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

ST. CATHERINE HEALTHCARE AND
REHABILITATION CENTER, LLC
Employer

and Case 28-RC-6661

DISTRICT 1199NM NATIONAL UNION OF
HOSPITAL AND HEALTHCARE EMPLOYEES,
AFSCME, AFL-CIO
Petitioner

Mitchell Rubin, Esq., for the General Counsel.

John Ontiveros, Esq., (Jackson Lewis, LLP)
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REPORT ON CHALLENGED BALLOT AND OBJECTIONS

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. The hearing in this case was held July 28-29, 2009, in Albuquerque, New Mexico. District 1199NM National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO ("the Petitioner") filed a petition on May 8, 2009,[1] to represent certain employees of St. Catherine Healthcare and Rehabilitation Center, LLC ("the Employer"). Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 28 on May 20 a secret ballot election was conducted on June 19 in the following appropriate unit:

> All full-time, regular part-time and PRN Certified Nursing Assistants, Certified Medical Assistants, Environmental Services Assistants, Activity Assistants, Maintenance Assistant, Dietary Assistants, and Social Services Assistant employer by the Employer at its facility located in Albuquerque, New Mexico: excluding all other employees including all PRN pool employees not employed by the Employer, agency employees, Nurses, Maintenance Director, Medical Records Assistant, office clerical and administrative employees, confidential employees, professional employees, managers, guards, and supervisors as defined in the Act.

The Corrected Tally of Ballots showed the following:

Approximate number of eligible voters……	69
Number of void ballots ……	0
Number of votes cast for the Petitioner ……...	29
Number of votes cast against participating labor organization(s) …….	29

[1] All dates are in 2009 unless otherwise indicated.

Number of valid votes counted …….. 58
Number of challenged ballots ……. 1
Number of valid votes counted plus challenged ballots …….. 59

The challenge therefore affects the results of the election. The Petitioner and the Employer each filed timely Objections to the Conduct of the Election.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Petitioner and the Employer, I make the following

Findings of Fact

I. Background

The Employer is a 178-bed healthcare facility located in Albuquerque, New Mexico, that provides long-term patient care and skilled rehabilitation services. It employs about 132 workers and typically has between 109 – 125 patients. Jaime Andujo is the Employer's administrator; he has overall responsibilities for the Employer's day-to-day operations. Carol Dionne Motal is vice president of human resources for Skilled Healthcare. The Employer contracts with Skilled Healthcare to provide certain administrative services. Motal came to the facility on the day of the election and she was present for the counting of the ballots after the voting period ended.

The Employer held three meeting on June 17 with employees to discuss its view of the upcoming union election. The day before, June 16, the Employer held a meeting for employees that it conducted in Spanish. Andujo, who is bilingual, conducted each of these meetings reading from a prepared script. He also used a PowerPoint presentation to emphasize certain points.

II. Challenged Ballot

During the counting of the ballots, the Board agent declared a ballot void on the basis that the intent of the voter was unclear. The Petitioner contends that the Board agent's interpretation of the ballot was incorrect and contends that the intent of the voter was clear and that the ballot should be counted. Contrary to the Petitioner, the Employer supports the Board agent's voiding of the ballot.

The ballot shows that the voter placed a clear "X" in the "Yes" box. In the "No" box the voter placed a "/" accompanied by some smudging as if the voter then attempted to erase[3] at least part of that marking.[4] The Board agent showed this ballot to those persons present during the counting of the votes.

The Board's goal in counting ballots is to give effect to a voter's intent whenever possible. *Daimler-Chrysler Corp.,* 338 NLRB 982 (2003). Cases such as this one, involving "dual-marked ballots," "often present difficult decisions." Id., at 983, fn. 5. In *Bishop Mugavero Center,* 322 NLRB 209 (1996), a voter marked an "X" in the "NO" box and a diagonal line in the "YES" box. Applying *Caribe Industrial & Electrical Supply,* 216 NLRB 168 (1975), the Board concluded that it could not discern the voter's intent and voided that ballot. In *TCI West, Inc.,* 322 NLRB 928 (1997), the Board stated the:

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[2] At the hearing the Employer withdrew objections 1 and 6, and the Petitioner withdrew objection 2.

[3] The pencils placed in the voting booths had erasers.

