

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

LUTHERAN SOCIAL SERVICES OF
MICHIGAN, d/b/a LUTHER MANOR

Employer

and

CASE 07-RC-023419

NATIONAL UNION OF HEALTHCARE
WORKERS

Petitioner

and

SEIU HEALTHCARE MICHIGAN

Intervenor

**HEARING OFFICER'S REPORT AND RECOMMENDATIONS
ON OBJECTIONS TO CONDUCT AFFECTING THE
RESULTS OF THE ELECTION**

This report contains my findings of fact, credibility resolutions, conclusions of law, and recommendations regarding the objections filed by the Intervenor in the above matter. As set forth below, I recommend to the Board that the Intervenor's objections be overruled and the Petitioner be certified as the exclusive collective bargaining representative of the Unit involved in the instant case.

BACKGROUND AND PROCEDURAL HISTORY

Upon a petition filed on March 23, 2011,¹ and pursuant to a Stipulated Election Agreement approved on April 7, an election by secret ballot was conducted on September 23, among the employees of the Employer in the following appropriate collective bargaining unit:

¹ Hereinafter, all dates are 2011 unless otherwise specified.

All full-time and regular part-time CNAs, activities assistants, assistant cooks, cooks, dietary assistants, housekeeping assistants, laundry assistants, maintenance workers, medical records clerks, rehabilitation nursing assistants, schedulers, and hydration monitors/CNAs employed by the Employer at its facility located at 3161 Davenport Avenue, Saginaw, Michigan; but excluding all office clerical employees, technical employees, professional employees, licensed practical nurses, registered nurses, confidential employees, agency personnel, CNA contingent pool employees, contingent employees, guards and supervisors as defined in the Act.

The payroll period for eligibility was the bi-weekly period ending Thursday, September 1.

Upon the conclusion of the election, a copy of the Tally of Ballots, showing the following results, was made available to each of the parties in accordance with the Rules and Regulations of the Board:

Approximate number of eligible voters	78
Void ballots	0
Votes cast for Petitioner.....	47
Votes cast for Intervenor (SEIU)	22
Votes cast against participating labor organizations.....	1
Valid votes counted.....	70
Challenged ballots.....	4
Valid votes counted plus challenged ballots.....	74

The challenged ballots were insufficient in number to affect the election results.

On September 30, the Intervenor (SEIU) timely filed Objections to Conduct Affecting the Results of the Election, a copy of which this office served upon the Employer and Petitioner in accordance with the Board’s Rules and Regulations. The Intervenor’s objections are as follows:

1. The Employer by its agents and representatives, distributed paychecks containing retroactive raises to a select group of employees on the day of the election, despite representing to employees that such raises were to be paid two weeks after the election. The Employer’s conduct substantially affected employees’ sentiment and destroyed the laboratory conditions necessary to conduct a free and open election.
2. Prior to the election, the Employer provided the Intervenor with an *Excelsior* list which contained a significant number of incorrect employee addresses. The Employer’s conduct did not substantially comply with the *Excelsior* rule,

and thus prevented the Intervenor from effectively communicating with employees prior to the election.

A hearing was held before the undersigned on November 4 and 7, in Detroit, Michigan. It was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties were present and were afforded full opportunity to be heard, to examine witnesses, to introduce relevant evidence, and to file briefs pertinent to the issues.

Upon the entire record in this proceeding,² and on the basis of my observations of the witnesses, demeanor and their testimony, I make the following findings of fact, conclusions of law, and recommendations with respect to the issues presented in this proceeding:

FINDINGS OF FACT AND CONCLUSIONS

Preface

This report is, unless otherwise noted, based on a composite of the credited aspects of the testimony of all witnesses, unrefuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record.

Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Record evidence omitted from this report is considered either irrelevant or superfluous. To the extent that testimony or other evidence not specifically mentioned in this report might appear to contradict my findings of fact, that evidence has not been overlooked. Rather, it has been rejected as incredible or of little probative value or impact. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of the witnesses at the hearing.³ Failure to detail all conflicts in testimony does not indicate that such conflicting testimony was not considered. *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

A number of persons testified in this matter and in this order: Ricky Webb, SEIU member representative; Tamika Ruth, certified nursing assistant (CNA); Rebecca Vasold, CNA hydration monitor; Robbin Smith, scheduler; Endora Jackson, CNA; Olga Vasquez, CNA; Eric Noyes, SEIU Organizing Director; David Robertson, NUHW organizer; and Kristi McKenzie, Vice President, Human Resources and Integrity.

Most of the findings of fact herein do not involve the resolution of directly conflicting testimony. However, where it is necessary to resolve directly conflicting testimony on substantive issues, my credibility resolutions are set forth below.

² The Petitioner and Intervenor filed briefs, which were carefully considered.

³ At the Employer's motion, I granted a sequestration order prohibiting potential witnesses from being present in the hearing room during the proceeding.

Background

Lutheran Social Services of Michigan is a non-profit social ministry organization linked with the Evangelical Lutheran Church in America providing social services in a broad spectrum of services. Lutheran Social Services employs approximately 1,700 employees and operates Luther Manor in Saginaw, Michigan. Luther Manor is licensed by the State of Michigan to provide skilled nursing and rehabilitation services. Luther Manor (Employer) is the only facility at issue in this matter.

SEIU Healthcare Michigan (Intervenor) has represented the petitioned-for unit since about 2001. The most recent collective bargaining agreement was ratified on September 2, 2011⁴ and is effective September 2 until December 31, 2013. The prior collective bargaining agreement expired on December 31, 2010.

Objection 1

Objection 1 alleges that the Employer distributed paychecks on the day of the election containing retroactive raises to a select group of employees despite representing to employees that such raises were to be paid two weeks after the election. The Intervenor alleges that the Employer's conduct substantially affected employees' sentiment and destroyed the laboratory conditions necessary to conduct a free and open election.

In support of this objection, the Intervenor's member representative Ricky Webb testified that negotiations for the new collective bargaining agreement started in about March. He, along with several others, was part of the Intervenor's bargaining committee. The Intervenor and Employer agreed to a tentative collective bargaining agreement around the last week of August. On August 26, the Intervenor submitted the tentative collective bargaining agreement for a ratification vote by the membership. The membership voted not to ratify the tentative collective bargaining agreement. On September 2, the Intervenor resubmitted the tentative collective bargaining agreement for ratification and the membership voted in favor of ratification. Under Section 16.1(a) of the ratified collective bargaining agreement, employees hired prior to December 31, 2007, would receive \$0.30 wage increase in 2011, 2012, and 2013. Under Section 16.1(c), employees hired on or after December 31, 2007, would be paid on a separate wage increase scale retroactive to the first pay period of January 2011, or their date of hire, whichever is later. Section 16.2 concerns the eligibility for the retroactive wages.

Webb testified that under the ratified collective bargaining agreement, the wage increase, regardless of what date the employee was hired, would go into effect the first pay period after ratification and wages were to be paid retroactive to the first pay period of January. Webb testified that there was no classification of employees excluded from the pay

⁴ Intervenor's representative Ricky Webb testified that ratification occurred on September 9; however, Employer Exhibit 15, which is an email from Webb to Kristi McKenzie, Vice President, Human Resources and Integrity, indicates that ratification took place on September 2.

raises under the collective bargaining agreement, and there were no other classifications of employees who were to receive retroactive pay increases at a different time than any other employees.

The Employer's 2011 pay period operates on a bi-weekly schedule. The beginning of the pay period is a Friday and the end of the pay period is 13 days later on a Thursday. The pay date is approximately eight days after the pay period ends, which is Friday. Based on the Employer's operations, employees are able to receive their paychecks during the afternoon on the eve of the pay date, which is Thursday. During the month of September, the Employer's pay periods were September 2 through 15, and 16 through 29, with pay dates on September 23 and October 7 respectively.

