

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

ALTA BATES SUMMIT MEDICAL CENTER

Employer

and

Case 32-RC-5612

NATIONAL UNION OF HEALTHCARE WORKERS

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS-WEST

Intervenor/Incumbent

Florice Orea Hoffman, Esq. (Law Offices of Florice Hoffman), of Orange, California, for the Petitioner.

Thomas J. Dowdalls, Esq. (Littler Mendelson, P.C.), of Walnut Creek, California, for the Employer.

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REPORT ON OBJECTIONS

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was heard in Oakland, California, on May 10, 12, 13 and 17, 2011. The petition in this matter was filed on February 2, 2009, by the National Union of Healthcare Workers (herein NUHW) to represent certain employees of Alta Bates Summit Medical Center (herein the Employer). Those employees were already represented the Service Employees International Union, United Healthcare Workers-West (herein SEIU). Pursuant to a stipulated election agreement approved on December 20, 2010, an election by secret ballot was conducted on January 21, 2011, in the following unit:

All full-time and regular part-time employees employed by the Employer in Oakland and Berkeley, California, at its Alta Bates, Herrick, Merritt and Providence campuses in the following job classifications (and, where noted in parenthetical, only at specific locations): Admitting/Registration Rep; Ancillary Svcs Coder; Associate Care I (Alta Bates Medical Center or "ABMC"); Associate Care II - IV Certified; Associate Care II

(ABMC); Billing/Scheduling Tech; Cash Adjuster; Central Processing Technician-Lead; Central Processing Technician I; Central Processing Technician II; Certified Nurse Assistant (Summit Medical Center or "SMC"); Clerk Typist; Computer Operator; Computer Operator Senior; Data Operator; Dishwasher/Potwasher; Dispatcher /Transporter (SMC); Distribution Tech; Eligibility Worker; Emergency Svc Tech (SMC); Environmental Aide; ER Unit Cleric (SMC); Financial Counselor; Food Service Aide; Head Env. Aide; Insurance Verifier; LVN; LVN Chem Dep (SMC); Medical Records Clerk 1; Medical Records Clerk II; Medical Records Clerk 111; Medical Records Specialist; Medi-Cal Review Assistant; Monitor Technician (SMC); Nurse Attendant; Office Coordinator; Oncology Data Assistant; Orthopedic Nurse Att. (SMC); Patient Account Asst; Patient Account Rep I; Patient Account Rep 11; Patient Care Assistant (ABMC); Patient Placement Rep.; Patient Transporter (SMC); PBX Operator; Perinatal Aide (SMC); Program Aide (SMC); Registration Rep, Lead; Rehab Svc Aide (SMC); Store Clerk; Surgical Services Aide (SMC); Technician-Licensed Psyc (ABMC); Transcriptionist; Unit Secretary (SMC); Ward Clerk (ABMC); Worker-Mental Health (ABMC); excluding all office clerical and other clerical employees (ABMC), all cooks, stationary engineers, technical, administrative, managerial and professional employees, guards, and supervisors as defined in the National Labor Relations Act.

The Tally of Ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters.	1,129
Number of void ballots.	3
Number of votes cast for Petitioner.	448
Number of votes cast for Intervenor/Incumbent.	510
Number of votes cast for Neither.	21
Number of valid votes counted.	979
Number of challenged ballots.	12
Valid votes counted plus challenged ballots.	991

NUHW filed objections to the election and on April 22, 2011,¹ the regional director issued a report and recommendations on objections and notice of hearing. In that report the regional director directed that certain objections were to be resolved after a hearing.²

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

FINDINGS OF FACT

Background

The Employer is an acute care facility that provides comprehensive health care services. It has three separate campuses: (1) Alta Bates, located in Berkley, California, (2) Herrick, also

¹ All dates are in December 2010 and January 2011 unless otherwise indicated.

² NUHW withdrew objection 7 at the hearing.

located in Berkley, and (3) Summit, located in Oakland, California. The SEIU has represented the unit employees for a number of years, but on January 27, 2009, the International Union imposed a trusteeship on the SEIU; this resulted in the formation of NUHW by former leaders of the SEIU. The Employer continued to recognize the SEIU throughout this period of time.

