

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

THE PERMANENTE MEDICAL GROUP, INC.  
and KAISER FOUNDATION HOSPITALS  
Employers

and

NATIONAL UNION OF HEALTHCARE WORKERS  
Petitioner

Case 32-RC-5774

and

SEIU-UHW (SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS - WEST)  
Intervenor

For the Petitioner: Florice Orea Hoffman, Atty., Orange, CA.

For the Intervenor: Bruce A. Harland, Atty., Weinberg, Roger  
& Rosenfeld, Alameda, CA.

For the Employers: Ronald E. Goldman, Atty., Kaiser Permanente,  
Oakland, CA; Michael R. Lindsay, Atty., Nixon Peabody, LLP,  
Los Angeles, CA.

**ADMINISTRATIVE LAW JUDGE REPORT AND  
RECOMMENDATIONS ON OBJECTIONS**

LANA PARKE, Administrative Law Judge. The National Union of Healthcare Workers (Petitioner or NUHW) filed a petition on June 29, 2010<sup>1</sup> seeking representation of employees of The Permanente Medical Group, Inc. and Kaiser Foundation Hospitals (Employers)<sup>2</sup> in a medical social workers bargaining unit (MSW unit) then, and currently, represented by Service Employees International Union, United Healthcare Workers – West (Intervenor or SEIU-UHW). The Regional Director of Region 32 of the National Labor Relations Board (NLRB or Board) issued his Decision and Direction of Election on September 7. An election by mail ballot was conducted between October 18 and November 8 in the MSW unit described below, the employees of which were located in 37 separate Kaiser facilities throughout the Employers' Northern California region:

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<sup>1</sup> All dates refer to 2010 unless otherwise indicated.

<sup>2</sup> Numerous entities make up the Kaiser Permanente enterprise of which the Employers are two. Herein, the national enterprise is referred to as Kaiser Permanente; unless separate designation is necessary, other groupings within Kaiser Permanente, aside from the Employers, are referred to as Kaiser.

5 All full-time and regular part-time medical social workers employed by  
the Employers in positions covered by the collective bargaining agreement  
between the Employers and SEIU-UHW effective October 1, 2005, including  
Medical Social Worker I, Medical Social Worker II, and Medical Social  
Worker III; excluding any medical social worker assigned to be Director  
of Social Services at any of the Employers' facilities or to whom the  
Employers have given the authority to hire, promote, discipline, discharge,  
10 or otherwise change status or to effectively recommend such action, all  
employees represented by other unions, confidential employees, guards,  
and supervisors as defined in the National Labor Relations Act.

The election resulted in the following final tally of ballots:

15	Approximate number of eligible voters .....	378
	Number of void ballots .....	4
	Number of votes cast for NUHW .....	139
	Number of votes cast for NEITHER .....	2
	Number of votes cast for SEIU - UHW .....	148
20	Number of valid votes counted .....	289
	Number, of challenged ballots .....	3
	Valid votes counted plus challenged ballots .....	292

25 Following the election, Petitioner filed timely objections to the election on November 17.  
On February 23, 2011, the Regional Director issued his Supplemental Decision and Notice of  
Hearing (decision on objections), recommending that Petitioner's Objections 5 and 7-71 be  
overruled in their entirety and setting for hearing, as limited in the decision, Objections 1-4 and  
6. Hearing on those objections was held in Oakland, California on May 2 and 3, 2011.

30 Unless otherwise explained, findings of fact herein are based on party admissions,  
stipulations, uncontroverted relevant testimony, and findings of fact made by Administrative Law  
Judge William L. Schmidt in Case 21-CA-39296 and adopted by the Board (with minor  
modification of unit description) at *Southern California Permanente Medical Group; and Kaiser  
Foundation Hospitals*, 356 NLRB No.106 (2011). On the entire record and after considering the  
35 briefs filed by Petitioner, Intervenor, and Employers, I find the following events occurred in the  
circumstances described during the critical period.

**Findings of Fact and Discussion**

40 A. Legal Overview

The critical period during which conduct allegedly affecting the results of a  
representation election must be examined "commences at the filing of the representation  
petition and extends through the election." *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1201 fn. 6  
45 (2005). Here, the critical period is June 29 through October 4.

