UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

SUTTER WEST BAY HOSPITALS d/b/a
CALIFORNIA PACIFIC MEDICAL CENTER
(California, Davis and Pacific Campuses),

Employer,

and

Case No. 20-RC-18214

NATIONAL UNION OF HEALTHCARE
WORKERS ,

Petitioner,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS-
WEST,

Intervenor/Incumbent

PETITIONER NUHW'S OPPOSITION TO INTERVENOR SEIU'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION OVERRULING OBJECTIONS TO ELECTION

I. INTRODUCTION

Petitioner the National Union of Healthcare Workers (NUHW) responds to the SEIU, UHW – West's Request for Review of the Regional Director's Supplemental Decision Regarding Intervenor's Objections to the Conduct of the Election ("Request"), submitted to this Board on July 26, 2011. The Request for Review in turn challenges the Supplemental Decision Regarding Intervenor's Objections to Conduct of Election ("Decision"), issued by Regional Director of Region 20 of the National Labor Relations Board, Joseph F. Frankl, on July 12, 2011.

Notably, this Decision came after more than a two-year delay in bringing this Petition to an election. On February 2, 2009, employees in this bargaining unit filed a petition seeking representation by NUHW. Finally, between April 25 and May 9, 2011, a secret mail ballot election was held. Of 632 valid votes counted, 384 votes were cast for the Petitioner and 237 votes were cast for the Intervenor. Thus, NUHW prevailed by a margin of 147 votes. Now, a full two and one half years following their February 2, 2009 filing, a majority of employees at CPMC still await certification of NUHW as their bargaining representative. They ask that this Board promptly resolve this matter.

II. ARGUMENT

A. Intervenor Has Not Met Its Burden of Establishing Compelling Reasons That Warrant Granting Review of the Regional Director's Supplemental Decision Overruling the Objections to the Election

As an extraordinary remedy of sorts, a request for review of a Regional Director's decision requires the requesting party to meet the formidable standard of demonstrating that the review is warranted by "compelling reasons." 29 C.F.R. § 102.67(c). Such compelling reasons are, in turn, delineated and limited as follows:

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy. (*Ibid.*)[1]

[1] The standards set forth in section 102.67 are incorporated by reference in section 102.69(c)(4), to wit: "[I]f the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith, including the right to submit documents supporting the request for review or opposition thereto as permitted by § 102.69(g)(3)." 29 C.F.R. § 102.69(c)(4).

Here, the Intervenor essentially argues that the Regional Director erred in not finding that there existed substantial and material issues of fact that would warrant a hearing. Although the Intervenor introductorily asserts "there are compelling reasons for reconsideration of an important Board rule and/or policy," no supporting facts or argument is offered in the Intervenor's brief other than that which supports its other asserted grounds for review. *Ibid.*

To warrant hearing on its Objections, the Intervenor must meet a formidable burden. "It is well settled that [r]epresentation elections are not lightly set aside. . . .Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *In re Safeway, Inc.,* 328 NLRB 525, 525 (2002) (internal citations and quotation marks omitted). "The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc.,* 344 NLRB 252, 253 (2005) (internal citations and quotation marks omitted). "[I]n order to raise "substantial and material factual issues," the objecting party must do more than disagree with the Regional Director's findings and conclusions." *NLRB v. McFarland*, 572 F.2d 256, 261 (9th Cir. 1978). "To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director." *Ibid.*, citing to *NLRB v. Griffith Oldsmobile, Inc.*, 455 F.2d 867, 868-69 (8th Cir. 1972). With these standards in mind, we respond to the arguments asserted in this case.

B. Response to Request for Review Regarding Objections 6, 7, 11 and 17

The Intervenor argues that its evidence "...demonstrates that while UHW was restricted access to various areas of the facilities, NUHW was allowed to freely roam the facilities,

including allowing NUHW supporter Aaron Jordan to campaign to about 30 employees at a staff meeting." Request at 2. The Intervenor appears to be arguing that the Regional Director's findings – that the Intervenor's proffered evidence failed to establish an unjustifiable denial of access to its representatives, and also failed to establish that the employer knowingly permitted NUHW representatives access to non-public areas – were clearly erroneous on the record and prejudicially affected the Intervenor. See Decision at 10-14.

