

Seton Medical Center/Seton Coastside and National Union of Healthcare Workers (NUHW), Petitioner and SEIU United Healthcare Workers-West (SEIU-UHW), Intervenor. Case 20-RC-073334

February 20, 2014

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS MISCIMARRA, HIROZAWA AND SCHIFFER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held March 21, 2012, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 301 ballots for Intervenor SEIU United Healthcare Workers-West (SEIU-UHW), 271 for Petitioner National Union of Healthcare Workers (NUHW), and 19 against participating labor organizations.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings¹ and recommendations only to the extent consistent with this Decision and Direction of Second Election.

We adopt, in limited part, the hearing officer's finding that Seton Medical Center/Seton Coastside (Seton or Employer) interfered with the election by discriminatorily allowing SEIU-UHW preferential access to its Seton Medical Center facility for electioneering purposes. In setting aside the election, we rely (as explained below) only on the fact that, in connection with the campaign, the Employer permitted exclusively SEIU-UHW representatives to solicit employees on worktime, in violation of the Employer's own facially neutral prohibition and without any asserted basis in the access-related provision of the collective-bargaining agreement between Seton and SEIU-UHW. Because we find that the preferential access for worktime solicitation is a sufficient basis to order a second election, we need not and do not reach any other allegations of objectionable conduct here.

¹ SEIU-UHW and the Employer have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings. In addition, some of SEIU-UHW's exceptions allege that the hearing officer's report demonstrates bias and prejudice. On careful examination of the recommendations and the entire record, we are satisfied that SEIU-UHW's contentions are without merit.

Discussion

NUHW filed 31 objections. Our decision focuses on Objections 21–23 in which the Petitioner alleges that the Employer discriminated in favor of SEIU-UHW, the incumbent union, with respect to access, solicitation, and distribution. We find that the election should be set aside because the Employer routinely condoned worktime solicitation by nonemployee representatives of SEIU-UHW while denying the same opportunities to nonemployee representatives of NUHW.²

Seton maintains a written policy on solicitation and distribution of written material which provides that nonemployees "may not, at any time, solicit or distribute literature or other items of any kind or for any purpose on Seton Medical Center/Seton Coastside property." Solicitations and distributions are prohibited during worktime and in immediate patient care areas at any time. Work areas are defined to exclude employee lounges and break rooms. Employees were specifically notified by the Employer that unions were not allowed to campaign in work units or to disrupt hospital business or patient care. Nevertheless, the evidence shows that the Employer routinely condoned worktime solicitations by nonemployee representatives of SEIU-UHW while denying the same opportunities to nonemployee representatives of NUHW.

Among the evidence of such disparate treatment is a preshift "huddle" in the environmental services department (EVS), attended by nonemployee SEIU-UHW representatives, who engaged in electioneering and solicited employee support during worktime. With approximately 15 employees in attendance at the huddle, the EVS supervisor told employees that SEIU-UHW representatives were there to speak with them and that the employees could stay or leave. With the supervisor still present, SEIU-UHW representatives proceeded to campaign for support among the employees in the upcoming election.

NUHW witnesses described several other instances of nonemployee SEIU-UHW representatives soliciting votes and attempting to persuade employees to support SEIU-UHW in the election while the employees were on worktime. Deborah Pitambar, a client services repre-

² The Board has long held that it is unlawful and objectionable for an employer to facilitate worktime electioneering by one union while denying the same access to a rival union. See, e.g., *Duane Reade, Inc.*, 338 NLRB 943, 943–944 (2003), *enfd.* 99 Fed. Appx. 240 (D.C. Cir. 2004); *Raley's, Inc.*, 256 NLRB 946, 957 (1981), *affd.* on remand 272 NLRB 1136, 1136 fn. 2 (1984); see also *Laub Baking*, 131 NLRB 869, 871–872 (1961) (finding no violation where the stepped-up frequency of the incumbent union's visits to the plant "was not done with the connivance" of the employer, and where the employer "sought to curtail" the incumbent's electioneering at the plant when brought to its attention by the petitioner).

sentative in the radiology department, testified that a SEIU-UHW representative solicited her support and electioneered while Pitambar was on duty in the hallway and at her workstation, the front desk. Juan Pedroza, an ultrasound technician, witnessed and overheard a SEIU-UHW representative campaigning in the ultrasound control room and outside of break rooms in work areas in his department. Merle Aragon, an environmental services employee, saw a SEIU-UHW representative campaigning in work areas and authenticated a photograph of a SEIU-UHW representative conversing with employees in the doorway to a patient's room. Dee Ann Doody,³ a switchboard operator, frequently witnessed SEIU-UHW representatives handing out election related flyers in work areas. On two occasions, she saw a SEIU-UHW representative discuss and distribute an election flyer to an employee while the employee was working at the switchboard operator's station.

It is clear, moreover, that management was on notice that SEIU-UHW staffers were appealing to employees on worktime. As described above, management facilitated SEIU-UHW organizers speaking to employees about the election during the EVS preshift huddle. More broadly, in a March 12 letter, NUHW complained to Seton that "[e]mployees are being bothered while on duty by SEIU-UHW paid staff," and that SEIU-UHW was electioneering and soliciting "during working time." NUHW also reported that SEIU-UHW representatives were included in department staff meetings for the purpose of campaigning. Seton never responded to NUHW's letter and never addressed the allegations or took any action responsive to the reports of worktime solicitation.

Although it would have been objectionable in any case, the preferential treatment given to SEIU-UHW also was inconsistent with the Employer's own stated rules

³ On p. 22 of the report, the hearing officer incorrectly refers to Doody as Dee Ann Dowdy.

and policies discussed above. Seton's solicitation and distribution policy explicitly prohibits worktime solicitation. In addition, at the onset of the critical period, Seton informed employees that while "unions are allowed to campaign on hospital property, they are not allowed to do so in work units nor are they allowed to disrupt hospital business or patient care." Seton knowingly waived this policy for SEIU-UHW representatives, but not for NUHW representatives.⁴ There is no claim here that Seton's policy was inconsistent with the collective-bargaining agreement in effect during the critical period or that the agreement required Seton to grant this particular type of access to SEIU-UHW.⁵

In sum, Seton discriminated against NUHW by allowing SEIU-UHW representatives, but not those of NUHW, to address electioneering appeals to employees while they were working. Especially considering the relatively narrow margin of victory in the election, we find that the objectionable conduct is sufficient to warrant a second election.

[Direction of Second Election omitted from publication.]

⁴ See *Duane Reade, Inc.*, supra, 338 NLRB at 944.

⁵ The Employer's rule against solicitation by employees on worktime reflects a long-established and well-defined legal distinction between worktime and nonworktime solicitation. The collective-bargaining agreement, in turn, provided that a SEIU-UHW representative was "allowed access to visit the facility at all times to ensure compliance with this Agreement and to conduct Union business." No party argues that this contractual provision gave SEIU-UHW representatives a contractual right to contact employees for campaign purposes during their worktime. Nor is there evidence that Seton had a prior history of permitting worktime solicitation, by anyone, at its facilities.

With respect to the issue of worktime solicitation, then, this case does not require us to decide whether or when an incumbent union's preferential access, predicated on a collective-bargaining agreement or an established past practice, would be grounds for setting aside an election. Cf. *West Lawrence Care Center*, 308 NLRB 1011, 1012 (1992) (employer violated broad contractual visitation clause by seeking to limit incumbent union's access, during election campaign, to contract administration).