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The Board does not lightly set aside representation elections.<sup>3</sup> “There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). The burden of proving a Board-supervised election should be set aside is a “heavy one.”<sup>4</sup> The burden is even heavier where the vote margin is large.” *Trump Plaza Associates*, 352 NLRB 628, 629-30 (citing *Avis Rent-A-Car System*, 280 NLRB 580, 581-582 (1986)). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the Petitioner has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, applied objectively, is whether election conduct has the tendency to interfere with employees’ freedom of choice.<sup>5</sup> Petitioner must show the conduct in question had a reasonable tendency to interfere with employees’ free and uncoerced choice in the election to such an extent that it materially affected the results of the election.<sup>6</sup>

#### B. Petitioner’s Objections Nos. 1 through 4 and 6

(1) The employer, by its agents, violated Section 8(a)(1) and Section 8(a)(5) by committing unlawful unilateral changes by withholding and/or cancelling scheduled annual across-the-board raises, tuition-reimbursement benefits, and union-steward training programs for employees represented by NUHW in other units.<sup>7</sup>

(2) The SEIU, by its agents, widely disseminated to employees the threat that if NUHW won this election, the employer would not pay contractually bargained-for wage increases including but not limited to threats that the employer would not provide employees with an upcoming salary increase due in or around October 2010.

(3) The SEIU, by its agents, widely disseminated to employees the threat that if NUHW won this election, the employer would not pay an already bargained-for Performance Sharing Program (PSP) bonus.

(4) The SEIU, by its agents, widely disseminated to employees the threat that if NUHW won the election that they would lose the benefits of the Coalition of Kaiser Permanente Unions and the benefits of the National Agreements because SEIU would forever bar NUHW participation in such bargaining.

<sup>3</sup> *Quest International*, 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5<sup>th</sup> Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5<sup>th</sup> Cir. 1972), cert. denied 412 U.S. 928 (1973)).

<sup>4</sup> *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6<sup>th</sup> Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6<sup>th</sup> Cir.), cert. denied 416 U.S. 986 (1974)).

<sup>5</sup> *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004); *Baja’s Place*, 268 NLRB 868 (1984).

<sup>6</sup> *Madison Square Garden Ct., LLC*, 350 NLRB 117, 119 (2007) (internal quotations and citations omitted); *Quest International*, 338 NLRB 856, 857 (2003).

<sup>7</sup> The Regional Director overruled the second part of Objection No. 1: “[the employers violated Section 8(a)(1) and (5) of the Act by] threatening similar reprisal and/or loss of benefits if NUHW won in this unit.”

(6) The SEIU, by its agents, widely disseminated to employees these threats, including but not limited to the SEIU's threat that Kaiser had "confirmed that NUHW members at Kaiser are not automatically eligible to receive Performance Sharing Program (PSP) bonuses" and that employees would not get such bargained-for bonuses if NUHW won.

## 1. Facts

### a. Unfair Labor Practices in the Southern California Professional Units

In 1995, labor organizations representing various units of Kaiser Permanente employees formed a Coalition of Kaiser Permanente Unions (the Coalition). The Coalition was comprised of local and international unions representing Kaiser Permanente employees in defined geographic regions and existed for the purpose of facilitating collective bargaining with Kaiser Permanente entities.<sup>8</sup> The Coalition's rules and bylaws determine eligibility for membership. In pertinent part, the Coalition bars from membership labor organization that obtain representative status by "raiding"<sup>9</sup> a unit of a Coalition member.

In 1996, Kaiser Permanente and the Coalition entered into a national labor management partnership agreement (the LMP). Thereafter, local, regional, and national negotiations were conducted under auspices of the LMP. The negotiations resulted in successive national collective-bargaining agreements between Kaiser Permanente and SEIU-UHW, the penultimate of which was effective by its terms from October 1, 2005 through September 30, 2010 (the national agreement), followed by the current agreement effective October 1 through September 30, 2012. SEIU-UHW and the Employers have been parties to seriatim local agreements covering the MSW unit, effective October 1, 2005 through September 30, 2010 and October 1, 2010, through September 30, 2013, each of which was integrated with the relevant national agreement to provide for a basic wage structure and a variety of fringe benefits, including provisions for tuition reimbursement, PSP bonuses, and across-the-board wage increases.

The LMP provided, inter alia, a performance sharing plan (the PSP). The stated purpose of the PSP was to recognize the value of national agreement-covered employees' contributions to Kaiser Permanente by permitting them to share in the company's performance gains. The PSP was, in short, a bonus incentive program, the amounts of which were annually agreed upon between the Coalition and Kaiser Permanente. Historically, the PSP was calculated in January and February based on performance in the preceding year and paid to employees in March.<sup>10</sup>

In 2007, following a merger of labor organizations, SEIU-UHW became the recognized representative for three professional collective bargaining units in Southern California—the Health Care Professionals unit, the Psych-Social Chapter unit, and the American Federation of Nurses unit (the SoCal-pro units)—comprised within the workforces of Southern California Permanente Medical Group and Kaiser Foundation Hospitals (collectively, the SoCal-pro

<sup>8</sup> Not all unions representing Kaiser employees participate in the Coalition.

<sup>9</sup> Raiding is an attempt by one union to obtain collective-bargaining rights over a unit of employees already represented by another union.