[4] Motal testified that she remembered the line in the "No" box being darker than appeared on the disputed ballot produced by the Regional Director's representative and received into evidence at the hearing. Lauterborn testified that the void ballot received at the hearing appeared in the same condition as the ballot he declare void after the election; he certainly looked at the ballot longer than other person after the election; his testimony rings true. Andujo, who also saw the disputed ballot after the election and also viewed the ballot received in evidence at the hearing, confirmed that they were the same. For these reasons I do not credit Motal's testimony to the extent that it suggests that the condition of the disputed ballot was visibly different on the day of the election than at the time of the hearing.

> [W]ell-established Board precedent holding that where a voter marks both boxes on the ballot and the voter's intent cannot be ascertained from other markings on the ballot (such as an attempt to erase or obliterate one mark), the ballot is void because it fails to disclose the voter's clear intent.

Under these circumstances the voter is charged with simply asking for another ballot.

I now address whether the voter attempted to erase the marking placed in the "NO" box. As indicated, the marking is accompanied by smudging. The Employer argues that the smudging could have been created by something other than the voter's attempt to erase the mark, such as the folding or other handling of the ballot. This is entirely speculative, given the fact that smudging is not present in the "YES" box and given the fact that the pencils in the voter's booth had erasers. I conclude the voter made an attempt to erase the mark he or she placed in the "NO" box, *Osram Sylvania, Inc.,* 325 NLRB 758 (1998). Although I find no case directly on point, I conclude that under existing case law the intent of the voter can be discerned and that the voter intended to vote in favor of the Petitioner. See *Mediplex of Connecticut, Inc.,* 319 NLRB 281, 300 (1995); *Brooks Brothers*, 316 NLRB 176 (1995). It follows that the Petitioner won the election and should be certified as the collective-bargaining representative of the unit employees unless the Employer's objections are sufficient to set aside that election.

III. The Employer's Objections

The Employer's objections are:

2. The Union, by its agents and/or supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by instructing employees-whom they believed did not support the Union-to not vote in the election.

3. The Union, by its agents and/or supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by falsely telling eligible voters if they did not vote they could opt out of the bargaining unit if the Union was elected as their bargaining representative.

4. The Union, by its agents and/or supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by falsely telling eligible voters New Mexico law prohibited employees from striking.

5. The Board Agent interfered with the fair operation of the election process and engaged in conduct affecting the results of the election by failing to properly follow established Board procedure for interpreting ballots and for improperly permitting the Union to challenge the Board Agent's interpretation of a ballot, and thereafter by failing to follow the Board's procedure for handling the improperly challenged ballot.

7. The Regional Director interfered with the fair operation of the election process and engaged in conduct affecting the results of the election by failing to properly follow established Board procedure by improperly permitting the Union to engage in a post-election challenge to the interpretation of a ballot and by entertaining the union's improperly asserted objection to the conduct of the election based upon the Board Agent's initial interpretation of a determinative ballot, and by thereafter revising the official Tally of Ballots issued by the Board Agent.

8. By the above and other conduct described in paragraphs (1)-(4), the Union has interfered with and coerced eligible voters with regard to the exercise of their Section 7 rights under the National Labor Relations Act and destroyed the atmosphere necessary to conduct a fair election. The above coercive acts and other conduct taking place during the critical pre-election and actual voting period were sufficient to unlawfully affect the results of the election.

9. By the above and other conduct described in paragraphs (5)-(6), the Board Agent interfered with eligible voters' exercise of their Section 7 rights under the National Labor Relations Act, and violated the Board's established procedure under the NLRB Casehandling Manual, ¶¶ 11340.7-11340.9. The above conduct was sufficient to unlawfully affect the results of the election.

10. By the above and other conduct described in paragraph (7), the Regional Director interfered with eligible voters' exercise of their Section 7 rights under the National Labor Relations Act, and violated the Board's established procedure under the NLRB Casehandling Manual, ¶¶ 11340.7-11340.9. The above conduct was sufficient to unlawfully affect the results of the election.

