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SEIU, UNITED HEALTHCARE WORKERS – WEST

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

NATIONAL UNION OF HEALTHCARE WORKERS,

Decertification Petitioner,

SEIU UNITED HEALTHCARE WORKERS – WEST,

Intervenor/Incumbent Union,

and

SETON MEDICAL CENTER/SETON COASTSIDE,

Employer.

Case No. 20-RC-073334

EXCEPTIONS AND BRIEF IN SUPPORT OF SEIU'S EXCEPTIONS TO THE RECOMMENDATIONS OF HEARING OFFICER REEVES

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Intervenor and Incumbent Union SEIU United Healthcare Workers – West (hereinafter "Intervenor" or "Incumbent Union" or "SEIU") hereby takes the following Exceptions to the Recommendations ("Recs.") of the Hearing Officer,[1] Region 20's Board Agent David Reeves[2] ("Hearing Officer") to sustain Objections 21-23, 25, and 27:

Exception 1	Transcript (Tr.), Passim	To the failure of the Hearing Officer to conduct a non-adversarial evidentiary hearing pursuant to sections 102.64 and 102.66 of the Board's Rules and Regulations. The record establishes that rather than conduct the hearing as a fact gathering Hearing Officer, the Hearing Officer conducted the hearing in an adversarial manner, biased against the Incumbent, at times commenting about what Administrative Law Judges did, said, recommended, or advised during the trials in which the Hearing Officer was in the capacity of Counsel for the General Counsel or in his pre-public service years.

[1] In support of all of its Exceptions, Intervenor hereby incorporates as if fully set forth herein the "Post Hearing Brief of SEIU United Healthcare Workers – West" in this matter, a copy of which is attached hereto as Appendix 1. In addition, Intervenor hereby incorporates as if fully set forth herein all of the arguments of Union Counsel on the record. (Tr. Passim [except for the objection of Union Counsel Gottesman at Tr. 1870:15 - Tr. 1873:25].)

[2] As the Board's administrative records reflect, the Hearing Officer is a seasoned Board Agent at Region 20 who has investigated a number of unfair labor practice charges filed by and against SEIU United Healthcare Workers – West. The Board's records also reflect that another long time Board Agent in Region 20 during relevant times herein was Supervisor Micah Berul, who not too long after the conclusion of the hearing in this matter accepted a job with Petitioner or its affiliate. Finally, the Board's records reflect that Region 20 was investigated previously by the Office of the Inspector General with respect to inappropriate contact between an employee of the Region and an agent of NUHW, which resulted in the Region having to transfer all of its CA and CB cases regarding SEIU and NUHW to Region 32 for investigation for a period of time. For these reasons alone the neutrality of the hearing is highly questionable.

Intervenor is confident that the Hearing Officer erred as a matter of law and therefore the Board should reject the Hearing Officer's recommendations to sustain any objections. But in the alternative, because the Hearing Officer's bias against SEIU affected the presentation and his interpretation of the evidence, the Board should remand the matter to the Region to afford Intervenor an opportunity to present the evidence to an Administrative Law Judge. At the minimum, Intervenor urges that the Board apply strict scrutiny to the findings of the Hearing Officer regarding any material facts and credibility determinations, after a full review of the transcripts.

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Exception 2	Tr. 38 - 44	To the failure of the Hearing Officer to order Petitioner to produce documents in response to the Employer's subpoena based on the Hearing Officer's mistaken belief that the subpoena sought "pre-hearing discovery" that is "not provided for in the rules and regulations." (Tr. 41-42) (*Cf.* Section 102.66(c) of the Board's Rules and Regulations: ["The Board…shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control."])
Exception 3	Tr. 44 - 59	To the failure of the Hearing Officer to order Petitioner to produce documents pursuant to the Intervenor's subpoena on the basis that: Intervenor should have made a "FOIA request" (Tr. 44-46); Intervenor is not entitle to the names of Petitioner's alleged witness prior to the hearing (Tr. 47-49, 54 and 57); Intervenor's subpoena is "in the nature of pre-hearing discovery, which is not provided in the rules (Tr. 50-51). (*Cf.* Section102.66(c) of the Board's Rules and Regulations). It is evident from the Hearing Officer's comments on the record that his decision to grant Petitioner's petition to revoke subpoenas was based on his understanding that a party is not entitled to pre-hearing discovery "in a ULP proceeding." (Tr. 52)
Exception 4	Tr. 1388:10 – 1390:17 and 1424:2 – 1436:2	To the failure of the Hearing Officer to remain neutral and refrain from prejudging the evidence in favor of Petitioner before hearing Intervenor's evidence. The record establishes that the Hearing Officer prejudged the case, because prior to hearing the Employer's entire case and any testimony from the Intervenor's witnesses, or seeing all of the documentary evidence, the Hearing Officer announced that he had already decided that he did not like that an employer has to continue to grant all contractual rights to an incumbent union during a decertification election petitioned by a rival union, including contractual rights such as the broad access provision and the use bulletin boards right granted to the Incumbent here. It is clear that the Hearing Officer failed to remain neutral and had made up his mind to side with Petitioner before he knew all of the evidence.

