UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

SOUTH METRO HUMAN SERVICES Employer and AFSCME COUNCIL 5 Petitioner	Case 18-RC-17754

HEARING OFFICER'S REPORT AND RECOMMENDATION
TO THE BOARD ON CHALLENGED BALLOTS AND OBJECTIONS

Pursuant to a petition filed on March 17, 2011,[1] and the provisions of a Stipulated Election Agreement approved by the Regional Director on March 31, an election by secret ballot was conducted among certain employees of the Employer on April 28.[2] The results of the election are set forth in the Corrected Tally of Ballots that issued on April 29.[3] The challenged ballots are sufficient to affect the results of the election. In

[1] All dates hereafter are in 2011 unless otherwise specified.

[2] The stipulated unit is as follows:

> All full-time and regular part-time Professional Employees employed by South Metro Human Services; excluding all Service and Maintenance employees, M.D.'s, psychiatrists, licensed psychologists, technical employees, business office clericals, skilled maintenance employees and excluding all managers, supervisors, confidential employees and guards as defined by the Act.

[3]
Approximate number of eligible voters	171
Void ballots	0
Votes cast for Petitioner	70
Votes cast against Petitioner	71
Number of valid votes counted	141
Number of challenged ballots	9
Number of valid votes counted plus challenged ballots	153

addition, both parties filed timely objections to conduct affecting the results of the election.

On May 11, the Regional Director issued a Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election, Order Directing Hearing and Notice of Hearing (hereafter, "the Regional Director's Report") in which he ordered a hearing as to the issues raised by the challenged ballots and objections. The Hearing Officer was directed to prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues.

Accordingly, on May 16, 19, 23, and 24 a hearing was held before the undersigned Hearing Officer duly designated for the purpose of conducting the hearing. All parties were represented at the hearing and had full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to make statements and submit briefs in support of their respective positions.

Upon the entire record in this case and from a careful observation of the manner and demeanor of the witnesses while testifying under oath, I make the following:

I. FINDINGS OF FACT

This decision will begin with a brief, general description of the Employer's operations, useful for understanding the other issues. I will describe facts specific to each issue raised by the Regional Director's Report by issue, starting with challenges: Mark Fellows, on-call voters, and then the professional issues; followed by Petitioner's objections; followed by the Employer's objections.

The Employer is a non-profit Minnesota corporation with a principal office located in St. Paul, Minnesota and more than a dozen other service sites located throughout the Twin Cities metropolitan area. The Employer provides services to homeless adults and adults with mental illness, chemical dependence, or both. These services include small group and apartment building-sized residences, as well as "out-patient" counseling and assistance with medical issues and daily living issues like transportation to doctors' appointments.

The small-group residences are classified as the Employer's "Adult Foster Care Program." The Employer operates five "Level I" residences, and ten "Level II" residences, four beds each. The difference is in the severity of the residents' condition – Level II residents generally have suicidal tendencies, chemical dependency, or other serious problems, and the staff is more likely to have to deal with crises. The primary staff at these houses are classified by the Employer as mental health counselors ("MHCs") and the Employer distinguishes between MHC I and II based on experience and training. The multi-unit residence is classified as the Employer's "Community Foundations" program. Its primary staff are classified by the Employer as mental health practitioners.

Not all of the Employer's services are residential. For example, the Employer operates a U Care program, which engages three full-time and two part-time case coordinators, from its main office. These case coordinators work with "members," who must be qualified for Minnesota public assistance. The case coordinators develop risk assessments and plans of care and follow up with periodic meetings to monitor the

members' progress. In addition, the Employer has a program to help recently incarcerated adults make the transition back into the community as well as outreach programs for homeless persons.

A. THE CHALLENGED BALLOTS

Petitioner challenged the ballot of Mark Fellows because he was not on the original eligibility list, which was submitted by the Employer and served on the Petitioner on April 7. The Employer submitted an amended list on April 26, which added Fellows. Petitioner contends that because of the original omission, it has no knowledge of Fellows' duties, hours of work, or start date, and one of its objections relates to Fellows' absence from the original eligibility list. The Employer contends that Fellows' omission from the original list was a clerical error and he is a regular part-time employee.

The Board Agent challenged the ballots of Robin Nadeau, Jennifer Olson, Lindsay Paetznick, and Susan Stamschror because their names were not on the eligibility list. The Employer contends that they are on-call employees, not regular part-time employees. The Employer challenged the ballot of Abiodum Adeboye because she is an on-call employee, not a regular part-time employee. According to the Employer, her name was on the eligibility list by mistake. Petitioner contends that Adeboye, Nadeau, Olson, Paetznick, and Stamschror should be counted as regular part-time employees.

Petitioner challenged the ballots of Darcy Anderson, Samantha Hofmaster, and Cindy Van Heise because they are not "professional" employees within the meaning of the Act and the Stipulated Election Agreement. The Employer contends that they have sufficient education and training and otherwise fully qualify as professional employees.

1. Mark Fellows

As explained above, Fellows was not on the original Excelsior list, but his name and address appeared on an amended list submitted by the Employer on April 26. Whether the Excelsior list problem is objectionable is dealt with below, Section B.2. Omission from the list does not, in any event, make Fellows ineligible to vote. An Excelsior list is not a binding eligibility agreement. "[E]ither party may challenge the eligibility of any person whose name has been placed by the employer on the Excelsior list and either party may also contend that persons left off the list should be allowed to vote." Dauman Pallet, Inc., 314 NLRB 185, 211 fn.13 (2000).

Fellows works ten hours or more a week as "U Care case coordinator," a position that otherwise appears to be within the stipulated unit. He does the same work under the same supervisor as the other U Care case coordinators, including one other who works part time. The fact that Fellows works at home for most or all of his hours in this position does not defeat his community of interest with other employees engaged in the same duties under the same supervisor – presumably Petitioner would be happy to negotiate for work-at-home privileges for other employees without risking their removal from the unit if the Employer agrees. See Pat's Blue Ribbons, 286 NLRB 918 (1987) (employees who work at home and have a right to reject work and set own hours still in unit). That Fellows also works other times as an on-call mental health counselor only makes him a dual function employee, still eligible to vote in this election. See, e.g., Berea Publishing Co., 140 NLRB 516, 519 (1963). Accordingly, I recommend that the challenge to Fellows' ballot be overruled and that it should be opened and counted.