<sup>10</sup> Non-Coalition negotiated contracts may contain bonus incentive programs, but they do not necessarily have the same terms as, and are not designated as, a PSP program.

employers).<sup>11</sup> One of the Employers herein—Kaiser Foundation Hospitals—is also one of the SoCal-pro employers.

5 SEIU-UHW and the SoCal-pro employers were, at all material times, parties to the national agreement as well as a local CBA covering each of the SoCal-pro units. The interrelated national and local CBAs provided for basic wage structures and a variety of fringe benefits, including provisions for tuition reimbursement, paid time-off for stewards to attend union-sponsored steward training sessions, PSP bonuses, and across-the-board wage increases. In 2008, an agreement among the parties to these agreements provided for across-the-board wage adjustments for, inter alia, employees in the SoCal-pro units, in the pay periods closest to October 1, 2008 and 2009 as well as a further adjustment of two percent to be effective in the pay period closest to April 1. The PSP bonus provisions of the national agreement applied to each of the SoCal-pro units.

15 In late January 2009, certain former SEIU-UHW officers and professional organizers formed NUHW and commenced raiding units represented by SEIU-UHW. On February 27, 2009, NUHW filed representation petitions with the Board seeking certification as the collective bargaining representative for the SoCal-pro units.

20 On February 3, the Board certified NUHW as the exclusive bargaining representative of the SoCal-pro units, and the SoCal-pro employers and NUHW commenced bargaining. At the initial bargaining meeting, NUHW requested that the SoCal-pro employers continue in effect until October 1 the terms of its agreements with SEIU-UHW. At a bargaining meeting held February 26, Kaiser's representatives told NUHW representatives that the SoCal-pro employers would not continue the terms of the agreements with SEIU-UHW, that the employees would not receive the two percent pay increase that had been negotiated in 2008, that the employees would not receive further tuition reimbursements, and that the NUHW stewards would not receive paid time off for steward training. Thereafter, the following sequence of events occurred:

30 March -- Employees in the SoCal-pro units received the PSP bonuses based on calculations of Kaiser's 2009 performance.

35 March 18 – At the March 18 bargaining session, the SoCal-pro employers presented NUHW negotiators with a letter stating that participation in the Coalition was a pre-condition to applying agreement terms to the NUHW-represented units, a participation NUHW would be unlikely ever to realize.

40 March 30 – NUHW filed ULP charges against the SoCal-pro employers in Case 21-CA-39296 (ULP charges), alleging that by unilaterally withholding certain benefits from employees in the Southern California pro units, the SoCal-pro employers had violated Section 8(a)(5) and (1) of the Act.

April – The SoCal-pro employers refused to pay the SoCal-pro unit employees the contractually projected two percent April adjustment. Kaiser paid the adjustment to employees in the Kaiser service and technical employees throughout California (the statewide unit) represented by the Intervenor.

45 End May – Negotiations on the national agreement concluded.

June 14 through June 23 – National agreement ratified.

June 29 – NUHW filed the instant representation petition, 32-RC-5774, beginning the critical period.

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<sup>11</sup> The Southern California pro units are separate and distinct from the MSW unit.

June 29 – NUHW also filed a representation petition in 32-RC-5775, seeking to represent the statewide unit.

August 27 – Based on the ULP charges, the Regional Director issued a complaint and notice of hearing against the SoCal-pro employers.

5 September 13 to October 4 – the Regional Director conducted the mail ballot election among employees in the statewide unit.

October 18 - November 8 – the Regional Director conducted the mail ballot election among employees in the MSW Unit.

10 October 4 – Region 21 in Los Angeles filed with the U.S. Central District Court a petition for temporary injunction against the SoCal-pro employers seeking to enjoin the commission of ULPs in the SoCal pro units.

October 6 –Ballots in the statewide unit election tallied: NUHW--11,364; SEIU-UHW -- 18,290.

15 October 10 –Ballots in the MSW unit tallied: NUHW--139; SEIU-UHW --148.

October 18 and 19 – Judge Schmidt opened hearing on the ULP charges.

20 December 13 – Judge Schmidt issued decision on the ULP charges, finding that the SoCal-pro employers violated Section 8(a)(5) and (1) of the Act by unilaterally withholding an April 2010 wage increase, tuition reimbursement for continuing education courses, and paid steward-training time-off from employees in the SoCal-pro units (Kaiser’s ULPs).<sup>12</sup>

March 3, 2011--The Board, in the absence of exceptions, with a minor unit-description modification, adopted Judge Schmidt’s findings and conclusions at *Southern California Permanente Medical Group; and Kaiser Foundation Hospitals*, 356 NLRB No.106 (2011)

25 b. Intervenor’s Campaign in the MSW Unit

30 During the critical period, the Intervenor widely disseminated throughout the MSW unit written campaign materials. Many of these materials referred, explicitly and implicitly, to the Kaiser ULPs detailed in Judge Schmidt’s decision, as well as to prospective nonpayment of the PSP incentive bonus. The following statements are representative excerpts from the Intervenor’s campaign materials disseminated widely during the critical period:

35 • NUHW has filed a petition to take away our union and our [new] contract. No matter what they try to tell us, the bottom line is: Their petition threatens to wipe away...our raises, healthcare, pensions, and job security. We would have to re-bargain our entire contract.