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Exception 5	Tr. 61:9-15; 73:8 – 75:7; 1887:6-21	To the failure of the Hearing Officer to refrain from ignoring Board well-established Board precedent. The record establishes that the Hearing Officer was aware of the Board's decision in *Laub Baking*, 131 NLRB 869 (1961), but had decided that because the decision "has not been cited by the Board since 1965," he wanted the current Board to address this issue because it's "kind of strange." (Tr. 1887:10-14)[3] The Hearing Officer also stated on the record that he was familiar with and had reviewed Administrative Law Judge Lana Parke's July 14, 2011 Report and Recommendations in Kaiser Foundation Health Plan, Inc. Case 32-RC-5775, where not only the employer's obligation under *Laub Baking* to remain neutral was discussed, but also specifically the employer's obligation to continue to grant preferential contractual access to an Incumbent Union in the middle of a decertification campaign, which is required by the Board's decision in *West Lawrence Care Center*, 308 NLRB 1011 (1992). It is clear that the Hearing Officer failed to remain neutral and had made up his mind to ignore long-established Board precedent before hearing the evidence because he found it "kind of strange" that the case has not been cited "since 1965." The Hearing Officer's disregard for this Board precedent is perplexing given that Intervenor also made sure that the Hearing Officer was aware of, among others, the April 22, 2010 Office of General Counsel Advice Memorandum in Seton Medical Center Case 20-CA-34867, as well as the most recent view of the General Counsel as set forth in the November 30, 2012 Office of The General Counsel Advice Memorandum in Kaiser Foundation Health Plans, et al. Cases 32-CA025578 and 32-CA-064585, which were attached to Intervenor's Post-Hearing Brief. (*See also* Appendix 1, p. 5:4-18.)

[3] Notably, the Hearing Officer was personally aware that *Laub Baking* had been cited in the November 30, 2012 Office of The General Counsel Advice Memorandum in Kaiser Foundation Health Plans, et al., Cases 32-CA025578 and 32-CA-064585. As a matter of caution, as Exception 3.1, Intervenor excepts to the failure of the Hearing Officer to recognize the General Counsel's Advice Memorandum as anything but Board authority.

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Exception 6	Recs. pg. 4-5	To the failure of the Hearing Officer to follow Board precedent, which requires that to set aside a representation election there must be substantial evidence of objectionable conduct affecting eligible voters that *objectively* had the tendency to interfere with free choice to such extent that it materially affected the results. *See, e.g., Quest International*, 338 NLRB 856, 857 (2003). The recommendations establishes that the only conduct the Hearing Officer found to be objectionable during the critical period was the Employer's decision to follow known Board-precedent and allow the Incumbent Union to continue using its broad contractual right to access non-public areas of the facility for Union business, including Union business related to the decertification election,[4] and to post Union notices, including election related notices, in its contractually designated bulletin boards throughout the facility.[5] As the record establishes, this was the second decertification election requested by Petitioner for this bargaining unit. (*See* Case 20-RC-018217 [Petitioner withdrew the petition on the eve of the January 2011 election].)[6] The record also establishes that for about two years prior to June 2012, including during the critical period at issue here and the critical period for the first election between the parties, the Employer's Manager of Labor Relations, Judy Frates, interpreted the broad contractual rights as allowing the Incumbent Union to campaign inside the facility and post campaign notices on its designated bulletin boards. (Tr. 1273-1275.) Frates's testimony was corroborated by testimony from Rudy Vallin and the offer of proof on Romina Loreto's testimony had she been able to testify in person

[4] Intervenor also excepts below to the Hearing Officer's failure to recognize that the Incumbent Union's strategy was to have a team working inside the facility led by SEIU Lead Representative Jean Cronin and focused on representation and the contract campaign, and to have a team working outside the facility led by SEIU Coordinator Carolyn Conter and focused exclusively on the election campaign. The Hearing Officer did not even acknowledge in his recommendations the unrebutted testimony that Intervenor had an outside team focused exclusively on the election.

[5] The Incumbent Union's contractual right to access non-public areas of the facility "at all times to ensure compliance with [the CBA] and to conduct Union business" is set forth in Article 32(A) of the Collective Bargaining Agreement. The Union's right to post "Union notices" in designate bulletin boards, including four locked bulletin boards, is set forth in Article 10(C) of the CBA. (*See also* Appendix 1, pp. 27:1 – 28:11 [discussing contractual access rights] and pp. 30:20 – 32:6 [discussing the contractual right to use designated bulletin boards].)

