

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 12-04

April 26, 2012

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

FROM: Lafe Solomon, Acting General Counsel

SUBJECT: Guidance Memorandum on Representation Case Procedure Changes

**I. INTRODUCTION**

Under the Act, one of the Board's principal responsibilities is to resolve a question concerning representation when employees and their employer are unable to agree whether the employees should be represented for purposes of collective bargaining. To fulfill this responsibility the Board has promulgated rules of procedure that govern the processing of representation petitions. Over the course of its history the Board has, from time to time, modified its representation procedures to increase efficiency, prevent parties from abusing the process, and eliminate unnecessary delay in the resolution of questions of representation.

On December 22, 2011, the Board adopted a final rule that will modify in certain significant respects the procedures applicable to the processing of representation cases. These changes are scheduled to go into effect on April 30, 2012 and will apply to all representation cases filed on or after that date. The provisions of the final rule are designed to reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation. The final rule is also intended to conserve time and resources for the Agency and parties participating in representation proceedings. The Board explained that the final rule will achieve these objectives by:

- Focusing pre-election hearings on those issues relevant to determining if there is a question concerning representation;
- Providing for post-hearing briefs after pre-election hearings only when it will assist decision makers;
- Reducing piecemeal appeals to the Board by consolidating requests for Board review of regional directors' pre-and-post election determinations into a single, post-election request;
- Making Board review of post-election regional determinations discretionary; and
- Eliminating duplicative regulations.

The final rule does not establish new timeframes for conducting hearings or elections. 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 that rule. This memorandum does not set forth new time goals for the issuance of decisions or the conduct of elections. Regions should continue to process representation petitions and conduct elections as expeditiously as possible, consistent with our statutory mission.

This memorandum provides guidance to Agency personnel, parties, practitioners, and other stakeholders on how the new rules will impact upon the processing of representation cases. It also incorporates recent developments in Board case law involving representation case issues. In addition, this memorandum describes certain best practices that have developed from the implementation of NxGen (the Agency's new case processing system) or have been identified through case processing. These procedures will enhance our efficiency and provide more field-wide uniformity and predictability in the processing of representation cases. A Committee comprised of senior managers from the Field and Headquarters identified and/or developed these procedures after a careful review of the Board's proposed rule changes and recent developments in case law and case processing.<sup>1</sup>

The changes to the rules are:

1) §102.64 is amended to expressly construe Section 9(c) of the Act to state that the statutory purpose of a pre-election hearing is to determine if a question concerning representation exists.

2) §102.66 is amended to clarify that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that which supports a party's contentions and is relevant to the existence of a question concerning representation. Consistent with this amendment, the rule eliminates Section 101.20(c) (along with all of Part 101, Subpart C).

3) §102.66(d) is amended to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the issues to be addressed and the time for filing, subject to the authority of the regional director.

4) §§ 102.67 and 102.69 are amended to defer most requests for Board review—with the exception of special permission to appeal—until after the election, when any such request can be consolidated with a request for review of any post-election rulings.

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<sup>1</sup> The following individuals comprised the Committee: Region 6 Director Bob Chester; Region 5 Director Wayne Gold; Region 18 Director Marlin Osthus; Region 28 Regional Attorney Mike Karlson; Region 34 Deputy Director John Cotter; Region 27 Assistant to the Regional Director Kelly Selvidge; Region 4 Supervisory Attorney Richard Heller; Region 2 Supervisory Attorney Suzanne Sullivan; Deputy General Counsel Celeste Mattina; Assistant General Counsel Charles Posner; Deputy Assistant General Counsel David Kelly; and Deputy Assistant General Counsel Dottie Wilson. Region 7 Director Steve Glasser also served on the Committee until his recent retirement. I want to thank the Committee members for their extensive efforts in preparing for the implementation of the new rules adopted by the Board.

5) §101.21(d) is amended to eliminate the recommendation (along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review.

6) §102.65 is amended to clarify and narrow the circumstances under which a request for special permission to appeal to the Board will be granted.

7) §§ 102.62(b) and 102.69 are amended to create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary.

The Agency is committed to providing ongoing guidance both to its workforce and the public about the procedures that will govern the processing of representation cases after the implementation of the new rules adopted by the Board. The guidance provided in this memorandum is intended to explain, as clearly as possible, how representation cases will be processed from beginning to end, incorporating to the extent necessary, the new rules and procedures that remain unchanged. Although there will be issues about the implementation of the new rules that will require a resolution by the Board, I am confident that the guidance provided here will allow regions to implement the new rules 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.

## **II. INITIAL PROCESSING OF THE PETITION**

### **A. Docketing of a Petition and Issuance of a Notice of Hearing**

A petition may be filed by fax, mail, or in person at one of the Agency's regional offices. A petition may not be filed electronically at this time. It may be filed by a labor organization seeking to represent employees (an RC petition), by a person seeking to decertify a current bargaining representative (an RD petition), or by an employer seeking to determine if a labor organization should be recognized as the representative of its employees (an RM petition). Petition forms are available on the Agency's website, [www.nlr.gov](http://www.nlr.gov), and in the regional offices.

