union to appear more knowledgeable about the election process than the Employer – indeed, while the Employer could only tell employees that it "just didn't know" when an election would be held, the Union was passing out printed flyers listing the specific date and time. To the unit employees at Devon Manor, it appeared that the Union had an "in" at the NLRB – and, technically, given that all of these benefits came to the Union based on an ex parte communication that was not communicated to the Employer – it did.

Given these facts, and the obvious prejudice that resulted, the Employer Objected, noting that the waiver constituted a material fact that was known to everyone except the Employer, and it was a fact that determined when RD Walsh would schedule the representation election. The Employer further alleged that the ex parte waiver communication was contrary to the Board's Election Procedures, which specify that a hearing officer should solicit a party's position on waiver during the representation hearing – something which the hearing officer in this case neglected to do. Moreover, because – under proper procedures – the existence of a waiver would have been included in the record, and all parties would have had equal knowledge of its impact on the election timeline, the Employer argued that the failure to communicate its existence actually constituted double error: first, because the union's position was not solicited by the Region at the hearing, and secondly, because the Region subsequently failed to share the existence of the Waiver with the Employer. Accordingly, the Employer claimed that the proper procedures were ignored on multiple occasions, that it was entitled to notice of the Waiver as a matter of law, and that this irregularity warranted the election being set aside.[8] *Jersey Shore Nursing and*

[8] If the Employer is incorrect and this conduct is acceptable, then the Board should be warned that its new rules open the door to abuse. To this end, any savvy union seeking to trick an employer

Rehabilitation, 325 NLRB No. 12 (1998)(noting that the Board has a duty to ensure due process in connection with the conduct of Board proceedings); *Bennett Industries, Inc.*, 313 NLRB 1363 (1994).

Still, as also described in the Employer's Objections and Exceptions, the failure of the Region to communicate the Waiver – twice – was not the only problem that resulted from the abbreviated election timeline; thanks to the late delivery from the Region, the Employer also faced a wholly unreasonable posting requirement. To summarize, RD Walsh's Decision and Direction of Election in this case was issued by the Region after 5 p.m. on October 26, 2015 – giving the Employer less than four days notice of an election that would be held that Friday morning. In turn, this meant the Employer had less than 7 hours to print and post the required Notices of Election, and less than two business days to prepare the list of eligible voters – two more glaring deviations from normal election procedures. And even this was not the end of the Region's error; despite the fact that the Employer had provided the name and contact information, including an email address, for its party representative on the record at the representation hearing, that information was completely ignored by the Region, and instead, the D&DE was emailed to the non-functional address of a completely different individual – one who was not even present that day. In all, through its repeated errors, the Region made it as difficult as possible for the Employer to remain informed about the election, to fulfill its legal obligations, and to communicate effectively with its employees. And, meanwhile, literally *none* of these errors had any prejudicial effect on the union – to the contrary, they afforded the Petitioner a distinct advantage and a degree of insider

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could simply deny any intent to waive while on the record, then promptly turn around and waive privately once the hearing ended. But this is clearly not how the waiver rule should work, and not what it was intended to do. Indeed, a Region should not become complicit in a union's attempt to trick an employer, and the Election Rules should not be used as a trap.

knowledge that the Employer was systematically denied. Thus, in light of the fundamental unfairness that resulted from the Region's mistakes, the Employer filed Objections to these irregularities, as well.

With respect to Objections 1 and 2, the Employer again asserted that the *Guardsmark* analysis would control, and that an election must be overturned when an alleged irregularity raises "a reasonable doubt as to the fairness and validity of the election[.]" *Guardsmark, LLC*, 363 NLRB No. 103 at 4 (2016); *see also, Durham School Services*, LP, 360 NLRB No. 108, slip op. at 4 (May 9, 2014)(an election may be set aside for Regional office procedural irregularities where the objecting party can show that the evidence "raises a reasonable doubt as to the fairness and validity of the election"); *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969)("the Board goes to great lengths to ensure that the manner in which an election is was conducted raises no reasonable doubt as to the fairness and validity of the election"). And, once again, RD Wilson agreed with the Employer on this point – however, she still failed to apply the standard in any meaningful way, or to remove the blinders and conduct a cumulative review of the evidence in this case.

a. The Cumulative Evidence Of The Region's Irregularities In Processing The Petition And Scheduling The Election. As Well As The Prejudicial Effect These Irregularities Had On The Employer, Require That The Election Be Set Aside.