2. On-call employees

Adeboye, Nadeau, Olson, Paetznick, and Stamschror are all challenged based on their alleged status as "on-call" employees. Adeboye and Olson are classified as mental health counselors and work in the Employer's Adult Foster Care group homes. Nadeau, Paetznick, and Stamschror are classified as mental health practitioners and work in the Employer's Community Foundations program (the apartment residence).

Olson, Paetznick, and Nadeau are all designated "on-call" on their "terms of employment" documents, which they signed when they obtained the position. Adeboye's "terms of employment" contains no such designation. Stamschror's "terms of employment" is not in the record, but she only quit her regular job in March and asked for on-call work exclusively going forward at that time.

During the pre-election conference held on the morning of the election, the parties agreed to strike Stamschror's name from the list, and both parties initialed the eligibility list to memorialize this agreement. The record is silent as to the basis for the parties' stipulation. There is no evidence that the parties reached any agreements with respect to this issue that might apply to other voters. There is no evidence that any characteristic of Stamschror's eligibility might implicate any policy of the Act that would preclude the Board from honoring this stipulation. Accordingly, I will honor the parties' agreement and recommend that the challenge to Stamschror's ballot should be sustained because the parties agreed she was not eligible.

The challenges to the other four on-call employees' ballots depend on whether the stipulated bargaining unit includes or excludes "on-call" employees.

> The three-part test set forth in Caesar's Tahoe, 337 NLRB 1096 (2002), applies to the resolution of challenged ballots in cases involving stipulated units. Under this test, if the objective intent of the parties is expressed in clear and unambiguous language in the unit stipulation, then the Board will enforce the agreement. If the language of the stipulation is ambiguous with respect to an employee's eligibility, then it is appropriate for the Board to examine extrinsic evidence to interpret the stipulation. If the intent of the stipulation still cannot be determined, then the Board will decide the eligibility of the challenged voter using traditional community-of-interest criteria.

Regional Emergency Medical Servs., Inc., 354 NLRB No. 20, slip op. at 1 (May 21, 2009) (footnotes omitted). [4]

Generally, "[w]here a stipulation neither includes nor excludes a disputed classification, the Board will find "that the parties' intent with respect to that classification is not clear. . . . The Board bases this approach on the expectation that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles. Butler Asphalt L.L.C., 352 NLRB 189, 190 (2008) (citations omitted). Applying that general rule in this case would result in a finding that the stipulation is not clear inasmuch as "on-call" employees are not explicitly included in the unit description, nor are they explicitly excluded.

On the other hand, the Board seems to have developed a specific rule regarding "on-call" employees. When an employer's use of the on-call term as a job classification descriptor is well established, and on-calls are not explicitly included in the stipulation,

[4] Had this issue been raised and disputed prior to the election, on-call employees (at least those who average four or more hours a week) would almost certainly have been included because in that posture, community of interest would have been the only determinative factor. E.g., Davison-Paxon Co., 185 NLRB 21 (1970). In the community of interest analysis, "[i]n deciding whether per diem or on call [employees] should be included in a . . . unit, the Board looks to the similarity of the work and the regularity and continuity of employment." Visiting Nurses Ass'n, 324 NLRB 55, 60 (1997). Lack of fringe benefits and a different pay scale do not defeat the community of interest created by doing the same job in the same place under the same supervisors. Crittenton Hosp., 328 NLRB 879, 883 (1999). Nor does the right to reject work. Tri-State Transp. Co., 289 NLRB 356, 357 (1988).

then on-call employees are excluded. Intercontinental Hotels Corp., 237 NLRB 906 (1978).

There is no evidence in this case that Petitioner consciously excluded or even knew about on-call employees' designation as such. While the Board occasionally looks for such evidence, e.g., Northwest Community Hosp., 331 NLRB 307 (2000) (petitioner included on-calls in petition, but omitted them from the stipulation), it is not required. See National Public Radio, Inc., 328 NLRB 75 fn.2 (1999) ("the express intent of the parties . . . may be determined by reference to the employer's regular use of the classifications in a manner known to its employees, industry practice, and the Board's established definitions of the classification"). In this case, there is no evidence of industry practice, but the classification is in general use by the Employer in documents known to and used by employees,[5] and it is used consistently with the Board's established definition of on-call employees.

Petitioner trumpets the fact that all of the challenged employees appear on schedules published by the Employer. Nadeau and Paetznick appear on a schedule that the Employer publishes two weeks or more in advance for the Community Foundations building. In the four months covered by the schedules, Nadeau worked on one Wednesday, three Thursdays, three Fridays, and one Saturday. Paetznick worked many more days, but still in a random scatter, covering virtually all shifts around the clock at one time or another. At most, the schedules establish that Nadeau and

[5] The Employer's Human Resources Director testified that the lack of on-call designation on Adeboye's terms of employment document was a clerical mistake made by a predecessor, which she corrected after the election. Although I am suspicious of post-election machinations, the fact remains that Adeboye averaged about 20 hours of work a week, and only eight of them are based on the "regularly scheduled" Saturday shift. I have to infer that the other hours are obtained on an on-call basis.

Paetznick occasionally declare their intentions several weeks in advance – they do not establish permanence or regularity inconsistent with their on-call classification.

Olson and Adeboye consistently appear on a schedule the Employer occasionally publishes showing each adult foster care home and the employees it expects to work listed shifts, along with contact numbers and a protocol for emergency shift coverage. These schedules appear to be revised as needed based on factors including transfers, new hires, and the like – they do not cover a monthly or other standard period like the Community Foundations schedules. Olson and Adeboye have been on the schedule consistently since April 2010 for work at the same house, every Saturday 8 a.m. to 4 p.m.

There is no evidence that the Saturday assignments, "regular" as they may be in a dictionary sense, changed Olson's or Adeboye's classification. Cf. Butler Asphalt L.L.C., 352 NLRB at 190-191 ("laborers" excluded by stipulation not included as "operators" despite occasional performance of operator duties). On the contrary, when Olson applied for a Saturday shift on an indefinite basis, she still called it "on-call" (the Employer's solicitation for this shift is not in evidence). Both Adeboye and Olson worked more than just Saturdays, on an irregular basis consistent with on-call status.

