

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 18 - Subregion 30

HEALTHCARE SERVICES GROUP, INC.

Employer

and

Case 18-RD-120778

LEXIE L. BUCKHOLT, An Individual

Petitioner

and

SEIU HEALTHCARE WISCONSIN

Union

and

**OMRO HEALTHCARE D/B/A
OMRO CARE CENTER**

Employer

and

Case 18-RD-120779

MAXINE M. FERRON, An Individual

Petitioner

and

SEIU HEALTHCARE WISCONSIN

Union¹

¹ In this report, Healthcare Services Group, Inc. will be referred to as "HCSG," Omro Healthcare d/b/a Omro Care Center will be referred to as "Omro," Lexie L. Buckholt will be referred to as "Petitioner Buckholt," Maxine M. Ferron will be referred to as "Petitioner Ferron," and SEIU Healthcare Wisconsin will be referred to as "Union."

HEARING OFFICER'S REPORT ON OBJECTIONS

This report contains my findings of fact, conclusions, and recommendations regarding the Union's Objection 1 in Case 18-RD-120778 and Objections 1 and 2 in Case 18-RD-120779. For the reasons contained in the report, I recommend that the Union's Objections in both cases be overruled and that a Certification of Results issue in each case.

Procedural Background

On January 17, 2014,² Petitioner Buckholt and Petitioner Ferron filed petitions in Cases 18-RD-120778 and 18-RD-120779, respectively. The Regional Director for Region 18 of the National Labor Relations Board (NLRB) approved Stipulated Election Agreements in each case on January 27. On February 13, elections were conducted under the direction of the Regional Director among certain employees of each of the stipulated units.³ The tally of ballots in Case 18-RD-120778 (HCSG) reflects that out of approximately 13 eligible voters, 4 cast votes in favor of Union representation, 7 cast votes against such representation, and there were no void or challenged ballots. The tally of ballots in Case 18-RD-120779 (Omro) reflects that out of approximately 24 eligible voters, 5 cast votes in favor of Union representation, 9 cast votes against such representation, and there were no void or challenged ballots.

On February 20, the Union filed timely objections to conduct alleged to have affected the results of the elections.⁴ On March 7, following a preliminary investigation of the Union's objections, the Regional Director issued a Report on Objections, Order Consolidating Cases for Purpose of Hearing, Order Directing Hearing, and Notice of Hearing, in which he concluded that

² Unless otherwise noted, all dates refer to 2014.

³ The stipulated bargaining unit in Case 18-RD-120778 included all full-time and part-time dietary employees, housekeeping, and laundry employees of HCSG employed at the Omro Care Center located in Omro, Wisconsin; but excluding all certified nursing assistants, activity aides, office clerical employees, professional employees, licensed practical nurses, registered nurses, maintenance, guards and supervisors as defined in the Act. The stipulated bargaining unit in Case 18-RD-120779 included all full-time and part-time certified nursing assistants, dietary employees, housekeeping employees, activity aides and laundry employees of Omro employed at Omro's facility in Omro, Wisconsin; but excluding employees employed by HCSG, office clerical employees, professional employees, licensed practical nurses, registered nurses, maintenance, guards and supervisors as defined in the Act.

⁴ The critical period during which conduct allegedly affecting the results of a representation election must be examined commences with the filing of the representation petition and extends through the election. *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962); *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961). Here, the critical period is January 17 through February 13.

the Union's objections raised substantial and material issues of fact that could best be resolved upon record testimony received in a formal hearing. The Regional Director ordered that the two cases be consolidated for a hearing to be conducted before a duly designated Hearing Officer for the purpose of receiving evidence to resolve the issues raised by the Union's objections.

A hearing was held by the undersigned on March 20 in Omro, Wisconsin. The hearing was adjourned to March 27 in Milwaukee, Wisconsin, in order to accommodate a witness, Keith Peraino, who was unable to travel to the hearing in Omro, Wisconsin, due to a medical condition. On March 27, the undersigned utilized video-conference equipment to conduct the hearing via video-conference/telephone from the NLRB's Subregional office in Milwaukee, Wisconsin. The Union's attorney and a court reporter were also present at the Milwaukee, Wisconsin, office. Witness Keith Peraino participated by video-conference from the NLRB's Newark, New Jersey, office. Omro's attorney, HCSG's attorney and both RD Petitioners participated in the hearing via telephone. The hearing concluded on March 27. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce all relevant evidence bearing on the issues in this case.