In considering the Employer's Objections 1 and 2, RD Wilson again ignored the proper standard in favor of the narrow scope of review she used in considering RD Walsh's involvement with the PFB. To this end, she again declined to delve into any serious recitation of the facts, giving only a bare recounting; yet, once more, she also acknowledged that the Employer did raise some valid points.

Specifically, with respect to the waiver, RD Wilson recognized that the Hearing Officer at

the representation hearing improperly "failed to solicit the Petitioner's position regarding waiver[;]" she further noted that the Petitioner filed a copy of its waiver on the morning after the hearing with Region 4, but that "a copy of the Petitioner's Waiver was not furnished to the Employer, nor was the Employer otherwise notified of the waiver at the time it was submitted." Decision, 4. And, she agreed the Employer's point that – had the proper election procedures been followed – the hearing officer would have solicited the Petitioner's position on Waiver while the representation hearing was underway, and accordingly, the fact of the Waiver would have appeared on the record, and would have been known by the Employer.

Still, despite admitting that the Board's rules were not followed, RD Wilson ultimately concluded that this constituted "no more than a single deviation from the Agency's case handling guidance[.]" Decision, 6. Which makes it all the more puzzling that, immediately after she characterized this error as being a "single deviation[,]"she could proceed in considering another deviation – the transmission of the RD's D&DE after the close of business on October 26. And, here, too, RD Wilson explained that she viewed the incident in isolation, dismissing the Objection based on the fact that the late transmission of RD Walsh's D&DE – "standing alone" – did not warrant a new election. Decision, 6. Meanwhile, despite the existence of other undisputed record evidence, these were the only two irregularities that even warranted discussion in RD Wilson's Decision; while the erroneous email address got a passing mention, it clearly carried no weight in her determination. Similarly, the fact that the Employer was still unsure about an election date while the Union was already distributing flyers – a direct consequence of the Union knowing something the Employer did not -- was not mentioned at all.

This tunnel vision perfectly encapsulates the Employer's continuing objection to RD

Wilson's Decision as a whole. In the span of three paragraphs, RD Wilson considered two clearly related incidents – the failure to transmit the Waiver, and the late transmission of the D&DE – as though they were completely independent occurrences. But this selective consideration of evidence is simply not how the analysis is supposed to work, and the RD cannot view these facts in a vacuum.

Once more, RD Wilson has not conducted the necessary analysis. Indeed, while she again cited *Guardsmark* for the proposition that deviations from established casehandling procedures "will not necessarily require setting aside an election[,]" the critical inquiry should have been whether the cumulative effect of the irregularities that occurred could create a "reasonable doubt" as to the fairness of the process. This consideration, however, appears nowhere in RD Wilson's Decision. Moreover, not only does it appear that RD Wilson fail to consider the evidence as a whole, she actually acknowledged that she did not do so, by specifically referring to one incident as isolated, and admitting that the other was viewed "standing alone." Such a limited approach is contrary to the duties of a factfinder in any circumstance; however, in cases where the critical inquiry is whether a reasonable person would find, in looking at all the evidence, that an election was not conducted fairly, the importance of considering the entirety of the record is even more paramount.[9] *See, Polymers, Inc.,* 174 NLRB 282, 283 (1969)(emphasis added)(holding that

[9] *See, Bauer Welding & Metal Fabricators, Inc. v. NLRB*, 676 F.2d 314, 318 (8th Cir. 1982), supplemental decision, 276 NLRB 1143 (1985), enfd. 800 F.2d 191 (8th Cir. 1986)(holding that "even where an incident of misconduct, not insubstantial in nature, is insufficient by itself to show that an election was not an expression of free choice, two or more such incidents, when considered together in the totality of the circumstances, may be deemed sufficient to support such a conclusion"); *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 238 (3rd Cir. 1984)(adopting 8th Circuit's reasoning and quoting same); *Picoma Industries*, 296 NLRB 498, 499 (1989)(overruling the findings of a hearing officer who "failed to properly consider the cumulative effect of the credited testimony").

in "considering whether there has been a breach of security in an election, or a reasonable possibility of such a breach, we are examining into questions of fact and inference. To answer these questions, we look at **all the facts**"); *Fresenius USA Mfg., Inc.*, 352 NLRB 679, 681 (2008)(emphasis supplied)(holding that, in "reviewing all the facts in this case, we find that the **cumulative effect** of these irregularities, particularly those during the ballot count, raises a reasonable doubt as to the fairness and validity of the election").

