

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



NATIONAL UNION OF HEALTHCARE  
WORKERS,

Charging Party,

v.

SEIU-UNITED HEALTHCARE WORKERS  
WEST,

Respondent.

Case No. SA-CO-78-M

PERB Decision No. 2249-M

April 18, 2012

Appearances: Law Offices of Bennett & Sharpe by Thomas M. Sharpe, Attorney, for National Union of Healthcare Workers; Weinberg, Roger & Rosenfeld by Vincent Harrington, Jr. and Kerianne R. Steele, Attorneys, for SEIU-United Healthcare Workers West.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the National Union of Healthcare Workers (NUHW) of a Board agent's dismissal of its unfair practice charge. The charge, filed June 29, 2009, alleged that SEIU-United Healthcare Workers West (SEIU) and Fresno County In-Home Supportive Services Public Authority (Public Authority) violated the Meyers-Miliias-Brown Act (MMBA)<sup>1</sup> during a decertification election conducted by the State Mediation and Conciliation Service (State Mediation) under the Public Authority's adopted local rules. The election was conducted in a unit of in-home support service providers (IHSS providers or bargaining unit members).

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<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

NUHW styled its charge as objections to the conduct of an election.<sup>2</sup> NUHW filed the charge within 10 days of the tally of ballots and served it on both SEIU and the Public Authority. NUHW alleged as well irregularities in State Mediation's conduct of the election.<sup>3</sup>

The Board agent determined that because the election was conducted by State Mediation under the Public Authority's local rules, and not by PERB under PERB's regulations,<sup>4</sup> PERB lacked jurisdiction to entertain NUHW's allegations as objections to the election. Instead, the Board agent construed NUHW's charge to raise unfair practice allegations only, and only against SEIU, viz., interference with the exercise of employee rights. In assessing the allegations, the Board agent considered separately each of NUHW's major allegations of SEIU election misconduct, and did not apply a totality of circumstances analysis.

NUHW's major allegations against SEIU were that SEIU agents: (1) obtained unsupervised access to marked ballots and otherwise interfered with balloting by bargaining unit members; (2) engaged in physical and verbal threats toward bargaining unit members; (3) misrepresented information to bargaining unit members; and (4) unlawfully destroyed and or removed bargaining unit members' personal property.

The Board agent determined that NUHW failed to state a prima facie case of SEIU interference with employee rights, as follows: allegations that SEIU agents (a) improperly obtained unsupervised access to marked ballots and otherwise interfered with balloting, and (b) improperly engaged in physical and verbal threats against bargaining unit members, both

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<sup>2</sup> The statement of charge/objections cites alleged election misconduct of the employer, the Public Authority, as well as of SEIU. Because NUHW filed its charge only against SEIU, we lack jurisdiction over alleged election misconduct of the employer.

<sup>3</sup> NUHW alleged that it raised concerns over the conduct of the election twice, at the tally of ballots and again thereafter in correspondence to State Mediation.

<sup>4</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

failed to identify by name the individual SEIU agents; allegations that SEIU engaged in misrepresentation to voters failed to establish SEIU used forged or otherwise deceptive documents; and allegations that SEIU agents engaged in destruction and removal of bargaining unit members' personal property failed to establish that the SEIU conduct "had the natural and probable effect" of discouraging voter participation in the representation election.

On appeal, NUHW contends that the Board agent should have analyzed the NUHW allegations as election objections, and that in any event, NUHW's allegations state a prima facie case of interference with employee rights.

We have reviewed the dismissal and the record in light of NUHW's appeal, SEIU's response thereto, and the relevant law. Based on this review, and for the reasons stated below, we reverse the Board agent's dismissal, and remand the matter for issuance of a complaint consistent with the discussion below.

#### BACKGROUND

The County of Fresno, by ordinance (Ordinance), established the Public Authority to operate an IHSS program pursuant to the California Welfare and Institutions Code. Chapter 2.80, section 100 of the Ordinance sets out the "local rules" for the Public Authority's labor relations program for IHSS providers.<sup>5</sup>

Pursuant to the local rules, NUHW petitioned for a representation election to decertify the incumbent SEIU as the certified labor organization representing exclusively the Public Authority's IHSS providers. The bargaining unit consists of approximately 10,000 providers.

The Public Authority's local rules call for State Mediation to conduct a secret ballot election and to certify that organization "if any, receiving a majority of ballots cast in a valid

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<sup>5</sup> MMBA section 3507(a) authorizes a local public agency to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations."

election. . . . If none of the choices on the ballot receives a majority of the ballots cast, a runoff election shall be held between the choices receiving the two highest numbers of votes.”