The findings of fact, credibility resolutions, conclusions and recommendations to the Board contained in this report are based upon my review and evaluation of all testimony in light of the demeanor of the witnesses, the logical probability of testimony, and the record as a whole.

Credibility

This report, unless otherwise noted, is based on a composite of the credited aspects of the testimony of all witnesses, un rebutted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including each party's briefs.

Although each iota of evidence, or every argument of counsel, may not be individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict findings of fact, that evidence has not been overlooked. Rather, it has been rejected as incredible or of little probative value.

In resolving credibility issues, I have considered such factors as the relative demeanor of witnesses, partisan interest, guarded or indirect answers, conclusionary and/or conflicting testimony, argumentativeness, ability to recall with accuracy and specificity, consistency, corroboration, inherent probabilities and reasonable inferences in light of the record as a whole. Although I may not detail all potential conflicts in testimony, I have considered all witness

testimony. Where any witness has testified in contradiction to the findings herein, his or her testimony has been discredited as being in and of itself not worthy of credence or because it conflicted with the weight of other credible evidence.⁵

Burden of Proof

It is well settled that “[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991). A Board-run representation election is presumed valid and the burden is on the objecting party to prove that the election is invalid. *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961) (per curiam); *Delta Brands, Inc.*, 344 NLRB 252, 252-253 (2005). The objecting party must show that the conduct in question affected the employees in the voting unit and that the conduct had a reasonable tendency to affect the outcome of the election. *Id.* at 253.

In order to establish that pre-election conduct by party representatives or agents warrants overturning the election, the objecting party must show that the conduct has a “reasonable tendency to interfere with employees’ free choice.” *Big Ridge, Inc.*, 358 NLRB No. 114, slip op. at 14 (2012) (citing *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 597 (2006)). In applying this objective standard, the Board considers factors including: (1) number and severity of the incidents and whether they would likely cause fear among the employees; (2) the number of employees subjected to the conduct; (3) whether the incidents occurred close to the election date; (4) the extent to which the conduct was disseminated among employees; and (5) the closeness of the final vote. *Id.* (citing, among other things, *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001)). Dissemination is not presumed, and the objecting party bears the burden of proving it. *Sanitation Salvage Corp.*, 359 NLRB No. 130, slip op. at 1 (2013).

The Objections

The Union’s Objections as delineated in the Notice of Hearing are as follows:

Objection 1 in Case 18-RD-120778

The Union asserts that HSG representatives offered to pay at least one employee to come in on her off day to vote no in the election. More specifically, on about February 7, 2014, Keith (whose last name is currently unknown) and Raphael

⁵ *Bishop and Malco, Inc. d/b/a Walker’s*, 159 NLRB 1159, 1161 (1966).

Rodriguez, offered to pay an employee a full day's pay to come to the Employer's facility on February 13, 2014, and vote no on election day.

Objection 1 in Case 18-RD-120779

The Union asserts that Omro representatives told employees who were scheduled to work the day following the election that they would receive the day off with pay if they voted no. More specifically, on about February 14, 2014, several employees who were previously scheduled to work were provided the day off because they agreed to vote "No" in the election.

Objection 2 in Case 18-RD-120779

The Union asserts that Omro representatives harassed and isolated Union supporters during a meeting of workers called by management employees and then demanded they leave the meeting. More specifically, on about February 4 and 5, Keith (whose last name is currently unknown) and Raphael Rodriguez, made disparaging comments about Union supporters in front, and/or disseminated to, other employees. Additionally, on about February 6, 2014, flyers were posted in the facility that disparaged Union supporters.

Interchangeability of Objections

Although not raised in its Objections, during the hearing, the Union argued that the objections filed against one employer should extend to the other employer as well, based at least in part on its contention that the labor consultants hired by Omro treated Omro and HCSG staff as part of a single, integrated workforce. For example, the Union argues that the objection in Case 18-CA-120778, which was filed against the election conducted for HCSG employees, encompasses offers of payment for voting made to Omro employees. However, I conclude that I do not have the authority to consider this legal theory as it is insufficiently related to the Objections set for hearing by the Regional Director.

