**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**

**OLEAN GENERAL HOSPITAL,**
**Employer**

**and** **03—RC—111355**

**COMMUNICATION WORKERS OF AMERICA, AFL-CIO,**
**Petitioner**

*James N. Schmit, Esq*.
Jaeckle Fleishmann & Mugel, LLP
for the Employer

*Catherine Creighton, Esq.*
Creighton, Johnson & Giroux
for the Petitioner

## DECISION AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND OBJECTIONS

Thomas M. Randazzo, Administrative Law Judge. This case was heard by me on December 17 and 18, 2013, and on January 28 and 29, 2014, in Olean, New York. The hearing addressed numerous challenged ballots and objections to the election conducted on October 25, 2013.

## PROCEDURAL HISTORY

Based upon a petition filed on August 16, 2013, and pursuant to a Stipulated Election Agreement (the Agreement) entered into by Olean General Hospital (the Employer) and the Communication Workers of America, AFL—CIO (the Petitioner), and approved by the Acting Regional Director for Region 3 on August 28, 2013, an election was conducted on October 25, 2013, in the following described appropriate collective-bargaining unit:

> All full-time and regular part-time technical employees employed by the Employer at its Olean, New York, Delevan, New York, Franklinville, New York, and Salamanca, New York facilities, including the classifications of Licensed Practical Nurse, Biomedical Services Technician, CT Tech, Dental Hygenist, Registered Cardiac Sonographer (Echo Tech), Licensed Practical Nurse — Endoscopy Technician (Endo Tech), MRI Technologist, Nuclear Medicine

> Technologist, Certified Occupational Therapy Assistant, Physical Therapy Assistant, Radiation Therapist, Radiologic Technologist, Registered Cardiac Sonographer, Registered Sleep Laboratory Technician, Certified Respiratory Therapy Technician, Registered Respiratory Therapist, and Ultrasound Technologist, excluding all other non-professional employees, professional employees, registered nurses, business office clerical employees, guards and supervisors as defined in the Act.

The polling took place in classroom 4 at the Employer's facility located at 515 Main Street, Olean, New York (the Employer's main facility) and consisted of three sessions: 5:30 – 8:30 a.m.; 11 a.m. – 1:00 p.m.; and 3 – 7:30 p.m.

The tally of ballots issued at the conclusion of the election revealed that of approximately 120 eligible voters, 118 cast ballots, of which 45 cast ballots for the Petitioner, 55 cast ballots against the Petitioner, and there were 18 challenged ballots, which were sufficient in number to affect the results of the election.

On November 1, 2013, the Petitioner filed timely Objections to Conduct Affecting the Results of the Election, a copy of which was duly served upon the Employer. Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, the Region conducted an investigation of the challenged ballots and the objections. Thereafter, on November 20, 2013, the Acting Regional Director issued his Order Directing Hearing on Challenged Ballots and Objections and notice of hearing, wherein he recommended that a hearing be held before an administrative law judge to resolve the issues raised in the challenged ballots and Petitioner's Objections 1 through 12.

Thereafter, in the hearing held before me the Parties appeared, participated, and were given full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. Thereafter, the Employer and Petitioner filed briefs which I have carefully considered.

On the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations with respect to the issues presented in this proceeding.

## THE CHALLENGED BALLOTS

### I. BACKGROUND

In the petition filed on August 16, 2013, the Petitioner sought to represent employees of the Employer, located at 515 Main Street, Olean, NY 14760, in a unit that included "All full-time and per diem Licensed Practical Nurses and Technicians," and which excluded "RNs, Professional employees, Service & Maintenance, Business Office Clerical, Managers, Guards and Supervisors as defined in the Act."

As mentioned above, the Parties entered into a Stipulated Election Agreement on August 28, 2013. In the commerce section (sec. 2) of the Stipulated Election Agreement, the Parties

agree that the Employer is engaged in the operation of an acute care hospital. The commerce section of the Agreement also states that the Employer is a not-for-profit New York corporation with a principal office and facility located at 515 Main Street, Olean, New York, and the following facilities: the Sleep Disorder Center located at 100 Main Street, Olean, New York, the Barry Street Health Center/Oncology located at 528 North Barry Street, Olean, New York, the Blood Draw Station located at 2223 West State Street, Suite 105, Olean, New York, the Delevan Health Center located at 38 Main Street, Delevan, New York, the Dialysis Center located at 623 Main Street, Olean, New York, the Franklinville Clinic located at 86 South Main Street in Franklinville, New York, the Gundlah Dental Center located at 623 Main Street, Olean, New York, the Holiday Park Health Center & Industrial Health/Occupational Wellness facility located at 2666 W. State Street, Olean, New York, the Outpatient Surgery Center, 500 Main Street, Olean, New York, a radiation medicine facility located at 1415 Buffalo Street, Olean, New York, and the Salamanca Clinic located at 4039 Rt. 219, Salamanca, New York.

In the commerce section, the Parties agree that commerce is specifically based on the fact that, "During the past 12 months, a representative period of time, the Employer derived gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000, which goods were shipped directly to the Employer's Olean, New York facility from points located outside the State of New York."

Contrary to the technical unit originally sought at only the Employer's main facility, the Parties eventually expanded the scope of the unit to include all of the Employer's facilities. In this connection, the unit stipulation, as mentioned above, states the Parties agreed the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time[1] technical employees employed by the Employer at its Olean, New York, Delevan, New York, Franklinville, New York, and Salamanca, New York facilities, including the classifications of Licensed Practical Nurse, Biomedical Services Technician, CT Tech, Dental Hygenist, Registered Cardiac Sonographer (Echo Tech), Licensed Practical Nurse — Endoscopy Technician (Endo Tech), MRI Technologist, Nuclear Medicine Technologist, Certified Occupational Therapy Assistant, Physical Therapy Assistant, Radiation Therapist, Radiologic Technologist, Registered Cardiac Sonographer, Registered Sleep Laboratory Technician, Certified Respiratory Therapy Technician, Registered Respiratory Therapist, and Ultrasound Technologist.[2]
>
> Excluded: All other non-professional employees, professional employees, registered nurses, business office clerical employees, guards and supervisors as defined in the Act.

[1] The Parties agreed that to qualify as "regular part-time" a per diem or casual employee must have worked an average of 4 or more hours per week in the 13-week period immediately preceding the eligibility date.

[2] The Parties agreed that there was a dispute as to whether the OR technician and sleep lab technician classifications should be included in the appropriate unit, and they agreed to resolve the issue by challenged ballot procedure in a post-election proceeding, if necessary.

In the election, the ballots of certain voters were challenged by the Petitioner, the Employer, and the Board agent conducting the election. Specifically, the Petitioner challenged the ballots of six employees (Gregory Juul, John Long, Laurie Krug, Christina Guimond, Kevin Griffin, and Lauren Bushnell) alleging they are employed at the Salamanca, New York Casino, a site not in the appropriate bargaining unit. The Employer challenged seven operating room or OR technicians (Mary Anne Bove, Anthony Titus, Matthew Barnard, Casey Belleisle, Donald Harris Jr., Todd Oliver, and Mary Grogan) and two sleep laboratory technicians (Kristina Fries and Janine Ours), alleging those classifications should not be in the bargaining unit.[3] Finally, the Board agent conducting the election challenged the ballots of three employees (Kim Mulkin, Andrea Keim, and Lisa Counsins) because their names did not appear on the voter eligibility list.

## II. GENERAL PRINCIPLES OF LAW

The Board has found that to be eligible to vote in a Board election, the employee must be in the appropriate unit: (1) on the established eligibility date (which is normally during the payroll period immediately preceding the date of the direction of election, or election agreement), and (2) in employee status on the date of the election. See, for example, *Plymouth Towing Co.,* 178 NLRB 651 (1969); *Greenspan Engraving Corp.,* 137 NLRB 1308 (1962); *Gulf States Asphalt Co.,* 106 NLRB 1212 (1953); *Reade Mfg. Co.,* 100 NLRB 87 (1951); *Bill Heath, Inc.,* 89 NLRB 1555 (1949); and *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993).

The community of duties and interests of the employees involved is a major determinant in an appropriate unit finding. When the interests of one group of employees are dissimilar from those of another group, a single unit is inappropriate. *Swift & Co.,* 129 NLRB 1391 (1961). However, the fact that two or more groups of employees engage in different processes does not by itself render a combined unit inappropriate if there is a sufficient community of interest among all the employees. *Berea Publishing Co.*, 140 NLRB 516, 518 (1963).

The Board has found that many considerations or factors enter into a finding of community of interest, such as the degree of functional integration (*Publix Super Markets, Inc*., 343 NLRB 1023 (2004); *United Rentals, Inc.,* 341 NLRB 540 (2004)); common supervision (*United Rentals,* supra); *Bradley Steel, Inc.*, 342 NLRB 215 (2004)); the nature of employee skills and functions (*Overnite Transportation Co*., 331 NLRB 662 (2000)); interchangeability and contact among employees (*United Rentals*, supra)*;* common work situs (*Bank of America*, 196 NLRB 591 (1972); *Kendall Co.,* 184 NLRB 847 (1970)); general working conditions (*United Rentals,* supra*; s*ee also *K.G. Knitting Mills*, 320 NLRB 374 (1995); and fringe benefits (*Cheney Bigelow Wire Works*, 197 NLRB 1279 (1972)).

The unit question is resolved by weighing all the relevant factors against the major determinant of community of interest. See, e.g., *Publix Super Markets,* supra; *Bradley Steel, Inc*., supra; *Trumbull Memorial Hospital,* 338 NLRB 917 (2003); *United Operations, Inc*., supra; and *Hotel Services Group,* 328 NLRB 116 (1999).

[3] In the stipulated election agreement, the parties agreed that the OR technicians and sleep laboratory technicians would vote under challenge and their unit placement would be resolved in a post-election proceeding, if necessary.

## III. CHALLENGED BALLOTS

### A. The Casino LPNs

Despite the fact that LPNs are included in the appropriate bargaining unit, the Petitioner challenged the ballots of LPNs Gregory Juul, John Long, Laurie Krug, Christina Guimond,[4] Kevin Griffin, and Lauren Bushnell because they are employed at the Seneca Allegheny Casino, a site allegedly not included in the bargaining unit. The Employer contends that the Casino location should be included in the unit and the LPNs are therefore eligible to vote.

Timothy McNamara, the Employer's vice president of human resources, testified that the Employer employs six LPNs at the Seneca Allegheny Casino where it has a contract with the Casino to provide health services to the Casino employees.[5] The Employer does not have an ownership interest in the Casino and it does not lease or rent the Casino LPNs' workspace. Under the terms of the Casino's contract with the Employer, the Casino provides the LPNs with a room, employee health care office, and medical equipment. The Employer has provided the Casino with LPNs for approximately 4 years and they provide 24 hour/7 days a week service.

The record reveals that the Casino LPNs are directly supervised by Mindy Haskins, a nurse practitioner or physician assistant at the Casino facility,[6] and Haskins oversees the operation and direction of the LPN duties on a daily basis.[7] Hankins makes the hiring decisions and she recommends discipline to Baggazzoli, who oversees all LPNs and is located at the main hospital facility. McNamara testified that the Casino LPNs do not report directly to the Employer's main facility or hospital, except for possibly once a year when they report to the hospital for some employee health training. The record reveals that the LPNs have the same wages, health benefits, insurance and pension plans as the Employer's LPNs at its facilities where it owns, leases or rents space. McNamara testified that while Casino LPNs are able to bid on jobs in the Employer's facilities, and are considered "internal applicants," only one employee (Lauren Bushnell) transferred from the Employer's hospital to the Casino before the election.[8] Bagazzoli testified that the Casino LPNs do not have access to the Employer's intranet site and do not receive employee announcements. She also testified that their work does not require that they go to, or work, at the Employer's hospital.

As mentioned above, the Parties entered into a Stipulated Election Agreement in this case when they met at the NLRB's Buffalo, New York Regional Office on August 28, 2013, for a hearing on the Representation case issues. In that meeting, the Employer's representatives consisted of the Employer's attorney, James Schmit, McNamara, and other management

[4] At the hearing the Parties agreed that Guimond maintained a sufficient number of hours to be eligible to vote, but the Petitioner's challenge is based on the assertion that as a Casino LPN she should be excluded from the unit.

[5] Customers are apparently only treated by the LPNs if their condition constitutes a medical emergency.

[6] McNamara stated that her title was nurse practitioner, while Gail Bagazzoli stated that Hankins was a physician assistant. It is undisputed that Mindy Hankins is not in the bargaining unit.

