

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

HILLSIDE MANOR NURSING d/b/a HILLSIDE
HEALTHCARE CENTER and HILLSIDE PLACE
Employer

and

Case 19-RD-3766

SAMANTHA GRAVNING, an Individual
Petitioner

and

UNITE HERE LOCAL 427 affiliated with UNITE
HERE
Union

Matthew B. Thiel of Missoula, Montana,
for the Employer
Cynthia K. Springer of Indianapolis, Indiana,
for the Union

REPORT ON OBJECTIONS

Gerald A. Wacknov, Administrative Law Judge. The decertification petition in Case 19-RD-3766 was filed on June 8, 2007.¹ Pursuant to a Stipulated Election Agreement approved on June 18 by the Regional Director for Region 19 of the Board, an election was held on July 18 among the Employer's employees in the following described unit:

All regular full-time and regular part-time nurses aides, certified nurses aides, personal care attendants, certified personal attendants, orderlies, certified orderlies, maintenance, dietary, housekeeping, and laundry employees employed by the Employer at its facilities located at 4720 23rd Ave. and 4718 23rd Ave., Missoula, Montana; excluding all administrators, office clerical employees, registered nurses, licensed practical nurses, supervisors, guards, confidential employees, intermittent, casual, and on-call employees, and guards and supervisors as defined by the Act.

Following the election the parties were furnished with a Tally of Ballots showing that of approximately 47 eligible voters, 42 cast ballots, of which 15 were cast in favor of the Union and 23 were cast against the Union. There were 4 challenged ballots, and the challenged ballots were insufficient to affect the results of the election. On July 25 the Union filed timely objections to the election.

¹ All dates or time periods herein are within 2007 unless otherwise indicated.

On August 10, the Regional Director for Region 19 issued a Report on Objections and Direction of Hearing in the above-captioned matter, finding that election objections filed by the Union raised substantial and material issues of law or fact, including credibility resolutions, which could best be resolved by a hearing, and ordered that a hearing be conducted. The Union's election objections are incorporated and fully set forth in the Regional Director's Report. Further, it was ordered that the Hearing Officer designated to conduct the hearing shall prepare and cause to be served on the parties a report on objections which will contain findings of fact, including credibility resolutions and recommendations to the Board concerning the disposition of the Issues involved.

The hearing herein was held on August 29 and 30, in Missoula, Montana. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Employer and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

1. Findings of Fact and Conclusions of Law

Objection No. 1: The Employer through its Agents Conducted Electioneering in the Voting Area that Improperly Affected the Outcome of the Election.

This objection involves the conduct of Dietary Manager Martha Tate. Tate directly supervises some seven or eight dietary aides who work in the kitchen and prepare meals for the residents. Tate directs their work, prepares their performance appraisals, and possesses the authority to impose discipline if necessary.

The kitchen is located down the hallway from the "breakfast nook," the room designated as the voting area for all the unit employees during the July 18 election. The first voting session began at 6:30 a.m. Shortly thereafter Tate walked with two dietary aides, Kane Small and Dianna Keeland, to the voting room. According to Tate and Keeland, the employees requested that Tate accompany them down the hallway to the voting room. Keeland acknowledged that she and Tate had a "friendly, close" relationship and that she considers Tate to be a friend. Keeland testified that the three of them were simply "goofing off" and that she and Tate were walking down the hallway with their arms looped, walking to the beat of "We're off to see the Wizard,"² and Small was "right behind."³ Apparently, other than some reference to the "Yellow Brick Road," there was no conversation. The two employees then entered the voting room while Tate leaned against the wall in the hallway, across from the doorway to the room. She waited for the employees during the two or three minutes it took them to vote, and then walked back to the kitchen with them after they had voted; again there was no conversation. From her vantage point Tate was able to observe the election observers in the voting room. During the two to three minutes Tate was present in the hallway, no other voters were present.

² Tate described it as, "Like skipping, like a fast walk," and said they were, "Just goofing off."

³ Small did not testify in this proceeding. There is no evidence that he was a reluctant participant in the camaraderie.