1. Alleged Misconduct by Petitioner

Objections 2-4 and 7 pertain to alleged misconduct by the Petitioner. These objections turn, in part, on whether Wendy Lahai was an agent of the Petitioner. Lahai has worked for the Employer since October 17, 2007, as a CNA. She is not employed by the Petitioner and holds no office with it. I need not, however, resolve the issue of whether Lahai acted as an agent for the Petitioner for reasons that follow. The Employer contends that Lahai made several false statements to employees, such as telling them that it was illegal to strike in New Mexico. In its brief:

> The Employer recognizes under current Board law parties may intentionally or unintentionally make statements that are inaccurate during a union campaign. Midland National Life Insurance Co., 263 NLRB 127 (1982).
> …
> Nevertheless, the Employer requests the ALJ apply the Hollywood Ceramics{[5]} standard.

I dismiss these objections for obvious reasons.

2. Alleged Misconduct by the Board

Objections 5 and 9 pertain to alleged misconduct by Johannes Lauterborn, the Board agent who conducted the election. Stephanie Blackburn, an administrative assistant who has worked for the Board for almost thirty years, assisted Lauterborn after the polls closed. At the ballot count after the polls closed Lauterborn counted the ballots and announced that there were 29 votes both for and against union representation. In addition, after consulting the Representation Casehandling Manual, Lauterborn announced that he could not determine the intent of the voter concerning the ballot described above and he declared the ballot void. He then completed the tally of ballots reflecting the tie vote with one void ballot and announced that the Petitioner did not win the election. Henry Santana, Petitioner's lead organizer for the election campaign, then congratulated Andujo and Motal and shook their hands. According to Andujo and Motal, Lauterborn then looked at Santana and said that he presumed Santana was going to challenge the disputed ballot. According to Lauterborn, he announced that any party had the right to challenge his interpretation that the ballot was void; he then looked at Santana and asked if he was challenging the interpretation that the ballot was void. Santana said that he was. Lauterborn then revised the tally of ballots to show that there was one determinative challenge and therefore the final results of the election had not yet been decided.

Citing *Solvent Services, Inc.,* 313 NLRB 645 (1994) the Employer argues that the Board agent improperly solicited the Petitioner to challenge the ballot that he had voided. I disagree. Even if Lauterborn said that he assumed the Petitioner was going to challenge his determination that ballot was void, he was merely stating the obvious. The Petitioner had the right to challenge Lauterborn's determination either through a challenge or by filing an objection. In *Brooks Bros., Inc.,* 316 NLRB 25 (1995), the Board resolved the issue of whether a voided ballot should be counted even though that ballot

[5] 140 NLRB 221 (1962).

was not subject to a challenge and issue was presented in the form of an objection. In its brief the Employer states "The Petitioner had no intention of challenging the ballot." But this is entirely speculative and I make no such finding.

Galli Produce Co., 269 NLRB 478, 478 FN. 1 (1984), cited by the Employer, is inapposite. In that case the Board stated:

> In Objection I, the Employer contends that the Board agent improperly challenged a voter on behalf of the Union. As found by the hearing officer, the Board agent reminded the Union's observer of the Union's intent, stated at the preelection conference, to challenge a certain voter. Sec. 11338 of the Board's Casehandling Manual admonishes Board agents not to make challenges on behalf of the parties. When a party believes that it has good cause to challenge a voter, the party's observer, not the Board agent, has the responsibility to follow through and make the challenge. However, as there is no basis here for finding that the Board agent's conduct affected the results of the election, we shall overrule Objection

The Board did not indicate that it would sustain the objection if the challenged ballot was determinative. Moreover, the cases cited by the Employer all deal with a situation where the Board agent allegedly challenged or solicited a challenge to the *eligibility* of a person to vote in the election; the Employer cites no case dealing with the situation in this case involving a challenge to the voiding of a ballot. I see nothing under either the Casehandling Manual or Board law that forbids a Board agent from reminding a party of their rights under the Act.

I dismiss this objection.

Citing *Paprikas Fono,* 273 NLRB 1326, 1328 (1984), the Employer argues that the election should be set aside because an appearance or possibility of irregularity in handling the ballot at issue. More specifically, the Employer argues that contrary to the Casehandling Manual, Lauterborn did not place the challenged ballot in an envelope and seal the envelope in the presence of the parties.