40 • Southern California Kaiser pros who voted for NUHW in January still don’t have the 2% pay raises that SEIU-UHW members got in April...[quoting a statewide-unit member]: “NUHW can’t even get the 2% raise that we’ve seen in our paychecks for three months now.”

45 • If [NUHW replaces SEIU-UHW as our union] our new contract and everything in it is gone and has to be re-bargained...In January, Kaiser Healthcare Professionals in So Cal voted to join NUHW and they lost their contract, the 2% raise that SEIU-UHW members got in April, continuing education reimbursements, and more.

50 • [Quoting an MSW unit member]: “To date, because the S. CA Professionals voted for NUHW, they are now at least 5% behind us in raises.”

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<sup>12</sup> Nonpayment of PSP bonuses was not an issue in the March 30 ULP charges.

5 • [Quoting an SEIU-UHW member]: “We get a total of 9% in raises over the next three years while NUHW is scratching and clawing to get their members in So CA the 2% raise that we got in April. We have no changes to our benefits while NUHW’s benefits are up for grabs...If you look at the facts, it’s obvious: Win with SEIU-UHW or lose with NUHW.”

10 • The National Agreement applies only to the unions in the Coalition (32 unions including SEIU bargaining the National Agreement)...If a bargaining unit is not represented by a Coalition Union, then the provisions of this National Agreement will not apply. NUHW is not a part of the Coalition, and thus employees represented by NUHW will not be covered by the National Agreement.

15 • While SEIU-UHW members have enjoyed the benefits of their 2% April raise for five months, NUHW members at Kaiser are going to trial to try and get the raise—a process that will likely take years with no guarantee they will be successful. Worse, the Southern California professionals who switched to NUHW are reporting being told by Kaiser that they will not be getting the 3% raise that all SEIU-UHW members will receive in October.  
20 That means in 10 months under NUHW, the Southern RNs and Pros will be 5% behind SEIU-UHW members on their raises—and facing the loss of their PSP bonuses.

25 • Two Approaches to Raises at Kaiser  
The SEIU-UHW way: One simple step  
A. Vote for SEIU-UHW and get all the raises in your contract—guaranteed, on time and without going to court.  
The NUHW Way: Years of legal fights  
A. File charges with the NLRB  
30 B. Six months later go to a trial  
C. Wait months for the judge to make a decision and hope the judge decides for you not against you  
D. The decision gets appealed to the NLRB in Washington D.C.  
E. A year later the NLRB issues a decision, which could be for or against you  
35 F. That decision is appealed in federal court, which could rule for or against you, and ultimately could go the U.S. Supreme Court.  
G. Several years later the case could be resolved with no guarantee of ever getting the raise.

40 • [From a flyer showing the photographs of five S. CA professionals] In NUHW, we lost our raises and guaranteed PSP Bonus. Don’t make the same mistake we did....  
[Quoting pictured employees of the SoCal-pro units]:  
○ “It was bad enough that giving up our SEIU-UHW contract meant we lost the 2% raise we were supposed to get in June. But now we’re also losing our PSP Bonus.”  
45 ○ “When I counted up everything I’ve lost since my co-workers switched to NUHW—the PSP and the raises for the next three years—I estimate it adds up to about \$20,000. That’s a huge step backwards for my co-workers and me.”  
○ [Quote from Cleante Stain (Stain), an employee in the psych-social SoCal-pro unit]:  
“We bet our future on NUHW, and we lost big. It was a mistake to put our raises and PSP at risk. I urge you not to take the same chance we did.”  
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- In January 2010, Kaiser Healthcare Professions in So Cal voted to join NUHW and they lost their contract, the 2% raise that SEIU-UHW members got in April, Continuing Education reimbursements and more.

5       • With NUHW, we'd have to start bargaining all over again, just like the Kaiser pros in Southern California who voted for NUHW in January...here's what the Kaiser pros already lost with NUHW:

      LOST RAISES: NUHW is in an ugly legal battle with Kaiser over the 2% raises SEIU-UHW members got in April but they didn't.