The most definitive record evidence indicates that the three election observers in the room, representing the Petitioner, the Union and the Employer, had already voted prior to the time Tate, Keeland and Small arrived at the voting place. Bryan Curry, the election observer for the Employer, testified that all three observers voted at the same time and that he was “pretty sure, yeah” that they had voted prior to the time Tate was observed in the hallway. The Union’s election observer, Kari Hoffman, President of the Union and Chief Shop Steward, testified that all the observers voted at the same time. She believes they voted between 7:00 and 7:15 a.m., but could not recall whether they had voted prior to the time Tate, Keeland and Small arrived at the voting site. The Petitioner, Samantha Gravning, who also acted as election observer, was not asked by either party whether the observers voted before Tate, Keeland and Small arrived at the voting site. Accordingly, as Curry’s recollection seems more decisive than Hoffman’s admitted uncertainty of the voting sequence, I credit the testimony of Curry.

This scenario was essentially repeated during the afternoon voting session. Tate testified that, again at the request of two other dietary aides, Vanessa Robinson⁴ and Scott Stanley, she accompanied these employees down the hallway from the kitchen to the voting area. They were laughing and having fun and the only discussion was also a reference by Robinson to the “Yellow Brick Road.”⁵ Upon being advised that the employees were early and the polls were not yet open, Tate walked back with them to the kitchen. They continued their repartee in the kitchen area, and after waiting a few minutes, Tate, again at the behest of these employees, returned to the voting area with them.⁶ Tate leaned against the wall while Robinson and Stanley voted. While the two were in the voting room and Tate was in the hallway, a total of three other voters approached. All were Certified Nursing Assistants (CNA’s), and were not under Tate’s supervision. Two entered the room to vote, and the third employee, who had not yet entered the voting room, whom Tate identified as “Tina,” asked Tate if this was the voting place. Tate said yes. The employee then asked if Tate was also waiting to vote. Tate replied “no, I’m not in this. I’m not part of the Union.”⁷ Then, after about two or three minutes,

⁴ Robinson testified that Tate is her supervisor and also her friend. While she, Stanley and Tate were conversing and joking around in the kitchen area, she asked Tate to accompany them down the hallway. Stanley testified that he did not know why Tate accompanied them down the hallway, and that he walked behind them in the hallway as Robinson and Tate continued to talk. However, he did not controvert Robinson’s testimony that the three were joking around together in the kitchen prior to their two trips down the hallway. I find that, as Robinson testified, Stanley was a participant in the kitchen conversation when Robinson requested that Tate come with them. There is no contrary evidence. Nor was Stanley asked, during his abbreviated testimony on this point, whether he recalled Robinson making this request.

⁵ According to Tate, Robinson said, “let’s walk down the Yellow Brick Road,” and “It was just laughing, having fun.” Robinson testified they were “Just goofing around and being silly, dancing and talking about the Yellow Brick Road, and saying she [Tate] could be our chauffeur.”

⁶ Tate testified that on their way back down to the voting room she saw, “Residents, CNA’s doing their job...” Robinson testified that the three went back down to the polls together, “Because we were still joking around.”

⁷ At about this time, either because of Tate’s conversation with this employee outside the voting room, or because of some retort made by Tate to the election observers, believing that her voting eligibility was under discussion, the Board Agent in the voting room made a general request that there be no talking.

Robinson and Stanley exited the voting room, and the three walked together back to the kitchen.⁸

5 Hoffman testified that as Robinson, Stanley and Tate were leaving the area there were other voters standing in the hallway waiting to vote, namely, Spring Buchman, Cindy Bryant, Perri Barron and Tonya DeRosa. Hoffman believes these individuals “were waiting to come into the breakfast room because they all came in afterwards.” Also, according to Hoffman, Martha Markwed was in the process of voting while Robinson and/or Stanley were in the voting room.

10 CNA Perri Barron testified that she walked down the hallway with CNA Shannon Duncan to vote, that she observed Tate standing there, and that as she exited the voting room she observed Robinson, Stanley and Tate walking back down the hallway. She does not recall seeing any other voters in the area while she waited in the hallway for Duncan to vote. Duncan recalls seeing Tate in the hallway as she entered the voting room, but does not recall seeing any other employees waiting as she simply wasn’t paying attention.

15 No witnesses corroborated Hoffman’s testimony that either Tate, Robinson or Stanley was present when Bryant, Buchman, DeRosa or Markwed voting were waiting or line to vote. the to vote. Accordingly, I credit the testimony of Tate, and find that only three other voters were present as she was waiting in the hallway for Robinson and Stanley. These three voters were, “Tina,”⁹ Barron, and Duncan.

