

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

MERCY HEALTH PARTNERS
Employer

and

Case 07-RC-232247

MICHIGAN NURSES ASSOCIATION
Petitioner

and

SEIU HEALTHCARE MICHIGAN
Intervenor

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, I hereby submit this report to the Regional Director regarding a number of objections filed by Petitioner Michigan Nurses Association.

On July 7, 2020, a Board agent of Region 7 counted ballots in a mail ballot election among certain employees of the Employer Mercy Health Partners (Employer). A majority of the employees casting ballots in the election voted for representation by Intervenor SEIU Healthcare Michigan (SEIU). Petitioner Michigan Nurses Association (MNA) filed timely objections against the Employer and SEIU. The Regional Director issued an Order in which she approved withdrawal of a number of objections and ordered a hearing on the remaining objections.

The objections against SEIU are:

1. Since January 2019 and continuing to date SEIU has falsely stated and promised employees that if a majority of the bargaining unit voted for representation by SEIU, nurses employed at the Hackley campus would immediately be covered by SEIU's collective bargaining agreement with superior wages and terms and conditions of employment.
2. Since January 2019 and continuing to date SEIU has falsely stated and threatened employees that if a majority of the of the bargaining unit voted for representation by MNA, nurses employed at the Mercy campus would lose their superior wages and benefits and that bargaining for a new agreement would start from "scratch" or "zero."
3. Since about January 2019 SEIU has falsely stated and threatened employees that terms of employment of employees represented by MNA are frozen.

4. [Withdrawn at hearing].

5. Since February 2019 and continuing to date SEIU has misrepresented and made false statements about unfair labor practice proceedings and the actions of the NLRB with respect to the Employer's unilateral discontinuation of a health care discount.

6. The above statements and conduct of SEIU were widely disseminated to employees in the bargaining unit and were ratified by the Employer who failed and refused to correct the statements and conduct.

7. By these and other acts SEIU engaged in conduct which destroyed the laboratory conditions conducive to employee free choice in the election.

Additionally, the Employer and its agents created an atmosphere of intimidation, coercion and confusion and interfered with the laboratory conditions of the election by the following conduct which interfered with employee free choice:

[Objections 8 through 11 were withdrawn before hearing.]

12. The Employer ratified the conduct and statements of SEIU set forth above, of which it had knowledge, by failing and refusing to disavow such conduct and statements.

13. By these and other acts the Employer engaged in conduct which destroyed the laboratory conditions conducive to employee free choice in the election.

Additionally, the following conduct interfered with the laboratory conditions of the election which interfered with employee free choice:

14. Four employees marked and returned their mail ballots but did not hear their names recited during the count on July 7, 2020. Those four employees are: Jennine Hoerle, Carie Somers, Dawn Waycaster, and Connie Hill.

After conducting the hearing and carefully reviewing the evidence and the parties' briefs, I recommend that MNA's objections be overruled and the case remanded to the Regional Director for action consistent with this decision.

In discussing the objections, I provide the procedural history, the Board's standard for setting aside elections and the parties' burdens of proof. I then briefly describe the Employer's operations. For the objections, I provide relevant facts, analysis and conclusions.

Procedural History

On December 7, 2018, Petitioner MNA filed a petition to represent a bargaining unit of registered nurses employed by Employer. On February 5, 2019, the Regional Director issued a Decision and Direction of Election for the following multifacility bargaining unit:

All full-time and regular part-time Registered Nurses, including Graduate Nurses, employed by the Employer at its Mercy Campus, located at 1500 East Sherman Boulevard, Muskegon, Michigan, and Hackley Campus, located at 1700 Clinton Street, Muskegon, Michigan, facilities, but excluding Directors of Nursing, Clinical Managers and Clinical Leaders, Registered Nurses working in Quality Assurance and Utilization Review and Cardiac Rehabilitation Clinic, managerial employees,

confidential employees, Registered Nurses at the School of Nursing, guards, and supervisors as defined in the Act and all other employees.

The Board conducted a mail ballot election, mailing the ballots on June 4, 2020. The Tally of Ballots, dated July 7, 2020, reflected the following results of a mail ballot election:

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|---|-----|
| Approximate number of eligible voters | 820 |
| Number of Void ballots | 6 |
| Number of votes cast for Petitioner Michigan Nurses Association | 333 |
| Number of votes cast for Intervenor SEIU Healthcare Michigan | 373 |
| 10 Number of votes cast for Neither | 0 |
| Number of votes cast against participating labor organizations | 3 |
| Number of valid votes counted | 709 |
| Number of challenged ballots | 30 |

Challenges are not sufficient in number to affect the results of the election

15

A majority of the valid votes counted plus challenged ballots has been cast for Intervenor SEIU Health Michigan

On July 14, 2020, Petitioner Michigan Nurses Association filed timely objections to the election, maintain that SEIU and the Employer both engaged in conduct that interfered with laboratory conditions of the election and employee free choice. The objections also included 1 issue with the actual conduct of the election.

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On August 20, 2020, the Regional Director for Region 7 issued an Order Approving Withdrawal of Objections and Order Directing Hearing and Notice of Hearing, scheduling the hearing to begin August 31, 2020 by Zoom videoconference. After MNA filed a Motion to Postpone Hearing until September 21, the undersigned scheduled the hearing for September 11, 2020 by Zoom videoconference. The hearing was conducted through Zoom videoconference technology, to which no party objected.¹

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Employer Mercy Health Partners' Operations

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Employer Mercy Health Partners operates acute care facilities. The facilities involved here are its Hackley campus and Mercy Main campus, which were approximately 3 miles apart and located in Muskegon, Michigan. SEIU represented the RN unit at the Mercy Main campus.