A petitioner seeking certification as the collective-bargaining representative or seeking to decertify an incumbent representative must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of employee support for the petition. Such evidence is usually in the form of cards or signature sheets, which must be signed and dated, authorizing the labor organization to represent the employees or supporting the filing of a decertification petition. If a petition is filed by an employer, the petitioner must supply, within 48 hours after filing, proof of a demand for recognition by the labor organization named in the petition or, if the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating good faith uncertainty for believing that the labor organization has lost its majority status.

Upon receipt in a regional office, the petition is reviewed for sufficiency, given a case number, and assigned to a Board agent to process. Next, docket letters and related correspondence are prepared and sent to the parties named on the petition and any other persons or labor organizations that the Agency believes may have an interest in the proceeding.

Docketing RC, RD, or RM petitions should be assigned the highest docketing priority. Consistent with the practice made applicable to all regions when they moved to the NxGen case processing system in 2011, the docket letters to the parties include a Notice of Representation Hearing for a hearing to be held as expeditiously as possible on consecutive days until completed.<sup>2</sup> The opening letters inform the parties that a joint conference may be held before the hearing to explore all potential areas of agreement in order to eliminate or limit the significant costs associated with formal hearings.

The revised rules adopted by the Board do not specify how soon the pre-election hearing should be held. Currently, most regions issue the Notice of Representation Hearing (NOH) on the day the petition is filed and schedule the initial hearing for 7 to 10 days after the petition is filed. In the interest of having uniform and predictable representation case processes throughout the field, I have adopted the practice of some regions to normally issue the NOH on the day the petition is filed, and schedule the hearing 7 days (or 5 working days) from the date of issuance of the NOH. This satisfies the Board's holding in *Croft Metals, Inc.*, 337 NLRB 688 (2002), which requires that parties in representation cases must receive notice of hearing not less than 5 days prior to hearing, excluding intervening weekends and holidays. It also will give regions some flexibility to address postponement requests and meet outstanding instructions that hearings be conducted within 14 days from the date of filing, absent extraordinary circumstances. However, if it is apparent at the time of filing, based upon the petition or otherwise, that dismissal of the petition is appropriate, a NOH should not issue and the case should be dismissed, absent withdrawal.

To ensure that the parties are aware that a petition has been filed and the date of the scheduled hearing, regions should continue the current practice of faxing or emailing the parties a copy of the petition and either the (NOH) or another document notifying them of the hearing date.

The docket letters to the parties and Form NLRB-4339 which accompanies the Notice of Representation Hearing will continue to reflect that requests for postponement of the hearing to a date more than 14 days after the petition was filed will normally not be granted absent extraordinary circumstances. Form NLRB-4812, which accompanies the docket letter and describes the procedures in representation cases, has been revised to reflect the changes described here.

As a result of a review of our current process and a recent Board decision, two changes will be made to the docket letters. First, the letter to the employer will be modified to advise the employer that, in accordance with the policy set forth by the Board in *Tropicana Products, Inc.*, 122 NLRB 121 (1958), if the employer does not submit the information necessary to establish

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<sup>2</sup> The requirement that the hearing be held on consecutive days until completed is currently set forth in CHM § 11143 and has been in effect since at least 1996. See GC Memorandum 96-2.

whether its operations satisfy the Board's discretionary jurisdictional standards, jurisdiction will be asserted without regard to whether any specific monetary jurisdictional standard is shown to be satisfied, if the record at a hearing establishes that the Board has statutory jurisdiction. Second, the letters to the parties entitled to receive the eligibility list (also referred to as the *Excelsior* list) will notify them of their right to waive having the eligibility list for 10 days before the election. As the Board acknowledged in its Notice of Proposed Rulemaking (NPRM) on June 22, 2011 and confirmed in *Ridgewood Country Club*, 357 NLRB No. 181 (2012), a party may waive its right to have the voter eligibility list for 10 days. Although *Ridgewood* involved an RC petition, it is clear that parties having a right to receive an eligibility list in RD and RM cases could also waive the full 10-day period. A new waiver form has been created for that purpose which permits waiving all or part of the 10-day period. The waiver is not effective unless all parties who are entitled to receive the list agree to waive the same number of days.

### **B. Requests for Postponement of Hearing**

In accordance with current standards specified in Form NLRB-4339, a request to postpone a hearing will not be granted unless good and sufficient grounds are shown and the following requirements are met: (1) a written request is filed with the regional director; (2) copies of the request are simultaneously served on all other parties and that is stated on the request; (3) absent extraordinary circumstances, the request must be received no later than 24 hours before the hearing is scheduled to begin; (4) requests for postponement of the hearing to a date more than 14 days after the petition was filed will normally not be granted absent extraordinary circumstances; (5) grounds for the postponement must be set forth in detail; (6) alternative dates for any rescheduled hearing must be given; and (7) the positions of all other parties regarding the postponement and alternative hearing dates must be ascertained in advance by the requesting party and stated in the request.

As specified in Form NLRB-4339, approval of a postponement request may be conditioned upon one or more of the following:

- (1) The agreement of all parties to participate at a conference to be held at the regional office or, alternatively at the discretion of the regional director, a teleconference at least one full day before the rescheduled hearing date;
- (2) Agreement by the requestor that if briefs are permitted, extensions of time for filing of briefs will not be sought or granted; and/or
- (3) The requestor's execution of stipulations on matters not in dispute, e.g., jurisdiction, labor organization status, appropriate unit.