Indeed, Lauterborn did not follow the Casehandling Manual in this regard. Instead Lauterborn placed the ballot in an envelope and sealed the envelope after the parties had left the room. Lauterborn then located the parties and had them sign across flap of the sealed envelope. He then traveled by airplane from Albuquerque to Phoenix and the next day, Saturday, he took the sealed envelope from his residence and left the sealed envelope in the office of the office manager in the Regional Office where it was placed in the safe located there. Another Board agent then retrieved the sealed envelope from the safe and brought it to the hearing site where, on the record, the parties identified their signatures, the envelope was opened, and the disputed ballot was displayed.

The Employer, in its brief, argues:

> [T]he Board Agent failed to secure the ballot and broke the chain of custody in at least three instances. He left the challenged ballot with Blackburn – who was not a supervisor or Board Agent – for several minutes. … He then (possibly) placed the challenged ballot in his checked luggage. . . . When he arrived in Phoenix, he left the ballot in his home overnight before securing it in the Regional Director's safe.

The Employer then argues:

> Moreover, the Board Agent broke the chain of custody after placing the challenged ballot in a manila envelope. Where a Board Agent fails to "secure the ballots in a way to assure against any tampering, mishandling or damage" the NLRB will order a re-run election. Fresenius USA Manufacturing, Inc., 352 NLRB No. 52, (sic) *3 (2008). . . . Fresenius, supra, (NLRB ordered re-run election where Board Agent left ballots at his home before placing them in Regional Director's safe.)

This argument makes it appear that in *Fresenius* the Board ordered a re-run election because the Board agent left ballots in his home before placing them in a safe. But that argument is clearly incorrect. While the Board in that case did note that the Board agent took the ballots home during the weekend and deposited them at the Regional Office the following Monday and then added: "There is no evidence that the Board agent secured the ballots in a way to assure against tampering, mishandling, or damage," *Fresenius USA Mfg, Inc.,* 352 NLRB 679, 680 (2008), it is clear that the Board did NOT hold that the election was set aside for that reason. Rather, the case turned on the peculiar composite fact situation in that case. Indeed, common sense shows that marked ballots and challenged ballots are frequently in the possession of Board agents for periods of time after an election and before they are deposited in a safe in the Regional Office. Although, as described above, Lauterborn failed to comply with the Casehandling Manual, it is well settled that the provisions of the Casehandling Manual are not binding procedural rules. *Correctional Health Care Solutions*, 303 NLRB 835 (1991). In any event, I conclude that the challenged ballot in this case was secured "in a way to assure against tampering, mishandling, or damage;" it was placed in an envelope, sealed with identifying signatures, and then opened at the hearing in the presence of the parties who confirmed their signatures.

The Employer also cites *Austill Waxed Paper Co.,* 169 NLRB 1109 (1968). In that case the Board agent left the ballot box unattended for two to five minutes during the course of the election; no such conduct occurred in this case. The Employer next cites:

> Tidelands Marine Services, Inc., 116 NLRB 12222 (sic) (1956) (NLRB ordered re-run election where Board Agent failed to keep ballots with him at all times when traveling.)

This reference is misleading; the Board made no such holding. Rather, the Board ordered the re-run election because the Board agent failed to seal the ballot box containing the ballots before they were counted and then traveled with the open ballot box while being transported by the employer and the intervenor.

I dismiss these objections.

Objections 7 and 10 pertain to alleged misconduct by the Regional Director. In this regard the Employer argues:

> The Regional Director furthered the misconduct by re-issuing the Tally of Ballots and allowing the Union to engage in a post-election challenge. The Board Agent filled out the Tally of Ballots stating that the ballot was void, challenges were not sufficient to effect (sic) the result of the election, and a majority of valid votes counted plus challenged ballots had not been cast for Petitioner. (Tr. 36, 88-89; Er.Ex. 3.) In essence, he declared that the election was over and Petitioner lost. The Employer maintains the Board Agent improperly solicited a challenge to the ballot. However, by filling out the Tally of Ballots in this manner, he unilaterally erased the Union's challenge. Moreover, the Union technically withdrew its challenge by signing the Tally of Ballots without protest. (Tr. 36, 88-89; Er. Ex. 3.) 12
>
> By issuing a Corrected Tally of Ballots, the Regional Director improperly reinstated the Union's challenge. Indeed, the Regional Director is permitting a postelection challenge, which is prohibited by Board law. See Solvent Services, supra at 646 ("[I]n the interest of promoting election finality, postelection challenges will not be permitted.") citing Sears, Roebuck & Co., 114 NLRB 762, 763 (1955). By engaging in the aforementioned conduct, the Regional Director created a reasonable doubt as to the fairness and validity of the election process, and a re-run election should be ordered.
>
> 12 This is also further evidence of the Board Agent's misconduct. The Board Agent failed to follow the proper procedures for filling out the Tally of Ballots. See Section 11340.8, "Preparation of Tally of Ballots (Sample Tally of Ballots)."