10       LOST CEU'S: Continuing Education Units no longer reimbursed.

15       • [Quoting an MSW unit member]: "I used my last PSP bonus to confirm a trip reservation to Alaska. I know co-workers who have used theirs to pay off credit cards. This is a significant amount of money, and I don't understand why NUHW wants us to take the risk of losing it."

20       • On a conference call with Kaiser employees August 3, Kaiser Southern California President Ben Chu confirmed that NUHW members at Kaiser are not automatically eligible to receive Performance Sharing Program (PSP) bonuses. The PSP adds thousands of dollars to Kaiser workers' income each year...Chu made it clear that only members of unions in the Coalition of Kaiser Permanente Unions-like SEIU-UHW-are guaranteed the bonus as part of the national agreement we just approved by an overwhelming majority. NUHW could try to negotiate a bonus, but they are unlikely to succeed because it is a function of the Partnership and Coalition which they are not a part of. No Kaiser union outside the Coalition or national contract gets the PSP bonus.

25       • [Quoting a SoCal-pro unit member]: "It's bad enough that we lost our 2% raise in April and our continuing education reimbursements. Now we just found out that we're losing our PSP bonuses too. It keeps getting worse with NUHW."

30       During the critical period, the Intervenor utilized the services of Cleante Stain (Stain), a psychiatric social worker employed by Kaiser Permanente in one of its Southern California facilities and a member of the psych-social SoCal-pro unit.<sup>13</sup> As arranged by SEIU-UHW,<sup>14</sup> Stain was present at an SEIU-UHW-sponsored meeting of MSW unit employees in Oakland, attended by as many as 40 employees. It is not clear from Stain's testimony what, specifically, she told the MSW unit employees. Generally, in the course of her visits, Stain told employees the SoCal-pro units did not get their two percent raise after selecting NUHW as their bargaining representative and suggested employees ask themselves if they could afford to live without the two percent. Stain further told employees that selecting NUHW might put at risk the three percent raise scheduled for October and that the SoCal-pro units had been told they would not get the PSP bonus in March because they were not a part of the Coalition. It is reasonable to infer that Stain delivered essentially the same message to the MSW unit employees in Oakland.

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<sup>13</sup> Stain's purported photograph and quotation appears in one of Intervenor's flyers detailed above. The parties stipulated that Stain's testimony taken in an earlier hearing in Case 32-RC-2775 be incorporated herein.

50       <sup>14</sup> SEIU paid Stain's travel expenses and an amount comparable to her hourly pay rate for the time she expended.

## c. Petitioner's Campaign in the MSW unit

During the critical period, Petitioner widely disseminated throughout the MSW unit written campaign materials countering Intervenor's communications. The following are relevant, representative excerpts from Petitioner's campaign materials:

- You can keep contract raises and benefits...the National Labor Relations Board agrees NUHW is right. SEIU hasn't been truthful. On August 27, 2010 the National Labor Relations Board General Counsel took legal action in Case #21-CA-39296 to protect Kaiser Professions who have joined NUHW and are entitled to all of their previously scheduled raises and tuition reimbursements. When we vote NUHW, our contract raises and benefits are protected.
- When the National Labor Relations Board sought an injunction against Kaiser on Oct. 4, they set the record straight. It was against the law for Kaiser to withhold the raises and benefits of workers who voted to join NUHW. When SEIU campaigned for months saying otherwise, they were lying about our rights.
- Last week, NUHW's attorneys filed objections to both Kaiser's and SEIU's conduct in the Service and Tech election. Misconduct included Kaiser illegally withholding raises and threatening to do the same to workers who were voting to join NUHW.
- [Provided web link for employees to read the injunction sought by Region 21] The NLRB says Kaiser broke the law by withholding raises. The NLRB says we get all the raises and benefits of the National Agreement, the local agreements, and the LMP...if we were entitled to it under SEIU, we're entitled to it in NUHW...U.S. District courts and appellate courts defer to the NLRB, and grant almost every request for injunction.
- [NUHW Bulletin story regarding the service and technical unit election] Employees' choice thwarted by delays in NLRB enforcement, false fear campaign by SEIU and employer [resulted in] 11,364 [votes for NUHW and 18,290...for SEIU—and workers are calling for a new election. [Quoting a statewide unit employee]: "Workers can't have a fair vote when they don't know they have the right to choose without being punished for it. SEIU and Kaiser management threatened people's livelihood and the NLRB didn't take action to protect us until it was too late."...Just hours after voting ended, the NLRB exposed SEIU's scare tactic as a lie [when the NLRB filed for injunction].
- In charges filed yesterday by the National Labor Relations Board, the federal government has instructed Kaiser management that all the raises and benefits of workers who vote for NUHW, including our April raise, are guaranteed by law and must be paid...This action by the government...directly contradicts what SEIU has been telling Kaiser workers...for months.
- The Federal Government has filed charges against Kaiser, which will have to pay the professionals with interest and reinstate all of the protections they have withheld.
- NLRB puts it in writing: Raises, PSP, and benefits are all guaranteed by law when we join NUHW.