¹ The transcript notations (Tr.) are for reference and do not reflect the entirety of my review. Certain errors are noted in the transcript, which is identified as Volumes 5, 6, and 7 for days of objections hearing 1, 2 and 3, respectively. At Tr. 676, at the bottom of the page, to Tr. 679, the speaker is identified as Judge Steckler, when the speaker was Petitioner counsel Runyon giving his opening statement. At Tr. 843, L. 25, the record reflects that Intervenor Exh. 7, page 2 was admitted; the actual document admission was Intervenor Exh. 2, page 7. At Tr.1072 L.22-23 stated, "the ballots that arrived after the Callie ballots," should read, "the ballots that arrived after the tally of ballots"

MNA represented the RN unit at the Hackley campus. Respondent employed approximately 446 nurses at its Hackley facility. Respondent employed approximately 379 nurses at the Mercy Main campus.

5 The Hackley and Mercy Main campuses were geographically close to each other. To accommodate a plan to merge the two campuses, Respondent built a new facility at the Mercy Main campus. The parties stipulated that, on July 14, 2010, they entered into a tentative agreement regarding permanent transfer and relation of work, limited to the Hackley and Mercy Main campuses and the RN units. (Tr. 688-689.) The parties could not agree whether this
10 agreement remained in effect or its relevance. Against this backdrop, in December 2019, MNA filed a petition for an election to merge the 2 bargaining units into a single unit.

The Board's Standard for Setting Aside Election and the Parties' Burdens of Proof

15 It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted.). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set
20 aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). Also see *In re Laliqie N.A., Inc.*, 339 NLRB 1119, 1120 (2003). To prevail, the objecting party, here MNA, must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB 637, 637 (2014) citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d
25 999 ((2d Cir. 1969), cert. denied 396 U.S. 1010 (1970)). To meet this burden, MNA must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

30 The Board applies an objective test to determine whether to set aside an election. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). The Board's test examines whether a party's conduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. See, e.g., *NLRB v. Enterprise Leasing Co., Southeast, LLC*, 772 F.3d 609, 616 (4th Cir. 2013); *Covenant Care of Ohio, Inc. v. NLRB*, 180 Fed. Appx. 576, 579 (6th Cir. 2006) (alleged objectionable conduct must interfere to extent it materially affects
35 election results); *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988).

40 In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors:

- (1) The number of incidents;
- (2) The severity of the incidents and whether they were likely to cause fear among employees in the voting unit;
- 45 (3) The number of employees in the voting unit who were subjected to the misconduct;
- (4) The proximity of the misconduct to the date of the election;
- (5) The degree to which the misconduct persists in the minds of employees in the voting unit;

- (6) The extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit;
- (7) The effect, if any, of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection;
- 5 (8) The closeness of the vote; and
- (9) The degree to which the misconduct can be attributed to the party against whom objections are filed.

10 *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-A-Car*, 280 NLRB 580, 581 (1986).

15 For all objections, the pertinent facts are included, then analyzed according to the standards for both union and employer conduct. Objections 1, 2 and 3 are factually intertwined and therefore presented together. In each objection, I consider whether the alleged objectionable conduct was widely disseminated and whether laboratory conditions were destroyed. I also consider whether the Employer engaged in objectionable conduct as MNA alleged.

20 MNA Objection 1: Since January 2019 and continuing to date, SEIU has falsely stated and promised employees that if a majority of the bargaining unit voted for representation by SEIU, nurses employed at the Hackley campus would immediately be covered by SEIU's collective bargaining agreement with superior wages and terms and conditions of employment.

25 MNA Objection 2: Since January 2019 and continuing to date SEIU has falsely stated and threatened employees that if a majority of the of the bargaining unit voted for representation by MNA, nurses employed at the Mercy campus would lose their superior wages and benefits and that bargaining for a new agreement would start from "scratch" or "zero."

30 MNA Objection 3: Since about January 2019 SEIU has falsely stated and threatened employees that terms of employment of employees represented by MNA are frozen.

A. Record Evidence

- 35 1. Both unions distribute literature and post on social media

This discussion does not include all incidents but reflects a representative sample during the critical period.

40 MNA filed its petition for an election in December 2018. Shortly after MNA filed the petition, on December 12, 2018, it sent an email to 350 MNA-represented nurses at Hackley. MNA predicted that SEIU would make unfounded claims, with use of fear tactics or confusion. MNA further predicted that SEIU would cherry pick portions of their contract that would be superior. It then reminded the reader that a contract is only "as good as the union behind it and enforcing it." (Tr. 1000; Int. Exh. 28.)

45 By January 2019, SEIU circulated information about what would happen to pay and the contracts after an election. On about January 2019, SEIU sent to both units a mailer that included language claiming SEIU had a contract superior to the MNA contract and further stated, "We would have to negotiate a completely new contract starting from zero." (Pet. Exh. 50 30.)

In response, about January 18, 2019, MNA mailed to the Mercy Main unit nurses a letter addressing some of the rumors. MNA’s statement made the following observations:

5 After an election, by law, the terms in both unions’ contracts remain status quo while the winning union bargains a new contract. If MNA wins, your pay and everything else from you contract stay in place. MNA would immediately look to bring nurses from the two unions together to serve on a new joint bargaining team to meet with the employer and work to merge the best of both contracts.

10 On about January 24, 2019, SEIU mailed further information to the Hackley MNA-represented bargaining unit. THE SEIU chief steward at Mercy Main stated

15 . . . If the majority of RNs vote for SEIU, Hackley nurses would immediately be covered by our superior SEIU contract, and start enjoying the better wages, benefits, rights and protections of SEIU membership. But if the majority of RNs vote for MNA, all Hackley and Mercy RNs will have to negotiate a completely new contract, with no guarantees of improvements.

20 (Pet. Exh. 31.)