(Public Authority local rules, Chapter 2.80.100(I).)

On or about May 14, 2009, NUHW, SEIU and the Public Authority concluded a “MEMORANDUM OF AGREEMENT FOR REPRESENTATION ELECTION TO BE CONDUCTED THROUGH THE UNITED STATES MAIL” (Election Memorandum). The Election Memorandum accords State Mediation’s designated election supervisor discretion to conduct the election, including, as to “Challenged Votes,” the discretion to “either count or reject said [challenged] ballot based on the eligibility list . . . or any other relevant information as determined by the Election Supervisor. The decision of the Election Supervisor shall not be subject to appeal and shall be final and binding on all parties.” (Appendix A, Election Memorandum, par. 8.) Additionally, the Election Memorandum provides, as to “Results,” that “the choice receiving the most valid ballots cast will determine the results of the election. The results of the election shall become final and binding on both parties ten (10) days after certification of the election.” (Appendix A, Election Memorandum, par. 11.)

Thereafter, between June 1, 2009 and June 15, 2009, State Mediation conducted a mail ballot election in the IHSS provider bargaining unit. More than 10,000 IHSS providers were eligible to vote in the election. The ballot choices were SEIU, NUHW or No Labor Organization.

On June 19, 2009, the State Mediation election supervisor tallied the ballots on a State Mediation form entitled “Results of Representation Election” which set forth the following information subscribed to by the election supervisor as “a true statement of the election returns:”

1. Total number of eligible voters	10,345
2. Total number of ballots received in P.O. Box	5,982

3. Total number of ballots challenged	(160)
4. Total number of challenges upheld	-0-
5. Total number of ballots rejected other than challenges	29
6. Total number of valid ballots	
(Add lines 4 and 5, and then subtract from line 2)	5,953
7. Total number voting for ["SEIU"]	2,938
Total number voting for ["NUHW"]	2,705
Total number voting "No Organization"	136

Upon tallying the ballots, the State Mediation's election supervisor announced that SEIU had received 233 more votes than NUHW. Immediately, NUHW requested that the challenged ballots be resolved and counted, and that all the ballots be recounted. State Mediation's election supervisor denied both requests.

On June 22, 2009, by letter to State Mediation and the parties, NUHW requested that: (1) the challenged ballots be resolved and counted; (2) due to late receipt of ballots by some IHSS providers, ballots received by State Mediation in its P.O. Box after the agreed deadline of 5:00 p.m. on June 15, 2009 be counted; and (3) due to a narrow margin of votes, all ballots be recounted. State Mediation responded three weeks later on July 14, 2009, denying NUHW's requests. Thereafter, on July 16, 2009, State Mediation by letter to the parties certified SEIU as the labor organization receiving "a majority of the ballots cast in the election conducted June 19, 2009."

#### NUHW ALLEGATIONS<sup>6</sup>

NUHW alleges that during the critical period of the election, SEIU staff and other SEIU agents, approximately 900 persons, "pervasively engaged in conduct which interfered with the employees' rights to freely choose a representative and which constitutes serious irregularity in the conduct of the election."

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<sup>6</sup> At this stage of the proceedings, we must assume that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB\* Decision No. 12; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.) (\*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

## SEIU Agents

NUHW alleged that during the election period: (1) SEIU announced that its agents would wear SEIU identification badges;<sup>7</sup> (2) persons then appeared in the garb of SEIU and wearing the identification badge of SEIU; (3) such persons said to voters that they were SEIU agents; and (4) such persons' conduct tended to or did promote the interest of SEIU.

## Interference with Balloting

NUHW alleges that SEIU agents frequently approached bargaining unit members at their homes, where they demanded that the bargaining unit member vote his or her secret ballot "on the spot" in the presence of the SEIU agent, and then demanded that the bargaining unit member hand over to the SEIU agent the marked ballot, or alternatively demanded that the bargaining unit member proceed immediately to a postal facility to mail the ballot. NUHW alleges that when the bargaining unit member traveled to a postal facility, the SEIU agent followed.

NUHW alleges that when thus confronted by an SEIU agent, bargaining unit members felt "sufficiently coerced" and "compelled to comply," and did vote their secret ballot in the presence of the SEIU agent and then turned the marked ballot over to the SEIU agent, or traveled immediately to a postal facility followed by an SEIU agent.

The Board agent dismissed these allegations because NUHW failed to identify by name the SEIU agents. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944 (*Ragsdale*).

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<sup>7</sup> An SEIU election flier circulated to bargaining unit members informed readers in both English and Spanish that "SEIU organizers have name badges in an official [SEIU] tag holder."