[7] Gail Bagazzoli testified that Hankins handles the day-to-day operation of the Casino LPNs with regard to nursing complaints, schedules and clinical duties.

[8] The record reveals that employee Lou Failla transferred from the hospital to the Casino after the election, and Guimond transferred from the Casino to the hospital after the election.

personnel. The Union was represented by Union Organizer Anne Luckdeak, Union Attorney Cathy Crieghton, and Union Organizer Ann Converso. Luckdeak testified that during the negotiations for the stipulation, the Schmit provided the Union with a list of locations that Luckdeak believed the Employer was claiming would be included in the unit. It is undisputed that the Casino location was not included on that list. The list allegedly contained unexplained numbers by each location, which she thought was meant to reflect the number of LPNs at each facility. No clarification was sought, nor explanation given, for the alleged numbers by each location, and the list has not been introduced into evidence.

McNamara testified that he asked his administrative assistant to provide a list of the Employer's facilities and addresses that it owned or leased, but he testified that the list did not include all locations where the Employer's employees worked. He stated that Schmit wanted the list for the commerce section of the stipulation, and that those locations on the list were subsequently incorporated into the commerce section. McNamara testified that he did not provide Schmit with the numbers of employees for the locations on the list, and he did not recall seeing numbers on the list. Luckdeak testified that the Employer's list of locations was given to the Board agent, who drafted the Stipulated Election Agreement. The Board agent then brought the Agreement to the Parties, who reviewed it and signed it.[9]

Both Luckdeak and Converso testified that they believed the purpose of the list was to determine the locations that were to be included in the bargaining unit, and that since the Casino was not listed as one of the locations, the Casino LPNs would not be included in the unit. Luckdeak further testified that she knew the Employer employed LPNs at the Casino location but she did not seek to include them in the stipulation. In fact, she testified that neither the Union nor the Employer raised the issue of including or excluding the Casino LPNs in the unit at any time prior to entering into the stipulation. McNamara stated that he wanted to make sure he included all the LPNs employed by the hospital, but at that time he had no conversations about the Casino employees and never brought up the issue of their inclusion or exclusion with the Petitioner. McNamara testified that, as the Employer's main representative in the meeting, he read the Stipulation and agreed to enter into it.

McNamara acknowledged that the list of the Employer's locations in the commerce section of the Stipulation included only the locations that the Employer owned, leased or rented. However, the wording of the "Unit and Eligible Voters," or unit stipulation section of the Stipulated Election Agreement, states that the included employees are ". . . those employed by the Employer at its Olean, New York, Delevan, New York, Franklinville, New York, and Salamanca, New York facilities . . . ." Despite reading and agreeing to this language in the Stipulation, McNamara testified that he never brought up, nor asserted at any time prior to

[9] The Petitioner asserts in its brief at p. 26 that: "When the Board agent drafted the stipulation, it included the specific addresses from Mr. Schmit's list in paragraph 2, which is the commerce clause. Rather than repeat the specific addresses in the unit section, the Board agent wrote 'all full time and regular part time employees employed by the Employer at its Olean, New York, Delevan, New York, Franklinville, New York and Salamanca, New York facilities.'" However, the Board agent did not testify in this case and these alleged facts are not found in this record. The Employer has not made a motion to strike these allegations from the Petitioner's brief, but since these alleged facts are not in the record, I have not considered, nor relied upon them in reaching my findings, conclusions and recommendations herein.

entering into the Stipulation, that the Unit should include employees employed by the Employer at facilities it does not own, lease or rent, but where the Employer provides services.

In addition, McNamara testified that besides the Casino, the Employer has employees at locations where the Employer does not own, lease or rent the space, such as at the Olean schools (High School, Middle School and two Elementary Schools), a Total Senior Care facility, Rehab Center, and Life Skills of Cattaraugus County. Luckdeak testified that she was not aware that PT assistants were working at the Olean Schools at locations not listed in the Stipulated Election Agreement.

It is well established that the Board applies the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), to determine whether challenged voters are properly included in a stipulated bargaining unit. Pursuant to that test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in "clear and unambiguous terms" in the stipulation, the agreement is simply enforced. However, if the stipulation is ambiguous, the Board must determine the parties' intent through normal methods of contract interpretation, including examining extrinsic evidence. If the parties' intent still cannot be discerned, the Board then applies the community-of-interest test to determine the eligibility of the challenged voters. Id. at 1097.

The Parties agree that applying *Caesar's Tahoe's* three-part test is the appropriate standard for resolving the Casino LPN issue. The Parties further agree that the issue whether to include the Casino LPNs in the stipulated Unit should be decided in the first prong of the test, and that the Agreement is clear and unambiguous on its face. However, they disagree on the manner in which their intention has been expressed. In this regard, the Petitioner alleges that the stipulation clearly and unambiguously excludes the LPNs working at the Casino, and the Employer argues that it clearly and unambiguously includes them. The Petitioner argues that the analysis should apply not just to the unit stipulation (sec. 5), but also to the commerce stipulation (sec. 2), and that taken as a whole, the Employer's placement of all its locations (and purposeful exclusion of the Casino location) in the commerce stipulation makes it clear and unambiguous that the Casino LPNs should not be excluded. The Employer, on the other hand, argues that the focus should be strictly upon the unit stipulation portion of the Agreement, and that the unit description clearly and unambiguously includes all LPNs, including those employed at the Casino.

In applying the first prong of the *Caesar's Tahoe* test, the case law reveals that the Board focuses its analysis upon the parties' unit stipulation. See *Regional Emergency Medical Services, Inc.*, 354 NLRB 224 (2009)(The Board found that the language of the parties' unit stipulation reflects their clear and unambiguous intent to exclude contingent employees); See also *Northwest Community Hospital*, 331 NLRB 307 (2000)(The Board will find that the parties have "a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description").

While many Board cases on this subject have involved whether to include certain types or classifications of employees in the unit, the Board has specifically addressed the issue whether an agreed upon classification at a disputed location or facility should be included in the unit, as is in the instant case. In that regard, I find that the Board's Decision and Direction in *St. Vincent*

*Hospital, LLC*, 344 NLRB 586 (2005) is on point and particularly persuasive in resolving the issue in the instant case. In *St. Vincent Hospital,* supra, the employer operated four facilities: the Medical Center facility, the Vernon Hills facility, the 10 Washington Square facility and the 20 Washington Square facility. The parties' Stipulated Election Agreement provided a unit for employees employed at the Medical Center and Vernon Hills facilities. The Agreement did not include the employees at the 10 and 20 Washington Square facilities. Id. at 588. Based on challenges and objections, the regional director ordered a hearing on the challenged ballots and objections. Following a hearing, the administrative law judge recommended, inter alia, overruling the petitioner's challenge to the ballot of employee Bernard, who was employed at the 10 Washington Square facility. The petitioner filed exceptions alleging, inter alia, that Bernard should be excluded from the unit because the Agreement expressly included only employees at the Medical Center and Vernon Hills locations. The judge, apparently applying the community-of-interest test, found that even though Bernard was employed at a facility not listed in the Agreement, she should nevertheless be included in the unit because she was employed in a covered classification and worked across the street from, and in the course of her duties sometimes traveled to, the Medical Center facility. Id. The judge also noted that the employees working at the 10 Washington Square facility were able to park in the same parking lot used by the Medical Center employees, and that the 10 Washington Square facility operated under the same procedures and labor relations policies as did the Medical Center and Vernon Hills facilities. Id. The judge implicitly found that Bernard shared a sufficient community of interest with the unit employees at the Medical Center and Vernon Hills facilities to warrant her inclusion in the bargaining unit. Id. On that basis, the judge recommended overruling the challenge to Bernard's ballot. Id.

In *St. Vincent Hospital*, the Board, applying the *Caesar's Tahoe* three-part test, reversed the judge on Bernard's ballot issue, finding that under the first prong of the test, the stipulated unit description in the parties stipulated election agreement unambiguously included only the employees employed at the Medical Center and Vernon Hills locations, and did not include the employees at the 10 Washington Square location, where Bernard was employed. Id. On that basis, the Board determined that "… the intent of the parties that employees working at the 10 Washington Square facility be excluded from the unit is unambiguously manifested in the stipulated unit description." Id. citing *Northwest Community Hospital*, 331 NLRB 307 (2000). The Board further found that, in light of the parties' clear and unambiguous intent to exclude those employees, the judge erred in relying upon extrinsic evidence of the employer's pre-Agreement proposal to include the employees at the 10 Washington Square location in the unit, and in applying the traditional community-of-interest test to conclude that Bernard should be included in the unit. On that basis, the Board reversed the judge on that issue and sustained the challenge to Bernard's ballot. Id.

The Board's rationale in *St. Vincent Hospital* is applicable to the instant case. In that regard, the facts of the instant case reveal that the Employer and Petitioner were both aware of the existence of LPNs at the Casino, which is a facility the Employer does not own, lease, or rent. Prior to entering into the Stipulated Election Agreement, neither party discussed, or even mentioned, the question whether the Casino LPNs should be included or excluded from the unit. Despite the fact that the petition for election sought employees at the Employer's main facility in Olean, New York, the parties eventually entered into a stipulated election agreement, in which the unit stipulation states that the included employees consist of: "All full-time and regular part-

time technical employees employed by the Employer at its Olean, New York, Delevan, New York, Franklinville, New York, and Salamanca, New York, facilities . . . ." I find that the stipulated unit reflects the parties' clear and unambiguous intent to include only those employees employed at "its facilities," which would encompass facilities such as those that it owns, leases or rents, and to exclude those employees employed by the Employer at facilities it does not own, lease or rent, but where the Employer nevertheless provides services or employs employees, such as the Casino location at issue.

I make this finding even though the unit stipulation does not specifically exclude those employees or generally exclude "all other employees" employed at locations that are not "its facilities" or "locations it does not own, lease or rent," but where it has employees or provides services. In support of this finding, I note, as mentioned above, that the Employer does not dispute the Casino is not one of "its facilities." In addition, I find it significant that despite reading and agreeing to the language in the unit stipulation, McNamara testified that he never brought up, nor asserted at any time prior to or during the negotiation of the unit stipulation, that the unit should include employees employed by the Employer at facilities it does not own, lease or rent, but where the Employer provides services, which would accurately describe and include the Casino LPNs. There is no question that the parties possessed specific knowledge of the distinction, and some significance must be attributed to the Employer's agreement to include only employees at "its facilities." I also note that the parties specifically gave consideration to which locations should be included in the unit, because the evidence reveals that the Petitioner originally sought employees only at the Employer's main facility in Olean, New York, but eventually entered into a unit stipulation wherein the parties agreed to expand the scope of the unit to include employees at its other facilities.

Support for finding that the unit stipulation clearly and unambiguously excludes the Casino LPNs is also supported by the Board's decision in *Northwest Community Hospital*, 331 NLRB 307 (2000). In that case, the employer had three categories of maintenance employees: full-time, part-time, and hourly on-call. The union petition sought all three categories, but the parties' unit stipulation specifically included only regular full-time and regular part-time employees. Id. The Board found that the stipulation was clear and unambiguous in its intent to include only full-time and part-time employees and exclude hourly on-call employees from the unit, even though it failed to specifically exclude them, or exclude them by general terms such as "all other employees." The Board found that there was a distinct difference in those types of employees, the petitioner knew of the distinction, and that the petitioner's agreement to include only regular full-time and regular part-time was therefore significant.

Similarly, finding that the parties' intent was clear and unambiguous in excluding the Casino LPNs is supported by *Regional Emergency Medical Services,* supra. In that case, the Board, in addressing the issue whether the hearing officer correctly found that contingent employees belonged in the stipulated bargaining unit, and that the challenge to an employee's ballot should be overruled, applied the *Caesar's Tahoe* test and found that the language of the parties' unit stipulation reflected their clear and unambiguous intent to exclude contingent employees. In *Regional Medical*, the parties' unit stipulation included, in relevant part, "all full-time and regular part-time emergency medical technicians," where the unit originally sought by the union in its petition for election was different, also including "contingent employees." Id. The Board reversed the hearing officer's recommendation to overrule the challenge to a

contingent employee's ballot, finding that *Northwest Community Hospital*, supra, was controlling, and finding that the unit stipulation unambiguously established the intention of the parties to exclude the contingent employees from the unit. In that case, like in *Northwest Community Hospital*, the Board gave weight to, inter alia, the fact that the petitioner was aware of the distinct contingent classification, and included that classification in the petition's unit description, but stipulated to a unit that failed to mention contingent employees. *Id*. Even though the stipulated unit did not exclude contingent employees or "all other employees," the Board found it nevertheless showed the parties' clear and unambiguous intent to include only full-time and part-time employees in the unit, and to exclude contingent employees. *Id*.