20 In *Milchem, Inc.*, 170 NLRB 362 (1968), the Board enunciated a new standard for dealing with “prolonged” conversations between parties to an election and employees preparing to vote, namely, “a strict rule against such conduct, without inquiry into the nature of the conversation.” Such a rule, the Board states, “by attaching a sanction to its breach...assures that the parties will painstakingly avoid casual conversations which could otherwise develop into undesirable electioneering or coercion.” Such conversations will “be deemed prejudicial without investigation into the content of the remarks,” and it is incumbent upon the parties to the election to “take pains to assure complete compliance with the rule by instructing their agents, officials, and representatives simply to refrain from conversing with prospective voters in the polling area.” Finally, the Board exempts “any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter,” from the strict application of this rule.

30 The Union maintains that the foregoing conduct of Dietary Manager Tate is clearly proscribed by the *Milchen* rule. The Employer maintains that Tate’s interaction with voters constituted chance, isolated, innocuous and non-prolonged conduct that the Board has deemed insufficient to warrant setting aside the election.

35 It appears that both verbal and non-verbal conduct is subject to the *Milchem* rule. Thus, in *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984), the Board states, at p. 830, “We note that whether conversations are “prolonged” or “sustained” is determined by

40 ⁸ Hoffman testified that following the morning voting session she advised the Board Agent conducting the election that Tate, a department manager, had been standing in the hallway as voters voted. The Board Agent said, according to Hoffman, there was nothing that she (the Board Agent) could do about it right then. Further, during the afternoon voting session, while Tate was standing in the hallway, Hoffman again brought Tate’s presence to the attention of the Board Agent. Again, the Board Agent said, according to Hoffman, there was nothing she could do about it at that time.

45 ⁹ There is no further evidence of “Tina’s” identity.

examining the cumulative effect of the party agent(s) *conduct*.” (Emphasis supplied; footnote omitted.) The conduct therein found proscribed by Milchen was threefold: a union agent’s four brief conversations with prospective voters, his sustained presence in the voters’ waiting room, and his disregard of admonitions that agents were not permitted in the waiting room. Similarly,
 .5 in *Pastoor Bros. Co.*, 223 NLRB 451 (1976), the conduct proscribed by Milchen consisted of a single conversation coupled with the proffering of election campaign literature.

In *Bio-Medical Applications, supra*, the Board found the union agent’s conduct, set forth above, to be “persistent and deliberate and clearly amounted to more than a ‘chance, isolated, innocuous comment or inquiry.’” Similarly, Tate’s conduct in accompanying the voters down the hallway to the voting room while engaging in frivolity and escorting them back to the kitchen on three separate occasions, and waiting for them while they voted on two of these occasions, was neither by chance nor was it isolated: It was deliberate because Tate clearly had the time to exercise discretion by declining the voters’ invitations to accompany them to the polls,¹⁰ and it was not isolated as it occurred three times. And while this display of fun and camaraderie may have been innocuous as far as Tate was concerned, Tate’s parading down the hallway to the voting room with the voters denied them the opportunity to be “as free from interference as possible” during the final minutes before they cast their vote.¹¹ Further, Tate’s waiting in the hallway while the employees voted cannot but have had an impact upon the other employees voting or waiting in the hallway to vote; indeed, one other voter asked Tate why she was there, and the voters who observed Tate could have readily have intuited a distinct relationship between the election and Tate’s presence as she waited for her subordinates to vote.¹²
 10
 15
 20

The Employer relies heavily on *Lowe’s HIW, Inc.*, 349 NLRB No. 48 (March 8, 2007). In that case the employer’s agent, Rodriguez, a trainer in human resources, “stood outside the operations office for a period of at least 20 minutes, holding the office door for employees waiting in line to vote while telling them to ‘have their votes ready.’” The Board noted that “these brief statements cannot be considered prolonged conversations encompassed by the *Milchem* rule.” The conduct of Rodriguez in *Lowe’s* is clearly distinguishable from Tate’s conduct herein: Tate’s frolicking with the voters while accompanying them from and back to their workplace, and waiting for them to vote, constitutes interaction of a personal and prolonged nature, and is unlike the cursory comments and impersonal conduct of Rodriguez.¹³
 25
 30

Moreover, in *Lowe’s* at fn. 6, the Board stated:

35
 It should also be noted that the election results were not close—the Petitioner lost the election by 125 votes—and there is no evidence that Rodriguez’s [the Employer’s agent during the voting process] conduct affected anything

40 ¹⁰ I further find that as Tate deliberately stationed herself immediately outside the voting room, any ensuing conversations she may have engaged in with voters were similarly not chance conversations; thus, she could have readily anticipated that her presence at that location would have provoked inquiries or comments.

¹¹ *Milchen, supra*.

