

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-06

Date: April 6, 2015

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel



SUBJECT: Guidance Memorandum on Representation Case Procedure Changes
Effective April 14, 2015

I. INTRODUCTION

On December 15, 2014, the Board adopted a final rule¹ that will modify in certain respects the procedures applicable to the processing of representation cases. These changes are scheduled to go into effect on April 14, 2015 and will apply to all representation cases filed on or after that date. Representation cases filed before April 14, 2015 will continue to be processed using the rules in effect before April 14, 2015.

In adopting the final rule the Board explained that the amendments made by the final rule remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated; unnecessary delay is reduced; procedures for Board review are simplified; and rules about documents and communications are modernized in light of changing technology. The Board adopted these amendments to provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.²

Neither the final rule, nor this memorandum, establishes new timeframes for conducting elections or issuing decisions. We will not be able to fully assess what impact the rule will have on the overall timing of elections until we have had some experience processing representation petitions under the final rule. Regions should continue to process representation petitions and conduct elections expeditiously, consistent with the Board's Rules.

The Agency is committed to providing ongoing guidance about the procedures that will govern the processing of representation cases after the implementation of the final rule.³ The

¹ 79 Fed. Reg. 74308.

² See 79 Fed. Reg. 74308.

³ Documents that will be available on the Agency website to assist in implementing the final rule include: fillable forms; sample completed forms; a document explaining the required format of the initial list and the voter list; and answers to frequently asked questions.

guidance provided in this memorandum is intended to explain, as clearly as possible, how representation cases will be processed from beginning to end, incorporating both the final rule changes and the procedures that remain unchanged. Where inconsistent, this memorandum supersedes the instructions in the Agency's manuals and other guidance, which will be updated in the near future. Although there may be issues about the implementation of the final rule that will require subsequent resolution, I am confident that the guidance provided herein will allow regions to implement the final rule effectively and efficiently. I am also confident that the dedication and professionalism consistently demonstrated by the personnel in the Agency's field offices will be exhibited in the implementation of the Board's new representation procedures.

A Committee comprised of senior managers from the Field and Headquarters carefully reviewed the final rule and identified and developed guidance for implementing it.⁴ This memorandum describes the changes made by the final rule and provides guidance to Agency personnel, parties, practitioners, and other stakeholders on how the final rule will impact representation case processing from the initial processing through certification.

II. INITIAL PROCESSING OF THE PETITION

A. Final Rule Changes to Initial Processing Procedures

The final rule makes the following changes to the initial processing of petitions:

- §102.60 requires the petitioner to serve the petition, a Statement of Position form, and a Description of Representation Case Procedures form on the employer and all other parties named in the petition and to file a certificate of service with the Region concerning those documents.

- §102.60 provides that representation case petitions may be E-Filed.

- §102.61 provides that, when filed, the petition must be accompanied by the petitioner's showing of interest.

- §102.61 requires that petitions in RC, RD, and RM cases include the name and contact information of the individual who will serve as the petitioner's representative and accept service of all papers in the representation proceeding and the type, date(s), time(s), and location(s) of election sought by the petitioner.

- §102.63(a) provides that within 2 business days after service of the notice of hearing, the employer must post a Notice of Petition for Election. The employer must also distribute the notice electronically if the employer customarily communicates with its employees electronically. It also provides that the pre-election hearing will generally be scheduled to open 8

⁴ The members of the Committee are: Region 14 Director Dan Hubbel; Region 18 Director Marlin Osthus; Region 5 Regional Attorney Paula Sawyer; Region 25 Assistant to the Regional Director Pat Nachand; Region 27 Assistant to the Regional Director Kelly Selvidge; Region 4 Deputy Regional Attorney Richard Heller; Region 7 Supervisory Field Examiner Elizabeth Kerwin; Region 2 Field Attorney Burt Pearlstone; Region 7 Field Examiner Ethan Ray; Senior Advisor Celeste Mattina; Assistant General Counsel Aaron Karsh; Assistant General Counsel Dottie Wilson; and Deputy Assistant General Counsel Dolores Boda.

days from the notice of hearing, and §102.64(c) provides that the hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.

- §102.63(b) requires non-petitioning parties to file a Statement of Position form before the hearing that identifies the issues they wish to litigate at the hearing and if they contend the proposed unit is not appropriate, the classifications, locations or other employee groupings that must be added to or excluded from the unit to make it an appropriate unit. The employer must also include an alphabetized electronic list(s) of employees with the full names, work locations, shifts, and job classifications of all individuals in the proposed unit and, if the employer claims the unit is inappropriate, a separate list of the full names, work locations, shifts, and job classifications of all individuals the employer claims should be added to the proposed unit in order to make it an appropriate unit. The employer must also separately indicate any individuals on the list whom it believes must be excluded from the proposed unit to make it an appropriate unit. Non-petitioning parties must also list those individuals whose eligibility to vote they intend to contest at the pre-election hearing and the basis for each such contention.

- §102.61(f) and 102.114(g) allow the showing of interest to be submitted by facsimile transmission.

B. Serving and Filing a Petition - §§102.60, 102.61 and 102.63(a)

Petition Forms: Petition forms in RC, RD, and RM cases have been revised to include the name and contact information of the individual who will be the petitioner's representative and accept service of all papers for purposes of the representation proceeding. The petition forms also include the petitioner's position on the type, date(s), time(s), and location(s) of election sought. To accommodate this additional information and ensure that the form remains readable, the petition form has been changed from one form where the petitioner checked a box to indicate the purpose of the petition (certification, decertification, unit clarification, etc.) to separate forms for RC, RD, RM, UC, UD, AC, and WH cases. All forms are available on the NLRB's website and in the NLRB's regional offices.

Service: To ensure the earliest possible notice of the filing of a petition and the Statement of Position requirement, a petitioner in an RC, RD, or RM case must serve on all parties named in the petition (1) a copy of its petition; (2) a Description of Representation Case Procedures (Form NLRB-4812); and (3) a Statement of Position form (Form NLRB-505). Both the Description of Procedures form and the Statement of Position form will be available on the NLRB website and in the regional offices. If the petition is E-Filed (through the Board's website, www.nlr.gov), the petitioner must serve the petition and forms on the parties by electronic mail (email), if possible. If a party does not have the ability to receive electronic service, that party must be notified by telephone of the substance of the transmitted document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.⁵ If the petition is filed by facsimile, §102.114(h) of the Board's Rules requires that service on the parties must be made in the same way as used to file the document, or in a more expeditious manner. When a party cannot be served by facsimile, or chooses not to

⁵ See §102.114(a) and (i).

accept service by facsimile, the party must be notified personally or by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service or overnight delivery service.

Filing: The petitioner may file the petition by E-Filing, by facsimile, by mail, or in person at one of the NLRB's field offices. The petition should be filed with the regional director for the regional office in which the proposed or actual bargaining unit exists. If the bargaining unit exists in two or more regions, it may be filed in any of those regions.

At the time of filing its petition, a petitioner seeking certification as the collective-bargaining representative (an RC case) or seeking to decertify an incumbent representative (an RD case) must provide the NLRB (but not the parties), evidence of employee interest in an election ("showing of interest"). This evidence is usually in the form of cards or signature sheets, which must be dated, authorizing the labor organization to represent the employees or providing that the employees no longer wish to be represented by the incumbent union.⁶ If a petition is filed by an employer (an RM case), the petitioner must provide, at the same time it files its petition, proof of a demand for recognition by the labor organization named in the petition or evidence supporting a statement of good faith uncertainty about majority support for an existing representative. If the showing of interest is E-Filed or faxed, the original of the showing of interest documents must be received by the regional office no later than 2 business days after the E-Filing or facsimile filing.⁷ If the E-Filed or faxed showing of interest is not followed by original documents containing handwritten signatures within 2 business days, the region will dismiss the petition.⁸

The petition may be amended before and during the hearing in the discretion of the regional director. If amended prior to the hearing, the petitioner should serve the amended petition on the other parties.

C. Docketing the Petition and Issuance of a Notice of Hearing - §§102.61 and 102.63(a)

A petition will not be docketed by the NLRB unless it is accompanied by both the showing of interest (original or electronically filed or faxed) and the required certificate of service showing that the petition, the Statement of Position form, and the Description of Representation Case Procedures form have been served on all the parties named in the petition. Upon filing, the petition is reviewed in the regional office for sufficiency and the showing of interest is checked to ensure that the petition is supported by at least 30 percent of the employees in the proposed unit. If both the petition and the showing are sufficient, the petition is given a case number, and assigned to a Board agent to process. RC, RD, or RM petitions should be

⁶ The Board directed the General Counsel to conduct an analysis, which is ongoing, of whether a practicable way exists for the Board to accept electronic signatures to support a showing of interest, while adequately safeguarding the important public interests involved.

⁷ See §102.61(f). Although the final rule says "2 days" instead of "2 business days," because the specified time is less than 7 days, pursuant to §102.111(a), the time is effectively 2 business days and is written that way here for clarity.

⁸ See 79 Fed. Reg. 74329.

assigned the highest docketing priority. A petitioner generally can expect that a petition received by noon will be served that same business day by the region.

A docket letter that transmits the petition, a Notice of Representation Hearing, a Notice of Petition for Election (Form 5492), a Description of Procedures in Representation Cases (Form NLRB-4812), and the Statement of Position (Form NLRB-505) is prepared for each party. However, a notice of hearing will not be included if it is apparent that dismissal of the petition is appropriate, for example if the petition is untimely filed. The region will mark the correspondence "Urgent," send the docket letter and all attachments by regular mail, and, to give the parties the earliest notice of the hearing and their obligations, will also send these documents by either email or facsimile transmission if available. If no email or facsimile number is listed on the petition, the region will attempt to obtain one to send these documents. In addition, the Board agent will attempt to contact the parties promptly after sending the documents to confirm their receipt and discuss processing the petition.