Thus, based on the evidence and the well established case law discussed above, I find that, despite the fact that the parties failed to specifically exclude the Casino LPNs from the stipulated unit, the stipulated unit nevertheless shows the parties' clear and unambiguous intent to include only the employees at the Employer's facilities in the bargaining unit, and to exclude employees employed at facilities that were not "its facilities," such as the Casino, which is not owned, leased or rented by the Employer. *Caesar's Tahoe,* supra; *St. Vincent Hospital,* supra; *Regional Medical,* supra; *Northwest Community Hospital,* supra; see, e.g., *S & I Transportation, Inc.*, 306 NLRB 865 (1992) (Board sustained the challenge to the ballot of an employee who worked in a covered classification on the ground that he was excluded from the unit because he worked at a different facility from that described in the unit description.).[10]

Accordingly, I recommend sustaining the challenges to the ballots of Casino LPNs Gregory Juul, John Long, Laurie Krug, Christina Guimond, Kevin Griffin, and Lauren Bushnell.

B. The OR Technicians

The unit description in the Stipulated Election Agreement does not set forth OR technicians as eligible voters for the election. However, a footnote in the unit stipulation reflects that the Parties agreed the unit placement of the OR technicians was at issue, and they should vote under challenge and have their unit placement resolved in a post-election proceeding. In that regard, the ballots of Mary Anne Bove, Anthony Titus, Matthew Barnard, Casey Belleisle, Donald Harris Jr., Todd Oliver, and Mary Grogan were challenged by the Employer because these employees are in a classification the Employer contends should not be included in the

[10] Based upon my finding that the objective intent of the parties was expressed in clear and unambiguous terms in the unit stipulation to exclude the Casino LPNs from the bargaining unit, my analysis ends and no further analysis is necessary. Therefore, I find it unnecessary to pass on the second part of the test (examining extrinsic evidence to interpret the stipulation), and the third part of the test (application of the tradition community-of-interest criteria to determine the eligibility of the challenged voters).

I similarly find it unnecessary to address the Employer's argument in its brief (p. 11) that LPNs assigned to the Casino should be included in the unit and their votes counted because some of the Employer's other employees, such as physical therapists and occupational therapists, work at several area schools which, like the Casino, are not owned, leased or rented by the Employer, voted in the election without having their ballots challenged by the Petitioner. The Employer failed to provide any case law to support this theory and I find that it lacks merit. The facts relied upon by the Employer in support of this assertion are inconsequential, as the relevant Board law on this issue does not dictate that just because a party fails to challenge the ballots of similarly situated employees, the challenges to the ballots of the employees in issue must be overruled.

appropriate bargaining unit. The Petitioner asserts that the OR technician classification should be included in the appropriate bargaining unit and that these employees should be eligible to vote.

The record reveals nine OR techs who were eligible to vote in the election – the seven challenged above, and James Stewart and Paul Davis.[11] The Employer did not challenge the ballots cast by Davis[12] nor Stewart, and claimed at the hearing that its failure to challenge the ballot of Stewart was an oversight. Despite the fact that the ballots of Stewart and Davis were not challenged, the Employer stated at the hearing that it alleges all OR techs are ineligible to vote in the election.

The OR techs are also known as "Surgical Techs" or "Scrub Techs." The record reveals that Mary Grogan and Paul Davis are the only "certified" OR techs. Anthony Titus was certified as an OR tech in the military, but apparently let his certification lapse. The remainder of the OR techs at issue are not certified. Grogan testified that the Employer did not require her to have certification to obtain the job. The Employer did not require certification and the OR techs do not receive extra pay of benefits for being certified.

Mary Grogan credibly testified that OR techs, regardless of whether they are certified, do the same job and perform the same duties. The record reveals that much of the OR tech's job is learned through on-the-job training under the supervision of another OR tech. According to Grogan, OR tech duties in a typical day consist of opening case carts and making sure they have all the equipment and supplies that are required for the surgical procedures that day. They check the availability and sterility of the machinery, such as microscopes, and make sure machinery such as TVs, video towers and saws are in working order. They scrub, set up the operating tables, and perform a surgical count to make sure all sponges and equipment are accounted for. Once the patient is brought in, the OR techs drape the patient and hand the equipment to the doctor during the procedure. She testified that they have to know the procedure and the surgeon so they are able to anticipate what he/she needs during the surgery. Upon the completion of surgery, the OR tech washes off the prep solution, places the sterile dressing on the patient, performs an instrument count, and then assists in moving the patient out of the operating room. Grogan testified that a "normal day" consisted of approximately 16 cataract surgeries or 2 – 3 joint replacements a day. The record shows that OR techs are involved in patient care prior to, during, and after surgery. The OR techs have to know the Employer's operation room procedures, such as knowledge of activating blue alert, the crash cart, identifying impending patient crisis (including increases in body gases, rigidity, and increases in patient body temperature), handling and storage of tissue samples and corneas, knowledge of the purpose and technique of various surgical preparations, the different kinds and uses of sutures and needles, and finally, gowning procedures.

The record reveals that the OR tech's job requires extensive specialized training. In this regard, McGovern-Graham testified that OR techs require 6 to 12 months of on-the-job training.

[11] The record reveals a newly hired OR tech by the first name of Lisa (last name not identified) who the Parties agreed at hearing was ineligible to vote because she was not employed by the Employer as of the election eligibility date.

[12] Employee Kimberly Schauer, who served as an election observer, testified that Paul Davis voted in the election and that his ballot was not challenged by the Employer.

I find it clear from the record that the OR techs, in exercising their duties, exercise independent judgment pertaining to patient care and the surgeon's needs during the operation procedures.

Employer OR Tech Supervisor Karen McGovern-Graham testified that all an OR tech does is open the surgical equipment packages and hand over equipment that the surgeon asks for, counts material to make sure no equipment is left inside the patients, and assists in taking the patients to the recovery room after the operations. Where McGovern-Graham's version of what the OR techs' duties and responsibilities consist of differs from that set for by current OR techs, such as Grogan, I credit Grogan and the other employees' versions of the OR tech's duties and responsibilities. I find that since the OR techs are currently performing OR tech work, they have a better understanding of the duties they perform. I also found Grogan and the other OR tech to be generally credible and straight forward in their demeanor, while, on the other hand, McGovern-Graham's testimony and demeanor reflected an effort to downplay or minimize the work and independent judgment exercised by the OR techs. My credibility determinations in this regard are also supported by the record evidence which shows that McGovern-Graham's experience as an OR tech was limited to obstetric and gynecological operations. She also testified that OR techs did not perform draping work on the patients, where the record and credible testimony of Grogan reveal that they clearly do in fact perform such work.

With regard to traditional community-of-interest factors, the record reveals that OR techs have the same supervision as unit employees based on the fact that Karen McGovern-Graham supervises the surgical services in the PACU and employees consisting of LPNs, aides and Techs. The OR techs' pay varies based upon experience. They also share the same fringe benefits and hours of work of other technical employees in the bargaining unit.

The Employer, as the party challenging the OR tech's ballots, has the burden of showing that the OR techs should not be included in the unit. The Employer contends that the OR techs lack the requisite training required for technical employees as they only require a high school education and no advanced degrees to perform their jobs. The Petitioner contends that the OR techs have specialized training on the job, use independent judgment in their jobs, and have a sufficient community of interest with the employees in the unit.[13]

[13] The Petitioner also argues that New York State passed a law (Public Health Law Sec. 2824) regarding surgical technologists which becomes effective January 1, 2015. Under that law, there are required minimum standards to function as a surgical technologist, and it provides that they must successfully complete a nationally accredited education program and maintain a certified surgical technologist credential or complete a training program for surgical technology in the armed forces, or be employed as a surgical technologist in a healthcare facility for one year. The Petitioner asserts that most of the Employer's OR techs will be treated by New York State as if they completed the accredited program for surgical technologists and most will be permitted to continue working for the Employer. The Petitioner argues that such a certification requirement lends support to its position that the OR techs will be certified and therefore such evidence supports its assertion that the OR techs should be included in the unit. The Employer, on the other hand, argues that the New York State law should not be given consideration in this matter because it was not in affect at the time of the election in this case.

As a general rule, the Board does not determine eligibility based on events occurring after an election. *Arlington Masonry Supply, Inc*., 339 NLRB 817, 820 fn. 15 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). I find that since the New York State certification law was not in existence at the time of the election in this matter, it should not be taken into consideration when evaluating whether the OR techs should be included in the bargaining unit. On that basis, I do not give it consideration, nor do I attribute it weight in reaching my findings, conclusions and recommendations in this case.

Technical employees are defined in Board law as employees who do not meet the strict requirements of "professional employees" as defined in Section 2(12) of the Act, but whose work consists of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training, usually acquired in colleges or technical schools, or through special courses. *Folger Coffee Co.*, 250 NLRB 1 (1980); *Avco Corp*., 173 NLRB 1199 (1969); and *Fisher Controls Co*., 192 NLRB 514 (1971). Under the Board's Health Care Rule, 284 NLRB 1515, 1553 (1987), technical employees constitute an appropriate unit in acute care hospitals.

I find that in the instant case, the OR techs, while not requiring an advanced degree to perform their work, nevertheless require 6 to 12 months of on-the-job specialized training in patient care and in operating room and surgical procedures. While some of the OR techs' duties are routine in nature, such as checking the tools and disinfecting the supplies and the room, other duties are considerably more skilled and technical in nature, and those duties require independent judgment in carrying them out and properly caring for the patient and assisting the surgeons. In this regard, the record reveals that OR techs exercise independent judgment in monitoring patients while they are receiving surgical treatment, they must be familiar with surgical procedures and many pieces of surgical equipment, and they are expected to be familiar with the surgeon's preferences or practices and be able to anticipate the surgeon's needs during surgery so that they can effectively hand the surgeons the proper tools and assist in the surgery. The Board has found that such duties are skilled in nature and weigh in favor of including OR techs in technical bargaining units. See *Meriter Hospital, Inc.*, 306 NLRB 598 (1992) (Board affirmed findings of a regional director that OR techs are technical employees where the evidence showed, inter alia, that many of the OR tech's duties were skilled and technical in nature, such as being responsible for anticipating the surgeons' needs and handing the surgeon at the appropriate time the appropriate instruments.). I find that the record also shows that the OR techs share a sufficient community of interest with other technical employees in the unit, work with LPNs and unit employees, receive similar pay and fringe benefits, and share common supervision.

The Board has found that similarly situated OR techs appropriately belong in the technical unit. In *William W. Backus Hospital*, 220 NLRB 414, 418 (1976), the Board found OR techs to be technical employees and included them in the technical unit. In that case, the Board reasoned that, although none of the OR techs were certified, licensed, or registered, they were technical employees, as they worked with LPNs, were paid at a salary level comparable to that of other technical employees, had been trained for a minimum of 6 months, and achieved a sufficient level of familiarity with the surgical tools and procedures to assist physicians during surgery. In addition, in *Rhode Island Hospital*, 313 NLRB 343, 353 – 354 (1993), the Board found that surgical techs working in the employer's operating room, while not being required to be licensed or certified, performed similar duties to those of the OR Techs in the instant case, and were to be included in the technical unit. Id. at 353-354. In that case, the Board found, inter alia, that the surgical techs were required to receive special training, be familiar with the hospital and its departments, and, even though some of their duties appeared routine in nature, others were clearly skilled, such as anticipating the needs of the doctors performing surgery. Id. See also, *Children's Hospital of Pittsburgh*, 222 NLRB 588 (1976); *Medical Arts Hospital of Houston*, 221 NLRB 1017 (1975). Thus, based on the foregoing and the record as a whole, I find

that the Employer, as the party asserting ineligibility to vote, has failed to carry its burden of proof.

On the basis of the above facts and well established case law, I find that the OR techs are technical employees and they appropriately should be included in the bargaining unit. In this regard, I recommend that the challenges to the ballots Mary Anne Bove, Anthony Titus, Matthew Barnard, Casey Belleisle, Donald Harris Jr., Todd Oliver, and Mary Grogan be overruled, and their ballots be opened and counted.

C. The Sleep Lab Technicians

The unit description in the Stipulated Election Agreement states that registered sleep laboratory technicians are included in the unit, but it does not set forth sleep lab technicians as eligible voters for the election. However, in the stipulation, the Parties agreed that the sleep lab technicians would vote under challenge and their unit placement would be resolved in a post-election proceeding. In that regard, the ballots of Kristina Fries and Janine Ours were challenged by the Employer because they are in a classification that should not be included in the appropriate unit. The Petitioner, on the other hand, asserts that the sleep lab technician classification should be included in the appropriate bargaining unit and that these employees should be eligible to vote.