### Physical and Verbal Threats

NUHW alleges that when approaching bargaining unit members, the SEIU agents engaged in physical and verbal threats, and menacing and abusive behavior. NUHW alleges, inter alia, that SEIU agents: (1) kicked in a bargaining unit member's screen door to remove an NUHW sign and replace it with an SEIU sign; (2) "shouted down" bargaining unit members; and (3) threatened to physically beat NUHW supporters in the presence of bargaining unit members.

The Board agent likewise dismissed these allegations because NUHW failed to identify by name the SEIU agents. (*Rasgdale.*)

### Misrepresentations to Voters

NUHW alleges that SEIU and its agents: (1) "pervasively falsely told members of the bargaining unit that the loss of their health insurance would be automatic or tantamount to automatic as a direct consequence of voting for the competing union, NUHW;" (2) "pervasively falsely told members of the bargaining unit who were on the waiting list to become enrolled in the Kaiser Health Plan that such individuals would automatically lose their place in the waiting list if they voted for NUHW;" (3) pervasively falsely told bargaining unit members that "their wages would be reduced to \$8.00 an hour" (or other very similar claims) automatically or essentially automatically if they voted for NUHW, and that wages and benefits established in the current memorandum of understanding would "automatically disappear" as a direct consequence of voting for NUHW; and (4) pervasively falsely told bargaining unit members that "they would lose their jobs entirely or would lose paid hours as a consequence of their voting for NUHW and as a consequence of their failure to promise to vote for SEIU."

The Board agent concluded that each of the foregoing alleged misrepresentations failed to state a prima facie case because NUHW did not allege that SEIU used forged documents to deliver the messages. (*Pasadena Unified School District* (1985) PERB Decision No. 530 (*Pasadena*); *Poway Unified School District* (2001) PERB Order No. Ad-310 (*Poway*)).

#### Unlawful Destruction and Removal of Voters' Personal Property

NUHW alleges that SEIU agents removed, tore down and defaced pro-NUHW signs and literature on the private property of bargaining unit members. A bargaining unit member exposed to this behavior ultimately refused to engage with the SEIU representative and walked away. After a SEIU agent pointed and yelled at a bargaining unit member to take down an NUHW sticker, the bargaining unit member was afraid the SEIU agent would rip off the NUHW sticker from her door.

The Board agent concluded that each of these allegations failed to establish a prima facie case of interference, because NUHW failed to establish: (1) how the alleged conduct interfered with the election or the employee's exercise of protected rights, and (2) how the alleged conduct had the "natural and probable effect" of discouraging voter participation. (*Tamalpais Union High School District* (1976) EERB Decision No. 1 (*Tamalpais*)). The Board agent concluded further that the alleged incidents were isolated, and that NUHW failed to establish that a substantial number of voters were even aware of the alleged conduct. (*State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S (*DPA*)).

### DISCUSSION

#### Jurisdiction

We begin our analysis, as we must in a MMBA case, with our jurisdiction. MMBA section 3509(a) provides, in pertinent part:

Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.

MMBA section 3509(c) provides:

The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

Under MMBA section 3509(c), PERB applies local rules in representation matters. We rely on PERB's MMBA regulations only when a MMBA local agency has no rule that governs a representation issue. (*County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M; *County of Orange* (2010) PERB Decision No. 2138-M.) Thus, as this matter concerns a representation election, we look to the Public Authority's local rules governing labor relations under the MMBA.

#### Representation Procedures

The local rules of the Public Authority provide for representation petitions and elections in Chapter 2.80.100(F-J) as follows:

##### F. Provider Labor Organization–Certification Petition.

1. A labor organization which seeks to become a certified labor organization shall file a petition for certification accompanied by proof of provider approval of at least fifteen percent, who desire the petitioning labor organization to be their sole representative;
2. Proof of provider approval means that the labor organization submitting a petition to the [Public Authority's] executive director or designee has demonstrated proof of approval by the provider whom it claims to represent by means of any one or any combination of the following:
  - a. Signed and dated signatures on a petition,
  - b. Signed and dated authorization cards; provided, however, that no petition or authorization card may be used as proof of provider approval unless it specifically provides that the intent of the

signer is to secure certification for the labor organization named therein. For purposes of subdivision (a) of this subsection, only signatures executed within ninety calendar days prior to the date the petition for certification is filed shall be accepted as proof of provider approval. In the instance of a provider designating more than one labor representative through either of the above mechanisms, a written notice shall be sent to that provider by the executive director or designee requesting that the provider designate only one labor organization within ten calendar days;

3. Upon the receipt and validation of certification petition, the executive director or designee shall post a thirty-day notice with the central labor council of Fresno and Madera Counties and published at least once in the legal section of the Fresno Bee;

4. If proof of employee approval is validated, the executive director or designee shall arrange for a secret ballot election, to be conducted in accordance with the rules of the State Mediation and Conciliation Service. Only those providers who were employed in such capacity at least fifteen days preceding the date of the secret ballot election shall be entitled to vote.

