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FOR DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KAISER FOUNDATION HOSPITALS; THE PERMANENTE MEDICAL GROUP, INC.,	
Petitioner,	Case No. 18-1004
vs.	NLRB Case Nos. 20-CA-202742 and 20-RC-188438
NATIONAL LABOR RELATIONS BOARD,	
Respondent.	

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Petitioners Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. (collectively, "Petitioners") hereby petition the United States Court of Appeals for the District of Columbia Circuit, pursuant to 29 U.S.C. § 160(f), for review of the following Decision and Orders issued by respondent National Labor Relations Board:

1. The Decision and Order issued by the National Labor Relations Board on December 16, 2017, in Case 20-CA-202742, reported at 365 NLRB No. 167 (a copy of which is attached as Exhibit A);

2. The Order issued by the National Labor Relations Board on May 17, 2017, in Case 20-RC-188438 (a copy of which is attached as Exhibit B), concerning Petitioners' Requests for Review of:

   a. The Regional Director's Supplemental Decision Regarding Challenged Ballots, Objections to Election, and Certification of Representative issued on February 16, 2017, by Regional Director Jill H. Coffman (a copy of which is attached as Exhibit C); and

   b. The Regional Director's Decision and Direction of Election issued on December 22, 2016, by then Acting Regional Director Jill H. Coffman (attached hereto as Exhibit D) and Erratum issued on December 23, 2016, by then Acting Regional Director Daniel J. Owens (attached hereto as Exhibit E).

Dated: January 5, 2018

Respectfully submitted,

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Counsel for Petitioners
Kaiser Foundation Hospitals
and The Permanente Medical Group, Inc.

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. *and* California Nurses Association. Case 20–CA–202742

December 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the California Nurses Association (the Union) on July 18, 2017, the General Counsel issued the complaint on July 28, 2017, and amended the complaint on August 21, 2017, alleging that Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 20–RC–188438. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed answers and an amended answer admitting in part and denying in part the allegations in the complaint and amendment to the complaint, and asserting affirmative defenses.

On September 12, 2017, the General Counsel filed a Motion for Summary Judgment. On September 15, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The Union filed a statement in support of the General Counsel's Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the certified unit does not share an overwhelming community of interest with the Union's larger unit of Registered Nurses in which the unit at issue here would be included, that certain objectionable conduct occurred during the critical period of the election warranting overturning the election results, and that the Regional Director failed to resolve all challenged ballots.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a California corporation engaged in the operation of acute-care hospitals with facilities located throughout Northern California.[3]

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[1] In addition, the Respondent advances two affirmative defenses to complaint allegations that could not have been raised below. First, the Respondent contends that the complaint and amendment to the complaint fail to state a claim under the Act. Second, the Respondent contends that the complaint allegations are barred to the extent that they were not filed within the statute of limitations set forth in Sec. 10(b) of the Act. The Respondent has not offered any explanation or evidence to support either of these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's motion for summary judgment in this proceeding. See, e.g., *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enfd. 2006 WL 4539237 (D.C. Cir. 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995).

[2] Chairman Miscimarra would have granted review in the underlying representation proceeding with respect to Objection 1, finding that the request for review raised a substantial issue as to the appropriate standard to apply in evaluating a party's use of photographs of unit employees without their prior authorization or consent. While he otherwise agreed with the denial of review, he did not pass on the holding in *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011), and he noted his continued disagreement 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), and that he continues to adhere to his dissenting views regarding the Election Rule. See Election Rule, 79 Fed. Reg. 74308, at 74430–74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson); id. at 74434–74441 (dissenting views regarding the Final Rule's acceleration of the preelection timeline). While he adheres to these views, Chairman Miscimarra agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

[3] In its answer, the Respondent denies the complaint allegation that it has been, at all material times, "a California corporation engaged in the operation of acute-care hospitals with facilities located throughout Northern California," but it "admit[s] and allege[s]" the following:

During the 12-month period ending November 16, 2016, in conducting its business operations described above, the Respondent derived gross revenues in excess of $250,000, and purchased and received at the Respondent's facilities, goods and materials valued in excess of $5000, which originated from points located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union, California Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot between December 30, 2016, and January 19, 2017, the Union was certified[4] on February 16, 2017, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, employed by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals located within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards, and supervisors, as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

Since at least about August 17, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since September 5, 2017, the Respondent has failed and refused to do so.[5]

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since September 5, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Kaiser Foundation Hospitals and The Permanente Medical Group, Inc., Northern California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the California Nurses Association (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

Kaiser Foundation Hospitals (KFH) is a nonprofit public benefit and charitable corporation organized under the laws of the State of California that owns and operates general acute care hospitals in Northern California, and also owns ambulatory (outpatient) clinics, including facilities in Oakland, Richmond and Santa Rosa, California. . . . The Permanente Medical Group, Inc. is a professional medical corporation organized under the laws of the State of California that provides medical services for Kaiser Permanente members in Northern California and has its headquarters in Oakland, California.

The Respondent's denials do not raise an issue of fact warranting a hearing, particularly in light of its admission that it is an employer engaged in commerce and a health care institution within the meaning of the Act.

[4] By unpublished Order dated May 17, 2017, the Board denied the Respondent's request for review.

[5] In the original complaint, the General Counsel alleged that the Union orally requested that the Respondent recognize and bargain with it about June 30, 2017, and Respondent denied that allegation in its original answer. The amended complaint replaced that allegation with an allegation that "since at least . . . August 17, 2017," the Union requested that the Respondent recognize and bargain collectively with it, and the Respondent admitted that allegation. Although the Respondent's amended answers admit its refusal to bargain by letter dated September 5, 2017, they do not refer to its refusal to bargain by letter dated July 17, 2017, which the Respondent admitted in its original answer. As a determination regarding the date on which the Respondent first received the Union's request to bargain does not affect the remedy, we find it appropriate to rely on the uncontested facts that the Respondent received a bargaining request on August 17, 2017, and refused to bargain by letter dated September 5, 2017.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, employed by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards, and supervisors, as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Northern California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the California Nurses Association (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, employed by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards, and supervisors, as defined by the Act.

