

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)
)
)
)
District of Columbia Health and) PERB Case Nos. 97-UM-05
Hospitals Public Benefit Corporation,) and 97-CU-02
)
) Opinion No. 589
Agency,)
)
and)
)
All Unions Representing Bargaining)
Units in Compensation Units 12, 20,)
21, 22, 23 and 24 and employees)
employed by the Health and Hospitals)
Public Benefit Corporation,)
)
Labor Organizations.)
)
)

**DECISION AND ORDER ON OBJECTIONS
AND DIRECTION OF ELECTION**

Pursuant to a Decision and Direction of Election issued by the Public Employee Relations Board (Board) on October 15, 1998, (Opinion No. 564) a secret mail-ballot election was conducted on January 22, 1999, for the unit of non-professional allied health care employees at the D.C. Health and Hospitals Public Benefit Corporation (PBC). The tally of ballots took place at the Board's offices on February 8, 1999. Representatives from two of the unions on the ballot, American Federation of State, County and Municipal Employees, Local 1033 (AFSCME) and the American Federation of Government Employees, District 14 (AFGE) were present at the tally.

The Election was conducted by the staff of the Board in accordance with the election procedures contained in the Board's Rules and the Board Directed Election Procedures for this proceeding. The secrecy of the ballots was maintained at all times. A total of six-hundred sixty-six (666) ballots were sent to voters on the eligibility list. A total of two-hundred fifty-nine (259) ballots were returned.

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In accordance with the above-referenced Board Directed Election Procedures, the question on the ballot was, "Do you desire to be represented, for purposes of collective bargaining on compensation and other terms and conditions of employment by: [the] American Federation of Government Employees, District 14 (AFGE) [; the] American Federation of State, County and Municipal Employees, Local 1033 (AFSCME) [; or the] Licensed Practical Nurses Association (LPNA)?"

A Report of Election Results containing the results of the election was issued to the parties on February 9, 1999. The results were as follows:

AFGE	<u>139</u>
AFSCME	<u>91</u>
LPNA	<u>4</u>
Challenged Ballots	<u>12</u>
Void Ballots	<u>13</u>

Pursuant to Board Rule 515.2, on February 18, 1999, AFSCME filed Objections to the election. AFSCME objects to the result on two grounds. First, it asserts that because the PBC did not use the current addresses of eligible employees, many AFSCME members did not receive mail ballots and were therefore unable to vote. Second, they assert the Board's office was closed for a couple of hours on February 5, 1999, the last day ballots could be received. As a result, AFSCME contends that many AFSCME members were unable to vote because they could not either hand deliver their ballot or obtain a duplicate ballot.

In accordance with Board Rule 515.4, an investigation of these objections was initiated pursuant to the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code § 1-618.10(d)(1) and Board Rule 515.2. By letter dated February 25, 1999, the parties were directed to provide evidence in support or in response to the objections. On March 5, 1999, responses were received from AFSCME and the PBC. No responses were received from AFGE or LPNA.

The ultimate objective in a representation proceeding under the CMPA is to effectuate employees' right to "bargain collectively through representatives of their own choosing" as

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"selected by a majority of employees in an appropriate unit who participated in an election". D.C. Code Sec. 1-618.6(a)(3) and 1-618.10(a). The Board has previously stated that this objective is achieved in a secret ballot election, unless an objecting participant can demonstrate that "laboratory conditions were so disturbed as to interfere with employees' freedom of choice" to the extent that it "affect[s] the outcome of the election". Fraternal Order of Police, Metropolitan Police Department and District of Columbia Metropolitan Police Department and International Brotherhood of Police Officers, 29 DCR 1045, 1046 Slip Op. No. 33 at p. 2, PERB Case No. 81-R-05 (1982). See, also Fraternal Order of Police/DOC Labor Committee, Teamsters, Local Union No. 1714, et al. and Dept of Corrections, Slip Op. No. 374, PERB Case No. 93-R-04 (1994). Cf., N.L.R.B. v. A.J. Tower Co., 329 U.S. 324 (1946) and Midland National Life Insurance Co., 263 NLRB 127 (1982) (The Supreme Court and National Labor Relations Board (NLRB) making a similar observation as to election proceedings under the National Labor Relations Act).^{1/}