[6] The record establishes that the critical period for the first election was from November 2010 through January 12, 2011.

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		at the hearing. The Employer's decision to continue to follow its contractual obligations during the critical period, as required by *Laub Baking* and *West Lawrence*, and as it had done since Petitioner first became a labor organization in February 2009, cannot *objectively* be said to have interfered with free choice to such extent that it materially affected the results of the election in this matter. Indeed, given the historical evidence of Intervenor's consistent use of its broad access rights prior to and during the critical period in this election, it cannot objectively be said that Intervenor's access caused fear or confusion that had a reasonable tendency to interfere with free choice. Thus, the Hearing Officer's conclusion regarding the Employer's conduct during the critical period was clearly arbitrary.
Exception 7	Recs., Passim	The failure of the Hearing Officer to recognize anywhere that the parties to this proceeding have long been aware of the Board's decisions governing the Union's contractual rights to access non-public areas of the facility and to post Union notices in designated bulletin boards even during the critical period of a decertification election, namely *Laub Baking* and *West Lawrence*.[7] The record establishes that the Employer's access policy was previously unsuccessfully challenged by Petitioner and is the subject of the April 22, 2010 Office of The General Counsel Advice Memorandum in Seton Medical Center Case 20-CA-34687 [citing *Laub Baking*]. In addition, the same access rights were the subject of the July 14, 2010 Office of The General Counsel Advice Memorandum in O'Connor Hospital Case 32-CA-25120 [citing *Laub Baking* and *West Lawrence*]. The Petitioner also unsuccessfully challenged the same exact contractual access rights at issue here in its failed efforts to decertify Intervenor at Saint Louise Regional Hospital. *See* December 9, 2010 Regional Director's Supplemental Decision and Certification of Representative in Saint Louise Regional Hospital Case 32-RC-5613, pp. 18-19 [citing *West*

[7] The critical period here is January 27 through March 21, 2012. Notably, neither during the critical period, nor at any time thereafter within the 10(b) period, did Petitioner file an unfair labor practice charge alleging that the Incumbent Union received unlawful assistant from the Employer during the critical period because it was allowed access the non-public areas of the facility for Union business and to post Union notices on its designated bulletin boards. If Petitioner had filed such charge, the Regional Director would have certainly dismissed it. *See, e.g.*, November 30, 2012 Office of The General Counsel Advice Memorandum in Kaiser Foundation Health Plans, et al., Cases 32-CA025578 and 32-CA-064585.

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		Lawrence]. Most recently, Petitioner failed in its challenge to superior access rights the Intervenor enjoys as a result of its collective bargaining agreement with Kaiser Foundation. *See* November 30, 2012 Office of The General Counsel Advice Memorandum in Kaiser Foundation Health Plans, et al., Cases 32-CA025578 and 32-CA-064585 (*See also* Appendix 1, p. 5:4-18.) Thus, the Hearing Officer's recommendation to set aside the election because of the Employer's choice to continue to allow the Incumbent Union to use its access provision and broad bulletin board access provision to camping was for arbitrary and capricious reasons, as it is contrary to the Board precedent that the parties to the proceeding, especially the Petitioner and Intervenor, have been told for several years is controlling, specifically not only by Region 20 and neighboring Region 32, but also by several ALJs and the Office of the General Counsel, Division of Advice.
Exception 8	Recs., p. 19, fn. 12	To the failure of the Hearing Officer to remain neutral and not assume facts or look for evidence outside the record to conclude that Intervenor had "a larger budget" than Petitioner for the election campaign at issue here. There is no evidence in the record for the Hearing Officer to make findings about which union had "a larger budget" for the election in this matter. The Hearing Officer assumed this or for inexplicable reasons conducted his own research of matters outside of the record to come to the assumption that Intervenor had "a larger budget" for the election campaign at issue in this matter. The Hearing Officer presumably heard this directly from Petitioner or its propaganda materials that SEIU spends "millions" in elections, although it is also possible that the Hearing Officer's former colleague who now works for Petitioner or its affiliate, Micah Berul, informed the Hearing Officer of his biased belief that Intervenor had "a larger budget" than Petitioner for the election campaign at issue here. However the assumption was reached, it was improper and irrelevant.