On the date of ratification, September 2, Webb and David Grundmeier, Administrator for the Employer, discussed when employees would receive their retroactive pay. Grundmeier told Webb that employees would receive their retroactive pay on September 23. Webb testified that he did not agree that this was the proper date for payment, but did not challenge Grundmeier. Webb felt that if Grundmeier wanted to pay employees early, Grundmeier could pay them early.

On September 13, Webb went to the office of Kristi McKenzie, Vice President, Human Resources and Integrity. Webb asked McKenzie when employees would receive their retroactive pay and raises. McKenzie told Webb that they would receive them on September 23. After learning the date that employees would receive their retroactive pay and raises, the Intervenor made flyers and distributed them to employees to inform them that they would get their pay increase and retroactive wages on September 23. The flyers also highlighted other changes to the recently ratified collective bargaining agreement.

On September 16, McKenzie emailed Webb about the expected raises. McKenzie wrote:

I know employees are expecting their raises to be reflected in their September 23 pay checks. As we were working to implement the contract, however, a careful reading clearly states the \$.30 increase is "... the beginning of the first payroll period following ratification of this Agreement..." Ratification of the agreement was on September 2. The beginning of the next payroll period following ratification is September 16. That payroll period runs through September 30 with the pay date being October 7.

Webb testified that after receiving McKenzie's email, he did not challenge the Employer in any way as to their intention to pay the increases and retroactive wages at a later date.

McKenzie testified that in some cases, the retroactive pay calculation was simple, while in other cases the calculations were rather complex based on anniversary dates, jumps

in the pay scale, or other personnel changes. McKenzie testified that the retro pay for each employee was calculated manually to assure accuracy and then inputted into the Employer's pay system after the manual calculation. The actual process of inputting the calculations was done in the Employer's Detroit office, not Saginaw. McKenzie made the decision that the retroactive portion of the employee's pay would be paid in a separate check rather than being included with an employee's regular check. The Employer originally anticipated the contract being ratified on August 26 making the pay increases effective for the September 23 pay date. However, ratification didn't take place until September 2, therefore September 23 was no longer the date in which the retroactive wages were to be paid, and the correct date would be the following pay date of October 7. McKenzie testified that increases had already been entered into the system to be effective September 23 and had to be removed from that pay period.

On September 17, the Intervenor held a picnic for employees. Approximately 12 employees came to the picnic. Intervenor's officials showed the employees the September 16 e-mail from McKenzie about the pay checks. In addition to notifying employees at the picnic, Intervenor officials distributed copies of McKenzie's e-mail during shift changes and gave Steward Nick Zimmerman copies to post on the Union bulletin board and distribute to employees. Several employees, including CNA Rebecca Vasold, scheduler Robbin Smith, and CNA Olga Vasquez, testified that they saw the e-mail from McKenzie about the retroactive pay being paid on October 7 rather than September 23.

On Thursday, September 22, and Friday, September 23, seven employees received their retroactive pay with their regular payroll check: Lakisha Adams, Candice Coleman, Chelsea Lytle, Bridgette Palmore, Mary Saucedo, Ayana Terry, and Mykia White. Approximately 72 employees did not receive their retroactive pay with their regular payroll check that week. According to the Employer, the retroactive wages were based upon the increase negotiated between the Employer and Intervenor for the applicable retroactive period and were scheduled to be paid on October 7. No evidence was presented that the retroactive wages paid on September 23 were not based upon the increase negotiated between the Employer and Intervenor.

CNA Tamika Ruth testified that on September 22, she learned from several employees that some employees received retroactive pay with their regular paycheck. After learning this, Ruth spoke with Grundmeier, Administrator for the Employer, about the retroactive wages. Grundmeier told Ruth that there were some people who received their retroactive check early and he was not going to go into detail. Grundmeier told Ruth that it will be corrected and she will get her retroactive pay on October 7, the following pay date. Ruth further testified that after speaking with employees, she learned that a number of employees went to Grundmeier and Sue Lamia, a Human Resources official at the Employer's Saginaw facility, about the retroactive pay and the employees were told that they were going to receive their retroactive pay. Ruth testified that after speaking with several employees, she knew that they were under the impression that the retroactive pay was a result of the ratification.