### **C. Election Agreements and Narrowing the Issues**

NLRB elections can occur either by agreement of the parties or by direction of the regional director or the Board. In about 90 percent of the cases, with Board agent assistance, the parties agree to the election details, including the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit are eligible to vote, and the method, place, date, and hours of voting.

By entering into an agreement, the parties can avoid the time and expense of participating in a hearing. Three types of informal voluntary procedures 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, which provides for possible Board review of post-election decisions by the regional director.

Consistent with current practice, the Board agent will contact the parties shortly after the petition is filed to explore the issues raised by the petition. The Board agent will explore all of the critical issues with the parties and the likelihood of the parties' positions prevailing. The Board agent should continue to seek the parties' positions and explore agreement on all issues, including issues that need not be litigated in a pre-election hearing under the revised rules.

If the issues that separate the parties appear to require a hearing, 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.

If a pre-hearing conference is held, it should be conducted before the actual date of the hearing whenever possible because the parties may be more willing to narrow the issues before they have invested substantial time preparing for the hearing. At this conference, the Board agent should explore all of the issues raised by the parties and attempt to obtain an election agreement. As is currently the practice, the parties should be encouraged to share information and documents at the conference. If an agreement is not possible, every effort should be made to narrow the issues for hearing and 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.

If a pre-hearing conference is not held because of a party's inability or unwillingness to attend, the Board agent should attempt to conduct a conference prior to the opening of the hearing. At the hearing, attempts to obtain agreement will continue, as always, with appropriate guidance from regional management.

In processing the petition, the parties should be encouraged to e-file documents through the Agency's website. Similarly, where possible, Board agents should electronically send documents, such as proposed election agreements and hearing stipulations, and other correspondence. This is efficient and expedient for the parties and the Agency.

The petition may be amended at any time prior to hearing and may be amended during the hearing in the discretion of the hearing officer.

The petitioner may be asked to withdraw its petition if the investigation discloses, for example, that the petitioner lacks an adequate showing of interest or that further processing is inappropriate because of a lack of jurisdiction or a written contract covering the petitioned-for unit is currently in effect. 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.

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. If the parties are willing to agree to an election, but are unable to agree to an election date, despite the Board agent's efforts to help the parties reach agreement on an election date, a hearing will have to be held...

#### **D. Hearing Preparation**

Prior to the hearing, the hearing officer should be sure 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 III G, below. If a party raises statutory exclusions, such as §2(11) supervisory status, or exclusions based on policy considerations, such as managerial employee status, confidential employee status, independent contractor, or agricultural workers, 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, when the hearing officer becomes apprised of the anticipated hearing issues, the hearing officer should have a meeting with regional management to discuss the issues that may be raised and develop a plan for conducting the hearing in light of the revised rules. Specifically, they should discuss the issues separating the parties, the number of employees in dispute, what issues must be litigated to establish a question concerning representation, and whether post-hearing briefs are necessary in the matter.

### **III. HEARINGS**

#### **A. The Role of the Hearing Officer**

The recent rule revisions and the Board's attempts to encourage more efficient election processes that underlie these revisions, contemplate that the hearing officer will ensure that the record is not burdened with evidence about issues that will not be decided by the regional director. Thus, where an issue will not be decided, it is not litigable and the hearing officer will

employ the traditional techniques for excluding evidence concerning nonlitigable issues, including requesting an offer of proof, and weighing the relevance of evidence. *See Guide to Hearing Officers*, at 27 “Nonlitigable Issues.” The result will be shorter transcripts focused on the relevant issues and a more efficient decision-writing process.

Pursuant to the rules revisions, the hearing officer’s role is to ensure a complete record as to issues relevant to the existence of a question concerning representation. It is also to prevent the introduction of evidence on individual eligibility and inclusion issues that are not needed to determine if a question concerning representation exists—unless the regional director decides to exercise discretion to decide the issue before the election. If an individual eligibility and inclusion issue is not litigated before the election, the parties will have the opportunity to litigate it after the election, if necessary, at a post-election hearing or a unit clarification proceeding. In the next section, this memorandum will discuss the distinctions between the types of issues that should generally be litigated at pre-election hearings and those that should be reserved until after the election.

Even where an issue is properly litigated before the election, the hearing officer should play a very active role in precluding the parties from presenting evidence that is irrelevant, duplicative, or otherwise unnecessary. 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. The hearing officer should closely consult with regional management in making rulings to limit and exclude evidence and should obtain regional management’s approval before precluding a party from presenting evidence on an issue.

As is currently the practice, at the beginning of the hearing the hearing officer should ask each party to state its position on each issue. This inquiry should cover the number of individuals in each disputed classification. If the contentions are vague or incomplete, the hearing officer should seek clarifications. 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. *Lynwood Manor*, 350 NLRB 489 (2007); *Austal USA, L.L.C.*, 349 NLRB 561 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006).