KAISER FOUNDATION HOSPITALS THE PERMANENTE MEDICAL GROUP, INC.

The Board's decision can be found at https://www.nlrb.gov/case/20-CA-202742 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

EXHIBIT B

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).

EXHIBIT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

KAISER FOUNDATION HOSPITALS AND
THE PERMANENTE MEDICAL GROUP, INC.

Employer

and **Case 20-RC-188438**

CALIFORNIA NURSES ASSOCIATION (CNA)

Petitioner

REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION REGARDING CHALLENGED BALLOTS, OBJECTIONS TO ELECTION, AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a petition filed by California Nurses Association (Petitioner or Union) on November 18, 2016, and a Decision and Direction of Election (Decision) that I issued on December 22, 2016, the Region conducted a mail-ballot election among Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. (Employer) employees, with ballots being sent to all eligible voters on December 30, 2016 and due to be returned to the Regional office by January 19, 2017, in the following appropriate bargaining unit to determine whether they wish to be represented for the purposes of collective bargaining by the Petitioner:

> All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals located within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program

services department at the South Sacramento location, excluding managers, guards and supervisors, as defined by the Act.

Upon conclusion of the election, on January 19, 2017, a Board agent counted the ballots and served a copy of the official *Tally of Ballots* on the parties. The *Tally* shows that of approximately 545 eligible voters, 240 votes were cast for, and 218 votes were cast against, representation by the Petitioner. There were 3 void ballots and 45 challenged ballots, a sufficient number to affect the election results. Pursuant to Section 102.69 of the Board's Rules and Regulations, I directed an investigation into the challenged ballots, and I find as follows:

THE CHALLENGES

During the ballot count, 16 ballots arrived by U.S. mail as the Board agent was in the process of drafting the *Tally*. The Board agent voided the late-arriving ballots, and the Employer challenged that determination. The Employer subsequently withdrew its challenge in its February 6, 2017 position statement. For its part, the Petitioner stipulated that the ballots are void and should not be counted. [1] Accordingly, I hereby approve the Employer's withdrawal of its challenge, and I affirm that the 16 tardy ballots are void.

The Employer also challenged the ballots of Cynthia Ann Mouton, Mariflor Battad Ong, Elna L. Discipulo, Patricia Cunanan Flores, and Marlys J. Hayden on the basis that they were no longer employed as of the date of the ballot count. Personnel records submitted by the Employer in support of its challenges show that all five individuals voluntarily separated from its employ on or before December 29, 2016. The Petitioner

[1] The Employer and Petitioner submitted position statements with supporting documentation to assist the Region in its investigation of the determinative challenged ballots. The parties' submissions established that they agree to the disposition of at least 24 of the 45 determinative challenged ballots. Additionally, in accordance with Section 11361.2 of the Board's Casehandling Manual- Part II- Representation Proceedings, Petitioner executed a Stipulation Resolving Challenged Ballots memorializing its agreement with the Employer's position that 24 of the 45 challenged ballots should not be opened and counted.

stipulated and agrees that these individuals are thus ineligible. Accordingly, I find that those five individuals are ineligible to vote, and their ballots will not be counted.

The Board challenged the ballots cast by three voters, Kathleen Mullen, Hellai Momen, and Dhezrae Herauf, because their names did not appear on the Voter List provided by the Employer pursuant to Sections 102.62(d) and 102.67(l) of the Board's Rules.[2] The Employer also challenged their ballots, taking the position that Mullen is employed in a job classification outside the bargaining unit; that Momen did not meet the regular part-time eligibility requirements; and that Herauf was not in its employ as of the election date. Petitioner and the Employer are now in agreement that these individuals are not eligible to vote in the election and were properly excluded from the Voter List. Consequently, I sustain the challenges to those ballots, and they will not be counted.

Findings and Conclusion

Having approved the Employer's withdrawal of its challenge to the 16 voided tardy ballots, and having sustained the above eight challenges to the ballots cast by Cynthia Ann Mouton, Mariflor Battad Ong, Elna L. Discipulo, Patricia Cunanan, Marlys J. Hayden, Kathleen Mullen, Hellai Momen, and Dhezrae Herauf; the 21 remaining challenged ballots are no longer sufficient in number to affect the outcome of the election. I attach hereto a Revised Tally of Ballots, and with 240 votes cast for Petitioner and 218 votes cast against, Petitioner has thus received a majority of the valid votes cast. A majority of eligible voters having cast ballots in favor of representation by the Petitioner, I now turn to the Employer's Objections to Conduct of Election and/or to Conduct Affecting the Results of the Election (Objections).[3]

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[2] 79 Fed. Reg. 74308.

[3] Petitioner timely filed, but subsequently requested to withdraw, its Objections to the Conduct of the Election; a request I hereby approve.

THE OBJECTIONS

On January 26, 2017, the Employer timely filed Objections and timely submitted an accompanying Offer of Proof (Offer).[4] The Employer's Objections read verbatim as set forth below allege that Petitioner, through its agents, representatives, employees, and supporters, interfered with the conduct of the election, affected the results of the election, and interfered with employee free choice in a manner which destroyed necessary laboratory conditions by engaging in the following conduct:

1. Coercing employees through the utilization of photographs of bargaining unit members on union campaign literature without their advance knowledge and consent, thus creating a false portrait of employee support.
2. Directing voters whom it believed were not supportive of the Petitioner not to vote.
3. Coercively informing PCCs that they would not leave the PCC alone until the PCC signed the card in support of Petitioner.
4. Coercively following and surveilling voters who Petitioner had identified as likely voters against representation throughout the workplace to monitor these employees in their discussions and interaction with other voters.
5. Creating a coercive environment during "ballot marking pizza parties" where the union pressured employees to vote in public and negated the privacy of the vote afforded by the NLRB.
6. Offering to drive PCCs to the post office to cast their ballot.

