

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-006-13

(CERTIFICATION OF REPRESENTATIVE)

ASSOCIATION OF OREGON)	
CORRECTIONS EMPLOYEES,)	
)	
Petitioner,)	
)	
v.)	
)	
STATE OF OREGON,)	
DEPARTMENT OF CORRECTIONS,)	DISMISSAL OF OBJECTIONS
)	TO CONDUCT OF ELECTION
Respondent,)	
)	
and)	
)	
OREGON AFSCME COUNCIL 75,)	
)	
Incumbent.)	
_____)	

Becky Gallagher, Attorney at Law, Eugene, Oregon, represented Petitioner.

Craig Cowan, Senior Labor Relations Manager, Department of Administrative Services, Salem, Oregon, represented Respondent.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, represented Incumbent.

On April 2, 2013,¹ the Association of Oregon Corrections Employees (AOCE) filed a petition, which was amended April 3, seeking to represent a group of employees of the State of Oregon, Department of Corrections (DOC) that were represented by incumbent Oregon AFSCME Council 75 (AFSCME). On May 1, the Elections Coordinator approved a consent election agreement between AOCE, AFSCME, and DOC. The results of that election were tabulated on June 14, with 553 votes for AFSCME, 532 votes for AOCE, and two votes for “no representation.”

¹All dates are 2013 unless otherwise specified.

On June 21, AOCE timely filed objections to the conduct of that election and conduct affecting the results of that election. *See* OAR 115-025-0060(9). Thereafter, AFSCME filed a response to AOCE's objections, contending that the objections lacked merit. The matter was assigned to Administrative Law Judge (ALJ) Grew, who conducted an investigation into the objections. *See* OAR 115-025-0060(11).

Based on ALJ Grew's investigation, he informed the parties in a July 24 letter that he would be submitting the matter to this Board, with the recommendation that the objections be dismissed without a hearing. In that letter, ALJ Grew set forth specific facts that resulted from his investigation, as well as relevant Board authority, which he believed warranted dismissal of the objections. ALJ Grew gave the parties until August 2 to present any factual or legal argument showing why he should not do so.

On July 26, AOCE counsel informed the ALJ that AOCE did not intend to present any further argument on its objections, and that the matter could be submitted to the Board. For the following reasons, we dismiss the objections.

For purposes of this dismissal order, we rely on the facts uncovered during our investigation, which were set forth in ALJ Grew's July 24 letter and which were not disputed by the parties. On May 30, the Elections Coordinator mailed 1,761 ballots through the State mailing service. Those ballots were mailed to the names and addresses on the final April 30 *Excelsior*² list, which was provided by the employer in the form of an electronic document and peel-off mailing labels. The ERB staff, under the supervision of the Elections Coordinator, peeled the labels off of their backing and applied them to envelopes with enclosed ballots. The envelopes were then submitted to the State mailing service for postage and mailing. State mailing service records confirm that it applied postage to 1,761 pieces of mail for ERB on May 30.

When the United States Postal Service (USPS) delivered completed or non-deliverable ballots to ERB, the Elections Coordinator recorded each event on an electronic spreadsheet derived from the final *Excelsior* list. This list is called the "voter list." The voter list also included totals of the ballots received each day. The Elections Coordinator sent an electronic copy of the voter list, as updated with the recorded events, to the parties on June 3, 4, 5, 6, 7, 11, and 12.

When an individual contacted ERB during the voting period and stated that a ballot had not been received, the Elections Coordinator immediately sent out a new ballot to the address provided by that individual. Those events were also recorded on the voter list.

As a matter of protocol, ERB staff does not return unopened ballots to senders during the elections period, and the Elections Coordinator is not aware of any such action taking place in this election.

²This term refers to the National Labor Relations Board's decision in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), which requires employers involved in pending representation elections before the Board to submit a list containing the names and addresses of all employees eligible to vote, which the Board then makes available to the organizing unions.

ERB received 1,088 ballots by the June 13 5:00 p.m. deadline. The results of the tally were 532 votes for AOCE and 553 votes for AFSCME, a difference of 21 votes.³ ERB also received 49 ballots after the deadline; six of the ballots were from individuals that AOCE claimed had returned completed ballots (discussed below). There were also 38 ballots returned by the USPS as undeliverable, only nine of which had forwarding addresses. For those nine, the Elections Coordinator mailed new ballots to the newly provided addresses.