## **B. Issues to be Litigated in a Pre-Election Hearing**

In general, Section 102.64(a), as revised,<sup>3</sup> contemplates that ordinarily issues relevant to a determination of whether a question concerning representation exists, and only those issues, should be handled at a pre-election hearing. The rules revisions seek to reduce unnecessary litigation and streamline the election and certification process by deferring, where appropriate, various issues to post-election proceedings where those issues are not rendered moot by the election results or resolved by the parties through post-election negotiations. Many issues will continue to be decided prior to the election. These, of course, include issues as to whether an election should be held at all, such as jurisdiction, labor organization status, and various election

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<sup>3</sup> “Disputes concerning an individual’s eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question concerning representation exists and there is no bar to an election, he or she shall direct an election to resolve the question.”

bars, among others. The issue of whether there is an appropriate unit for an election, including unit scope questions, must also be decided prior to the election.

However, the revised rules now provide 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. The change is designed to avoid unnecessary delays in the election process and to reduce the overall amount of litigation, saving resources for the Agency and all parties.

In adopting the rules, the Board did not define "ordinarily" or otherwise specify the percent of unit employees whose unresolved voting eligibility is substantial enough to warrant pre-election litigation. More specific proposals on this point remain under consideration by the Board, but the rules going into effect on April 30 simply grant discretion in this area to the regional director. To provide some guidance in the exercise of this discretion while these proposals are under consideration—and without any prejudice to those deliberations—I have decided that regional directors should look to the current guidance for election agreements. CHM §11084.3 provides, in pertinent part, "As a general rule, the regional director should decline to approve an election agreement where it is known that more than 10 percent of the voters will be challenged, but this guideline may be exceeded if the regional director deems it advisable to do so." Applying this guidance to directed elections, regional directors should generally treat 10 percent as a rule of thumb for deciding whether to permit litigation over eligibility issues, bearing in mind that deviation is sometimes advisable.

### **C. Specific Issues Appropriate for Pre-Election 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. Once it has been determined that there is reasonable cause to believe that a QCR exists, all issues relevant to whether the Board has jurisdiction over the employer must be resolved 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*, 167 NLRB 691 (1967), *enfd.* 427 F.2d 312 (6<sup>th</sup> Cir. 1970), *affd.* as to applicable standard only, 402 U.S. 600 (1971); *The Regional Medical Center at Memphis*, 343 NLRB 346 (2004). 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), but the Board will continue to refer these cases to the National Mediation Board for advisory opinions where appropriate. An additional jurisdictional issue is whether the employer is a religious organization. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Catholic Social Services*, 355 NLRB No. 167 (2010). Finally, the region may need to decide prior to the election whether the employer is a horseracing or dog racing facility. See The Board's Rules and Regulations, §103.3; *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 Board to provide information relevant to the Board's jurisdictional determination, jurisdiction will be asserted 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 connection, the initial docketing letter will request that the employer provide a completed commerce questionnaire, and the Board agent assigned to the petition should emphasize, beginning with his or her earliest communications, that the employer should comply with this request. If the employer is not expected to appear at the hearing or comply with this request, 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, sells its products to, or performs work in states other than where it is headquartered. 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 the docketing letter requests a completed commerce questionnaire and 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 based on the record obtained at a pre-election hearing. 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 employees in petitioned-for classifications involving significant parts of the unit 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 contract bar, recognition bar, successorship bar, and election bar, must be resolved at the pre-election hearing. 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 that "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. 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, as discussed below, the hearing officer needs to be aware of the presumptions that apply in these cases and to limit the presentation of evidence appropriately.

Issues involving the nature of the employing entity that must be litigated at the pre-election hearing include: whether a single employer or multiemployer 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 *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007); *Mercy General Health Partners*, 331 NLRB 783 (2000); *All County Electric Co.*, 332 NLRB 863 (2000); and whether

independent entities have a joint-employer relationship. See *N.K. Parker Transport, Inc.*, 332 NLRB 547 (2000); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3<sup>rd</sup> Cir. 1982). 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 multiemployer units and are statutorily permissible only with the consent of all parties.

## **5. Expanding and Contracting Unit Issues**

If the employer contends that its business, or the applicable portion of its business, will imminently be closing, 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.

## **6. Employee Status**

Issues as to whether individuals are employees within the meaning of Section 2(3) of the Act must be resolved at the initial hearing only if they involve the entire unit or classifications that constitute more than 10 percent of the unit. These include determinations of: whether individuals are statutory employees or independent contractors. *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846 (2004); whether individuals are "agricultural employees," see *Pictsweet Mushroom Farm*, 329 NLRB 852 (1999); *Cal-Maine Farms*, 307 NLRB 450 (1992); and whether students who perform work are employees, see *Brown University*, 342 NLRB 483 (2004), and *Boston Medical Center Corp.*, 330 NLRB 152 (1999). As to the employee status of disabled clients, see *Brevard Achievement Center*, 342 NLRB 982 (2004).

## **7. Seasonal Employees**

Whether the employer is a seasonal operation is an issue that must be resolved at the pre-election hearing. 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).

## **8. Other Issues that Must be Decided Before the Election**

Certain other issues also must be decided before the election. For example, if a party contends that individuals are professional employees to be included in an otherwise appropriate unit, the issue must be answered 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 guard and the appropriate unit description excludes guards, the contested individual can be voted subject to challenge.