Objection 1

In Objection 1, the Employer alleges that the Petitioner used photographs of eligible voters in its campaign literature without employees' advance knowledge and consent, thereby creating a false representation of employee support. To support this Objection, the Employer proffered three witnesses who would testify that a Petitioner representative photographed them and used the images in Petitioner publications without their consent.

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[4] Only conduct which occurred during the "critical period" (between the November 18, 2016 filing date of the petition and the January 19, 2017 ballot count) can form the basis for objectionable conduct. *E.L.C. Electric, Inc.*, 344 NLRB 188, 189, n. 6 (2005), citing *Ideal Electric Co.*, 134 NLRB 1275 (1961).

When considering election objections involving campaign literature that contains the names or signatures of employees, or which attributes quotes to employees without the employees' consent, the Board has applied the standard set forth in *Midland National Life Insurance Co.,* 263 NLRB 127, 133 (1982); to wit, that the Board does not explore the veracity or falsity of campaign propaganda. Rather, the Board examines whether or not a party has used "forged documents which render the voters unable to recognize propaganda for what it is." *See Van Dorn Plastic Machinery Co. v. NLRB,* 736 F.2d 343, 348 (6th Cir. 1984) ("where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.")

In *NLRB v. Enterprise Leasing Co. LLC,* 722 F.3d 609 (4th Cir. 2013), the court upheld the Board's overruling of a similar objection and found that the union's use of an employee photograph on a campaign flyer without the employee's prior authorization did not impermissibly taint the election. The court reasoned that the union's conduct involved no forgery, and there was nothing to indicate that eligible employees' ability to recognize flyer as campaign propaganda was compromised. Similarly, in *Durham School Services LP*, 360 NLRB No. 108 (2014), the day before the election, the union circulated a flyer, clearly identified as a union document, that included names and pictures of eligible voters, captioned by statements indicating that the pictured voters were voting for the union. At least one employee did not authorize the union to use her image or to attribute any quotation to her. The Board overruled the objection, reasoning that, absent evidence of forgery or any dispute that the union's flyer was easily recognized as campaign propaganda, "[a]t most, then, the employer's evidence suggests a possible misrepresentation of an employee's sentiments which, under *Midland*, provides no basis for setting aside the election." Slip op at 2. The Board also concluded that it would have reached the same result applying the *Van Dorn* standard, supra.

Here, Petitioner's use of employee photographs, even if unauthorized, amounts to nothing more than campaign propaganda, and there is no indication that it was not

easily recognized as such. There is no evidence of forgery at play and the offer of proof does not assert that any of the witnesses ever informed Petitioner that they objected to its use of their image in campaign literature. Moreover, the alleged conduct involved three out of approximately 545 employees, a number insufficient to be characterized as "pervasive." While not dispositive, I note that there is no offer of proof or claim that these three employees held such a position of influence that public misrepresentation of their voting preference would reasonably impact other employees' votes.

Based on all of the above, I find that the Employer's proffered evidence does not raise substantial and material issues of fact that would warrant a hearing, and I hereby overrule Objection 1.

Objection 2

In Objection 2, the Employer contends that the Petitioner directed voters, whom it believed did not support the Petitioner, not to vote in the election. To support this Objection, the Employer offered a single unidentified witness who would testify that another unidentified individual reported that Petitioner had a majority and that employees in Santa Rosa need not bother casting their votes.

When revising its Representation Case Rules (April 14, 2015), the Board noted that "objections to a secret-ballot election should not be filed by any party lacking factual support for the objections and, therefore, a filing party should be able to describe the facts supporting its objections at the time of filing." 79 Federal Register 74308, 74411 (Dec. 15, 2014). See also *Daily Grind*, 337 NLRB 655 (2002), in which the Board observed:

> The Employer was required to supply the Board with some evidence supporting its allegation, preferably in the form of an affidavit or affidavits. At a minimum, the Employer should have identified witnesses and provided a description of the relevant information they could provide. *Id* at 656.

The Board has maintained that a hearing on objections is held only when there are substantial and material issues of fact in dispute which, if resolved in the objecting party's favor, would *prima facie* warrant overturning the election results. *Care Enterprises,* 306 NLRB 491 (1992). Accordingly, a party raising objections cannot rely

on bare assertions to raise an issue requiring a hearing. *Builders Insulation, Inc.*, 338 NLRB 793 (2003); *The Daily Grind, supra* (unsupported allegations are insufficient to trigger administrative investigations); *Heartland of Martinsburg,* 313 NLRB 655 (1994). In *Holladay Corp.*, 266 NLRB 621 (1983), the Board emphasized that the critical prerequisite to a full investigation of specific allegations in objections is the submission of names of witnesses who can provide direct, rather than hearsay, testimony. Citing its decision in *Cities Service Oil Co.*, 77 NLRB 853, 857 (1948), the Board reiterated that "[W]e consider as crucial, in making an investigation of preelection interference, that we have names of witnesses upon whom the moving party relies." *Id* at 622. Thus, I find that the Employer's proffered evidence is insufficient to raise substantial and material issues of fact which, if resolved in the Employer's favor, would warrant overturning the election results. *Care Enterprises; The Daily Grind, Holladay Corp.*, supra. Accordingly, I overrule Objection 2.

Objection 3

Through Objection 3, the Employer alleges that the Petitioner engaged in coercive conduct by informing employees that it would not leave them alone until the employees signed an authorization card in support of Petitioner. The Employer submitted declarations from two employees who assert that, during the period from August to October 2016, Petitioner representatives informed them that signing authorization cards merely indicated a desire to receive more information about union representation.