- There is no other way to put it. SEIU has been lying to us about our raises and benefits...We all have the right to join NUHW, and when we do our raises and benefits are guaranteed by law.

- 5       • It's the Law; our PSP is just another benefit that we'll keep when we vote to join NUHW. [Citing *More Truck Lines, Inc.*] The employer must keep everything the same while we negotiate for improvements.

d. NLRB Regional Office Information

10       During the critical period, NLRB regional staff responded to public inquiries about Kaiser elections by reading the following script:

15       In general, an employer' is required to maintain existing contract terms when a new union is selected to represent bargaining unit employees, subject to further bargaining...the Regional Director in Region 21 (Los Angeles)...issued a complaint alleging, among other things, that Kaiser violated the National Labor Relations Act by refusing to grant a wage increase that had been scheduled to go into effect on April 1, 2010...That matter will go to hearing before an administrative law judge if the parties are

20       unable to settle the case.

25       The outcome of every case filed before the NLRB depends on the particular facts applicable to that case. Because every situation may have unique facts, it cannot be stated with certainty what Kaiser's obligation would be if NUHW became the bargaining representative of the unit employees scheduled to vote in the mail ballot representation election that will begin on September 13, 2010.<sup>15</sup>

C. Discussion

30       Petitioner's Objection No. 1 asserts, essentially, that the SoCal-pro employers' unlawful conduct toward NUHW-represented employees in the SoCal pro units, in and of itself, interfered with the election. The Board holds that 8(a) violations may, a fortiori, interfere with an election unless the unlawful conduct is so de minimis that it is virtually impossible to conclude the

35       violations could have affected the results of the election.<sup>16</sup> While it is true that one of the Kaiser employers involved in this case engaged in unlawful conduct, as detailed in *Southern California Permanente Medical Group*, supra, the conduct did not occur in the MSW unit but in the SoCal pro units, which are distinct and separate geographically from the MSW unit. Kaiser argues that its earlier conduct in discrete bargaining units cannot be considered objectionable in the MSW

40       unit election, as the conduct was not directed at MSW unit employees. Essentially, Kaiser maintains that conduct affecting one bargaining unit cannot be applied to a separate bargaining unit as a fortiori conduct. There being no authority establishing that conduct in a geographically separate unit can, without more, interfere with an election in another unit, I recommend that Objection No. 1 be overruled.

45       <sup>15</sup> There is no evidence as to how many, if any, MSW unit employees sought election information from the Region.

50       <sup>16</sup> See *Cooking Good Division of Perdue Farms, Inc.*, 323 NLRB 345 (1997); *Pembrook Management*, 296 NLRB 1226, 1242 (1989); *Airstream, Inc.*, 304 NLRB 151, 152 (1991). In assessing whether unfair labor practices could have affected the results of the election, the Board considers "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." *Enola Super Thrift*, 233 NLRB 409 (1977).

A determination that Kaiser's ULPs did not, a fortiori, interfere with the MSW-unit election so as to justify setting it aside, does not eliminate Objections Nos. 2, 3, 4, and 6, however. Intervenor's campaign repeatedly correlated Kaiser's ULPs to the MSW unit, emphasizing the benefit risk the unlawful conduct denoted for employees who selected NUHW as their representative. The crucial question, then, is whether by emphasizing and parallelizing Kaiser's ULPs, Intervenor's campaign unfairly interfered with MSW-unit employees' election choice. Also to be considered is whether pronouncements that MSW unit employees would be ineligible for PSP incentive bonuses if they selected NUHW interfered with the election.

Intervenor argues that its campaign statements during the critical period (1) were neither threatening nor untruthful, but were factual, good-faith statements of potential voting consequences relevant to employees' decisions about union representation; (2) were factual predictions or statements of risk and not "unanswerable threats that employees fear because they know the speaker...can carry them out;" (3) caused no employee fear, which, if any existed, resulted from "employees' own reasoned choices based on all the available information, in a campaign in which each union had the ability to present its version of the facts"; (4) were objective statements about Kaiser's behavior—at worst, misrepresentations or incomplete statements of the law made during a campaign - neither of which are grounds for setting aside the election.