In January 2019, the SEIU “leadership” group, comprised of the chief steward and other stewards at the Mercy Main campus, met and received information entitled “Frequently Asked Questions.” One question was “Which contract is better, the one at Mercy or Hackley?” The answer responded:

25 We strongly believe that our SEIU contract at Mercy is far superior to the Hackley contract in many ways, including pay and benefits. When you look at our side-by-side comparison, many areas stand out in the SEIU contract, including preceptor pay, scheduling, charge nurse pay, on call pay, continuing education pay, and moving up in our pay scale based on years, not hours worked.

30 (Pet. Exh. 29.)

35 Later questions ask:

If all nurses become part of SEIU what would happen next?

40 If the majority of all nurses vote to join SEIU, the Hackley nurses would immediately become part of our bargaining unit and covered under our SEIU contract. That is one of the many reasons why, if an election is held, it is in the best interest of Hackley RNs to vote for SEIU, because they would then start experiencing the benefits of our superior SEIU contract.

45 **If all the nurses become part of MNA, what would happen to our SEIU contract?**

If the majority of nurses vote to be part of MNA, it would be an absolute disaster for Mercy RNs. Our contract terms would be frozen. We would then, as MNA members, have to start negotiating a completely new contract with Mercy.

We would not only lose our SEIU contract which we have built up over many years, but we would also lose all the strength, support and resources of SEIU.

5 Id. The Frequently Asked Questions handout apparently was left at the SEIU office and not distributed. (Tr. 919-920.) Nurses usually do not visit the SEIU office.² However, at some point, likely the end of 2019 and through the election, the answer to the question about the SEIU contract was posted on the SEIU website. The website also contained a contract comparison. (Tr. 934; Pet. Exh. 19.)

10 On January 5, 2019, MNA emailed its 350 Hackley nurses about the SEIU claims of a better contract and where the MNA contract was advantageous. (Tr. 997; Int. Exh. 26.) On January 16, 2019, MNA emailed its 350 Hackley members about SEIU's claims. It specifically disabused SEIU's claim that if members vote for MNA, they will lose their contract and have to bargain from zero. It explained that the contracts would remain status quo after the election
15 until a new contract could be negotiated. (Tr. 995-996; Int. Exh. 25.)

By the end of January 2019, MNA's contract comparison was posted on its Facebook page for a chat group involving the merger. (Tr. 938-939.) MNA also mailed its contract comparison to all Hackley nurses and apparently the Mercy Main nurses, for a total of 700
20 issued. (Tr. 971; Int. Exh. 18.)

In response to SEIU's mailing, on January 28, 2019, MNA sent its Hackley dues-paying nurses an email stating that the SEIU contract was not superior and its contract comparison was inaccurate in a number of ways. It also disabused SEIU's claims about what happens after the
25 election:

. . . [N]o matter who wins, the terms and conditions of the contracts will stay in place at the campuses until a new contract is negotiated. This is a very basic feature of labor law called status quo. They continue to either have poor
30 understanding or complete disregard of the law.

. . .

We are preparing our own contract comparison, but at the end of the day you are
35 not voting on a contract. You are voting for the union behind the contract. . . .

(E'er Exh. 20.)

40 During the first week of February 2019, MNA mailed to the Mercy nurses its own contract comparison. (Int. Exh. 3.) MNA stated, "SEIU is missing the mark if they think this vote is only about who has 'a superior contract' and here's why" Id. The information talked about how MNA's contract included provisions that put more money in the nurses' pockets, focused on nurses' rights and safety, and after the election, the negotiations would include the best of both contracts. Id. Then the information did a side-by-side comparison of certain
45 contract provisions. Id. Two MNA officers, Brian Gemzer and Sacha Eisner, also reported it to Bachelder. No one made copies of the website until MNA prepared for the objections. (Tr. 787-

² Andrea Acevedo, current SEIU president, answered questions on this document. She did not know a great deal about the document and, over SEIU and Employer objections, I admitted the document but asked the parties brief how much weight the document should receive.

789.) Gemzer reported seeing a comment that MNA Hackley contract nurses had “frozen terms”; he first recalled seeing this language at least in January 2020 and until the ballots were counted in July 2020. (Tr. 931; Pet. Exh. 19.)

5 On February 5, 2019, after the Regional Director’s decision to direct an election, MNA emailed the MNA bargaining unit about the election and SEIU’s move to block the election. It included a postscript about SEIU attempting to contact them about the election. It further included: “They will repeat the few things that are better in their contract and promise you things they can’t deliver. Don’t be swayed” (Int. Exh. 12(a)-(b).)

10 About late February to early March 2019, Brian Gemzer, a labor relations representative for MNA, noted a flyer posted on a bulletin board at Hackley for approximately 2 weeks. The language of the flyer included, “The MNA is endangering our wages, benefits and job security because if Mercy nurses vote to leave SEIU, we will lose our contract completely at a very risky time of change, and have to start the negotiating process from zero.” (Pet. Exh. 44; Tr. 934-935.)

15 On March 5, 2019, MNA emailed approximately 350 Hackley nurses about SEIU’s contract comparison and pointed out some differences it believed to be significant. It also highlighted that SEIU incorrectly stated what would happen to the nurses depending on which union won. (Tr. 992 -993; Int. Exh. 24.)

20 On March 6, 2019, SEIU mailed to both Mercy Main and Hackley nurses a contract comparison that addressed pay.

25 In December 2019, the SEIU website posted its perception of a comparison of the MNA and SEIU collective bargaining agreements. The contract comparison included Saturday pay, paid time off, pay scale, seniority, preceptor pay, and posting of schedules. (Tr. 764; Pet. Exh. 19.) MNA responded, about January 18, 2020, with a mailing responding to “rumors” about the contracts, specifically about the status of the contracts if MNA won. (Int. Exh. 4.) The MNA website also addressed how the two contracts would be handled, which was continuation of the contracts until a new agreement was in place after the election. It also addressed the issue of seniority in its contract. (Int. Exh. 2.) During 2020, Bachelder observed the website twice, which had no changes. The SEIU website also posted that the MNA collective bargaining agreement expired, which left the terms and conditions of employment “frozen.”