CNA Rebecca Vasold testified that after the contract was ratified, she was notified by the Employer that employees would receive their retroactive paychecks on September 23. Vasold does not remember how she learned, but she remembers that prior to the election, she was notified that the retroactive pay would not be on September 23 and that it would be the following pay date, October 7. On September 23, Vasold learned that at least two employees received their retroactive pay with their regular paychecks. After learning this, Vasold spoke to Lamia about the retroactive pay and Lamia told Vasold that her retroactive pay would be processed for the following pay period, and she would receive the retroactive pay on October 7.

Scheduler Robbin Smith testified that on September 22, employee Palmore showed Smith that Palmore received retroactive pay with her regular paycheck. Smith also learned that employee Adams received retroactive pay. Smith further testified that she knew from speaking with other employees that they knew they were getting their retroactive pay; they just didn't know when.

CNA Olga Vasquez testified that on September 2, Webb told her that employees would be receiving their retroactive wages on September 23. On September 20, Vasquez saw a note posted in the staff dining room that the retroactive wages were not going to be paid on September 23. After seeing this note, Vasquez called McKenzie to inquire about the retroactive wages. McKenzie told Vasquez that there was a mistake and the retroactive wages would be given out on October 7. Vasquez testified that she was talking to at least four employees about the payment of retroactive wages and some of them said it didn't matter; they were going to get their check anyways.

McKenzie testified that during the morning of September 23, she heard from Webb that an employee received retroactive pay in the employee's paycheck. After hearing this, McKenzie went to Employer official Lamia and asked her to verify that information. McKenzie testified that she has no idea how seven employees received their retroactive pay with their regular payroll check on September 23 rather than in a separate check on October 7. McKenzie said that the only explanation she could come up with is that the retroactive pay was not understood as the collective bargaining agreement retroactive pay, but rather as retroactive for something else. McKenzie further testified that the Employer could not find an association or link among the individuals who received retroactive pay with their regular paycheck on September 23.

Analysis

In *General Shoe Corp.*, 77 NLRB 124, 126 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), cert denied 343 U.S. 904 (1952), the Board stated that an "election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative." In that case, the Board enunciated its "laboratory conditions" standard:

"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to

determine the uninhibited desires of the employees.... When, in the rare extreme case, the standard drops too low, ... the requisite laboratory conditions are not present and the experiment must be conducted over again.”

Id. at 127.

The Intervenor cites *Kalin Construction*, 321 NLRB 649 (1996), in support of its objection. In *Kalin*, which addressed an employer's manipulation of payroll procedure for the purpose of influencing an election, the Board adopted a “strict rule against changes in the paycheck process for the purpose of influencing the employees' votes in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” Id. at 652. The Board defined the term “paycheck process” to encompass the following four elements: (1) the paycheck itself; (2) the time of the paycheck distribution; (3) the location of the paycheck distribution; and, (4) the method of the paycheck distribution. The Board in *Kalin* further held that “if a change in the paycheck process is motivated by a legitimate business reason unrelated to the election, the rule would not be violated.” Id. at 652.

In *Tinius Olsen Testing Machine Company*, 329 NLRB 351 (1999), the employer negotiated a new successor collective-bargaining agreement with the incumbent union that provided for retroactive wages increases. The employer paid the employees the retroactive wage increases the first payroll period after the new contract was ratified. The Board held that the grant of wage increases did not improperly affect the results of the election. Thus, they held that by granting the wage increase with retroactive pay in the next regular paycheck, the employer honored its collective-bargaining agreement with the intervenor and respected the rule set out in *RCA del Caribe, Inc.*, 262 NLRB 963 (1982).

In the instant case, the Employer and Intervenor negotiated raises and retroactive pay increases to be effective the beginning of the first payroll period following ratification of the collective bargaining agreement. The parties did not specify a date in which the negotiated raises and retroactive pay would be issued. At the time the Employer and Intervenor negotiated the raise, the parties did not know when the election would take place. The election was postponed because of a pending unfair labor practice charge. Additionally, at the time the Employer and Intervenor negotiated the raise, the parties did not know when ratification would take place.