The Employer did not express a preference to employees concerning the outcome of the election. Instead, its official position was one of neutrality. The Employer informed employees that it would respect their choice and work with whichever union the employees selected. The Employer instructed its managers that they should not voice an opinion on which union the employees should select; “The medical center does not offer advice about which union they should choose.”

Before I turn to the specific objections and describe the evidence in support of them, I set forth the general standards I apply in deciding whether the results of the election should be set aside. As the Board stated in *Safeway, Inc.*, 338 NLRB 525 (2002):

It is well settled that “[r]epresentation elections are not lightly set aside.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). Thus, “[t]here 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.*, supra, 941 F.2d at 328. Accordingly, “the burden of proof on parties seeking to have a Board-supervised election set aside is a ‘heavy one.’” *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974)),

The proper test for evaluating conduct of a party is an objective one—whether it has “the tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). The Board in *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), set forth several factors that should be considered:

In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Objections 2 and 3

2. The employer granted unlawful access and knowingly assisted SEIU to campaign against NUHW

During the critical period, the Employer, by its agents violated Section 7 of the Act and unlawfully granted SEIU non-employee representatives superior and enhanced access to its facilities, including but not limited to knowingly allowing SEIU campaign staffers and lost timers to engage in anti-NUHW and pro-SEIU campaign solicitation and distribution on patient care floors, in break rooms, in hallways, and in areas other than public areas. In addition, the Employer blocked NUHW nonemployee representatives and employees from lawful activities in the public areas of the hospital. The Employer knowingly allowed SEIU nonemployee representatives access to conference rooms for electioneering. The Employer and its agents increased SEIU access during the critical period and interfered with the laboratory conditions necessary for a free and fair election.

3. The employer imposed discriminatory solicitation, distribution and access rules during the critical period

During the critical period, the Employer by its agents, unlawfully granted SEIU supporters superior and enhanced access to its facilities, including but not limited to knowingly allowing SEIU supporters, including but not limited to SEIU campaign staffers, to engage in anti-NUHW and pro-SEIU campaign solicitation and distribution in patient care and other non public areas. The Employer, by its agents, imposed discriminatory access, solicitation, and distribution policies designed to coerce employees in the exercise of their protected Section 7 rights, encourage voting for SEIU, and to discourage voting for NUHW, and which interfered with the conduct of a fair election.

I describe the standards that I apply in determining whether the Employer engaged in objectionable conduct where there is an incumbent union and a petition is filed by a rival union. As for SEIU, an employer in this situation must continue to recognize the incumbent union. *RCA del Caribe*, 262 NLRB 963, 965 (1982). An element of that obligation of recognition is to continue to apply the collective bargaining agreement, including its access provisions. *West Lawrence Care Center*, 308 NLRB 1011, 1012 (1992). An employer, however, may not grant additional, noncontractual access rights to the incumbent while at the same time denying those additional rights to a petitioning union. *Raley's Inc.*, 256 NLRB 946, 956–957 (1981), enf. in part *Raley's Inc. v. NLRB*, 725 F.2d 1204 (9th Cir 1984), modifying 703 F.2d 410 (9th Cir 1983), *Raley's Inc.*, 272 NLRB 1136 (1984). As for NUHW, as a stranger, it generally had no right to enter the nonpublic areas of an employer's facility. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Albertson's Inc.*, 351 NLRB 254, 257–258 (2007). As to the public areas of the Employer's facilities, namely the cafeterias, both NUHW and SEIU are accorded equal access and the Employer may restrict their use on the same basis it restricts their use for the general public. Said differently, the Employer may restrict use of its cafeterias by nonemployee members of the staffs of SEIU and NUHW to eating, drinking, and socializing for reasonable periods of time.

The relevant access provisions from the contract between the Employer and SEIU are set forth below.

Section 34.1 The Field Representative or qualified representative of the Union shall be allowed to visit the Medical Center for the purpose of ascertaining whether or not this Agreement is being observed and to observe job conditions under which employees are employed. The privilege shall be exercised reasonably and shall be related to the representative's responsibilities for seeing that the Medical Center is in compliance with the Agreement.