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Exception 9	Recs., p. 21	To the failure of the Hearing Officer to recognize and consider the significance of the fact that during the critical period Petitioner had as many as ***nine*** individuals accessing the facility,[8] and to the failure to remain neutral as evidenced by his discussion in the recommendations of only the number of Intervenor's representatives at the facility during the critical period without acknowledging that, pursuant to its contractual access rights, Intervenor historically had on average more than half a dozen staff assigned to conduct Union business at the facility. The record establishes, without rebuttal, that prior to the critical period for this election the number of Intervenor's representatives assigned to the Employer's facilities had been ***nine*** as of September 28, 2009, (Exh. P-38), ***seven*** in 2010, (Tr. 1662-1663), and ***five*** as of January 2012, just before the critical period, (Tr. 1670-71). The record also establishes, without rebuttal, that during the critical period Intervenor's staff assigned to the facility ranged from ***eight to ten***. (Tr. 1453-1457 and 1470-1473.) (*See also* Appendix 1, pp. 21, fn. 32.) The record also contains testimony from Petitioner's own lead organizer, without rebuttal, that Petitioner had as many as ***nine*** staff accessing the facility during the critical period. (Tr. 995-996.) (*See also* Appendix 1, p. 22, fn. 33.) The Hearing Officer's finding that "SEIU had as many as 12 to 15 individuals" during the critical period is not supported by any facts in the record, and can only add up if, like Petitioner, the Hearing Officer improperly counts as "SEIU Field Representatives" the SEIU rank-and-file members who visited the facility on their days off from their jobs with other employers. Even if the Hearing Officer's factual finding that there had been "12 to 15" staff assigned to the Employer's facility were correct, there is nothing in the CBA limiting the number of staff and the Employer had not before the critical period in this election limited the number of Intervenor's staff that could access the facility. In addition, another significant factor on whether there was interference with free choice was the number of Petitioner's staff and their access to the

[8] There is testimony from the Employer's managers, without rebuttal, that because of "confusion" and lack of clarity among management, they allowed Petitioner's organizers into their departments' break rooms to campaign during the critical period. (Tr. 1159, 1166-1167, and 1208-1211) (*See also* Appendix 1, pp. 27:10 – 28:2 and fn. 57)

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		facility, and the Hearing Officer's recommendations fail to address this in any way as required by Board precedent. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct).
Exception 10	Recs., p. 20	To the failure of the Hearing Officer to also recognize that Intervenor's Coordinator Carolyn Conter headed up Intervenor's election campaign efforts during the critical period with a team of five staff who were working exclusively on the election campaigning outside of the facility. The record contains testimony from Carolyn Conter, without rebuttal, that during the critical period Conter lead a team of five staff who focused exclusively on the election campaign. (Tr. Tr. 1823-1826) Conter's team worked parallel to Intervenor's team that was led by Jean Cronin, who worked inside the facility primarily on the ongoing contract campaign and representation, "and only if individuals were solidly supportive of our bargaining team were [Intervenor's representatives inside the facility] even to address the issue of the election with folks." (Tr. 1463) (*See also* Appendix 1, p. 1, fn. 2.)
Exception 11	Recs., p. 21	To the failure of the Hearing Officer to dig into the facts and recognize that no evidence in the record supports a factual finding "that SEIU representatives engaged in a considerable amount of electioneering activity in the Employer's departments and patient floors and hallways during the critical period." The record establishes that, even if all of Petitioner's evidence is accepted as true for the sake of argument, there was no *widespread* electioneering in break rooms or hallways. In particular, Petitioner's evidence consisted of innocuous sightings of Intervenor's representatives and rank-and-file members in the break rooms and facilities and assumptions that they were electioneering and distributing election materials. But Petitioner's witnesses testified over and over that they neither heard the conversations nor saw the literature, with only a handful of exceptions. At best, for the entire critical period, there was only a handful of instances of alleged electioneering inside a break room and one instance of alleged electioneering in a hallway. Those *six* incidents involved only *three* of the SEIU representatives on Jean Cronin's team, one Shop Steward, and one employee from another hospital. (See Appendix 1,

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		pp. 25:3 – 26:20.) Thus, the Hearing Officer's factual finding is arbitrary as it is not supported by the weight of the evidence, no matter if all of the Petitioner's evidence of alleged "campaigning" were accepted as true, as the Hearing Officer appears to have done.
Exception 12	Recs., p. 21	To the failure of the Hearing Officer to recognize that Intervenor's representatives who worked on Jean Cronin's team distributed flyers inside the facility related to the contract campaign and representational issues. The record establishes that Intervenor's representatives inside the facility were focused on representation and the contract negotiations, as the strategy was to get members involved in supporting their bargaining team in order to win a strong contract, "and only if individuals were solidly supportive of our bargaining team were [Intervenor's representatives inside the facility] even to address the issue of the election with folks." (Tr. 1463) (*See also* Appendix 1, p. 1, fn. 2.) Thus, it is arbitrary and irrational for the Hearing Officer to "not credit the testimony of SEIU representatives…that the flyers they carried were solely related to negotiations." Contrary to the Hearing Officer's suggestion, no one argued that SEIU staff carried flyers related only to the contract negotiations. Indeed, as the record establishes, without rebuttal, Jean Cronin did not put any restrictions on her staff's distribution of campaign related literature and simply told them "to get their flyers to their leaders, and then the leaders would be making sure that [SEIU] flyers got around." (Tr. 1519-1520.)