Except in cases presenting unusually complex issues, the regional director⁹ will set the hearing on the eighth day after service of the notice of hearing, excluding intervening holidays. If the eighth day falls on a Federal holiday or weekend, the hearing will be scheduled for the next business day. The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.¹⁰ The docket letters will inform the parties that we will continue to explore all potential areas of agreement in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Both the docket letter and the Notice of Representation Hearing will specify the due date for the Statement of Position, which will be noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice of hearing. If the hearing is set to open *more than* 8 days from the service of the notice, the regional director may set the due date for the position statement earlier than at noon on the business day before the hearing. However, parties will have at least 7 days notice of the due date for completion of the Statement of Position form in all cases. The Statement of Position form generally will be due no later than noon (in the time zone of the region issuing the Notice of Hearing) on the business day before the hearing so that it may serve its intended purposes of facilitating entry into election agreements and narrowing the scope of any hearing that must be held, thereby enabling the Board to expeditiously resolve questions concerning representation.

Form NLRB-4812, which accompanies the docket letter and describes the procedures in representation cases, has been revised to reflect the changes described here and is available on the NLRB's website.

After the docket letters have been sent to the parties, the region should ensure that the E-Filed or faxed showing of interest is followed by original documents containing handwritten signatures within 2 business days. If not received, the region will dismiss the petition.

⁹ Any reference in this memorandum to the regional director includes an acting regional director.

¹⁰ See discussion below in Section V.L.

D. Notice of Petition for Election - §102.63(a)(2)

The employer is sent a Notice of Petition for Election with the docket letter and is notified that, within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If the employer customarily communicates with *all* the employees in the petitioned-for unit through electronic means, the employer must also distribute the Notice of Petition for Election electronically to the *entire* unit. If the employer customarily communicates with only some of the employees in the petitioned-for unit through electronic means, then the employer must distribute the Notice of Petition for Election electronically to those employees.¹¹

The employer must maintain the posting of the Notice of Petition for Election until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. Failure to properly post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed.

E. Statement of Position - §102.63(b)

The Statement of Position form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In RC cases, a Statement of Position must be filed by the employer; in RD and RM cases, a Statement of Position must be filed by the employer and the union. The Board did not require that an intervenor file a Statement of Position, but indicated that the regional director has discretion to impose this requirement on an intervenor.¹²

If a party contends as part of its Statement of Position that the proposed unit is not appropriate, the party will be required to state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. As part of their Statement of Position, the parties must also identify any other individuals whose eligibility they intend to challenge at the pre-election hearing and the basis of each such contention. As part of its Statement of Position form, the employer will also provide an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

The employer must submit the list in an electronic format approved by the General Counsel, unless the employer certifies that it does not have the capacity to produce the list in the required format. I have concluded that, for ease of access of the data, the lists must be filed in common, everyday electronic file formats that are searchable. The lists must be in a table in a

¹¹ See 79 Fed. Reg. 74379.

¹² See 79 Fed. Reg. 74375, fn. 325 and 74383.

Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word. The first column of the table must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections.

Ordinarily, the Statement of Position must be filed with the regional office and served on the other parties such that it is received by them by noon on the business day before the opening of the hearing. The Statement of Position form may be E-Filed, but unlike other E-Filed documents, will *not* be timely if filed on the due date but after noon in the time zone specified in the Notice of Representation Hearing.

F. Requests for Postponement of Hearing and Extension of Time to Submit Statement of Position - §102.63(a) and (b)

If a party wishes to postpone the hearing, it may make a request to the regional director. The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should be filed with the regional director and should include the positions of the other parties regarding the postponement. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request. The regional director also has discretion to postpone the hearing when the regional director concludes that it is highly probable that the parties will be able to enter into an election agreement.¹³

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.

G. Dismissal or Withdrawal of Petition

The petitioner may be asked to withdraw its petition if the investigation discloses, for example, that further processing is inappropriate because of a lack of jurisdiction or because the petition is untimely. A regional director may approve a petitioner's oral request to withdraw a petition. If the petitioner refuses to withdraw the petition, the regional director may dismiss it and advise the petitioner of the right to request review by the Board of the regional director's dismissal.

¹³ See 79 Fed. Reg. 74424.

III. ELECTION AGREEMENTS

A. Types of Election Agreements

By entering into an election agreement, the parties can avoid the time and expense of participating in a pre-election hearing. Three types of agreements are available to resolve representation issues: (1) a consent election agreement which provides that the regional director's rulings on challenged ballots and election objections are final and binding; (2) a full consent agreement, which provides for final regional director determination of both pre-election and post-election disputes; and (3) a stipulated election agreement, under which the regional director will resolve any post-election disputes subject to discretionary Board review. In about 90 percent of the cases, with Board agent assistance, the parties enter into an election agreement that specifies the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit are eligible to vote, and the type, place, date, and hours of voting, along with any special eligibility formulas.

Consistent with current practice, the Board agent will contact the parties shortly after the petition is filed to explore the possibility of entering into an election agreement and narrowing the issues if a hearing is held. If an election agreement is reached and approved before the Statement of Position is due, the Statement of Position need not be filed. Even if an election agreement is not reached, the Board agent should seek the parties' positions and explore agreement on all issues, including issues that need not be litigated in a pre-election hearing under the final rule.

B. Agreement to Vote Certain Individuals Subject to Challenge

The final rule leaves to regional directors' discretion what percentage of the unit with individual eligibility or inclusion issues may be deferred. The Board noted that it had uniformly held that a change affecting no more than 20 percent of the unit does not require a new election. On occasion, the Board has also permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters. The Board expressed confidence that regional directors will consider that precedent in exercising their discretion under the final rule and said it would expect regional directors to typically exercise their discretion in favor of approving parties' stipulated election agreements in which up to 20 percent of the unit is to be voted under challenge.¹⁴

If the parties enter into an election agreement and also agree that certain classifications or job titles will vote subject to challenge, the agreement to vote those individuals subject to challenge should be part of the election agreement.

C. Time to Provide Voter List - §102.62(d)

Absent agreement of the parties to the contrary specified in the election agreement, the employer must provide the voter list to the regional director and the parties within 2 business days after the regional director's approval of the election agreement. Any agreement by the

¹⁴ See 79 Fed. Reg. 74388 fn. 373.

parties to extend the time for providing the list must be approved by the regional director, and it is expected that any extension will be brief.

D. Election Date

The Board has said that the election should be held at the earliest date practicable consistent with the Board's rules. At this point, because there is no experience processing cases under the final rule, it is not possible to express a standard in terms of a specific number of days from the filing of the petition to the election. Rather, I expect that regional directors will exercise their discretion and approve agreements where the date agreed upon by the parties is reasonably close to the date when an election would likely be held if it were directed. Factors that will influence the date when a directed election would occur include the number of likely days of hearing, the length of time required to write the decision, and whether the parties entitled to the voter list have waived some or all of the time to have the list. As suggested by the Board,¹⁵ regional directors' discretion in selecting an election date should continue to be guided by the factors listed in CHM §11302.1: the desires of the parties, operational considerations, the desirability of facilitating employee participation, and the prompt and timely conduct of the election.

IV. HEARING PREPARATION

If the parties have not entered into an election agreement, the region should, where appropriate, conduct a pre-hearing conference at the regional office or by conference call for the purpose of further exploring the possibility of entering into an election agreement or narrowing the issues to be litigated at a hearing.

At this conference, the Board agent should explore the issues raised in the Statement of Position and attempt to obtain an election agreement. If an agreement is not possible, every effort should be made to narrow the issues for hearing and to reach written stipulations on the issues that are not in dispute, such as commerce, labor organization status, eligibility formulas, unit inclusions, and unit exclusions. These stipulations can either be read into the record or be introduced as exhibits during the hearing. The Board agent should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

Prior to the hearing, the hearing officer should be certain to research the potential issues to ensure that he or she is fully aware of the applicable legal standards under the most current Board law. The NLRB Guide for Hearing Officers in Representation and Section 10(k) Proceedings and the Outline of Law and Procedure in Representation Cases are excellent starting points for such research, but such research should be supplemented with a review of the most current case law, particularized to the type of industry and employee classifications likely to be at issue.

The hearing officer should also determine whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. A list of presumptions is provided in Section V.H., below. If a party raises statutory exclusions, such as

¹⁵ See 79 Fed. Reg. 74405.

§2(11) supervisory status, independent contractors, or agricultural workers, or exclusions based on policy considerations, such as managerial employee or confidential employee, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 395 (1989) (as a general rule, if the unit is appropriate, the burden is on the party asserting the employee or the employee classification ineligible); *Sweetener Supply Corp.*, 349 NLRB 1122 (2007) (burden of proof rests on the party asserting ineligibility to vote); *Crest Mark Packing Co.*, 283 NLRB 999 (1987) (party claiming an exclusion because of confidential status has the burden of establishing that exclusion); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (party claiming supervisory status has the burden of proving the status).

Before the hearing begins, the hearing officer should have a meeting with the regional director to review the Statement of Position and discuss the issues that have been raised.