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. *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004); *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970) and *Woodward Detroit*, 355 NLRB No. 181 (2010) (eligibility formula for part-time employees); *Marquette General Hospital*, 218 NLRB 713, 714 (1975) (part-time formula in healthcare industry); *Steiny & Co.*, 308 NLRB 1323 (1992) (construction industry).

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).

#### **D. Issues That May Be Deferred for Post-Election Determination**

Issues as to whether certain classifications are included in the unit may be deferred to post-election proceedings 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 classifications is 10 percent or less of the unit. In other words, if a determination with respect to the appropriateness of the unit can be made without resolving the issue of whether a disputed classification is within the unit, that issue can normally be deferred to the post-election stage, unless the number of employees in the disputed classification is more than 10 percent. 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 should direct that these employees vote subject to challenge rather than take evidence about them at the pre-election hearing.

The revisions to the rules generally divide eligibility/inclusion issues into two categories: whether individuals in an appropriate unit are ineligible because they are not employees as defined by the Act; and whether individuals fall within the terms used to describe the unit. Litigation over the status of individuals in both of these categories should not normally occur before the election unless more than 10 percent of the unit is in dispute.

With respect to the first category, a significant percentage of pre-election hearings have involved supervisory issues. Prior to the rules revisions, if parties did not agree to vote disputed supervisors subject to challenge, there would be pre-election hearings 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 have to necessarily resolve those issues. Because these issues do not directly impact on whether there is a question concerning representation, eligibility issues will normally not be litigated at the pre-election stage.

The supervisory status of individuals, like other issues of eligibility or inclusion, generally will not be litigated 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 showing of interest are normally determined through an administrative investigation conducted by the regional director independently 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 should be deferred until after the election. See *Newton-Wellesley Hospital*, 219 NLRB 699, 705 (1975). 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 election. See *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980).

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); *Pierce-Phelps, Inc.*, 341 NLRB 585 (2004). 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 small groups of employees fall within the unit description should also be deferred until after the hearing. 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, (2005); *Harold J. Becker, Co.*, 343 NLRB 51 (2004). Additional issues that can be resolved during post-election proceedings are whether an individual's tenure of employment is so uncertain as to exclude that individual as a "temporary" employee (see *Marian Medical Center*, 339 NLRB 127 (2003)) and whether a part-time employee works enough hours to be included in the unit as a "regular" part-time employee or should be excluded as a casual (see, *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 (2003)).

To the extent feasible, hearing officers should ensure that the names of the individuals whose eligibility to vote or inclusion in the unit has been deferred for resolution to the post-election stage are in the record, in order to facilitate their opportunity to vote through the challenge procedures.

#### **E. Parties' Right to Introduce Evidence that Supports Its Contentions and Is Relevant to the Existence of a QCR or Bar to an Election**

Revised §102.66(a) provides that any party shall have the right at hearing to call, examine, and cross-examine witnesses, and to introduce documentary and other evidence, so long as the evidence supports its contentions *and* is relevant to the existence of a question concerning representation or a bar to an election. The Board indicated it would no longer require

hearing officers 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 commenting on this rule change, the Board stated it would no longer follow *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. In sum, the revised rules do 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. 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).

#### **F. Consequences When a Party Fails to Take a Position on an Issue**

The failure or refusal of a party to take a position on the issue of the appropriateness of a unit *where there is no presumption* that the unit is appropriate does *not* relieve the hearing officer of the duty to garner the appropriate evidence needed to make a determination on that issue. *Allen Health Care Services*, 332 NLRB 1308, 1309 (2000) (Board distinguishes *Bennett Industries*, 313 NLRB 1363 (1994), where there was no presumption with respect to the unit at issue). However, under revised §102.66(a) if the employer declines to take a position on whether the unit is appropriate, the employer has, in effect, not made a contention, and, therefore, would not be entitled to introduce evidence on that issue.

#### **G. The Role of Presumptions at the Hearing**

Based largely under its responsibility set forth in Section 9(b) of the Act, the Board has established either through case law or rulemaking the following presumptions related to appropriate units:

- Single plant or store 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);
- 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-branch unit. *Wyandotte Savings Bank*, 245 NLRB 943 (1979);
- 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. *Groendyke Transport*, 171 NLRB 997 (1968); *Alterman Transport Lines*, 178 NLRB 122 (1969); and *Wayland Distributing Co.*, 204 NLRB 459 (1973); and

- System-wide unit with public utility. *Colorado Interstate Gas Co.*, 202 NLRB 847 (1973); *Deposit Telephone Co.*, 328 NLRB 1029 (1999).

#### **H. Burdens of Proof Related to Unit Determinations: *Specialty Healthcare***

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), the Board faced an issue of the appropriateness of the petitioned-for unit of certified nurses assistants in a non-acute care setting, a unit that did not involve any presumption of appropriateness. The Board set forth the analytical framework to be applied where a party contends that the smallest appropriate bargaining unit must include additional employees or job classifications beyond those in the petitioned-for unit. The Board stated that it would first assess whether the petitioned-for unit employees are “readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors),” and would then apply traditional community-of-interest principles to determine if the petitioned-for unit is appropriate. If the petitioned-for unit satisfies that standard, the burden is on the employer to demonstrate that the additional employees it seeks to include share “an overwhelming community of interest with the petitioned-for employees,” such that there “is no legitimate basis upon which to exclude certain employees from” the larger unit because the traditional community-of-interest factors “overlap almost completely.” *Id.*, slip op. at 11–13, and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008)).