It is well established that only conduct which occurs during the "critical period" (here, between the November 18, 2016 filing date of the petition and the January 19, 2017 ballot count) can form the basis for objectionable conduct. *E.L.C. Electric, Inc.*, 344 NLRB 188, 189, n. 6 (2005), citing *Ideal Electric Co.*, 134 NLRB 1275 (1961). Here, even assuming for the sake of analysis that the alleged conduct occurred, it fell outside the critical period and, therefore, cannot form the basis for objectionable conduct. Accordingly, I overrule Objection 3.

Objection 4

In Objection 4, the Employer asserts that Petitioner coercively followed and surveilled certain voters in the workplace in order to monitor employee discussions and interactions with other voters. To support this Objection, the Employer proffered three employee witnesses who would testify that they were "followed in the workplace during work hours by Petitioner's agents, representatives, employees, and supporters in their attempts to convince [them] to vote for CNA." Another two witnesses would testify that Petitioner representatives approached them on multiple occasions, both individually and in group settings, during their work hours and asked one of the employees how they intended to vote.

I shall assume for the sake of analysis that Petitioner agents and supporters followed employees, attempted to proselytize them, and asked them how they intended to vote. However, those isolated and innocuous exchanges do not run afoul of the Board's standard for assessing objectionable conduct by a party or nonparty to an election. In evaluating party conduct, the Board applies an objective standard of whether the conduct has "the tendency to interfere with the employees' freedom of choice." The Board considers: (1) number of incidents; (2) severity of incidents and whether they were likely to cause fear; (3) number of employees subjected to the misconduct; (4) proximity of misconduct to election date; (5) degree of persistence of misconduct in the minds of employees; (6) extent of dissemination of the misconduct among employees; (7) the effect of any misconduct by opposing party to cancel out original misconduct; (8) closeness of the vote, and (9) degree to which the misconduct can be attributed to the party. *Cedars-Sinai Medical Center,* 342 NLRB 596, 598 (2004).

The test for third-party or nonparty misconduct is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Rheem Mfg. Co.,* 309 NLRB 459, 463 (1992), quoted in *Hollingsworth Management Services,* 342 NLRB 556, 558 (2004).

Taken together, the campaigning and "surveillance" by Petitioner agents and its supporters did not rise to the level of "misconduct," as contemplated by the Board, much

less objectionable conduct. Indeed, corralling and attempting to convince employees to vote for union representation is the bread and butter of any organizing campaign. In short, the offer of proof does not specify any misconduct which would reasonably instill fear in employees or otherwise "reasonably tend to interfere with the employees' free and uncoerced choice in the election." To illustrate, in *Reliable Trucking, Inc.*, 349 NLRB 812 (2007), the Board refused to set aside an election in circumstances where union agents barged into a meeting attended by 15-20 employees regarding the election that was to commence the next day, disrupted the meeting, and yelled at and exchanged profanities with employees and the employer's representatives. I find the alleged conduct herein to be far less compelling and, accordingly, I overrule Objection 4.

Objections 5 and 6

Objections 5 and 6 raise similar issues, and I shall address them together. Through these Objections, the Employer contends that the Petitioner held "ballot marking pizza parties" where it pressured employees to vote in public, thereby destroying the confidentiality of their vote. Additionally, the Employer alleges that the Petitioner offered to drive employees to the post office to cast their ballots. In support of these Objections, the Employer proffered an unidentified supervisory employee, who would testify to receiving reports from unidentified employees that Petitioner was holding "ballot marking pizza parties." Similarly, one identified witness would testify that she heard that the Petitioner was offering to drive employees to the San Leandro post office to deposit their ballots in the mail.[5] When she confronted Petitioner representatives with this report, they replied that "[it] was perfectly legal" and "there was nothing wrong with giving people rides to the post office."

The hearsay evidence in support of these Objections is insufficient to raise substantial and material issues of fact which would warrant a hearing. *Care*

[5] The witness works out of an Oakland facility approximately 13 miles away from San Leandro, and she did not disclose the identity of the person who told her that Petitioner offered to drive employees to that post office.

Enterprises; The Daily Grind, Holladay Corp., supra. Moreover, I note that the Board has consistently held that, absent special circumstances, providing food and drinks to employees as part of an election campaign does not carry with it a tendency to interfere with employee free choice in an election. *Far West Fibers, Inc.* 331 NLRB 950, 952. Absent any direct evidence whatsoever that employees marked their mail ballots at the alleged pizza event(s) in a manner that would compromise the secrecy of their ballot, no such "special circumstances" exist.

Finally, Board law is well settled that transporting voters to the polls is not objectionable, unless accompanied by other conduct clearly prejudicial to the employees' freedom of choice.[6] Here, there is no allegation or evidence that Petitioner representatives engaged in any electioneering or other improper conduct in the course of the alleged transportation. Based on the foregoing, I overrule Objections 5 and 6.

CONCLUSION

The Employer's Objections and Offer of Proof do not raise any material and substantial issues of fact or law that would warrant a hearing, much less necessitate setting aside the election results. Accordingly, for the reasons set forth above, I hereby overrule the Employer's Objections in their entirety, and issue the following Certification of Representative:

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for CALIFORNIA NURSES ASSOCIATION (CNA), and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care

[6] See *Gastonia Combed Yarn Corp.*, 109 NLRB 585; *Reidbord Bros. Co.* 99 NLRB 127, 130; *Hoague-Sprague Corporation*, 80 NLRB 1699, 1701. Cf. *Gong Bell Manufacturing Co., 108 NLRB 1314; Federal Silk Mills, 107 NLRB 876.*

Coordinators-Case Managers at its hospitals located within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards and supervisors, as defined by the Act.

RIGHT TO REQUEST REVIEW

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, D.C. by March 2, 2017 Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Kaiser Foundation Hospitals and
The Permanente Medical Group, Inc.
Case 20-RC-188438

Dated at San Francisco, California, this 16th day of February, 2017

JILL H. COFFMAN, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

FORM NLRB-760
(7-10)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed 11/18/2016

KAISER FOUNDATION HOSPITALS AND
THE PERMANENTE MEDICAL GROUP, INC.

