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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

SETON MEDICAL CENTER/SETON COASTSIDE, Employer, and NATIONAL UNION OF HEALTHCARE WORKERS (NUHW), Petitioner, and SEIU UNITED HEALTHCARE WORKERS-WEST (SEIU-UHW), Intervenor.	No. 20-RC-073334 **SEIU-UHW'S BRIEF IN OPPOSITION TO PETITIONER'S THREE EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDATIONS**

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I. PETITIONER'S EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDATION TO OVERRULE OBJECTION NUMBERS 1 AND 2 ARE WITHOUT ANY MERIT

A. MANALESE DID NOT "AMBULATE" RESIDENTS "BETWEEN 6:00 AND 8:00 A.M."

According to Petitioner, "[b]argaining unit employee Jenneth Manalese, a Nursing Assistant Restorative Aide…ambulated patients in the hallway near the West Door during the first voting session." (*See* Petitioner's Brief, p. 4) (citing Tr. 409, 411-412.) Manalese is a bargaining unit member at the Employer's Coastside facility, a nursing home. Petitioner claims in its Brief, just like the Hearing Officer did in page 9 of his Recommendations, that "during the '*whole*' first voting session [between 6:00 and 8:00 a.m.], Ms. Manalese observed SEIU UHW Steward Susan Ordona, wearing a purple t-shirt…'standing up in the west side door [to the Fireside Lounge].'"[1] (Petitioner's Brief, p.4, emphasis added; see also Hearing Officer's Recommendations, p. 9 [finding that Manelese was "ambulating patients between 6:00 and 8:00 a.m., i.e., the morning polling hours."].)

Like the Hearing Officer, Petitioner failed to recognize that there is no evidence in the record to support a factual finding that Jenneth Manalese "observed" Susan Ordona at the Fireside Lounge door while "ambulating patients between 6:00 and 8:00 a.m., i.e., the morning polling hours."[2] (Hearing Officer's Recommendations, p. 9.) Specifically, both the Petitioner and the Hearing Officer inexplicably failed to acknowledge that Manalese herself testified, without rebuttal, that on election day her shift did not commence until 6:45 a.m. (Tr. 438-439

[1] The record establishes that the entrance to the Fireside Lounge was approximately 25 feet from the entrance to the polling site, i.e., the Solarium. The evidence in the record also establishes that a wise Board agent had the parties cover completely with butcher paper all of the windows that would have allowed anyone to peer into the Solarium. (Tr. 1809.) In addition, the table inside the Solarium where the parties' observers were seated was at least 6 feet inside the entranced to the Solarium. (Tr. 1811 and 1870-1873; see also Employer Exh. E-6(a)-6(b); Intervenor Exh. I-11.) The ballot box itself was located 12 feet away from where the observers were seated, specifically at the other end of the long table. (Tr. 1818 and 1870-1873; Intervenor Exh. I-11.)

[2] The Hearing Officer recognized that Board precedent holds that even if Ordona was by the Fireside door "between 6:00 and 8:00 a.m.," as Petitioner claims, she did not engage in any unlawful conduct. *See C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011) (union agent's presence near the polls "alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election") (citation omitted).

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[Manalese's testimony that her shift was "6:45 to 3:15."].)[3] Certainly, common sense tells us that Manalese would not have started ambulating patients near the Fireside Lounge until at least a minute or two after her shift began at 6:45 a.m., as she would have had to first go to the room of a patient/resident before commencing her duties that day.

With regard to her duties, Manelese testified that during her 6:45 a.m. to 3:15 p.m. shift on election day, she exercised residents at a fixed location in the hallway and walked laps around the facility with the residents, i.e., ambulating the facility with the residents. (Tr. 409-410 and 428-429.) According to Manalese, each exercise took about 20 minutes with each resident and each lap around the facility with a resident took approximately 10 minutes. (Tr. 429 and 444.) Manalese estimated that during the 6:45 to 8:00 a.m. portion of her shift (i.e., a 75 minute period) she did *eight to ten* laps around the facility with a resident (80-100 minutes) and six exercises (120 minutes). (Tr. 444-445.)