Applying the *Specialty Healthcare* analytical framework to a petitioned-for unit that is presumptively appropriate, the burden of proof immediately falls on the party opposing that unit to show that the unit is inappropriate. *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999); *Red Lobster*, 300 NLRB 908, 910, 911 (1990). Under the *Specialty Healthcare* framework, the burden assigned to the party challenging the presumptively appropriate unit is to establish that employees in excluded classifications share an “overwhelming community of interest” with those employees in the presumptively appropriate, petitioned-for unit. See, *DTG Operations, Inc.*, 357 NLRB No. 175 fn. 16 (2011).

When the unit sought is not presumptively appropriate, the petitioner must show that it seeks “an appropriate” unit, not the “only” or the “most” appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723, 723 (1996); *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950), *enfd.* on other grounds 190 F. 2d 576 (7th Cir. 1951). Under the rationale of *Specialty Healthcare*, which arose in the context of a unit that was not presumptively appropriate, when the petition is for a unit of employees readily identifiable as a group and the petitioned-for unit is appropriate under traditional community of interest factors, the burden shifts to the party contending the proposed unit is inappropriate to establish that the excluded employees share an “overwhelming community of interest” with employees in the proposed unit.

The Board has applied the analytical framework of *Specialty Healthcare*, in several different contexts. See *Odwalla, Inc.*, 357 NLRB No. 132 (2011) (merchandisers shared an overwhelming community of interest with employees the parties had agreed should be in the unit so a unit excluding the merchandisers was not an appropriate unit); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, (2011) (finding petitioned-for group of technical employees was an appropriate unit because they were “readily identifiable as a group” and

shared a “community of interest under the Board’s traditional criteria” and that the employer had failed to establish that the other technical employees it sought to include shared an “overwhelming community of interest” with the petitioned-for employees); *DTG Operations, Inc.*, supra, (finding that the rental service agents and lead rental service agents shared a community of interest and that the Employer failed to demonstrate that the additional employees it sought to include in the unit shared an “overwhelming” community of interest with the petitioned-for RSAs and LRSAs).

### **I. Offers of Proof at the Hearing**

Offers of proof are often utilized in Board proceedings as evidentiary tools to focus and define issues and provide a foundation to accept or exclude evidence. In Board proceedings offers of proof normally take the form of a narrative statement presented by a party’s representative. While offers of proof may take a question and answer form, this format is less efficient and should be used only in exceptional circumstances... A hearing officer can require an offer of proof from the party seeking to overcome a presumption or meet an assigned burden and if the offer of proof is insufficient, refuse to allow litigation of the issue. A hearing officer’s rulings limiting the parties’ right to introduce evidence based on their offers of proof and the regional director’s reliance on those rulings and determinations that the offers of proof were insufficient to overcome presumptions or to satisfy burdens of proof have been looked upon favorably by the Board. *Laurel Associates, Inc.*, 325 NLRB 603 (1998); *Mariah, Inc.*, 322 NLRB 586 (1996). Such rulings should be discussed whenever possible with regional management before being made.

### **J. Notices To Show Cause Issued Before the Hearing**

A notice to show cause, often 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 and the regional director and hearing officer to plan for permitting or precluding litigation on certain or possibly all issues. *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 as to a change in circumstances since an earlier Board proceeding involving the same parties is an appropriate tool, and a regional director may properly limit the scope of the hearing to evidence of changed circumstances. *Heartshare Human Services of New York, Inc.*, 320 NLRB 1 (1995).

### **K. Post-Hearing Briefs and Solicitation of Parties’ Positions**

#### **1. Post-hearing briefs**

The revised rules give the hearing officer discretion related to the filing and content of post-hearing briefs to regional directors. This discretion includes whether briefs will be filed, when briefs will be filed, and what the brief should address. The hearing officer should consult with regional management before determining whether to permit briefs. In exercising this discretion, several factors should be considered:

- 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
- Parties' positions on the need for briefs.

If the determination is made that post-hearing briefs will not be permitted, the new rules provide that any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

## **2. Alternatives to filing post-hearing briefs to regional directors**

Even when post-hearing briefs are not allowed, hearing officers can and should encourage the parties to address in their oral arguments specific issues in dispute or cite cases in support of their positions. Additionally, a party may file a brief, memo of points and authorities, or other legal arguments with the hearing officer during the course of the hearing and before the hearing closes.

If the hearing officer concludes that some type of post-hearing filing is appropriate, the hearing officer can explore other means besides a brief for a party to convey its legal position. These might include:

- Granting a brief period to file short post-hearing briefs on legal authority only;
- Submitting a case list with summary argument; and
- Oral argument supplemented with a list of relevant cases.

The hearing officer should advise the parties that they can always file a brief in support of a request for review in the post-election process in which the same arguments can be made.