V. HEARINGS

A. Final Rule Changes to Hearing Procedures

The final rule amendments regarding pre-election hearings include:

- §102.64(a) states that the purpose of the pre-election hearing is to determine if a question of representation exists and provides that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.
- §102.65(a) and (b) are amended to provide that regional directors will rule on motions to amend the petition or to intervene.
- §102.65(e)(3) is amended to state that if a motion for reconsideration based on changed circumstances or a motion to reopen the record based on newly-discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or to permit the moving party to challenge the ballots of such employees, even if they are specifically included in the direction of election in any election conducted while such motion is pending.
- §102.66(a) provides that any party shall have the right to call, examine, and cross-examine witnesses, and to introduce into the record, evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation.
- §102.66(b) provides that, at the beginning of the hearing, the Statement of Position (SOP) is introduced into the record and all other parties are required to respond to issues raised in the SOP before other evidence is received. The hearing officer will not receive evidence concerning any issue on which parties have not taken an adverse position, except that this will not preclude the receipt of evidence concerning the Board's statutory jurisdiction or limit the regional director's discretion to direct the receipt of evidence concerning any issue the regional director deems necessary, such as the appropriateness of the proposed unit.
- §102.66(c) provides that the regional director will direct the hearing officer regarding the issues to be litigated at the hearing.

- §102.66(d) provides that a party is precluded from raising or litigating any issue that it failed to raise in its timely Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to statutory jurisdiction. If the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and the eligibility or inclusion of any individuals at the pre-election hearing.

- §102.66(g) provides that, before the hearing closes, the hearing officer will solicit the parties' positions on the type, date(s), time(s), and location(s) of the election, the eligibility period and the name and contact information of the employer's on-site representative to whom the regional director should transmit the Notice of Election. The hearing officer will inform the parties of their obligations if an election is directed and of the time for complying with such obligations.

- §102.66(h) provides that, at the close of hearing, parties are permitted to make oral arguments on the record, but are permitted to file post-hearing briefs only with special permission of the regional director.

B. The Roles of the Regional Director and the Hearing Officer

The regional director will decide which issues will be litigated at the hearing, whether to allow intervention, amendments of the petition or the Statement of Position, or filing of post-hearing briefs, and whether to grant postponements or continuances of the hearing.

The hearing officer's role is to ensure a complete record as to issues relevant to a question concerning representation and any other issue the regional director has decided should be litigated at the pre-election hearing. The hearing officer may question witnesses and introduce documentary evidence, to the extent necessary, to ensure the record evidence is sufficient to enable the regional director to decide these issues. The hearing officer should also make sure the record does not contain irrelevant, duplicative, or otherwise unnecessary evidence. While the hearing officer must always be respectful to the parties and their representatives, he or she must also strive to ensure that the record is concise.

At the beginning of the hearing, the hearing officer should obtain the petitioner's response to the issues raised by the other party(ies) in their Statement(s) of Position. The hearing officer has discretion to ask each party to make an offer of proof as to the evidence that they would present in support of their position on any of the issues in dispute, but may not preclude a party from presenting that evidence without first obtaining the regional director's approval.¹⁶ Once the regional director has determined which issues should be litigated, the hearing officer should identify these issues on the record. The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position and that general conclusory statements by witnesses will not be sufficient. *The Republican Co.*, 361 NLRB No. 15, slip op. at 8 (2014); *Lynwood Manor*, 350 NLRB 489 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006). The hearing officer will not receive evidence concerning any issue as to which parties have not taken adverse positions, except the hearing officer may receive evidence regarding the

¹⁶ See discussion below in Section V.I.

Board's jurisdiction, the appropriateness of the unit, or any other issue the regional director determines is necessary.

C. Issues to be Litigated in a Pre-Election Hearing - §§102.64(a) and 102.66(a)

Issues relevant to a determination of whether a question concerning representation exists must be litigated at a pre-election hearing. The final rule grants regional directors discretion to defer litigation concerning individual eligibility or inclusion issues that do not significantly change the size or character of the unit until after the election, where appropriate, thereby giving regional directors tools to reduce litigation of issues that are unnecessary to decide before the election and that may be rendered moot by the election results or resolved by the parties after the election. Eligibility and inclusion issues concern either (1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory or policy exclusion or should not be in the unit. For example, if the petition calls for a unit of "production employees," excluding "guards and supervisors as defined in the Act," eligibility/inclusion issues would include: (1) whether employees who perform quality control functions are production employees; (2) whether Joe Smith is a production employee; (3) whether production foremen are supervisors; and (4) whether production employee Jane Doe is a supervisor.

As discussed more fully in the next section, some issues will continue to be decided prior to the election. The issue of whether there is an appropriate unit for an election, including unit scope questions,¹⁷ must be decided prior to the election. Issues such as jurisdiction, labor organization status, and various election bars must also be decided before the election.

However, the final rule now provides that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit "ordinarily" need not be litigated or resolved before an election is conducted. Such issues may be resolved after the election in a post election or unit clarification procedure, if necessary. The Board did not, however, define "ordinarily" or otherwise specify the percentage of unit employees whose unresolved voting eligibility is substantial enough to warrant pre-election litigation. In fact, the Board decided not to adopt a proposal that would have required that hearing officers bar litigation of disputes concerning the eligibility or inclusion of individuals comprising less than 20 percent of the unit. Rather than adopt a bright-line requirement, the Board decided to grant regional directors the discretion to make these decisions in a manner that is least likely to result in unnecessary litigation, while permitting litigation of eligibility/inclusion issues when in their judgment it is appropriate to do so.¹⁸ In making these determinations, regional directors should consider factors such as: the percentage of the unit in dispute; the anticipated amount of time that will be needed to litigate the

¹⁷ Multi-facility and multi-employer issues are commonly referred to as unit scope issues. See discussion below in Section V.D.

¹⁸ The Board noted that it strongly believed that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election litigation of eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. On occasion, the Board has permitted regional directors to defer resolution of the eligibility of more than 20 percent of potential voters, though it recognizes that allowing 25 percent of the electorate to vote subject to challenge is not optimal. See 79 Fed. Reg. 74388 fn. 373.

eligibility/inclusion issue(s) (i.e., number of witnesses, etc.); the anticipated amount of time that will be needed to draft a decision on the issue(s) (i.e., the complexity and novelty of the issue(s)); the size of the unit; whether an eligibility/inclusion issue is the sole issue in dispute; whether inclusion or exclusion of a classification at issue might significantly change the size or character of the unit; the parties' positions on litigating the issue(s); and any other factors that the regional director deems relevant.

If multiple eligibility/inclusion issues together involve more than 20 percent of the unit, the regional director may identify a subset of the issues involving less than 20 percent of the unit and defer those issues while conducting a hearing on the remaining issues. In determining which issues to litigate, the regional director may attempt to determine which issue(s) can be handled most expeditiously at the hearing and in the decision. To this end, the regional director may in some situations instruct the hearing officer to request the parties to make offers of proof as to their positions on the issues and to identify the witnesses and evidence they would proffer at the hearing. The regional director could also request the hearing officer to determine whether the parties can agree as to which issues should be litigated and which should be deferred.

There may, of course, be situations in which there are eligibility/inclusion issues in the context of significant differences between the parties' positions as to the unit. In these situations, the regional director should base the determination as to the percentage of the unit affected by eligibility/inclusion issues on the size of the petitioned-for unit and any other unit in which the petitioner is willing to proceed to an election. Thus, if the petitioner asserts that it would be unwilling to proceed to an election concerning an employer's alternative unit, the regional director need not take into account the size of that unit. If, on the other hand, the petitioner is willing to proceed to an election in a unit proposed by the employer or another party, then the regional director will retain discretion to decide the most efficient means of structuring the litigation of eligibility/inclusion issues. In such a situation, the regional director may, of course, consider the relative percentage of eligibility/inclusion issues presented in each of the proposed units.

D. Specific Issues Appropriate for Pre-Election Hearing

As discussed below, issues that must be litigated in a pre-election hearing if in dispute include: (1) jurisdiction; (2) labor organization status; (3) bars to elections; (4) appropriate unit; (5) multi-facility and multi-employer issues; (6) expanding and contracting unit issues; (7) employee status of a significant portion of the unit; (8) seasonal employees; (9) inclusion of professional employees or guards with other employees in a unit; (10) eligibility formulas; and (11) craft and health-care employees. However, except for jurisdiction, preclusion will apply if any of these issues is not raised in the Statement of Position or disputed at the hearing.

1. Jurisdiction

A proper petition cannot be filed, and a question concerning representation (QCR) cannot arise under Section 9(c)(1) of the Act, unless the employees in the unit are employed by an employer covered under the Act. Issues relevant to whether the Board has jurisdiction over the employer must be litigated at the pre-election hearing. This would include establishing that the employer meets the Board's defined jurisdictional standards. See *Siemons Mailing Service*, 122

NLRB 81 (1959). When using the retail standards of gross volume of revenue, there must also be a showing of statutory jurisdiction, that is a demonstration of some flow of goods or services across state lines, valued greater than *de minimis*. This amount should be at a minimum \$5,000, as set out in the Pleadings Manual §401.9(a). See also *J. M. Abraham, M.D.*, 242 NLRB 839 (1979), in which statutory jurisdiction was established by receipt of Medicare funds and *International Longshoremen & Warehousemen's Union (Catalina Island Sightseeing)*, 124 NLRB 813 (1959), in which regulation by another Federal agency under the commerce clause established statutory jurisdiction. The employer or any other party has the right to present evidence regarding *statutory* jurisdiction, even if they take no position on the issue and even if the employer has not provided commerce information.

Regions should continue to determine all jurisdictional issues during pre-election proceedings, through hearings if necessary. One such issue is whether the employer falls within the statutory exemption for any state or political subdivision. See *Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). Another issue is whether the employer is subject to the Railway Labor Act. See, e.g., *Spartan Aviation Industries, Inc.*, 337 NLRB 708 (2002); *Federal Express Corp.*, 317 NLRB 1155 (1995), where the Board may refer these cases to the National Mediation Board for advisory opinions, if appropriate, i.e., NLRB jurisdiction is sufficiently doubtful. An additional jurisdictional issue is whether the employer is a religious organization. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Pacific Lutheran University*, 361 NLRB No. 157 (2014); *Catholic Social Services*, 355 NLRB 929 (2010). Finally, the region will need to decide prior to the election whether the employer is a horseracing or dog racing facility. See §103.3 of the Board's Rules and Regulations; *Prairie Meadows Racetrack and Casino*, 324 NLRB 550 (1997).