The Sleep Disorder Center is located at the Hampton Inn in Olean, New York. The record reveals that at the time of the election, the Employer employed four sleep lab technicians or "Sleep Techs": Kristina Fries, Janine Ours, Mark Beyth, and Tereena Hanner.[14] Ours and Fries were the only two sleep techs whose ballots were challenged. Of the eligible sleep techs, only Mark Beyth is certified and is a registered sleep technician.[15] Tereena Hanner is neither certified nor registered as a sleep technician, but her ballot was not challenged by the Employer. The record does not reveal the reason Fries' and Ours' ballots were challenged, but Hanner's ballot was not challenged.

The record reveals that the Employer's job description for the sleep techs states that they perform "comprehensive sleep testing and analysis, and associated interventions under the supervision of the Sleep Lab Technologist, who is a Registered Respiratory Therapist and/or medical director."[16] The position is also responsible for "consistently performing competent sleep recordings, while providing patient education to assist in patient compliance of treatment for sleep disorders." The qualifications required consist of a high school diploma or equivalent degree, and successful completion of a polysomnography program of no less than 1 year and which is associated with a state licensed and/or nationally accredited educational facility or a minimum of 6 months on-the-job training as a sleep lab trainee with documented proficiency in all competencies. It is also expected that the sleep lab techs will prepare for and pass the "RPST

[14] At the hearing, the Parties stipulated that newly hired sleep techs Stephanie Theisen and Michelle Woods were not employed during the eligibility period, and therefore were not eligible to vote in the election.

[15] The record reveals that registered sleep lab tech Mark Beyth voted in the election and his ballot was not challenged.

[16] Fries testified that she is not under the supervision of a respiratory therapist, but she is instead under the direction of the Employer's medical director who is on call.

exam." The job description states that "skills required" consist of "independent judgment in decision making."

As mentioned above, a high school education is required and the job does not require a technical degree. While New York State requires that by February 2014 all sleep techs must be licensed, that requirement did not exist at the time of the election. As mentioned above in the OR tech portion of this decision, the Board does not determine eligibility based on events occurring after an election. *Arlington Masonry Supply, Inc*., supra; *Dean & Deluca New York, Inc.*, supra. Since the New York State law was not in existence at the time of the election in this matter, it should not be taken into consideration when evaluating whether the sleep techs should be included in the bargaining unit. Therefore, I have not considered it in reaching my findings, conclusions and recommendations in this case. Manager Penny Oyler testified that sleep techs learn the position through on-the-job training, and it takes approximately 6 to 8 weeks to learn the job. The record also reveals that the sleep techs have "continuing education units" that are required, and which are performed on-line.

Kristina Fries credibly testified that the sleep techs' jobs are essentially the same, regardless of certification or registration.[17] The patients usually come in around 8 p.m. The sleep techs get the charts ready, take the patients to the rooms, make sure the paperwork (such as insurance and a questionnaire) is completed, and they show the patient a video pertaining to the testing. The sleep techs test the equipment, calibrate the CPAP machines to make sure they function correctly, and they check the computers. There are usually two sleep techs who work together, but on occasion (approximately once a month) they work alone. They are generally responsible for two patients at a time, placing wires on the patients' heads, chest, face, and legs. The sleep examination starts at 11 p.m., and the sleep techs watch them while they are sleeping and monitor their heart rate and document such things every half hour or so. The sleep techs read the calibrations on the computer and "score" the sleep study. The sleep techs are responsible for the patients through the night.

The sleep techs monitor the patients from a different room via a camera and computer monitor. They take notes of their observations and monitor readings. They monitor heart rate, if they stop breathing, or if their oxygen levels drop. The sleep techs are trained to watch the monitors and determine what stage of sleep the patient is in, or if the patient is in REM sleep (rapid eye movement). They compare their observations of the patient with the monitor readings. When monitoring a patient, the sleep techs independently decide if the patient is having problems, and whether to seek assistance for them. They also make the determination as to whether the patient requires the use of a CPAP machine, which forces air into the patient's mouth. If a patient is experiencing problems, the sleep tech talks to the patient and then the sleep tech can call the medical director. The sleep techs are trained to interpret EKG readings and determine if there is a heart issue. The sleep tech, working under the direction of a medical doctor, independently determines if there is a medical problem and may call the medical director

[17] I found that Fries was a credible witness who testified in an honest and straight forward manner. Where her testimony differs from that of Employer Manager Penny Oyler, I credit Fries' testimony, as she was not only credible in her demeanor, her testimony was also clear and concise. In addition, since Fries works as a sleep lab tech, she appeared more familiar with the duties of the job and how it was performed. Oyler's testimony was, for the most part, consistent with Fries, but where it differed, I found her less credible than Fries.

for assistance if they believe such assistance is necessary. They are also training in basic life support (including CPR) to assist a patient if there is an issue.

The record reveals that no supervisor is on duty at the Hampton Inn during the sleep tech's shift. However, sleep techs, both registered and unregistered, have a common supervisor named Patty Prosser. Prosser, in turn, is supervised by Penny Oyler, the Manager of the cardiopulmonary department. The sleep techs appear to share the same fringe benefits as other technical employees, but their range of pay is not reflected in the record. Penny Oyler testified that sleep techs, regardless of whether or not they are "registered," perform the same work. While she testified that Mark Beyth, the registered sleep tech, takes the patients who have severe or multiple co-morbidities as he is best prepared to handle those patients, she acknowledged upon questioning that she could not say how many "severe cases" or "co-morbidities" there are at the sleep lab, and that for the last month and a half, there had been no patients with severe co-morbidities.

Based on the facts of this case, I find that the sleep lab techs are technical employees. In this regard, the record shows that the sleep techs perform comprehensive sleep testing and analysis, and are responsible for performing competent sleep recordings, while providing patient education to assist in patient compliance of treatment for sleep disorders, and, even though they are not required to have an advanced technical degree, they nevertheless have specialized training and are expected to complete a polysomnography program or have a minimum of 6 months on-the-job training. The record shows that the sleep techs' job requires the exercise of independent judgment in decision making. In that regard, the record shows that the sleep techs compare their observations of the patient with the monitor readings, and they independently decide if the patient is having problems, and exercise their judgment in deciding whether to request assistance for the patient. They also use their independent judgment in determining how the sleep study should proceed, whether the patient requires the use of a CPAP machine, or whether the patient requires the assistance of the medical director. Thus, I find that the sleep techs warrant inclusion in the bargaining unit. Although the cases are limited, there is Board precedent for including polysomnographic techs or sleep lab techs in a technical unit. *Rhode Island Hospital*, 313 NLRB 343 (1993).

Based on the above, I find that the Sleep Lab Techs are technical employees who should be included in the appropriate bargaining unit. Therefore, I recommend that the challenges to the ballots of employees Kristina Fries and Janine Ours be overruled, and that their ballots be opened and counted.

D. The employees not on the Eligibility List (alleged dual-function employees).

There were two employees who were not placed by the Employer on the voter eligibility list, and they were challenged by the Board agent conducting the election. Those employees were Andrea Keim and Lisa Cousins.[18] Keim and Cousins are employed as cardiopulmonary

[18] The ballot of employee Kim Mulkin was also challenged for not being on the *Excelsior* list. At the hearing, the Parties stipulated that Kim Mulkin was not employed as of the payroll period ending date and therefore her ballot should not be counted. The status of her ballot is therefore no longer at issue, and the challenge to her ballot, by the agreement of the parties, is sustained and it will not be counted.

technicians, a classification not included in the Stipulated Election Agreement. However, they are also LPNs, a classification that is included in the stipulated unit. The Employer asserts that these employees are not eligible to vote. The Petitioner, on the other hand, asserts that they are dual-function employees who share a community of interest with the unit employees, and they should therefore be eligible to vote.

The record reveals that the Employer has three cardiopulmonary techs in the cardiopulmonary department – Lisa Cousins, Andrea Keim and Megan Studley. Cousins and Keim are also LPNs, while Megan Studley is not. Lisa Cousins credibly testified that Supervisor Darren Shanley oversees the cardiopulmonary department, which includes cardiopulmonary techs, respiratory therapists, and ecocardiogram techs. Cousins testified that she became an LPN just after high school. She does not have a higher degree, although she is a licensed LPN. In 2001, Cousins began working for the Employer as an LPN on the medical/surgery floor, and in 2007 she transferred to the cardiopulmonary department, keeping her LPN license. Cousin's employee badge issued by the Employer states: "Lisa Cousins, LPN, Cardiopumonary Tech."

Cousins stated that she, Keim, and Studley work together on stress tests, usually in the mornings. Primarily, Cousins and Keim do the preparation for the stress tests, and Studley will help if they have several to do. However, Studley usually performs the EKGs and paperwork. Cousins testified that approximately half the day is usually spent performing stress tests. Cousins stated that the stress test work generally consists of getting the patient's medical history, recording the medications, and checking the oxygen and blood pressure. The work also involves inserting IVs and administering oxygen treatments, which only the LPNs can perform. Cousins testified that while there is one RN for the entire pulmonary department, the RN generally does not administer the IVs. According to Cousins, after the patients have their IVs, the cardiopulmonary techs take the patients to receive a radioactive isotope which is administered by other employees. After a wait, the patients are scanned by other employees and they are brought back to the cardiopulmonary techs' area. The three techs can place EKG electrodes on the patient and register the information in the computers. Only the LPNs can flush the IV to make sure a second dose of isotope can be administered. Cousins testified that the test takes about 10 minutes. Only an LPN can administer a breathing treatment for patients who need them. If a patient has issues after a stress test, the doctor may have the LPNs monitor them, which is a task only the LPNs can perform. In addition, only the LPNs can remove the IVs from the patients.

Cousins testified that the second half of the day is usually spent performing EEGs, arterial dopplers, EKGs, pulmonary function tests, and breathing treatments. During these tasks, only LPNs can perform the breathing treatments or change the dressings on wounds.

The record reveals that there is cardiopulmonary tech work that only Cousins and Keim can perform because they are LPNs. As mentioned above, only the LPNs administer medicated and unmedicated IV solutions, start peripheral IV lines, administer saline IV fluids, flush venous access lines, and discontinue and remove venous lines.[19] Cousins testified that she usually administers as many as six IVs a day. In addition, only the LPNs can administer breathing treatments or change dressings. Furthermore, LPNs can retrieve medications from the

[19] The Employer's IV policy provides that LPNs must be competent to administer IVs, and they are required to take the annual competency test required by the Employer's policies.

Employer's PYXIS machine, which requires a code and fingerprint to access. Studley is not allowed to retrieve or administer medications, and she usually asks Cousins and Keim to do that for her.

The record also reveals that the Employer treats Cousins and Keim like the Employer's other LPNs, by requiring them to participate in an annual skills training or "skills sphere," and on a yearly basis, they must demonstrate to an RN that they have certain LPN competencies. They must also complete yearly training set up by the Employer on work time, which usually takes 3-4 hours.

The Employer does not dispute that Cousins and Keim perform LPN work, as Oyler acknowledged that they perform such tasks, which Studley cannot, and she acknowledged that the two LPNs perform those tasks for Studley's patients.[20] With regard to the percentage of time Keim and Cousins spend performing LPN work (which Studley does not), Cousins testified that approximately 40% of her workday is spent performing work that only LPNs can perform. Specifically, she testified that only LPNs can set up IVs which take 15 – 20 minutes for each one, and perform an "IV flush" in the stress test which takes 15 – 20 minutes. On the subject of time spent performing LPN work, Oyler testified that the breathing treatments on average take 75 minutes and they perform approximately 4 per day, totally 5 hours. The IV treatments take 15 minutes each and they perform approximately 5 per day, totaling 1 hour and 15 minutes. The record reveals that they disconnect IVs which takes around 2 minutes and they perform these on around 5 patients per day, totally 10 minutes. They also retrieve medications from the PYXIS machine, which takes an additional couple of minutes. Thus, even using Oyler's calculations, Cousins and Keim spend a little over 6 hours performing work that is LPN work and work which Studley is unable to perform. Even assuming the estimate of 6 hours is high, it is nevertheless safe to say that, based on the record, Cousins and Keim spend a significant amount of time (between 40 to 50 percent of their time) performing LPN work.