## **3. Soliciting parties' positions on issues**

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 on any alternate unit which may be found appropriate. The hearing officer should ensure that all relevant off-the-record discussions are summarized and the parties affirmatively agree to summaries on the record.

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

## **L. Special Appeals**

Amendments to §102.65(c) clarify the circumstances under which special permission to appeal to the Board will be granted and are designed to avoid piecemeal litigation. They provide: that the Board will only grant permission to appeal under "extraordinary

circumstances,” when it appears that the “issue will otherwise evade review;” that a party need not take a special appeal to preserve its right to review in the post-election process; a special appeal will not stay an election or require ballots be impounded unless specifically ordered by the Board; and that the amended rule’s new and narrower standard related to special appeals is not applicable to requests for special permission to appeal rulings of the hearing officer to the regional director.

CHM §11203 contains helpful directives for handling special appeals from hearing officer’s rulings:

- Parties may not directly appeal rulings of the hearing officer, except by special permission of the regional director.
- Parties have automatic exception to unfavorable rulings making them subject to review when the entire record is considered by the regional director or Board.
- Requests for special permission to appeal should be made promptly, in writing, and served on the hearing officer and other parties.
- If adjournment is requested to prepare a special 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 file the special appeal during a break.

To limit the filing of special appeals, the hearing officer should consult with regional management during the hearing about potentially significant procedural and substantive issues. The hearing officer should be prepared to address and rule on procedural and substantive matters before the hearing and as they arise; however, the hearing officer can always reserve ruling and during a break consult with regional management before making a decision regarding any particular issue. As previously noted, the narrower standard for granting requests for special appeals to the Board set forth in §102.65(c) is not applicable to requests for special appeals from a hearing officer’s ruling to the regional director.

### **M. Post-Hearing Report and Meeting With Regional Management**

As soon as practical, the hearing officer should meet with regional management and the designated decision writer<sup>4</sup> to review what transpired at the hearing, reporting on any procedural issues and rulings and the substantive issues presented, without making any recommendations as to their disposition. Once the deliberative process begins regarding disposition of the substantive issues, the hearing officer should leave. The hearing officer should also have prepared a pre-election hearing officer’s report using the revised report form. The revised report, although devoid of any recommendations, 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 and the number of employees in issue; (3) eligibility issues and the number of employees in contention; (4) whether the hearing officer precluded the introduction of evidence, and the basis for the exclusion; and (5) a place to record information, if provided prior to the

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<sup>4</sup> The decision writer is always someone different from the hearing officer because Section 9(c)(1) of the Act prohibits the hearing officer from making recommendations about the outcome of the pre-election hearing.

close of the hearing, about the payroll period and the parties' positions on the preferred method (manual, mail, or mixed), date, time, and place of the election.

#### **IV. PRE-ELECTION DECISIONS**

##### **A. Expediting Pre-Election Decisions**

Consistent with the Board's longstanding emphasis on the need to resolve questions concerning representation as promptly as possible, expediting the issuance of pre-election decisions continues to be a priority. Therefore, regions should adopt practices that ensure that decisions are issued promptly and that they are consistent with the revised rules.

One common practice that regions should follow is ensuring that agents assigned to draft pre-election decisions are not assigned other work, but work only on drafting the decisions until completed. Regions should utilize the interregional assistance program to request that other regions draft decisions when necessary to ensure expedited issuance. In some situations it may be appropriate to contact headquarters for additional support. If the agent assigned to draft a decision has other scheduled work, that work should either be deferred or reassigned. In addition, the assignment of the agent to draft the decision should be made once the hearing opens. This early assignment permits that agent to clear up other work and begin preliminary research on issues that are expected to be the subject of the hearing.

As discussed above, the revised rules are also clear that hearing officers need not allow parties to present evidence under certain circumstances. Regions will be provided guidance on preparing decisions which cover that situation and others that may arise under the revised rules. The guidance will be available on the on the Operations - R Case Processing page of *The Insider* (the intranet) and will be updated periodically as we obtain experience under the revised rules.

Finally, if there are no objections or determinative challenged ballots, requests for review must be filed within 14 days after the tally of ballots has been prepared and made available to the parties. On the other hand, if there are determinative challenged ballots and/or objections are filed, requests for review of pre-election decisions must be filed within 14 days after the regional director's decision on challenged ballots, on objections, or both. The request for review of the pre-election decision may be combined with a request for review of the decision on objections/challenged ballots.

Board rules still allow regional directors to treat requests for review as motions for reconsideration. Therefore, regional directors should keep in mind that they can supplement their decisions and directions of elections after receiving and reviewing requests for review. In any event, an early request will remain pending and, to the extent it is not moot, may be considered by the Board at the appropriate time after the election. This is similar to the practice of the federal courts in the Federal Rules of Appellate Procedure, Rule 4(a)(2), where an appeal filed after a final decision but before the entry of judgment is simply "treated as filed on the date of and after the entry [of judgment]."

## V. ELECTION PREPARATIONS AND ELECTION

As soon as possible after issuance of a regional director's Decision and Direction of Election, the decision should be emailed or faxed to the parties so that they have an opportunity to revise (or state) their position on the method, date, time and place of the election. The Board agent will attempt to reach the parties as expeditiously as possible and obtain agreement before the region specifies the method, date, time and place of the election.