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Exception 13	Recs., p. 21	To the failure of the Hearing Officer to acknowledge that after the "early March" incident Petitioner's adherent Jose Banuelos testified about, of Intervenor's representatives being allowed to address EVS employees after the shift change "huddle,"[9] Intervenor's representatives were banned from the entire department by the Employer, and to the failure to acknowledge that only 2% of eligible voters were present after the "huddle," only one testified, and that there is no evidence in the record of fear by any one of them.[10] The Hearing Officer failed to follow Board precedent. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the number of incidents, their severity and whether they were likely to cause fear among voters, the number of voters exposed, and the proximity of the misconduct to the election). The record establishes that this incident occurred in the beginning of March, nearly three weeks before the election. (Tr. 518-519) The Hearing Officer failed to acknowledge the lack of proximity to the election. The record establishes that out of the 726 eligible voters, there were "approximately 15" in the huddle. (Tr. 519-520) The Hearing Officer failed to acknowledge this is only 2% of the eligible voters. Not one of those employees except Petitioner's adherent testified about the incident and he was in the room "less than a minute" after they began to speak. (Tr. 529) The record contains testimony from Banuelos himself that after he complained to his Manager, Ojie Rayala, about the incident, both Rayala and the head of the Employer's Chief of Security told

[9] Intervenor's Field Representatives have a contractual right to access the EVS break room to enforce the contract and conduct Union business. Jose Banuelos did not identify any member of Jean Cronin's staff in the group, but he identified rank-and-file member Marc Quarles, as well as an eligible voter, a CNA. (Tr. 521 & 526-527) Quarles, an Ultrasound Tech III at Saint Louise hospital, one of the Employer's sister hospitals that is in bargaining with Intervenor, was at the time also a member of SEIU's bargaining team. (Tr. 1602-1605) For the sake of argument here, Intervenor infers, from the Hearing Officer's factual finding that Quarles and his colleagues "spoke to employees about why they should vote for SEIU," that those individuals were *only* electioneering and not talking to the employees about contract negotiations.

[10] Indeed, Banuelos testified that "[a]s soon as they started [talking about the election], my co-worker stood up before I did and confronted one of the SEIU people, something about the contract. And I got up and walked out of the room at that time." (Tr. 528)

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		Banuelos that Intervenor's representatives would not be allowed in the department without his permission, which Banuelos "was fine with…[a]nd that's where it stayed." (Tr. 532-533) Banuelos also confirmed in his testimony during the hearing that after the one incident Intervenor's representatives were never allowed in his department again during the critical period. (Tr. 577 and 604) (*See also* Appendix 1, p. 23:16-21.) The Hearing Officer failed to acknowledge this was a one time incident. The Hearing Officer also failed to acknowledge that there was no testimony of "fear" as a result of Quarles and his colleagues addressing the EVS employees after the shift change "huddle." It is simply incredible and telling of the Hearing Officer's bias that these mitigating factors are not considered anywhere in the Hearing Officer's recommendations.
Exception 14	Recs., p. 21-22	To the failure of the Hearing Officer to acknowledge that Jose Banuelos failed to identify any of Intervenor's representatives, other than rank-and-file member Rudy Vallin who was on Union leave, who he claims to have observed "throughout the hospital carrying election flyers," and to the failure to acknowledge that Banuelos "never picked up one [flyer] to actually read it," and Banuelos never spoke with the "dozens" of SEIU organizers or "listen in on their conversations." (Tr. 534-540 and 579) *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the number of incidents, their severity and whether they were likely to cause fear among voters, the number of voters exposed, and the proximity of the misconduct to the election). It is simply incredible and telling of the Hearing Officer's bias that these mitigating factors are not considered anywhere in the Hearing Officer's recommendations.
Exception 15	Recs., p. 22	To the failure of the Hearing Officer to acknowledge that the testimony of Petitioner's adherent Juan Pedroza regarding Shareefa Joseph's access to the Radiology department "almost daily" was not objectionable because there was no evidence that management knew of any unlawful conduct, (Tr. 649-650),[11] and to the failure to acknowledge mitigating factors concerning that alleged misconduct.[12]

[11] Intervenor's representative Shareefah Joseph had a contractual right to access the Radiology department's break room to enforce the contract *and* to conduct Union Business.