30 About December 26, 2019, Hackley nurse Jeannine Hoerle received a mailing from SEIU. The mailing, with a Christmas theme, started

40 We aren’t Santa, but we’d love to give you this gift . . .

- Better Pay
- Better Working Conditions
- Better Network (80,000+ strong nurses)
- Better Contract overall for you

45 Joining SEIU provides you with these gifts immediately via our superior contract.

(Pet. Exh. 45.) The mailing encouraged the recipient to contact SEIU Organizer Paul Haag. Id. Hoerle only talked with MNA Labor Relation Representative Gemzer about the mailer. (Tr. 957-958.)

5 On April 22, 2020, the MNA RN Staff Council sent to the 350 Hackley nurses about the previous day's Zoom meeting regarding the upcoming election. Over 100 nurses attended the Zoom meeting. (E'er Exh. 21.) The information included what would happen with the election results:

10 . . .

+Once the prevailing union was identified, the membership will be represented by that union.

+The terms of the contracts at each hospital will remain in effect until a new one is negotiated with the hospital. . . .

15 (E'e'r Exh. 21.)

20 On May 18, 2020, MNA's Hackley RN Staff Council emailed the Hackley nurses that they likely would receive a barrage of calls from SEIU about the upcoming election. It included, "A lot of what was stated in the most recent flyer was either deliberately misleading or genuinely misinformed." (Tr. 963; Int. Exh. 15.) The email also discussed MNA's benefit packages and the status of bargaining. Id.

25 On May 20, 2020, SEIU handed out to Mercy Main nurses a flyer that stated, inter alia, ". . . [W]e know that SEIU has negotiated a stronger contract for Mercy nurses—a contract that is put at risk if we don't vote to stay with SEIU." The number of Mercy nurses receiving the flyer was unknown. (Pet. Exh. 35.)

30 Also on May 20, MNA mailed to both Hackley and Mercy nurses literature describing MNA's role in bargaining, including that it "forced the employer to offer a wage package greater than what the nurses at either campus currently get."³

35 On May 29, 2020, SEIU sent a mailer to both Mercy Main and Hackley nurses with a contract comparison, similar to the one it sent in March 2019. The number of mailers to Mercy Main nurses was approximately 379. (Compare Pet. Exh. 33 with Pet. Exh. 32.)

40 About early June 2020, Tinsley, a bargaining unit employee at the Mercy Main campus who is also a SEIU shop steward and member of the SEIU executive board, issued to the Mercy Main RN bargaining unit the following post on Facebook:

45 If we lose we will immediately fall under the MNA agreement. So you want to keep your contract. Get out the vote. Talk to your colleagues and make sure they have sent their ballots in. There is too much to lose. \$\$\$ Saturday premium, higher wages, seniority. Please send in your ballots today. Don't wait.

³ On May 27, 2020, MNA had another mailing to approximately 400 nurses who MNA thought were likely supporters. (Tr. 974-975.)

(Pet. Exh. 28.) This Facebook post was accessible to 300 to 350 Mercy Main bargaining unit employees. However, it did not reflect how many visits were made to the site in what time period. (Tr. 724-725.) At some point, an employee commented, “What???? When did this change??” (Pet. Exh. 46.) Tinsley did not recall responding to that comment. Another bargaining unit employee posted a comment to the extent that scaring members into voting probably isn’t the way to go. (Tr. 732.) Tinsley responded that he was trying to get out the vote but not scare anyone. (Tr. 733.) For another bargaining unit employee’s comments about the seniority, Tinsley posted a thank you for clarification. Tinsley testified that the post was removed after the election.

On June 2, 2020, SEIU again mailed to all potential bargaining unit nurses a contract comparison. (Pet. Exh. 37.) On about the same date, it mailed to the 379 Mercy nurses a petition that included language in the header the SEIU nurses “have a far superior contract with better wages, benefits and working conditions.” (Tr. 873-875; Pet. Exh. 40.)

On June 3, 2020, SEIU handed out and mailed a petition to nurses. The number of nurses who received the petition was unknown. The petition was headlined with a statement that SEIU had a superior contract with better wages, benefits and working conditions. (Pet. Exh. 34.)

At the time of this hearing, the SEIU website continued to have posted statements about its contract as superior to MNA’s contract and bargaining would start from zero if MNA won. (Tr. 1019-1020.)

2. MNA contacts the Employer’s attorney

MNA nurses received literature about SEIU’s contract comparison and that information was forwarded to MNA. The record does not identify how many nurses shared the information with MNA. Amy Bachelder, an outside attorney who represented MNA on various matters during the election campaign, testified that she telephoned Employer’s outside labor counsel Keith Brodie about SEIU’s representations about the end of March 2019. (Tr. 766 et seq.)⁴ The conversation lasted approximately 10 minutes. Bachelder expressed her concerns about the literature SEIU distributed to the RNs that represented that the Hackley MNA nurses would immediately fall under the SEIU agreement should SEIU win the election. Brodie said his understanding was that each facility would maintain its terms and conditions of employment until the winning union and the Employer negotiated a new collective bargaining unit. Brodie told Bachelder that MNA could tell the unit employees so. Bachelder said the employees could not discern the claims between the competing unions and the Employer had an obligation to clear things up as it was coercive and affected free choice. Brodie said he understood her position but declined to become involved. Bachelder communicated Brodie’s position to MNA officials and officers. No attorney from MNA issued a letter or legal opinion concerning what would happen. (Tr. 768-769.)⁵

In February or March 2019, Sascha Eisner, MNA’s associate executive director for field operations, also telephoned Brodie. Eisner told Brodie that he saw chats between SEIU,

⁴ Both Bachelder and Brodie testified credibly and primarily corroborated each other about the telephone calls. I find that any differences in testimony do not significantly affect the facts or my analysis.