To the extent that I am able to understand this argument, I conclude it amounts to nothing more than a contention that the Regional Director erred in not correcting the alleged misconduct of the Board agent. I dismiss these objections

3. Additional Objection

As described in the Employer's brief:

> At the outset of the hearing the Employer also objected to the Regional Director's failure to issue an Order removing the case from his office to the NLRB's Division of Judges. (Bd. Ex. 2(a)) The honorable William G. Kocol conducted the hearing on July 28 and 29 on behalf of the Regional Director. (Tr. 5, Bd. Ex. 2(a)) Although the Employer did not challenge the ALJ's impartiality (and still does not), it did object to the conflict of interest in having the ALJ issue a Hearing Officer's Report for decision by the Regional Director involving an objection alleging Regional Director misconduct. (Tr. 7-10).
> …
> St. Catherine also objected on thee record that the Regional Director failed to issue an Order removing the matter to the NLRB Division of Judges. With all due respect to the Regional Director and the ALJ who heard this matter, there is an inherent conflict in the Regional Director having an ALJ issue a Report to the Regional Director for decision on this Objection.

The Employer provides no case authority or further argument in support of this contention; I am unable to discern any merit in this contention and I dismiss it.

IV. Petitioner's Objection

I now resolve the Petitioner's objections in the event that the Board might find it useful. Those objections are:

1. Respondent interrogated bargaining unit members about their voting preference in circumstances that restrained, coerced and improperly influenced their vote in violation of the Act.

3. Respondent threatened to terminate bargaining unit employees who were active in the Union campaign and threatened to terminate bargaining unit members if the Union won the election, in violation of the Act.

4. The Respondent changed the working conditions of the bargaining unit employees in order to restrain, coerce and intimidate them so that they would vote against the Union in violation of the Act.

In its brief the Petitioner refers to the testimony of Marites Rose, who worked at the Employer during the election period.[6] Rose testified that before the election she was walking down the hall when Director of Nursing Benanita Smith called her into Smith's office. They spoke to each other in Tagalog. According to Rose, Smith asked her whether she agreed or disagreed with the Union. Rose answered that she did sign a card for the Union and that she was going to join the Union. Smith told Rose about the disadvantages of joining the Union based on Smith's experience when she worked in California. More specifically, according to Rose, Smith said that she knew it was illegal to fire someone for joining the Union, but that they could be fired for some other reasons, not for joining the Union. Rose also testified that Smith asked her "So, what do you think? Did you hear anything from anybody whether they are joining the Union or not?" Rose answered that she thought most of them were not voting for the Union. Smith testified that about ten days before the election Rose was walking by her office as she was facing the hallway and then entered her office. They initially talked about personal matters and their common Filipino culture. Rose then brought up the Union and Smith explained that she used to work in California

[6] Rose was fired after the election for the stated reason of sleeping on the job.

and belonged to a union and told her the good things and bad things about the union, including how she had been involved in a strike. According to Smith, Rose volunteered that she and another employee in dietary were not voting for the Union. Smith denied asking Rose whether Rose agreed or disagreed with the Union or how other employees would vote in the union election; she also denied telling Rose that employees could not lose their jobs for engaging in union activities but that they could get fired for other reasons. Although the demeanor of both witnesses appeared credible, I conclude that Rose's testimony is less likely to be accurate. As the Employer points out in its brief, Smith had been instructed not to interrogate employees about their union activities. Moreover, Rose had recently attended the mandatory meetings about the Union, conducted in English while Rose's first language is Tagalog; it seems under these circumstances it is more likely that Rose would have sought out Smith's advice. Finally, Rose had recently been fired for reasons that she perceived to be unfair. For these reasons I do not credit Rose's testimony