Given Manalese's implausible estimate of the number of exercises *and* laps that she did between 6:45 and 8:00 a.m., the accuracy of Manalese's entire testimony is questionable at best. Indeed, it is impossible for Manalese to have seen Ordona standing by the Fireside Lounge for the "whole" polling period when she did not start work until 6:45 a.m. and performed a number of exercises and laps with residents that she would have had to retrieve from their individual rooms

[3] Petitioner concedes in its Brief that on election day Manalese "ambulated patients in the hallway near the West Door from 2:00 p.m. to 3:15 p.m." when her shift ended. (Petitioner's Brief, p. 5.) The Hearing Officer was also aware that Manalese's shift ended at 3:15 p.m. (Tr. 426.) Thus, it is unclear why Petitioner and the Hearing Officer discredited Manalese's testimony that her shift on election day started at 6:45 a.m.

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throughout the facility.[4] If Manalese was observing Ordona for the entire polling period, then Manalese was engaged in the same conduct that Petitioner complains about.[5]

The Board is urged to disregard any argument by Petitioner that SEIU Steward Susan Ordona was "observed" standing near the Fireside Lounge door "between 6:00 and 8:00 a.m."

B. SEIU STEWARD SUSAN ORDONA'S TESTIMONY WAS NOT NECESSARY AS A MATTER OF LAW.

Petitioner correctly points out in its brief that "SEIU did not even call Ms. Ordona to deny she was there,"[6] (Pet. Brief, p. 6), but Petitioner conveniently ignores the testimony of SEIU

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4 Manalese testified on cross examination that she saw Ordona talk to no more than 6 people during the morning polling period. (Tr. 432-433.) When pressed on what she heard, the only things Manalese could come up with that Ordona said were things such as "hi, how are you?," "come here," "this way," "let's go vote now," "did you eat?" and "did you take your break?" (Tr. 435 and 453-455.) Manalese did not testify that anyone was ever waiting in line to vote.

5 Petitioner speciously claims that that Manalese also saw "a SEIU UHW field representative in the West Door and the hallway outside the Fireside Lounge." (Petitioner's Brief, p. 6, citing Tr. 419-420.) A review of the transcript pages cited by Petitioner reveals that Manalese testified only that she saw a white man in his 40s and that she "think[s] he's a field representative of SEIU." (Tr. 419.) Manalese's testimony did not include any other characteristics or evidence to support Petitioner's claim in its Brief. The record establishes that the only SEIU field representatives in the Coastside facility on election day were Amalia Woods-Drake and Max Arias, and neither one left the Coastside cafeteria when the polls were open. (Tr. 1773-1774, 1778, and 1782.) Petitioner's witness Tania Velazquez described Amalia Woods-Drake as a "very beautiful white woman but not blonde hair" and Max Arias as "between Spanish and white, but I mean more like Spanish." (Tr. 319.) Manalese herself described Max Arias in detail as a tall man with brownish/blonde long curly hair, "[b]ut he's not American." (Tr. 440-443.)

6 Petitioner is correct; SEIU made every effort not to make its members unnecessarily suffer through silly and argumentative cross-examination. Here, it was clear that even if Ordona was near the Fireside Lounge door during the morning polling session proudly wearing her purple t-shirt and saying hi to folks, her presence there was not objectionable conduct as a matter of law because the record is clear that there was never anyone waiting in line to vote in or outside of the polling site, i.e., the Solarium, a room whose entrance is 25 feet away from the door that Ordona was allegedly near. *See C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011) (union agent's presence near the polls "alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election") (citation omitted); *cf. Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1338 (2004) (finding a violation of the *Milchem* rule because multiple union agents engaged in "prolonged" conversations of "several minutes" and "5 to 10 minutes" with employees waiting in line to vote). The Hearing Officer agreed with this presumably recently cited Board precedent in finding that Ordona did not engage in objectionable conduct.

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Representative Amalia Woods-Drake,[7] who candidly admitted that although Ordona was "sitting if not pacing" inside the Seton Coastside cafeteria during polling periods because "it was a nervous day for her," Ordona also left the cafeteria *at least several times for several minutes at a time*. (Tr. 1772-1774.) It is very important to note here that Petitioner's counsel did not cross-examine Woods-Drake about any of her testimony regarding Ordona's whereabouts on the day of the election, which is a tacit recognition by Petitioner's counsel that Woods-Drake's testimony was credible and convincing.[8]

The Board is urged to disregard Petitioner's obsession with the irrelevant fact that SEIU chose not to call Ordona as a witness.