The Employer, for reasons unbeknown to it, issued approximately seven employees their retroactive pay increases one paycheck earlier than as required by the ratified collective bargaining agreement. Insufficient evidence was presented that the Employer knew prior to the issuance of the paychecks on September 22 and 23, that seven employees would be receiving their retroactive pay increases earlier than as required by the ratified collective bargaining agreement. While there was some testimony that the retroactive pay was supposed to be included in a separate paycheck, the regular paychecks containing the early retroactive pay identified the pay increase as retroactive. The amount of the retroactive pay was consistent with the terms of the ratified collective bargaining agreement. While there may have been confusion caused by the retroactive pay issuing early to a small fraction of

the unit, seven employees, there was testimony that employees were aware that some employees received their retroactive pay early and that the large remainder of the eligible employees would receive their retroactive pay pursuant to the ratified collective bargaining agreement.

Kalin, which dealt with the paycheck process rather than the actual pay distributed to employees, did not address the subject of retroactive pay. However, even viewing the inclusion of the retroactive pay as a change encompassed by *Kalin*, I find that the Employer unintentionally made a mistake in issuing retroactive pay on September 23 and the retroactive pay was not provided in order to influence the outcome of the election. The employees were aware that per the collective bargaining agreement, all employees would be receiving their retroactive pay the following pay period. In applying *Tinius*, I do not find that the Employer's error tainted the laboratory conditions for a fair election.

Accordingly, I recommend that this objection be overruled.

Objection 2

Objection 2 alleges that prior to the election, the Employer provided the Intervenor with an *Excelsior* list which contained a significant number of incorrect employee addresses. The Intervenor alleges that the Employer's conduct did not substantially comply with the *Excelsior* rule, and thus prevented the Intervenor from effectively communicating with employees prior to the election.

The Intervenor called Eric Noyes, Organizing Director for the Intervenor, in support of this objection. Noyes is responsible for overseeing the Intervenor's organizing staff and representation elections. In about December 2010, in preparation for contract negotiations, the Intervenor requested a list from the Employer of the bargaining unit employees' contact information, and the Employer provided a list to the Intervenor.

The petition in the instant case was filed on March 23 and a Stipulated Election Agreement was approved on April 7. By letter dated April 14, in accordance with the decisions of the National Labor Relations Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordan Company*, 394 U.S. 759 (1969) and *North Macon Health Care Facility*, 315 NLRB 359 (1994), the Regional Director forwarded to the Petitioner and Intervenor, a copy of a document which was received by the Regional Director from the Employer, which purported to be an election eligibility list containing the full names and addresses of all employees eligible to vote in the election to be conducted. The election was not conducted as scheduled due to a pending unfair labor practice charge.

Noyes testified that after receiving the names and addresses from the Employer, various employees of the Intervenor conducted home visits to unit employees based on the addresses the Employer provided and the addresses it was able to update through various resources. The Intervenor was not successful in reaching all employees through home visits. In about the end of August and again around mid-September, the Intervenor conducted

mailings for unit employees. The Intervenor used the addresses provided by the Employer and addresses it was able to update through various resources for the mailings. Noyes testified that mailings were returned as undeliverable and some included forwarding information, but he is unsure the exact number of mailings that were returned.

By letter dated September 8, the Intervenor and Petitioner were furnished with a new *Excelsior* list. This was the *Excelsior* list used for the election conducted on September 23. There were 79 names on the *Excelsior* list. Noyes testified that various employees of the Intervenor conducted home visits to employees on the voter eligibility list and the Intervenor asserts that approximately 17 addresses from the September 8 *Excelsior* list were not accurate. After receiving the *Excelsior* list, Noyes did not contact Region Seven or the Employer regarding the Intervenor's determination that there were inaccurate addresses.