However, the Regional Director's findings concerning access cannot plausibly be construed as "clearly erroneous on the record" and warranting review. First, the Decision addresses these Objection numbers 7, 11, and 17, in detail in a five-page analysis that carefully discusses each and every evidentiary factual allegation presented by the Intervenor. Based on the Intervenor's own evidence, and assuming it to be true for purposes of determining whether a hearing is warranted, the Regional Director found, *inter alia*, that: (1) the employer granted the Intervenor "extra-contractual access to CPMC facilities during the period just prior to the election" (Decision at 10); (2) in the very few instances when SEIU representatives, while alone, were asked to leave restricted and/or work areas, "it appears that SEIU may have in fact been violating the agreed-upon access policy" in those few circumstances (Decision at 13); (3) "SEIU did not cite a single example when management knowingly permitted NUHW representatives access to non-public areas" (Decision at 13); and (4) shortly before the election, on April 1, the employer communicated by letter that it maintained a strict policy of disallowing NUHW representatives from entering any non-public areas of the hospital (Decision at 13). In other words, the Regional director found that the employer, for the most part, granted SEIU superior and even "extra-contractual" access, did not allow NUHW any access to non-public areas, and communicated to bargaining unit members that it had strict policies to enforce against NUHW.

SEIU also argues that the employer allowed an employee (Aaron Jordan) to express his alleged support for NUHW during a staff meeting. However, the Regional Director found that SEIU presented no evidence that this employee was an agent of NUHW, that "no supervisor or manager was in the room during this presentation" and there was no evidence that management endorsed or even condoned the alleged speech, and the alleged speech occurred before ballots were mailed. Accordingly, even assuming SEIU could offer evidence to prove agency (which it did not), the Regional Director found this allegation would not constitute objectionable conduct. Decision at 14.

Finally, SEIU argues that the employer prevented UHW from distributing literature on "numerous occasions" and this "demonstrated to eligible voters that their exclusive representative was not even permitted to speak to its members in public areas of the hospital." Request at 2. The related evidence focused on distribution, not access to speak with employees.[2] And actually, SEIU submitted very little evidence that the employer prohibited it from distributing literature. As accurately summarized by the Regional Director, "SEIU presented evidence that at two of the three campuses, on a total of four occasions, a security guard approached SEIU representatives and told them to remove their literature. It appears that no unit employees witnessed one of these incidents, and that from one to six unit employees witnessed the others." Decision at 9. The Intervenor's bold assertions that it couldn't speak to its members in public areas is simply contradicted by the affidavits and documentary evidence it provided in support of its Objections, including Objection number 6.

Even more importantly, the Regional Director noted, based in large part on admissions

[2] There was no question that SEIU representatives had ample opportunity to speak with employees and even to distribute to employees in break rooms. "It is undisputed that both SEIU and NUHW continually campaigned and distributed flyers in the cafeterias and other public areas of the hospital. The Employer also permitted SEIU representatives to distribute and post representational materials in break rooms." Decision at 6.

from the SEIU's own representatives, that the relatively few, if any, incidents where SEIU representatives were questioned, in the context of a campaign lasting over two years, on three campuses, and to the approximately 650 unit members, was not at all sufficient to disrupt the conditions necessary for a fair election. All of these assertions, and others, are supported in the Decision by thorough factual analysis that is entirely consistent with the evidentiary submissions that accompany the Intervenor's Request for Review. Indeed, based on the SEIU's own submissions, there is no credible basis to assert that, overall, the employer denied legitimate contractual access to SEIU, or discriminated against SEIU in favor of NUHW concerning access to employees, during the more than two years preceding the election. "In the context of campaigning that lasted more than two years across three campuses to appeal to approximately 650 eligible voters, it cannot be said that four instances of brief interference with the display of flyers, all or most of which may be attributable to a single apparently overzealous security guard, disrupted the conditions necessary for a fair election in this matter." Decision at 9.