Employer

And

CALIFORNIA NURSES ASSOCIATION (CNA)

Petitioner

Case No. 20-RC-188438

Date Issued 2/15/2017

City San Francisco State CA

Type of Election: (Check one:)

- ☐ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☒ RD Direction Incumbent Union (Code)

(If applicable check either or both:)

- ☐ 8(b) (7)
- ☐ Mail Ballot

REVISED TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 545
2. Number of Void ballots 19
3. Number of Votes cast for PETITIONER (see name above) 240
4. Number of Votes cast for
5. Number of Votes cast for
6. Number of Votes cast against participating labor organization(s) 218
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 458
8. Number of challenged ballots 21
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 479
10. Challenges are **not** sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has been cast for PETITIONER (see name above)

For the Regional Director Jill H. Griffin

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For

For

For

EXHIBIT D

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

KAISER FOUNDATION HOSPITALS AND
THE PERMANENTE MEDICAL GROUP, INC.

Employer

and

Case 20-RC-188438

CALIFORNIA NURSES ASSOCIATION (CNA)

Petitioner

DECISION AND DIRECTION OF ELECTION

Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. (the Employer) is a California corporation engaged in the operation of acute-care hospitals with facilities located throughout Northern California.[1] By its amended petition[2], California Nurses Association (CNA or the Petitioner)[3] seeks to represent the approximately 550 employees employed by the Employer at 22 facilities located in the following California cities: Antioch, Fremont, Fresno, Manteca, Modesto, Oakland, Redwood City, Richmond, Roseville, Sacramento, San Francisco, San Rafael, Santa Clara, Santa Rosa, San Jose, San Leandro, South San Francisco, South Sacramento, Stockton, Vacaville, Vallejo, and Walnut Creek; in the following proposed unit: All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of

[1] The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act. I further find that the Employer is an employer as defined in Section 2(2) of the Act, a healthcare institution within the meaning of Section 2(14) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

[2] The Petitioner amended the Petition at hearing with my approval.

[3] The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of the Act.

care and coordination to outpatient locations, by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers[4] at its hospitals located within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location[5], excluding managers, guards and supervisors, as defined by the Act.[6]

A hearing officer of the Board held a hearing in this matter and the Petitioner and Employer subsequently filed briefs with me. The parties stipulated on the record that the unit set forth above is an appropriate unit. The Petitioner seeks a self-determination election[7] among the proposed unit to determine whether they wish to be included in the existing Petitioner-represented unit of over 17,000 Registered Nurses (RNs) employed by the Employer at facilities located in Northern California.[8] The Employer, on the other hand, opposes a self-determination election on the ground that the proposed unit does not share a community of interest with the existing unit. It argues that the PCCs perform a planning and regulatory function, which it asserts is an entirely different function than the direct patient care provided by the represented RNs. The Employer did not seek to challenge the appropriateness of the unit on any other ground. Therefore, the only issue to be decided is whether the proposed unit shares a community of interest with the existing unit.

As explained below, based on the record evidence and relevant Board law, I find that the proposed unit employees share an overwhelming community of interest with the existing unit and that a self-determination election is appropriate to determine whether or not the proposed unit of employees wish to be represented by the Petitioner in the existing unit.

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[4] Herein collectively referred to as PCCs.

[5] Further, the parties stipulated that per diem PCCs are eligible to vote if they worked at least 120 hours in either of the two calendar quarters immediately prior to the eligibility date. *Marquette General Hospital, Inc.*, 218 NLRB 713 (1975)

[6] Petitioner is not willing to proceed to an election in a separate unit.

[7] *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); and *Armour & Co.*, 40 NLRB 1333 (1942)

[8] The parties current collective-bargaining agreement (CBA) reveals that the existing unit contains the following positions: Nurse Permittee, Staff Nurse I, Staff Nurse II, Staff Nurse II-Short Hour, Staff Nurse III, Staff Nurse IV, Charge Nurse II, Charge Nurse II-Short Hour, Charge Nurse III, Charge Nurse IV, Home Health Nurse I, Home Health Nurse I-Short Hour, Home Health Nurse II, Home Health Nurse II-Short Hour, Home Health Nurse III, Nurse Practitioner I, Nurse Practitioner I-Short Hour, Nurse Practitioner II, Nurse Practitioner II-Short Hour, and Nurse Practitioner III.

STATEMENT OF FACTS

The Employer's Operations and Managerial Hierarchy

The Employer operates 21 acute-care hospitals and related facilities in Northern California. The Employer is also under contract with St. Joseph's Medical Center in Stockton, California to provide Patient Care Coordinators to care for patients. Generally, the Employer provides healthcare and patient-care services to individuals. The managerial hierarchy at the executive level of the Employer's Northern California operations includes the following executives, from the top down: Chief Executive Officer/Chairman, Executive Vice President-Group President, President of Northern California, and Senior Vice President of Operations.

Either an Area Manager, Hospital Administrator, or Chief Executive Officer oversees each service area, which consists of one or two hospitals. The management reporting structures below this level differ throughout Northern California. The PCCs generally have one reporting structure which differs from the existing unit's various reporting structures. The charts below exemplify some, but not all of the reporting structures for the existing unit.

Area Manager/Hospital Administrator/Chief Executive Officer
Chief Nursing Executive[9]
Clinical Adult Service Director
Manager
Assistant Manager
Staff RN

Area Manager/Hospital Administrator/Chief Executive Officer		
Continuum Administrator		
Skilled Nursing Facility Director	Home Health Director	Hospice Director
Skilled Nursing Facility Manager	Home Health Manager	Hospice Manager
Staff RN	Staff RN	Staff RN

[9] Currently, at four Employer facilities, the Chief Operating Officer (COO) and Chief Nursing Executive (CNE) are combined positions. However, the Employer claims it is phasing out the combination position and establishing separate COO and CNE positions at those facilities.