In its brief Petitioner refers to the testimony of "Carmen Valencia" in support of its claim that employees were unlawfully interrogated. This is an obvious error because no person with that name testified at the hearing. The Petitioner neither referred me to a transcript page nor described in particularity the nature of the alleged interrogation, so I am unable to ascertain the real identity of "Carmen Valencia." I therefore cull the testimony of other witnesses presented by the Petitioner in search for interrogations. Elsa Rubio works for the Employer as a certified nursing assistant since about July; she has worked as a CNA for about 20 years. Rubio testified that about ten days before the election she was at nurse's station listening to a conversation among employees about the Union when Louella Scott, assistant director of nursing, came up to her and asked her, in Spanish, "And what do you think? Who are you going to vote for?" Rubio replied that she did not know what her answer was because she did not understand what a union was and that her English was not so good so she had to ask questions. Scott then told Rubio to think about it very well. Scott, in turn, testified that Rubio came to her office and told her, in Spanish, that she wanted to understand what the union was. Scott explained that the union promised a lot of things and that many things that would be promised could not be completed from one day to the next, but that they could take months. Scott denied asking Rubio what she thought about the Union or who Rubio was going to vote for. Again, the demeanor of both witnesses seemed believable. But both Rubio and Scott agree that Rubio indicated that she did not understand what a union was; this makes it seem likely that it was Rubio who was asking the questions. And Scott, like Smith, had been instructed by the Employer not to interrogate employees. I am unable to conclude that Rose's testimony is more credible that Scott's.

Hiroshi Clubs has worked for the Employer as a CNA for about three years; he asserts that he was one of the "lead instigators" behind the Union. Clubs admitted that about a week after the petition was filed he went to Andujo's office and told Andujo that he was the person who initiated the union campaign; he described in general terms what lead him to do so. Andujo did not reply. Clubs also testified that the day before the election he went to the office of Acting Director of Nursing Amanda Francine White (formerly Chavez)[7] to tell her why he started the effort to get the Union. Clubs testified that he spoke first and told White that the reason he started the union was because management wouldn't listen to his points of view "and that's when the conversation stopped … that was it and I left after that." But earlier in his testimony Clubs claimed that White asked him first how was he going to vote and later told him that she was sorry about the whole thing but yet she had to follow the policies and procedures as well. On cross examination Clubs admitted that White never asked him how he was going to vote. I do not credit Clubs' testimony. First, his demeanor was not credible. Next, his testimony was confused to say the least. And I find it highly unlikely that he would walk into White's office the day before the election and she would ask an open leading "instigator" for the Union how he was going to vote.

According to Clubs about six or seven days before the election he went to office of Assistant Director of Nursing Louella Scott to discuss a work matter. According to Clubs he never got to discuss that issue because Scott told him that the Union was going to take his money, that he was going to be paying dues and everything, and that he was "going to make them fatter." The Petitioner attorney then

[7] White works for Skilled Healthcare but worked for the Employer as Director of Nursing for several weeks in June.

asked Clubs, in a leading fashion, "Did she ask you anything about your involvement in the Union?" Clubs answered, ambiguously "Yes, since I'm one of the – lead instigators." The Petitioner's attorney then tried again by stating "Okay. What did she ask you about the Union, Louella Scott?" Clubs answered "She really didn't -- give me the history but I just said yes and no and that was it." The Petitioner's attorney persisted "What did she ask you –." Clubs' third response to this question was "she asked me if I was for it or if I was against it, you know, it's on your conscience whatever you do and she was just being more negative. But she said she worked for a union and it wasn't fit for her, and that's why she persuaded me to try to get a no vote for the union." Then Petitioner's attorney asked "what did you tell her when she asked you whether you were for or against the union?" Clubs replied "At that time I wasn't definite. I didn't say yes or nay. I just left it open." During cross-examination Clubs testified that it was he who told Scott that he was the lead instigator. I again do not credit Clubs' testimony. In addition to the reasons stated above, Clubs' testimony was in response to blatantly leading questions.

