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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD – REGION 32

CHILDREN'S HOSPITAL OF OAKLAND, Employer and NATIONAL UNION OF HEALTHCARE WORKERS, Petitioner and SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS- WEST, Intervenor	Case No. 32-RC-005617 **PETITIONER NUHW'S ANSWERING BRIEF TO EXCEPTIONS FILED BY INTERVENOR SEIU**

I. INTRODUCTION

Petitioner the National Union of Healthcare Workers (NUHW) answers to the SEIU, United Healthcare Workers – West's Exceptions to the Administrative Law Judge's Report and Recommendations ("Exceptions"), submitted to this Board on January 11, 2012. The Exceptions in turn challenge the Administrative Law Judge Report and Recommendations on Objections ("Report"), issued by Administrative Law Judge Gerald M. Etchingham, on December 28, 2011. Notably, this Decision came after more than a two-and-one-half-year delay in bringing this

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Petition to an election. On February 2, 2009, employees in this bargaining unit filed a petition seeking representation by NUHW. Finally, on August 17, 2011 a manual election was held. Challenges were determinative and some of the Intervenor's many objections were sent to hearing. Although then, and now, the Petitioner has stipulated to a rerun, that rerun has yet to be scheduled.

In its earlier-filed Motion for Remand, Petitioner argues that these Exceptions are moot and need not be considered by this Board. See Petitioner's Motion for Remand of Case to the Regional Director of region 32, previously filed in this Case. No. 32-RC-5617. However, should the Board decide to consider the merits of the Exceptions, Petitioner also briefly addresses the Exceptions. In short, Petitioner herein argues that the Administrative Law Judge's ("ALJ") findings and recommendations are consistent with the relevant evidence and law, and if they are considered on their merits, they should be adopted by the National Labor Relations Board in all respects.

II. ARGUMENT

A. Answer to Exceptions 1-6 (Section A of the Intervenor's Brief)

The Intervenor's first set of exceptions argues that the NUHW staff persons were engaged in surveillance because of the view available from where each was allegedly physically present. Other exceptions focus on findings concerning how employees could access the polling booths from the main hospital. All of these exceptions in effect challenge credibility determinations made by the ALJ. "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Kieft Brothers Inc.*, 355 NLRB No. 19 (2010) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951)). And here the ALJ's factual findings, which incorporate his credibility determinations, are not only without error, they are perfectly in line with the evidence.

These exceptions are related to Objections Nos. 14 and 20, which alleged that the Petitioner engaged in surveillance of employees "as they were voting" and/or of voters "at or near the election area" on the day of the election. As developed at hearing, these objections appear to

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be based on two main factual assertions. The Intervenor asserted (but failed to prove) that one or more NUHW staff members were (1) continuously present in areas just outside the main hospital during the entire time that the polls were open such that (2) eligible employees who worked in the main hospital would have to pass by these NUHW staff members when they exited the main building and crossed over to enter the OPC building to vote. In this regard, the Intervenor's objections and theory was not based on any allegations of improper electioneering, but rather asserted that the mere alleged presence of the NUHW staff members constituted objectionable surveillance. As developed at hearing, these allegations, relating to Objection Nos. 14 and 20, were levied entirely against the Petitioner, not against the employer. Report at 7-8.

What the ALJ wrote in his analysis of these two objections was based on sound credibility determinations based on relevant caselaw and the evidence introduced at hearing (Report at 8-9):

> In *J.P. Mascaro and Sons*, 345 NLRB 637, 639 (2005), the Board noted that the continued presence of a union official standing near the polling area for the entire day where employees had to pass through to vote and where the union representatives observed employees waiting in line to vote interfered with an election. I adopt the Petitioner's arguments based on the specific facts in this case particularly because the questioned conduct on the part of the Petitioner's staffers took place sufficiently removed from the polling area in the OPC basement that it was virtually impossible to prove that the eligible voters had to pass by the Petitioner's staff near the main hospital in order to vote or to even identify who the eligible voters were since there were several other destinations for someone walking past the Petitioner's staff other than to the polling room at a location out of sight of the Petitioner's staff. No improper surveillance by Petitioner's staff at the polling area was proven in this case.

These findings are supported by the evidence, as articulated in the Report. Report at 8-9. For example, at hearing, there was considerable, consistent testimony that employees from the main hospital who were crossing 52nd Street could be going to a number of places, including Human Resources, the garage, or the OPC building. Tr. at 207-208, 221-222. Employee witness Jacqueline Patrick testified at length about the many reasons why employees like herself who worked in the main hospital would access OPC for various purposes, including performing job duties. Tr. at 528-543. Even SEIU Organizer Mr. Felipe Garcia admitted that there was no way to see or tell where an employee was going when an employee crossed 52nd Street in front of the

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main hospital. Tr. at 207-208, 221-222. Also, there was no evidence at hearing that any NUHW staff person was present inside the OPC building while the polls were open. Given such evidence, it cannot be plausibly said that the ALJ's findings amount to clear error or are contrary to overwhelming evidence. The Intervenor has not presented a convincing argument.