It is true that Intervenor had no control over or involvement in Kaiser's ULPs and that Intervenor could not control Kaiser's future actions regarding MSW unit benefits. As Intervenor points out, its challenged statements were factual recountings of what Kaiser had done in the SoCal-pro units, which, Intervenor represents, were made in good-faith.<sup>17</sup> The accuracy and good-faith of Intervenor's reporting is not, however, dispositive of the issues. The Board applies an objective standard when evaluating whether statements interfere with free election choice, looking neither at motivation nor subjective effect.<sup>18</sup>

Intervenor points out that at the time it described Kaiser's ULPs to MSW unit employees, Kaiser's actions had not been judicially found to be unlawful. The absence of a judicial pronouncement does not alter the fact that Kaiser's conduct was, at all times critical to the election, unlawful. However factually accurate Intervenor's statements may have been, Intervenor's campaign specifically linked its predictions or risk-warnings to existing and ongoing Kaiser ULPs not to future lawful behavior.

Insofar as Intervenor's campaign focused on Kaiser's conduct in the SoCal-pro units, its objective effect was to warn employees that they jeopardized monetary benefits if they changed representatives. In Intervenor's communications, Kaiser's ULPs figured as concrete, menacing reminders that Kaiser had unilaterally withheld benefits from employees in the SoCal-pro units when they chose to be represented by NUHW. Viewed objectively, Intervenor's statements presented an obvious cause and effect: SoCal-pro units voted for NUHW; Kaiser withdrew certain of their established benefits. Intervenor's communications invited, if not provoked, the obvious inference that Kaiser's conduct would be repeated as to MSW unit benefits if employees voted for Petitioner.

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<sup>17</sup> I accept Petitioner's good-faith claim even though its disseminated caution that unit employees could obtain established raises through NUHW only after years of legal fights suggests awareness that Kaiser's conduct was unlawful.

<sup>18</sup> *S.T.A.R., Inc.*, 347 NLRB 82 (2006).

As Intervenor points out, USW unit employees could not reasonably have feared that Intervenor could withhold benefits, and employee fears as to what would happen under NUHW representation may have stemmed from reasoned conclusions based on available facts, facts that Intervenor neither created nor misrepresented but merely disseminated. But the very  
 5 interconnection of unlawful conduct with campaign rhetoric is the problem here. Intervenor's messages rested on coercive bedrock, i.e., the existence of unremedied ULPs that clearly paralleled the MSW employees' situation. Viewed objectively, the facts—broadcast widely during the critical period—must have signified to MSW unit employees the likelihood that Kaiser  
 10 would, consistent with continuing misconduct, unlawfully eliminate certain MSW unit benefits if employees chose NUHW. Under those circumstances, the known existence of the facts had, at the very least, the tendency to interfere with employees' freedom of choice.<sup>19</sup>

Prospective curtailment of PSP incentive bonuses to employees in the SoCal-pro units was not at issue in *Southern California Permanente Medical Group*, supra, but Judge Schmidt's  
 15 reasoning can be applied to that benefit as well. Employee entitlement to PSP incentive bonuses was the product of the national agreement, as were the benefits Kaiser had unlawfully, unilaterally changed. Judge Schmidt rejected Kaiser's arguments that (1) participation in the Coalition and the LMP was a pre-condition to the application of the national agreement to the  
 20 SoCal-pro units and (2) that benefits therein were "creatures of the national agreement that ceased to apply when the employees selected a [non-Coalition] bargaining agent, such as the NUHW." Rather, as Judge Schmidt explained, "the terms of each [applicable] agreement as a whole – local, cross-regional, and national – [made] up the terms and conditions of employment encompassed by the statutory duty to bargain under Section 8(a)(5)."

Under Judge Schmidt's reasoning, Kaiser was required to maintain and continue  
 25 conditions of employment that came into being "by virtue of prior commitment or practice,"<sup>20</sup> i.e., the prior commitments memorialized by the terms of the applicable agreements. Although the precise incentive bonus design entitled "Performance Sharing Plan," the payouts of which required an annual agreement between the Coalition and Kaiser, might not have survived a  
 30 change of bargaining representative, the granting of incentive bonuses constituted a term and condition of employment that Kaiser was required to maintain and continue in substance if not in specific form, unless altered through collective bargaining.

Intervenor's widely disseminated warnings that PSP incentive bonuses could be lost if  
 35 employees selected NUHW were erroneous since Kaiser's practice of granting incentive bonuses was subject to change only through collective bargaining. Further, Intervenor was joined in its warnings by Kaiser's President Chu, who informed employees that only members of coalition unions were guaranteed PSP incentive bonuses. Intervenor widely disseminated  
 40 Chu's statement, giving weight to Intervenor's repeated forewarnings that representational change might endanger PSP incentive bonuses. In these circumstances, widely disseminated warnings that PSP incentive bonuses would not survive a change of representative must also have tended to interfere with employees' freedom of choice.

Employers and SEIU-UHW argue that both unions actively campaigned and had ample  
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<sup>19</sup> See *Taylor Wharton*, supra and *Vegas Village Shopping Corporation*, 229 NLRB 279, 280 (1977) (employer's unlawful conduct among one unit of employees in a metropolitan area "would tend to discourage all employees in the...area from voting for the same Union which was on the ballot for both units" and have a coercive impact on the employees in both units.