Lahai testified that about two weeks after the petition was filed she was summoned to the office of Director of NursingTom Rigirozzi. Rigirozzi told Lahai that a patient had filed a complaint against her but he concluded Lahai was innocent of the accusation and then added that he would see Lahai in his office again another time. Lahai asked why and Rigirozzi answered because of what Lahai was doing. Lahai then left the office. Rigirozzi did not testify at the hearing. I nonetheless conclude that any comment made by Rigirozzi cannot be objectively construed to be a threat of retaliation for Lahai's union support. I note that in the conversation Rigirozzi absolved Lahai of the accusation made by a patient and made no direct reference to the Union or to Lahai's support for it. Rigirozzi's reference to seeing Lahai again in his office is certainly not necessarily a threat of retaliation nor was his reference to what Lahai was doing necessarily a reference to Lahai's union activity. I simply cannot add these two vagaries together and come up with an unlawful threat. I dismiss this objection.

Lahai testified that during the critical period the Employer announced that the census was down and as a result the lunch period for employees would be lengthened from a half-hour to one hour with no lengthening of the work day. As a result the employees' paid hours were reduced by one-half hour. According to Lahai, some employees lost insurance coverage as a result of the reduction in hours. However, Virginia Lea Russo is employed by Skilled Maintenance and is a member of its regional support team for New Mexico. One of the issues she deals with is patient census at the facilities to which Skilled Maintenance provides services, including the Employer. Russo explained that Skilled Maintenance uses a mathematical calculation called "per patient day" of "PPD" to determine how many hours different classifications of worker may be utilized depending on the census. Under this formula the higher the census, the more hours are allotted and the lower the census, the lower the hours that are allotted. In April, Russo was asked to determine the appropriate staffing patterns for the Employer based on its census. Russo determined that the Employer was over the PPD by 56 hours per day. She recommended that the Employer lengthen the lunch hour across the board for all nursing shifts from one-half hour to one hour. Russo's testimony and documentary evidence shows that the Employer announced this change on about April 24 and it went I effect on April 27. I credit this evidence over Lahai's recollection. Because this matter occurred outside the critical period, I dismiss this objection.[8] *Ideal Electric & Manufacturing Co.,* 134 NLRB 1275 (1961).

Each year the Employer celebrates CNA Appreciation Week. This is a national, annual event and the dates of the celebration are determined by an outside organization. In 2008 the Employer had barbeques and provided cupcakes from an expensive cake shop. In 2009 the national event was held June 11-18. White (formerly Chavez) planned the events for CNA Appreciation Week at the Employer; White had done so at several other facilities where she had worked in the past. White obtained the dates of the event from American Healthcare Association web site. During that week White arranged for a scavenger hunt, a car wash, a sock hop, and Hawaiian Day. One day the nursing administration team cooked breakfast for the night shift CNAs. The Employer gave out an I Pod Shuffle, costing about $49.95, and a DVD player, costing about $35, to the winners of a game of musical chairs played on the

[8] The evidence shows that on June 22, three days after the election, the Employer restored the lost hours by reinstating the half-hour lunch period for the nursing department despite the fact the census had not increase. Of course, that is not an issue to be resolved in this proceeding.

day and evening shifts. The Employer also gave out two gift certificates worth $25 at a local restaurant, $5 gift cards at Subway and Starbucks, and $2 gift cards for Baskin Robbins ice cream. The Employer provided its CNAs with root beer floats, nachos, breakfast burritos, burgers, and hot dogs. In total the Employer spent less than $1000 on the weeklong event. White was not employed by the Employer in 2008 and thus was unable to compare the costs.

While the timing of the celebration of the CNA Celebration Week, ending as it did on the day before the election, gives cause for concern, White's uncontradicted testimony is that the dates were determined by an outside organization and were verifiable by searching on a web site. I conclude this event was not scheduled in a manner designed to interfere with the election. Also, the record does not show that the 2009 event was significantly better than prior years; free food and games seem to form the core of these events. Finally, the costs of free gifts seemed nominal in context of the purpose of the event. I agree with the Employer's observation in its brief that "[e]mployees would have viewed this as being consistent with past celebrations as opposed to an attempt to 'buy' their vote." For these reasons I dismiss this objection.

Conclusion

I conclude that the challenged ballot should be counted as a vote in favor of representation by the Petitioner. I further overrule the objections to the election filed by both the Employer and the Petitioner. It follows that the Petitioner should be certified as the collective-bargaining representative of the employees in the unit described above.[9]

Dated, Washington, D.C. September 28, 2009

_____
William G. Kocol
Administrative Law Judge

[9] Pursuant to Sec. 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of this Report, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Exceptions must be received by the Board in Washington by October 13, 2009. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 28. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.