C. Response to Request for Review Regarding Objection 16

Next, the Intervenor argues that the election should be set aside because one employee allegedly marked and mailed the ballot of another employee. Request at 2-3. There are multiple grounds justifying the Regional Director's decision not to send this alleged conduct to hearing. First, SEIU submitted no evidence that the alleged NUHW supporter (James Roberts) was acting as an agent of NUHW. Decision at 15-16. On the facts alleged, there is no basis to assert that Mr. Roberts was acting an NUHW's agent. It is undisputed that Mr. Roberts was an employee, and his allegedly speaking to an NUHW representative after the fact does not establish agency at the time the alleged impropriety occurred.

The Intervenor's citation to *Star Expansion Industries Corporation*, 170 NLRB 364

(1968), does not establish a possible theory of agency. In *Star Expansion*, the alleged improper conduct was committed by the Union's designated "chief observer" and there was additionally a factual question concerning whether that same designee was the Union's Business Representative. *Id.* at 364, 365, fn. 8. Furthermore, in *Star Expansion*, there was testimony that the election misconduct occurred "during a substantial part of the voting period" which was thus found "sufficient to warrant the inference that it interfered with the free choice of the voters." *Id.* at 365. As *Star Expansion* acknowledges, a single or isolated act of misconduct – "one isolated remark to an employee at the end of the voting line" – is insufficient to overturn an election. *Id.* at 365, fn. 10, citing to *Intertype Company*, 164 NLRB 770, 771-772 (1967) ("On this record, even assuming that the evidence offered by the Company is to be given full weight, the election should not be set aside").

Similarly, the Regional Director did not find this single act, impacting at most the vote of one bargaining unit member, even if true, would be sufficient to set aside an election decided by 147 votes. Decision at 16. This decision was sound, and review is unwarranted.

D. Response to Request for Review Regarding Objection 18

Finally, the Intervenor argues that the Regional Director erred by overruling an objection that the employer made unilateral changes to employees' health insurance. Request at 3-4. Again, the Regional Director considered this matter thoroughly and concluded that, assuming the evidence to be true, the alleged conduct does not warrant setting aside the election. First, the conduct itself occurred in 2009, and is remote in time. Second, this Board very recently found strikingly similar conduct to that alleged by the Intervenor herein was not in violation of Section 8(a)(5). *Sutter West Bay Hospitals d/b/a CPMC*, 356 NLRB No. 159 (2011). Accordingly, the alleged parallel charge herein is unlikely to have been sustained as a violation of the Act. Third,

the Union and the employer reached a successor agreement in March 2010, long before this election was finally held. Fourth, regardless of why it chose to do so, the Intervenor did in fact enter into a settlement with the employer in which the employer directly compensated employees for the alleged violations of the alleged unilateral imposition. If any resulting message was communicated to the employees, it was that the Intervenor had secured for the employees a make-whole remedy. As the Regional Director found, "[t[he parties' resolution of this unilateral change, months before the election, puts to rest any conceivable basis for SEIU's objection to the Employer's conduct." Decision at 17. In these circumstances, SEIU cannot plausibly argue that the Regional Director's determination was clearly erroneous.

III. CONCLUSION

For the foregoing reasons, the Intervenor's Request should be denied in its entirety, and this Board should uphold, in its entirety, the Supplemental Decision Regarding Intervenor's Objections to Conduct of Election, issued July 12, 2011 by Regional Director Joseph F. Frankl, Director of Region 20 of the National Labor Relations Board.

DATED: August 2, 2011

SIEGEL & LEWITTER

By: Latika Malkani

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PROOF OF SERVICE

I declare that I am employed in the county of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 1939 Harrison Street, Suite 307, Oakland, California 94612.

On August 2, 2011, I served the within document:

PETITIONER NUHW'S OPPOSITION TO INTERVENOR SEIU'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION OVERRULING OBJECTIONS TO ELECTION (Re Case No. 20-RC-18214)

on the interested party(ies) herein by sending a true copy as follows:

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✔ (BY MAIL) Each such envelope, with postage thereon fully prepaid, was placed in the United States mail at Oakland, California. I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service pursuant to which practice the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 2, 2011 at Oakland, California

Lisa Simpson