As set forth in CHM §11704.1, if an employer refuses a reasonable request by the Agency to provide information relevant to the Board's jurisdictional determination, jurisdiction will be found if the record establishes that the Board has statutory jurisdiction, even if no specific monetary jurisdictional standard is shown to be satisfied. *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958). See also *Continental Packaging Corp.*, 327 NLRB 400 (1998); *Major League Rodeo, Inc.*, 246 NLRB 743, 745 (1979). In this regard, the employer is required to provide a completed commerce questionnaire as part of its Statement of Position. If the employer does not submit a completed commerce questionnaire, the hearing officer must ensure that sufficient secondary evidence is available to determine whether the employer meets the standards for statutory jurisdiction. This includes evidence showing that the employer purchases goods and materials from out-of-state, sells its products to out-of-state entities, or performs work across state lines. Generally, the best source of such information is testimony of employee witnesses and documents provided by the petitioner. Information obtained from an employer's website may also be introduced into the record to establish jurisdiction. Thus, it is generally not necessary to issue a subpoena for commerce information where sufficient secondary evidence will be available to establish statutory jurisdiction. However, if there is doubt about the sufficiency of secondary evidence, the region should issue a subpoena as soon as possible.

2. Labor Organization Status

If a party contends that an entity is not a labor organization within the meaning of Section 2(5) of the Act, or refuses to stipulate to such status, the regional director must resolve this issue.

The Act requires that to be deemed a labor organization, an organization need only: (1) have employees participate in its activities; and (2) exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, and terms and conditions of employment. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Once the evidence adduced at the hearing establishes that these requirements have been met, the hearing officer should ensure that the record does not include unnecessary or irrelevant information concerning the labor organization.

Section 9(b)(3) issues as to whether a guard union admits nonguards to membership or is affiliated with an organization that admits nonguards to membership must be decided in pre-election proceedings. These issues may include determinations as to whether some of the employees in petitioned-for classifications are guards (see, e.g., *Boeing Co.*, 328 NLRB 128 (1999); *MGM Grand Hotel*, 274 NLRB 139 (1985)), as well as issues as to whether a union seeking to represent guards also represents nonguards (see *Burns International Security Services, Inc.*, 278 NLRB 565, 568 (1986); *Wells Fargo Guard Services*, 236 NLRB 1196 (1978)).

3. Bars to Election

All potential election-bar issues, including certification bar, contract bar, recognition bar, successorship bar, and election bar, must be litigated and resolved before an election can be conducted. Hearing officers must be thoroughly familiar with significant recent developments as to recognition bar and successorship bar.

In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the Board overruled *Dana Corp.*, 351 NLRB 434 (2007), and returned to the recognition-bar rule of *Keller Plastics Eastern*, 157 NLRB 583 (1966), under which an employer's voluntary recognition of a union, based on a showing of majority support, bars any challenge to the union's representative status for a "reasonable period of time," in order to give the new bargaining relationship a chance to succeed. The Board defined "reasonable period of time" as no less than six months after the parties' first bargaining session and no more than one year.

In *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board overruled *MV Transportation*, 337 NLRB 770 (2002), and returned to the successor-bar doctrine previously set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). This doctrine provides that, when a successor employer recognizes the incumbent representative of its employees, that representative is entitled to represent the employees in collective bargaining with their new employer for "a reasonable period of time" without challenge to its representative status. The Board modified the successor-bar doctrine as articulated in *St. Elizabeth Manor* by holding that the required "reasonable period of bargaining" would depend on whether the employer has expressly adopted the existing terms and conditions of employment as the starting point for bargaining.

4. Appropriate Unit Issues

A finding of an appropriate unit must always be made before conducting an election. Accordingly, the hearing officer must be sure that the record will enable a finding to be made that a unit is appropriate for the purposes of collective bargaining. In determining the

appropriateness of the unit, the region should apply the presumptions discussed more fully below in Section H.

5. Multi-Facility and Multi-Employer Issues

Multi-facility and multi-employer issues, commonly referred to as unit scope issues, must be determined prior to conducting the election. Where an employer operates at multiple locations, issues involving which facilities should be included in a unit must be litigated at the pre-election hearing. See *Hilander Foods*, 348 NLRB 1200 (2006); *Prince Telecom*, 347 NLRB 789 (2006). However, presumptions that apply in these cases may make it appropriate to limit the presentation of evidence.

Issues involving the nature of the employing entity that must be litigated at the pre-election hearing include: whether a single-employer or multi-employer unit is appropriate, see *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005); *Architectural Contractors Trade Association*, 343 NLRB 259 (2004); whether nominally separate entities constitute a single employer or alter ego, see *Lederach Electric, Inc.*, 362 NLRB No. 14 (2015); *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007); *Mercy General Health Partners*, 331 NLRB 783 (2000); and whether independent entities have a joint-employer relationship, see *CNN America, Inc.* 361 NLRB No. 47 (2014); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982).¹⁹ Also see *Oakwood Care Center*, 343 NLRB 659 (2004), in which the Board overruled *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), and held that combined units of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the consent of all parties.

6. Expanding and Contracting Unit Issues

If the employer contends that its business, or the applicable portion of its business, will be closing imminently, the regional director must make a pre-election determination on this issue. See *Hughes Aircraft, Co.*, 308 NLRB 82 (1992). Similarly, the regional director must make a pre-election determination regarding a contention that the petition should be dismissed because the bargaining unit is expanding and the employer does not presently employ a substantial and representative complement of employees. See *Yellowstone International Mailing*, 332 NLRB 386 (2000); *Toto Industries (Atlanta)*, 323 NLRB 645 (1997). Frequently, resolution of these issues requires evidence presented at a pre-election hearing. On these issues, an employer's contention must be based on evidence that is more than speculative. *Canterbury of Puerto Rico*, 225 NLRB 309 (1976). Even if the regional director decides not to dismiss the petition based on evidence adduced at the hearing, unit expansion may affect the date on which the election is scheduled.

7. Employee Status

Issues as to whether individuals are employees within the meaning of Section 2(3) of the Act must be litigated at the initial hearing if they involve the entire unit and should likely be

¹⁹ On May 13, 2014, the Board invited the parties and interested *amici* to file briefs in *Browning-Ferris Industries*, Case 32-RC-109684, to address whether the Board should adhere to its existing joint-employer standard or adopt a new standard.

litigated if they concern classifications that constitute more than 20 percent of the unit.²⁰ These include determinations of: whether individuals are statutory employees or independent contractors, *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015); *FedEx Delivery*, 361 NLRB No. 55 (2014); whether individuals are “agricultural employees,” see *Pictsweet Mushroom Farm*, 329 NLRB 852 (1999); *Cal-Maine Farms*, 307 NLRB 450 (1992), *enfd.* 998 F.2d 1336 (5th Cir. 1993); and whether graduate students who serve as teaching assistants and research assistants are employees, see *New York University*, 356 NLRB No. 7 (2010); *Brown University*, 342 NLRB 483 (2004); *Boston Medical Center Corp.*, 330 NLRB 152 (1999). As to the employee status of disabled clients, see *Brevard Achievement Center*, 342 NLRB 982 (2004).

8. Seasonal Operations

Whether the employer is a seasonal operation is an issue that must be litigated at the pre-election hearing because that impacts the date when an election is held. See, *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974); *Brookville Citrus Growers Assn.*, 112 NLRB 707 (1955). On the other hand, issues concerning the reasonable expectation of future employment of a small number of seasonal employees may be deferred to post-election proceedings. See, e.g., *Macy's East*, 327 NLRB 73 (1998); *Maine Apple Growers*, 254 NLRB 501, 502-503 (1981).

9. Professional Employees and Guards

Certain other issues also must be decided before the election. If a party contends that certain individuals are professional employees and those individuals are to be included in an appropriate unit of nonprofessional employees, the issue of whether they are professional employees must be decided before the election because professional employees must be given an opportunity to decide whether to be included in a nonprofessional unit, which requires special balloting procedures. *Sonotone Corp.*, 90 NLRB 1236 (1950). However, if a party contends an individual is a professional and the appropriate unit description excludes professionals, the contested individual can vote subject to challenge.

Additionally, if a party contends that one or more of the employees in the petitioned-for non-guard unit are guards, or vice-versa, this issue must be decided before the election to ensure that the unit does not run afoul of Section 9(b)(3). See, e.g., *Madison Square Garden*, 333 NLRB 643, 644 (2001). However, the issue of whether a particular employee should be excluded from a non-guard unit as a guard may be deferred to the post-election stage.

10. Eligibility Formulas

If a party contends that a different eligibility formula than the Board's standard formula must be used, this matter must be addressed before the election. See *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970) (formula for most part-time employees); *Marquette General Hospital*, 218 NLRB 713, 714 (1975) (healthcare industry); *Steiny & Co.*, 308 NLRB 1323 (1992) (construction industry); *Kansas City Repertory Theatre*, 356 NLRB No. 28 (2010) (employees with irregular employment in the entertainment industry).

²⁰ See discussion above regarding the percentage that may be left to challenge.

