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**The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWU, UAW, Petitioner.** Case 02-RC-143012

December 16, 2017

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The National Labor Relations Board, by a three-member panel,<sup>1</sup> has considered objections to an election held on December 7–8, 2016, and the Hearing Officer’s report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 1602 for and 623 against the Petitioner, with 647 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions, has adopted the Hearing Officer’s findings<sup>2</sup> and

<sup>1</sup> Member Kaplan is recused, and has taken no part in the consideration of this case.

<sup>2</sup> The Employer has excepted to some of the hearing officer’s credibility findings. 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 us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

We agree with the Hearing Officer’s assessment that the Region’s handling of voter identification requirements, while not “optimal,” does not constitute grounds for setting aside the election.

Although the Employer and the Petitioner initially agreed in a telephone conference call that employees would be required to present their identification before voting, the Regional Director later found that it would be prejudicial to voters caught unawares to impose such a previously unannounced requirement at the polls. Thus, as the Regional Director advised the parties, neither the Supplemental Decision and Order nor the Notice of Election stated that there was a voter identification requirement. In these circumstances, the Regional Director’s decision was reasonable—and well within her broad discretion in arranging and conducting elections. See *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998).

During the election, in turn, there were some inconsistencies in the Region’s voter-identification procedures: in certain instances Employer observers were permitted to request (though not require) identification; in other instances, they were not. But, contrary to our dissenting colleague, these inconsistencies did not make the election a “shambles” or require that it be set aside.

As the Board has explained:

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.

recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Graduate Workers of Columbia-GWU, UAW, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty, and Nevis facilities, but excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

Dated, Washington, D.C. December 16, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part.

At this juncture in this case, the Board is considering objections to a university-wide election held on December 7–8, 2016, among a large assortment of student assistants enrolled at Columbia University. Like my colleagues, I agree there is no merit in most of the objections.<sup>1</sup> However, there was a significant irregularity in

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*Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 4 (2016) (footnotes citing cases, omitted).

Here, the Employer has failed to carry its burden. The Employer’s evidence shows that the Region’s inconsistent handling of voter-identification procedures potentially affected just *four ballots* at most. The election covered a unit of over 4,000 eligible voters, in which the Petitioner won by a 979-vote margin. In these circumstances, we find no reasonable doubt as to the fairness and validity of the election.

<sup>1</sup> I have previously expressed my disagreement with the finding that the petitioned-for student assistants in the instant case are “employees” within the meaning of Sec. 2(3) of the National Labor Relations Act

the election that, unfortunately, cannot be undone, which I believe has the unfortunate consequence of requiring a rerun election. Specifically, the record reveals there were multiple inconsistencies—the full extent of which cannot even be determined now—regarding whether students would be required to present documentation of their identity at the polls, i.e., voter ID. The voter documentation problems in this case have nothing to do with voter identification laws in various states, which have given rise to substantial controversies.<sup>2</sup> Rather, before the election, the parties reached an agreement regarding voter documentation; subsequently, the Region sent an email advising parties that the Regional Director had decided that voter documentation could not be required; and during the election itself, different Board agents handled voter documentation in a manner that was inconsistent with the parties' agreement, the Region's email, or both. In short, whether or not anyone thinks voter documentation was appropriately agreed upon, or merely advisable, or required, or a terrible idea, this election involved discrepancies and inconsistent treatment that rendered it a shambles so far as voter identification was concerned.

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(NLRA or Act). See *Columbia University*, 364 NLRB No. 90, slip op. at 22–34 (2016) (Member Miscimarra, dissenting). I continue to believe that the student assistants are not employees, but the “employee” status of the petitioned-for student assistants is not before the Board at this juncture.

With respect to the Employer's first objection claiming that Earl Hall voters had to pass by known Petitioner agents en route to the polling place, I agree with my colleagues that the actions of the Petitioner's agents during the election were not objectionable. Previously, I have observed that “the mere presence of a party's agents in a place employees must pass in order to vote constitutes objectionable conduct sufficient to set aside an election.” See *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 6 (2016) (Member Miscimarra, dissenting). Here, in contrast, students did not have to pass directly by the Petitioner's agents to vote. Upon entering the main floor foyer area of Earl Hall through the building's front door, students would immediately turn to the right to ascend a staircase leading up to the polling area. The Petitioner's agents were present in the main floor foyer area only periodically during scheduled observer shift changes, and they would have been visible only were students to look to the left and further into the room before heading upstairs. In any event, both agents would have been unknown to most voters and thus would have been unrecognizable to most as the Petitioner's agents. At no time did the Petitioner's agents either impede access to the front door of Earl Hall or ascend the staircase to access the polling place during voting. Further, the foyer was not visible from the polling place.

<sup>2</sup> See, e.g., New York Times, “How States Moved Toward Stricter Voter ID Laws,” Nov. 3, 2016 (<https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html?mcubz=0>); Washington Post, “Do voter identification laws suppress minority voting? Yes. We did the research,” Feb. 15, 2017 ([https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm\\_term=.b62964d6b040](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm_term=.b62964d6b040)).

In these circumstances, I believe the Board has no reasonable alternative than to order a rerun election. In various contexts, I have emphasized the importance of upholding the integrity of the Board's election procedures. See, e.g., *Patient Care*, 360 NLRB 637, 638–639 fn. 4 (2014) (Member Miscimarra, concurring); *Magnum Transportation, Inc.*, 360 NLRB 1093, 1094 (2014) (Member Miscimarra, concurring). The situation presented here—where we know voters were treated inconsistently at different times and in different polling places regarding their fundamental right to participate in the election—strikes at the very heart of what the Board must safeguard in every election: confidence that all eligible voters have been given a fair opportunity to participate in the election itself.