B. Answer to Exceptions 7-9 (Section C of the Intervenor's Brief)

These exceptions are based on the Intervenor's objection No. 21, brought against the employer, that managers held meetings outside the polling area and were thus able to conduct surveillance on employees. The Intervenor argues that the ALJ "misconstrued and ignored evidence showing that management held meetings in the area of the polling site during polling sessions." Intervenor's Brief at 5. This accusation is unfounded. We address this briefly. There was no evidence at hearing that any managerial meeting occurred during the times that the polls were open. The employer refused to stipulate that the meetings in Intervenor's Exhibit 3 (a purported picture of a meeting schedule) ever took place. The Intervenor did not introduce any evidence to prove that such meetings actually took place while polls were open. The employer stipulated that a Nursing Managers meeting occurred in the OPC basement from 9 to 11 a.m., during times that the polls were closed, and evidence of this scheduled meeting was introduced. Tr. at 339-340, and Intervenor's Exhibit 4. There was no other evidence of any meeting while the polls were open. One SEIU Observer testified that she saw some employees in a conference room *after the polls closed* for the morning session. Tr. at 233-234. There was also insufficient evidence that any manager would be able to see any employee while they were either voting or waiting in line to vote. Given these facts, the ALJ's determination cannot be deemed erroneous.

C. Answer to Exceptions 10-11 (Section B of the Intervenor's Brief)

The Intervenor's exceptions plainly do not raise a "substantial question of law or policy for which there is no Board precedent." Intervenor's Brief at 4. There is well-established Board law concerning these exceptions but the Intervenor ignores its application to this case.

The Intervenor objects that the Petitioner "promised eligible voters that they would pay less dues and/or not have to pay initiation fees if they voted for NUHW." Regional Director's November 17, 2011 Supplemental Decision on Challenged Ballots and Objections, at 25,

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Objection No. 22. In setting this objection for hearing, the Regional Director limited "the scope of hearing to testimony from witnesses who can testify that they have direct non-hearsay personal knowledge that agents of Petitioner affirmatively made such a conditional offer to employees." *Id.* at 26 (emphasis added).

The law requires that such an offer be conditional for it to be unlawful. For a Union's promise of waived initiation fees or lower dues to be objectionable, the offer must communicate to the eligible voters that it is somehow conditioned or limited only to those eligible voters who support the Union. *L.D. McFarland Company*, 219 NLRB 575, 575-576 (1975). Accordingly, a Union's promise to waive initiation fees for all employees who signed authorization cards before an election was objectionable because it was a promise of monetary gain or reward to an employee in exchange for a vote, and thus precluded employee free choice. *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). However, where such a waiver or promise is not limited to those who supported the Union before the election, but instead is publicized in a letter made available to all employees in the unit after the election, it is not objectionable. See., *L.D. McFarland Company*, *supra*, 219 NLRB at 576:

> In this case, the Union's statements in no way implied that eligible voters would have to pay dues or initiation fees unless they joined the Union prior to the election. Rather, the employees would have received a waiver of dues and initiation fees even though they had became members of the Union after the election. Thus, the waiver of dues and initiation fees here was unconnected with support for the Union before the election, unrelated to a vote in the election, and without distinction between joining the Union before or after the election.

Thus, there is nothing objectionable about a union promising that all employees in the unit would have lower dues or would not have to pay an initiation fee, because the promised benefit is equally available to all employees if the Union wins the election. That promise is not a bribe selectively given and thus is valid. *Id.* at 576.

NUHW Representative Ms. Faye Roe testified that she had several conversations with employees about dues or initiation fees. However, she testified that when having these conversations, she never made any conditional offers, and actually made clear to employees that the promise was unconditional, and often used a flyer to make clear that the offer was available to all employees. Tr. 509-515.

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At hearing, the Intervenor failed to offer any evidence that any agent of Petitioner promised lower dues or a waiver of initiation fees conditionally, that is, only to those employees who supported NUHW. The single witness who testified for the Intervenor in support of this Objection asserted only that the dues would be lower if NUHW was voted in by the employees. Ms. Gloria Mulder testified about two conversations with Ms. Faye Roe in which Ms. Roe allegedly told Ms. Mulder that "if we would join the – become – if we would join NUHW, we wouldn't have to – our dues would be cheaper" (first conversation) and "it was pretty much the same about coming to join NUHW, NIUs (sic), the dues would be cheaper" (second conversation). Ms. Mulder did not testify that any promise of lower dues was made conditionally, and her use of the word "we" and "our dues" at most conditions lower dues upon membership in NUHW, which would only be possible if NUHW won the election.[1] However, even conditioning a promise of lower dues to all employees who joined the union and became members after the Union won the election would not be objectionable. *L.D. McFarland Company, supra*, 219 NLRB at 576 ("The requirement that an employee be a "member" is not objectionable since such language places no requirement upon employees to join the Union before the election.")

D. Answer to Exceptions 12-16 (Section A of the Intervenor's Brief)

These exceptions are concerning Intervenor's Objection No. 24, which was sustained. Accordingly, these exceptions are particularly moot. To the extent these exceptions are relevant to the discussion of Objections No. 14 and 20, the above discussion of Exceptions 1-6 is incorporated by reference.