[12] Pedroza distributed pro-NUHW flyers in his department and other break rooms. (Tr. 641-642)

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		The Hearing Officer failed to acknowledge that there was no evidence of "fear" or about how many workers Joseph spoke to in her "almost daily" visits, and that Pedroza did not hear Joseph's conversations other than she telling workers that "it was more important to vote for SEIU as opposed to NUHW" and trying to get their signature on a pro-SEIU petition, which he was told by someone that it related to retro pay. (Tr. 619-622) *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the severity of the incidents and whether they were likely to cause fear among voters, and the number of voters exposed).
Exception 16	Recs., p. 22	To the failure of the Hearing Officer to acknowledge that Suaad Husary had Intervenor's representative Shareefa Joseph banned from accessing the respiratory department break room *during the majority of the critical period*. (Tr. 1129-1130, 1134-1135, and 1579) *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the number of incidents and the proximity of the misconduct to the election).
Exception 17	Recs., pp. 22-23	To the failure of the Hearing Officer to recognize the significance of the fact that throughout the critical period there was confusion among managers about whether Petitioner's representatives could campaign in break rooms, and that some managers actually allowed Petitioner's organizers to engage in electioneering in non-public areas of the facility although Petitioner had not contractual or legal/statutory right to access non-public areas. (Tr. 1159, 1166-1167, and 1208-1211) (*See also* Appendix 1, p. 27:10 – 28:11) *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the effect of misconduct by the opposing party to cancel out the effects of the original misconduct).
Exception 18	Recs., pp. 23-26	To the failure of the Hearing Officer to recognize the significance of the historical broad interpretation given to the contractual access and bulletin board rights by Judy Frates, the Employer's Manager of Labor Relations, during her entire two year tenure from June 2010 through June 30, 2012,[13] including allowing Intervenor's representatives "to engage in electioneering activities anywhere in the hospital except work areas" and permitting them "to post election materials on the bulletin boards assigned to SEIU's use." *See Laub*

[13] During the hearing the Hearing Officer recognized that Judy Frates had made it "clear that the [access] policy throughout has been to allow campaigning" in break room. (Tr. 1371)

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		Baking Co., 131 NLRB 869, 871 (1961) ("when one of the competing unions is the incumbent employee representative, the employer must continue to honor" its contractual obligations to the incumbent union, which "[undoubtedly, [] confers an advantage upon the incumbent union."); *West Lawrence Care Center*, 308 NLRB 1011, 1012-14 (1992) (despite the strict neutrality rule the employer must continue to honor a contract clause even if its broad enough to allow campaigning, unless it has been limited otherwise by past practice).
Exception 19	Recs., p. 26	To the failure of the Hearing Officer to recognize that *West Lawrence* is well-established Board precedent that has been well-known to the parties in this matter, especially Petitioner and Intervenor, and to the failure to adhere to Board precedent simply because the Hearing Officer believes that "[t]he majority in *West Lawrence* appears to have gone beyond *RCA del Caribe*."
Exception 20	Recs., p. 27, fn. 26	To the failure of the Hearing Officer to focus on the facts in the record, rather than bizarrely and irrationally speculate about irrelevant theories, namely that the term "Union business" in SEIU's CBA could be "[t]aken to its extreme" to "allow the Union to sell lottery tickets, conduct a commercial enterprise, or open a tavern in the break room." The Hearing Officer certainly knows from his years of investigating unfair labor practice charges that not only would the plain meaning of "Union business" not include his ridiculous examples, but that a contract provision that is ambiguous would not be open to whatever interpretation a party wants unless that party's interpretation can be substantiated with evidence of past practice or bargaining history. The evidence in the record establishes that the Employer's past practice, at least for nearly two years before the election here and including during a prior decertification campaign by Petitioner, had been to interpret the Intervenor's contractual rights broadly to allow the Union to engage in any business related to its role as a Union in the facility, including allowing campaigning on a number of Union matters in any non-work areas, as long as there was no interference with workers on the clock or patient care, and the Employer had also allowed Intervenor to freely post any Union related notices in its contractually designated bulletin boards. There was no evidence in the record even suggesting that SEIU sells "lottery tickets" to its members, runs "commercial enterprises" on the