The Board has held that dual-function employees (employees who perform more than one function for the same employer), may vote even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. *Martin Enterprises*, 325 NRLB 714, 715 (1998); *Continental Cablevision*, 298 NLRB 973 (1990); *Air Liquide America Corp.*, 324 NLRB 661 (1997); *Alpha School Bus Co.*, 287 NLRB 187 (1987). The Board does not have a bright line rule setting forth the required amount of time on unit work which would sufficiently show that dual-function employees regularly perform duties similar to unit employees for sufficient periods of time to demonstrate substantial interest in the unit's conditions of work. The Board instead examines the facts of each case. See, e.g., *Oxford Chemicals*, 286 NLRB 187 (1987) (Board held that an employee

[20] I found Cousins to be a very credible witness whose testimony appeared honest and consistent. To the extent that Oyler's testimony differed from that of Cousins' testimony, I credit Cousins over Olyer. I found that Olyer's demeanor appeared uneasy and, in an attempt to downplay the duties of the LPNs in this matter, struck me as unbelievable and implausible at times. In regard to Cousins and Keim, Oyler was asked if it seemed like being an LPN was somewhat essential for the work they were doing. In response, Oyler responded that the LPN duties were "not required," and it was "just something they wanted to do." That assertion, besides being unsupported by the facts discussed above, was incredible and evinced an attempt to downplay the significance of these employees' well established LPN duties in performing the cardiopulmonary tech job.

who regularly performed unit work for 25 percent of each working day was included in the unit); *Davis Transport,* 169 NLRB 557, 562 – 563 (1968) (Board found that employees who spent less than 3 percent of their time performing unit work during a 10-month period were not included in the unit).

Applying these principles to the facts of the instant case, I find that Cousins and Keim regularly spend time performing LPN duties, which are duties similar to those performed by unit employees, for sufficient periods of time, to demonstrate that they have a substantial interest in the working conditions in the unit. In this connection, I find that they spend at least 40 to 50 percent of their time performing LPN work. As discussed above, Cousins credibly testified that approximately 40 percent of her workday is spent performing work that only LPNs can perform. Her testimony was supported by Employer manager Oyler, who estimated that the time Cousins and Keim spent performing unit work was at least 40 percent (her estimate of over 50 percent was actually higher than Cousin's estimate). The evidence also shows that in the instant case, the performance of unit work by Cousins and Keim was not sporadic, but regular and consistent.[21]

On the basis of the above, I find that the Employer, as the party asserting ineligibility to vote, has failed to carry its burden of proof with regard to these challenged ballots, and that Cousins and Keim, as dual-function employees, have a substantial interest in the working conditions in the unit which warrants their inclusion in the bargaining unit. *Air Liquide America Corp.*, supra; *Oxford Chemicals*, supra.

On the basis of these findings, I recommend that the challenges to the ballots of Cousins and Keim be overruled, and their ballots be opened and counted.

## THE OBJECTIONS TO THE CONDUCT OF THE ELECTION

### I. GENERAL PRINCIPLES OF LAW

A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp*., 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). The Board and courts have held that "ballots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees." *Diamond Walnut Growers*, 316 NLRB 36, 49 (1995), quoting *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, in objection cases, the burden of proof on parties seeking to have a Board-supervised election set aside is a "heavy one." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974). This burden is not met by showing proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the

[21] Despite the fact that the record shows Cousins and Keim share similar conditions of work as other LPNs and unit employees, in light of my finding that they should be included in the unit as dual-function employees, I find it unnecessary to analyze community-of-interest factors, as the Board has held that the inclusion of dual-function employees within a particular unit does not require a showing of community-of-interest factors in addition to the regular performance of a substantial amount of unit work. *Fleming Industries*, 282 NLRB 1030 fn. 1 (1987).

employees' exercise of free choice to such an extent that they materially affected the results of the election." *NLRB v. USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975)(quoting *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973). Thus, the Board and courts have held that Board-conducted representation elections are not lightly set aside. *Quest International*, supra at 856; *Safeway, Inc*., 338 NLRB 525 (2002); *Diamond Walnut Growers*, supra at 49; *Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973).

As a general rule, the period during which the Board will consider conduct as objectionable and warranting the setting aside of an election, the so-called "critical period," occurs between the filing of the petition through the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). In the instant case, the critical period falls between August 16 and October 25, 2013. It is the objecting party's burden to show that the conduct occurred during the critical period. *Gibraltar Steel Corp*., 323 NLRB 601 (1997).

In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995); *Phillips Chrysler Plymouth, Inc*., 304 NLRB 16 (1991), citing *Baja's Place*, 268 NLRB 868 (1984). In deciding whether such interference has occurred under this standard, the Board considers:

> 1) the number of incidents of misconduct; 2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; 3) the number of employees in the bargaining unit subjected to the misconduct; 4) the proximity of the conduct to the election date; 5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; 6) the extent of dissemination of the misconduct among the bargaining unit employees; 7) the effect, if any, of misconduct on the opposing party in cancelling out the effect of the original misconduct; 8) the closeness of the final vote; and 9) the degree to which the misconduct can be attributed to the party.
> (*Cedars-Sinai*, supra at 597; *Cambridge Tool*, supra at 716; *Phillips Chrysler Plymouth*, supra at 16 (quoting *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986); see also, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001)).

The Board has held that no one factor is dispositive, but rather, it is a balancing test of all the factors. *Taylor Wharton Division*, supra at 158.

In *NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994), the court stated,

> While the Board "aspires to 'laboratory conditions' in elections," it is clear that "clinical asepsis is an unattainable goal in the real world of union organizational efforts." Indeed, "exaggerations, hyperbole, and appeals to emotions are the stuff of which election campaigns are made." *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 379 (4th Cir. 1968)(en banc). And while "[c]oercive conduct is never condoned during the election process . . . the Board will not set aside an election unless an atmosphere of fear and coercion rendered free choice impossible." [Citations omitted, supra at 595.]

With the above as an introduction, I turn to Objections 1, 3, 5, 7, 8, 11 and 12, which are in issue.[22]

## II. THE OBJECTIONS

A. Objection 1 – On the date of the election, the Employer stationed numerous uniformed security guards in and around the hospital and at the entrances of the hospital, and members of management and concierges were also posted at the entrances of the hospitals and the time clocks. Thus, employees had to walk through managers and concierges and the unprecedented increased security was designed to intimidate employees who were voting.

The entrance located at the back or rear of the hospital is one of the entrances employees use when reporting to work. It consists of two sets of sliding doors, opening to an alcove where an employee time clock is located. That alcove contains a small stairway leading up to the first floor of the hospital, and a narrow hallway that leads to elevators and another stairway leading to the building's lower level or basement. The Employer normally has one security guard per shift, three shifts per day, seven days per week that patrol both inside and outside the hospital. However, it is undisputed that the Employer had additional security guard staffing on the day of the election.[23]

David Miller, the Employer's director of facility services, credibly testified that he had extra security guards in the morning and they helped him set up for the election by having ceiling cameras removed, blocking vision panels on the stairways for privacy, and marking doors that were to be used for voting. He testified that the extra security was necessary due to the "special events" that day — the NLRB election and a uniform sale (which was relocated from its normal location in the basement where the election was held, to the Employer's Education Center). In addition, Miller testified that the extra security was needed due to the fact that on the date the election was originally scheduled to be held,[24] there had been complaints from employees that they felt unsafe because union representatives were unexpectedly approaching their vehicles as they entered the Employer's driveway to hand out baskets or literature.

While the Employer does not normally have a concierge or security guard stationed at the back entrance, on the day of the election Miller and McNamara decided to have a concierge and security guard at both the front and back entrances to assist those coming in for the election and the uniform sale.[25] Miller stated that extra security that day was also the result of a request from the Employer's behavioral health unit in dealing with the presence of a troubled or potentially violent patient in the hospital that day. Miller testified that he has ordered additional security in the past for similar "special events," such as: (1) in 2012 for a chicken barbeque; (2) for a

[22] At the hearing, I granted the Petitioner's motion to withdraw Objections 2, 4, 6, 9, and 10.

[23] McNamara testified that the Employer has approximately five – six security guards, and the extra security guards used on the day of the election were the Employer's security guards, not guards from an outside agency.

[24] The originally scheduled election never took place due to the fact that the government shut down at that time.

[25] Miller testified that uniform sales at the hospital are held usually twice a year.

strawberry festival on the Employer's grounds; and (3) for an instance in 2013 when the Employer discovered that an insulin pen was used on several patients and approximately 2000 patients were notified of a possible hepatitis problem and instructed to come in for blood tests on a certain day.

According to Miller's credible testimony, the security personnel were instructed to assist people with directions to the election and the uniform sale and they were not instructed to stop or confront anyone.[26] Likewise, Karen Fohl, the Employer's manager who is responsible for the concierges, testified that she assigned a concierge to the back door on the day of the election because a lot of people were coming in for the election and the uniform sale, and some of them may be from offsite locations and unfamiliar with the hospital facility. She testified that the concierges were instructed to "greet people and give directions where to go," and if any Union officials needed to know where to go for the election, the concierges were to contact McNamara and get instructions from him. She stated that she stationed concierge employee Dave McHenry as the front entrance concierge and Nina Parker as the back entrance concierge. Fohl also testified that McNamara informed her that he wanted an extra concierge at the rear door so that the Union election would go smoothly and to make sure that people who came in for the uniform sale did not walk into the election room.

Registered Nurse Barbara Walker who is in the New York State Nurses' Association bargaining unit at the Employer's facility, testified that it was unusual to have a concierge and security guard stationed at the back entrance of the facility, as the Employer did on the day of the election. In addition to the security guard's presence at the back entrance, employees reported seeing security inside the hospital throughout the day of the election. Although Miller testified that he believed all but one security guard left by 12:30 p.m. that day, other witnesses reported the presence of security guards in the hospital in the afternoon and evening.[27] Even though the exact number of guards in the afternoon is disputed, I find it unnecessary to determine the exact number of guards who were there in the afternoon of the election because, as stated above, the fact that the Employer employed more than the usual number of security guards throughout the day of the election is not in dispute.

Walker also testified that she saw Tim McNamara and Joyce Martinez standing at the top of the stairs at the back entrance, but she could not say how long they were there.[28] She also testified that she did not remember any employees coming through that area when the administrators were there, and she did not know if Parker actually spoke to any employees who entered the facility through that back door. Walker also admitted that it was not unusual to see the Human Resource managers standing in the stairs of the back entrance. Walker stated that she punched out from work and went to the voting area where she informed the Board agent "what

[26] Miller testified that at the first scheduled election in this matter which was postponed due to the government shutdown, the union representatives were handing out baskets/literature to employees entering in the Employer's driveways, resulting in potentially unsafe conditions where extra security would have been helpful.

[27] In this regard, RN Kristine Powell testified that when she finished work at 7 p.m. the day of the election, she noticed four security guards in the hospital.

[28] Employee Joelle Hyson testified that when she entered the hospital through the back entrance, she saw Parker sitting there, and McNamara and Martinez standing on the stairway, but when she left through the same entrance after voting, only Parker was in that area of the building.

[she] had witnessed upstairs."[29] She also admitted that she spoke to Joyce Martinez before going down to talk to the Board agent, where her discussion consisted only of "chat[ting] about the uniform sale." In that conversation with Martinez, Walker never mentioned anything about the fact that she believed it was improper for the Employer to have a security guard and concierge at the back entrance, or that it was intimidating for Martinez and McNamara to be standing on the stairs in that area.

McNamara testified that he and Martinez were standing in the area above the stairs for approximately 3 to 4 minutes around 11:30 a.m. that day. In addition, Martinez acknowledged that she was standing on the stairs at times during the election because there were occasions when she relieved Nina Parker so she could go to the bathroom, and she passed through the stairwell on the occasion she went to get coffee. There is no evidence that McNamara or Martinez confronted, threatened, intimidated or coerced employees on the day of the election, or that they even spoke to any employees who were eligible to vote in the election that day. There is also no evidence to establish, or even suggest, that either McNamara or Martinez were anywhere near the polling area on the ground floor when the election was being conducted. In fact, McNamara testified that the managers were directed to stay off the ground floor that day and managers with offices on the ground floor were directed to relocate that day to another area of the hospital away from the polling area. The Employer also extended the hours of its coffee kiosk located away from the polling, and had the cafeteria stock it with sandwiches and other food items because the managers would not be able to go to the cafeteria on the ground level.

The Petitioner asserts that the Employer's intent with regard to employing extra concierges and security personnel on the day of the election was to "monitor voters' activity and spread a sense of coercion and alarm among the workers who voted that day," and under Board law it is a violation of the Act for an employer to interfere in an election by engaging in surveillance or employees and intimidating voters.