C. SEIU STEWARD MARINELA PICA HAD A RIGHT TO VOTE ON ELECTION DAY AND HER TESTIMONY WAS NOT NECESSARY AS A MATTER OF LAW.

Petitioner also irrationally wants to ignore that Marinela Pica, a bargaining unit member and SEIU Steward who was on medical leave at the time of the election, was an eligible voter who had a right to vote on election day. The only substantive testimony about Ms. Pica was from Petitioner's witness Tania Velazquez who said that Marinela Pica entered the Solarium with a group of about 15 workers and said "vote for SEIU." (Tr. 314-315.) There is also no dispute in the record that Pica was an eligible voter who voted on election day because she was on a leave of absence. (Tr. 1779-1780 and 1805.)

Nonetheless, Petitioner is obsessed with the fact that Marinela Pica was not called "to testify during the hearing" about her vote on election day. (Petitioner's Brief, p. 7.) Petitioner is so upset that Marineal Pica was allowed to vote that it went out of its way to falsely suggest in its

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[7] Woods-Drake was the SEIU Representative assigned to Seton Coastside from mid-February through the election. (Tr. 1757-1760.) She was at Seton Coastside daily almost always in the cafeteria, (Tr. 1763-1764), and her duties were "to handle representation, questions about bargaining and also questions that arose about the upcoming election." (Tr. 1759.) The support for SEIU at Coastside was overwhelming. As Woods-Drake explained to the Hearing Officer, "fortunately, at Coastside, I didn't have to convince anyone [to vote for SEIU]." (Tr. 1803)

[8] Even the Hearing Officer had to recognize that Woods-Drake's testimony was not inconsistent with Manalese's testimony, as he had to concede that Ordona "may have retired to the cafeteria" at least some times during the polling period. (Hearing Officer's Recommendations, p. 12.)

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Brief that Pica was "engaged in campaign activities on behalf of SEIU UHW" on election day. (See Petitioner's Brief, pp. 6-7, *citing* Tr. 310-312, 330, 339, 1790, and page 10 of the Hearing Officer's recommendations.) A review of the transcript pages cited by Petitioner, however, reveals that not one of the pages cited by Petitioner contains any testimony that Marinela Pica was "campaigning" or "giving out written campaign materials" at any time anywhere near the polls on election day.

The Board is urged to disregard Petitioner's obsession with SEIU Steward Marinela Pica, who had a right to vote on election day and did not need to testify at the hearing as there is no evidence in the record that she engaged in any objectionable conduct.

D. SEIU STEWARD JESUS HERNANDEZ ALSO HAD A RIGHT TO VOTE ON ELECTION DAY AND HIS TESTIMONY WAS NOT NECESSARY AS A MATTER OF LAW.

Petitioner is similarly obsessed that SEIU Steward Jesus Hernandez was not called "to testify during the hearing." (Petitioner's Brief, p. 7.) The record establishes that Hernandez was an eligible voter. As Petitioner points out in its Brief, Manalese testified that she saw SEIU Steward Jesus Hernandez standing outside the door to the cafeteria by the courtyard. (Tr. 436; see also Petitioner's Brief, p. 7.) As the evidence in the record reflects, the door to the Coastside cafeteria was about 50 feet away from the entrance to the Fireside Lounge, which itself was about 25 feet from the entrance to the polling site, i.e., the Solarium.

Manalese testified that all she heard Hernandez say was "vote for SEIU, or something, you know, he was doing that to me and - - and he knows that I was not going to vote for SEIU, so he - - come on, Jenneth, vote…[w]e're going to win…SEIU is going to win…[y]ou know, that's the conversation only. (Tr. 421.) Manalese, however, did not hear Hernandez say anything else and she did not testify that she saw Hernandez talking with any eligible voter waiting in line to vote nor did she see him otherwise engaged in electioneering near or at the polling site. (Tr. 435-436.) Petitioner nonetheless also suggests in its Brief that Hernandez was "campaigning" and "giving out written campaign materials" on election day, (see Petitioner's Brief, pp. 6-7, *citing* Tr. 310-312, 330, 339, and 1790), but just as was the case with regard to Petitioner's allegation regarding Marinela Pica, there is nothing in any of those pages to support the claim that

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Hernandez was "campaigning" or "giving out written campaign materials" to any voters waiting in line to vote.

The Board is urged to disregard Petitioner's allegations regarding SEIU Steward Jesus Hernandez, who had a right to vote on election day and did not need to testify at the hearing as there is no evidence in the record that he engaged in any objectionable conduct.