I find this case indistinguishable from Intercontinental Hotels and National Public Radio. Therefore, I recommend that challenges to the on-call employees' ballots should be sustained.

3. Professional issues

A. Anderson: Case Manager: Darcy Anderson is classified by the Employer as mental health substance abuse case manager for the Employer's Assertive Community

Treatment Team. She was originally hired as a mental health practitioner in the same department. The job description for the case manager position requires a bachelor's or master's degree in a behavioral science or related field, 2000 hours of experience working with individuals with mental illness, 2000 hours of training or supervised experience in substance abuse treatment, and 30 hours of continuing education a year. Anderson had nursing assistant certification when hired and six or seven years' experience as a home health aide or nursing assistant working with mentally ill clients.

The job description for the case manager position includes functions such as "primary responsibility for developing, writing, implementing, evaluating, and revising overall treatment goals and plans in collaboration with the client and the treatment team"; "assist[ing] with all aspects of psychiatric rehabilitation and all aspects of obtaining and maintaining housing"; attending commitment and other court hearings and follow through; assessing, planning and treating substance abuse for assigned clients; client family outreach; on-call nighttime crisis intervention; and other duties.

No other evidence was presented specifically with respect to Anderson or generally with respect to the position of mental health substance abuse case manager.

B. Hofmaster and Van Heise: Mental Health Counselors: Samantha Hofmaster and Cindy Van Heise are classified as mental health counselor (MHC) II. MHCs are the front-line staff at the residences that make up the Employer's Adult Foster Care Program. There is at least one on duty 24-7, and they are normally the only staff on duty overnight. Each residence is supervised by a lead counselor on duty during a normal day shift. As more fully explained below, MHCs have a protocol that requires a call to an "on-call supervisor" in certain situations, whenever they occur, even during the

day shift (when a "lead counselor" is likely on duty at the residence). Residences are licensed by the state. It is not clear from the record which if any other Employer personnel are required to have an individual license, but MHCs are not.

MHCs are responsible for oversight of all residents; administering their medications; helping them manage their mental health symptoms; making sure they get to their appointments; ordering medications when necessary; teaching independent living skills; making sure residents are fed, including preparing food for them; cleaning the residences; taking out the trash; arranging for activities and taking residents on outings; and helping the residents work through their crises, among other things.

The Employer generally distinguishes MHC Is from IIs based on the houses in which they work.[6] The residents in a Level II house are more likely to have serious problems such as suicidal tendencies, self-abuse patterns, or alcohol or chemical abuse issues. This, in turn, makes it more likely that residents in Level II houses will have crises requiring intervention by the staff. MHC IIs earn a dollar an hour more than MHC Is (seven-odd percent). MHC Is can and do work on an on-call basis at Level II houses, with no unique instructions or duties. The choice of a Level I or II house for each client is determined by his or her case manager and the Adult Foster Care program director, based in part on clinical need and in part on the authorized level of funding the client brings. MHCs have no input in this choice.

[6] I say "generally" because at least one employee testified she was hired, without any degree beyond a high school diploma, to work an overnight shift at a Level II house, although she never explicitly said whether she was classified or paid as a I or a II for that job. She is currently working as MHC I in a Level I house. In addition, at least one of the payroll records offered into evidence by the Employer labels employees as "Overnight MHC," without a I or a II, even though some of them are assigned to Level I residences and some to Level II residences, but there is no other evidence of whether that is a distinct classification or not.

The job description for MHC II requires a bachelor's degree plus either 2000 hours experience working with individuals with mental illness or 2000 hours working in corporate (individual adult as opposed to family) foster care. In practice, the Employer "prefers" that MHC IIs have a bachelor's degree or better in a "behavioral science or related field," but occasionally hires (perhaps ten percent) based on experience in lieu of a relevant bachelor's degree. Van Heise had over ten years' experience providing direct care and supervising residential facilities offering care for mentally ill and chemically dependent clients, and Hofmaster had one year of experience supervising a residence for mentally ill clients and three years of experience as a home health aide specializing in the care of elderly persons with Alzheimer's or dementia.

By contrast, the MHC I job description requires a high school diploma or equivalent, good knowledge of mental illness, and experience working in a group home environment. Daily care duties appear identical for both MHC I and II. Crisis duty and responsibility appears identical, too, distinguishable only by frequency. Both MHC I and II job descriptions state a requirement of 12 hours of continuing education a year.

All of the Employer's clients have on file a written individual service plan, including generalities about their conditions and goals; a crisis plan, which includes suggestions for use in specific situations; and an individual abuse prevention plan. These plans are prepared by the house lead counselor, a program director, and a program manager when a client initially moves into a residence. MHCs have no responsibility in the development of client plans.

There is an “Incident Report Procedure” in effect and posted at each residence, both Level I and Level II. It requires MHCs to file a detailed report with six named managers by e-mail in the following circumstances:

1. If police or EMS are contacted (even if they do not come to the house).
2. If on-call [supervisor] is contacted.
3. If there is any physical altercation or threats of assault between residents.
4. If a resident is suspected of being intoxicated, high, etc.
5. If a resident is in possession of alcohol, illegal drugs, etc.
6. If a resident is transported to urgent care, the emergency room, or the mental health unit at any hospital.
7. If a resident is injured in a home accident (ie [sic] falling down the stairs, cutting self with knife while helping in kitchen).
8. If a visitor is treated for injuries of any kind.
9. Self Injurious Behavior or signs of SIB that have not been previously reported.
10. Any report to Vulnerable Adult Common Entry Point.
11. Etc...When in doubt fill out a report. You will never get in trouble for filling out an incident report when you don’t need to.

This procedure also requires the MHC to call the “on-call supervisor” in the following circumstances:

1. If police or EMS are contacted (even if they do not come to the house).
2. If there is any physical altercation or threats of assault between residents.
3. If a resident is suspected of being intoxicated, high, etc.
4. If a resident is in possession of alcohol, illegal drugs, etc.
5. If a resident is transported to urgent care, the emergency room, or the mental health unit at any hospital.
6. If a resident is injured in a home accident (ie, falling down the stairs, cutting self with knife while helping in kitchen).
7. If a resident engages in Self Injurious Behavior or signs of SIB that have not been previously reported.
8. If a resident is AWOL or may be lost in the community.
9. If a resident is escalating and your attempts to help them deescalate are not effective.
10. If there are any suspicions of vulnerable adult issues.
11. If there are any clinical questions of immediate importance.
12. If a client reports feeling suicidal.

