



# Representation Case Rules 2019 Amendments

Public Outreach

# Overview

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# Procedural History - 2019 Final Rule

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- On December 13, 2019, the Board announced modifications to the 2014 amendments in several respects.
- Published at 84 Fed. Reg. No. 243.
- New rules will apply to petitions filed on or after May 31, 2020.

# 2019 Changes - A Summary

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## Notice of Petition for Election

- Distribute electronically only to unit employees, if customary

## Responsive Statements of Position (RSOP)

- Petitioners now required to submit a written responsive Statement of Position (RSOP).

## Litigable Issues at Hearing

- Parties now entitled to litigate scope of unit, eligibility and supervisory status
- No deferral of issues unless agreement of parties

# 2019 Changes - A Summary

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## Post-Hearing Briefs

- Parties have right to file briefs in pre-election and post-election hearings

## Elections after Decisions and Direction of Elections (DDEs)

- May not schedule election before 20<sup>th</sup> business day after issuance of DDE, absent a waiver

## Notice of Election

- Rule emphasizes RD discretion to issue NOE shortly after DDE issues

# 2019 Changes - A Summary

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## Request for Review

- If a party files a RFR within 10 days after DDE, ballots will be impounded
- (Generally) No impounding if filed later

## Observers

- Must be unit employees if available
- Otherwise, must at least be non-supervisory employee of Employer

## Certifications

- If election is held after a DDE, certifications will no longer issue if there is a pending RFR or the period for filing has not expired

# Postponements and Extensions - Good Cause Standard

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“Special circumstances” no longer a standard

“Extraordinary circumstances” only applies to hearings not continuing day to day, extensions to file voter lists and reopening the record.

Return to “good cause standard” for postponement of hearing and extensions to file documents

Hearing postponements not to be routinely granted under good cause standard

# New Time Period Calculation

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Under § 102.1 of the rules, all time periods calculated as “business days.”

Exception: 10 *calendar* days for parties to have the voter list prior to election unaffected as established under Board law. See *The Ridgewood Country Club*, 357 NLRB 2247 (2012); *Mod Interiors, Inc.*, 324 NLRB 164 (1997).



# Comparative Time Periods

REQUIREMENT/ ACTION	2014 RULES	2019 RULES
<b>Pre-Election Hearing</b>	8 calendar days from NOH (2 day postponement for special circumstances or up to 4 days total for extraordinary circumstances)	<b>14 business days</b> from NOH (Postponement upon good cause)
<b>Posting/Electronic Distribution of Notice of Petition for Election</b>	2 business days from NOH and distribute electronically, if customary	<b>5 business days</b> from NOH. Electronic distribution, if customary, to employees in the petitioned-for unit

# Comparative Time Periods

REQUIREMENT/ ACTION	2014 RULES	2019 RULES
<b>Statement of Position for Non-Petitioning Parties</b>	By noon the business day preceding the opening of the hearing if set at 8 days from NOH (usually noon, 7 days after issuance of NOH). May be less if hearing set to open more than 8 days after NOH (Postponement for 2 days for special circumstances, and additional 2 days for extraordinary circumstances)	<b>By noon 8 business days from NOH (May postpone for good cause)</b>
<b>Petitioner's (Responsive) Statement of Position</b>	N/A	<b>By noon 3 business days before hearing</b>

# Comparative Time Periods

REQUIREMENT/ ACTION	2014 RULES	2019 RULES
Pre-Election, Post-Hearing Brief	Filed only with special permission of RD and within time limit and for subjects permitted by RD	Entitled to file <b>within 5 business days</b> after close of hearing (Prior to close of hearing and for good cause, Hearing Officer may grant up to 10 additional business days)
Notice of Election after Decision	Ordinarily will issue with Decision and Direction of Election	May issue with Decision. Emphasis on Regional Director discretion to investigate details after issuance of Direction of Election
Voter List	2 business days after approval of election agreement or issuance of Direction of Election	<b>5 business days</b> after approval of election agreement or issuance of Direction of Election

# Comparative Time Periods

REQUIREMENT/ ACTION	2014 RULES	2019 RULES
<b>Date of Election After Decision</b>	Earliest date practicable	Earliest date practicable, but normally not scheduled before <b>20<sup>th</sup> business day</b> after issuance of direction unless waiver filed for review.
<b>Objections to Election and Offer of Proof</b>	7 days after tally has been prepared, except RD may extend time to submit offer for good cause	<b>5 business days</b> after tally prepared, except RD may extend time to submit offer of proof for good cause
<b>Post-Election Hearing on Objections/Challenges</b>	21 days after the preparation of tally of ballots or as soon as practicable, unless parties agree to earlier date	<b>15 business days</b> after preparation of tally of ballots, or as soon as practicable, unless parties agree to earlier date

# Comparative Time Periods

REQUIREMENT/ ACTION	2014 RULES	2019 RULES
Post-Election, Post-Hearing Brief	Only with special permission of Hearing Officer and within time and for subjects permitted by Hearing Officer	Entitled to file within <b>5 business days</b> after close of hearing (Prior to close of hearing and for good cause, Hearing Officer may grant up to 10 additional business days)
Exceptions/Supporting Brief to Hearing Officer's Report on Objections/Challenges	14 calendar days from issuance of report	<b>10 business days</b> from issuance of report
Answering Brief to Exceptions	7 days from last date exceptions could be filed, or further time RD may allow	<b>5 business days</b> from last date exceptions could be filed, or further time RD may allow