Section 34.1.e "[I]f the Medical Center determines that a non-employee Union officer(s) and /or representative(s) has engaged in a serious violation of these provisions or the access policy on more than one occasion, the Medical Center may deny access rights to the non-employee Union officer(s) and/or representative(s) for a specified period of time not to exceed two (2) years" Section 34.2 The Field Representative or qualified representative of the Union shall report to a designated management official when entering the Medical Center and such representative shall not interfere with the normal conduct of work in the Medical Center. The Union representative may confer with employees, including Shop Stewards, only upon their own free time and in public areas within the Medical Center such as cafeterias or coffee shops or in the designated non-work areas.

Section 34.3 In the case of a tour to observe conditions, the Field Representatives or qualified representative shall notify the designated management official where he or she intends to go within the permitted areas of the Medical Center. The Union representative shall not engage in discussion with employees who are on duty during the course of the tour, and shall not be accompanied on the tour by anyone other than an authorized Field Representative.

Section 34.4 In the case of grievance investigation, the Field Representative shall make an appointment in advance with the designated representative of management. Prompt and reasonable arrangements will be made so that a joint investigation of the grievance can be made.

Before the election the Employer advised its supervisors and managers that although SEIU representatives had certain contractual rights to access they did not have the right to engage in campaign activities while exercising those contractual access rights. It also advised them that if they observed SEIU representatives in patient care areas they should ask the SEIU representatives to leave and if they did not leave immediately to call security.

The Employer's policy regarding nonemployee solicitation and distribution is as follows:

Non-employees may not solicit or distribute literature on Medical Center property at any time for any purpose. Non-employees may conduct authorized business activity in designated area of the Medical Center provided such business has prior approval of either the Administrative Office or of the Human Resources Department. Non-employees who

violate this procedure will be asked to leave the premises and may be subject to a charge of trespassing.

Employees are prohibited from soliciting or distributing literature during working time or in immediate patient care areas. The security officers were informed that employees had the right to distribute union literature but only in nonwork areas such as the parking lots, sidewalks, lounges, and hospital restaurants.

Conference Rooms

NUHW asserts that the Employer allowed SEIU to have access to the non-public conference rooms in the three weeks leading up to the election for campaign events. The Employer's practice has been to allow SEIU, upon request, to use its conference rooms if the rooms are available and after permission is granted. The Employer, of course, does not monitor what the SEIU and employees do in the conference rooms.

During the weeks prior to the election the Employer continued to allow SEIU to use its conference rooms. During that period of time SEIU was allowed to use the conference rooms on about 18 occasions lasting 2–3 hours each and invited unit employees to attend the events held in the conference rooms. Free food was provided by the SEIU and SEIU representatives calculated, for interested employees, the amount of money the employee might earn under the contract in future years and might lose if the SEIU no longer represented the employees. Cards describing *Weingarten* rights were distributed and information concerning the contract was also made available. At least on one occasion an employee discussed a grievance matter with an SEIU representative. However, SEIU campaign literature was available in those conference rooms and the upcoming election was a matter of discussion as well. In short, SEIU representative engaged in some election campaigning with employees in the Employer's conference rooms prior to election. Again, because the Employer does not monitor what the SEIU and employees do in the conference rooms, the Employer had no direct knowledge that SEIU was campaigning there.³

Break Rooms

The NUHW contends that the Employer considers certain break rooms at its facilities to be work areas and generally has not allowed representatives access to those areas but that during the election period the Employer allowed SEIU access to its break rooms. NUHW relies mostly on the testimony of John Borsos, NUHW's vice president, to establish the past practice component of this argument. I do not find this testimony convincing. Borsos seemed more set on making a case than giving accurate testimony and his testimony is contradicted by the testimony of other witnesses. Richard Hinshaw, the Employer's director of employee/labor relations credibly explained that in the past the Employer did allow SEIU access to the break rooms under certain circumstances. Keesha Johnson works for the Employer as a patient transportation dispatcher. She was a shop steward for the SEIU for about 8 years before a

³ The foregoing facts are base on a composite of the credible portions of the many witnesses presented by the Petitioner, including Keesha Johnson, Shayne Silva, Oscar Medina, Charles Bradley, DeAnn Horner, James Boatner, Alfred Sanders, and Ann Marie Willis.

trusteeship was imposed. She admitted that while she was a steward the SEIU was routinely permitted access to the break rooms to meet with workers. Vicki Jackson works as a representative for the SEIU; she serviced the unit employees of the Employer intermittently beginning in 2005 into 2008. She credibly testified that during that time she met with workers in the break rooms in the Employer's facilities. She also credibly testified that SEIU's leadership, including Borsos, never instructed her not to meet employees in the break rooms or that the Employer took the position that break rooms were work areas. In sum, contrary to NUHW's contention I conclude that the Employer did allow SEIU access to its break rooms well before the critical period and continued to do so through the election.