^{1/} The NLRB in Midland, citing A.J. Tower Co., made the following observation:

Although the Board's exercise of discretion must be consistent with the principle of majority rule, the Supreme Court has held that the Board is not precluded from making 'practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud.' [citation omitted] In making these rules, the Board must weigh and accommodate not only the principle of majority rule, but several other conflicting factors, such as preserving the secrecy of the ballot, insuring the certainty and finality of election results, and minimizing unwarranted and dilatory claims by those opposed to the election results. [citation omitted]

Accordingly, a Board rule governing a representation proceeding need not be an 'absolute guarantee' that the election will, without exception, reflect the choice of a majority of the voting employees. Rather, the rule simply must be 'consistent with' and constitute a 'justifiable and reasonable adjustment to the democratic process.' [citation omitted]

Midland Nat'l Life Ins. Co., 263 NLRB supra at 131.

Ensuring the integrity of the representation proceedings under the CMPA requires the Board to accommodate these same factors and conflicting interests. Thus, the Board has reviewed objections to an election within this context and under the circumstances of each

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There is no dispute that the Board's offices were in fact closed for approximately 2 hours of the polling period on the last day of the election. Moreover, affidavits submitted by AFSCME in response to the Board's investigation established that eligible voters indeed attempted to vote during this period and could not because the polling site, i.e., the Board's office, was closed.

Notwithstanding alternative means and procedures available to voters under the Board Directed Election Procedures, we find the unscheduled closing of the polling site on the last day of the election—a period often associated with a rush of last minute voters—not only contravened established election procedures but creates the real possibility of disturbing the kind of laboratory conditions under which the elections should be conducted. See, Vaughn Bennet, et al. v. International Association of Firefighters, Local 36, et al., 43 DCR 1494, Slip Op. No. 461 at n. 7, PERB Case No. 95-RD-01 (1996). The closing of the poll cite prevented eligible voters of what could have been the only opportunity they may have had to vote. We cannot second guess whether or not voters were limited to this one opportunity nor can we say with certainty the number of voters that may have been precluded from voting since potential voters (both known and unknown) had a right to expect the polling site to be open during this time.

Based on our discussion and the uncontroverted facts concerning this objection, we find a hearing pursuant to Board Rule 515.4 unnecessary to reach our conclusion that this objection meets the prescribed standard under the CMPA and Board Rule 515.2. Therefore, we sustain the objection and, pursuant to Board Rule 515.6, shall declare the election inconclusive.^{2/}

campaign and election, while being cognizant of these sometimes competing factors and interests. Fraternal Order of Police, Metropolitan Police Department and District of Columbia Metropolitan Police Department and International Brotherhood of Police Officers, Local 442, 28 DCR 5018, Slip Op. No. 23, PERB Case Nos. 81-R-05, 81-S-02 and 81-R-09 (1981).

^{2/} In view of our disposition of this objection, we have no occasion to address AFSCME's other objection. We are nevertheless concerned by the implications of the percentage return on the mail ballots issued by eligible voters, i.e., that a significant number of mail ballots may not have reached their intended addressee. We will be mindful of providing greater assurances in

(continued...)

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Consequently, in accordance with Board Rule 515.7, the election is further declared null and void and another election is directed among the two choices on the ballot that received the most votes, i.e., AFGE and AFSCME. The election shall be conducted in accordance with the Board Directed Election Procedures attached and made part of this Decision and Order.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Objection to the election filed by the American Federation of State, County and Municipal Employees, Local 1033 (AFSCME) is sustained.
2. The mail ballot election conducted among the non-professional allied health care employees be declared inconclusive and thereby set aside as null and void.
3. The election to determine the certified representative of the allied health care employees unit at the District of Columbia Health and Hospitals Public Benefit Corporation (PBC) shall be conducted by the Board in accordance with Board Directed Election Procedures. Pursuant to Board Rule 515.7, the labor organizations appearing on the ballot shall be the American Federation of Government Employees, District 14 and AFSCME. AFSCME, AFGE and the PBC may, by mutual agreement, retain the services of a third party to conduct an on-site election. Any mutual agreement between the parties must be reached and submitted to the Board's Executive Director for review within fourteen (14) days following the issuance of this Decision and Order.
4. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
May 28, 1999**

²(...continued)

this regard in mail ballot elections. Such measures will be reflected in the Board Directed Election Procedures attached to our Order.