To ensure that employees are fully informed about the composition of the unit and who will be permitted to vote, I have decided that where either an election agreement provides or a decision and direction of election directs that individuals will vote subject to challenge, the Notice of Election will include language so stating. That language will be:

**OTHERS PERMITTED TO VOTE:** At this time, no decision has been made regarding whether (Classifications) 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 resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following 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 should be prepared to challenge voters whose eligibility is deferred to the post-election stage. To assist in identifying those individuals and to avoid post-election issues, the letter requesting the eligibility list from the employer will ask that their names and addresses be placed on a separate page of the list or a separate portion of the list so that the individuals who will be voting subject to challenge are clearly identified.

## VI. POST-ELECTION PROCEDURE AND DECISIONS

### A. Changes to Post-Election Procedure

The revised rules include changes to both Board procedure and the issuance of decisions involving post-election matters. Among the changes are the following:

- If a regional director issues a decision disposing of objections and/or determinative challenged ballots based on an investigation, the decision should include a certification of the results of the election, including certification of representative where appropriate.
- 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 supporting evidence to determine whether the objecting party's evidence "could be grounds for overturning the election if introduced at a hearing." Similarly, if a party has challenged a voter, the regional director should evaluate the challenge and supporting offer of proof to determine whether the challenging party's evidence "raises material and substantial issues." If either of these standards is met, the objection and/or challenge should be set for hearing. Where there are related objections and charges, regions should follow the procedures outlined in CHM § 11407.

- Perhaps the most significant change is that in all cases exceptions to hearing officers' reports are to be filed with regional directors instead of the Board. If no exceptions are filed, the regional director may decide the matters in dispute based on the record before the hearing officer. If exceptions are filed, regional directors are to issue a decision on the hearing officer's report, taking into account the exceptions and either affirming or rejecting the conclusions of the hearing officer. Whether or not exceptions to hearing officers' reports are filed, regional directors' decisions should include, as appropriate, a certification of results, certification of representative, direction to open and count ballots, or direct a rerun election.
- Finally, all exceptions will be decided by the regional director instead of the Board. Thereafter, the Board may grant or deny requests for review, and if the Board denies the request for review, the denial is summary affirmance of the actions of the regional director.

In view of these changes, it is necessary to modify notices of hearing when there are determinative challenged ballots or when there are objections and the regional director has concluded that a hearing is required. In addition, the appeal language in post-election reports has been revised. This language will be available on the R Case Processing page of *The Insider* and incorporated into NxGen templates.

If the subject matter of the objections to conduct of the election involves regional or Board agent misconduct which 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 the order directing a hearing. This is necessary because the revised rules require that exceptions to the hearing officer's report be filed with the regional director. In order to remove claims of prejudice, the out-of-region hearing officer's report should be reviewed, if exceptions are filed, by that out-of-region hearing officer's director for purposes of issuing a decision on the exceptions to the hearing officer's report.

When there are no objections filed and no determinative challenges, the timing of the issuance of the certification will differ depending on the circumstances that led to the election. If the election was conducted pursuant to an election agreement, the certification could issue after the expiration of the 7-day period for filing objections. If the election was directed, the issuance of the certification would normally issue after the expiration of the 14-day period for filing a request for review of the decision directing the election.

## **B. Regional Director Decisions in Post-Election Proceedings**

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. The approach taken in a particular case depends largely on the strength and depth of 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 and/or elaborate on the

hearing officers' reports. Examples of cases requiring more in-depth analysis might include difficult legal issues where a regional director could bolster the conclusions of the hearing officer or where more careful analysis of the facts is required in applying Board law. Finally, regional director decisions should thoroughly and carefully discuss the hearing officer's reports and exceptions when the regional director disagrees with the hearing officer's recommendation.

Samples will be made available for issuing these decisions. In addition, sample language will be made available to regions for use in pro forma adoption of the hearing officer's report and not disturbing the credibility resolutions of the hearing officer.

### **C. Burdens of Proof in Post-Election Settings**

With post-election objections, 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, the party seeking to challenge a voter's eligibility bears the burden of proving the voter is ineligible to vote.

## **VII. 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 and the challenges are not determinative, 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 did not rule on the inclusion or exclusion of (*unit category*) and ordered them voted subject to challenge.

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*) and they voted subject to challenge.

## **VIII. CONCLUSION**

It is my sincere hope that the new Board rules and this guideline memorandum will save time and resources for both Agency staff and the parties who appear before the Board. While these guidelines present challenges with regard to their implementation, they also provide opportunities for us to fully effectuate the policies and purposes of the Act, as they relate to the representation process. In addition, I thank the staff for its commitment in implementing the various initiatives contemplated by the Board's rule changes which will be effective on April 30, 2012. Finally, I intend to continually reevaluate the procedures set forth above to

ensure they are achieving the goals of reducing unnecessary litigation and more expeditiously resolving questions concerning representation. In carrying out this reevaluation, I assure you that I will solicit the views of the staff and the public and that their suggestions will be the basis of future guidance to the field and the public as warranted.

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

/s/  
L. S.