Lawanna Williams works for the Employer as an environmental services aide. She credibly testified that on January 11 that she encountered several SEIU representatives in her break room. She complained to her supervisor, Fran Kidd, and requested that he ask the SEIU representatives to leave the break room so that they could enjoy their breakime. Kidd answered that the SEIU representatives had a right to be there to post material on the bulletin board. After Williams pointed out that the bulletin board was not located in the break room Kidd replied that in any event he was not going to ask them to leave. Williams thereafter sent a letter to Kidd describing the incident but she did not receive a response. Jaime Cosio works for the Employer in the central processing department. His supervisor, Iesha Epton, explained that SEIU would be allowed access to break room to post material on the SEIU bulletin boards that is located there.⁴

Patient Floors

I describe the evidence that NUHW relies on to support its contention that the Employer allowed SEIU to campaign in patient areas while denying that opportunity to NUHW representatives. In Keesha Johnson's affidavit she stated that "SEIU was roaming the floors, where we were more in the cafeteria." Because this evidence is hearsay, without foundation, and lacking in detail, I give this evidence no weight. Maria Hernandez works the graveyard shift as an environmental service aide. She credibly testified that she saw Dominic Mitchell, SEIU's representative, accompanied by other people on the floors. Mitchell was talking to employees and had some papers in his hand. One of the persons with Mitchell, identified as Mauricio, approached Hernandez while she was working and asked if she wanted any information about the SEIU; Mauricio offered Hernandez some literature by she did not accept any. I infer that Mitchell was campaigning for SEIU. Andrea Garcia also works for the Employer as an environmental service aide. She credibly testified that on about January 17 she saw Felipe Garcia, an SEIU representative, approach Darlene, a coworker and ask if he could talk to her about the Union but Darlene "shooed" away Felipe Garcia. On another occasion Andrea Garcia saw Felipe Garcia walking into the emergency room; she did not see him talking to employees. Andrea Garcia also saw Mitchell on a patient care floor try to talk to an employee but the employee declined, answering that she had to hurry to begin her shift. Lawanna Williams saw

⁴ NUHW also relies on the testimony of Borsos and Sal Rosselli, NUHW's president, concerning statements made to them by the employer's supervisors. I do not credit that testimony. Their demeanor was not convincing; and again it seemed like they were trying to support the NUHW's position rather than simply relaying factual information.

Betelhem Michael, a staff member of SEIU, approach a nurse's station and give a flier to an employee and then go into a break room and leave a campaign booklet there.

In sum, SEIU engaged in some campaigning on patient floors. However, there is no evidence that anyone reported these specific incidents of SEIU election campaigning to the Employer or that the Employer otherwise knew about them.

Kitchen Area

Kenneth Hill works for the Employer in the dietary department. He credibly testified that Fola Farrigon, a staff member of SEIU, came to the kitchen area 2–3 times a day everyday during the weeks before the election and talked to workers there about the election. There is no evidence that anyone reported these incidents of SEIU election campaigning to the Employer or that the Employer otherwise knew about them. When the Employer learned that Farrigon was interfering with patient care by talking to an employee during the election period, it sent a message to SEIU threatening to remove Farrigon from the premises in the future.