On November 4, pursuant to a subpoena, the Employer produced the personnel files for the employees it listed on the *Excelsior* list. Noyes testified that he went through the files and noticed that there were some inaccuracies in addresses. He did not keep track of the number of inaccuracies. Noyes further testified that he did not look to see if the address listed in the personnel file matched the address on the *Excelsior* list.

David Robertson, an organizer for the Petitioner, testified that the *Excelsior* list it received is the same *Excelsior* list that the Intervenor received. Robertson further testified that after receiving the *Excelsior* list, the Petitioner did not conduct house visits, but rather sent mailings to employees. Petitioner mailed information to approximately 52 employees on the *Excelsior* list. Petitioner did not mail to all employees on the *Excelsior* list based on its assessment of each employees' support. Of the approximate 52 mailings, three were returned by the post office as undeliverable.

Kristi McKenzie testified on behalf of the Employer. According to McKenzie, since 2001, the Employer has used an electronic software system called UltiPro to store and maintain employee related information that is typically contained in a personnel file. Prior to UltiPro, the Employer used Aimes, a different electronic software system. When the Employer upgraded from Aimes to UltiPro, the information was manually moved from one system to the other. If an employee was hired after the Employer's transition to UltiPro, an employee's personal information was entered directly into the UltiPro system by Lamia. The Employer also maintains paper personnel records. Each employee has a jacket folder that contains their personnel record. The outside of the jacket folder contains identifying information such as the employee's name and address. The paper personnel records are not regularly kept up-to-date like the UltiPro records.

Employees are provided with instructions on how to make changes in the UltiPro system. When an employee logs into the UltiPro system, the first screen that appears contains the employee's personal information, including home address. An employee's home address is also reflected on the employee's individual paycheck. The home address on an individual paycheck is the same address stored in the UltiPro system. McKenzie testified that certain information, such as an employee's home address, can be updated by the

employee or by a Human Resources employee. Per the Employer's Work Rules and Code of Conduct booklet, failure to maintain current personal and emergency contact information on file with the human resource office may result in a class one offense discipline. Class one offenses are progressive and begin with a written reprimand, followed by a one-day suspension, three-day suspension, and discharge. McKenzie is aware of one instance where an employee received discipline for not providing the Employer with current information.

McKenzie testified that it is her understanding that Lamia prepared the *Excelsior* list by obtaining employee information from the UltiPro system. The Employer had approximately three mailings to employees about the election using the information contained in the *Excelsior* list. Of those mailings, a total of approximately five or six were returned to the Employer. McKenzie testified that even though the Employer had five or six mailings returned, it did not necessarily follow that there were five or six incorrect addresses. The five or six returned envelopes were over a period of three mailings.

McKenzie testified that the following employees may have had inaccurate addresses on the *Excelsior* list: Jennifer Calligaro, LaTonsha Jones-Twilley, Lindsay Lenhart, Chelsea Lytle, and Robbin Smith. McKenzie testified that these individuals initiated a change of address in the UltiPro system. Calligaro initiated a change of address on about August 8. On August 17, it was approved by management for the change to be effective. McKenzie does not know why the change to Calligaro's address was not reflected on the September 8 *Excelsior* list. Jones-Twilley, Lenhart, and Lytle initiated a change of address after September 8, which was after the *Excelsior* list was prepared and distributed to the Petitioner and Intervenor. Smith initiated a change of address in 2009, but the address on the *Excelsior* list had a different street number than the address in the UltiPro system. McKenzie did not testify as to why the address on the *Excelsior* list for Smith was different from the address in UltiPro.

As noted above, Jones-Twilley, Lenhart, and Lytle initiated a change of address after September 8, which was after the *Excelsior* list was prepared and distributed to the Petitioner and Intervenor. There was no testimony that the Employer was made aware that Jones-Twilley, Lenhart, and Lytle had different addresses at the time the *Excelsior* list was prepared. At the time the *Excelsior* list was prepared, the Employer had correct addresses for Calligaro and Smith, but the *Excelsior* list did not reflect their correct addresses. There was no testimony that the Employer was aware of any other address changes that were not reflected in the *Excelsior* list furnished to the Petitioner and Intervenor.