⁵ Brodie testified he and Bachelder had a second conversation in which he again emphasized that he was not going to get involved and he was not aware of what SEIU was saying. (Tr. 1100.)

Hackley nurses and MNA members as well as heard from some members regarding the same “confusing” information about SEIU’s contract comparison; he also related SEIU’s claim that, if the nurses selected MNA as their bargaining representative, the SEIU members would lose their contract and start to bargain from “zero.”⁶ Eisner also said he heard that SEIU was telling employees covered under the MNA that, if they voted for SEIU, they would immediately start receiving “superior benefits” under the SEIU contract. Eisner told Brodie he did not think these statements were correct under the law. (Tr. 819-820.) Eisner asked Brodie to clarify the record because people did not know what to believe despite MNA’s efforts to correct the matters. Brodie agreed with Eisner’s legal analysis and that status quo ante would continue until the prevailing party could bargain a new agreement. (Tr. 820.) Eisner repeated that MNA had tried to convince people of the correct law; however, it was one union’s propaganda against the other union, and the people did not know what to believe. Eisner implored Brodie that the Employer had the final authority on the issue. Brodie again agreed with Eisner interpretation of the law and said he would talk with his client. However, Brodie said he was not inclined to advise the Employer to weigh in on the matter because to do so would like the Employer was taking sides between the unions. Eisner said he was not asking Brodie to take sides but only clarify what the law was, as people were confused and not trusting what they heard from either union.

Eisner testified that MNA issued rebuttals to the SEIU information to MNA bargaining unit members. Before receiving the Excelsior list, MNA attempted to send out its rebuttal to the Mercy Main nurses, represented by SEIU, but was limited: It only had the names of nurses at both campuses and was not sure it reached all the SEIU nurses. MNA did not request a list of names of the Mercy Main nurses because it did not believe it was entitled to that information. Once MNA received the Excelsior list, about 1½ years later, MNA sent out some mailings to the Mercy Main bargaining unit nurses. Eisner was not sure whether those mailings addressed that issue alone, but the mailings gave a narrative on several points, including the above issues. (Tr. 826.)

In late spring or early summer of 2019,⁷ Eisner and the MNA bargaining team attended negotiations with the Employer. Eisner, with the MNA bargaining team present, spoke with Director of Labor Relations Robin Belcourt about the SEIU position about what would happen to the contracts after either union won the election. Belcourt confirmed the Employer’s position, that the status quo ante continued until a new contract could be negotiated. (Tr. 837.) Eisner did not recall whether he related this information at a membership meeting or whether he ever referred to his conversation with Belcourt. (Tr. 839.)

3. The Employer puts on its own campaign

On April 30, 2020, the Employer began its own election campaign, which supported the non-union option on the ballot. (Tr. 1113.) It set up a Facebook page that included “Election Facts.” It also handed out and directly mailed information to employees and conducted a town hall meeting.

⁶ Brodie testified that Bachelder never mentioned the term “start from zero,” nor had he seen literature with that claim (Tr. 1098-1099.) He also did not mention any recollection in his conversation with Eisner that SEIU put forth a “start from zero” claim.

⁷ Belcourt testified that the conversation took place about March 21, 2019. (Tr. 1110-1111.) Otherwise, Belcourt essentially corroborates the discussion.

The Facebook page included a section for frequently asked questions. About May 26, it included a specific question: “If SEIU or MNA win the election, does a new contract need to be negotiated?” The answer then stated, “Yes, with the new bargaining unit, representing the combined campuses, an entirely NEW contract must be negotiated with the winner of the election, if any.” (E’er Exh. 5 (EMPHASIS IN THE ORIGINAL); Tr. 1114-1115.) Belcourt did not know how many viewed the page.

Belcourt communicated with nursing leadership about information that should be shared with the nursing employees about the election. (Tr. 1117.) Among the information was the same information in the frequently asked questions. (Tr. 1117-1118; E’er Exh 7 (c).)

In early June 2020, Employer’s CEO and its chief nursing officer conducted a town hall meeting via videoconference. The Employer sent invitations and a link for questions to the nursing employees at Hackley and Mercy Main campuses but no one was required to attend. Before the town hall, one of the submitted questions asked when the winning union would be effective and would the union remain separate until a contract is negotiated. (E’er Exh. 6(g).) During the town hall meeting Belcourt answered the question, stating that the contracts would remain in status quo until a new contract is negotiated with the selected bargaining representative. (Tr. 1121.) Belcourt did not know how many viewed the town hall. (Tr. 1122.)

B. Analysis

I recommend overruling MNA’s Objections 1, 2 and 3⁸ and the related objections of Employer conduct.

1. Applicable Law

In assessing election campaign statements, the Board follows *Midland National Life*, 263 NLRB 127 (1982). Unless documents are forged, the Board does not examine whether campaign statements are true or false and does not set aside elections. *Id.* at 133. In considering promises of benefits, the Board presumes that employees have a fair degree of understanding that unions must go through bargaining procedures to obtain benefits, which are beyond a union’s control and not the same as when an employer makes such promises. *In re DLC Corp. d/b/a FleetBoston Pavilion*, 333 NLRB 655 (2001).