13. Questions that can't wait for business hours – it's still better to call if unsure.

The list of potential "on-call supervisors" includes five managers, a registered nurse, and two licensed independent clinical social workers, the latter three of whom were in the bargaining unit eligible to vote in this election.

The Employer's witnesses on the issue conclusionarily supported MHC II discretion and independent judgment. They testified that counselors dealing with a crisis were permitted discretion in responding to a crisis before calling the on-call supervisor, and that the suggestions for response in the crisis and abuse prevention plans were not exhaustive. As a concrete example, one manager testified that an MHC should exercise discretion in choosing a particular response, such as suggesting a distraction technique (going for a ride), to a client's professed desire to hurt herself. Another testified that an MHC should exercise judgment about whether or not to suggest an as-needed prescription medication when a client reported hearing voices.

On the other hand, the Petitioner's witnesses generally downplayed the level of independence or discretion exercised by MHCs. For example, one MHC II testified that she would offer an as-needed prescription medication anytime the client asked for it, and only if it was suggested in their treatment plan. The decision that seemed to get the most testimonial attention was when to call cabs for residents who needed a ride somewhere. One of the on-call supervisors testified that she complained about getting too many calls in the middle of the night regarding cab rides and made a more general suggestion that MHCs be given more authority to make independent decisions. Apparently, the Employer did take authorization for cab rides between 11 p.m. and 7 a.m. off the mandatory call list in response, but declined to otherwise loosen the reins.

C. Professional conclusions Section 2(12) of the Act defines in relevant part a "professional" employee as:

> any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes

Section 2(12) was meant to apply to small and narrow classes of employees, and employees must satisfy each of the four requirements set forth in Section 2(12)(a) before they qualify as professional employees. E.g., Virtua Health, Inc., 344 NLRB 604, 609 (2005).

Finding professional status or not has no direct consequences on any employee's protections under the Act or even the appropriateness of a bargaining unit. It only means that before the Board may find a unit that combines professional and nonprofessional employees appropriate for the purposes of collective bargaining, the professional employees must be given a chance to decide by majority vote whether they wish to be included in such a combined unit. See Section 9(b)(1) of the Act. Accordingly, there are no statutory presumptions[7] and neither employers nor petitioners have any burden of proof on this issue. However, the Board has some independent

[7] The Board has established some presumptions in the course of its rulemaking on units in the health care industry based on repetitive experience, which are not relevant to this case.

responsibility to protect the interests of professional employees when this issue is raised. Pontiac Osteopathic Hosp., 327 NLRB 1172 (1999).

Based on the stipulated election agreement and the selectivity of the challenges, I conclude that the parties agreed that in general the classifications of case managers and MHC IIs are included in the unit. When the parties agree to professional status of a particular job classification, the Board is not generally required to inquire beyond that stipulation on its own initiative. Minneapolis Society of Fine Arts, 194 NLRB 371, 373 & fn.10 (1971); see also Westlake Plastics Co., 119 NLRB 1434, 1441 (1958) (noting Board's "well established policy of honoring stipulations made in the interest of expeditious handling of representation cases"). When facts inconsistent with the stipulation come to light, however, the Board has an affirmative obligation to disregard such agreements in order to protect professionals' rights under Section 9(b)(1) of the Act to a self-determination election. Pontiac Osteopathic Hosp., 327 NLRB at 1173.

With respect to Anderson, I do not see any factual basis for questioning the parties' apparent agreement that case managers in general are professionals even if the evidence that was presented might not cover all the issues raised by the statutory definition of professional. The job description requires a degree, significant related experience, and regular and substantial continuing education. It also requires the case manager to assess and treat mental illness, which typically requires professional expertise and discretion. There is no evidence that case managers' assessment and treatment duties are controlled by any specific guidelines or protocols or preemptive supervisory review, in contrast to the evidence presented regarding MHCs.

There is really no evidence contrary to the agreement, but for Petitioner's single challenge to Anderson's ballot on the sole basis that Anderson does not possess the stated educational requirement of the position. Even in its post-hearing brief, Petitioner makes no general arguments about the case manager position – it merely argues that Anderson is not qualified for the position. Whether one or a few occupants of a position have a relevant degree does not answer the question of the professional status of the job or Anderson's individual eligibility, because knowledge of an advanced type required by Section 2(12)(iv) is "customarily," not exclusively, acquired in pursuit of specific academic degrees. "[I]t is not the individual's qualifications but the character of the work required that is determinative of professional status." Virtua Health, Inc., 344 NLRB at 609. See also Avco Corp., 313 NLRB 1357 (1994) ("If a group of employees consists *primarily* of individuals with professional degrees, the Board may presume that the work requires 'knowledge of an advanced type.' Conversely, if few in the group possess the appropriate degree, it logically follows that the work does not require the use of advanced knowledge") (emphasis added, citations omitted). Therefore, I conclude that the challenge to the ballot of Anderson should be overruled and her ballot should be opened and counted.

Regarding Hofmaster and Van Heise, by contrast, I am unable to blindly apply the general stipulation to the specific challenges. The witnesses generally agreed that whatever independent judgment and discretion Hofmaster and Van Heise exercise is in response to client crises. It is also plain that most or all of their other duties, including driving clients around to appointments and activities, helping them cook, taking out the

trash, etc., are not "intellectual and varied in character." The latter duties are shared almost identically with MHC Is. The former are also shared in kind with MHC Is, the only distinction being in the frequency with which they come up. However, there is no evidence from which to compare frequencies, or to make any findings about absolute frequency for Hofmaster and Van Heise. Moreover, MHC Is (as well as on-call and overnight MHCs without MHC II qualifications) are permitted to work on-call in Level II houses, any time and with no unique constraints, so at those times even the frequency is the same.

Those factors taken together preclude a finding that Hofmaster's and Van Heise's work is *predominantly* intellectual and varied in character. See Texaco Employees Federal Credit Union, 315 NLRB 828, 831 (1994) ("If any of the loan officers' work is intellectual and requires the exercise of discretion and judgment, there is no recitation of whether such duties comprised a major portion of their work"); A.A. Matthews Assoc., 200 NLRB 250, 251 (1972) (certain engineers found not professional because "major" portion of their work found identical to that performed by admitted nonprofessionals).