McKenzie testified that approximately nine employees, including the five mentioned above, had different addresses listed on their paper personnel record compared to what was listed on the *Excelsior* list. The employees with multiple addresses initiated a change of address in the UltiPro system and those changes were not reflected in the Employer's paper personnel records. However, the Employer did not use the paper personnel records to generate the *Excelsior* list; it used the UltiPro system, which is more up-to-date than the paper records.

Analysis

In *Excelsior Underwear*, supra, 156 NLRB at 1236, 1239-1240, the Board established a requirement that an employer “must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case.” As explained by the Board, the purpose of the rule is two-fold: “(1) to insure an informed electorate by affording all parties an equal opportunity to communicate with eligible employees, and (2) to expedite the resolution of questions of representation by minimizing challenges solely on the lack of knowledge as to the voter’s identity.” *Women in Crisis Counseling*, 312 NLRB 589 (1993).

The Board’s purpose in promulgating the *Excelsior* rule was to ensure that all employees be “exposed to the arguments for, as well as against, union representation.” *Excelsior*, Id. at 1241. The fact that unions might, by expending resources and energy in other ways, gain access to some, or even most, employees, was not sufficient; the Board explicitly discounted the availability of alternative means of communication with employees as a factor weighing against the requirement that employers provide a list of the names and addresses of eligible voters. Thus, the fact that the Intervenor here was able to make contact with employees is irrelevant.

In its brief, the Intervenor cites *Merchants Transfer Company*, 330 NLRB 1165 (2000) in support of its objection. I find the instant situation distinguishable. In *Merchants*, the Employer was grossly negligent in providing an *Excelsior* list it knew had employee addresses so inaccurate that it no longer used them for its own purposes. Thus, the Board set aside an election showing 27 votes for and 29 votes against the petitioner, with no challenged ballots, and ordered a new election. The employer provided incorrect addresses for 22.41 percent of the employees and the petitioner, even with further efforts, was unable to reach 10.34 percent of the employees. In *Merchants*, the facts showed that the employer itself recognized that the list was essentially worthless for its own purposes.

There are numerous cases where the Board found compliance with the *Excelsior* requirement despite inaccuracies on the list. In *Lobster House*, 186 NLRB 148 (1970), inaccuracies on the *Excelsior* list were found to be of an insubstantial nature to affect the results of the election where 20 of 97 addresses were erroneous (a 16% error rate). Similarly, in *West Coast Meat Packing Co., Inc.*, 195 NLRB 37 (1972), 22% of addresses on the *Excelsior* list were inaccurate, but the Board found the inaccuracies not substantial enough to require setting aside the election. In that case, the addresses had been drawn from the W-4 forms completed by employees. In *Days Inns of America*, 216 NLRB 384 (1975), 13.2 % of voter addresses on the *Excelsior* list were inaccurate, those addresses also having been drawn from employee personnel forms. However, the Board found the percentage not substantial enough to set aside the election.

In *Women in Crisis Counseling*, supra, the *Excelsior* list contained incorrect addresses for 6 of 20 employees, a 30% inaccuracy rate. The Board stated that, “[I]n determining whether an employer has substantially complied with the [*Excelsior*] rule, the Board has consistently viewed the omission of names as more serious than inaccuracies in addressees ... [because it] is far more likely to frustrate the Board's purposes than inaccuracies in addresses.... A party with an employee's name but an inaccurate address at least has a key piece of information which can be used to identify and communicate with the person by means other than mail.” Id. at 589. The Board found that a 30% inaccuracy rate for addresses on the *Excelsior* list did not warrant setting aside the election. The Board also noted that the inaccuracies were not the result of gross negligence or bad faith. The Board recognized that its greater tolerance of address inaccuracies as compared to address omissions reflected a “pragmatic recognition” that an employer may not be able to maintain a completely accurate list of current addresses.