11. Craft and Health-Care Employees

A determination as to whether a petitioned-for craft unit is appropriate should also be made prior to the election. See *Mirage Casino-Hotel*, 338 NLRB 529 (2002); *Bartlett Collins Co.*, 334 NLRB 484 (2001). A determination must also be made as to whether the employer is an acute-care hospital such that the health-care unit rules apply.²¹

E. Issues That May Be Deferred for Post-Election Resolution

As discussed above, at the regional director's discretion, litigation and resolution of issues as to whether certain classifications are included in the unit may be deferred until after the election, if the petitioned-for unit or the unit in which the election will be conducted is an appropriate unit and the number of individuals in the disputed classification(s) would not significantly change the size or character of the unit.²² For example, if the employer contends that its only two quality control employees must be added to a petitioned-for unit of 50 production and maintenance employees, the regional director may direct that these employees vote subject to challenge rather than take evidence about them at the pre-election hearing.

The final rule generally divides eligibility/inclusion issues into two categories: whether individuals in an appropriate unit are ineligible because they are not employees as defined by the Act or are excluded by Board policy, and whether individuals fall within the terms used to describe the unit. Prior to the final rule, if parties did not agree to vote disputed supervisors subject to challenge, pre-election hearings would be held on this issue, even if they only involved a single individual or a miniscule portion of the unit, and even if the regional director or Board did not necessarily need to resolve those issues. Because these issues do not directly impact on whether there is a question concerning representation, regional directors may now decide not to permit litigation of them at the pre-election stage.

Moreover, the regional director may decide not to permit litigation of supervisory status prior to the election even if a party asserts that pro-union conduct by a supervisor tainted the petition or the showing of interest. See, e.g., *Terry Machine Co.*, 356 NLRB No. 120 (2011); *Harborside Healthcare*, 343 NLRB 906 (2004). Allegations of supervisory taint of the petition or showing of interest are normally determined through an administrative investigation conducted by the regional director independent of the pre-election hearing.

Because a petition filed by a supervisor cannot raise a valid question concerning representation, a dispute with respect to whether the individual filing a petition is a supervisor must be resolved at the pre-election stage, typically in an administrative investigation. *Modern Hard Chrome Service Co.*, 124 NLRB 1235, 1236 (1959).

Managerial employees present similar issues. Generally, these issues only affect a single individual or an insignificant portion of the unit and may be deferred until after the election. See *The Republican Co.*, supra. However, if the petitioned-for unit or a major portion of that unit is assertedly managerial, a hearing must be held to ascertain managerial employee status before the

²¹ §103.30 of the Board's Rules and Regulations.

²² See footnote 17 above.

election. See *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980); *Pacific Lutheran University*, supra.

Another statutory exclusion issue that can be deferred until after the election is whether an individual is employed by his or her parent or spouse. See *NLRB v. Action Automotive*, 469 U.S. 490 (1985); *Peirce-Phelps, Inc.*, 341 NLRB 585 (2004). Further, although not excluded by statute, Board policy also excludes confidential employees from bargaining units. See *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 US 170 (1981). Similar to supervisory and managerial issues, these issues of individual eligibility can be deferred until after the election.

Issues concerning whether individual employees or relatively small groups of employees fall within an appropriate unit may also be deferred until after the election. One such issue is whether an employee is an office clerical or a plant clerical. See *Kroger Co.*, 342 NLRB 202 (2004); *Caesar's Tahoe*, 337 NLRB 1096 (2002). Another is whether a "dual-function" employee should be included. See *Bredero Shaw*, 345 NLRB 782, 786 (2005).

Additional issues that can be deferred until after the election are whether an individual should be excluded as a "temporary" employee (see *Marian Medical Center*, 339 NLRB 127 (2003)) and whether an individual should be included in the unit as a regular part-time employee or excluded as a casual employee (see *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 (2003)).

Hearing officers should ensure, to the extent feasible, that the record contains the names and job classifications of the individuals whose eligibility to vote or inclusion in the unit is being deferred, in order to facilitate their opportunity to vote through the challenge procedures.

F. Parties' Right to Introduce Evidence that Supports Their Contentions and Is Relevant to the Existence of a QCR - §102.66(a)

The final rule provides that any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce evidence of the significant facts that support the party's contentions *and* are relevant to the existence of a question concerning representation. Hearing officers are no longer required to permit parties to fully litigate all eligibility issues prior to the direction of an election, meaning parties no longer have a right to litigate an individual's inclusion or eligibility. In explaining this rule change, the Board overruled *Barre-National Inc.*, 316 NLRB 877 (1995), where the Board held that employers have a right to litigate, before the election, the status of certain individuals it contended were supervisors.²³ In sum, the final rule does not limit any party's right to present evidence in support of their contention, so long as it is relevant to determining whether a QCR exists. The Board also overruled cases relying on the holding of *Barre National*, such as *North Manchester Foundry*, 328 NLRB 372 (1999). Moreover, in presenting evidence in support of its contention, a party has no right to present irrelevant evidence. *Mariah, Inc.*, 322 NLRB 586 fn. 1 (1996).

²³ 79 Fed. Reg. 74386.

G. Consequences of a Party's Failure to Take a Position on an Issue - §102.66(d)

After a Statement of Position is received into evidence, the other parties respond to each issue raised in the Statement. The regional director has discretion to permit parties to amend their Statements of Position or their responses in a timely manner for good cause. Good cause would not normally include situations where the party knew or should have known of the issue at the time the petition or Statement of Position was filed. Good cause may include situations of changed circumstances, but should be raised at the time the party learned of the change. If the regional director permits a party to amend its Statement of Position, the other parties should respond to each amended position.

A party generally may not raise any issue, present any evidence relating to any issue, cross-examine any witness concerning any issue, or present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response. However, if a party's Statement of Position does not raise an issue of the eligibility or inclusion of a particular individual, and that individual's status is not specifically addressed in the decision and direction of election, that party could still challenge the individual at the election. In addition, no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction and the regional director has the discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary. If the party contends that the proposed unit is not appropriate in its Statement of Position, but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party may not raise any issue or present any evidence or argument about the appropriateness of the unit. If the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

H. Presumptions Regarding Bargaining Units

Nothing in the Act requires that the unit for bargaining be the *only* appropriate unit or the *most* appropriate unit. *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). In determining appropriate units, the Board has established, either through case law or rulemaking, the following presumptions related to appropriate units:

- **Employer-wide unit:** Employer-wide unit presumptively appropriate. See, e.g., *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998);
- **Single plant unit:** Presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Hilander Foods*, 348 NLRB 1200, 1200 (2006); *J & L Plate*, 310 NLRB 429 (1993);

- **Acute-care hospital units:** Board's healthcare rules establishing eight appropriate units through rulemaking (§103.30), 29 C.F.R. Sec. 103.30 (1990), upheld *American Hospital Association v. NLRB*, 499 U.S. 606 (1991);
- **Craft-wide unit:** *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966) (setting forth factors for determining when craft-wide unit is appropriate);
- **Plant-wide unit:** *Airco, Inc.*, 273 NLRB 348 (1984); *Livingstone College*, 290 NLRB 304 (1980) (all nonprofessionals in a college/university setting);
- **Service and maintenance unit:** *Laurel Associates, Inc.*, 325 NLRB 603 (1998);
- **Single-employer unit:** *Central Transport, Inc.*, 328 NLRB 407 (1999);
- **Single-store unit in retail industry:** *Haag Drug Co.*, 169 NLRB 877 (1968); *Sav-On Drugs*, 138 NLRB 1032 (1962);
- **Single-terminal unit:** *Alterman Transport Lines*, 178 NLRB 122 (1969); *Groendyke Transport*, 171 NLRB 997 (1968);
- **System-wide unit for public utility:** *Deposit Telephone Co.*, 328 NLRB 1029 (1999); *Colorado Interstate Gas Co.*, 202 NLRB 847 (1973);
- **Readily identifiable group of employees:** Where employees in a petitioned-for unit constitute a readily identifiable group that share a community of interest, the burden is on the non-petitioning party to demonstrate that any additional employees it seeks to include share "an overwhelming community of interest with the petitioned-for employees." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

I. Offers of Proof at the Hearing - §102.66(c)

Before the hearing, the regional director and the hearing officer will discuss potential hearing issues and the issues, if any, on which the director would like the parties to provide an offer of proof. The regional director will direct the hearing officer about the issues to be litigated at the hearing. A hearing officer may also require parties to make offers of proof as to any or all such issues. If the regional director determines that the evidence described in this offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

Offers of proof are often utilized as tools to focus and define issues and provide a foundation to accept or exclude evidence. Section 102.66(c) provides that the offer of proof may take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony.

J. Objections to the Conduct of the Hearing and Special Appeals - §102.65(c)

The final rule eliminated special appeals to the Board of actions or rulings by the hearing officer or the regional director. Instead, special appeals may only be filed with the regional director and with the regional director's permission. Parties may request special permission to appeal a hearing officer's ruling or to seek reconsideration of a regional director's ruling,

including rulings rejecting offers of proof.²⁴ However, if a request for review is filed and granted, the Board will review the hearing officer's rulings and the regional director's actions, regardless of whether a request for special permission to appeal has been filed. Thus, a party need not seek special permission to appeal a hearing officer's ruling to preserve an issue for review after the hearing.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and will be included in the record. No such objection is waived by further participation in the hearing.

Neither the filing, nor the granting, of a request for special permission to appeal from a ruling of the hearing officer will stay the hearing unless otherwise ordered by the regional director.

CHM §11203 contains helpful directives for handling special appeals from hearing officers' rulings:

- Parties may not directly appeal rulings of the hearing officer, except by special permission of the regional director.
- Parties have an automatic exception to unfavorable rulings made by the hearing officer when the entire record is considered by the regional director.
- Requests for special permission to appeal should be made promptly, in writing, and served on the regional director and other parties.
- If a party seeks an adjournment in order to prepare its request for special permission to appeal, the hearing officer may grant a minimal time to prepare and transmit a special appeal and resume the hearing immediately thereafter, or may deny the request for adjournment and direct the party to prepare and file the special appeal during a break in the hearing.