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		side, or would want to "open up a tavern" in its members' break rooms. The Hearing Officer's speculation about these activities is not only irrelevant, but it is actually offensive.
Exception 21	Recs., p. 28	To the failure of the Hearing Officer to recognize that during the period that Petitioner's organizer Colleen Fewer was employed by Intervenor, i.e., from March 2008 until January 2009 when as the Hearing Officer put it, she "transferred her allegiance to the newly-formed NUHW,"[14] Fewer used her contractual access to break rooms to meet with rank-and-file member Rudy Vallin in order to campaign against SEIU's decision to impose the Trusteeship. (Tr. 1660) The Hearing Officer tellingly leaves out of his recommendations that Fewer had these conversations with Vallin in the break room. The Hearing Officer also left out of his recommendations testimony from Rudy Vallin that he saw Petitioner's organizers in break rooms in the facility during the prior election critical period and that Colleen Fewer would try to engage him about that earlier election. (Tr. 1657-1659) This is simply additional evidence that the Hearing Officer had made up his mind and his recommendations are simply a means to an end, i.e., his arbitrary and capricious decision to ignore evidence of past practice in order to proceed with his decision to challenge *Laub Baking* because "it's kind of strange" that it "has not been cited by the Board since 1965."
Exception 22	Recs., p. 28	To the failure of the Hearing Officer to recognize that the fact "that…NUHW supporters and representatives engaged in election talk all over the hospital during the critical period" is a very relevant factor. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (among the factors to consider is the effect of misconduct by the opposing party to cancel out the effects of the original misconduct).
Exception 23	Recs., p. 28	To the failure of the Hearing Officer to not simply assume that Intervenor's representatives "engaged in election talk all over the hospital during the critical period." (*See* Exception 12)

[14] As the record reflects, after they were ousted from their positions with SEIU in late January 2009, the former officials appointed themselves in February 2009 as the "officers" of the newly created Petitioner.

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Exception 24	Recs., p. 28-29	To the failure of the Hearing Officer to recognize that the Employer indeed had knowledge and acquiesced to Intervenor's broad access rights, as set forth in the unrebutted testimony of Judy Frates and managers that the Employer's past practice had been to allow Intervenor's representatives to use their contractual access to non-public areas of the facility to conduct any Union business as long as they did not interfere with workers on the clock or patient care. (*See* Exceptions 18 and 19) The Hearing Officer also failed to recognize that there is testimony in the record from Rudy Vallin, without rebuttal, that during the prior election critical period he spoke with "quite a few" SEIU representatives about the prior election in break rooms. (Tr. 1662-1663) The record also establishes that had she been allowed to testify by the Hearing Officer, Intervenor's representative Romina Loreto would have testified that in the "prior election critical period," specifically starting in or about October 2010 through and after January 2011, she and other SEIU representatives used their access to non-public areas of the facility to talk to workers about any Union business, including the prior election. (Tr. 1831:17 – 1833:11)
Exception 25	Recs., p. 28-30	To the failure of the Hearing Officer to recognize that the broad access practice that the Employer's Manager of Labor Relations Judy Frates maintained during her entire two year tenure from June 2010 through June 30, 2012 is more relevant than the alleged limited access practice that Petitioner's representative Colleen Fewer testified existed during her tenure before January 2009 when as the Hearing Officer put it, she "transferred her allegiance to the newly-formed NUHW."
Exception 26	Recs., p. 29	To the failure of the Hearing Officer to recognize that although Judy Frates "did not testify as to what SEIU's practice was during the prior election critical period," Frates testified that her practice during the "prior election critical period" was the same during the critical period at issue here, i.e., to allow Intervenor's representatives to use their contractual access to non-public areas of the facility to conduct any Union business as long as they did not interfere with workers on the clock or patient care. (*See* Exceptions 18 and 19) There is also testimony in the record from Rudy Vallin, without rebuttal, that during the prior election period he spoke with "quite a

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		few" SEIU representatives about the prior election in break rooms. (Tr. 1662-1663) The record also establishes that had she been allowed to testify by the Hearing Officer, Intervenor's representative Romina Loreto would have testified that in the "prior election critical period," specifically starting in or about October 2010 through and after January 2011, she and other SEIU representatives used their access to non-public areas of the facility to talk to workers about any Union business, including the prior election. (Tr. 1831:17 – 1833:11)
Exception 27	Recs., 29	To the failure of the Hearing Officer to dig into the facts in the record and recognize that there was no basis to infer from Jean Cronin's testimony that during the "prior election critical period" SEIU staff were also instructed "not to campaign in break rooms."[15] The Hearing Officer's recommendations ignored testimony in the record showing that Intervenor's representatives indeed campaigned in break rooms during the "prior election critical period." In particular, Rudy Vallin testified, without rebuttal, that during the prior election period he spoke with "quite a few" SEIU representatives about the prior election in break rooms. (Tr. 1662-1663) The record also establishes that had she been allowed to testify by the Hearing Officer, Intervenor's representative Romina Loreto would have testified that in the "prior election critical period," specifically starting in or about October 2010 through and after January 2011, she and other SEIU representatives used their access to non-public areas of the facility to talk to workers about any Union business, including the prior election. (Tr. 1831:17 – 1833:11) Contrary to the Hearing Officer's inference, the record establishes that SEIU's strategy to limit campaigning in break rooms, and to allow Carolyn Conter's team do the campaigning outside of the

