UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

HORIZON HOUSE, A WASHINGTON CORPORATION

Case 19-RC-106734

Employer

and

SEIU HEALTHCARE 775NW

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

This report contains my findings and recommendations regarding an objection filed by SEIU Healthcare 775NW ("Petitioner") to a secret ballot election conducted on July 16, 2013 to represent certain employees of Horizon House ("Employer").[1] The Tally of Ballots showed the following results:

Approximate number of eligible voters	47
Void ballots	0
Votes cast for Petitioner	18
Votes cast against participating labor organization	21
Valid votes counted	39
Challenged ballots	0
Valid votes counted plus challenged ballots	39

On July 23, 2013, the Petitioner filed three timely objections to the election and to conduct affecting the election results. On August 2, 2013, the Regional Director issued a Report and Recommendation on Objections and Direction of Hearing, in which he concluded that the Petitioner's Objections raised substantial and material issues which would best be resolved at

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[1] In a Stipulated Election Agreement, approved by the Regional Director on June 18, 2013, the parties stipulated that a self-determination election be held among employees in the following voting group:

> All full-time and regular part-time lead cooks, cooks, dishwashers, dietary aides, prep cooks, lead server, servers, pantry workers, hosts and hostesses employed by the Employer at its 900 University Street, Seattle, Washington facility; excluding all other currently represented employees, Food Service Directors, Executive Chefs, Registered Dieticians, Catering Coordinators, confidential employees, all managerial employees, and guards and supervisors as defined by the National Labor Relations Act.

hearing. On August 8, 2013, the Petitioner withdrew two of its objections; the withdrawal was approved by the Regional Director the same day. The remaining objection, Objection 3, alleges: "[t]he Employer maintains an Employee Handbook containing unlawful prohibitions on employee conduct and communication."[2] (Petitioner's Objections p. 2)

Pursuant to the August 2, 2013 Regional Director's Report, the undersigned conducted a hearing on August 9, 2013. All parties were accorded a full opportunity to be heard, present evidence and cross examine witnesses, introduce evidence bearing upon the issues, and provide oral argument.[3]

Upon the entire record in this proceeding, and from my observations of the witnesses, as described in greater detail below, I make the following findings of fact, conclusions, and recommendations.[4] I find that the Employer's maintenance of an employee handbook containing coercive prohibitions on employee conduct and communication improperly affected the election results. Accordingly, I recommend that the Petitioner's objection be sustained.

I. Background

The Employer operates a long-term care facility in Seattle, Washington. The Employer's facility has approximately 600 residents.[5] Approximately 500 residents are housed in "independent living" floors and the remaining 100 residents are housed in "supported living" floors. The facility has a clinic and therapy rooms, and some of the residents receive varying levels of care. However, the extent and nature of that care is not described in the record. The facility is staffed by approximately 20 licensed practical nurses and 10 registered nurses, who work on the supported living floors and in the clinic. The facility contains a number of non-patient care areas, including a bistro, a gym, employee break rooms, the Park Terrace lounge, the lobby, offices, and a kitchen. Employees may purchase and eat meals and other food items in the bistro and exercise in the gym.

The Employer employs approximately 315 employees, 100 of which are currently represented by the Petitioner. That bargaining unit, which comprises nursing assistants, garage

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2 The Employer, both at hearing and on brief, asserts that the Petitioner's Objection 3 is so vague and ambiguous that it fails to meet the standards set forth in the NLRB Casehandling Manual (Part Two) Representation Proceedings §11392.5. While the language of Objection 3 may be poorly drafted, I find it sufficiently specific to meet the requirements of the Casehandling Manual.

3 Briefs were filed by the Petitioner and the Employer and were duly considered.

4 Although not every piece of evidence or every argument is specifically addressed, I have nonetheless considered all matters. To the extent that testimony, or other evidence is not specifically mentioned, may appear to contradict my findings, it is because the evidence or testimony has been rejected as not credible or of little probative weight. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of the witnesses at hearing. *3-E Company v. NLRB*, 26 F.3d 1, 3 (1st Cir. 1994); *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912 (9th Cir. 1982). All witness testimony has been considered even though I may not detail conflicts in testimony. *Walker's*, 159 NLRB 1159, 1161 (1966).