To minimize the filing of special appeals, the hearing officer should consult with regional management during the hearing about any potentially significant procedural and substantive issues upon which, consistent with the rules, the ruling will be made by the hearing officer, as opposed to the regional director.

K. Notices To Show Cause Issued Before the Hearing

A notice to show cause, sometimes issued before a pre-election hearing, elicits the functional equivalent of an offer of proof and permits the regional director to determine whether to conduct a hearing. *Mueller Energy Services, Inc.*, 323 NLRB 785 (1997) (through responses to a notice to show cause, regional director properly determined that a contract bar existed and no hearing was required). A notice to show cause may be issued instead of a notice of hearing if

²⁴ See, 79 Fed. Reg. 74426 fn. 526, where, in discussing adverse rulings on offers of proof, the Board noted that "parties retain the right to present their arguments directly to the regional director through a request for special permission to appeal."

the regional director determines there is not reasonable cause to believe that a question concerning representation exists.

L. Requirement That Hearings Continue From Day to Day - §102.64(c)

The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. As the term “extraordinary circumstances” suggests, regional directors should not, in most cases, look favorably upon parties’ requests for continuances beyond the next day. For example, a party’s request to gather additional evidence typically would not meet the standard of “extraordinary circumstances.” Moreover, a regional director would not normally agree to a request made during a hearing that is based on facts known to the requesting party prior to the hearing, if those facts were not brought to the region’s attention. If the regional director decides that extraordinary circumstances warrant a continuance to a non-consecutive day, this continuance should be for the briefest possible time.

A party requesting a continuance to a non-consecutive day should do so at the earliest feasible time. The requests may be made in writing or orally on the record. The requesting party must seek the other party’s position on the matter. The hearing officer will apprise the parties verbally of the regional director’s ruling.

M. Motions to Intervene or to Amend the Petition - §102.65(a) and (b)

All motions, including motions for intervention, must be in writing or made orally on the record during the hearing. Motions are filed with the regional director, or if made during the hearing, with the hearing officer.

A person seeking to intervene in a proceeding must make a motion for intervention, stating the grounds upon which it claims to have an interest in the proceeding. The regional director, or the hearing officer at the specific direction of the regional director, may permit intervention to the extent and upon such terms as the regional director deems proper. The intervenor will then become a party to the proceeding.

The hearing officer will rule either orally on the record or in writing on all motions filed at the hearing or referred to the hearing officer, except that the hearing officer will rule on motions to intervene and to amend the petition only as directed by the regional director. All motions to dismiss petitions will be referred for appropriate action at such time as the entire record is considered by the regional director or the Board.

N. Other Information at the Hearing

Prior to the close of hearing, the hearing officer will solicit the parties’ positions on the type, date(s), time(s), and location(s) of the election, and the eligibility period. No litigation of these issues is permitted. The hearing officer should also inquire whether ballots or notices are required in another language because potential voters speak another language and do not read English. If a party contends that foreign language notices or ballots are required, the record should reflect the basis of the claim and the approximate number of employees needing the foreign language notices or ballots. See CHM §11315.

The hearing officer must advise the parties what their obligations will be if an election is directed, such as the content and format of the voter list, and will inform the parties of the time for complying with such obligations. The hearing officer will also solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election, if an election is directed.

At the hearing, the hearing officer should encourage parties to state positions on all issues and explain the basis for their positions, and particularly elicit from the petitioner its position on proceeding to an election in any alternate unit which may be found appropriate. The hearing officer should ensure that all relevant off-the-record discussions are summarized and that the parties affirmatively agree to those summaries on the record.

The hearing officer should ensure that, to the extent feasible, the record includes the job titles and the names of all individuals who will vote subject to challenge. In addition, the hearing officer should ask the parties entitled to receive the voter eligibility list if they wish to waive some or all of the 10-day period that they are entitled to have the list. See *Ridgewood Country Club*, 357 NLRB No. 181 (2012).

O. Oral Arguments and Briefs

At the close of hearing, parties are permitted to make oral arguments on the record. The hearing officer will provide parties a reasonable period of time to prepare their oral arguments. Parties are permitted to file post-hearing briefs *only* with special permission of the regional director. The regional director specifies the time for filing such briefs and may limit the subjects to be addressed in post-hearing briefs. The regional director's ruling on whether briefs will be permitted will be stated on the record by the hearing officer.

In determining whether briefs may be filed, factors which may be considered include:

- Number and complexity of issues;
- Whether significant issues are presented that are factual, legal or both;
- Whether the law is in flux, settled, or recently changed;
- Whether the case presents issues that are of first impression, unusual, or novel; and
- The parties' positions on the necessity for providing written briefs.

Hearing officers should encourage the parties to address, in their oral arguments, specific issues in dispute and case citations in support of their positions. Additionally, a party may offer into evidence a brief, memo of points and authorities, or other legal arguments before the hearing closes so long as that filing does not delay the proceeding.

P. Hearing Officer Report of Pre-Election Hearing

As soon as practical after the hearing closes, the hearing officer should prepare a pre-election hearing officer's report using the hearing officer report form. The report is devoid of any recommendation, but includes the following information: (1) a summary of the oral arguments and the cases relied on by the parties in support of their positions; (2) the classification(s) and the number of employees in issue; (3) any stipulations reached by the parties

including those employees who the parties agree will vote subject to challenge; (4) any eligibility or inclusion issues and the number of employees in contention; (5) whether the regional director precluded the introduction of evidence, and the basis for the exclusion; and (6) the parties' positions about the election details, including the payroll period, the need for foreign language Notices and ballots, use of eligibility formulas, and the preferred type (manual, mail, or mixed), date, time, and place of the election.

VI. PRE-ELECTION DECISIONS

A. Final Rule Changes for Pre-Election Decisions

The final rule makes the following changes to the contents of a pre-election decision:

- §102.67(b) provides that the regional director ordinarily will specify the election details in the direction of election and will transmit the direction of election and the notice of election to the parties by email, facsimile, or overnight mail (if neither an email address nor a facsimile number was provided).
- §102.67(c) provides that a party may file a request for Board review of a regional director's pre-election decision at any time following the decision until 14 days after a final disposition of the proceeding by the regional director. A request for review will not operate as a stay of any action by the regional director unless specifically ordered by the Board.
- §102.67(l) provides that, absent extraordinary circumstances, within 2 business days after issuance of the direction of election, the employer must provide the regional director and the parties a list of the full names, work locations, shifts, job classifications, and contact information (including home address, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters and, in a separate section of the list, the same information for any employees directed to vote subject to challenge.

B. Expediting Pre-Election Decisions

Consistent with the Board's longstanding emphasis on expeditiously resolving questions concerning representation, expediting the issuance of pre-election decisions continues to be a priority. Therefore, regions should adopt practices that ensure that decisions are issued promptly.

One common practice that regions should follow is ensuring that Board agents assigned to draft pre-election decisions only work on drafting the decisions until completed. When necessary to ensure expedited issuance of a decision, regions should request to use the interregional assistance program for decision writing. If the Board agent assigned to draft a decision has other scheduled work, that work should either be deferred or reassigned. In addition, the assignment of the Board agent for decision drafting should be made once the hearing opens. This early assignment permits that agent to address other work and begin preliminary research on issues that are expected to be the subject of the hearing.

C. Direction of Election - §102.67(b)

A new element of most pre-election decisions is the inclusion of election details, including the type of voting, and the date(s), time(s), and location(s) of the election, as well as the eligibility period. The regional director ordinarily will not need to solicit party positions regarding election details after the close of the hearing because the hearing officer will have solicited those details prior to closing the hearing, and the decision will specify the type of voting, and the date(s), time(s), and location(s) of the election. However, in some cases, it may be appropriate for the director to consult with the parties concerning election details after the decision has issued, notwithstanding the parties' prior positions, for instance when the unit found appropriate differs substantially from the unit advocated by either party. In these limited circumstances where election details are worked out after issuance of the decision, the Board agent will attempt to reach the parties as expeditiously as possible to obtain their positions before the region specifies the type, date, time, and place of the election.

The decision will set the election for the "earliest date practicable" consistent with the Board's Rules. In accordance with CHM 11302.1, the date selected should balance the desires of the parties and operational considerations, along with the desirability of facilitating employee participation and of conducting a prompt and timely election. The election date, therefore, will be based on the circumstances of the case, including whether the parties entitled to receive the voter list waive the right to use the voter list for some or all of the 10-day period, and whether the notice and ballots must be translated into one or more foreign languages.²⁵ The Board has noted that, consistent with current practice, an election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served on the parties, unless this requirement is waived by the parties entitled to the list.

Absent extraordinary circumstances specified in the direction of election, the direction of election will state that the employer must provide the voter list to the regional director and the parties within 2 business days after issuance of the direction of election. A showing of extraordinary circumstances may be met by an employer's "particularized demonstration that it is unable to produce the list within the required time limit due to specifically articulated obstacles to its identification of its own employees."²⁶ The mere fact that the employer is decentralized, that the workforce is large, that a party may propose a multi-site unit, or that the employer relies on a third-party payroll company, does not warrant a blanket exception from the two-business day timeframe set forth in the final rule.²⁷

When the regional director issues a decision and direction of election in a unit larger than that requested by the petitioner, and the petitioner or an intervenor has indicated its willingness to participate in such an election, further processing of the petition is conditioned on the petitioner or an intervenor having an adequate showing of interest in the unit as directed. If the petitioner or an intervenor already has a sufficient showing of interest in the enlarged unit, the

²⁵ In deciding whether foreign language notices or ballots are necessary, the regional director will consider the factors set forth in CHM 11315.1.

²⁶ See 79 Fed. Reg. 74354-74355.