2. Objections 1, 2 and 3 against SEIU

As explained on the record numerous times and by testifying counsel, much of SEIU statements in its campaign propaganda were complete misstatements of the law. Nonetheless, these misguided statements do not form a basis for setting aside the election. *Midland National Life*, *supra*. MNA argues that, despite its efforts to correct these falsehoods, the employees took the SEIU statements hook, line and sinker.⁹

The evidence demonstrates that SEIU repeatedly statements about contract comparisons, that bargaining would start from zero if MNA won, and that nurses would

⁸ To the extent that Objections 6 and 7 apply here, I also recommend that they be dismissed.

⁹ The etymology for “hook, line and sinker” is an analogy to the well-hooked fish and is used to show that someone acted without hesitation or reservation. See:

<https://www.merriam-webster.com/dictionary/hook%2C%20line%20and%20sinker#h1>.

immediately be covered by one contract or the other of the prevailing union. MNA countered with corrections, which also were disseminated. The evidence shows no effect on the bargaining unit employees.

5 One must consider the “real world” of industrial relations and some degree of
 “exaggerations, hyperbole, and appeals to emotion are to be expected.” *Enterprise Leasing*
Co., 722 F.3d at 616, citing *NLRB v. Coca-Cola Bottling Co.*, 132 F.3d 1001, 1003 (4th Cir.
 1997) (internal quotes omitted). The alleged benefits SEIU promised if the bargaining unit
 10 selected it as the representative are not considerable objectionable. I am directed by long-
 standing precedent:

15 Employees are generally able to understand that a union cannot obtain
 benefits automatically by winning an election but must seek to achieve them
 through collective bargaining. Union promises of the type involved herein are
 easily recognized by employees to be dependent on contingencies beyond the
 Union’s control and do not carry with them the same degree of finality as if
 uttered by an employer who has it within his power to implement promises or
 benefits.

20 *The Smith Co.*, 192 NLRB 1098, 1101 (1971).

MNA contends that SEIU promises financial benefit if it won the election. The financial
 benefit is immediate coverage under the SEIU contract. In response to SEIU’s misleading
 statements, MNA repeatedly and correctly stated the possible outcomes. The record does not
 25 reflect that if any voters were swayed by SEIU’s misleading statements. .

Relying upon *Amboy Care Center*, 322 NLRB 207, 207-208 (1996), MNA contends that
 SEIU’s statements about starting bargaining from zero were objectionable and requires that the
 election be re-run. However, in *Amboy*, the employer, not the union, made the statements. I
 30 therefore do not find *Amboy* applicable to this objection. Similarly, it was the employer, not the
 union, that threatened to withdraw a previously promised wage increase if the union won the
 election and stated bargaining would start from “zero.” *In re Pearson Educ., Inc.*, 336 NLRB
 979, 979-980 (2001), *enfd.* 373 F.3d 979 (D.C. Cir. 2004), *cert. denied* 543 U.S. 1131 (2005).
 Further, the employer in *Pearson* never cleared up these threats. *Id.* at 980.¹⁰ These two cases
 35 do not show that a union’s threats carry the same weights as an employer’s threats. In another
 case MNA cited, the Board found objectionable conduct when the union promised a cash award
 by raffle if it won the election. *Crestwood of Stockton d/b/a Crestwood Manor*, 234 NLRB 1097-
 1098 (1978). It did not depend on bargaining or the contents of the collective-bargaining
 agreement and I cannot find it to be the same as the present situation.

40 I therefore recommend overruling Objections 1, 2 and 3. *The Smith Co.*, *supra*.

3. Objections against the Employer related to Objections 1, 2 and 3

45 The Employer did not engage in any objectionable conduct by refusing to get involved in
 the propoganda fight between the two unions. The Employer only made a statement in its own
 election campaign: It did not differentiate between the two unions, but merely answered the

¹⁰ *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977), also cited by MNA, is another case in which the
 employer, not the union, said bargaining would start from scratch as a threat.

question of whether the Employer would need to bargain a new contract when the election was over.

5 When an employer is faced with two rival unions, it should remain neutral. *Everport Terminal Services, Inc.*, 370 NLRB No. 28, slip op. at 33 (2020), citing *Ralco Sewing Industries, Inc.*, 243 NLRB 438, 442 (1979).¹¹ None of the cases cited by Petitioner MNA points to a requirement that the Employer correct misrepresentations¹² by another union in a representation campaign. In *Hamburg Shirt Corp.*, 156 NLRB 511, 523-524 (1965), enfd. 371 F.2d 740 (D.C. Cir. 1966) the administrative law judge sustained an objection in the employer failed to
10 repudiate “threats of businessmen that the plant would close. . . .” The businessmen were responsible for establishing the plant. This case is differentiated from the present situation, in which two unions were involved and the promises and threats came from one of the union.

15 I recommend that Objections 12 and 13, as related to Objections 1, 2, and 3 be dismissed.

20 MNA Objection 5: Since February 2019 and continuing to date, SEIU has misrepresented and made false statements about unfair labor practice proceedings and the actions of the NLRB with respect to the Employer’s unilateral discontinuation of a health care discount.¹³

25 In December 2018, SEIU filed an unfair labor practice charge about the allegation with the Region 7 office over the Employer’s alleged unilateral changes in the pharmacy discount benefit, which occurred in late 2018. The alleged pharmacy discount benefit change affected a number of Mercy facilities, including Hackley and Mercy Main. In early 2019, SEIU posted on its website, “Employees of the hospitals were hurt, including Hackley nurses represented by MNA, but MNA did nothing.” (Tr. 1021-1022.)