E. PETITIONER'S BRIEF FAILS TO CITE ANY BOARD PRECEDENT THAT IS APPLICABLE TO THE FACTS HERE.

None of the cases cited by Petitioner in its Brief is applicable to the facts in the record in this matter. (See Petitioner's Brief, pp. 8-9, citing *ITT Automotive*, 324 NLRB 609, 623-625 (1997); *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964); *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982); and *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 992 (D.C. Cir. 2001).)[9] None of the cases cited by Petitioner contain facts that are like the facts here, which are governed by the Board's decision in *C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011).

In *ITT Automotive*, the ALJ found that the employer engaged in objectionable conduct because at the facility "where a majority of the unit employees work," a number of supervisors and managers stood "in a circle" where voters not only had to pass them on their way to vote but "where the managers could watch them 'as they were standing in line to vote.'" *ITT Automotive*, 324 NLRB at 623. The employees waiting in line to vote "were in clear view" of the 5 or 6 managers. *Id.* at 624. There was "no supervisor's desk anywhere in that area." *Id.* Several voters testified about the "how intimidating" it was to have a group of managers watching them while they were in line to vote. *Id.*

[9] Petitioner cites *Nathan Katz* only for the proposition that the "Board's surveillance law from *Electric Hose* and *Performance Measurements*" is applicable to alleged "surveillance by union agents." (Petitioner's Brief, pp. 9 and 11.) The conduct at issue in *Nathan Katz* is completely distinguishable, as there the union agents sat in a car that was parked in a "no-electioneering zone" outside of the church where the voting took place and they "motioned, gestured, and honked at the employees as they passed the car." *Nathan Katz*, 251 F.3d at 991. Here, in contrast, there is no evidence that any agent of the Union was in a "no-electioneering zone."

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In *Performance Measurements*, the Board found objectionable the "continued presence" of the employer's president "by the door" to the polling site and at a desk "6 feet from such doorway." *Performance Measurements*, 148 NLRB at 1659. The employer's president even entered the polling site twice. *Id.*

In *Electric Hose*, the ALJ found objectionable, among many other things, the "continued presence" of a supervisor "within 10 to 15 feet" of the polling site's entrance. *Electric Hose*, 262 NLRB at 216. The ALJ reasoned that the only inference that could be made was "that his purpose…was to effectively survey the union activities and to convey to these employees the impression that they were being watched." *Id.*

Here, in contrast, not only is the Coastside facility a site where a small number of employees work, but even if there had been sufficient evidence that Ordona stood in the lobby near the entrance to the Fireside Lounge the "whole" polling period, the record is clear that Ordona's location would have been at least 25 feet from the entrance to the polling site, i.e., the Solarium. The record is also clear that there was never anyone waiting in line to vote inside or outside the Solarium. The record establishes that the only things Ordona was heard to say were innocuous comments such as "hi, how are you?," "come here," "this way," "let's go vote now," "did you eat?" and "did you take your break?" Not one of Petitioner's supporters who voted on election day testified that they were in any way intimidated by SEIU Steward Ordona. Under controlling Board law, Ordona's presence near the Fireside Lounge entrance is not objectionable conduct. *C&G Heating & Air Conditioning*, 356 NLRB No. 133 (2011) (union agent's presence near the polls "alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election") (citation omitted).

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Thus, *not one* of the cases cited by Petitioner is controlling here as the facts there were completely distinguishable from the facts here, and the Board is hereby respectfully urged to dismiss Petitioner's exceptions in their entirety.[10]

Dated: March 7, 2013

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/s/ Manuel A. Boigues
By: MANUEL A. BOIGUES

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[10] Petitioner's exception number 3 "to the Hearing Officer's finding that Marinela Pica was not an agent of SEIU UHW-W," which Petitioner says in its Brief is "not of tremendous importance," (Petitioner's Brief, p. 9, fn. 9), should also be rejected as it is wholly irrelevant to any objection given that, as noted above, the only testimony in the record regarding Ms. Pica's conduct on election day is that she showed up to vote, which she had a right to do.

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 7, 2013, I served the following documents in the manner described below:

SEIU-UHW'S BRIEF IN OPPOSITION TO PETITIONER'S THREE EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDATIONS

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jaranda@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 7, 2013, at Alameda, California.

/s/ Joanna Son
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