In *Factor Sales, Inc.*, 347 NLRB 747 (2006), the Board overruled an objection to an election alleging the employer issued an improper directive to off-duty employees, contrary to the hearing officer's recommendation, when the evidence at hearing established that the employer issued an improper directive to "on the clock employees" and engaged in surveillance of employees' protected activities. In finding that the employer was denied due process, the Board stated:

[The wording of the objection] failed to provide the “meaningful notice...and...full and fair opportunity to litigate” that are the fundamental requirements of procedural due process. *Lamar Advertising of Hartford*, 343 NLRB 261, 266 (2004). To be “meaningful,” the notice must provide a party with a “clear statement” of the accusation against it.” *Id.* “It is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is.” *Champion International Corp.*, 339 NLRB 672, 673 (2003).

To attribute the objection(s) filed against HCSG to Omro, or vice-versa, would deprive the employers of due process. The Union’s objections failed to put the employers on notice that the objectionable conduct alleged to have been committed by the other was also being attributed to them. The cases in this matter were consolidated for administrative ease and efficiency; although each employer was served with a notice of hearing (NOH) that set forth the objections filed against the other, neither employer was notified that they would be required to defend any objections beyond those relating to their own conduct as set forth in the NOH. I decline to view the Union’s objections as being interchangeable as they relate to the employers.⁶

I also note that even if the Union is correct that its objections against one employer should be attributed to the other, the fact is that I am recommending overruling the objections. Therefore, the Union’s argument becomes moot.

Background

Omro is a 24-hour long-term care nursing home owned and managed by a company called Consulate. The bargaining unit set forth in the collective-bargaining agreement between the Union and Omro, which expired on March 15, 2013, included full and part-time certified nursing assistants, dietary employees, housekeeping employees, activity aides and laundry employees. Sometime prior to June 1, 2013, certain employees, including the dietary and housekeeping employees, became employed by HCSG although they continue to work in Omro’s facility. There was testimony that the Omro employees and HCSG employees work together “as a team” and share the same break room.

Consulate hired a company called National Labor Consultants to assist Regional Director of Human Resources for Consulate Beverly Heiney in explaining to employees why she didn’t think

⁶ I further note that the Union has not claimed, nor has the evidence established, that the employers are a single employer, joint employers or alter-egos.

that they needed a union. The labor consultants who visited the facility were identified as Keith Peraino, Raphael Albelo and Frank Degang. During the approximately two weeks before the elections, the labor consultants were present at the Omro facility for varying lengths of time.

Because the labor consultants hired by Omro are alleged to have engaged in the objectionable conduct, the first question I must address with regard to both cases is whether Peraino, Albelo and Degang are agents of Omro and HCSG (referred to collectively as “the Employers.”)

There is no dispute that Consulate hired the labor consultants to assist in explaining to Omro employees why the Union was not good for them. I find that the labor consultants were agents of Omro acting with actual authority and their conduct is attributable to Omro. See *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991) (“actual authority refers to the power of an agent to act on a principal’s behalf when that power is created by the principal’s manifestation to him”).

On the other hand, there is no evidence that HCSG was involved in the hiring of the labor consultants. However, I conclude that that the labor consultants were also agents of HCSG.

In *Pratt (Corrugated Logistics) LLC*, 360 NLRB No. 48 (2014), the Board stated:

Under common-law principles of agency, which the Board applies when examining whether an individual was an agent of the employer in the course of making a particular statement or taking a particular action, the Board may find agency based on either actual or apparent authority to act for the employer. “Apparent authority results from a manifestation by the principal to a third party that created a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, employees would “reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 425-427 (1987) (quoting *Einhorn Enterprises*, 270 NLRB 576 (1986)).