I also find insufficient evidence that Hofmaster's and Van Heise's work involves consistent exercise of professional discretion and judgment. Likely crisis situations and suggested responses are spelled out in the clients' plans and the emergency notification protocol. In addition, Hofmaster and Van Heise are required to report crises, either by

phone to an on-call supervisor when in progress or least afterwards in a written report.[8] The fact that not every situation may be described in the plans or protocol is not very impressive, especially in light of the protocol's requirement that any doubts be resolved in favor of calling a supervisor and making reports. By contrast, other conceded professional employees, including mental health practitioners and case managers, have a role in developing the plans.

I find that the difference between developing the plans, versus implementing them, is crucial, and that Hofmaster's and Van Heise's exercise of judgment or discretion is too closely circumscribed by plans and protocol and too closely supervised during or at least shortly after the fact to satisfy the requirements of Section 2(12). Compare Catholic Bishop of Chicago, 235 NLRB 776, 780 (1978) (bachelor's level social workers found professional based on responsibility for counseling services and therapeutic treatment) with Samaritan Health Services, Inc., 238 NLRB 629, 640 (1978) (bachelor's level social workers found not professional based on routine tasks and close supervision).

In sum, based on the facts that there is insufficient evidence to categorize what therapeutic and clinical work Hofmaster and Van Heise do as a "major" part of their job, and that Hofmaster's and Van Heise's therapeutic or clinical work is closely circumscribed by protocol and supervised by other professional employees, I conclude

[8] The Employer also argues that there is a difference between having to seek approval before the fact and reporting a client interaction after the fact. Of course there is a difference, but both kinds of monitoring enable the supervisors to keep a rein on the caller, whether that is by participating in the decision, or by offering instructions after the fact for future guidance.

that Hofmaster and Van Heise are not professional employees within the meaning of the Act and the challenges to their ballots should be sustained.[9]

B. PETITIONER'S OBJECTIONS

1. The Employer threatened to terminate employees that were pro-union

The only evidence offered to support this objection was the testimony of one employee to the effect that she asked a co-worker identified as her "lead" or "supervisor" if employees could be fired for inappropriate and unprofessional conduct exhibited at an anti-union campaign meeting held at the main offices a week prior to the conversation, and the "lead or supervisor" answered, "maybe." The witness did not further describe the inappropriate and unprofessional conduct to which she referred sufficiently to support a finding that it included any protected concerted activity or union activity. There is nothing objectionable about an employer firing or threatening to fire employees for inappropriate or unprofessional conduct. I would therefore overrule this objection.

2. Employer failed to comply with the *Excelsior* rule by submitting an amended *Excelsior* list shortly before the election

The Employer timely submitted an Excelsior list on April 7, and it was promptly served on Petitioner. On April 26, less than 48 hours before the polls opened for this election, the Employer submitted a revised Excelsior list, which included one additional name (Mark Fellows) and deleted two names (Abiodum Adeboye and Sara

[9] To the extent this decision has implications beyond the specifically challenged ballots, they are not appropriately addressed in this case inasmuch as no other challenges were made, and no objections were filed on this issue by either party. The stipulated unit, all professional employees, is not affected by this decision.

Stamschror). Petitioner's objection may be fairly read to complain about Fellows' omission and the two inclusions. I find no case, however, supporting finding an over inclusive list to be objectionable conduct. I suppose a large enough number of over inclusions might in some circumstances be objectionable by, say, confusing the union or sending it on a wild goose chase. In this case, however, I recommend against finding two extra names objectionable in a unit of this size, especially considering the fact that Petitioner is arguing that Adeboye and Stamschror should be counted eligible.

Regarding Fellows' omission, "[t]he Board has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee's name suffers an obvious disadvantage in communicating with that person." Woodman's Food Markets, Inc., 332 NLRB 503, 504 (2000). Whether omission of names justifies setting an election aside depends on the number of omissions, absolutely and as a percentage of the unit; the margin in the election; and the employer's explanation for the omissions. Id.

The Employer explained Fellows' omission as a result of its decision that "on-call" employees are not eligible, further discussed in subsection A, above. Besides Fellows' part-time work as U Care case coordinator, he also works on-call as a mental health counselor at one of the group homes, a job he held before the U Care program even came into existence. The list was created by a generalist in the human resources department and checked by the HR director, and the Employer made an effort to correct the mistake once it was found. I consider this a good-faith mistake.

As the tally stands now, Fellows' vote alone could not be determinative, because even if he is counted and voted yes, Petitioner would not have a majority. If a revised

tally remains out of reach for Petitioner even presuming a reversal of Fellows' vote, or if my recommendation that the challenge to Fellows' vote should be overruled is rejected, then I would easily reject this objection – it would then be a single error in a large unit, it would not be determinative, and the Employer offered a plausible, good-faith excuse for the mistake. All of the Woodman's Food Market factors would stand in favor of finding substantial compliance with the Excelsior rule.

If Petitioner either ties or loses by one vote after a revised tally in which Fellows' vote is counted, then his ballot is potentially determinative because we would have to assume he might have voted no, whereas meaningful pre-election contact by Petitioner might have persuaded him to vote yes.[10] I would still recommend overruling this objection. The error rate, both absolutely and as a percentage of the unit, and the Employer's good faith would still weigh in favor of finding substantial compliance. Determinative effect is a factor, not conclusive. As long as the rule requires "substantial" compliance, rather than "perfect" compliance, I do not believe a single error in so large a unit should require a rerun – doing better the next time around would be speculative anyway. Accordingly, I recommend overruling this objection.

3. The Employer provided two wage improvements in order to influence the election

The objection specification states that the Employer granted a wage increase of $1.00 an hour to persons unspecified on April 15, and told employees at one specified

[10] The Employer argues in its brief that the error was not prejudicial because Fellows was in fact contacted by Petitioner. On the contrary, Fellows testified that he read campaign literature that was posted on the walls and got some e-mails from the Employer and from "the union," but I cannot conclude from that whether he meant from Petitioner or from pro-union employees. In any event there is no evidence Petitioner had Fellows' home address, which is what the Excelsior list requires.

residence that it recently received a grant and would provide $5000 for employees of that house to divide among themselves. No evidence was offered at the hearing to support the second allegation. Accordingly, I recommend that this aspect of Objection No. 3 be overruled.