On January 7, 2011, NUHW sent a message Richard Hinshaw, the Employer's director of employee/labor relations, and Brice Hatten, an employee and labor relations specialist for the Employer. The message asserted that SEIU had used the Employer's conference rooms for campaigning. NUHW requested equal access to the conference rooms for campaigning purposes. The message reported that SEIU was campaigning in break rooms and that SEIU was interrupting employees while working; the message, however, gave no more specific information that would allow the Employer to ascertain the accuracy of those claims. The message also indicated that certain bulletin boards that SEIU is allowed to use were "riddled with anti-NUHW and pro-SEIU campaign literature, unrelated to SEIU's role regarding representation" of the unit employees. The message also complained that on January 6, 2011, security officers sat passively while Darnita Geary and two other SEIU representatives "verbally attacked" John Borsos, NUHW's vice president, and other NUHW supporters. On January 14 NUHW sent a similar but updated message to the Employer's attorney.

Hinshaw reacted to the message sent to him by asking Hatten, who was in overall charge of the use of the conference rooms, if he knew anything about SEIU using the conference rooms for campaign purposes; Hatten said that he did not. Hinshaw also asked Val Tagawa, an SEIU representative. Tagawa answered that the NUHW's assertion about the conference rooms was false; she told Hinshaw that the conference rooms were being used to go over the collective-bargaining agreement and inform members. Hinshaw also reviewed the SEIU literature attached to the message and concluded that much of that literature could not be classified as campaign literature but rather information about the contract and such.⁵

On January 10 SEIU complained to the Employer that it was improperly allowing NUHW campaigning preferences. In fact, although NUHW staff was prohibited from entering

⁵ These facts are based on Hinshaw's credible testimony. I have taken into account Hatten's testimony that he did not recall Hinshaw asking him about the SEIU's complaint concerning the use of the conference rooms. I nonetheless rely on Hinshaw's testimony; his demeanor was convincing and it seems likely that he would have taken these steps in looking into the NUHW's claims.

the non-public areas of the Employer's facilities, they nonetheless did so. For example, Roselli, NUHW's president, entered the Employer's facility without its permission and campaigned in break rooms; he was removed by security. On January 4 Beverly Griffith, an NUHW staff representative, entered the Employer's facility through a side door and went to a nonpublic area where she questioned an employee concerning why the employee was wearing purple, the color used by SEIU. Other instances of NUHW staff being present in non-public areas occurred on January 11, 13, and 17.

Analysis

First, I point out that both SEIU and NUHW conducted vigorous campaign activities. Both, at times, violated the Employer's rules. I conclude, however, that the evidence does not show that the Employer gave preferential treatment to the SEIU. To the contrary, faced with a difficult situation the Employer did the best it could follow the law and maintain its neutrality in the election. As it was required to do, the Employer continued to grant SEIU access rights consistent with its contractual obligations and past practice. There is no evidence that the Employer directly knew of any campaigning by SEIU officials in non-public areas yet did nothing to stop it. When NUHW made assertions that SEIU was improperly campaigning, the Employer took steps, albeit modest steps, to ascertain whether this was occurring. The Employer was on notice that the SEIU was using its conference rooms frequently in the weeks before the election, but this alone does not constitute objectionable conduct. I recommend that Objections 2 and 3 be overruled.

Objection 4

4. The employer engaged in surveillance and other acts of intimidation and coercion

During the critical period, the Employer and its agents unlawfully conducted surveillance of known employee-adherents of NUHW and NUHW organizers and staff. The Employer limited and restricted the public areas where the NUHW had access to campaign, engaged in surveillance of the protected concerted activities and evicted NUHW organizers and staff from nonwork areas. By these acts of misconduct, the Employer coerced employees in the exercise of their protected Section 7 rights, intimidated them and encouraged them to not support or vote for NUHW, and which destroyed the laboratory conditions necessary for a fair election.

I first set forth the standards I apply in determining whether surveillance occurred sufficient to warrant setting aside the election results. “[U]nion representatives and employees who choose to engage openly in their union activities at an employer’s premises should have no cause to complain that management observes them.” *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). An employer must do something more, something “out of the ordinary” than merely observe open displays of union activity in order to convert lawful observation into unlawful surveillance. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007). As the Board stated in *Town & Country Supermarkets*, 340 NLRB 1410, 1415 (2004):

The principles governing whether employer surveillance, photographing, and videotaping of protected employee activity violates the Act are well established: [A]n employer’s

mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woolworth* [310 NLRB 1197 (1993)] reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. *Id.*, *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), *enfd.* 401 F.2d 128 (7th Cir. 1968), *cert. denied* 393 U.S. 1019 (1969). Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), *enfd.* 156 F.3d 1268 (D.C. Cir. 1998).