But RD Wilson's analysis is not only erroneous because she failed to consider the combined effect of the irregularities; it also improperly failed to consider the irregularities in light of the Employer's other Objections. And, in order to truly give meaning to the Employer's Objections 1 and 2, the Board must consider them in conjunction with the Objections relating to RD Walsh and his involvement with the PBF.

Indeed, nowhere in the Decision is the intentional disconnect more obvious than in RD Wilson's discussion of Objections 3 and 4 themselves. There, RD Wilson concludes that no appearance of impropriety existed as a result of RD Walsh's involvement with the PBF, because the handling of the election was consistent with Board rules and its guidance memorandum – "aside from the alleged misconduct covered by Objections 1 and 2[.]" Decision, 10. Still, she went on to reason that those inconsistencies – which she considered as discrete events – could not be considered evidence of impropriety, because she had overruled them. We could follow this path all day long, but clearly, this circular logic misses the mark.

Ultimately, the conduct alleged in Objections 1 and 2 – conduct which RD Wilson acknowledged to have occurred – is the exact evidence the Employer points to in support of the

notion that the election in this case was simply not fair. RD Wilson cannot ignore the fact of those irregularities simply because she has determined that, standing alone, they did not warrant setting aside the election; she cannot choose to ignore undisputed evidence because RD Walsh's Region did not violate every election rule.[10] And, she cannot consider these circumstances in total isolation, as though one had nothing to do with the other.

Indeed, it is the appearance of potential bias by RD Walsh – in favor of unions, and against employers – that makes the irregularities in this case all the more alarming. Thus, while RD Wilson categorizes the Objections and the evidence as speculative and disconnected, by stepping back and looking at the bigger picture, a more complete image emerges. Stepping back, a proper analysis reveals that, six weeks after being "compelled" to quit his position as Chair of the Peggy Browning Fund, RD Walsh was made aware of a petition filed in his Region, and involving both a Union, and a law firm, that had historically contributed to his cause. The petition was then processed, during which time the following errors occurred:

- The Union's Waiver was not made on the record at the hearing, because the hearing officer failed to solicit this information, in violation of the Election Rules;
- The Region received the Union's waiver, via an ex parte communication, after the hearing, but failed to transmit it to the Employer;
- The Region failed to require the Union to complete the required Official Form NLRB-4483, as further required by the Election Rules;

[10] Moreover, the RD similarly ignored the fact that, when dealing with a breach of protocol, the factfinder must remain keenly aware of the fact that ultimately, these are the Board's own rules, and if anyone should be expected to follow them, it should be the Board. *Polymers, Inc.*, 174 NLRB 282, 283 (1969)("the failure to achieve absolute compliance with these rules does not necessarily require that a new election be ordered, although, of course, deviation from standards formulated by experts for the guidance of those conducting elections will be given appropriate weight in our determinations").

- The Region inexplicably delayed in sending RD Walsh's Decision and Direction of Election, ultimately issuing it after the close of business less than four days prior to the election (and shocking the Employer in the process);

- The Region failed to consult the record to identify the party representative who was designated to receive the D&DE, and sent it instead to a non-functional email address of an individual who was not even present at the hearing; and

- The Region's late transmission of the D&DE provided the Employer insufficient time – less than seven hours – to comply with the posting requirements, and less than two days to compile the list of employees eligible to vote in the election.

In all, the sheer volume of the undisputed technical errors in this case is somewhat staggering; what is even more concerning, however, is the fact that each of these errors occurred while the petition was being processed by Region 4, and each of these errors handicapped the Employer's ability to run its campaign. Indeed, in stepping back, one cannot avoid the conclusion that things here were not handled properly, and that the fairness of this election is inherently called into question.

b. The Employer Was In Fact Prejudiced By The Region's Mishandling Of The Petition In This Case.

