

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

HEARTLAND HUMAN SERVICES ,)	
)	
Employer)	
and)	Case No.: 14-RD-063069
)	
CODY PHILLIPS,)	
)	
Petitioner)	
and)	
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 31, AFL-CIA)	
)	
Union.)	

**HEARTLAND HUMAN SERVICES' EXCEPTIONS
TO HEARING OFFICER'S REPORT**

NOW COMES Heartland Human Services (HHS) by and through its attorney, John Gilbert and Leigh C. Bonsall of Hinshaw & Culbertson LLP and as its exceptions to the Hearing Officer's Report on a Challenged Ballot and Objections and Recommendations states as follows:

EXCEPTIONS

I. The Hearing Officer Erred When She Sustained Objection 1 by Holding that Heartland Failed to Substantially Comply with the Excelsior Rule.

Heartland substantially complied with the *Excelsior* rule by supplying the Union with all of the names and addresses of eligible voters, while failing to supply only the address of one unit member, Ryan Beagle. As such, the Hearing Officer erred by sustaining the Union's Objection 1.

The Hearing Officer relied upon the case *Automatic Fire Systems* to sustain the Union's objection. However, *Automatic Fire Systems* is inapposite. In *Automatic Fire Systems*, the employer omitted 8 names from the *Excelsior* list, thereby omitting "an entire segment of the

Employer's work force." 357 NLRB No.190, at *3 (2012). Moreover, the employer took no action to correct the inadequate *Excelsior* list. *Id.* Accordingly, the Board held that the employer's actions "raise[d] a serious question of bad faith, and, at the least, indicate gross negligence" and therefore, the results of the election were set aside. *Id.*

Here, unlike the employer in *Automatic Fire Systems*, Heartland never omitted an entire segment of its workforce from its *Excelsior* list. While Heartland initially failed to provide addresses for eligible voters, it did not omit their names entirely. *See Women in Crisis Counseling & Assistance*, 312 NLRB 589, 589 (1993) ("The omission of names from an *Excelsior* list is far more likely to frustrate the Board's purposes than inaccuracies in addresses."). In fact, there is not a single eligible employee that Heartland failed to disclose to the Union prior to the election.

Automatic Fire Systems is also distinguishable because when Heartland did make errors, it immediately worked to correct them. When Heartland initially failed to provide addresses for eligible voters, it corrected that deficiency the very same day. When Heartland then inadvertently failed to include five employees it previously identified, that deficiency was substantially corrected the very next day. Finally, when Heartland failed to include one employee, Ryan Beagle, that deficiency was corrected when Heartland informed the Union of its oversight prior to the election. As such, the only deficiency Heartland did not correct was its failure to provide Ryan Beagle's address. Such a deficiency simply does not demonstrate lack of substantial compliance with the *Excelsior* rule.

For example, in *Women in Crisis Counseling & Assistance*, the employer supplied the Union with an excelsior list that had a 30 percent inaccuracy rate concerning unit members' addresses. 312 NLRB 589, 589 (1993). Still, the Board found that the employer substantially

complied with the *Excelsior* requirements because “the number of address inaccuracies in the *Excelsior* list was not substantial enough to require setting aside the election.” *Id.*

Similarly, in *Pacific Beach Corp. and International Longshoremen and Warehouse Union, Local No. 142, AFL-CIO*, the employer submitted an *Excelsior* list with 43 incorrect addresses. 344 NLRB 1160, 1163 (2005). The employer sent the union a corrected list about a week later, but it still contained 24 inaccuracies. *Id.* The Board held that “the 4.8 percent inaccuracy rate and employer’s good faith attempt to correct the inaccuracies require a finding that the Employer substantially complied with the *Excelsior* list rule.” *Id.* See also *Bon Appetit Management Co. and Service Employees’ International Union, Local 50, AFL-CIO*, 334 NLRB 1042, 1043 (2001) (Employer substantially complied with *Excelsior* rule when it corrected its mistakes and supplied a new list because the “minimal delay in providing the Union with a complete and accurate list did not interfere with the purposes behind the *Excelsior* rule.”).

As in the precedent cited above, the inadequacies in Heartland’s *Excelsior* list did not “interfere with the purposes behind the *Excelsior* rule.” Heartland corrected the few deficiencies in its list such that all eligible voters were disclosed to the Union, along with their addresses, save one employee. Accordingly, the Hearing Officer erred by sustaining the Union’s objection.

II. The Alleged Threatening Letter Does Not Warrant Setting Aside The Election.

In regard to the Union’s Objection 2, the Hearing Officer correctly concluded, “[t]he record does not establish the identify of the person who prepared or mailed the threatening letter.” (Hearing Officer’s Report, p. 20). Accordingly, to set aside the election, the Union was required to meet the “third-party standard for objectionable conduct” and prove that the conduct surrounding the anonymous letter was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 260 NLRB 802,

803 (1984). The facts of this case do not meet the stringent third-party standard and therefore, the Hearing Officer erred by concluding that the election should be set aside.