The Employer argues that its managers did not engage in any improper conduct with regard to the voters, and that its increased security and concierges on the day of the election was reasonable and in no way coercive. The Employer also argues that the relevant case law establishes that the allegations in Objection 1 do not rise to objectionable conduct.

In support of its position, the Petitioner cites *Quest International*, 338 NLRB 856 (2003), where the Board reversed a hearing officer's finding that an employer's unprecedented posting of uniformed security guards and security dogs for 10 days before the election was objectionable conduct which interfered with the election. In that case, the Board overruled the objection, reasoning that the increased security was basically only one unarmed guard, supplemented by one dog, and on election day by an additional armed guard; the guard only patrolled the perimeter of the property and only entered the plant to use the restroom or vending machines; the guards and dog were not in or near the polling area on the day of the election; the security guards and dog did not engage in any coercive or questionable conduct towards the employees; and the Board noted that the union lost the election by a large margin. Id. at 857.

[29] Walker testified that she was referring to the presence of the Concierge and the security guard at the back parking lot entrance.

The Petitioner argues that the facts of the instant case are distinguishable from those the Board relied upon in overruling the objection in *Quest*, and therefore that case supports the assertion that the objection in the instant case should be sustained. Specifically, the Petitioner asserts that the Employer in the instant case had more than one security guard on the day of the election, the security guards were at employee entrances and on patient care floors assuring that employees would see them, at the results of the vote in the instant election were close.

Despite the distinctions drawn by the Petitioner, I find that the Petitioner's arguments lack merit. The facts of the *Quest* case are distinguishable in that the employer's placement of security guards and dogs for 10 days before the election was unprecedented and they were removed after the election. In the instant case, the Employer's staffing of a security guard at the hospital was seven days a week, 24 hours a day, and existed both before and after the Union organizing and the election. In addition, in *Quest,* the employer's additional security on the day of the election was in conjunction with the presentation of a campaign asserting or linking unionization to strikes, work stoppages, or violence. In the instant case, there is no evidence that the Employer's campaign contains similar ties to strikes, work stoppages or violence. Thus, even considering the distinctions drawn by the Petitioner, I find the *Quest* case does not support finding that the Employer's conduct in the instance case constituted objectionable conduct.

The Petitioner also relies on *Alamo Rent-A-Car*, 338 NLRB 275 (2002) where an administrative law judge found that a respondent violated Section 8(a)(1) of the Act by engaging in surveillance of the election activities when a police deputy, employed by the respondent as a guard, entered the polling area. Id. at 276. The Board reversed the judge's finding in that matter, finding that the evidence concerning that brief incident was too ambiguous to warrant an unfair labor practice finding. The Petitioner argues that, by contrast, the role of the Employer's security in the instant case was ". . . not too ambiguous to draw the conclusion that the guards were hired to surveil and intimidate employees."

The Petitioner's assertions in this regard are also without merit, as there is no credible evidence establishing that the Employer's security guards in the instant case were instructed or directed to engage in surveillance of the unit employees who were to vote in the election. In this regard, I find Miller's assertion that the Employer did not direct nor instruct them to surveil the voters to be credible, and an assertion that has not been contradicted by any credible testimony or evidence. Likewise, there is no credible evidence that security guards actually engaged in surveillance of employees who were eligible to vote in the election that day. The credibility of Miller's and McNamara's assertions that the additional security on the day of the election was needed for legitimate reasons other than for surveillance and intimidation of the employees, is bolstered by the undisputed fact that the Employer, on the morning of the election, had its security guards remove the hospital's ceiling cameras and block the vision panels in the hospital's stairways so employees using the stairs could not be seen. It is equally undisputed that the Employer, while not required to do so, relocated its managers who had offices on the ground floor where the election was being held, and took it upon itself to direct its managers to stay off the ground floor and not use the cafeteria which was also located on the ground floor. These actions are consistent with, and support, Miller's and McNamara's assertions. I find it implausible that the Employer, if it chose to use its security guards and managers to engage in the surveillance of employees who were eligible to vote, would take the time and make the effort on the day of the election to remove surveillance cameras, block vision panels on stairwells,

direct it's managers to stay away from the ground floor where the polling was taking place, prohibit it's managers from using the cafeteria on the ground floor, and make arrangements for its managers to purchase food from its coffee kiosk.

Regardless of the Employer's intent behind the additional security guards on the day of the election, the Petitioner's assertions that the extra security and concierge constituted objectionable conduct is simply not supported by, nor consistent with, the record evidence in this case. In the instant case, the Employer maintained security 24 hours a day, 7 days per week, both inside and outside the hospital before the union organizing and the election, and has continued to use it after the election, and the use of the extra security on the election day was not in conjunction with a campaign where the Employer tied unionization to strikes, work stoppages or violence. There is no evidence that the security guards threatened, intimidated, harassed, or coerced employees who were voting in the election. In fact, there is no evidence or assertion that the security guards even spoke to employees or were in or near the polling area. There is also no credible evidence that the security guards engaged in surveillance of employees or interfered in any way with their free choice in the election.

I also find that the Petitioner has failed to show that McNamara and/or Martinez interfered with or affected any employees' free choice in the election. Despite the fact that they had been standing at the top of the stairs at the back entrance, no evidence was presented to show that they were there for any extended periods of time, and in fact, Walker testified that she could not say how long they were there. However, even assuming the administrators were positioned on the stairs for extended periods of time, the Petitioner failed to present any credible evidence that while on the stairs, those administrators interfered, coerced, intimidated or engaged in surveillance of employees, and in fact, there is no evidence that they spoke to any employees or engaged in campaigning, or were even seen by employees who were going to vote. In addition, the administrators were in an area that was not in the immediate proximity of the polling area located on the ground floor. The administrators' essentially passive conduct away from the polling place did not reasonably tend to coerce employees or interfere with their freedom of choice in the election.

This finding is supported by well-established case law where the Board has found similar supervisory conduct not objectionable. In *Patrick Industries,* 318 NLRB 245, 256 (1995), the Board affirmed an administrative law judge's finding that supervisors' conduct was not objectionable where they were in a certain area for work-related reasons, they did not converse with employees, they were a reasonable distance from the voting area, and their behavior was not intimidating. In *Roney Plaza Management Corp.*, 310 NLRB 441, 447 (1993), the Board affirmed an administrative law judge's overruling an objection where supervisors were approximately 25 feet from the entrance to the voting area, but there was no evidence that management interfered with employees approaching the polling place or conversing with employees as they waited to vote. See *Standard Products Co*., 281 NLRB 141, 163 – 164 (1986) (Board affirmed administrative law judge's finding that congregation of five supervisors at a location from which they watched employees waiting in line to vote was not objectionable where their conduct was inconsequential, did not interfere with employees in line to vote, they were standing 50 to 60 feet away from the employees, and there is no evidence the supervisors engaged in campaigning or even spoke to employees waiting to vote); See also *Mid-Wilshire Healthcare Center d/b/a Fid. Healthcare Center*, 349 NLRB 1372, 1373 (2007) (Board affirmed

administrative law judge's finding that even though a supervisor stood near the polling entrance for a few minutes, he was not speaking to employees waiting to vote, and was not electioneering or monitoring the activity in the polling area. The Board found that, as a whole, the supervisor's essentially passive conduct did not reasonably tend to coerce employees or interfere with their freedom of choice in the election).

The Board has held that an objecting party must show, *inter alia*, that the conduct in question actually affected the employees in the eligible voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997); see also *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999). A party's conduct cannot be the basis for setting aside an election unless it reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). Applying these principles to the instant case, I find that the Petitioner has failed to carry its burden of showing that the Employer's use of extra security and an extra concierge on the day of the election, or the actions of administrators McNamara and Martinez on that day, actually affected the voting employees or had a reasonable tendency to interfere with the employees' free choice in the election. See *Quest*, supra at 857.

Thus, the evidence and relevant case law establish that the allegations in Objection 1 do not constitute nor rise to the level of objectionable conduct, and I recommend that the objection be overruled.

B. Objection 3 - On the date of the election, the Employer told an employee representative from the New York State Nurses Association (NYSNA) that she was not permitted to leave her work area all day. The employee was told by her manager that she was being watched and that she should "behave" herself. When the NYSNA representative went to the cafeteria, a management employee followed her to the cafeteria, and then back to her work location where she was surveilled all day.

Kristine Powell, an RN at the Employer's facility and the chair of the New York State Nurses Association, testified that she believed she was being watched by the Employer's managers on the day of the election. She testified that when she saw Gail Bagazzoli that day, Bagazzoli told her: "Don't be wandering around the hospital, they're watching you." Powell testified that Bagazzoli did not explain who "they" were, and she did not ask. On cross-examination, Powell testified that she responded to Bagazzoli that she was fully aware that there was a potential for her to be watched.

Bagazzoli admitted to speaking to Powell that day. However, she testified that it was Powell who initiated the conversation. In that regard, Bagazzoli stated that there was an LPN who happened to also be a patient at the time of the election. Bagazzoli stated she was on the phone with the department where that patient was being treated, and she informed the hospital staff that if that patient needed assistance getting down to vote in the election, she would arrange to have someone help her or assist her in getting down to the lower level to vote. According to Bagazzoli, Powell overheard her comments while she was on the phone and Powell told Bagazzoli that the patient called her that morning and she wanted Powell to take her down to vote and Bagazzoli asked her if she was able to take the patient to vote, and Powell responded

that she "wouldn't be caught dead downstairs" that day, and that she (Powell) called a CWA union representative to have him take her down to vote. Bagazzoli testified that she agreed that Powell should not wander around on the day of the election.

Powell also testified that when she left the department to go to lunch in the cafeteria, she noticed while in the stairwell that a security guard was behind her and while she was in the cafeteria, she notice that the same security guard was also in the cafeteria. She stated that when she left the cafeteria via the back door and got on the elevator there, the security guard was "wandering around the cafeteria," and then went somewhere near the loading docks. She also testified that when she got off the elevator, a cafeteria manager was standing by the Operating Room doors and she had the feeling she was being watched. However, on cross-examination, she testified that this unidentified person she "believed" was a manager, was "merely standing in the hallway." Powell testified that she did not know for certain if the person was a manager of the Employer. Thus, the record does not contain evidence that a member of management was watching her while she was by the elevator/OR doors.

Where Powell's and Bagazzoli's testimonies differ, I credit Bagazzoli's version of the conversation as her testimony was more detailed and precise, and consistent with the testimony of other witnesses who testified that there was an eligible voter who was also a patient on the day of the election who wanted help in going down to vote. I also note that Powell, at no time, objected directly to Bagazzoli about her alleged comments or responded to Bagazzoli that her rights were being violated by Bagazzoli's statement that she was being watched by management and Bagazzoli's alleged directive not to wander around the facility. In addition, Powell did not report Bagazzoli's alleged comments or the alleged incidents of her being followed to the Employer's administrators. Powell is Chair of the NYSNA Union and someone who, by her testimony, did not appear to be timid or unable to confront those whom she believed were infringing upon her rights or violating the law in some way. I find it implausible that such a person who is used to standing up for her rights and the rights of others, would stand by idly and not object to Bagazzoli's comments or report the perceived coercive conduct to the Employer's administrators, whom she is likely used to dealing with as a leader of the NYSNA Union.

However, even according to Bagazzoli's credible version of the conversation, she did in fact tell Powell that she should not wander around on the day of the election. I find Bagazzoli's statements in this regard were not objectionable for several reasons: first, Bagazzoli's statements were innocuous and were not accompanied by threats or coercion; second, Powell is not a unit employee who was eligible to cast a vote in the election and therefore it was impossible for Bagazzoli's comments to affect a vote where she had none; and third, there is no evidence that eligible voters heard Bagazzoli's comments to Powell, or that Powell told eligible voters about Bagazzoli's comments or that the comments were disseminated in any way. Thus, there is no evidence that Bagazzoli's comments affected employees' free and uncoerced choice in the election.