The chart below reflects the reporting structure for the PCCs.

Area Manager/Hospital Administrator/Chief Executive Officer
Chief Operating Officer
Coordinator of Care Services Director
Resource Management Manager
Patient Care Coordinator (PCC)

Hiring and disciplinary decisions involving the existing unit and the PCCs occur within the respective, separate reporting structures in consultation with the Employer's Human Resources department in the applicable service area.

Bargaining History

As discussed above, the Petitioner currently represents more than 17,000 Registered Nurses employed by the Employer at its Northern California facilities. The existing unit dates back to at least the 1960s. Nurses hold a variety of job titles in numerous departments and capacities. For example, some RNs work as bedside nurses, providing patient care throughout several departments at each hospital. Other nurses assist patients by providing Home Health, Hospice, and Palliative Care (life planning for patients with serious illness). The parties stipulated that there are at least several hundred Call Center/Advice Nurses in the existing unit that provide nursing assessments over the telephone, rather than at patients' bedsides. The parties' bargaining history concerning the PCCs is not clear on the record, and there is no evidence that the Petitioner or any other union ever previously filed a petition to represent them. Further, the parties stipulated that there is no bar to processing the instant Petition.

Duties of Employees and Functional Integration with Existing Unit

PCCs are RNs that provide long-view care coordination to patients who need transitional care. Each day they receive a new patient list identifying which patients are assigned to them that day. They then develop and coordinate the patient's care by reviewing the patient's charts, examining the care and trajectory of the disease, visiting the patient and his/her family at bedside, consulting with physicians and others to understand the patient's needs, utilizing certain software, and consulting with outside agencies regarding continued treatment or hospitalization.

PCCs coordinate the interdisciplinary approach to providing continuity of care, including utilization management, transfer coordination, discharge planning, and obtaining all authorizations as needed for patients and families to obtain outside services. Along with the physicians, the PCCs evaluate and develop discharge plans, recommend alternative levels of care, and determine the proper post-hospitalization care. They also ensure compliance with federal, state and local requirements.

With respect to Medicare requirements, the PCCs follow specific protocol and criteria to determine medical necessity for hospitalization and whether the patient is at the correct level of care for their illness burden. The PCCs also consult with physicians and utilize InterQual, a program that analyzes patient information to determine whether or not a patient meets the criteria to remain hospitalized. The PCCs then communicate the outcome of this process to the patient and advise the patient of their rights under Medicare, if applicable.

The bedside nurses, on the other hand, perform substantial hands-on or direct patient care. They are responsible for performing nursing assessments and developing and executing a nursing plan of care, such as administering medication, inserting IV and catheter lines, giving infusions, physically moving patients, and performing a variety of treatments.

In order to assist in creating a complete care plan for the patient, a PCC arranges a daily multi-disciplinary round with the bedside nurse and primary care physician. Occasionally, other healthcare officials are consulted, such as physical therapists, speech therapists, dieticians or social workers, as deemed necessary. The PCC uses these daily rounds to assess patient needs.

PCCs also assist physicians who wish to evaluate a patient during multi-disciplinary rounds by providing the patient with hands-on assistance with mobility. PCCs may also intervene and provide hands-on assistance if a patient is at immediate risk.

Contact Among Employees and Interchangeability

Record testimony shows that PCCs collaborate with bedside nurses daily by telephone and in person, sometimes on an hourly basis, to identify and provide solutions for potential patient need and care issues. This communication occurs during and after rounds in a patient's room, in the hall, at the Nurses Stations, or in other work areas. In performing their respective duties, the PCCs and bedside nurses consult with one another to develop a patient care plan and exchange patient information. The PCCs rely on the information obtained from the bedside nurse when determining a patient plan of care.

PCCs and nurses employed at the Employer's facilities in Modesto and Walnut Creek, work at, or out of, the same buildings, sit at Nurses Stations when not working on the floor, take daily breaks in the same break room, and celebrate birthdays, retirements, and attend potlucks together on occasion. PCCs and nurses attend quarterly and annual regional meetings together, in which the Employer provides direction about its objectives and reviews quarterly and annual accomplishments.

PCCs are required to attend trainings in order to maintain competencies to perform bedside nursing so that they may be able to take over that role when needed during an emergency. Examples include strike situations or when patient census is very high. One PCC testified that, during the past two years, there were approximately ten instances when she performed the same bedside duties that a primary nurse performs.

At the Employer's facility in Modesto, there is at least one example of an Emergency Department nurse that went on to become a PCC. There are three other examples at the Employer's facility in Walnut Creek, where RNs transferred, respectively, from bedside nursing, ICU nursing, and Emergency Department nursing to PCC nursing, only to transfer back to their original nursing assignments.

Education, Skills and Training of Employees

The educational requirements for a RN consist of obtaining two years of general education requisites, an Associate's degree in any program, licensure testing and passing the Nursing Board Exam. RNs must also complete continuing education requirements in order to keep their RN license current, as mandated by the Board of Registered Nursing.

PCCs are required to possess a Bachelor's degree in nursing or a health-related field, or four years of experience in a directly related field, a degree from an accredited nursing school, and a high school diploma or General Education Development (GED).

The Employer requires the PCCs and represented RNs to be licensed and active RNs under State guidelines. In this regard, PCCs and Nurses are required to complete the same or similar online training modules for continuing education requirements. They are also required to maintain particular patient-care competencies and certifications on an ongoing, yearly basis, which they typically obtain through the modules. For example, PCCs and Emergency Department nurses are required to complete the training modules for Emergency Medical Treatment and Active Labor Act (EMTALA). While the required competencies or certifications the PCCs and represented RNs must possess may differ, they are both required to have a Basic Life Saving (BLS) competency or certification. Additionally, PCCs must perform nursing training and provide a list of their competencies, certifications and job experience in the event they need to fill in for the nurses during an emergency.