45 ¹² In this regard it should be noted that both parties engaged in extensive pre-election campaigning, and that the Employer made abundantly clear its opposition to the Union.

¹³ I do not mean to be unduly critical of Tate. As noted above, it is incumbent upon the parties to the election to “take pains to assure complete compliance with the [*Milchen*] rule” by appropriate instructions to their agents, officials, and representatives. Therefore, even though Tate was invited by the voters to accompany them to the polls, this does not excuse Tate’s conduct.

approaching that number of voters... Thus, even assuming that Rodriguez's conduct was objectionable, we cannot conclude that it materially affected the outcome of the election. See generally *Werthan Packaging, Inc.*, 345 NLRB No. 30, slip op. at 3 (2006).

.5 In the instant case, however, it may be reasonably concluded that Tate's conduct directly impacted at least the seven employees noted above who had not yet voted, and perhaps more, as Tate recollected that she observed CNA's "doing their job" as she accompanied voters down the hallway. This number of votes is sufficient to have materially affected the outcome of the election.

10 Accordingly, on the basis of the foregoing, I conclude that the Employer engaged in objectionable conduct warranting that the election be set aside.

15 **Objection No. 2: The Employer Made Promises and Inducements that Improperly Affected the Outcome of the Election.**

20 During a July 12, 2007 mandatory group meeting prior to the election, attended by a number of employees, Staff Development Coordinator Jessica Denman read the following from a prepared text:

25 You should also consider whether the Union has gotten you better benefits. The employees at the Village and Riverside [two similar facilities operated by the Employer's parent entity] have better benefits than you have. For example, they have more paid time off [PTO]. There has been a Union at Hillside for over 20 years. If the Union has not been able to get you higher wages or better benefits before now, what makes you think it will be able to do so in the future?

30 The Union maintains that during a question and answer session following Denman's reading of the prepared text, Denman promised that, in the absence of the Union, the employees would receive the same paid time off benefits that the Village and Riverside employees enjoyed.

35 CNA Jamie Nooney initially testified that at the end of the meeting Denman stated, "if the Union was voted out the PTO would be better than what the benefits are now." Again, when asked to relate "exactly" what Denman said, Nooney testified that Denman said, "If we had the PTO there would be better—it would have better benefits versus what we have under the Union Contract."

40 CNA Kari Hoffman, President of the Union and Chief Shop Steward, testified that at this meeting she asked Denman to explain the difference between the holiday pay and vacation pay benefits the employees were receiving under the Union contract, as compared with the PTO benefits the Village and Riverside employees were receiving. Denman replied, according to Hoffman, that the PTO benefits enjoyed by the non-union facilities were more favorable than
45 the comparable benefits under the union contract.

Denman testified that there was no such discussion of PTO during the question and answer session.¹⁴ Further, on any occasion when the subject of PTO came up, or when she was asked by employees whether, in the absence of the Union, they would receive the same benefits that non-union employees at the other facilities were receiving, she “always said that was my assumption, but I had no idea in all reality.”

Assuming *arguendo* that such a discussion took place during the July 12, 2007 meeting, Nooney’s second version of the comments she attributes to Denman is consistent with Hoffman’s testimony, and therefore the more probable. Accordingly, even if such a discussion occurred, it appears that Denman made no promises of benefits, but merely reiterated what she had stated in her foregoing prepared remarks, namely, that the PTO benefits the non-union employees were receiving were better than comparable benefits received by employees covered under the Union contract.

Sherry Clawson, a laundry and housekeeping employee, testified that during a cigarette break with Denman and other employees, Denman said, “the company was offering us PTO time instead of vacation time, or they were thinking about it if we got rid of the Union.” Clawson also testified, “I wasn’t you know, really paying attention to what she was saying. I was getting ready to go back to work anyway.” No other employee corroborated Clawson’s testimony.

As Clawson admittedly was not “really paying attention” to Denman’s remarks, I credit the testimony of Denman and find that she did not promise benefits to employees if they got rid of the Union. Denman did admittedly state to employees, when they asked about benefits in the absence of the Union, that she assumed but did not know whether employees would begin receiving the same benefits as the non-union employees. This appears to be an assumption that any employee could reasonably make under the circumstances, namely, that as a non-union facility their benefits would be the same as the Employer’s other non-union facilities. Accordingly, I conclude that Denman’s response, couched in indefinite terms, does not constitute a promise of benefit.

One of the Employer’s leaflets disseminated during the election campaign is headed “What Will Happen to My Pay and Benefits if the Union Loses?” One of the items under that heading is as follows:

Q: If the Union loses, will my hourly Pay Rate change?