The evidence establishes that the labor consultants were agents of HCSG under the doctrine of apparent authority. Regional Director of Human Resources for Consulate Heiney testified that the meetings with the labor consultants were also for HCSG employees and that

consultant Degang spent most of the time in dietary. Labor consultant Peraino testified that he held meetings for the Omro certified nursing assistants (CNAs) and also for the housekeeping and dietary staff. The dietary and housekeeping employees are employed by HCSG. Peraino testified that he communicated with HCSG manager Cassie (last/name/unknown) to set up the meetings for the housekeeping employees. HCSG District Manager Brian Tate testified that he was at the Omro facility at the same time that the labor consultants were there. He knew that the consultants had been hired by Consulate and was apparently aware that the consultants were interacting with HCSG employees, as evidenced by his testimony that the HCSG employees seemed indifferent to the consultants. Tate also appeared to be aware that the labor consultants were in the kitchen area (with the HCSG employees) as he testified that he never asked the consultants to leave the kitchen area because no employee approached him with any concerns. There is no evidence that HCSG informed employees that it did not retain the labor consultants and that the labor consultants did not act on behalf of HCSG. As HCSG permitted the labor consultants to interact with its employees in their work places during the critical period preceding the election, its employees would reasonably have concluded that the labor consultants hired by Consulate were speaking and acting on behalf of HCSG.

Objection in Case 18-RD-120778

The only objection in Case 18-RD-120778 asserts that HCSG representatives offered to pay at least one employee to come in on her day off to vote no in the election. More specifically, on about February 7, Peraino and Albelo⁷, offered to pay an employee a full day's pay to come to the Employer's facility on February 13 and vote no on election day.

In *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), the Board concluded that an employer's offer to pay off-duty employees two hours of pay to come to work to vote was objectionable conduct. The Board found that "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome." *Id.* The standard is objective – whether the challenged conduct has a reasonable tendency to influence the election outcome. *Id.* In evaluating the likely effect, the Board takes into account such factors as (1) the size of the benefit in relation to its stated legitimate purpose; (2) the number of employees receiving it; (3) how the employees would reasonably construe the purpose given the context of the offer; and (4) the timing of the offer. *Id.*

⁷I have identified Peraino and Albelo by their accurate names for the sake of clarity. The Objection does not give a surname for Peraino and gives an inaccurate surname for Albelo.

The Union presented one employee, Mackenzie Malson, in support of the objection. On direct examination, Malson testified that on Friday, February 7, within an hour of starting work, she observed two unfamiliar men in the facility. She testified that she did not remember their names. One man watched her cook the whole day and spoke with her regarding his family and other matters. Around 4:00 p.m., the two men called her into her boss's office, which is located just off the kitchen. The men told her that the Union contract was up and the Union was taking employees' money. They asked if she would be voting the next Thursday. She replied that she had school. The men then told her that they would pay her to come in. She replied that she couldn't miss school.

Malson further testified that "the man that is here today" told her that they would give her a day's worth of pay to come in.⁸ In her initial description of the conversation with the men, Malson did not indicate that the offer of payment was tied to how she voted. However, on cross-examination, Malson testified for the first time that Albelo told her that the offer of a day's pay was tied to her coming in and voting "no" in the election.

The Union did not question Malson regarding any dissemination of this alleged objectionable offer of benefit. On cross-examination, Malson testified that she told unit kitchen employee Ann (last/name/unknown) about her conversation with the labor consultants. Although Malson testified that Ann was present at the hearing, the Union failed to call her to corroborate the alleged dissemination regarding the promise of benefit.

Ten more witnesses testified after Malson. The Union then recalled Malson to the stand and questioned her again regarding her conversation with the two men. When asked if she knew the two men by name, Malson indicated that "after today, I found out that one was Fred and one was Raphael."⁹ Malson did not testify as to how she came to know Degang's name after she had testified earlier in the day that she did not know the men's names.¹⁰ Although Malson initially

⁸ The only labor consultant present at the hearing was Albelo.

⁹ Union attorney: Do you know who those two men are by name?
Malson: After today, I found out one was Fred and one was Raphael.
Union attorney: Okay. Fred or –
Malson: Fred. Frank?
Union attorney: Frank?
Malson: Frank. Frank, I think.

¹⁰ She was informed during her testimony that the name of the labor consultant who was present at the hearing was "Raphael."

testified that Albelo, "the man who is here today," told her that she would be paid for the day if she came in to vote, on re-cross examination, Malson testified that it was Degang who first made the offer and Albelo "backed him up."

During his testimony, labor consultant Albelo admitted that he told employees that if they were off-duty the day of the election, they could clock in and clock out and be paid for the time that they would vote. He denied telling any employee that they would be paid for a full day if they came in to vote while off-duty or that he told any employees that they had to come in and vote no. Albelo denied having any one-on-one meetings with dietary employees in which he discussed voting. He testified that he did not know "Mackenzie Malson."