G. Election—Organizations on Ballot. In an election, the names of the petitioning labor organization and of any other labor organizations which submit proof of provider approval of at least ten percent shall appear on the ballot together with the choice of 'No Labor Organization'.

H. Election—Cost. The cost of conducting a certification election shall be borne equally by the authority and petitioning labor organization.

I. Certification Following Election. State mediation shall certify as a certified labor organization, that organization, if any, receiving a majority of ballots cast in a valid election. In the event that a majority of such ballots cast is for no labor organization, state mediation shall certify that no certified labor organization represents the providers. If none of the choices on the ballot receives a majority of the ballots cast, a runoff election shall be held between the choices receiving the two highest numbers of votes. State mediation shall certify as the certified labor organization the choice receiving the majority vote in a valid runoff election or shall certify that no certified labor organization represents the providers.

J. Unfair Election Practices. Unfair practice charges made during an election shall be submitted to the Public Employment Relations Board for resolution.

The foregoing local rules provide for employees to choose representation by an organization, or by no organization, through a showing of interest and where appropriate an election among bargaining unit employees conducted by State Mediation. State Mediation conducts elections pursuant to a consent election agreement of its own devise, of which the Election Memorandum herein is typical. State Mediation's election procedures described in the Election Memorandum accord the designated election supervisor, typically a State Mediation employee, significant discretion in conducting the election, and in determining which challenged ballots, if any, shall be counted. Neither the Public Authority's local rules nor State Mediation's procedures provide a party to an election the right to challenge directly alleged election irregularities or alleged improper conduct by a party to the election.<sup>8</sup>

Here, the local rules define unfair labor relations practices in Chapter 2.80.100(R). It is unlawful for organizations or their agents to:

1. Interfere with, restrain or coerce providers in the exercise of the rights recognized or granted in this chapter; [or] . . .
5. Violate any section of this chapter.

Thus, the Public Authority's local rules forbid conduct by employee "organizations or their agents" which conduct interferes with, restrains or coerces providers [employees] in the exercise of rights under either MMBA or the local rules, e.g., the MMBA right freely to choose

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<sup>8</sup> By contrast, under PERB's MMBA election regulations, a party to the election may challenge directly a serious irregularity in the conduct of the election, or actions of a party which interfere with employee rights freely to choose a representative. If timely filed, PERB will investigate such challenge, and upon finding irregularity or interference, PERB may set aside the election and order another after a suitable interval. PERB also entertains as unfair practice charges alleged interference with employee rights arising during a representation election.

a representative and the right under the local rules to participate in a representation election conducted by State Mediation.

Accordingly, we conclude, with the Board agent, that we should consider, pursuant to our unfair practice jurisdiction, the alleged representation election misconduct, to wit, that conduct which if engaged in by “organizations or their agents” would interfere with, restrain or coerce providers in the exercise of their rights under Chapter 2.80.100(F)(4), to vote in “a secret ballot election.” In so doing, however, we apply a totality of circumstances analysis to discern whether the alleged conduct either interfered with employees’ right to freely choose a representative, or constituted a serious irregularity in the conduct of the election.

We conclude that SEIU’s alleged conduct weighed in its totality may have interfered with employee’s right freely to choose a representative or constituted a serious irregularity in the running of the election. Thus, we remand the case for issuance of a complaint consistent with this decision.

#### NUHW’s Allegations

We approach this case as an unfair practice charge of interference with IHSS provider [employee] rights. Accordingly, we ask whether the providers casting a secret mail ballot were exercising protected rights, whether conduct attributed to SEIU tended to interfere with, intimidate, restrain, coerce or discriminate against providers in the exercise of protected rights, and whether SEIU’s conduct was justified by legitimate business reasons. (MMBA section 3506; PERB Regulation 32604; *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797.)

But our inquiry does not end there. A party objecting to an election result, and seeking a new election, must present a prima facie showing of conduct that tends to or does interfere with employee choice or had the natural and probable effect of interfering with employee

choice. (*Pasadena; Jefferson Elementary School District* (1981) PERB Decision No. 164; *San Ramon Valley Unified School District* (1979) PERB Decision No. 111; *Santa Monica Unified School District and Santa Monica Community College District* (1978) PERB Decision No. 52.)