[15] The record establishes that Jean Cronin identified all of the "big" campaigns that she had worked on previously and did not say that she worked on the prior election at Seton. (Tr. 1441) The record also establishes that Jean Cronin was unfamiliar with Seton and relied on SEIU representative Rachel Zamar and on Rudy Vallin to orient herself about Seton before her assignment began. (Tr. 1448-1449 and 1458) Cronin had not previously worked with Zamar, and had worked with Vallin only on a "contract campaign at Stanford." (Tr. 1458-1459) In addition, Rudy Vallin identified all of the SEIU Representatives who were assigned to the Employer's facility during the prior election critical period and he did not identify Jean Cronin. (Tr. 1662) Thus, the weight of the evidence militates strongly against the Hearing Officer's inference that Cronin worked on the "prior election campaign at Seton Medical Center" or that her testimony gives insight into what happened during that campaign.

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		facility, was driven in part by Jean Cronin's understanding that "what happens in these situations is we [SEIU] win the election and then NUHW files charges to try to get the election overturned. And they use things like campaigning in break rooms as part of their evidence." (Tr. 1466)
Exception 28	Recs., p. 29	To the failure of the Hearing Officer to recognize that there is unrebutted evidence in the record that "SEIU engaged in electioneering activity in break rooms prior to the critical period herein," and the failure to recognize that the Employer's managers had knowledge of and acquiesced to such access. (*See* Exceptions 18-19, 22, 25, and 27-28)
Exception 29	Recs., p. 30	To the failure of the Hearing Officer to recognize the irrelevancy of the Employer's "non-solicitation policy" to the extent that it is different than the Union's contractual access provision and the historically broad interpretation of that access provision by the Employer's Manager of Labor Relations Judy Frates during her entire two year tenure from June 2010 through June 30, 2012.
Exception 30	Recs., p. 31	To the failure of the Hearing Officer to recognize that his suggested "simple solution" of the Employer allowing "NUHW access to break rooms to engage in electioneering activity" would be objectionable conduct as it would be a violation of the Employer's duty to remain "strictly neutral" given that Petitioner did not have such rights before the critical period.
Exception 31	Recs., p. 32	To the failure of the Hearing Officer to recognize that pursuant to the Board's decision in *West Lawrence* the Employer was prohibited from terminating Intervenor's contractual right to post Union notices on the SEIU designated bulletin boards or in any way deviate from the past practice of not placing any limitation on the type of Union materials that could posted by the Intervenor on its designated bulletin boards. (Tr. 1280-1281 and 1375) *West Lawrence Care Center*, 308 NLRB 1011, 1012-14 (1992) (despite the strict neutrality rule the employer must continue to honor a contract clause even if its broad enough to allow campaigning, unless it has been limited otherwise by past practice).

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Exception 32	Recs., p. 32	To the failure of the Hearing Office to recognize the significance of the fact that Petitioner failed to present any evidence that the Employer actually prohibited Petitioner's agents from posting and distributing Petitioner's campaign materials throughout the facility. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004).
Exception 33	Recs., p. 34	To the failure of the Hearing Officer to recognize that eligible voters would have reasonably concluded that Intervenor's right to access non-public areas of the facility and to post Union notices on designated bulletin boards occurred only because of SEIU's contractual rights that have long been in the CBA that has protected the workers for more than several years, and the failure to recognize that the eligible voters would not have "reasonably concluded that the Employer was favoring SEIU" as the Hearing Officer assumes, especially since the workers also saw Petitioner's organizers in the facility on a daily basis, including in some break rooms because some managers allowed it.
Exception 34	Recs., p. 34	To the failure of the Hearing Officer to remain neutral and acknowledge in his recommendations that Intervenor had a 5% victory margin because Intervenor received 30 more votes than Petitioner out of all votes casted. Any objective individual looking at a vote tally of 301 for Intervenor and 271 for Petitioner, out of 591 votes casted, would be able to perform simple arithmetic and acknowledge that Intervenor had 30 more votes than Petitioner, a 5% victory margin. Another way to look at it is to say that out of all votes casted the tally was 51% vs. 46%, again a 5% victory margin. It is telling of the Hearing Officer's bias, however, that he ignored simple arithmetic and went out of his way to claim, like Petitioner, that Intervenor's victory margin is only 1% because "a swing of 6 votes would have resulted in a runoff election."
Exception 35	Tr. 1826:25 – 1828:7	To the failure of the Hearing Officer to postpone the hearing and/or reconvene in Los Angeles, California in order to allow Intervenor's witness, SEIU representative Romina Loreto, to testify about relevant information.

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For the above reasons, and the reasons previously set forth in Intervenor's post-hearing brief to the Hearing Officer, these exceptions should be granted and the decision of the Hearing Officer be reversed or modified as appropriate.

Dated: February 28, 2013

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