I observed Malson to be a pleasant witness but her overly cheerful demeanor belied the gravity of the hearing. While I credit her that she had a conversation with the labor consultants regarding voting in the election, I do not believe that her testimony accurately reflects the substance of the conversation. I do not credit her testimony that the labor consultants offered her a full day's pay in order for her to come in and vote "no" in the election. Malson failed to recount a significant portion of the alleged conversation ("vote no") until it was suggested to her on cross-examination. I found her testimony regarding "vote no" to be contrived and unconvincing. In addition, after being recalled to the stand, she changed her testimony regarding which of the labor consultants offered her the alleged promise of pay in exchange for her coming in to vote "no."

Furthermore, Malson's testimony is not supported by the credible testimony of the other employee witnesses. While I do not find the objections filed against each employer to be attributable to both employers, I note that none of the Omro CNAs who testified regarding their conversations with labor consultant Albelo regarding payment for voting stated that he promised them a day's pay if they came in and voted.¹¹ None of the other CNAs testified that Albelo linked any payment for voting, or for time spent voting, with a "no" vote.

¹¹ Omro CNA Sarah Arndt initially testified on direct that she was told that if she came in and voted, she would be paid for the day. However, she also testified that she understood that if she had been able to vote, she would have been paid for the time that she was at the facility. On cross-examination, when asked what labor consultant Albelo said to her regarding coming in on her off day to vote, she admitted that the statement he made to her was "I'll get you paid for that." Omro CNA Kristin Marks testified that she didn't know exactly what Albelo said to her but that he said, "If you're not working, you can come in and you can get paid for voting." She testified that she understood that if off-duty employees came in to vote, they would be paid for their time. Omro CNA Ashley Guden testified that Albelo told her that if off-duty employees came in on their day off, they would get paid if they voted. On cross-examination, she testified that Albelo said if the off-duty employees came to vote when they didn't have to work, they would be paid for being there.

Despite the fact that Albelo was fidgety on the stand and appeared nervous, I credit his testimony that he did not tell any employees that they would be paid a full day to come in on election day if they were off duty, or that he tied any such benefit with a requirement that they vote against the Union. Moreover, I find Regional Director of Human Resources for Consulate Heiney and labor consultant Peraino to have been candid and sincere witnesses and I fully credit their testimony. Both were forthcoming regarding the fact that the labor consultants told employees who would be off-duty on the day of the election that they would be paid for the time they punched in and out in order to vote.¹² Therefore, I do not find that Malson's testimony supports the Union's objection.

Although not specifically alleged in the Union's objections, there is testimony at the hearing regarding an offer to off-duty HCSG employees to punch in and out and be paid for their time spent voting. Labor consultant Peraino testified that he held a total of three meetings regarding the elections at which housekeeping staff, and possibly dietary employees, were present. During these meetings, Peraino stated that employees who were not scheduled the day of the election could punch in and clock out for the time that they were voting. The Union presented no HCSG employees to testify to Peraino's statements. Thus, I conclude that the credible evidence supporting the Union's objection is limited to offers that off-duty employees would be able to punch in and out and therefore be paid for their time voting.

In determining whether Peraino's statements to employees about being paid for the time they spent voting had a reasonable tendency to influence the election outcome, the offer must be analyzed under the test described in *Sunrise Rehabilitation*: the size of the benefit in relation to its stated legitimate purpose, the number of employees receiving it, how the employees would reasonably construe the purpose given the context of the offer and its timing. *Sunrise Rehabilitation*, 320 NLRB No. 20 (quoting *B & D Plastics*, 302 NLRB 245 (1991)).