<sup>20</sup> *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 F.2d 1088 (4<sup>th</sup> Cir. 1983).

5 opportunity to urge their respective merits on the voters and to promulgate their respective  
 10 messages in the campaign. Employers argue that Petitioner's extensive counteractive  
 15 campaign, as well as the Region's well-publicized Complaint and Notice of Hearing and court  
 20 injunction filings, gave voters sufficient information to permit a free and uncoerced choice in the  
 25 election. It is true Petitioner informed voters of all relevant Board proceedings, repeatedly  
 30 accused Intervenor of lying, and assured unit employees that Kaiser's benefit withdrawals could  
 35 not lawfully be repeated. While the Board's legal proceedings against Kaiser weighted  
 40 Petitioner's assurances, since Kaiser actively disputed the charges, employees must have  
 45 realized that only litigation would resolve the issues. Indeed, one of Intervenor's handouts  
 50 emphasized that if unit employees chose Petitioner, they would receive established raises only  
 through "The NUHW Way: [after] Years of legal fights." The timeline of legal proceedings  
 tended to affirm Intervenor's caution: although complaint issued on August 27, the ULP hearing  
 did not open until October 18, the day balloting commenced, and initial decision would not issue  
 for nearly two months. Petitioner's counter-campaign could not, when weighed against pending  
 litigation of indeterminate outcome and unremedied ULPs, be reasonably expected to persuade  
 voters that Intervenor's warnings were mere campaign propaganda. The unavoidable inference  
 to be drawn from these circumstances is that MSW unit employees voted with objectively  
 reasonable, albeit inaccurate and ULP-induced, apprehensions that a vote for Petitioner was a  
 vote for benefit reduction.

Intervenor's widely disseminated, consistent warnings that Kaiser was likely to repeat its  
 2009 unlawful conduct in the MSW unit if unit employees selected Petitioner as their collective-  
 bargaining representative tended to stoke unwarranted and coerced voter fears. Given  
 Intervenor's relatively small margin of victory, Intervenor's conduct, viewed objectively, had a  
 reasonable tendency to interfere with unit employees' free and uncoerced choice in the election.  
 Accordingly, I recommend that Objections Nos. 2, 3, 4, and 6, in the circumstances described  
 by Objection No. 1, be sustained.

#### RECOMMENDATION

Based on the above, I recommend that Objections Nos. 2, 3, 4, and 6 be sustained and  
 that Objection No. 1 be overruled. Accordingly, I recommend that the Board election in Case  
 32-RC-5774 be set aside and a new election be held.<sup>21</sup> Inasmuch as I have recommended that  
 Objections Nos. 2, 3, 4, and 6 be sustained, I recommend that the mail ballot election held in  
 Case No. 32-RC-5774 be set aside and that the representation proceeding be remanded to the  
 Regional Director of Region 32 for the purpose of conducting a second election.

Further, and in accordance with *Lufkin Rule Co.*, and [Fieldcrest Cannon, Inc., 327 NLRB  
 109 FN 3 \(1998\)](#), I recommend that the following notice be issued in the Notice of Second  
 Election in Case No. 32-RC-5774:

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<sup>21</sup> Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as  
 amended, within 14 days from the date of issuance of this Recommended Decision, either party may file  
 with the Board in Washington D.C. an original and eight copies of exceptions thereto. Immediately upon  
 the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and  
 shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this  
 Recommended Decision.

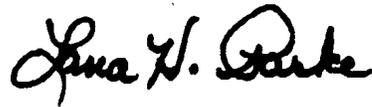
**NOTICE TO ALL VOTERS**

The mail ballot election held between October 18 and November 8 was set aside because the National Labor Relations Board found that certain conduct of SEIU-UHW-West in the circumstances of unfair labor practices committed by Kaiser Foundation Hospitals and Southern California Permanente Medical Group among three professional collective bargaining units of Kaiser employees in Southern California interfered with the exercise of a free and reasoned choice among employees in the following unit:

All full-time and regular part-time medical social workers employed by the Employers in positions covered by the collective bargaining agreement between the Employers and SEIU-UHW effective October 1, 2005, including Medical Social Worker I, Medical Social Worker II, and Medical Social Worker III; excluding any medical social worker assigned to be Director of Social Services at any of the Employers' facilities or to whom the Employers have given the authority to hire, promote, discipline, discharge, or otherwise change status or to effectively recommend such action, all employees represented by other unions, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.<sup>22</sup>

Dated at Washington, DC: July 19, 2011



Lana H. Parke  
Administrative Law Judge

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<sup>22</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by August 2, 2011.