# Comparative Time Periods

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REQUIREMENT/ ACTION	2014 RULES	2019 RULES
Requests for Review to RD Decision and Actions (Pre and Post-Election)	Any time until 14 days after a final disposition	Any time until 10 business days after a final disposition
Opposition to Request for Review	7 days after last day that request for review must be filed.	Within 5 business days after last day that request for review must be filed. No reply to opposition without special leave
Briefs Following Grant of Board Review	14 days after grant of review	10 business days after the grant of review. (No reply briefs absent special leave of Board)

## Responsive SOPs - § 102.63(b)

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RSOP form, with instructions, will be sent to all Petitioners with the docket letter

Petitioners must complete, file and serve their RSOP(s) on all parties

Petitioners must file a separate RSOP in response to each party's SOP

# Responsive SOPs - § 102.63(b), continued

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Extension of filing deadline available for good cause

Extension limited because original due date is only **3 business days** before the hearing

Employers that file RMs must file their RSOPs with employee lists by noon **3 business days** before the hearing (previously, SOP filed noon the day before the scheduled hearing)



# Responsive Statements of Position - Content

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RSOP not an onerous requirement - does not need to be exactly detailed to avoid preclusion

Sufficient to identify an issue, even if unable to provide a detailed response

Must be able to tell that the Petitioner disputes the other party's position

RD may allow amendment upon showing of good cause

# SOPs, RSOPs and Preclusion

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“A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement of Position or response ...” § 102.66(d)

Preclusion applies to RSOPs as well as SOPs

Petitioners were previously asked to respond *at hearing* to issues raised in the SOP. Now must file and serve a written RSOP 3 business days before the hearing.

# SOPs, RSOPs and Preclusion, continued

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- Parties have right to litigate issues of unit scope, eligibility and supervisory status, absent agreement of the parties to defer. RD should normally resolve the issues in a decision. § 102.64
- However, issues must be “properly raised.” § 102.66(a)
- Preclusion applies to the failure to timely file and serve SOPs and RSOPs as issues not “properly raised.”
- Reminder: even if precluded from litigating issues, parties may still challenge voters at the election.

# Pre-Election Hearings

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- Final rule restores right of parties to litigate issues in dispute, but RDs still have authority under §102.66(b) to “direct the receipt of evidence concerning any issue.”
- Offers of proof are used to police the record from attempted introduction of “truly irrelevant evidence” -- “but in no event shall a party be precluded from introducing relevant evidence otherwise consistent with” §102.66(c)
- Hearing Officers will inform parties of issues to be litigated and of burdens, if any, before proceeding

# Pre-Election Hearings, continued

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- Hearing Officers solicit payroll ending date and frequency and positions on election details: type, ideal or problematic days of week, shifts, schedules, location and if non-English ballots and notices are needed
- As before, election details are *not* litigable
- Parties have right to file post-hearing briefs within 5 business days

# Pre-Election Decisions - Scheduling Election

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- DDE *may* include election details, whenever possible
- RD has discretion to continue to investigate after issuance
- Absent waiver by all parties, election not normally scheduled before 20th business day after date of issuance of DDE

# Pre-Election Decisions - Voting List

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## Preparation of Voting List - sec. 102.67(h)

ER must serve voting list on parties and RD within five business days of issuance of DDE

ER may seek EOT from RD upon showing of "extraordinary circumstances"

Parties entitled to the list may continue to waive part of the 10 calendar days

# Designation of Observers - sec. 102.69(a)(5)

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Observers must be unit employees whenever possible

- *Whenever possible*, a party *shall* select a current member of the voting unit
- When no such individual is *available*
- A party *should* select a current nonsupervisory employee



## Nonemployee observer is “disallowed”

- Nonemployee observer is breach of election agreement
- Exceptions
  - “absent agreement of the parties to the contrary”
  - “reasonable under the circumstances”

# Request for Review – sec. 102.67(c)

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## What's Changed?

*Impounded* If filed *within 10 business days* after issuance of DDE, ballots at issue must be segregated and all ballots impounded

*Right Remains* Right to file a request for review at any subsequent time until 10 business days following *final disposition*

*Final Disposition* (1) Dismissal of petition, (2) issuance of tally of ballots with no objections or determinative challenges or Request for Review pending, (3) issuance of post-election decision that will ultimately result in issuance of a cert if left unchallenged

# Request for Review – sec. 102.67(c)

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## What's Remained the Same?

*Extraordinary Relief* Impoundment may be ordered after 10 days, but “very rarely granted”

*Combined RFR* RFR of DDE may be combined with RFR of objections/challenges

*No Piecemeal Review* Party may not seek review of different issues pertaining to single action

## Certification of Election to be issued only:

- (1) upon Board resolution of a request for review *or*
- (2) after the time for filing a request for review has passed without any such request having been filed

Questions?

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