In *Sunrise Rehabilitation*, the Board found that the proffered benefit was substantial – two hours of pay, which was not linked to reimbursement for actual transportation expenses, for doing nothing other than showing up to vote in the election. See also *DLC Corp., d/b/a Tea Party Concerts and/or Live Nation*, 353 NLRB 1292 (2009) (finding that the offer of four hours of pay, which was not linked to reimbursement for actual transportation expenses, to off-duty employees in exchange for going to the election to vote was objectionable conduct and warranted setting

¹² As I do not credit Malson's testimony, I do not need to determine whether an adverse inference should be drawn for Omro's failure to present labor consultant Degang to testify in this matter. I note that he was not named as an actor in any of the Union's objections and the Employer was not on notice that any of his conduct was alleged to be objectionable. The Employer called both Albelo and Peraino, who were named as actors in the Objections, to testify at the hearing.

aside the election). Here, the proposed benefit is not nearly as substantial. There is no set amount of pay that employees were to receive if they showed up to vote; rather, employees were told that they would be paid for their time spent voting. Thus, the off-duty employees were not promised any additional “benefit” beyond what on-duty employees would have received had they voted while on the clock. I note that this comports with the common NLRB practice of scheduling elections so that employees are able to vote on work time.¹³

It is not clear how many HCSG employees, if any, heard Peraino’s statement that off-duty employees could be paid for the time they spent voting. No HCSG employees testified to being aware of such an offer. Dietary cook Shirley Meihak testified to attending a meeting where Peraino spoke but she was not questioned about any comments he made about being paid for voting.

Based on the schedules provided by HCSG, it appears that three dietary employees, including Malson, were off-duty on the day of the election and therefore potentially affected by the offer of payment. While this is more than de minimis given that the schedules reflect that HCSG employed 8 dietary employees and six housekeeping employees at the time of the election, on the other hand there is no evidence that any of the three off-duty employees voted.¹⁴ Thus, the only HCSG employees who received pay for February 13, the day of the election, were those employees who were scheduled to work that day.

I conclude that the paucity of the proffered benefit of pay for the time spent voting, and the lack of testimony from any HCSG employees confirming that they either heard or received the offer outweighs any concerns regarding the context within which the offer was made and the timing of the offer. The benefit at issue is so insubstantial that is unlikely to even cover off-duty employees’ transportation costs to get to the election. Therefore, I do not find the offer to pay off-duty employees for the time they spent punched in while voting warrants setting aside the election.

¹³ The NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11302.3, Selection of Hours, states, in relevant part, “The voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, without making a special trip to vote.”

¹⁴ In its brief, the Union contends that HCSG scheduled six housekeeping employees to work on the date of the election rather than the normally scheduled three to four employees. The Union argues that scheduling employees for work who would not otherwise have been scheduled is a favor from the employer that an employee may feel obligated to repay by voting against the Union. I cannot conclude on the basis of two weekly schedules that HCSG normally schedules three to four housekeeping employees to work and that scheduling six to work on election day was a departure from established practice. Furthermore, an allegation that HCSG intentionally scheduled employees to work on the day of the election in order to sway their vote is not sufficiently related to the objection at hand.

Even if I found the offer of payment for the time off-duty employees spent voting objectionable, such conduct did not have a reasonable tendency to affect the outcome of the election. In *Detroit Medical Center Corporation*, 331 NLRB 878 (2000), the Board agreed with the hearing officer's conclusion that, standing alone, an offer of an hour's pay to nine off-duty employees for coming to vote in a Board election, where 63 employees out of a total voting complement of 2000 were aware of the offer, did not have a reasonable tendency to influence the outcome of the election. In the instant case, the offer was far less substantial, no employees received the proffered benefit and there is no evidence as to how many, if any, HCSG group employees were aware of the offer. Accordingly, I recommend that the objection in Case 18-RD-120778 be overruled.

Objection 1 in Case 18-RD-120779

Objection 1 in Case 18-RD-120779 asserts that Omro representatives told employees who were scheduled to work the day following the election that they would receive the day off with pay if they voted no. More specifically, the objection alleges that on about February 14, 2014, several employees who were previously scheduled to work were provided the day off because they agreed to vote "No" in the election.

The Union failed to present any evidence in support of this objection. Therefore, I recommend that Objection 1 in Case 18-RD-120779 be overruled.