²⁷ See 79 Fed. Reg. 74355.

regional director should so indicate in the Decision and Direction of Election. If the petitioner or an intervenor does not have a sufficient showing of interest, the direction of election should be conditioned on the petitioner or an intervenor making an adequate showing of interest in the unit as directed. The petitioner or an intervenor may be given a reasonable period of time to secure the additional showing of interest, normally 2 business days after the issuance of the Decision and Direction of Election, or such further time as the regional director may allow based on sufficient justification. After a determination is made as to whether the petitioner or an intervenor has an adequate showing of interest in the enlarged unit, the Board agent will inform the employer in writing either of the employer's obligation to serve the voter list on the parties and the regional director within 2 business days of this notification, or that the petition has been withdrawn or will be dismissed due to an insufficient showing of interest.

D. Requests for Review - §102.67(c) – (j)

Requests for review of the regional director's pre-election decision can be filed at any time after issuance of a decision until 14 days after a final disposition of the proceeding by the regional director. The 14-day period commences when a regional director dismisses a petition, issues a certification of representative or results, or orders challenged ballots to be opened and counted. The Board will grant a request for review only where compelling reasons exist.

Accordingly, a party need not file a request for review of a decision and direction of election before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The request for review of the pre-election decision may be combined with a request for review of the regional director's decision on objections/challenged ballots. The grant of a request for review does not stay the regional director's action unless the Board specifically orders otherwise.

The final rule clarifies that when objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to a stipulated election agreement or a direction of election, a request for review of the regional director's decision and direction of election will be due at the same time as the exceptions to the administrative law judge's decision are due.

A party requesting review may also request extraordinary relief in the form of a stay, expedited consideration of a request, or impoundment of one or more ballots from the Board as described in §102.67(j). Relief will be granted only upon "a clear showing that it is necessary under the particular circumstances of the case."

VII. ELECTION PREPARATIONS AND ELECTION - §102.67(b) and (k)

A. Final Rule Changes for Election Preparations and the Election

The final rule makes the following changes to election preparations and elections:

- §§102.67(b) and (k) provide that, along with the decision and direction of election, the Region will email or fax to the parties and their designated representatives Notices of Election, which the employer is required to post. The employer must also distribute the notice electronically if the employer customarily communicates with its employees electronically.

- §§102.67(b) and (l) provide that the Notice of Election will identify employees who will vote subject to challenge by, for example, listing their job titles, shifts, work locations, and other descriptive factors.

B. Notice of Election - §§102.62(e) and 102.67(k)

When the election agreement is approved, the region will immediately notify the parties and their designated representatives by electronic means if possible. Together with the election agreement, the regional director will transmit a letter specifying the voter list requirements, such as the due date, content, approved electronic format, and the required means of transmitting the voter list to the parties and to the regional director. The regional director will also promptly transmit the Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail if no facsimile number or email address was provided. In addition, at the time the Notice of Election is transmitted, the region will send the parties a new form describing the election and post-election procedures in representation cases.

Similarly, if the election is directed, ordinarily the Notice of Election will be emailed or faxed to the parties, along with the decision and direction of election. If a party provides neither an email address nor a facsimile number, the regional director will send the decision and notice to the party by overnight mail.

If the election agreement or the direction of election provides for individuals to vote subject to challenge, the election notice will advise employees that some individuals will vote subject to challenge because their eligibility has not been determined. The notice usually will not name these employees, but rather will refer to their job titles, shifts, work locations, and other descriptive factors. The notice will provide as follows:

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether (insert classification(s)) are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The final rule requires employers to post the notice of election in conspicuous places in the workplace, including all places where notices to employees in the unit are customarily posted) at least three full working days (excluding Saturdays, Sundays and holidays) prior to 12:01 am on the day of the election. The employer is also required to distribute the notice electronically to unit employees if it customarily communicates with employees in the unit electronically, either by email or by posting on an employer intranet site or both. If the employer customarily communicates with only some of the unit employees electronically, the employer is to distribute the notice of election to that subset of the unit. The employer's failure to properly post or distribute the notice of election is grounds for setting aside the election whenever proper and timely objections are filed. However, a party may not object to the nonposting if it is responsible for the nonposting, and likewise may not object to the nondistribution of the notices if it is responsible for the nondistribution.

C. The Voter List - §§102.62(d) and 102.67(l)

The employer must provide the regional director and parties named in the decision an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters, accompanied by a certificate of service on all parties. The employer must also include in a separate section of that list the same information for those individuals who, according to the election agreement or direction of election, will be permitted to vote subject to challenge. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties.

To be timely filed and served, the list must be *received* by the regional director and the parties within 2 business days after approval of the election agreement or the direction of election unless a longer time was specified in the agreement or in the direction of election. **The region will no longer serve the voter list.** The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure.

The employer must submit the voter list in an electronic format approved by the General Counsel, unless the employer certifies that it does not have the capacity to produce the list in the required format. I have concluded that, for ease of use of the data by the parties entitled to the list before the election, the lists must be filed in common, everyday electronic file formats that can be searched. Accordingly, unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections.

The Board stated that it is presumptively appropriate for the employer to produce multiple versions of the list where the data required is kept in separate databases or files, so long as all of the lists link the information to the same employees, using the same names, in the same order and are provided within the allotted time.²⁸ If the employer provides multiple lists, the list used at the election will be the list containing the employees' job classifications.

The parties may not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.²⁹

²⁸ See 79 Fed. Reg. 74356.

²⁹ See discussion below in Section XI.

D. Challenges at the Election

In an election conducted pursuant to an election agreement, the parties will be responsible for making the agreed-upon challenges. In a directed election, the Board agent conducting the election must challenge anyone who has been permitted by the regional director or the Board to vote subject to challenge. To assist in identifying those individuals and to avoid post-election issues, the employer is required to include, in a separate section of the voter list, the names of such employees along with the same information for those employees voting subject to challenge as the required information for all other employees.

VIII. POST-ELECTION PROCEDURE AND DECISIONS

A. Final Rule Changes to Post-Election Procedures

The final rule includes changes to both Board procedure and the issuance of decisions involving post-election matters. The changes include the following:

- §102.69(a) provides that, when filing objections to an election, a party must also file an offer of proof in support of its objections, which identifies its witnesses and summarizes their testimony. A party filing objections must also serve a copy of the objections, but not the offer of proof, on all other parties and include a certificate of service when filing the objections.
- §102.69(c)(1)(i) provides that, where challenges and/or objections are determined administratively without a hearing in a stipulated or regional director directed election, the regional director may issue a certification of the results of the election, including a certification of representative where appropriate, which shall be final unless a request for review is granted.
- §102.69(c)(1)(ii) provides that where a post-election hearing on challenges and/or objections is conducted, it shall be scheduled for 21 days from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date.
- §102.69(c)(1)(iii) provides that a hearing officer's post-election report will be directed to the regional director. A party may file exceptions with the regional director, who would then issue a decision that will be final unless a request for review is granted by the Board in a stipulated or directed election case.
- §102.69(c)(2) provides that all appeals from a regional director's post-election decision will be discretionary, consistent with the standard of review now applied in reviewing pre-election decisions.

B. Filing Objections - §102.69(a)

Within 7 days after the tally of ballots has been prepared, any party may file objections to the conduct of the election or to conduct affecting the results of the election. The objections must be submitted within this time frame, regardless of whether the challenged ballots are sufficient to affect the results of the election. The objections must contain a short statement of the reasons for the objections and be accompanied by a written offer of proof identifying each witness the party would call to testify concerning the issue and summarizing the witness's testimony. Upon a showing of good cause, the regional director may extend the time for filing the offer of proof. The party filing the objections must serve a copy of the objections, but not the

written offer of proof, on each of the other parties to the case, and include a certificate of service with the objections.

C. Processing Objections and/or Challenges - §102.69(b) and (c)

Ordinarily, regional directors should not conduct investigations where affidavits are taken before deciding whether to set challenges or objections for hearing. Instead, the regional director should simply evaluate each objection and the accompanying offer of proof to determine whether the evidence described in the offer of proof “could be grounds for setting aside the election if introduced at a hearing.” Similarly, if a party has challenged a voter, the regional director should evaluate the challenge and the parties’ positions and supporting evidence to determine if the evidence “raises substantial and material issues.” If the applicable standard is met, the objection and/or challenge should be set for hearing. The notice of hearing will be transmitted to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). Where there are related objections and charges, regions should follow the procedures outlined in CHM §11407.

If the subject matter of the objections involves regional or Board agent misconduct that would require that a hearing officer outside the regional office be assigned to hear the matter, the case should be transferred to another region before an order directing a hearing issues so that exceptions to the hearing officer’s report will be reviewed by the out-of-region director.

D. Post-Election Hearings - §102.69(c)

If the regional director decides to issue a notice of hearing on the objections or challenges or both, the hearing will be scheduled for 21 days from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date or unless the regional director consolidates the hearing with an unfair labor practice proceeding before an administrative law judge.

In any proceeding involving a consent election where the representation case has been consolidated with an unfair labor practice proceeding for hearing, after issuing a decision the administrative law judge will sever the representation case and transfer it to the regional director for further processing. If there was no consent election, the administrative law judge’s recommendations on objections and/or challenges that have been consolidated with an unfair labor practice proceeding will be ruled upon by the Board if exceptions are filed.

The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. At the hearing, any party will have the right to appear in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party’s contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The hearing officer may rule on offers of proof without consulting with the regional director. Post-hearing briefs may be filed only upon special permission of the hearing officer and within the time set by the hearing officer and addressing the subjects permitted by the hearing officer.

E. Burdens of Proof in Post-Election Issues

With post-election objections, the objecting party bears the burden of proof relative to its objections. *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004). The objecting party's burden encompasses every aspect of a prima facie case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984). The burden of proof is on the objecting party to prove its case because a Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987).