At the hearing, Petitioner offered evidence that mental health therapist/mental health professional Jenny Jendro and mental health therapist Tara Severts received raises, announced on about February 16 and implemented in early March. I find this evidence not conceivably suggested by Petitioner's objections, so I am precluded from considering it by the Regional Director's Report. E.g., Precision Products Co., 319 NLRB 640 (1995).

Regarding an April 15 wage increase, the Employer's owners and co-founders Tom Paul and Terry Schneider, both testified that in December 2010, they reviewed compensation for all of their employees. Relevant to this issue, they decided, in sum, that two of the programs, Targeted Case Management (TCM) and Assertive Community Treatment (ACT) had operated in the black, so to speak, for two years running, and that "we could provide some enhancement to compensation as a result of the work that people did." By contrast, they decided there was no similar justification for general "enhancements to compensation" in any other program. TCM and ACT are two of the twenty "programs" administered by the Employer. The only evidence of how many unit employees they include is one employee's "guess" that there are 75 to 100.

By February 8, the Employer knew that the Petitioner had resumed an organizing campaign that had apparently gone dormant since summer 2010. In about mid-February, Paul started making the rounds of regular staff meetings held at each

residence or office, not just within the TCM and ACT programs, to tell employees about general financial conditions. At meetings for other programs, Paul said there was money for TCM and ACT, but not for the employees being addressed. At the TCM and ACT staff meetings, he told employees that the Employer had some money to spend, and asked them for input on whether they wanted it in salary or perhaps in other benefits.

On March 31, Paul sent an e-mail to TCM and ACT team members which states:

> Over the past month or so, I know we've discussed specific dates for compensation changes in some of your staff meetings I attended. It was my intention to have this on your March 31 paycheck, but by now it is obvious that didn't happen.
>
> Unfortunately, the salary adjustments required more coordination than I originally anticipated, which has caused a delay in processing.
>
> I truly apologize for not meeting the expectation that I presented to you all. Please note, the salary adjustments will appear on your April 15th paycheck.

The Employer paid a lump sum on April 15 to make the raises retroactive to January 1. The Employer offered a "sample" of four employees' payroll records (without explaining the basis for the sampling), two of whom got raises of about $2000 on salaries of about $48,000 and $39,000, and two of whom got raises of about $500 on salaries of about $48,000 each. There is no explanation for the differences.

Employees who testified about the meetings were more or less vague about the details of Paul's staff-meeting lectures. I credit Paul that he clearly conveyed an intention to give some increase to employees in only two programs during the meetings, but that he left the meetings with only ideas about how to translate that into specific

salary or benefits. There is no other evidence concerning the final deliberation or decision.

Granting a benefit such as a wage increase during the critical period between the filing date of the petition and election raises an inference of interference, unless the employer rebuts the inference so established by proving that both the fact and the timing of the grant were unrelated to the union campaign. Center for the Disabled, 344 NLRB 273 (2005); Sun-Mart Foods, 341 NLRB 161 (2004). Since granting or withholding benefits while a union campaign proceeds both have their risks, employers have to take care to act as if there was no union campaign. In making this determination, the Board will examine multiple factors including the size of the benefit conferred, the number of employees receiving the benefit, the timing of the benefit, inferences a reasonable employee might draw, and consistency (or lack thereof) with past practices. E.g., Virginia Concrete Corp., 338 NLRB 1182, 1184 (2003).

This case involves a substantial wage increase of about one to four percent, the exact size depending on factors not addressed in the record. Although the estimate of the number of employees receiving the benefit is rough, I would think that if the parties thought it was too far off, they would have offered some other evidence, so it appears that "roughly" half the unit was targeted by this increase. Of course that means half the unit therefore did not share in the wage increase. It is also a permanent increase in the scale, not a one-time event.

The Employer made no apparent use of the wage increase in its anti-union campaign. On the other hand, Petitioner considered it a boon. In a campaign flyer issued in April and signed by ten employee-members of Petitioner's organizing

committee, Petitioner took credit for the raise and argued that the Employer's selectivity was all the more reason to vote for union representation. There is no evidence that the ACT or TCM programs were a particular hotbed of union activity, either pro or con.

As for timing, Schneider and Paul testified without contradiction that they resolved on the fact in December 2010 – that is well in front of the critical period, but after Petitioner started courting employees the prior summer. Paul commenced a serial effort to explain selective increases to all employees soon after learning that Petitioner had resumed its campaign in earnest, before the critical period opened but continuing into it. Paul testified that he explained to TCM and ACT employees that they were due an increase because of financial performance and asked them how they wanted it, and that he told other employees how they might improve their programs' performance in the future and justify their own increases. While the employees who testified about the meetings did not remember the rationale, they didn't deny or contradict Paul's testimony either. It took until the end of March for Paul to get to all the staff meetings, take into account employees' suggestions, make a final decision, and figure out exactly who was in the relevant programs. Cross-examination suggested that some inattention or even incompetence contributed to delaying the announcement, but if impact on the election was the goal, the Employer could have waited a few more weeks.

Past practice is somewhat mixed. The Employer presented evidence that it has in the past presented year-end lump-sum bonuses based on an assessment of overall financial performance, but it presented no evidence of a raise in the base wage schedule of selected programs because of their specific performance. On the other hand, there have been other increases based on specific public grants and unexplained

factors that must have made it appear to an average reasonable employee that there is a random element to the Employer's treatment of wages. I find past practice not supportive of the Employer's position, but also not so far out of whack as to suggest that the union campaign must be the only explanation.

I conclude that the Employer sustained its burden. I credit Paul's explanation and find the only contrary factor is the inference based on timing during the critical period. The Employer decided it was going to do something, but only for its two "profitable" programs, while the union campaign was essentially dormant. From then on, it had to act on the wage increase like it didn't know there was a campaign. It campaigned vigorously against Petitioner, but did not connect the increase to any union-related message and on the contrary explained the tie to financial performance to employees. It stuck with the selective increase it resolved to make in December even after the union campaign started, after which it should have appeared that a more wide spread increase would serve the anti-union campaign better. Accordingly, I recommend that this objection should be overruled.