Despite this reality, RD Wilson still concluded, without any meaningful discussion, that the Employer was not "prejudiced, or disadvantaged, by not receiving notification of the Petitioner's waiver at the time it was submitted[;]" but this ignores the record evidence, and is simply contrary to common sense. Decision, 6. With respect to harm, it is undisputed that the Employer was ignorant of the Union's Waiver, and its resulting reliance on normal election timelines clearly impacted the Employer's campaign, and placed the Employer at a significant disadvantage. Indeed, as demonstrated at the hearing and as explained in its Brief in Support of Exceptions, by allowing the Employer to falsely believe that an election remained twelve days away, the Region interfered with the Employer's ability to effectively communicate to its employees, or to plan its strategy. Suddenly, instead of having twelve days to inform employees of key concepts of

unionization, the Employer had to scramble to present those messages in less than three; and, as the record shows, they simply couldn't get it all in. Further, this was not just a minor annoyance for the Employer: given that they were learning, on a Monday, about an election to be held that Friday – in a company where some CNAs only work weekends – this timing actually foreclosed the Employer from communicating with some of their employees at all. And, as a corollary, it also prevented those employees from learning key information, and further contributed to the general atmosphere of confusion that permeated this election.

Notably, with regard to this point, while RD Wilson found that Employer failed to provide any "direct evidence" to show that employees were "confused by the process[,]" this too is contrary to the record; it is also, however, contrary to RD Wilson's own findings. Decision, 5. Indeed, in addition to the direct evidence that the Employer's HR Director fielded numerous questions and witnessed significant frustration on the part of employees, those employees who did testify at the hearing – including Janneh and Brown – offered conclusive evidence of their own. Indeed, HO Shepley – whose credibility determinations were adopted in full by RD Wilson – specifically noted that Janneh "demonstrated little understanding of the election process[.]" Recommendation, 22. With respect to employee Brown, the Hearing Officer discounted his testimony as well, noting that he "struggled somewhat to articulate" what he had been told about a Union flyer. Recommendation, 26. Thus, by RD Wilson's own ruling, and in her own Decision, the Devon Manor voters were confused about the election; and this confusion flowed directly from the Employer's lack of knowledge, and its inability to properly communicate important information to its employees. For RD Wilson to selectively ignore this evidence is simply disingenuous, and further underscores the fundamental unwillingness to review the evidence in a realistic way.

Finally, turning to the late transmission of the D&DE and its effect on the Employer, RD

Wilson had even less to say, finding only that there was no evidence of prejudice because the Employer posted the notices on time. In arriving at this conclusion, RD Wilson distinguished the cases cited by the Employer by noting that "in those cases the Employer failed to post the notices for the required three full days prior to the election." Decision, 7. But again, this mischaracterizes the proper inquiry – the question was not whether the postings were not adequately displayed at Devon Manor; thanks to a yeoman's effort by management, they were. Rather, the appropriate question was whether this irregularity – along with each and every other irregularity – contributed to the appearance of impropriety in the way this election was processed by Region 4, and whether it created the reasonable perception that this process was unfair.

Despite the conclusory findings of RD Wilson, this is not a case where the Employer simply speculates that things may have gone wrong; in this case, *things went wrong*. And, given that all of these errors occurred under the watch of a Regional Director whose bias in favor of labor is well-documented, and given that the effect of these errors conveyed a benefit to a law-firm and a Union, while prejudicing only the Employer in return – reasonable doubt certainly exists as to whether or not this election was fair.

Nevertheless, even if, *assuming arguendo,* the Employer could not show any actual prejudice, these irregularities would still warrant the election being set aside, because the potential for harm was more than simply "speculative." Again – the errors in this case actually occurred. They occurred repeatedly, and they had a disproportionate effect on the Employer alone. Despite the suggestion of RD Wilson, the fact is that the Employer in this case was not required to show either actual bias on the part of RD Walsh or his Region, or that is suffered actual harm; it was only required to show that the appearance of impropriety was raised, and that reasonable doubt could be found as to the fairness of the procedures at hand. *Paprikas Fono*, 273

NLRB 1326, 1328 (1984)("We are not questioning the integrity or neutrality of the Regional Office personnel involved here. Rather, the appearance of irregularity created by the procedures used and the impact of that appearance on the election's validity lead us to conclude that this election must be set aside").

In the end, in conducting a proper analysis of the facts here, only one question need be posed – given RD Walsh's involvement with the PBF, his forced resignation, the multiple prejudicial errors committed by his Region in processing the petition, and the differing effect those errors had on the Union and the Employer – could a reasonable individual conclude that the process was unfair? The answer is simple: of course they could – and, of course they should. The basic principles of justice demand that the question be asked, and the good reputation of the Board compels no other answer.

Accordingly, the Employer respectfully submits that the particular circumstances of this case rendered the election unfair, that the Employer's Objections 3 and 4 should have been sustained, and the election vacated as a matter of law.