With regard to Powell's assertion that she believed she was followed by a security guard to the cafeteria and then was being watched by management when she got off the elevator, there is insufficient evidence to show that she was being followed or watched. The evidence is too vague to establish that the security guard and suspected manager were conducting surveillance of Powell and her movements. The fact that the guard was going to the cafeteria at the same time

as Powell, without more, is insufficient to establish that she was being followed. In the same vein, the fact that some unidentified person whom she believed was a manager was "standing in the hallway" when Powell got off the elevator, is too vague to be of any consequence. There is no evidence that the security guard or the suspected manager engaged in any conduct or made any statements that would indicated or suggest that they were doing anything other than other than going to the cafeteria to get something to eat or drink, or standing in the hallway waiting for or coming off of the elevator for legitimate reasons. There is also no evidence that management directed the guards to follow Powell. In fact, to the contrary and as discussed above, the credible and uncontradicted evidence shows that the guards were not instructed or directed to engage in surveillance of the employees, and the Employer had even taken steps to prevent surveillance by removing ceiling video cameras, blocking glass panels in the stairways, directing its managers to stay off the ground floor where the election was being held, and arranging for the manages to dine at locations other than the cafeteria on the ground floor.

Finally, as mentioned above, the Board has held that an objecting party must show, *inter alia*, that the party's conduct in question actually affected the employees in the eligible voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997). I find that the Petitioner has failed to make such a showing and there is no evidence to establish that the alleged conduct described in Objection 3 had any impact on the employees' exercise of free choice in the election. Accordingly, I recommend that the objection be overruled.

C. Objection 5 - When representatives of the Union came to the voting area during the voting hours, managers from the hospital surrounded them and escorted them to the voting area for the conference with the NLRB agent. This occurred each voting period, and was viewed by employees voting in the election. The Petitioner contends the Employer was attempting to represent the Petitioner representatives almost like criminals within their control, and its purpose was to intimidate employees and interfere with their free and uncoerced choice in the election.

Robert Matasich testified that as an election observer, pursuant to the Board agent's direction, he met at a designated entrance with the Board agent, two union organizers, and other observer, and they were escorted down to the voting area by McNamara and the Employer's attorney. Employee Kim Schauer testified that she also served as an observer for the Petitioner and, when they appeared for the voting session, McNamara led the group of union organizers, observers and the Board agent to the voting area. She testified that she was offended by the fact that she was escorted by the Employer to the voting area, and similarly offended when the group stopped and waited for her to use the restroom after the voting session ended and they were being escorted out of the building. McNamara did not dispute that he lead the group to and from the polling area, and asserted that he thought it was a matter of courtesy that they all leave and travel together as a group, and that was why he stopped the group while Schauer used the restroom.

There is no evidence that any employees who were voting witnessed the group being escorted to the polling area, and even if they had, there is no evidence that such actions affected their ability to vote freely without coercion in the election.

The Petitioner argues that the Employer attempted to manipulate the election process in a way that would lead voters observing their actions to believe the NLRB was on the side of the Employer, and that it gave the average voter the impression that the Employer was in control of the process, and that such actions should be found to be a violation of the Act under Section 8(a)(1). The Employer, on the other hand, argues that the evidence does not show that it engaged in objectionable conduct, and even if it did, it was not viewed by the voting employees. In this connection, the Employer asserts that the Employer's arrangement in the instant case is not unlike the plan in *Lowe's HIW, Inc.*, 349 NLRB 478 (2007), where the Board determined that a human resources representative's act of transporting voting employees to the polling place in a golf cart was not objectionable conduct. The Employer reasons that if it is not objectionable to escort the voting employees themselves, it cannot be considered objectionable to have management and Union representatives walking together to the polling area.

I find that the evidence does not establish that McNamara's act of escorting the union organizers, observers, and Board agent to and from the election interfered in any way with employees' exercise of free choice to such an extent that it materially affected the results of the election. Despite the fact that several of the observers were allegedly offended by the Employer escorting them to and from the polling area, there is no evidence that they spoke out about that matter to management or in any way conveyed at that time that McNamara's actions were offensive. Notwithstanding that fact, there is no testimony from employees who were waiting to vote which shows they witnessed or heard that the Employer escorted the group to the voting session, or that it in any way affected their free choice in casting their ballots in the election.

There is also no evidence to establish that the Employer's action in any way reflects or shows that the Employer misused the NLRB's election process or in any way conveyed to employees that the NLRB somehow favored the Employer in the election process.

Based on these facts and the case law, I find that the Petitioner has not carried its burden of showing that the Employer's escorting of the group interfered with the employees' exercise of free choice in the election, and I recommend that Objection 5 be overruled. See *Avante at Boca Raton, Inc.*, supra at 560 (an objecting party must show, inter alia, that the party's conduct in question actually affected the employees in the eligible voting unit.)[30]

D. Objection 7 - On the date of the election, Nina Parker, concierge, was stationed at the back door of the Hospital. When Robert Matasich came to vote, Parker

[30] In reaching my findings and recommendations in this matter, I do not rely on *Lowe's HIW*, supra, cited by the Employer in support of its position because in that case, the Board's analysis was focused on the *Milchem* rule which pertains to conduct of a party involving prolonged conversations with employees waiting in line to vote, and the Board did not specifically address whether the fact that the person in question transported the voters to the voting site constituted objectionable conduct. In addition, that case involved the transport of voters to the voting area and the instant case involved leading the observers, union organizers, and Board agent to the site to conduct the election.

> blocked his path and asked him what he was doing at the Hospital. Matasich replied he was there to vote and Parker stepped out of the doorway and into the hallway so he could pass. After he went to vote, about 10 minutes later, Matasich left by the same door and Parker followed him out the door and across the sidewalk, stared at him as he walked to his car and glared at him as he drove away.

Robert Matasich testified that he was an outspoken supporter of the Union where he voiced his support for the Union in the local newspaper and served as the Union's observer for the afternoon election period. He stated that when he came to the Employer's facility at noon to vote in the election, he entered through the back/rear entrance to the hospital, where he found Concierge Nina Parker sitting in a chair. According to Matasich, Parker got up and said "Hi Bob, what are you doing here?" He told her he was there to vote in the election and she stepped out of his way so he could pass. After Matasich voted he walked out of the hospital through the same entrance and stated that he believed Parker, while on her cell phone, followed him out the door, and that Parker "stared at him."

On cross-examination, Matasich acknowledged that Parker was "not unfriendly, but different," and that Parker said nothing to him about voting in the election. Parker testified that she did not remember seeing Matasich that day, and she denied following him. However, she did admit that she left the building once out of curiosity to see where the Union President had gone once she had left the building.

The Petitioner argues that the presence of a concierge, two administrators and multiple security guards at the employee entrance of the hospital is part of the scheme of surveillance and intimidation described in Objections 1 and 3, and that it is a violation of Section 8(a)(1) of the Act for an employer to monitor or create the impression of monitoring employees' union support. The Petitioner argues that such surveillance resulted in "destruction of the laboratory conditions that the Board requires during an election," citing *General Shoe*, 77 NLRB 124, 127 (1948). The Employer argues that Parker did not see Matasich on the day of the election and did not follow him out of the building.

Where Parker testified that she did not remember seeing Matasich on the day of the election and Matasich testified that Parker not only saw him, but said hello to him and asked him what he was doing there, I credit Matasich's testimony as he appeared truthful in his demeanor and general recall of the events. I find it unlikely that Parker would not remember seeing Matasich on the day of the election, and I credit Matasich's version that when he told her he was there to vote in the election, she stepped out of his way so he could pass. I also credit his assertion at after he voted and left the building by the same entrance in which he entered, Parker went outside after he exited, as she admitted that she did walk outside at some time that day.

However, I find that the evidence does not show that Parker in any way blocked Matasich from entering the back entrance and she in no way interfered with or prevented Matasich from exercising his free choice in voting in the election. There is also no evidence that Parker engaged in electioneering or made any threatening, coercive or intimidating statements to Matasich upon entering the building to cast his ballot. In fact, he testified that he proceeded past Parker and went to the lower level of the hospital and cast his ballot. With regard to the

allegation that Parker followed Matasich out of the building after he voted and watched and stared at him while he left, such conduct would not be objectionable as it was in no way accompanied by threats or coercion, and, even if it was, it would be impossible for such conduct to affect his free choice in the election because he had already cast his ballot. In addition, there is no evidence that Parker's following him out of the building and allegedly staring at him was in anyway witnessed by employees who were eligible to vote, or that such conduct was disseminated to voting employees or affected employees' free choice in casting their ballots.

Thus, the Petitioner has failed to carry its burden of showing that the conduct alleged in this objection had a tendency to interfere with the employees' freedom of choice. *Cedars-Sinai Medical Center*, supra at 597. I recommend that Objection 7 be overruled.

E. Objection 8 - On October 23, 2013, at about 9:30 a.m., Penny Oyler, cardiopulmonary medical director, and Robert Matasich watched a Hospital produced anti-union video in her office with her present, where in Matasich questioned the accuracy of some of the content of the video. Approximately a half hour later, Matasich again spoke to Oyler and said he had some questions about the video. Oyler asked him to step into an equipment room where they were alone and she allegedly told him that she liked him, and that he was a good respiratory therapist, but that she was very concerned about his future, and they should just leave it at that. Matasich said "OK" and the conversation ended.

As mentioned above, Robert Matasich served on the union organizing committee and had voiced his support for the Union in the local newspaper. He testified that he tried unsuccessfully to watch an Employer informational video on-line regarding unions. He asked his manager, Penny Oyler, if he could get a copy of the video and watch it. She said she did not have a copy but that he could come to her office and watch it with her. Matasich watched the video on Oyler's computer with her. Shortly after that, he saw Oyler in the hallway and said he had some questions about the videos and some concerns. Oyler offered to step into a supply room to talk and Matasich accepted that offer. According to Matasich, in the supply room, he told Oyler that he was feeling pressure from his open support for the Union, and Oyler responded that she thought he was a good respiratory therapist, that he did well with patients and was a good person, but she was concerned about his future, and to just leave it at that. Matasich then left the room.

Oyler testified that Matasich came to her about wanting to view the video, and she informed the human resources department that an employee wanted to view the Employer's video, but they told her the information technology department was working on it. She then told Matasich she and another employee were watching it and he could watch it with her if he wanted to do so. According to Oyler, Matasich said he wanted to watch it with her, and, after viewing it, he asked Oyler about raises and that he believed he had not received a raise when he should have received one. She testified that she directed him to the human resources department. Shortly after watching the video, Oyler said Matasich saw her in the hallway and asked her to step into the storage room. Oyler claims that Matasich wanted to talk about his interview in the newspaper and she said she did not want to discuss it. She testified that it was Matasich who said he was concerned about his job, and that she told him she was uncomfortable discussing that. According to Oyler, she told him he was a nice guy and a good therapist; other than that,

she could not talk to him and he had to talk to human resources if he was concerned about his job. She also testified that immediately after the conversation, she reported it to Martinez and one of the Employer's attorneys (not Jim Schmit) in anticipation for the election. Oyler specifically denied suggesting that Matasich's job was in jeopardy.

The Petitioner asserts that Oyler's statement was coercive and an "implicit threat," in violation of Section 8(a)(1) of the Act and it constituted objectionable conduct. The Employer argues that Oyler denied the implicit threat, but even if she did make the statement attributed to her, such single instance of allegedly objectionable conduct involving one employee would be insufficient to set aside the election.

As mentioned above, I found Matasich to be a credible witness, and I credit his version of the conversations with Oyler in her office and in the storage room. Oyler's demeanor on the witness stand appeared uneasy at times and some of her assertions were less than credible. For example, I find it unlikely that, as she stated, it was Matasich who said he was concerned about his job and her response was that she was uncomfortable discussing that with him. I find it equally implausible that the manager's response to that alleged concern from an employee who she admitted was "a nice guy and a good therapist," was that she was uncomfortable discussing it, where the more plausible response would have been to assure him that his job was not in jeopardy. Likewise, I find it implausible that, if the conversation occurred as Oyler alleges and she said nothing improper or coercive, she would be compelled to report the benign conversation to Human Resources and the Employer's attorney.

I find that Matasich's viewing of the video with Olyer did not constitute objectionable conduct as he agreed to watch the video with her and by his own admission, she said nothing at that time which could be construed as threatening, coercive, or intimidating. However, crediting Matasich, I find that Oyler's comments in the supply room implicitly inferred that his job could be in jeopardy.

As mentioned above, in evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cedars-Sinai Medical Center*, supra; *Cambridge Tool*, supra; *Phillips Chrysler Plymouth,* supra, citing *Baja's Place*, supra. In deciding whether misconduct constitutes interference under this standard, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the conduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct on the opposing party in cancelling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

In this case, even though the vote was close, the Board has held that no one factor is dispositive, but rather, it is a balancing test of all the factors. *Taylor Wharton Division*, supra at 158. Applying the factors above, I find that Oyler's statement that he "was a good respiratory therapist, that he did well with patients and was a good person, but she was concerned about his

future . . . .," while not a direct threat that he would lose his job for supporting the Union, was nevertheless an inferred threat that his job could be in jeopardy. The objectionable conduct, however, consists of a single, isolated incident, among a large bargaining unit of approximately 120 eligible voters, which affected one employee approximately two days before the election. Critically, there is no evidence that other eligible voters viewed or were aware of Oyler's statement, or that it was disseminated among the unit employees.[31] The burden of proof on the Petitioner's attempt to have this election set aside is a heavy one, and that burden is not met by simply showing that an unlawful act occurred, but also that it interfered with the employees' free choice to the extent that it affected the results of the election. I find this single instance of an inferred threat is de minimis, and does not have the tendency to interfere with the employees' freedom of choice, and therefore it could not have affected the outcome of the election.