AOCE timely filed objections, claiming that: (1) 25-named individuals reported that they returned ballots “as required by the Election Notice,” but those votes were not accounted for in the June 14 tally;⁴ (2) one individual (Emilio Carbajal) asserted that he did not vote, yet he was recorded as having voted; (3) 12 eligible voters never received ballots; (4) three individuals “did not receive ballots in time to vote”; (5) one completed, unopened ballot was returned to the house of the voter by the USPS; and (6) the June 14 ballot count was “confusing.”

In considering objections to a representation election, this Board has observed that “[e]lections should not be set aside lightly, because to do so interferes with the orderly processes of labor relations.” *Employees of State of Oregon Motor Vehicles Division v. Oregon State Employes Association*, Case No. C-29-80, 5 PECBR 3069, 3073 (1980). We will, however, set an election aside “[i]f it may reasonably be said that proscribed conduct at an election had an impact or reasonably could have been expected to have an impact on the outcome of the election.” *Id.*; see also *Don and Employees of the City of St. Helens v. Oregon AFSCME Council 75, and the City of St. Helens*, Case No. DC-39-03, 20 PECBR 547, 550 (2004). For the following reasons, we conclude that none of AOCE’s objections warrant setting aside the election.

Under OAR 115-025-0060(4), “[i]n a mail ballot election, a ballot that is not delivered through the U.S. mail or in person by the voter is void.” We have explained that our

“mail ballot election procedures are clear with regard to voting deadlines; by whatever means delivered, ballots must be received in the Board offices before the voting deadline or they will not be counted.” *Teamsters Local 58 v. City of Rainier*, 13 PECBR 169, 170 (1991).

Here, with respect to objections 1, 3, 4, and 5, the undisputed facts show that the ballots were not delivered to ERB through the U.S. mail or in person by the voter before the voting

³As previously noted, ERB also received two votes for “no representation.” There was also one voided ballot.

⁴AOCE asserted that there were 26 individuals, but only provided the names of 25 individuals. Therefore, we consider the number of alleged unaccounted-for ballots to be 25. In any event, even if the number were 26, our result would be the same.

deadline; therefore, under our rules and case precedent, those alleged ballots are void and will not be counted. See OAR 115-025-0060(4); *City of Rainer*, 13 PECBR at 170.⁵

We turn to objection 2, which claims that an eligible voter (Emilio Carbajal) did not vote, yet had a ballot counted as though he did. The undisputed facts discovered during our investigation show that ballots were sent to two individuals with the last name Carbajal, Emilio and Bobby, both of whom appeared on the *Excelsior* list. Both individuals were recorded during the tally as having submitted timely ballots. Aside from those facts, neither the Elections Coordinator nor this Board has any additional information about this issue. Under these circumstances, we do not conclude that the disputed ballot should be treated as void. In any event, even if we agreed to void that ballot, doing so would not affect the outcome of the election.

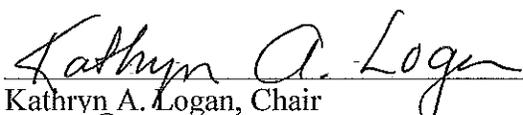
We turn to the final objection (number 6), which alleges that the June 14 ballot count was “confusing.” Specifically, AOCE alleges that, during the count, ballots were not placed in designated “AOCE” and “AFSCME” boxes, but were instead “piled on the table and/or one common box.” At the conclusion of the tally process, however, AOCE’s observers/representatives “certif[ied] that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above.” Moreover, AOCE does not allege that any ballot was lost or miscounted during the tally. Under such circumstances, we find no merit to this objection.

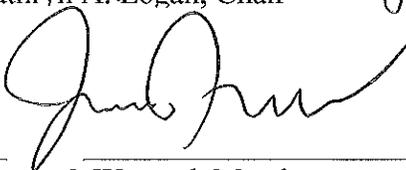
Accordingly, for the foregoing reasons, we will dismiss AOCE’s objections.

ORDER

The objections to the conduct of the election and conduct affecting the outcome of the election are dismissed. The Elections Coordinator shall certify the election results as soon as practicable.

DATED this 2 day of August, 2013.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

⁵Neither the allegations nor the undisputed facts discovered during our investigation show any extraordinary circumstances (e.g., natural disaster or postal service strike) that would warrant an exception to our general rule. Likewise, the record does not establish any irregularities when the ballots were received by ERB and recorded on the voter list.