With challenges to the ballots cast by voters, generally, the party seeking to exclude or disenfranchise an employee or employee classification has the burden of proof to sustain the challenge. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 (1989). That general assignment of the burden of proof has been followed in the situations described below:

- **Agricultural employee status/exemption:** *AgriGeneral L.P.*, 325 NLRB 972 (1998).
- **Confidential employees:** *Crest Mark Packing Co.*, 283 NLRB 999 (1987).
- **Disabled workers - employment principally characterized as rehabilitative:** *Goodwill Industries of North Georgia, Inc.*, 350 NLRB 32, 39 (2007).
- **Dual-function employee - if employee falls into a classification excluded from the unit, burden falls on party seeking the inclusion as a dual-function employee:** *Harold J. Becker Co., Inc.*, 343 NLRB 51, 52 (2004).
- **Independent contractor status:** *BKN, Inc.*, 333 NLRB 143, 144 (2001).
- **Laid-off employees - reasonable expectancy of recall:** *The Pavilion at Crossing Pointe*, 344 NLRB 582, 584 (2005).
- **Leave - employees on sick or disability leave - presumed eligible and party contesting eligibility must affirmatively show the employee has resigned or been discharged:** *Vanalco, Inc.*, 315 NLRB 618 (1994).
- **Managerial status:** *Allstate Insurance Company*, 332 NLRB 759 (2000); *Montefiore Hospital and Medical Center*, 261 NLRB 569, 572 fn. 17 (1982).
- **Not-on-list and other Board challenges - party seeking to exclude or disenfranchise:** *Sweetner Supply Corporation*, 349 NLRB 1122 (2007); *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986).
- **Office clerical:** *The Kroger Company*, 342 NLRB 202, 203 (2004).
- **Professional employee status - party seeking to rebut presumption in certain classifications has burden of proof:** *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999).
- **Quit before election - challenging party must demonstrate that the voter manifested a clear intent to quit before the election:** See *Orange Blossom Manor*, 324 NLRB 846, 847 (1997); cf. *Foote & Davies, Inc.*, 262 NLRB 238, 238 (1982).

- **Strikers** - economic striker abandoning interest in struck job: *Ms. Desserts, Inc.*, 299 NLRB 236, 237 (1990).
- **Strikers' jobs eliminated** - employer's burden to prove ineligibility: *Omaha Line Hydraulics Co.*, 340 NLRB 916, 917 (2003).
- **Strikers - replacement presumed permanent** - party seeking to rebut presumption has burden: *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995).
- **Supervisory status:** *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001).

F. Exceptions to Hearing Officer Reports - §102.69(c)(1)(iii)

In all cases, exceptions to hearing officers' reports are filed with regional directors instead of the Board. Any party may, within 14 days from the date of the issuance of a hearing officer's report, file with the regional director exceptions to the hearing officer's report, and a supporting brief, if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director.

Briefs in support of exceptions and answering briefs may not exceed 50 pages, excluding the subject index and table of cases and authorities, unless permission is obtained from the regional director by motion, setting forth the reasons for exceeding the limit, filed not less than 5 days (including Saturdays, Sundays, and holidays) before the date the brief is due. If a brief exceeds 20 pages, it must contain a subject index with page references and an alphabetical table of cases and authorities. All documents filed with the regional director must be double-spaced and on 8 ½ by 11-inch paper, and be printed or otherwise legibly duplicated.

G. Regional Director Decisions in Post-Election Proceedings - §102.69(c)(2)

If exceptions are filed to the hearing officer's report, the regional director will issue a decision, taking into account the exceptions and either affirming or rejecting the conclusions of the hearing officer. The regional director may also remand the case to the hearing officer for further hearing, if he or she deems it necessary. Whether or not exceptions to hearing officers' reports are filed, regional directors' decisions should include, where appropriate, a certification of results, including a certification of representative. If the regional director's decision orders ballots to be opened and counted, the request for review language included in the decision in a directed or stipulated election case should explain that requests for review to the decision and direction of election and the director's decision to open and count must be filed with the Board within 14 days of issuance of the regional director's post-election decision. To help protect voter secrecy, the region should not open and count until the time for filing a request for review has passed and no request was filed or the Board has ruled on the request for review. A post-election decision that directs a second election does *not* constitute a final disposition by the regional director, and parties may file a request for review at a later date.

When issuing decisions after receiving exceptions to post-election hearing officers' reports, regional directors should carefully review the hearing officer's report and the exceptions and briefs in support. The approach taken in a particular case depends largely on the hearing

officer's report, the nature of the exceptions, and the difficulties of the issues. A regional director's decision might be a pro forma adoption if the hearing officer's report covers the issues thoroughly, the exceptions basically repeat arguments made to the hearing officer, and those arguments are properly analyzed by the hearing officer's report. However, in other cases, regional directors may decide to specifically address the exceptions or elaborate on the hearing officer's report.

H. Board Review of Regional Director's Post-Election Decisions - §§102.62(b) and 102.67

The final rule makes the process for obtaining Board review of regional directors' dispositions of *post*-election disputes parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes.³⁰ As is currently the case, if a consent election has been held, the decision of the director is not subject to Board review. In cases involving stipulated election agreements and directed elections, the Board may grant or deny requests for review, and if the Board denies the request for review, the denial constitutes affirmance of the actions of the regional director. The Board's granting a request for review of a regional director's post-election decision will be discretionary, consistent with the standard of review now applied in reviewing pre-election decisions. A party seeking review from a regional director's post-election decision must identify a significant, prejudicial error or some other compelling reason for Board review, just as the current rules require with regard to a request for review of a regional director's pre-election decision.³¹

When no objections are filed and there are no determinative challenges, the certification should issue immediately after the expiration of the 7-day period for filing objections. However, if the election was directed, the certification will contain instructions on how to file a request for review of the regional director's pre-election decision, if not previously filed.

³⁰ Requests for Review of pre-election and post-election disputes may be filed separately or as one document. Papers filed with the Board must be typewritten or otherwise legibly duplicated on 8½ - by 11-inch plain white paper, with margins no less than one inch on each side; in a typeface no smaller than 12 characters-per-inch (elite or the equivalent); and be double spaced (except for quotations and footnotes).

³¹ The final rule does not change the standard for granting requests for review. §102.67(d) describes the requirements as follows: *Grounds for review*. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of: (i) The absence of or (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

IX. BLOCKING CHARGES - §103.20

The final rule provides that whenever a party to a representation proceeding files an unfair labor charge and desires to block the processing of the petition, or whenever any party to a representation proceeding desires that its previously filed unfair labor practice charge block the further processing of a petition, the party must request that the petition be blocked and must simultaneously file a written offer of proof in support of the charge that contains the names of the witnesses and a summary of each witness's anticipated testimony. Accordingly, under the final rule, the regional office will no longer block a representation case unless the party filing the unfair labor practice charge requests that the petition be blocked and simultaneously files the required offer of proof. Form NLRB-5546 may be used to request to block a petition and to provide the offer of proof. The rule also requires the charging party requesting to block the processing of a petition to promptly make its witnesses available.

X. ELECTION CERTIFICATIONS

Consistent with the current requirement set forth in CHM §11474, when individuals in a particular classification are voted subject to challenge either by agreement of the parties in an election agreement or by direction of the regional director or the Board, and the challenges are not determinative of the election results, the certification will state that the challenged classifications are neither included in nor excluded from the bargaining unit, inasmuch as no determination was made regarding the disputed placements. The language to be added where the election was directed will be:

However, (*unit category*) is neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the [regional director] [Board] did not rule on the inclusion or exclusion of (*unit category*) and ordered them to vote subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

The language to be added where the election was conducted pursuant to an election agreement will be:

However, (*unit category*) is neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the parties did not agree on the inclusion or exclusion of (*unit category*) but agreed to vote them subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

XI. USE OF VOTER LIST - §§102.62(d) and 102.67(l)

The final rule specifically provides that parties shall not use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters. For example, parties may use the voter list information to campaign and communicate with employees about the election, to investigate eligibility issues and/or objections, and to prepare for a post-election hearing on determinative challenges and/or objections or a unit clarification proceeding involving unresolved eligibility or inclusion issues that were not determinative of the results of the election. Similar usage of the list in connection with re-run elections and unfair

labor practice investigations and hearings is also permitted. Some examples of violations of this restriction are (1) selling the list to telemarketers, (2) providing it to a political campaign, or (3) using the list to harass, coerce, or rob employees.³²

A party may decide to raise allegations of misuse by filing objections to the election or an unfair labor practice charge. A party may also choose to seek to have the attorney or other representative responsible for this alleged breach disciplined for engaging in misconduct under §102.177 of the Board's Rules and Regulations.

The Board concluded that case-by-case adjudication is the appropriate way to consider circumstances in which a remedial order is appropriate so that it can tailor its order to the specific misuse and ensure that the remedy it imposes is effective.³³

XII. CONCLUSION

It is my sincere hope that this guideline memorandum assists in the implementation of the final rule, which allows us to better effectuate the policies and purposes of the Act as they relate to representation case processing. I thank the field personnel for their commitment in adopting and implementing the changes and for their efforts to inform the public about the changes. I intend to continually re-evaluate the procedures set forth above to ensure they are achieving the goals of fairly, efficiently, and expeditiously resolving questions concerning representation. In carrying out this re-evaluation, I assure you that I will solicit the views of the NLRB staff, practitioners, representatives, and the public, and that I will consider all suggestions when making a determination about further guidance to the field and the public.

If you have questions related to this memorandum, please direct them to your Deputy or Assistant General Counsel.

³² 79 Fed. Reg. 74358.

³³ 79 Fed. Reg. 74359.