I conclude initially that the Employer has presented adequate justification for photographing events in and around its cafeterias. It was attempting to maintain order, allow the cafeterias to be used for their intended purpose and not be overcome by electioneering, and assure that nonemployees did not distribute literature in violation of its rules and thereby become trespassers. I now set forth the evidence in support of this objection and apply these standards as well as the general standards described earlier in this decision.

The Employer has four cafeterias in its facilities. Employees were allowed to, and did, distribute campaign literature for both unions in those cafeterias. The Employer practice concerning the use of its cafeterias by nonemployee staff of NUHW and SEIU was:

Both SEIU-UHW and NUHW representatives may visit our cafeterias just like the general public. There are Security Officers on duty in the cafeterias during peak times. Please report any issues to those officers or call Security

Those representatives, like all nonemployees, were prohibited from distributing literature there. Both SEIU and NUHW maintained a significant and continuing presence in the cafeterias during the weeks preceding the election. The Employer increased its security presence in those cafeterias to assure that its rules and policies were enforced. Both NUHW and SEIU representatives attempted to distribute literature in the cafeterias notwithstanding the Employer's policy; security officers did their best to prevent the distribution.

I now present the evidence in fuller context that NUHW relies on to support this objection. Yolanda Alley works for the Employer in the environmental services department. She credibly testified that while in a cafeteria she sat at table with two coworkers, one had a binder with some NUHW fliers in it. A security officer sat at the table behind them and observed them. This is nothing more than observation by security officers of employees gathered in a public area of the facility.

Keesha Johnson and other persons were at a table in cafeteria. The table was covered by a red tablecloth; this is the color used by the NUHW. The red tablecloth was placed over the

table by NUHW staff. The security officer told them to remove the tablecloth and told the persons assembled there that he did not want them to distribute literature. SEIU also covered tables in the cafeteria with tablecloths; their tablecloths were purple. They too were instructed by security officer to remove the tablecloths. However, while Johnson testified that other employees were present at the table, she did not indicate whether or not nonemployee staff members from NUHW were also at the table. In any event, under these circumstances the security officer could reasonably believe that some persons at the table were not employees. Although the security officer could have said that he did not want any nonemployees at the table to distribute literature, this incident could not reasonably tend to have any effect on the outcome of the election especially given the fact that employees supporting both unions continued to distribute literature in the cafeterias.

Shayne Silva works for the Employer as a psychiatric technician. She was talking with a NUHW staff member in the lobby when a security guard told them that they had to step outside. They went outside to the bottom of the steps and resumed talking there. The security guard followed them and stood nearby observing. Silva went back into the building and the NUHW staff member was "kind of following" her; so did the security guard. Silva asked a coworker whether he wanted to sign a petition on behalf of NUHW; the security guard stood nearby observing. On another occasion Silva spent 3 hours in a cafeteria campaigning on her day off. Two security guards were seated two tables away for the entire period. After 3 hours Hatten appeared and told Silva that she had been in cafeteria long enough and asked her to leave; Silva then left. In sum, the security guard asked Silva and NUHW staffer to take their conversation outside and merely observed them while they remained outside but still on the Employer's premises and then when they came back into the building. And the mere presence of guards seated two tables away in a public cafeteria does not amount to surveillance. Finally, Hatten properly asked Silva to leave the cafeteria after she had been there three hours, not eating, drinking, or socializing, but campaigning. The Employer was not required to allow employees to occupy space in the cafeteria for hour after hour campaigning; nor was it required to allow NUHW to solicit in its lobby or front steps especially where there is no evidence that it allowed SEIU to do so.

Oscar Medina works for the Employer as a patient transporter. On several occasions security guards observed him talking to NUHW staff members. Marcus Patrick works as a housekeeper for the Employer. Patrick met with NUHW staff in the cafeterias and as he did so, the security guards sat nearby and "kept a close eye on the NUHW representatives." Marcia Boyd, another employee, also was observed by security officers as she interacted with NUHW staff members in public areas of the Employer's facility. Because the security guards had justification for observing nonemployees on the premises, so too they must be allowed to incidentally observe employees who are interacting with the nonemployees.