3. Regional Director Wilson Ignored Record Evidence And Misapplied Board Precedent In Finding That The Conduct Of The Union And Its Agents Did Not Destroy Laboratory Conditions On The Day Of The Election.

In addition to the procedural irregularities alleged by the Employer, the election in this case also suffered from acts of coercion by the Union and its agents which rendered free choice impossible. To this end, the Employer presented evidence that employee Jeneba Janneh was harassed and intimidated by the action of the Union agents. In this case, the Union admitted that, on the morning of the election, a Union organizer took a photograph of a visibly upset Janneh, without her permission. The photo was taken after an incident at the polls in which Janneh refused

to serve as the Union's morning election observer, before essentially fleeing the polling area; moreover, at the time the photo was taken, Janneh was being consoled by Employer representatives. The Union raised no objection to the Employer's questioning regarding this incident, and the facts were confirmed by the Lead Organizer, who was present at the time of the incident, and who served as the Union's party representative at the hearing.

On top of this, the Employer presented additionally undisputed evidence that the photography occurred in conjunction with other coercive conduct by the Union; it also introduced testimony showing that news of the Union's conduct was quickly disseminated to other employees in the unit, who responded by consoling Janneh, as well.

Given these facts, the Employer argued that the Union, by its agents, created a general atmosphere of fear and coercion that improperly influenced the outcome of the election. It also noted that, by taking a photo of Janneh, the Union's conduct was *per se* objectionable under the rule of *Randell Warehouse*, 328 NLRB 1034 (1999), *review granted, cause remanded,* 252 F.3d 445 (D.C. Cir. 2001) *and decision supplemented,* 347 NLRB 591 (2006), and this – standing alone – would warrant the election being set aside.

Despite the Employer's contention, RD Wilson – in agreement with HO Shepley – discounted the evidence on two grounds: first, by claiming that the photography allegation was not encompassed by the Objection, and second, by concluding that no harm was demonstrated by the existence of the photo. But again, these arguments are contrary to the record facts, and cannot be sustained.

With respect to whether the conduct was properly encompassed by the language of the Objection, the Employer submits that, based on Board precedent, it clearly was. *See, Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1005 (6th Cir. 2012); *Fiber Industries*, 267 NLRB 840

(1983)(union's objections identified certain pieces of campaign literature, but the Board affirmed the hearing officer's consideration of other pieces of literature because they were "sufficiently related" to the union's objection); *Hollingsworth Management Service*, 342 NLRB 556 (2004)(affirming the hearing officer's consideration of electioneering by some third parties even though the written objection referred only to "electioneering by the union, its officers, agents and representatives").

Turning to the language of the Objection at issue here, the Employer set forth the following brief statement:

> Both before and during the pre-election conference on October 30th, employees and agents of the Petitioner attempted to "force" Jeneba Janneh to serve as their observer in the morning vote – against her wishes. Ms. Janneh's reaction to the Petitioner's open and notorious efforts to solicit her participation was so adverse that she emotionally broke down and openly expressed fear of what the Petitioner might to do her for turning them down. Discussion of this incident was widespread amongst employees who had not yet voted and they, too, because upset. The entire incident served to chill employee expression of free choice and destroyed the laboratory conditions surrounding the election.

The objection refers specifically to the conduct by Union employees and agents, directed at Janneh, on the morning of the election. It encompasses the conduct of the agents who named her as the observer; it encompasses the circumstances under which the Employer brought Janneh to the polling location; it encompasses the Union agent glaring at Janneh in an attempt to intimidate her; and finally, it encompasses Janneh's ultimate breakdown – the precise time the Union chose to snap a picture of her. Indeed, these are the facts that make up the "entire incident," as the Employer summarized it, and each of these facts should have been considered. For RD Wilson to wholly discount a portion of the "entire incident" because it was not specifically set forth in the Objection summary (although reference to the photograph was submitted by the

Employer in support of the Objections) constitutes an unreasonably narrow approach to Objections in general, moreover, it is inconsistent with the reasoning behind *Fiber Industries*, as well as other cases which deal with the necessary degree of specificity which must be pled in Objections.