5 According to Gloria Riggers, the Employer's human resources director, there is no distinction between a "patient" and a "resident," but the Employer does not use the term "patient" because it is outdated.

attendants, engineers, environmental services, housekeepers, and janitorial staff, has been represented by the Petitioner for approximately 35 years.[6] The voting group at issue in the instant case consists of about 47 employees who hold the following food-service related positions: lead cooks, cooks, dishwashers, dietary aides, prep cooks, lead server, servers, pantry workers, hosts and hostesses.

The Petitioner's union representatives have access to the site, and may post materials in the employee break rooms which are utilized by all of the Employer's employees. A meeting room is regularly set aside the first Friday of every month for the Petitioner's union representatives to meet with staff in the current bargaining unit. The Petitioner also utilizes shop stewards, but the number of shop stewards at the Employer's facility is unclear.

II. The Handbook Policies at Issue

There are two policies in the employee handbook at issue in the instant case, one concerning solicitation and another concerning off-duty employee visitation. The relevant portions of these policies state as follows:

> **SOLICITATIONS**
>
> Most forms of selling and solicitations are inappropriate in the work place. They can be an intrusion on employees and residents and may present a risk to employee safety or the security of the employer or employee property. The following limitations apply ...
>
> Employees may not solicit for any purpose during work or non-work time in resident areas, including resident apartments or rooms, treatment rooms, or lounges. Reasonable forms of solicitation are permitted during non-work time, such as before or after work or during meal or break periods and in non-patient care areas. Employees who are soliciting on non-work time may not solicit other employees who are on work time. Employees may not distribute literature for any purpose during work time or in work areas. The employee lounge is considered a non-work area under this policy.

(Petitioner's Ex. 1. B)

> **EMPLOYEE VISITS AND VISITORS**
>
> Since Horizon House is home for approximately 600 residents, it is our responsibility to provide a safe environment, which respects

[6] This group of employees already represented by the Petitioner shall be referred to in this decision as the "bargaining unit."

> their privacy and dignity. If you need to visit Horizon House other than during your scheduled work time, you should receive prior authorization from your supervisor. If friends or family need to see you while you are on duty, they will be asked to wait in our lobby area until you are free to meet them there. During the year, there may be several all-employee events to which your families will be invited and encouraged to attend.

(Petitioner's Ex. 1 A)

Both rules have been in place since 2002. There is evidence that in connection with collective-bargaining negotiations covering employees in the bargaining unit, the Petitioner received copies of the handbook containing the solicitation and visitation policies on multiple occasions within the last 10 years.

Newly hired employees receive a copy of the handbook during their orientation. When changes are made to the handbook, employees receive a notice of the change via memo, email, and posting. An employee may then request a copy of the handbook containing the changes. The record indicates that two employees received copies of the handbook after the petition was filed. However, neither employee was eligible to vote in the election as each was hired after the payroll period cutoff date.

There is no evidence that either policy has ever been enforced.[7] For example, both Dining Services Manager Hansen and Executive Chef Homewood testified that they had seen off-duty employees in the bistro and understood that some off-duty employees worked out in the gym. There is no evidence that either manager required employees to ask permission to remain on the premises. Similarly, HR Director Riggers testified that she is regularly approached by employees selling items for school and charity fund-raising.

III. Analysis

The Petitioner asserts that the Employer's above-described handbook rules are unlawful, and as such, the election results should be overturned. The Employer asserts that the rules are lawful, and the permissive practices and lax enforcement of those rules establish that the rules did not infringe on employee rights or affect the results of the election.