30 On January 3, 2019, MNA notified its 350 members at Hackley to keep their receipts because the change should have been negotiated. (Tr. 998-999; Int. Exh. 27.) On February 4, 2019 MNA posted that it immediately filed a grievance and demanded to bargain, later meeting with the Employer. MNA further stated it filed its own unfair labor practice charge on the morning of February 6, 2019, then segued to, “Several hours after MNA filed our Unfair Labor Practice, management folded. It should be noted that SEIU and MUSW have also both taken steps to challenge management’s unjust decisions.” (Emp. Exh. 4(b).) It later contradicted
35 SEIU:

The fight is not yet over.

40 Contrary to the inaccurate flyers SEIU has put out, there is more to resolving members’ issues than just getting an email saying they give in. It is one thing for management to say they are reinstating the policy and another to get into the specific of how they will make it right.

¹¹ The Employer could lawfully express its views of the advantages or disadvantages of representation by the unions. It may not threaten or promise employees that it would act differently based upon the employees’ choice of union. *Amboy Care Center*, 322 NLRB 207, 207-208 (1996). *Amboy* does not show, however, that an employer would be required to do so. The record is devoid of any promises or threats made by the Employer about the nurses’ selection of bargaining representative.

¹² Presuming Bachelder and/or Eisner told Brodie about SEIU’s “start from zero” claims, Brodie’s continued interest in remaining neutral is not objectionable for the reasons stated above.

¹³ Pharmacy discount and medical discount were used interchangeably.

As a nurse's union, we know that these kinds of details matter.

5 That is why our first step upon receiving an email from management was to clarify that the administration's proposal would resolve the issue in full and create a path that would allow nurses to easily get back every cent they are owed. The details are being quickly figured out. At MNA our priority is doing the work, not trying to take the credit.

10 **The National Labor Relations Board has ruled that an election be held to decide which union should represent RNs.** Yet SEIU staff *still* want to block the election over this unrelated issue so that this process could be dragged out for months. A long and protracted campaign is to the benefit of no nurse. What are they so afraid of?

15 **Tell SEIU staff to stop blocking the election and let nurses vote!**

(Emp. Exh. 4, **emphasis in the original.**)

20 On February 5, 2019, Attorney Brodie received an email from a board agent telling him that the election was blocked. (Tr. 1086.)

25 About February 6, 2020, SEIU announced that the Region found merit to its allegation and was obtaining a resolution, while MNA had done nothing. On the same day, MNA filed its own charge on the same allegation with Region 7. Also on February 6, 2019, the Employer emailed SEIU that the pharmacy discount was coming back. (Emp. Exh. 12.)

30 Also on February 6, 2019, MNA filed its own unfair labor practice charge over the pharmacy discount plan. About the same time, MNA attorney Bachelder notified Employer's outside labor counsel Brodie about its intent to file a charge. (Tr. 1087.) On February 7, 2019, per social media, SEIU posted that the discount was back. (Emp. Exh. 4(a).) According to Brian Gemzer, a labor relations representative from MNA who regularly checked the SEIU website, the language was present from February 2019 until the counting of ballots in July 2020. (Tr. 930-931.) On Friday, February 8, 2019, the Employer's Director of Labor Relations Robin Belcourt emailed a number of bargaining units, including the MNA-represented group at Hackley and the SEIU-represented nurses at Mercy Main, that the Employer was rescinding the changes to the pharmacy discount plan. The emails included a notice of the employees' legal rights and that the Employer would not unilaterally change policies. (E'er Exh. 1.) On February 8, 2019, the Employer emailed to all bargaining units its own notice that it rescinded its decision regarding the medical discounts, effective January 7, 2019 (Emp. Exh. 1(a)-(n).) The notice was similar to the ones required by the Board.

45 On February 27, 2019, MNA emailed the Hackley nurses about the SEIU unfair labor practice charge, including that SEIU blocked the election over MNA's request to proceed. (Tr. 982-984; Int. Exh. 21.) The email stated it was responding to the Employer's flyer and email of the Notice to Employees, which settled the SEIU unfair labor practice charge over the pharmacy benefits.

50 On April 12, 2019, the Region issued its notice that it approved a settlement to which all parties, including MNA and SEIU, agreed. (Emp. Exh. 2 (a)-(i).) It later changed the settlement

approval, which later was approved on May 20, 2019. (E'er Exh. 2(n).) The Region's compliance officer sent Belcourt the official notice for posting for all parties. (Emp. Exh. 2(j)-(n).)

5 On June 6, 2019, MNA emailed the Hackley bargaining unit about its continued bargaining with the Employer and its success with the unfair labor practice charge on the Employer's unilateral change of the medical discount. The information included how to be reimbursed for claims. (Int. Exh. 13(a)-(b).)

10 The record also reflects that MNA distributed its own information about the unfair labor practice charges and the developments surrounding settlement. The record does not demonstrate that any voting employee was swayed because of the propaganda SEIU promoted.

15 At hearing I dismissed the objection against Employer ratification of SEIU's conduct. The record does not include evidence that the Employer ratified any of SEIU's statements about MNA involvement. The Employer responded to the unfair labor practice charge and notified employees that it intended to settle the charge. No evidence showed that the Employer's conduct swayed any voters. I now adhere to this determination. I therefore recommend dismissal of Objection 5¹⁴ and related Objections 12 and 13 for Employer conduct.

20 MNA Objection 14: Four employees marked and returned but did not hear their names recited during the count on July 7, 2020. Those four employees are: Jeannine Hoerle; Carie Somers; Dawn Waycaster; and Connie Hill.

25 The Region mailed the ballots to eligible votes on June 4, 2020. The ballots were due in the Regional office by July 2, 2020. The ballot count was held on July 7, 2020.¹⁵ Despite the July 2 deadline, ballots received on the day of the count were also opened and included in the count.¹⁶ MNA subpoenaed documents relevant to the objection to determine whether the Region mailed the ballots to the employees, when the Region received the ballots of the named employees, whether the ballots were counted.