The third-party standard for setting aside an election is not easily met, as is demonstrated by the cases relied upon by the Hearing Officer. For example, in *Westwood Horizons Hotel*, a prounion employee made threats of physical harm directly to one employee, in the presence of other employees, while also threatening to “beat up” any other employee who did not vote for the union. 270 NLRB 802, 802 (1984). On the day of the election, the prounion employee physically forced one employee into the voting area while forcing another employee to cast his vote, all in the view of other employees waiting to vote. *Id.* at 803. The prounion employees also continuously yelled that all of the employees should vote for the union. *Id.* Accordingly, a new election was required. *Id.* at 804.

In contrast, in *Cal-West Periodicals*, the Board found that the alleged threats did not warrant setting aside the election. 330 NLRB 599 (2000). In *Cal-West*, prounion employees told another employee (while in earshot of additional employees), that he better vote for the union, and if he did not, “he could wait and see what happened to him.” *Id.* at 599. The Board applied the third-party conduct standard to hold that a new election was not warranted because the threat was ambiguous and did not necessarily establish a threat of physical harm. *Id.* at 599-600 (distinguishing the facts from those in *Steak House Meat Co.* where a knife-wielding employee threatened to kill a 16 year old if he voted against the union).

Similarly, in *Lamar Advertising of Janesville*, also relied upon the Hearing Officer, the Board again found that a threat *did not* warrant setting aside the election. 340 NLRB 979. In that case, two prounion employees threatened another employee by telling him that they would “kick his ass” if he did not vote for the union. *Id.* at 980. The Board held that the threat did not

warrant setting aside the election because it was addressed to only one employee, not the entire bargaining unit. *Id.* at 981. Additionally, the employee testified that when the prounion employees threatened him, “they didn’t come [at] me or anything.” *Id.* Therefore, the Board found that the threat was not objectionable because the Board and courts recognize “that in a hotly contested election, a certain measure of bad feeling and even hostile behavior is probably inevitable.” *Id.* See also *Accubilt, Inc.*, 340 NLRB 1337 (2003) (threats to employees, including that they could be fired or have their fingers broken, insufficient to set aside election).

Here, as in *Cal-West* and *Lamar*, the alleged threatening letter does not warrant setting aside the election. The letter was received by only one employee and was never accompanied by any physical or verbal threats, as was the case in *Westwood*. Moreover, the record does not establish who wrote or sent the letter. Accordingly, it cannot be concluded that the unknown drafter of the letter had the power to act on the threats. Finally, the threat made in the letter was never rejuvenated at any time or referenced at all on the day of the election. Ultimately, one isolated threat made via an unauthenticated letter sent to one employee does not create a “general atmosphere of fear and reprisal” and does not warrant setting aside an entire election. As such, the Hearing Officer erred by sustaining the Union’s Objection 2.

III. One Incident of Alleged Interrogation Is De Minimis.

The Hearing Officer also sustained the Union’s Objection 4 concerning improper interrogation, but only in regard to one alleged incident. Assuming, arguendo, that such conduct did constitute improper interrogation, it is *de minimis*. In *NLRB v. Bon Appetit Management Co.*, the Board found that the employer violated the Act by interrogating an employee about the employee’s union membership prior to an election. 334 NLRB 1042 (2001). However, the Board found that the employer’s violation of the Act was *de minimis* because the incident

involved only one employee and occurred two weeks prior to the election. *Id.* at 1044. *See also Detroit Medical Center*, 331 NLRB 878 (2000) (Board declined to set aside election because 2 employees out of unit of 106 were interrogated).

Here, as in *Bon Appetit*, the Hearing Officer has found that only one employee was interrogated and that the interrogation occurred “2 weeks prior to the election.” (Hearing Officer’s Report, p. 33). Accordingly, as in *Bon Appetit*, such conduct, assuming it violated the Act, is *de minimis* and does not warrant setting aside the election.

CONCLUSION

The Hearing Officer erred by holding that the election should be set aside based on the Union’s Objection 1 because Heartland supplied the Union with an adequate *Excelsior* list. Moreover, the alleged threat that forms the basis of the Union’s Objection 2 did not create a atmosphere of fear to warrant setting aside the election. Finally, one incident of alleged interrogation is *de minimis*. Consequently, the election should not be set aside based on the Union’s Objections 1, 2 and 4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that the attached Heartland Human Services' Exceptions to Hearing Officer's Report was served on August 8, 2012, upon the following named individuals by the method described below:

1. Via Hand Delivery:
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