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[7] In mid-May of 2013, HR Director Riggers spoke to employees in the kitchen. An unnamed employee asked Riggers where employees could meet with a union representative to speak to them about organizing. According to HR Director Riggers, she responded: "yes, they could talk to a Union rep, they could talk to each other, they could talk to other Union employees, but it must be done on nonwork time in nonwork areas." There is no evidence that HR Director Riggers referred to the handbook or the policies at issue during this meeting. The meeting occurred prior to the filing of the petition on June 6, 2013. While an argument may be made that this conduct colors the coercive rules at issue in the instant case, I do not find this evidence necessary to my analysis. *See Dresser Industries, Inc.*, 242 NLRB 74 (1979) (Pre-petition conduct may be considered where it adds meaning and dimension to related postposition conduct).

The Board's position on whether the maintenance of an unlawful rule is sufficient to overturn the results of an election has varied at times. However, the Board has recently reaffirmed its position that maintenance of unlawful rules during the critical period warrants setting aside the results of an election. *Jurys Boston Hotel*, 356 NLRB No. 114 slip op. (2011). In light of this case law, I shall first examine whether the handbook policies at issue could violate § 8(a)(1) of the Act and therefore constitute election misconduct, and then explore whether the results of the election should be set aside.[8]

A. The Handbook Policies

In determining whether the maintenance of certain work rules violates § 8(a)(1), the Board examines "whether the rules would reasonably tend to chill employees in the exercise of Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their mere maintenance is an unfair labor practice, even absent evidence of enforcement." *Layfayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

With respect to solicitation, Board law is clear that a rule which prohibits solicitations during work time is presumptively lawful. *Our Way*, 268 NLRB 394 (1983). It is equally clear that a rule that prohibits solicitations during non-work time, in other words an employee's own time, is presumptively unlawful, unless the prohibition is limited to an immediate patient care area of a medical facility. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *St. Johns Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976), *enfd. in part* 557 F.2d 1368 (10 th Cir. 1977).

In the instant case, the rule prohibits solicitations at any time in resident areas. The sentence following the prohibition does not clarify or limit what is meant by "resident areas." That sentence states: "Reasonable forms of solicitation are permitted during non-work time, such as before or after work or during meal or break periods and in non-patient care areas." The policy does not state whether "resident areas" are the same as "patient care areas," and there is nothing in the record that suggests that these two types of areas are the same.

Board law is clear: "rules that reasonably could be read to have a coercive meaning – are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights- whether or not that is the intent of the employer[.]" *Flex Frac Logistics*, 358 NLRB No. 127, slip op. at 2 (2012). With respect to prohibiting solicitation in resident areas, the Board has found similar language prohibiting solicitation in resident care areas or client areas overbroad and therefore unlawful. *See The Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1076 (2004), *enfd.* 174 Fed. Appx. 631 (2 nd Cir. 2006); *Lake Holiday Manor*, 325 NLRB 469, 478 (1998); *Valley*

[8] To be clear, as a hearing officer, I do not have the authority to actually find a violation of the Act. Any reference to a violation of § 8(a)(1) is only to illustrate that the conduct at issue may also constitute objectionable conduct.

View Nursing Home, 310 NLRB 1002, 1002 n.2, 1005 (1993); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 152 n.3, 160 (1992). In light of this case law, I find the solicitation rule in the instant case could violate § 8(a)(1).

As to the visitation policy, the Board announced in *Tri-County Medical Center*, 222 NLRB 1089 (1976), the following test to evaluate the lawfulness of off-duty employee access rules:

> such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Id. at 1089.

In *JW Marriott Los Angeles at LA Live*, 359 NLRB No. 8, slip op. (2012), the Board found unlawful an access rule with similar language to the visitation policy in the instant case. In that case, the access rule required off-duty employees to "obtain prior approval from your manager" in order to access the interior of the facility. *Id.* slip op. at 2. The Board found that this rule violated the Act under the third prong of the *Tri-County Medical Center* test because the rule was not a uniform prohibition. *Id.* The Board further found the rule could reasonably be construed by employees to prohibit § 7 activity because an employee may believe that § 7 activity is prohibited without prior authorization. *Id.*

In the instant case the Employer's visitation policy likewise violates the third prong of the *Tri-County Medical Center* test, as the policy is not a uniform prohibition. I further note that the visitation policy could reasonably be read to include outside non-working areas such as parking areas. *Tri-County Medical Center*, 222 NLRB at 1089. For these reasons, I find that the Employer's visitation policy could violate § 8(a)(1).