I decline to find, as urged by the Union, that this objection encompasses statements by labor consultants Peraino and Albelo to Omro employees that if employees were off-duty on February 13, they could punch in and out in order to be paid for the time that they spent voting. The statements that the Union now argues are objectionable involve a new legal theory and different factual circumstances than those set forth in the objection. The testimony concerns an entirely different offer of benefit than that set forth in the objection (an offer of payment for time spent voting versus an offer of a paid day off for voting no). The testimony that off-duty employees were told that they could punch in and out on February 13 in order to be paid for their time spent voting is not sufficiently related to the written objection that employees were promised, and granted, the day after the election off if they agreed to vote "no." See *Iowa Lamb Corp.*, 275 NLRB 185 (1995); *Precision Products Group*, 319 NLRB 640 (1995).

The Board does not consider evidence of misconduct unrelated to objections unless the "objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but previously unavailable." *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984). The Union did not proffer any evidence during the hearing that the testimony regarding labor consultants Peraino and Albelo's offer to off-duty employees that they could punch in and out and be paid for

their time spent voting was newly discovered or previously unavailable.

In the alternative, if the objection reasonably encompasses the labor consultants' statements in question, I find that the offer did not have a reasonable tendency to sway the results of the election based on the paucity of the offer and the fact that none of the CNAs who testified to receiving the offer actually voted in the election. Moreover, the evidence reveals that only one CNA punched in and out in order to vote in the election.¹⁵ Her vote would not have affected the results of the election, which had 9 votes cast against Union representation and 5 votes cast in favor of such representation.

Objection 2 in Case 18-RD-120779

Objection 2 in Case 18-RD-120779 asserts that Omro representatives harassed and isolated Union workers during a meeting of workers called by management employees and then demanded that they leave the meeting. More specifically, on about February 4 and 5, Keith (whose last name is currently unknown) and Raphael Rodriguez, made disparaging comments about Union supporters in front, and/or disseminated to, other employees. Additionally, on about February 6, flyers were posted in the facility that disparaged Union supporters.

Omro CNA and Union work site leader Virginia Van Dyke testified that on February 5, she was called to a meeting in Dagget Lounge. Before being called into the meeting, according to Van Dyke, DON Deanna Kroll told her that the meeting was regarding a plan of correction for the state. However, when Van Dyke arrived at the meeting, she saw labor consultants Peraino and Albelo. Van Dyke then accused DON Kroll of lying to her. Van Dyke admitted that at this time she was a little upset. When asked in the meeting to sit down, Van Dyke indicated that she preferred to stand. Van Dyke testified that labor consultant Peraino then accused her, in the presence of the employees attending the meeting, of telling employees that they made below minimum wage. She responded that she had never made statements about people making below minimum wage and that she was not lying. According to Van Dyke, Peraino then asked her and CNA Rhonda Verburgt to leave the meeting. Van Dyke left the meeting and told a couple of CNAs, whose names she could not recall, that she was thrown out of the meeting. She also told them that she was upset about being called a liar because she never told anyone that they would make below minimum wage.

CNA Rhonda Verburgt testified that when she and CNA Van Dyke arrived at the meeting, they saw labor consultants Peraino and Albelo, and Regional Director of Human Resources for

¹⁵ CNA Hannah Egan received 31 cents for the three minutes that she was punched in.

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Cosulate Heiney.¹⁶ Verburgt and Van Dyke were asked to sit but declined. The labor consultants introduced themselves and then stated that there were rumors that if the Union went away everybody would be dropped down to minimum wage. They stated that this would not happen at the facility. They then turned and looked at Van Dyke and Verburgt and said, "You two can now leave."

Verburgt further testified that after the leaving the meeting, she went to the kitchen to ask Brittany (last/name/unknown) if she felt that Verburgt had bullied her into putting on a "vote yes" tag.¹⁷ Shirley (last/name/unknown), Brittany and Verburgt then walked back to the meeting. Verburgt stated that she wished to clarify that she did not bully Brittany into putting a tag on. As she and the other women walked away, she heard one of the gentleman say, "Now, isn't that just pathetic."¹⁸

Heiney, the Regional Director for Human Resources for Consulate, and labor consultants Peraino and Albelo also testified regarding the meeting that CNAs Van Dyke and Verburgt attended. All three testified that the two CNAs were behind Heiney and Peraino and continually interrupted Heiney as she was speaking. They were then asked to leave the meeting due to their interruptions.