Accordingly, I believe the Board is required to order a rerun election. Because my colleagues find otherwise, I respectfully dissent as to this issue.

#### Background

The relevant facts are undisputed. During a November 21, 2016 conference call with the Petitioner and Region 2, all parties agreed that the Region would require either “Government or Columbia issued ID” at the election. Subsequently, in an email dated December 6, 2016, Assistant Regional Director Nicholas Lewis stated: “This is to confirm that presentation of voter ID will not be a requirement in order for an individual to vote. As the presentation of identification was not included in either the Supplemental Decision or Notice of Election, the RD has concluded it cannot be made to be a requirement.” (Jt. Exh. 1).

During the election itself, the Board agents' treatment of voter identification was inconsistent. Assistant Director of Employee Relations Mirian Stincone testified that while acting as an Employer observer on December 7, the first day of the election, she was advised by a Board agent that she could not require identification as a prerequisite to allowing voters to cast their ballots, but she was permitted to request it. Stincone found that doing so facilitated the process and helped to ensure accuracy in checking names off the voter list. However, when Stincone arrived for her observer shift on December 8, the second day of the election, a different Board agent advised her that she was not permitted to even request voter identification. As a result, Stincone had to ask some voters to repeat their names multiple times to verify their identity.

Similarly, Director of Labor Relations Idina Gorman testified that, before she reported to her observer shift at noon on December 7, Columbia Assistant Vice President of Labor Relations and Client Services Dan Driscoll advised her that she could request identification from vot-

ers. She did so, and found that requesting identification made the process smoother and more accurate given that multiple voters had the same or similar names.<sup>3</sup> However, at 3:30 p.m. that day, a Board agent advised Gorman that she could no longer request voter identification.

The record therefore establishes—and the hearing officer found—that the Region conducted the election contrary to the parties’ agreement to require voter identification and in an uneven and inconsistent manner with respect to the actual use of identification during polling. Additionally, the hearing officer conceded that the use of voter identification, when permitted, “facilitated the process by helping the observers to find voters” on the voter list. The hearing officer further conceded that “the procedures [the Region] employed were not optimal,” citing the Region’s last-minute notice (the day before the election) to the parties that voter identification could not be required as well as its inconsistent treatment of identification during the election.

#### Discussion

As noted above, I believe the Board must hold itself to a high standard in conducting elections. Doing so is particularly important when the election involves a large, complex bargaining unit like the one in the instant case. Specifically, the Board must adhere to election procedures that not only *are* fair, consistent, and free of irregularities, but that also inspire confidence that this high standard has been met. Election observers play a “significant role” in the process. *Equinox Holdings, Inc.*, 364 NLRB No. 103, slip op. at 3 (2016) (Member Miscimarra, dissenting). Observers “represent their principals, carrying out the important functions of challenging voters and generally monitoring the election process,” and they also “assist the Board agent in the conduct of the election.” NLRB Casehandling Manual, Part Two (Representation Proceedings), Sec. 11310.3. Importantly, observers must be “satisfied as to the voter’s identity” before that individual may receive a ballot. See NLRB Casehandling Manual, Part Two (Representation Proceedings), Section 11322.1, para. 4–5; see also *Equinox Holdings*, 364 NLRB No. 103, slip op. at 3–4 (Member Miscimarra, dissenting) (the Board’s election procedures “require each voter to identify him- or herself by name to each observer”) (emphasis omitted).

In the instant case, inconsistent voter identification procedures were employed at different times and in different polling locations; and no matter what procedures were employed at particular times and places, they were either inconsistent with the parties’ preelection agree-

ment (which required documentation to be presented by each voter), or they were inconsistent with the Region’s preelection email (which stated documentation could not be required). As a result, we cannot determine whether eligible voters may have been improperly turned away and if so, how many, or whether ineligible individuals may have been improperly permitted to vote and if so, how many. This rampant confusion also necessarily undermined the role played by election observers because the record—sparse and incomplete though it is—establishes there was no consistency regarding the manner in which observers established the identities of voters, which raises reasonable concerns regarding the accuracy of those identifications.<sup>4</sup> The two observer witnesses also each testified that requesting voter identification—when they were permitted to do so—facilitated the process and improved accuracy.<sup>5</sup> Consequently, the election procedures followed here, which were applied in a case that everyone understood would have great significance, were deeply flawed, inconsistent, and arbitrary, creating uncertainty as to the single most important issue in every election: whether eligible voters were actually permitted to participate in the election.

I will close with the same observation I made earlier: this case does not involve any partisan questions about whether voter ID documentation is a good idea or a bad idea or should be required, optional, or prohibited. The fact of the matter here is that the parties themselves reached an agreement that was brokered by the Board’s regional personnel; the agreed-upon procedures were then changed by the Region prior to the election; and the election was then conducted in a manner that was inconsistent both internally and with the parties’ agreement and the Region’s subsequent instructions. There may be cases where isolated deviations from appropriate procedures would present a close question about whether the election must be set aside based on “reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282, 282 (1969). However, in my view, this is obviously not one of those cases.

#### CONCLUSION

Accordingly, as to the above issue, I respectfully dissent.

<sup>3</sup> A review of the voter list confirms that there were in fact multiple voters with the same or similar names. See (Jt. Exh. 5).

<sup>4</sup> At the vote count held on December 9, 2016, one challenged ballot was impounded because a person with the same name had already been checked off as having voted at another polling place. (Jt. Exh. 1).

<sup>5</sup> Upon learning that election observers were not requesting voter identification, one student voter even asked Stincone, “how do you know I am who I say I am?” (Tr. 114).

Dated, Washington, D.C. December 16, 2017

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Philip A. Miscimarra, Chairman

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