A: No! No one’s pay rate will be cut because the Union loses the election. That’s a guarantee.

The Union maintains that this “guarantee” constitutes a promise of benefit or an improper inducement to vote against the Union. The Union has cited no precedent in support of its contention that for an employer to guarantee wages will not be cut “because the Union loses the election” constitutes objectionable conduct.

The Union suggests that Denman backdated the re-employment request of CNA Cynthia Bryant in order to make her eligible to vote in the election. I credit the testimony of Denman, and find that the backdating of Bryant’s return-to-work request, within a day or so

¹⁴ CNA Brian Curry corroborated Denman in this regard.

after she had resigned, was to enable Bryant to retain her prior employee benefits which, as a new employee, she would have been ineligible to receive. I do not find Bryant's return-to-work request was backdated in order to influence the election results.

.5 I recommend that this objection be overruled in its entirety.

Objection No. 3: The Employer Engaged in Threats, Coercion and Interrogation that Improperly Affected the Outcome of the Election.

10

CNA Casey McKeever testified that prior to the election Nikki Denman, Jessica Denman's sister, began talking with her about the Union and attempted to convince her to vote against the Union. During the course of the discussion, according to McKeever, Denman then "did ask me if I had any idea as to how, which way I would vote. And I told her I didn't know at the time because honestly I really didn't." By such a question, McKeever understood Denman to be inquiring how she intended to vote. Denman asked if McKeever had any questions, and there was some comment by McKeever to the effect that if Denman wanted to give her more information this would be okay. Denman said she would talk with "Starla"¹⁵ and get back to McKeever, but never did.

20

According to McKeever, Nikki Denman works in medical records. She takes care of the medical records, answers the phone when people call, "kind of relays calls for residents, takes the phone to them and basically takes care of...the important stuff in that realm." Nikki Denman is not a supervisor, is not in the bargaining unit, has no authority over any other employees, and the record is devoid of any specifics regarding the nature of her work and her interrelationship, if any, with bargaining unit members.

25

The Union maintains that Nikki Denman was acting as an agent of the Employer during her interrogation of McKeever. I find the record evidence insufficient to make such a determination. Whether the duties of Denman, as a medical records employee, involved acting as a conduit between management and unit employees which, in turn, could have reasonably caused McKeever to perceive her in a similar position vis-à-vis the election campaign, is not established by the record evidence.¹⁶ Moreover, the Union has cited no authority to show that her familial relationship to Jessica Denman is, without more, sufficient to establish agency.

35

Prior to the election CNA Linda Browne, a part-time employee, approached Dietary Manager Tate, who is not Browne's supervisor, to seek Tate's opinion regarding the upcoming election. Browne testified that she was admittedly concerned about perhaps making the wrong decision as a result of the conflicting campaign propaganda being disseminated by both the Employer and the Union, and therefore sought Tate's input. Tate Told her that union dues was a consideration, and that if the Union were voted out she would no longer have to pay union dues. Tate also told her, "It's up to you, either vote for it or against it."

45

¹⁵ Starla Horwath is Administrator for Hillside Health Care Center.

¹⁶ See, generally, *Poly-America, Inc.*, 328 NLRB 667 (1999).

Some days later, according to Browne, Jessica Denman told her that she understood Browne “had some concerns about the election.” Then the two went outside by the smoking shed to have a chat. Browne told Denman she was nervous over the situation and didn’t want to make a mistake.” Denman repeated what Tate had told her about union dues, and asked if she had any questions. That concluded the conversation.

Denman testified Tate advised her that her Browne was really confused about the election. Denman approached Browne and invited her outside to visit. Browne told her that she didn’t understand why the Union was taking so much money out of her paycheck because she was not a full time employee. Browne, who was apparently receiving some sort of Social Security disability payments, expressed her fear that she would lose this if the Union were voted out. Several other employees approached, and Browne became “really uncomfortable.” She told Denman that she was uncomfortable around the “day girls because they were all Union and she didn’t want to make them upset.” Denman suggested that Browne ask her parents to help her out if she was not confident enough to make her own decision, believing that it would be less stressful if she sought the advice of individuals who were clearly neutral.