Ron Jackson works as an environmental services aide. One day he came to the facility while off duty; he was wearing a red suit, red hat, and red shoes. Jackson stood in front of the elevators greeting people as they came along. A security guard approached him and told him to be quiet. Jackson protested that he was merely saying hello to people and that he did that all the time. The security guard then moved away and made a telephone call. As he was doing so Jackson asked who he was calling; Jackson said that he worked there. Jackson then started to walk towards the cafeteria; as he did so the security guard took a picture of him. Dressed

entirely in red, Jackson was obviously symbolically campaigning. Under the circumstances the security guard had reason to photograph the gentleman in red.

DeAnn Horn testified concerning an incident in the cafeteria. Hayward McClain took a picture of her. McClain apparently works both as a security guard and as a ward clerk, a bargaining unit position. Horn said that if he took her picture she was going to take his, and she did so. Horn told McClain "how dare" he take her picture, one union member "surveilling" another. McClain answered that he had to do it for personal reasons. Horn first testified that she was handing out literature or talking to people when her photograph was taken. She then testified that she was seated at a table and was both talking to people and handing out literature. Next she testified "I don't remember exactly what I was doing" when the photographing occurred. I conclude this incident of mutual picture taking does not reasonably have the tendency to affect the outcome of the election.

Andrea Garcia works as an environmental services aide; she was a supporter of the NUHW. On her time off she came to the cafeteria and sat at a table with a copy of the contract ready to answer questions that her coworkers might have. Garcia was not sure whether she wore a red shirt that day that would identify her as an NUHW supporter, although she did not think she was wearing her work uniform. She testified that she was wearing her employee badge. In any event, a security guard followed her as she left the cafeteria and walked down a hallway. Garcia then "hopped on an elevator to lose him." This monetary following of an off duty, out of uniform employee walking down a hallway does not amount unlawful surveillance. And the fact that Garcia "hopped on an elevator" to enter the facility proves the point as to why such observation was necessary in the first place.

Elizabeth T. Ortiz works for the Employer as a sterile processing technician. On January 19, the first day of the election, while on her day off and while not wearing her work uniform Ortiz went to the third floor of a facility to campaign. There a coworker who was on duty approached Ortiz in a hallway and they began talking about the election. Ortiz' manager, Sheila Johnson, saw them standing in the hallway and talking. A few minutes later security guards appeared and asked Ortiz to leave the floor. Ortiz left the third floor but then went to the sixth floor. There a security guard told Ortiz that she was not allowed to be in the hospital if she was not working. This time the security guard escorted her to the cafeteria. In the cafeteria Ortiz encountered Borsos and explained to him what had happened. Borsos told Ortiz and the security guard that Ortiz had the right to campaign for NUHW as she had attempted to do. The security guard replied that they should raise the matter with human resources. Ortiz then went to the elevators and again attempts to access the working areas of the facility, but was again blocked by a security guard. I comment on this incident only to say that NUHW apparently was advising its supporters that they had the right, while off duty and not in uniform, to access the working areas of the facilities and talk to employees who should be working.

James Boatner transports patients for the Employer. On one occasion he and a coworker were in a hallway near the main lobby between the restrooms and cafeteria and were talking about their families; Boatner was wearing the NUHW colors. He testified that a security guard approached them and said that if they were going to be talking about the NUHW they need to break it up and move it somewhere else out of sight because they were disturbing other employees. Boatner answered that they were not being loud but he and the coworker moved to

the side of the hallway. The security guard observed them until dispersed. Boatner was on working time at the time, although as a transporter he is normally allowed to talk to other employees during “down time” when he has no patients to transport. It is not clear whether the other employee was also on working time. On another occasion Boatner and Oscar Medina attempted to enter the labor and delivery wing of the Employer’s facility to campaign for NUHW. This is a secure wing and security guards maintain control of access there. Boatner was wearing his employee identification but was off duty. Boatner explained to the security guard that they were going there to talk to employees about the election. The security guard refused to allow them access and instead directed them to the cafeteria.⁶ None of the credited testimony described above could reasonably have affected the outcome of the election; the Employer was certainly allowed to continue to control access to this area.

