UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KAISER FOUNDATION HOSPITALS AND
THE PERMANENTE MEDICAL GROUP, INC.
Employer

and Case 20-RC-188438

CALIFORNIA NURSES ASSOCIATION (CNA)
Petitioner

ORDER

The Employer's Requests for Review of the Acting Regional Director's Decision and Direction of Election and the Regional Director's Supplemental Decision Regarding Challenged Ballots, Objections to Election, and Certification of Representative are denied as they raise no substantial issues warranting review.[1]

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[1] Contrary to the Employer's contentions, direction of a self-determination election does not require a showing that the petitioned-for voting group shares an "overwhelming community of interest" with the existing unit employees. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), cited by the Employer, did not involve a self-determination election, nor did it purport to change the Board's longstanding standard for determining whether a self-determination election is appropriate. In any event, the "overwhelming community of interest" standard does not apply to the initial question whether a petitioned-for unit of employees shares a community of interest. Rather, that heightened standard applies to a party's claim that the smallest appropriate unit must include employees in addition to those included in the petitioned-for unit. Id. at 943-946.

With respect to its objections, the Employer cites judicial authority requiring "closer scrutiny" where an election result is close. "Closer scrutiny" is warranted, however, only where the objecting party proffers evidence that, if credited, would establish conduct warranting setting aside the election. See Sec. 102.69(c)(1) of the Board's Rules and Regulations (a post-election hearing is required only "[i]f . . . the Regional Director determines that the *evidence* described in the accompanying offer of proof could be grounds for setting aside the election.") (emphasis added). Here, the Employer's offer of proof did not cite any non-hearsay evidence that objectionable conduct occurred during the critical period before the election. Thus, we are left with a failure of proof by the Employer that any objectionable conduct might have occurred.

Further, with respect to the Employer's objection that the Union used photographs of employees in its campaign literature without their consent, we observe that, as found by the Regional Director, the Employer has proffered no evidence that the Union committed any misrepresentation or forgery in its use of the photographs, or otherwise engaged in any misconduct with the photographs that would taint the election. See *Enterprise Leasing Company-Southeast, LLC*, 357 NLRB 1799 (2011) (union's unauthorized use of employee's

PHILIP A. MISCIMARRA, CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., May 17, 2017.

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photograph in campaign flyer was not objectionable where there was no evidence that the union misrepresented the employee's support for the union, there was no forgery, and the flyer was readily identifiable as campaign propaganda), later proceeding 361 NLRB No. 63 (2014), enfd. 631 Fed.Appx. 127 (4th Cir. 2015).

Chairman Miscimarra believes the Board should grant review as to Employer Objection 1, which alleges that the Petitioner engaged in objectionable conduct by using photographs of unit employees in campaign literature without their advance knowledge and consent, because this raises a substantial issue as to the appropriate standard to apply in evaluating such conduct. See, e.g., *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001) (finding that employer engaged in objectionable conduct by using employee photographs in campaign literature without their consent), enfd. 301 F.3d 167 (3d Cir. 2002); *Enterprise Leasing Company-Southeast, LLC*, 357 NLRB 1799 (2011) (Board majority, with former Member Hayes dissenting, declines to apply *Allegheny Ludlum* standard to union campaign literature), later proceeding 361 NLRB No. 63 (2014), enfd. 631 Fed.Appx. 127 (4th Cir. 2015). Cf. *Durham School Services*, 360 NLRB No. 108 (2014) (Member Miscimarra, dissenting) (involving whether union engages in objectionable conduct by disclosing employees' intended votes without their consent). Chairman Miscimarra otherwise agrees with the denial of review, although he does not pass on the holding in *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011), cited by the Acting Regional Director's Decision and Direction of Election, and Chairman Miscimarra disagrees with *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), also cited by the Acting Regional Director, for the reasons he articulated in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 22-33 (2014) (Member Miscimarra, dissenting). More generally, Chairman Miscimarra continues to adhere to his dissenting views regarding the Election Rule. See Election Rule, 79 Fed. Reg. at 74430-74460 (dissenting views of Members Miscimarra and Johnson); id. at 74434-74441 (dissenting views regarding the Final Rule's acceleration of the pre-election timeline).