B. The Objection

Given that the two rules at issue could violate § 8(a)(1), the question remains whether the election results should be set aside and a rerun election ordered. The Employer argues that there is no evidence that the policies in the instant case actually chilled employees' § 7 activities, the employees in the voting group had access to the Union, and the Petitioner acquiesced to the unlawful policies for many years. The Employer relies on *Delta Brands, Inc.*, 344 NLRB 252 (2005) and *Safeway, Inc.*, 338 NLRB 525 (2002). However, the Board has essentially limited those cases to their facts. As the Board made clear in *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. (2011), evidence of enforcement of an unlawful rule is not necessary to set aside an

election; rather mere maintenance is sufficient. *Id.* slip op. at 4. *See also Target Corp.*, 359 NLRB No. 103 slip op. (2013); *Pacific Beach Hotel*, 343 NLRB 372, 374 (2004); *Freund Baking Co.*, 336 NLRB 847 (2001). I further note that the types of rules at issue here, solicitation and employee access, are the same types of rules at issue in *Jurys Boston Hotel,* 356 NLRB slip op. at 3, and it was a close election. *Cambridge Tool & Mfg.*, 316 NLRB 716 (1995) (In making a determination as to whether the conduct at issue has a tendency to interfere with employee free choice, the Board will consider the closeness of the election.) In light of the above, I find the election misconduct to be objectionable conduct sufficient to warrant a rerun election.

IV. Conclusion and Recommendation

Having concluded that Petitioner's Objection has merit, and that the objectionable conduct described herein was coercive and interfered with voting group employees' right to freely choose whether they wanted to be represented by the Union, I recommend the Objection be sustained and that the election conducted be set aside and a rerun election be ordered. [9]

Dated at Seattle, Washington, this 1st day of October, 2013

M. Anastasia Hermosillo, Hearing Officer
National Labor Relations Board, Region 19
2948 Jackson Federal Building, 915 Second Avenue
Seattle, Washington 98174

[9] Under Section 102.69 of the Board's rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW Washington, DC 20570. A request for review may also be submitted by electronic filing. See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under E-Gov on the Board's website. This request must be received by the Board in Washington, DC, by 5:00 pm (ET) on October 15, 2013. This request may not be filed by facsimile. Also, due to the lapse in appropriated funds the National Labor Relations Board is temporarily closed, which may affect the exceptions filing due date. The Notice detailing the particulars is attached to this report as Attachment A.

Attachment A

THIS OFFICE OF THE NATIONAL LABOR RELATIONS BOARD IS CLOSED DUE TO A LAPSE IN APPROPRIATED FUNDS

Due to a lapse in appropriated funds this office of the National Labor Relations Board is temporarily closed. This office will reopen after a funding bill is passed by Congress and signed by the President. Only such Government activities necessary to prevent an imminent threat to the safety of human life or the protection of property may be undertaken in the absence of specific budget authority. To report an imminent threat to the safety of human life or the protection of property as a result of a violation of the National Labor Relations Act, you should contact the National Labor Relations Board Headquarters by telephone at (202) 273-1000, by fax at (202) 273-4483, or by email at EmergencyContact@NLRB.gov.

If the safety of human life or the protection of property is not subject to an imminent threat, you must wait until the Agency resumes normal operations.

Timeliness of Charges, Petitions and Other Documents:

The Board has granted an extension of time to file or serve any document for which the grant of an extension is permitted by law. The terms of the extension are that for each day on which the Agency's offices are closed for all or any portion of the day, one day shall be added to the time for filing or service of the document.

Pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), a complaint cannot issue on a charge alleging an unfair labor practice unless the charge is filed and served within 6 months of the alleged violation. The operation of Section 10(b) during an interruption in Agency services as a result of a lapse in funds is uncertain. If the 6-month period of Section 10(b) is to expire during the interruption in the Board's normal operations and your charge has not previously been filed and served, you should serve a copy of the charge on the party charged and fax a copy of the charge to this office at (206) 220-6305.