4. The Employer provided a new benefit in order to influence the election

The objection specification states that on April 26, the Employer announced by e-mail a program to match employees' 403(b) plan contributions. The evidence established that the Employer has provided a limited 403(b) benefit in the past, but few employees participated because the Employer never matched employee contributions. Paul testified that in the year-end discussions with Schneider further described above, they decided they had $100,000 to spare, they should make a match to encourage more participation in the 403(b) program, and $50,000 was an appropriate amount for

that purpose. According to Paul, the rest of the story was their accountants' and consultants' ham-handed effort to allocate the money among the eligible participants.

Paul also testified that he announced the general intention to match 403(b) contributions at the staff meetings described above, which started in February. No employee testified about any reference to 403(b) at these meetings. In an e-mail dated March 18, one employee asked Paul for more details about his staff-meeting proposal to make a 403(b) match. In response, Paul said that they were contributing $50,000 in total and there was no guarantee this was going to happen every year and a typical case manager could expect about $2000.

On April 26, Paul addressed an e-mail to a select list of the employees who had made qualifying contributions in 2010 and earned a match. The list includes about a dozen unit employees, and more supervisors and nonunit employees than that. It states in relevant part:

> I am happy to report that our 403b Administrator has (finally) calculated our match to your 403b account. . . . If you send me an e-mail, I will tell you exactly how much will be put into your account. . . . I would have written to you individually, but I didn't really have time (and I just got the information today at 4:45 p.m.). Lastly: The decision to make this contribution, for a total of $50,000, was made on December 31, 2010, lest you think the timing of this is suspicious. Some of you, at least will recall hearing about this directly from me earlier this year.

The standard for assessing whether this is objectionable is described in the previous section. As with the wage increase, I find Paul's explanation credible, and sufficient to overcome the inference raised by timing.

As far as the size of the benefit goes, the only evidence concerning individual amounts is the estimate in Paul's March e-mail response to an employee's query about

the staff meeting announcement. There is no evidence the Employer used the 403(b) program in its anti-union campaign.

There is no evidence the April 26 e-mail was disseminated beyond the recipients in the short time left before the election. While the prior conduct is relevant to understanding the April 26 announcement, I am precluded by the specificity of the objection and the Regional Director's Report from finding that any other employees' choice in the election was interfered with, other than those who received or heard about the April 26 e-mail. With the margin so close, however, I recognize that this announcement affected enough employees to affect the result, if it is otherwise objectionable.

Timing of this announcement on the eve of the election is in one sense more pernicious to Petitioner's interest than the wage increase announced almost a month before. On the other hand, the Employer has better, objective support for its claim of a legitimate business reason for the timing – the message from its consultant announcing that the program was ready for implementation really did arrive only a few hours before Paul sent his e-mail on April 26. By that time, Paul had already announced the decision and the aggregate amount - conduct which is not alleged as objectionable - and the only thing left to announce was each employee's individual contribution, which is all Paul did on April 26. I see no reason to discredit Paul's testimony that a decision was made in December 2010, a general announcement was made in February and March, and the final details were announced as soon as Paul had them. I am convinced that the decision and its timing were legitimate business decisions, not intended to influence the election. Accordingly, I recommend that this objection should be overruled.

5. The Employer's observer provided reports to the Employer during the election regarding employees voting

The objection specification states that an Employer election observer, Daina Lowe, "was tallying voters and making notes of which employees were voting, and reporting these results to the Employer during her restroom and lunch breaks." Several of Petitioner's election observers testified that they saw Lowe make notations in a notebook that she kept on the table in front of her during the polling times (a table on which Petitioner's observers also kept a list of names of voters they intended to challenge), although Petitioner's observers could not see what Lowe wrote because of the notebook's cover. No witness supported finding that Lowe made any notes visible to a voter.

Lowe produced the notes at the hearing. The notes include a list of six names at the top of the first page, which Lowe explained were names she was given before the election to challenge if they appeared to vote. The notes also include about 15 entries describing incidents that occurred during polling times, in abbreviated language, such as:

- 11:20: Melissa [the Board agent] took break – 1 min.
- Mark F. 15 wk 2 jobs PT wanted to know if he would find out the decision
- thought I was recording names

Lowe testified that she talked to two managers in the Human Resources Department during her breaks in the midst of polling time and, besides reporting on challenges, she "randomly" named some voters in an attempt to give them some idea of turnout from various departments.

In this case, the only names Lowe wrote down were related to the Employer's challenges, which is permissible. See Mead Coated Board, Inc., 337 NLRB 497, 498 (2002). Moreover, the Board will "set aside an election on the basis that a voting list other than the official eligibility list was kept only if it can be shown or inferred from the circumstances that employees were aware that their names were recorded." Indeck Energy Servs., 316 NLRB 300, 301 (1995). There is no evidence that any voter saw Lowe make any notations, so even if she had been writing down names of voters as they appeared, it would not be a sufficient basis for setting aside the election.

It appears that Lowe did keep a list of voters in her head, and reported some, "randomly," to some Human Resources managers. Absent evidence that any employees knew about this before the polls closed, however, I cannot find that it affected the election and I recommend overruling the objection in its entirety.

6. The Employer held mandatory anti-Union meetings, and paid employees their mileage for attending these meetings

Petitioner objects to the Employer's reimbursement of employees' mileage expenses for attending an anti-union campaign meeting at the Employer's office headquarters building as a grant of a new benefit because the Employer did not otherwise reimburse employees' mileage expenses for attendance at other meetings.

There is no evidence the Employer made any general change in the compensation rules for employees' attendance at meetings – it just offered expense reimbursement for this one.[11] Petitioner's first witness on this issue testified at first that

[11] This fact distinguishes the case relied on by Petitioner in its brief, Burlington Times, Inc., 328 NLRB 750 (1999) (general policy change in answer to employee complaints).

sometimes she got reimbursed for mileage to attend meetings (plural) at headquarters, sometimes she got reimbursed parking expenses, and sometimes she got both, and she did not know what explained any differences. Then she corrected herself and insisted that the anti-union campaign meeting was the first time she was ever paid mileage reimbursement to attend a meeting at headquarters. The Employer then offered a payroll record that showed that witness was reimbursed for mileage and parking expense to get from her home to the main office in September 2010. Petitioner's second witness on the issue testified that employees were always reimbursed for attendance at meetings they were required to attend at the main office.