E. Answer to Exceptions 17-21 (Section D of the Intervenor's Brief)

The Intervenor's exceptions here raise the same arguments made at hearing and in its post-hearing brief. However, the evidence remains the same, and supports the findings and recommendations in the Report.

The heart of this factually limited objection is its assertion of differential treatment, that is,

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[1] The Intervenor's argument to the contrary makes no sense. The Intervenor complains, "Notably, Petitioner presented no evidence that the waiver of union initiation fees was available even if Petitioner's effort to decertify was unsuccessful." Intervenor's Brief at 5.

the assertion that on the election day, upon arriving at the facility, that Intervenor's agents were escorted but the Petitioner's agents were not. However, the evidence at hearing established at most that, when staff of both Unions first arrived at the hospital and checked-in at the Ambassador's desk in the main hospital, that staff person was initially escorted by security. Even assuming this to be true, this proves at most that staff of both Unions was given an initial escort. And that is plainly not differential treatment.

SEIU's Organizer Felipe Garcia testified that when he initially checked in on August 17, early in the morning on the day of the election, he was given a badge and escorted by security to the cafeteria. His coworker Davere Godfrey was with him. Tr. at 165-166. After that initial escort, Mr. Garcia and apparently other SEIU staffers, including Mr. Godfrey at least while he accompanied Mr. Garcia, were given free reign of the hospital, and were allowed to move freely without any escort as they accessed the upper nursing floors in the presence of identified managers and traversed in and out of the main hospital. Tr. at 188-191, 210-211, 221.

Mr. Garcia testified on direct examination that when he was initially entering the facility, he saw NUHW staff person Pat Alvarez "walking into the facility" and he assumed that Ms. Alvarez was heading to the cafeteria. Tr. at 170. But aside from Mr. Garcia's "assuming" that this was the first time that morning that Ms. Alvarez was arriving at the hospital, the Intervenor offered no evidence to support its theory of differential treatment. Indeed, there was no admissible evidence that the Hospital allowed any NUHW staffer to access the Hospital without initial escort. There was in fact evidence that when Ms. Alvarez initially accessed the Hospital, she and three other NUHW staffers – including Faye Roe, and several other NUHW staffers -- were all escorted to the cafeteria by security, who walked them into the cafeteria. Ms. Roe in fact testified that the Hospital had always required NUHW staffers to check-in at the Ambassador's desk upon arrival, where they would obtain a badge, and be escorted to the cafeteria. And, unlike the SEIU's staffers, NUHW staffers were not, after this initial escort, allowed to access the hospital floors.

F. Answer to Exceptions 22-24 (Section E of the Intervenor's Brief)

The Intervenor's argument that the subpoena should not have been revoked is not supported by

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any case law. To the contrary, Board precedent, cited by the ALJ, supports his ruling. See *Brink's, Inc.* 281 NLRB 468, 468 (1986); Report at 14-15. Just one business day before this hearing was scheduled to begin, the Intervenor served its subpoena. In so doing, it ran the risk that its subpoena would be untimely. This is especially so when this hearing had been scheduled well in advance (on November 25, 2011 for a December 5, 2011 hearing date), thus allowing ample opportunity for proper and timely service of this subpoena, and accordingly, the Intervenor's eleventh hour service was not justified by any exigency, nor warranted by any apparent excuse.

In any case, as noted in the Report, the requested documentation is moot based on the Report's recommendation that two objections be sustained and that the initial election be set aside and a rerun ordered. Report at 14.

G. Answer to Exception 25 (Section F of the Intervenor's Brief)

Intervenor is correct in that Petitioner is National Union of Healthcare Workers. The ALJ properly so named the Petitioner in many places throughout his sixteen page report. This is not a proper exception requiring a Board order, but simply a typographical error that will certainly be corrected by the Regional Director on remand when he issues the Notice of Second Election in this matter.

H. Answer to Exception 26 (Section G of the Intervenor's Brief)

The Intervenor's "limited exception" asks that Petitioner be ordered to mail the Second Notice of election to each eligible voter. However, the Intervenor provides no discussion why the Board should exercise its discretion to require an extraordinary remedy of this sort. The Intervenor presents no compelling facts warranting such a remedy, and makes no argument likening this case to others where such remedy is warranted. The ALJ's determination should again be upheld.

III. CONCLUSION

The Board should declare the Intervenor's exceptions moot, and order this case remanded to the Regional Director of Region 32 so that he may promptly schedule a new election. Alternatively, if the Board decides to consider these exceptions on the merits, the Board should

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reject these exceptions, adopt the ALJ's findings and recommendations, and order this case remanded to the Regional Director of Region 32 so that he may promptly schedule a new election.

DATED: January 18, 2012

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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 January 18, 2012, I served the within document:

PETITIONER NUHW'S ANSWERING BRIEF TO EXCEPTIONS FILED BY INTERVENOR SEIU

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✔ (BY E-MAIL) All of the pages of the above-described document(s) were sent to the recipients listed above via electronic mail, at the respective electronic mail addresses indicated thereon.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 18, 2012 at Oakland, California.

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