I credit Heiney, Peraino and Albelo's testimony that CNAs Van Dyke and Verburgt were asked to leave the meeting as they were being disruptive. There is no dispute that Van Dyke and Verburgt were asked to sit during the meeting and declined to do so. Van Dyke admitted that she was a "little upset" during the meeting. She stated several times that she did not tell employees about minimum wage in a "louder, a little louder" tone. She testified that the labor consultants stated that they had statements that she had told people they made below the minimum wage. However, Van Dyke's testimony is not supported by the other witnesses, including Union witness Verburgt, who testified that the men stated that "someone" told employees that if the Union went away, everybody would be dropped to minimum wage. No other witness supported Van Dyke's testimony that any statements regarding minimum wage were specifically attributed to her. Based on the evidence presented, I conclude that no objectionable conduct occurred at this

¹⁶ Based on other testimony, I believe that Beverly refers to Beverly Heiney, the Regional Director of Human Resources for Consulate.

¹⁷ Verburgt indicated that she went to speak to Brittany because "they" mentioned that someone had bullied some of the workers to put "vote yes" tags on.

¹⁸ Brittany was not called to testify. Shirley Meihak, a dietary cook and a Union work site leader, testified at the hearing regarding attending a meeting with the labor consultants but she did not testify about walking to a meeting with Verburgt or Brittany or any "pathetic" statement by the labor consultants.

meeting.

The day after the meeting, HCSG employee and Union work site leader Shirley Meihak found posted handwritten signs on the Union bulletin board in the break room and on the table in front of the Union board.¹⁹ There is no evidence to establish that the signs were created and/or posted by Omro or the labor consultants, or that they even knew of the signs' existence.²⁰ There is no evidence that the posted signs were viewed by anyone other than HCSG employee Meihak, who promptly removed them and provided them to CNA Verburt, or that the existence of the signs was disseminated to any employees other than Verburt and Van Dyke.²¹ I find that these signs do not constitute objectionable conduct. I recommend that Objection 2 in Case 18-RD-120779 be overruled in its entirety.

Conclusion

Based on the foregoing, I conclude and recommend that the Union's Objections in each case be overruled in their entirety, and that a Certification of Results should issue in Case 18-RD-120778 and Case 18-RD-120779.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this report, any party may file with the Board in Washington, DC, exceptions to such report with or without supporting brief. Immediately upon filing of such exceptions, the filing party shall serve a copy, together with any brief filed, upon the other parties and upon the Regional Director and simultaneously submit to the Board a statement of such service. See Section 102.69(f) as to the time limit for filing an answering brief to the

¹⁹ One sign read, "UNION BULLIES VIRGINIA + RHONDA LETS GET OUR DUES BACK." The second sign read, "SAY NO TO HARASSMENT! SAY NO TO RHONDA, AND VIRGINIA!!!"

²⁰ Although I decline to extend this objection to HCSG, I note that there is no evidence that HCSG played any part in the posting of the signs or that it was aware of the signs' existence.

²¹ I believe the logical reading of Objection 2 in Case 18-RD-120779 is that the "disparaging comments" made by Peraino and Albelo about Union supporters in front of other employees refers to comments made at the meeting described in the objection. I do not believe that the objection reasonably encompasses the alleged statements that CNAs Van Dyke and Verburt heard the labor consultants make as they were passing outside a patient's room. Van Dyke testified that she heard the consultants say, "There goes trouble" or "There's trouble." Verburt testified that the consultants said, "These two are our troublemakers." Van Dyke and Verburt admitted that they did not hear the rest of the labor consultants' conversation as they passed by so the context in which the statements were made is unknown. There is no evidence that the statements were heard by or disseminated to any other bargaining unit employees. Even if such statements were encompassed by the objection, I would not find them objectionable.

exceptions. If no exceptions are filed to the Hearing Officer's Report, the Board may decide the matter upon the record or make other disposition of the case.²²

Dated at Milwaukee, Wisconsin, on April 11, 2014.



Tabitha Boerschinger, Hearing Officer
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²² Filing exceptions may be accomplished by accessing the E-filing system on the Agency's website. To file such exceptions electronically, go to www.nlr.gov and select the E-File Document tab, enter the NLRB Case Number, and follow the detailed instructions. Exceptions may also be filed by mail to National Labor Relations Board, Attn: Executive Secretary, 1099 14th St NW, Washington, DC 20570-0001. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website. A request for an extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the exceptions with the Board.