30 On the first day of hearing, Counsel for the Region presented MNA with subpoenaed documents from the mail ballot elections. At hearing, Counsel for the Region answered questions about the process but was not a sworn witness. As explained by Counsel for the Region on the third morning of hearing, these documents included unopened mail ballots with their return envelopes and a list identifying the voter to the code number. The return envelopes were stamped with the date received in the Regional office, or in some cases, received at the home of the Region's election clerk. The envelopes also showed the postmark dates.

40 During the weekend break in the hearing after the first day of hearing, MNA had an opportunity to review the documents that Counsel for the Region presented. On the second day of hearing, MNA added additional information that it claimed was objectionable. Objection 14 did not contain the "catch all" phrase "[b]y these and other acts," as it did with the objections against SEIU and the Employer. Much of the additional objectionable issues were that certain mail ballots had postmarks as early as June dates, yet were not received by the Region until
45 after the ballot count was concluded.

¹⁴ To the extent that Objections 6 and 7 apply here, I also recommend that they be overruled.

¹⁵ MNA sent out instructions on how to correctly fill out the ballot but stated to select the preferred union. (Tr. 1005-1006; Int. Exh. 30(a).)

¹⁶ The information here is from Bachelder, who reviewed all the subpoenaed ballots. (Tr. 1053.)

At hearing, Intervenor SEIU and the Employer protested that this conduct was not included in the objections and the evidence should be excluded. In essence, they had no way to prepare for any response to the additional issues because MNA discovered the additional information over the weekend. In an abundance of caution, we reviewed some of the evidence on the record. I find that the evidence is properly before me for consideration. *Iowa Lamb Corp.*, 275 NLRB 185 (1985). My consideration includes whether the issue was fully litigated and whether it was “wholly unrelated” to the objections scheduled to be heard. *Id.* I find that the matter was litigated on the record. I also consider that the matter relates to whether the Region failed to present all the ballots it received for the count on July 7, 2020.¹⁷ But see *Precision Products Group, Inc.*, 319 NLRB 640, 640-641 (1995).

The Board maintains an interest in effectuating employee choice through elections. It also maintains an interest in obtaining finality of results. *Classic Valet Parking, Inc.*, 363 NLRB No. 23, slip op. at 1 (2015). A number of the ballots and supporting documents reflects that the mail ballots sometimes required duplicates issued because the voter failed to sign across the envelope flap other issues. A number of the ballots were postmarked before the count date, sometimes as early as June 20, yet were not received in the Region until after the count. I cannot fault the Region or its processes as the ballots were received in the Region after the tally was completed because:

The Board’s rule already permits acceptance of mail ballots arriving after the date they are due, whatever the reason for the delay, as long as they are received before the scheduled ballot count. Thus, the rule provides a grace period for receipt of late ballots.

Id.

Review of the ballots for the 4 named persons in Objection revealed that Hoerle’s vote was counted; she therefore was not disenfranchised. The record reflects Hill’s ballot was not received in the Region before the count and per the rules on finality, her vote could not have counted. The remaining 2 ballots apparently were never received, so it cannot be said whether these 2 votes actually voted at all. Objection 14, therefore, on this point is overruled.

To the extent I consider the remaining ballots not counted, the Employer correctly points out that 14 ballots¹⁸ were postmarked before the election but not counted. Despite this representation, 5 of the voters apparently received duplicate ballots that were counted; therefore these 5 voters were not disenfranchised. (E’er Br. 23-24.) One ballot alone was received in Region before the count and not counted; the rest were received after the count. The 1 vote not tallied does not significantly affect the outcome, given that the margin favoring SEIU was 40 votes. MNA argues 2 ballots were wrongly excluded and a number of extraneous factors

¹⁷ The Employer argues that the information was not “previously unavailable” or “newly discovered” because the objection is framed as voters who did not hear their names called. While this point is well-taken, the ballots were the best evidence. Although I have taken the evidence in the light most favorable to Petitioner, I question whether the evidence presented through conversations with Counsel for the Region is sufficient to make the record as well.

¹⁸ MNA prepared an exhibit of void ballots, which I ruled were irrelevant and placed the exhibit in the rejected exhibit file. (Tr. 1057-1058; Rejected MNA Exh. 49.) The voided ballots were not listed as an objection and cannot be considered here. *National Hot Rod Ass’n*, 368 NLRB No. 26, ALJ slip op. at fn. 23 (2019). Even if I did consider it, employees have some responsibility for following the directions to vote properly and some clearly did not. *Versail Mfg., Inc.*, 212 NLRB 582, 593 (1974).

warrant overturning the election. Those factors include the COVID-19 pandemic, the closed Grand Rapids office and the well-publicized problems with USPS delivery. It cites no case law. (MNA Br. 19.) I cannot make new law here. I therefore recommend overruling Objection 14.

5

CONCLUSION

I recommend that Petitioner MNA's Objections be overruled in their entirety. Based upon these determinations I recommend that the Regional Director issue a Certification of Representative for Intervenor SEIU.

10

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 7 by November 2, 2020. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

15

Exceptions 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.nlr.gov, select E-file Documents, enter the NLRB Case Number and follow the detailed instructions. If not e-filed, the exceptions should be addressed to the Regional Director, Region 7, National Labor Relations Board, Patrick McNamara Federal Building, 477 Michigan Avenue—Fifth Floor, Detroit, Michigan 48226.

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Pursuant to Section 102.111-102.114 of the Board's Rules and Regulations, exceptions and any supporting brief must be received by the Regional Director by the close of business at 5:00 p.m. on the due date. If e-filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern time on the due date.

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Within 7 days from the last date on which exception and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall be served immediately on the other parties and a statement of service filed with the Regional Director.

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Dated October 20, 2020
Washington, DC

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Sharon Levinson Steckler
Administrative Law Judge

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