BOARD DIRECTED ELECTION PROCEDURES

Pursuant to the Decision and Order of the Public Employee Relations Board (Board) in Case No. 97-UM-05, Opinion Nos. 559, 564 and 589, a secret ballot election shall be held in the unit described below, previously found appropriate by the Board, to determine whether the unit employees wish to be represented by the **American Federation of State, County and Municipal Employees, Local 1033 (AFSCME)** or the **American Federation of Government Employees (AFGE)**, District Council 14.

1. CONDUCT OF THE ELECTION

By direction of the Board, a secret ballot election shall be conducted by the Board.

2. APPROPRIATE UNIT

All allied health non-professional and technical employees employed by the Health and Hospitals Public Benefit Corporation (PBC); but excluding all management officials, confidential employees, supervisors, employees engaged in personnel and labor management relations work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

3. THOSE ELIGIBLE TO VOTE

All those employees described in the appropriate unit in paragraph 2 above that are on the payroll as of **June 20, 1998**, and that are still employed on the date of the election.

4. The PBC shall generate two lists of eligible voters. One list shall be a comprehensive list of all eligible employees in alphabetical order. The second list shall be a comprehensive list of all eligible employees grouped together under their currently designated work location. The PBC shall provide **AFGE and AFSCME** with a copy of these two lists, and file a confirmation to this effect with the Board, on or about **June 11, 1999**. Any disagreement as to the names on the two lists or employees' designated work location shall be resolved on or before **June 22, 1999**. If any asserted disagreement is not resolved, the names and designated work locations provided by the PBC shall be used.

Board Directed Election Procedures
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The parties shall sign off on the conforming eligibility list. The PBC shall provide the Board with a copy of the conforming eligibility list, together with a corresponding set of employee name labels, no later than **June 25, 1999**. The list of eligible voters filed with the Board shall contain a certificate of service showing service on **AFGE and AFSCME**. This procedure will not prevent AFSCME or AFGE from challenging an individual's eligibility prior to the opening of the envelopes containing the ballots.

5. Issuance of Ballots: The Board's staff shall prepare the secret mail ballots and transmit them to the PBC by **July 7, 1999**. The PBC will hand-deliver the secret mail ballots directly to all employees on the eligibility list (grouped by work location version) at their work site during normal working hours for a period of ten consecutive work days commencing on **July 8, 1999, and ending on July 21, 1999**. In order to receive a ballot, the voter shall produce two pieces of identification (preferably one of which is a PBC ID card). The outer envelope will contain the words **"DO NOT DESTROY/BALLOT ENCLOSED."**

Upon receiving a ballot, the employee shall sign his/her name next to his/her name on the eligibility list used at that location. At the conclusion of the issuance period, the PBC shall make copies of the signed eligibility list(s) used at each work location for **AFGE and AFSCME** and make arrangements for the Board to receive the original signed eligibility list(s) in its office no later than **July 22, 1999**. The signed eligibility list(s) shall be accompanied by all unissued ballots, if any, and an explanation why the ballots were not issued. The PBC shall make continuing efforts to provide all employees on the eligibility list who did not receive a ballot during the issuance period with a copy of the Board's Notice of Election.

If an eligible voter does not receive a mail ballot during the issuance period or the ballot he/she received is inadvertently lost or destroyed, such voter may call the Board and make arrangements to obtain a ballot and vote at the Board's office from **July 22, 1999 to July 30, 1999**. To obtain a ballot and vote at the Board's office, the voter shall produce two pieces of identification (preferably one of which is a PBC ID card). Where a duplicate ballot is being provided by the Board, the outer envelope for such a ballot will be marked "Duplicate Ballot." All ballots must be received by the Board at the designated address on the return envelope by **4 p.m. on July 30, 1999**.

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6. Wording on the Ballot: The wording on the ballot will be as shown in the sample ballot annexed hereto.