Furthermore, to the extent that the RD argues that the evidence should not be considered because the Union was not on notice of the violation, this reasoning is equally unpersuasive. Indeed, testimony about this conduct came from the Union's lead organizer. It was not disallowed by the Hearing Officer, and the Union did not even object to the questioning during the hearing. Moreover, the Union did not follow up with the questioning, despite the fact that it had every opportunity to do so – indeed, these facts were admitted by its own party representative, who was certainly available. Thus, with no evidentiary objections and no reason to exclude, the testimony should have been considered, and used to invalidate the election.

Finally, turning to the nature of the violation, the Employer notes that, under the rule of *Randell Warehouse* and its progeny, unexplained photography of an employee engaging in protected activity – by either an Employer or a Union – will be considered *per se* objectionable; and here, this is precisely what occurred. Janneh was [photographed, without permission, in a blatant effort to intimidate her on election day, and in retaliation for her refusal to act as the Union's observer. There is simply no lawful explanation for the Union agent's conduct here, and his actions were patently coercive, and clearly violative of the Act. Accordingly, in this respect as well, RD Wilson's determination was in error, and should be vacated by the Board.

III. REGIONAL DIRECTOR WALSH'S UNIT DETERMINATION WAS CONTRARY TO LAW.

While, in this Request for Review, the Employer has sought to demonstrate that the election at Devon Manor was fatally flawed in multiple ways, it also submits that – in fact – the election actually should not have been held at all. Or, more specifically, the election should not have been held in the unit as determined by RD Walsh.

A. Issue Presented

1. Whether Regional Director Walsh abused his discretion and acted contrary to established Board precedent by ordering an election in the unit described above.

B. Argument

In its petition to represent certain Devon Manor employees for the purposes of collective bargaining, the Union sought to represent a unit limited to full-time and regular part-time non-professional employees, including nurse aides, medical technicians, activity assistants, and patient care coordinators, while excluding all other employees. The Employer, on the other hand, argued that the only appropriate unit would be one that included other classifications – specifically, general clerks, medical records clerk, scheduler, central supply clerks, and maintenance assistants. In all, including the employees sought by the Employer would result in the addition of 8 individuals to the proposed unit.

Ultimately, based on the evidence presented at the hearing and the closing arguments made by the parties, RD Walsh ordered an election be held in the unit proposed by Petitioner; accordingly, he excluded the general clerks, the medical records clerk, the scheduler (although one particular scheduler, who held a dual role as a scheduler and CNA, was permitted to vote under challenge), and the central supply clerk – in short, all of the employees the Employer sought to include.

The Employer submits that this holding was in error, because it results in a small number of similarly situated employees being left out of the unit; moreover, it creates the potential for the propagation of units in a healthcare setting – a consequence which Congress specifically intended to avoid.[11] Moreover, it ignores the practical facts of working in an assisted living facility; indeed, while RD Walsh concluded that the individuals whom the Employer sought to include did not engage in patient care, and therefore did not share an overwhelming community of interest with the petitioned-for group, the reality is that in a healthcare setting, *every* employee is responsible for the care of the patients – thus, all share together in a common goal. Further, considering the similarities in working conditions, hours, pay, and other terms and conditions of employment between the petitioned for employees and the employees named by the Employer, it simply makes no sense to exclude them; to this end, the overwhelming community of interest between these employees should have warranted the opposite result, and they should not have been denied the opportunity to vote.

Thus, for this reason as well, the Employer submits that the election was improper, and the results should be vacated accordingly.

IV. CONCLUSION

For the reasons above, the Employer respectfully requests that the Board grant this request for review and vacate the underlying Decisions in this case.

[11] To this end, the Employer notes its continuing objection to, and disagreement with, the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011), and asks that the Board revisit its decision in this matter. Specifically, the Employer submits that the *Specialty* rule creates the distinct possibility of a proliferation of units in the healthcare setting – and that such risk is particularly high in a case such as this, where only eight employees stand to be excluded.

Respectfully submitted this 4th day of March, 2016.

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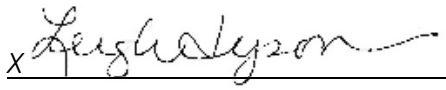

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

DEVON MANOR – DEVON PA, D/B/A DEVON MANOR

Employer

and CASE 04-RC-161246

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES DISTRICT 1199C

Petitioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned filed the foregoing REQUEST FOR REVIEW via the National Labor Relations Board's E-Filing Service, and also provided copies to the following parties via electronic delivery:

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Nancy Wilson
Regional Director
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This 4th day of March, 2016.

Signature on Following Page

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