Thus, I find that the Petitioner has failed to satisfy its burden of showing the conduct alleged in this objection constituted objectionable conduct that would interfere with the vote in the election, and I recommend that Objection 8 be overruled.

F. Objection 11 - The Employer encouraged and assisted employees to withdraw their authorization cards.

Union Organizer Ann Converso testified that the Petitioner received two identical letters from eligible voters asking that their union authorization cards to be returned. The letters, dated September 27, 2013, both read, "I work at Olean General Hospital in Radiology. I hereby wish to revoke the authorization card I signed. Please tear it up and send it back to me. Thank you." Both of the envelopes that the letters were mailed in had the Employer's logo and address on them, and Converso testified that she believed they were stamped using the Employer's postage meter, which she stated she had seen on other hospital mailings. However, Converso admitted that it was possible the employees could have approached the Employer and asked whether they could withdraw their cards. The Petitioner failed to offer the testimony of the two employees who signed the letters.

The Petitioner argues that this evidence shows that the Employer assisted employees in requesting the return of authorization cards in violation of Section 8(a)(1) of the Act. The Employer asserts that this objection is based solely on the assumptions of a Union employee and there is no evidence to suggest the Employer encouraged employees to request withdrawal of their cards.

I find that there is no credible evidence that the two letters at issue here establish that the Employer encouraged or assisted the employees in any way with regard to their requests to have their authorization cards returned. On that basis, the Petitioner failed to satisfy its burden of showing in this objection that the Employer engaged in conduct which warrants setting aside the election. Accordingly, I recommend that the objection be overruled.

[31] I note that the Board will not infer dissemination even where the threat is a significant one. See *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004).

G. Objection 12 - An employee who participated in a publically released pro-union video was shortly thereafter approached by two managers and interrogated about his participation in the video. One manager spoke to the employee in an angry tone telling him that he was a liar and that he defamed the hospital. A second manager said that she could not understand why the employee supported the Union because he was a good worker and only lazy employees supported the Union. The employee felt harassed, intimidated and threatened.

1. The alleged comments by Managers Marie Bailey and Joyce Martinez

The Petitioner offered the testimony of Jose Nunez, an LPN in the Employer's urgent care center who openly supported the Petitioner and appeared in a pro-union video during the period leading up to the election. He testified that at some time in or around late July 2013 manager Marie Bailey asked him if he was "involved in this union thing," and that she did not "give a shit, but there are people who want to know." He testified that she further commented that "she wasn't crazy about the Union, but it did not affect the way she would be working with us."

The evidence reveals Nunez alleged that Bailey's question whether he was involved with the Union, and her alleged statement that there are people who want to know, allegedly occurred in July 2013, well before the critical period which commenced on August 16, 2013 with the filing of the representation petition. It is well established that the Board will only consider conduct as objectionable and warranting the setting aside of an election if it occurs between the filing of the petition through the date of the election. *Ideal Electric Mfg. Co.*, supra. Thus, this alleged question and statement can not constitute objectionable conduct.

The record reveals that Nunez also had a conversation with HR Manager Martinez at some time in August 2013. The details of that conversation are, however, in dispute. Nunez stated that Martinez called him to her office to inform him that she would be approving his request to transfer to another department despite the fact that he had not been in his current position for six months, as was generally required. Nunez testified that Martinez then stated that she wanted to talk about "this union business." According to Nunez, Martinez stated that if the Union came in, it would close down the Employer and that getting time off for education would not happen if he were part of the Union. Nunez asserts that he responded that he saw "good and bad unions and good and bad corporations and he thought the Employer needed the Union." According to Nunez, Martinez ended the conversation by stating that she thought he would benefit from speaking to Tim McNamera and Nunez responded that he was willing to talk to anyone about what he felt was needed at the Employer. In that regard, he stated that McNamara sent him an email a few days later stating that it was his understanding that Nunez wanted to meet, but Nunez responded he did not request a meeting but was willing to meet with him.

Nunez never followed up or accepted McNamara's offer to meet. Nunez testified that after the alleged statements by Bailey and Martinez, he continued to engage in union organizing by talking to employees at a local coffee shop.

Martinez disputed Nunez' assertions. She testified that she spoke to Nunez about his request to transfer to the emergency department, rather than send him an email, because she they had a good relationship and he never hesitated to come to her when he had a problem. She also stated that she previously helped Nunez get his wife a job with the Employer in January or February 2012. Martinez acknowledged that she personally informed Nunez that she was making an exception to the policy that he had to be in his current position for six months before he was eligible to bid on the LPN position in the emergency department. She said that during their conversation, Nunez became angry because she had recently terminated his daughter who was an employee, and Nunez told her that he was attempting to find an attorney to sue the Employer. Martinez testified that she said he could get an attorney, but she did not think the Employer did anything wrong. She testified that he brought up the Union and "started going off about the Union," stating that people were not signing union authorization cards because they were afraid they would be fired, and that she told him that was not the case. Martinez denied that she made any comments about the impact of the Union on the Employer. In fact, she testified that she specifically said people would not be fired if there was a union at the Employer's facility. She stated that Nunez spoke about his vision to make things right at the hospital, including his suggestion that they appoint two representatives for every floor to gather complaints from employees, and she responded that any employee can take complaints to management. Finally, Martinez testified that Nunez successfully transferred to that position he sought in the emergency department.

I find that Martinez testified in a clear and believable manner and I credit her testimony over that of Nunez, who appeared angry with the Employer and whose testimony was less than credible and, at times, implausible. Nunez did not deny that he was upset with the Employer for firing his daughter and that he was going to sue the Employer over her discharge. Nunez' assertion that Martinez stated that the Employer would close and he would not get time off for education if the Union came in, is not believable nor plausible in light of the fact that Martinez also suggested that Nunez talk to McNamara who is her superior in the human resources department. It seems unlikely that Martinez would make such statements and then suggest talking to her superior, the person Nunez could have complained to about Martinez's alleged coercive statements. In addition, Nunez never met nor spoke with McNamara, when it was plausible for him to check with McNamara to see if Martinez's statement was true. In addition, it is implausible that Martinez would make such threatening statements to Nunez, a known Union supporter, when at the same time she overlooked the rules for transfers so that Nunez could transfer to a department where he wanted to go. Such assertions do not add up with the facts, and thus cast doubt over the veracity of Nunez' assertions.

Thus, there is no credible evidence to establish that Martinez threatened or coerced Nunez, or said anything to affect his free choice in the election process. Therefore, I do not find Martinez's statements to be objectionable.

2. <u>The alleged comments by Manager Nevil, an unidentified manager, and Manager Bagazzoli</u>

Nunez testified that after the release of the pro-union video on October 15, 2013, there were three instances where managers made comments to him. He stated that after the video release, Manager Harriet Nevil told him the video was disgusting, filled with lies, horrible,

untrue and he was trying to destroy the hospital. She told Nunez that the Employer's managers were open to discussing any issues that came up. Nunez testified that he asked her if problems were always addressed, why was the Employer still negotiating a contract after the previous contract expired.

In a second instance, he testified that a person with a manager's name tag told him his video was terrible when she passed him in the Hospital hall. Nunez was unable to identify the person who allegedly made that statement and he could not state with certainty that she was in fact a manager.

In a third instance, he testified that Bagazzoli, Nunez' manager at the time, said she saw the video and was disappointed in him for supporting the Union. He alleged that she also stated that he was a good employee and she questioned why he would want to get involved with the Union. Nunez testified that Bagazzoli told him unions close hospitals, and Lakeshore Hospital closed because of the Union. Nunez testified that he knew that Lakeshore Hospital had not, in fact, closed and that the Employer has even sent patients to that hospital. Nunez stated that he responded to Bagazzoli that the Employer was the only hospital in the county and the chance of it closing down seemed extremely remote to him. He stated that Bagazzoli asked him what he thought would happen if the Union lost the election, to which he replied "I guess I'm going to get fired." He said Bagazzoli responded, "Oh, no, we won't do that."

The Petitioner argues in its brief that the alleged statements by Nevil and Bagazzoli, constitute violations of Section 8(a)(1) of the Act and "ruined the laboratory conditions" of the election. The Employer argues that the comments were personal opinions protected by Section 8(c) of the Act and that the Employer is allowed to explain its perception of the advantages and disadvantages of collective bargaining to its employees as long as there are no threats or promises of benefits.

With regard to the alleged statement from the Manager Harriet Nevil that the video was disgusting, filled with lies, horrible, untrue and he was trying to destroy the hospital, it is devoid of any threats or promises of benefits. It is an expression of her personal opinion, which she is entitled to, and is protected under Section 8(c) of the Act. Likewise, the alleged statement of an unidentified person, if in fact that person was a supervisor or manager, that Nunez' video was terrible when she passed him in the Hospital hall, is an expression of personal opinion without threat or promise of benefit, and which is also protected speech under Section 8(c) of the Act. I find that there is no evidence that these statements interfered with any employees' freedom of choice in the election.

Finally, it is alleged that Bagazzoli told Nunez that she saw the video and was disappointed in him for supporting the Union, she questioned why he wanted to support the Union, and finally told him Lakeshore Hospital closed because of the Union. Bagazzoli testified but was never asked about these alleged statements, and she therefore never denied making them. Thus, the evidence with regard to these statements is uncontradicted.

Accepting Nunez' assertions of Bagazzoli's statements, I find that her statement that she was disappointed in Nunez is a personal opinion and expression devoid of threat or promise of benefit, and protected by Section 8(c) of the Act. I find that her questioning of Nunez, a well

known Union supporter, was not coercive as it was known that he was a strong union supporter, and the questioning did not contain a threat or promise of benefit which could interfere with his free choice in casting a ballot in the election. In addition, her alleged statement that Lakeshore Hospital closed because of the Union, was not coercive as Nunez testified that he did not believe the Employer would close, and he was personally aware that Lakeshore Hospital had not closed because the employer had recently sent patients to that hospital. In any event, even if the statement was coercive, it was isolated and there is no evidence that other employees heard the statements and there is no evidence that Nunez informed other eligible voters about the statements. Thus, in the absence of any dissemination among the unit employees, there is no evidence that this isolated statement in any way affected the employees' exercise of free choice to such an extent that it materially affected the results of the election. See *Avante at Boca Raton*, supra (the Board overruled the employer's objection where it found there was no evidence that the unit employees knew of the alleged coercive incident).

Therefore, I find that the Petitioner has failed to satisfy its heavy burden of showing that the conduct alleged interfered with the election. On the basis of the above, I find that Objection 12 is without merit and I recommend that it be overruled.

## CONCLUSIONS AND RECOMMENDATIONS

Based on the above, I have concluded that the challenges to the ballots of Gregory Juul, John Long, Laurie Krug, Christina Guimond, Kevin Griffin, and Lauren Bushnell should be sustained and I recommend that their ballots not be counted. Having also found that the challenges to the ballots of Mary Anne Bove, Anthony Titus, Matthew Barnard, Casey Belleisle, Donald Harris Jr., Todd Oliver, Mary Grogan, Kristina Fries, Janine Ours, Lisa Cousins, and Andrea Keim should be overruled, I recommend that their ballots be opened and counted, and that the Regional Director for Region 3 prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification. Furthermore, having concluded that Petitioner's Objections 1, 3, 5, 7, 8, 11, and 12 are without merit, I recommend that they be overruled.[32]

Dated, Washington, D.C., May 9, 2014.

Thomas M. Randazzo
Administrative Law Judge

[32] In accordance with Sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board in Washington, D.C. an original and seven (7) copies of the exceptions to this Decision and Recommendations on Challenged Ballots and Objections within fourteen (14) days of the date of issuance. Immediately upon the filing of such exceptions, the party filing same shall serve a copy upon each of the other parties to this proceeding and upon the Regional Director. If no exceptions are filed thereto, upon the expiration of the period of filing such exceptions, the Board may adopt the recommendations of the administrative law judge or make other disposition of the case.