The Board has consistently followed the principle with respect to objections based on inaccurate *Excelsior* lists that an employer does not engage in objectionable conduct when it provides “its latest, best list.” Thus in *Bear Truss, Inc.*, 325 NLRB 1162, 1164 (1998), the Board overruled an *Excelsior* objection where the Employer furnished “the most recent and best possible information it possessed as to employee names and addresses.” In *Texas Christian University*, 220 NLRB 396, 398 (1975), the Board found that although the *Excelsior* list contained inaccuracies, there was “no indication that at the time of the submission of the list the Employer was aware of the inaccuracies in the addresses.”

In the instant case, there is no allegation or evidence that the Employer was aware that addresses on the list were inaccurate at the time that it furnished the list to the Petitioner or Intervenor. According to testimony from the Intervenor, it knew prior to the September 8 *Excelsior* list that there was a possibility that the Employer had inaccurate addresses on file. Further, the evidence revealed that the Petitioner and Intervenor failed to notify the Employer of any mistakes, thus giving the Employer no opportunity to correct its error. The Employer testified that using the UltiPro system, it provided its best possible information it possessed for employee names and address. In fact, the Employer also used the same contact information it furnished to the Petitioner and Intervenor. If the Intervenor is correct that the *Excelsior* list contained incorrect addresses for 17 out of 78 employees, about 22% of the employees, that is a percentage which the Board has already not found to be substantial enough to require setting aside the election.

I find that the Employer substantially complied with the eligibility requirements of *Excelsior Underwear*, supra. Accordingly, I recommend that this objection be overruled.

RECOMMENDATIONS

Based upon the foregoing and the record evidence in its entirety, I recommend to the Board that the Intervenor's objections be overruled and the Petitioner be certified as the exclusive collective bargaining representative of the Unit involved in the instant case.

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

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.11-102.114, concerning the Service and Filing of Papers, exceptions, with supporting brief, if desired, must be received by the Executive Secretary of the Board in Washington, D.C. by the close of business on December 30, 2011, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. A copy of the exceptions together with a copy of any brief filed must be served on each of the other parties to the proceeding, including the Regional Director, in accordance with the requirements of the Board's Rules and Regulations. (See Section 102.69(f) as to the procedure and time limit for filing an answering brief to exceptions.) If no exceptions are filed to this Report, the Board may decide the matter forthwith upon the record or make any other disposition of the case.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the Board/Office of the Executive Secretary and follow the detailed instructions. The responsibility for the exceptions rests exclusively with the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason.

Dated at Detroit, Michigan, this 16th day of December, 2011.

/s/ Stephanie J. Steib

Stephanie J. Steib, Hearing Officer
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

RECEIVED

2011 DEC 20 AM 11:08

NLRB
ORDER SECTION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LUTHERAN SOCIAL SERVICES OF
MICHIGAN d/b/a LUTHER MANOR

Employer

and

NATIONAL NATIONAL UNION OF
HEALTHCARE WORKERS

Petitioner

SEIU HEALTHCARE MICHIGAN

Intervenor

Case 07-RC-023419

Date of Mailing: 12/16/2011

**CERTIFICATE OF SERVICE OF: HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING
THE RESULTS OF THE ELECTION**

I, the undersigned employee of the National Labor Relations Board, certify that on the date indicated above I caused the above-entitled document to be served by **Regular Mail**, by placing copies into the U.S. Mail, postage paid, addressed to the following persons at the following addresses:

Lutheran Social Services of
Michigan, d/b/a Luther Manor
2723 S. State
Ann Arbor, MI 48104
ATTN: Ronald J. Santo, Esq.

Ellis Boal, Esq.
National Union of Healthcare Workers
9330 Boyne City Road
Charlevoix, MI 49720

SERVICES CONTINUED ON NEXT PAGE

SEIU Healthcare Michigan
400 Galleria Officentre, Ste. 117
Southfield, MI 48034
ATTN: Patrick J. Rorai, Esq.

Sheila M. Matlock, Automation Office Assistant

(Print Name and Title)

Sheila M. Matlock 12-16-2011

(Signature)

(Date)

RECEIVED
2011 DEC 20 AM 11:07
MLRD
ORDER SECTION