Working Conditions, Compensation, Hours, Benefits

PCCs and nurses both work 8- or 12- hour shifts depending on the department in which they work. PCCs have varying weekly schedules, whereas represented RN schedules may or may not change. PCCs receive their schedules either electronically or from a particular Employer office. For example, in Modesto, PCCs receive their schedule from the utilization management office, and in Walnut Creek, the PCCs receive their schedule from the continuing care office. They are typically assigned to work with a physician daily.

PCCs and represented RNs are paid hourly and receive benefits, such as overtime pay, holiday pay, Employer healthcare, and a pension and/or 403(b) or 401(k) contribution options. PCCs receive paid time off and are paid bi-weekly. One PCC testified that she earns approximately $71.00 per hour. The collective-bargaining agreement covering the existing RN unit provides for hourly pay between $55.72 and $103.27. The represented RNs receive compensation and benefits that PCCs do not receive, such as, differential pay, sick leave, paid

vacation leave, education leave, bereavement leave, and other leaves of absence, in addition to having access to a grievance-arbitration provision.

Both PCCs and represented RNs use Health Connect, the online program utilized by the Employer for patient charting purposes, although they input their data into different program applications. PCCs may have broader access than the bedside nurses to patient information in Health Connect; however, the record evidence is not clear on this point. As discussed above, PCCs use InterQual to help determine whether a patient's hospitalization is medically necessary. Bedside nurses do not use this software.

Regarding work attire, PCCs and certain represented RNs, including those performing Palliative Care, are not required to wear scrubs. However, the bedside nurses are required to wear scrubs.

ANALYSIS

A self-determination election is a proper method by which a union may add unrepresented employees to an existing unit. See *Globe Machine & Stamping Co.*; *Armour & Co.* Such an order is appropriate if the employees sought to be included both: (a) share a community of interest with the existing unit employees; and (b) "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011) (citing *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990)). Thus, a self-determination election determines not only whether the employees wish to be represented, but also whether the employees wish to be included in the existing unit. *Warner-Lambert Co.*, *supra*.

At the hearing, the parties agreed that the proposed unit to be added is an identifiable, distinct segment, but the Employer did not agree that it shares a community of interest with the existing unit of RNs. In determining whether one group of employees shares a community of interest with another, the Board considers the following factors: frequency of contact and interchangeability among employees; degree of skills and common functions; commonality of wages, hours, work situs, and other working conditions; and shared supervision. *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004). The continued use of this test was reiterated in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 934 (2011). Thus, in determining whether employees in a proposed unit share a community of interest, the Board examines: "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *Id.*, quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

As discussed below, the record evidence establishes that the PCCs and the existing unit of RNs are functionally integrated into the Employer's overall provision of healthcare in Northern California, have frequent interchange, interact on a daily basis, engage in common work tasks toward a common goal, work similar 8- or 12-hour schedules, have similar licensing

and continuing-education requirements, and enjoy similar wages and benefits. In sum, the PCCs are a readily identifiable group that share a community of interest with the existing unit.

Health Care Rule Presumption

On April 21, 1989, the Board set out the appropriate units for acute-care hospitals in a rulemaking proceeding, reported at 284 NLRB 1515, et seq. The Health Care Rule (Rule) (29 CFR Section 103.30 (1990)) provides that except in extraordinary circumstances, only certain units (including, among others, all RNs) are appropriate in an acute-care hospital. Further, the Rule finds that units of RNs are appropriate, and issues of unit placement are determined on a case-by-case basis. Licensing is an important factor in determining whether a particular employee or group should be included in an RN unit. As the Board indicated:

> Although the Board has not included all RNs in a hospital RN unit regardless of function, the Board generally has included in RN units those classifications which perform utilization/review of discharge planning work where an employer requires or effectively requires RN licensing for the job. *Salem Hospital*, 333 NLRB 560 (2001).

In *St. Vincent Charity Medical Center*, *supra,* the Board held that the Rule left residual units in the healthcare industry to adjudication and ordered an *Armour-Globe* election. More specifically, the Board found that a self-determination election would not run afoul of the Rule or lead to undue proliferation of units and further found that the petitioned-for phlebotomists in that case constituted an appropriate voting group that shared a sufficient community of interest with the existing, nonconforming unit to permit a self-determination election.

In the instant case, the Employer requires the PCCs to maintain active RN licensure in order to apply for and perform their jobs. This important factor, coupled with the Board's Rule and its rationale in *St. Vincent*, supra, weighs in favor of directing an *Armour-Globe* election to determine whether the PCCs wish to join the existing unit.

Community of Interest

In the case at bar, the Employer contends that the PCCs do not share a community of interest with the nurses in the existing unit because the PCCs perform a planning and regulatory function, which it asserts is an entirely different function than the direct patient care provided by the represented RNs. It also points out that the PCCs comprise a separate department and have a different management reporting structure than the nurses. However, I do not find that those factors outweigh the other factors that otherwise show an overlap of common interests between the two groups.

The PCCs work hand in glove with the represented RNs on a daily basis toward a common goal of providing quality healthcare for patients. They participate in multi-disciplinary rounds, and they frequently collaborate by consulting one another and exchanging information to perform their respective patient-care duties. The PCCs and represented RNs interact daily at the Nurses Stations, in the halls, and at patients' bedsides. They periodically attend the same Employer meetings and socialize together in the workplace. The record disclosed that there is

some interchange between the PCCs and the represented RNs, and there is significant overlap of required licensure, competencies, and continuing education. For example, the Employer requires PCCs and the represented nurses to maintain active RN licenses and to complete many of the same training modules. The PCCs and represented nurses both use the Employer's Health Connect system, and their working conditions, working hours, compensation and benefits are relatively similar.