The Employer instructed its security force to photograph violations of its solicitation and distribution policies by nonemployee NUHW and SEIU staff members, and the security force did so. On about five or six occasions the security guards also took photos of employees in public areas at the facilities; some of these photos were of employees only, others were of employees with nonemployee staff of NUHW. When this came to the Employer’s attention the security force was instructed not to photograph employees. These isolate instances of photo taking in public areas likewise could not reasonably have affected the outcome of the election.

Analysis

To summarize, the employees in the voting unit was large – over 1100 – and the employees who actually voted was likewise large – almost 1000. In this context the incidents of photographing of employees and incidental surveillance were relatively few in number. And SEIU received 62 more votes than NUHW; a margin of over 6 percent. The nature of the conduct of the security guards was not severe and there is no evidence that this conduct was widely disseminated. Considering all the credible evidence supporting this objection in the overall context of this election, I conclude the evidence does not show that the Employer engaged in conduct sufficient to warrant overturning the election result. I recommend that Objection 4 be overruled.

Objection 6

6. The employer monitored the polling

The Employer by its agents and management staff, interfered with the laboratory conditions necessary for a fair election by monitoring the polling. This conduct by the Employer coerced employees in their exercise of protected Section 7 rights and destroyed the laboratory conditions for a fair election.

⁶ I do not credit any testimony that prior to the election period off-duty employees had unfettered access to this area. I also do not credit any of Boatner’s testimony beyond what is described above; he appeared to be confused.

In its brief NUHW states:

Finally, there was no reason for the Employee Labor Relations Specialist, Bruce Hatten, to be standing in view of employees going to the polling area in a dark trench coat. The Employer does not provide security for the NLRB.

Jamale Burks work for the Employer in the environmental services department. Burks voted on January 19 at the Summit Campus. He testified that as he was coming to vote he saw Hatten at the end of the long hallway by the elevators talking to someone. The elevators are about 100 feet away from the entrance to the voting area. After Burks voted he noticed that Hatten and the person had moved even further away from the voting area. Hatten denied “stationing himself” at that location. I need not resolve this factual issue because there is no evidence that Hatten was observing anyone going into or out of the polling area as opposed to talking to another person at the end of the long hallway. In any event, Hatten was located too far away from the voting area for too short a period of time for this event to have an appreciable effect on the outcome of the election. *Patrick Industries*, 318 NLRB 245, 256 (1995); *Roney Plaza Management Corp.*, 310 NLRB 441, 447 (1993).

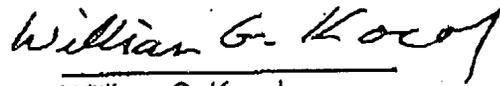
On January 20 before 7 p.m., during the time the polls were open at the Alta Bates Campus, Hatten lingered in and around the gift shop area for a period of about 20 minutes.⁷ The gift shop was on the same floor as the voting area. One can not see the voting area from where he was, nor can one see employees standing in line to enter the voting area from there. Rather, from that location a person would have to walk down a corridor of about 40 feet, make a turn at an intersection, walk down a corridor of about 120 feet, walk through a doorway, turn and walk down another short corridor, and then walk further down into the voting area. In other words, Hatten was stationed too far away from the voting area for there to be any impact on the results of the election. *Patrick Industries*, supra; *Roney Plaza*, supra.

⁷ These facts are based on the credible portions of Hatten’s testimony. Hatten gave an explanation of why he was there, but that explanation rings hollow and I do not credit it. D’Arblay Washington testified that she saw Hatten in that area the day before, on January 19, as she went to vote, but I credit Hatten’s testimony that he was not at that location on January 19.

Conclusion

I recommend that Objections 2, 3, 4, and 6 be overruled and that SEIU be certified as the collective bargaining representative of the employees in the unit.⁸

Dated, Washington, D.C., August 10, 2011.



William G. Kocol
William G. Kocol
Administrative Law Judge

⁸ Pursuant to Sec. 102.69 of the Board's Rules and Regulations, any party may, within 14 days from the date of this recommended decision, file with the Board in Washington, D.C., an original and 8 copies of exceptions thereto. Exceptions must be received by the Board in Washington by August 24, 2011. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director for Region 32. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.