7. Posting and Posting Period: The Board shall furnish the PBC with the Notice of Election by **June 18, 1999**. The Notice of Election will be posted in conspicuous places at the various work sites where allied health employees are located (including places where notices to employees are customarily posted) no later than **June 28, 1999**. The Notice of Election will also advise employees participating in the mail ballot vote that if anyone does not receive the ballot at their designated work location during the issuance period (**July 8, 1999 to July 2, 1999**) he/she may contact the Board and make arrangements to obtain a ballot and vote in person at the Board's office. The Notice shall also state that the ballots may be sent to the Board at the designated address on the stamped return envelope by regular U.S. Mail, by special overnight mail delivery, or hand-delivered on or before the voting deadline of **4 p.m., July 30, 1999**.

8. Challenged Ballots: The parties will try to resolve challenged ballots before the ballots are tallied. Challenged ballots that are not resolved will be set aside and not opened unless they could affect the outcome of the election, in which case they will be resolved in accordance with PERB's Rules. Only the parties subject to these election procedures may file challenges. The Board will rule on the validity of individual ballots and the clear intent of the voter will be the prevailing standard.

9. The Ballot Tally and Its Service: The ballot will be checked against the eligibility list and then tallied at the Board's offices at **10 a.m., August 3, 1999**. Each party may have two official observers present. A report of the election results will be served by the Board on the parties within three (3) working days after the ballot tally.

10. Objections: Only the parties that are the subject of these proceedings may file such objections. All objections shall be processed in accordance with PERB Rules.

11. Certification of Results: The Board shall certify the results in accordance with PERB Rules.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD.
Washington, D.C.**

May 28, 1999

OFFICIAL SECRET BALLOT

Instructions for Mail Ballot — Please read carefully: Mark one box only. Do not sign the ballot. When you have finished marking one box, place the ballot in the enclosed secret ballot envelope and place the secret ballot envelope in the prepaid postage envelope. Seal and print your name and address on the prepaid postage envelope and sign in the space indicated. Mail your ballot promptly. **YOUR BALLOT MUST BE RECEIVED BEFORE 4 P.M. ON JULY 30, 1999,** in order to be counted. If you damage or lose your ballot, please call the Board at (202) 727-1822.

Do you desire to be represented for
the purpose of collective
bargaining on compensation and
other terms and conditions of
employment by:

(SELECT ONLY ONE)

American Federation of Government
Employees, District 14 (AFGE)

American Federation of State,
County and Municipal Employees,
Local 1033 (AFSCME)

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INSTRUCTIONS FOR MAIL BALLOT

1. The envelope forwarded to each voter contains one ballot, envelope marked "Secret Ballot" and a return self-addressed postage stamped envelope.
2. The voter indicates his or her choice by clearly marking an "X" or a "✓" (check) on the designated line on the ballot.
3. The ballot should then be placed in the envelope marked "Secret Ballot". The envelope should be sealed and placed in the self-addressed stamped envelope. The voter must sign and print his or her name on the outside envelope and promptly mail it.
4. Envelopes received after **4 p.m. on July 30, 1999**, at the designated address will not be counted. You may hand deliver your ballot to the designated address in lieu of mailing it.
5. Only the official ballot in the enclosed return envelope will be accepted. The voter is not to write his or her name or otherwise identify him or herself on the ballot; the secrecy of the voting process must be maintained at all times.

The returned ballots will be counted on **August 3, 1999**, at **10 a.m.** in the offices of the PERB.

Any questions regarding these election instructions may be directed to the PERB at the following address and telephone number.

**D.C. Public Employee Relations Board
717 14th Street, N.W. , 11th Floor
Washington, D.C. 20005
(202) 727-1822**

CERTIFICATE OF SERVICE

This is to certify that the attached Decision On Objections and Direction of Election in PERB Case No. 97-UM-05 was sent via mail (U.S. Mail) to the following parties on the 28th day of May, 1999:

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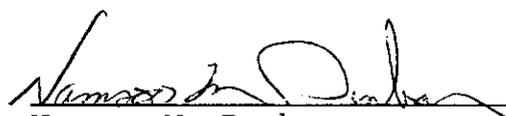
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