I note that the PCCs do not regularly perform hands-on, direct patient care, like certain of the represented RNs. However, many of the represented RNs are also "hands-off," including the Palliative Care and Call Center/Advice nurses. Likewise, although the PCCs have a unique management reporting structure, there is not a single uniform reporting structure for the represented nurses. Indeed, Palliative Care and Call Center/Advice Nurses, as well as Home Health and Hospice Nurses, have management reporting structures that are separate from the bedside nurses. Accordingly, I do not find the nature of the PCCs' work or their management reporting structure detract from their overall common interests with the existing unit.

Finally, I have also considered that the record disclosed no history of collective-bargaining vis-a-vis the PCCs, that the Petitioner seeks to include the PCCs in the existing non-conforming unit, and that no other labor organization seeks to represent the PCCs separately or in a different combined unit.

Finding: Based on all of the above, I find that the PCCs are an appropriate voting group that share a community of interest with the existing unit of RNs. Accordingly, I shall direct an election among the PCCs to determine whether they wish to be represented by the Petitioner in the existing RN unit.

CONCLUSIONS

I have carefully weighed the record evidence and the arguments of the parties, and I conclude that the Petitioner has carried its burden of proving that the proposed unit is an appropriate unit, and I direct herein a self-determination election among that unit.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1) The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2) The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act. I further find that the Employer is an employer as defined in Section 2(2) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

3) The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4) I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5) The following employees of the Employer at its Northern California facilities constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals located within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards and supervisors, as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be included in the existing unit for purposes of collective bargaining by CALIFORNIA NURSES ASSOCIATION (CNA). Should the PCCs vote against, it will be taken to mean that they wish to remain unrepresented.

A. Election Details

The parties stipulated to a mail-ballot election. Given the high degree of employee scatter throughout Northern California, I agree that conducting the election by mail, as described below, will serve to ensure the effective exercise of employees' Section 7 rights:

> The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 20, on December 30, 2016. Voters must return their mail ballots so that they will be received in Region 20 of the National Labor Relations Board before the ballot count, which will take place at Region 20's offices located at 901 Market Street, Suite 400, San Francisco, CA 94103 at 10:00 am on January 19, 2017.
>
> If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 20 office by no later than 5:00 pm on January 9, 2017, in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending November 26, 2016, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by December 27, 2016. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015. Because this mail ballot election involves a large voting group please be sure to number the list as shown in the above sample form.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once

the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: December 22, 2016

JILL COFFMAN
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20

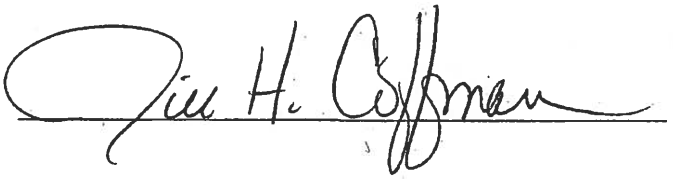

EXHIBIT E

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

KAISER FOUNDATION HOSPITALS AND
THE PERMANENTE MEDICAL GROUP, INC.

Employer

and

Case 20-RC-188438

CALIFORNIA NURSES ASSOCIATION (CNA)

Petitioner

ERRATUM

The *Decision and Direction of Election (Decision)* in this matter that issued yesterday contained the following error on page 11: "Also eligible to vote in the election are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election." As noted on page 2 of the *Decision,* the parties stipulated that "per diem PCCs are eligible to vote if they worked at least 120 hours in either of the two calendar quarters immediately prior to the eligibility date." Accordingly, the first paragraph of Section B. "Voting Eligibility" on page 11 is now corrected to read:

> Eligible to vote are those in the unit who were employed during the payroll period ending November 26, 2016, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are per diem PCCs in the unit who worked at least 120 hours in either of the two calendar quarters immediately prior to the eligibility date.

Kaiser
Case 20-RC-188438
Erratum

DATED AT San Francisco, California this 23rd day of December 2016.

Daniel J. Owens, Acting Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KAISER FOUNDATION HOSPITALS; THE PERMANENTE MEDICAL GROUP, INC.,	
Petitioner,	Case No. _____
vs.	NLRB Case Nos. 20-CA-202742 and 20-RC-188438
NATIONAL LABOR RELATIONS BOARD,	
Respondent.	

CORPORATE DISCLOSURE PURSUANT TO CIR. R. 26.1

Pursuant to Circuit Rule 26.1, petitioners Kaiser Foundation Hospitals and The Permanente Medical Group, Inc., by and through its attorneys, Nixon Peabody LLP, state that (i) Kaiser Foundation Hospitals has no parent corporation, and does not issue any stock; and (ii) The Permanente Medical Group, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Dated: January 5, 2018

Respectfully submitted,

Kenneth J. Nichols (D.C. Bar No. 486720)
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Counsel for Petitioners
Kaiser Foundation Hospitals
and The Permanente Medical Group, Inc.

UNITED STATES COURT OF APPEALS
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KAISER FOUNDATION HOSPITALS; THE PERMANENTE MEDICAL GROUP, INC.,	
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NATIONAL LABOR RELATIONS BOARD,	
Respondent.	

PROOF OF SERVICE

Kenneth J. Nichols of Nixon Peabody LLP states that, on the 5th day of January, 2018, he caused a copy of the *Petition for Review, Corporate Disclosure Pursuant to Cir. R. 26.1,* and this *Proof of Service* to be served upon:

Pamela Allen, Esq., Legal Counsel
California Nurses Association
155 Grand Avenue, 2nd Floor
Oakland, CA 94612

Counsel for the Charging Party

Carmen Leon, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

Counsel for the General Counsel

and that such service was made to the above-named individuals at their last known address by First-Class Mail, with postage fully prepaid thereon, and by depositing said envelopes and its contents in a receptacle for the United States mail in Washington, District of Columbia.

Kenneth J. Nichols

4824-4136-3289.3