Browne testified that several days later she went to Denman’s office regarding an unrelated personnel matter. Denman asked Browne to close the door, and asked her if she was feeling good about the election. Browne said yes, “I’m feeling good.” Denman then asked whether Browne had made her decision. Browne replied that “when the day comes I’ll make my decision.” On cross-examination, Browne testified as follows regarding this same conversation:

I handed her the time slip, and we closed the door. And then she just said: How do you feel? And I said: I’m feeling good. And then she said: Have you...made your decision? Either vote for it or against it. I said: When Wednesday comes I’ll make that decision.

Denman testified that Browne came to see her about a social security matter and asked when she should put in a request for time off in anticipation of a medical procedure involving surgery. Denman told her to close the door because Browne had previously expressed to her that she was uncomfortable being seen talking with management about the Union in view of the “day girls still around.” Denman said, “Hopefully you’ve had time to decide what you’re going to do.” Browne said that she hadn’t made up her mind yet, and that she would decide when the day came. Denman told her “she just needed to do what was good with her.”

Browne gave varying accounts of her conversation with Denman. I credit the testimony of Denman, and find that, under the circumstances detailed above, Denman’s inquiry was couched in language Browne could reasonably have interpreted in a literal sense, namely, as merely wanting to know whether Brown had resolved her dilemma, rather than as impliedly asking Browne to declare how she intended to vote.

I recommend that this election objection be overruled in its entirety.

**Objection No. 4: The Employer Enforced an Invalid No Solicitation—
No Distribution Rule that Improperly affected the
Outcome of the Election.**

.5 The Union apparently maintains that the Employer sought to prohibit pro-union discussion among employees during working time, while encouraging and permitting non-union discussions to take place during working time. The Union does not address this issue in its brief.

10 Alisha Hermes, an LPN, and accordingly a supervisor, attended an election strategy meeting attended by supervisors. The Employer's attorney conducted the meeting. Hermes testified that the supervisors were told they could not ask employees how they were going to vote, and other rules were also explained; and they were also told that as supervisors, they would be expected to espouse the Employer's non-union position. Further, it was her
15 understanding that the supervisors were to discourage pro-union talk but to encourage anti-union talk during working hours. However, Hermes' testimony was somewhat equivocal on this matter, and at one point she testified "it was not specified" whether supervisors were to encourage employees to express themselves negatively about the Union during working time. Following the meeting, Hermes went to Starla Horwath, the Employer's Executive Officer.
20 Hermes expressed her concerns about being required to espouse the Employer's non-union position, and told Horwath that she preferred to remain neutral. No action was taken against her.

25 There is no evidence that supervisors followed such a policy of encouraging anti-union talk and discouraging pro-union talk during working time.¹⁷ I discount the testimony of Hermes and find that she misunderstood the instructions from the Employer's attorney.

I recommend that this objection be overruled in its entirety.

30 **Objection No. 5: The Employer Relied on Knowing Misrepresentations
Of Facts Relating to 2005 and 2007 Legislative
Ad-On Monies that Affected the Outcome of the
Election.**

35 The Union does not address this issue in its brief. By this objection the Union maintains the Employer, in campaign literature, misrepresented, or failed to explain, that its union employees would be receiving a wage increase in the future as a result of a Montana State Law providing for additional hourly wages for nursing home employees. The Employer maintains, however, that as the amounts of the wage increase had not yet been finalized or implemented,
40 it was premature to include them in its campaign literature comparing the wages of its union and non-union employees; further the legislative ad-on monies for its union employees were not misrepresented in its campaign literature: rather, the monies were simply not included within the wages of either the union or non-union employees for purposes of wage comparison.

45

¹⁷ Hoffman testified that as she was in the kitchen handing a union flyer to a kitchen employee, Dietary Manager Tate advised her that she could not be engaging in such conduct on the clock. This isolated incident is insufficient to establish that the Employer encouraged non-union conversations but discouraged pro-union conversations.

The Union has not demonstrated that any misrepresentations were made. To the extent, however, that such literature may contain misrepresentations, the Board will not overturn elections based on misrepresentations or misleading statements, as it is expected that the parties and employees are in a better position to monitor and evaluate such matters. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 132-33 (1982).

I recommend that this objection be overruled in its entirety.

2. Recommendations

On the basis of the foregoing findings of fact and conclusions of law, I recommend finding merit to Union Objection No. 1, and overruling the remaining Union objections to the election. Further, regarding Union Objection No. 1, having concluded that the Employer engaged in objectionable conduct warranting that the election be set aside, I recommend that the election be set aside and that a second election be directed.¹⁸

Dated: Washington, D.C. October 11, 2007

Gerald A. Wacknov
Administrative Law Judge

¹⁸ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by October 25, 2007.