The burden of proving interference with an election is on the objecting party. I find Petitioner failed to prove that this conduct was unusual as distinguished from reimbursement for attendance at any other required meetings at headquarters. In addition, Petitioner offered no evidence of how much money any employee was paid, or how much employees were paid in the aggregate. It was in any event reimbursement for an expense the employees would not otherwise have incurred but for being required to attend an anti-union meeting at headquarters, so in one sense, it was no benefit at all, but a wash.

Employers can and do routinely use the "stick" and require employees to attend its anti-union campaign speeches. E.g., Litton Systems, Inc., 173 NLRB 1024, 1030 (1968); Ridgewood Management Co., Inc., 171 NLRB 148, 151 (1968). In fact, employers have a problem if they require employees to attend anti-union campaign meetings and don't pay them. See Comet Elec., 314 NLRB 1215 (2000). I find use of this small "carrot" of mileage reimbursement unobjectionable.

7. The Employer paid employees their mileage to vote at the election

No evidence was presented to support finding that the Employer offered anything more than mileage reimbursement for actual expenses incurred in attendance at the election. This is no basis for setting aside the election. Good Shepard Home, Inc., 321 NLRB 426 (1996), enfd. 145 F.3d 814 (6th Cir. 1998).

C. EMPLOYER'S OBJECTIONS

1. Inconsistent Treatment and Disenfranchisement of On-Call Employees

The Employer did not include on-call employees on the Excelsior list (but for one or two mistakes), and sent e-mails to employees, generally and in response to specific inquiries, stating that on-call employees were not eligible to vote. The Employer makes the contingent objection that if on-call employees are deemed eligible, then the election should be set aside because on-call employees were prevented from voting. Inasmuch as I recommend that on-call employees are not eligible, this objection should also be overruled.

If the Board finds on-call employees are part of the unit, I would still recommend overruling this objection. Then the problem would be purely a result of the Employer's erroneous decision to declare them ineligible and publicize its decision. I would not grant an Employer's objection based on its own conduct. See, e.g., George Washington Univ., 346 NLRB 155, 155 (2005) (employers are estopped from objecting to defective Excelsior list), enfd. 181 LRRM (BNA) 3024 (D.C. Cir. 2006).[12]

[12] I do not believe the conduct alleged "disenfranchised" voters in the sense that the Employer claims in its brief anyway. In the cases cited by the Employer, employees were physically prevented from voting because of bad weather or a work assignment, or in one case because a Board agent gave a voter a blank ballot.

2. Discriminatory Solicitation of Ineligible Voters

The Employer's Objection (re)numbered 2 alleges that Petitioner solicited on-call employees to vote only when it believed they would vote yes, and ignored on-call voters it believed would vote "no." The Employer has not specifically withdrawn this objection, although it does not address it in the brief. In any event, it offered no evidence to support it. Among the on-call employees who appeared, none testified they ever told a union agent how they intended to vote. Moreover, even if they had, I can't imagine finding objectionable a union's decision to concentrate its efforts on its base. Accordingly, I recommend that this objection should be overruled.

3. Discriminatory Solicitation of Ineligible Voters

The Employer's Objection (re)numbered 3 alleges that Petitioner solicited former employees it knew were ineligible to vote only when it believed they would vote yes, and ignored former employees it believed would vote "no." As with Objection 2, the Employer has not withdrawn this objection, but it also fails to mention it in its brief, and it presented no admissible evidence[13] to support it as a matter of fact. Accordingly, I recommend that this objection should be overruled.

4. Intimidation and Coercion of Employees in the Exercise of Their Section 7 Rights

The Employer listed about 40 bullet points under this heading, generally characterizable as statements or actions related to union solicitation deemed

[13] The Employer did offer a supervisor to testify that a former employee said she was told to vote by a union representative, and I sustained a hearsay objection. The Employer does not argue with that ruling in its brief and I consider the matter waived.

threatening or harassing by the audience. The only evidence produced at the hearing even remotely supportive of any of these bullet points is in testimony of a couple of employees who said they were contacted at home or by mail even after expressing a desire to be left alone. Their testimony does not support finding that these contacts were in any way threatening or coercive, even if I were to conclude that the perpetrators at issue were union agents, which is doubtful. Persistent solicitation by unions, even at the expense of annoying the listener, is protected activity, not objectionable conduct. See, e.g., RCN Corp., 333 NLRB 295, 300 (2001).

5. Deception, Lies and Fraudulent Conduct

The Employer listed six bullet points under this heading, accusing Petitioner of conduct including misleading employees into posing for a photo that it used in a campaign brochure, claiming credit for a wage increase granted to employees, telling employees either that supervisors didn't care about them or in fact supported the Union, and telling employees that it could shift the units around after the election. Preliminarily I note that deception and lies are not generally considered objectionable conduct by the Board. Midland Nat'l Life Ins. Co., 263 NLRB 127 (1982).

The only evidence offered at the hearing anyway that remotely supports this allegation is a letter Petitioner mailed to employees some time after April 15, which opens by claiming that "[a]s a direct result of our organizing efforts, South Metro Human Services recently issued an unexpected raise to some employees." The letter continues on to state that Petitioner would work hard to get everyone a raise, and without a contract, the Employer could retract the raise already given at any time. This is clearly the type of campaign propaganda the Board declared hands-off in Midland.

CONCLUSION AND RECOMMENDATION

In sum, I recommend that the challenge to the ballot of Sara Stamschror should be sustained because the parties agreed before the election that she was not eligible; the challenges to the ballots of Abiodum Adeboye, Robin Nadeau, Jennifer Olson, and Lindsay Paetznick should be sustained because they work in a job classification not included in the unit (on-call); the challenges to the ballots of Samantha Hofmaster and Cindy Van Heise should be sustained because they work in a classification not included in the unit (nonprofessional); and the challenges to the ballots of Mark Fellows and Darcy Anderson should be overruled and their ballots should be opened and counted.

I recommend that all of Petitioner's and the Employer's objections should be overruled and that an appropriate certification should issue after compilation of a revised tally.[14]

---

[14] *Right to File Exceptions:* Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on July 1, 2011, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Minneapolis, Minnesota, this 17th day of June, 2011.

/s/ Joseph H. Bornong

_____

Joseph H. Bornong, Hearing Officer
National Labor Relations Board
Eighteenth Region
330 South Second Avenue, Suite 790
Minneapolis, MN 55401-2221