When asked to set aside an election based on interference, we treat demonstration of unlawful conduct in an election as a threshold question. (*State of California (Department of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.) The party seeking to have the election set aside assumes a further burden, submitting specific facts showing how the conduct interfered with the election. (*Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333.) In deciding whether to set aside an election, we examine “the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested.” (*Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis*)). Where the alleged conduct is egregious, proof of actual interference is not required. For example, in *San Diego Unified School District* (1996) PERB Order Ad-278, we set aside a runoff election between two employee organizations, and ordered a new election, where one employee organization obtained unsupervised access to marked ballots in a mail ballot election.

Here, the Board agent assessed separately each allegation rather than considered the totality of the circumstances. Moreover, the Board agent declined to consider the conduct of alleged SEIU agents whom NUHW did not identify by name. We disagree on both counts.

#### Totality of Circumstances

In *State of California (Departments of Personnel Administration, Mental Health and Developmental Services)* (1985) PERB Decision No. 542-S (*Communication Workers*), PERB reversed a Board agent’s partial dismissal of several separate unfair practice allegations of

improper election conduct, where the Board agent had weighed the allegations separately rather than considered the totality of the circumstances. The Board noted:

In our view, the critical inquiry is whether the factual allegations set forth in the charge, if true, would lend support to the legal theory that the Charging Party puts forth. Each individual factual assertion need not stand alone as conduct violative of the Act but, rather, the totality of circumstances must be considered. . . .

(*Ibid.* Emphasis added.)

### SEIU Agents

The acts of an agent within his actual or apparent authority are binding on the principal. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.) The same agency rules that apply to employers apply as well to employee organizations. (See *Aladdin Hotel* (1977) 229 NLRB 499; *Local 15, Operating Engineers* (1977) 231 NLRB 563; *Certain-Teed Products Corp. v. NLRB* (1977) 562 F.2d 500.) Apparent authority may be found from manifestations by the principal that create a reasonable basis for employees to believe that the principal has authorized the alleged agent to perform the act in question. (*State of California (Department of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S; *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 781.)

In almost every case, we are concerned with whether a person whose conduct is under scrutiny is an agent of either an employer or an employee organization. Only employers and employee organizations may be respondents in unfair practice charge cases under our statutes. Such entities act through agents. Often a charging party knows the name of the alleged agent of the employer or employee organization. However, the name of the alleged agent is not always known, nor is it necessary to a prima facie case. Without providing the name of an individual, a charge may allege sufficient facts to establish prima facie that the individual is an

agent, officer or employee of, or otherwise acts for, or may be deemed to act for, a respondent.

As we noted in *Communication Workers*:

[W]e do not find it fatal to the charge that [charging party's] declarants failed to name the managerial personnel. . . . [A]t this stage of these proceedings, [charging party's] declarations should be read as representations that individuals can and will testify as to certain facts. At any subsequent evidentiary proceeding, due process guarantees will ensure that the employer be given an opportunity to fully cross-examine witnesses called by [charging party] and, through its own witnesses, to rebut the allegations. . . .

(*Ibid.*)

We hold that the name of a person alleged to be an agent of an employee organization or an employer is not an indispensable element in a prima facie case. We reject a formulaic application of an oft-quoted statement from our decision in *Ragsdale*. We favor a more nuanced analysis turning on the elements of the particular prima facie case. In *Ragsdale*, the Board itself adopted the warning and dismissal letters of the Board agent as the decision of the Board. We do not believe that in so doing the Board then intended to adopt a statement from the Board agent's warning letter as a litmus test for assessing the sufficiency of factual allegations. Our test for sufficiency of allegations was and is set forth in our regulation, namely, "a clear and concise statement of the facts and conduct alleged to constitute the unfair practice." (PERB Reg. 32615(a)(5).) The *Ragsdale* formulation, that a "Charging Party must allege with specificity who, what, when, where and how" of the respondent's alleged violation may be useful in explaining to a charging party how to plead a violation, but it is not a hurdle over which every charging party must leap at the risk of dismissal.

Thus, where, as here, it is alleged that: (1) SEIU announces that its agents will wear identification badges; (2) persons then appear in the garb of SEIU and wearing the identification badge of SEIU; (3) such persons say to voters that they are SEIU agents; and (4) such persons' conduct tends to or does promote the interest of SEIU, we may conclude

prima facie that the person is an SEIU agent without the need for the person's name. If the person's conduct is improper, it may be attributed prima facie to SEIU.

Because NUHW did not allege the individual names of alleged SEIU representatives, the Board agent dismissed without further assessment the alleged conduct of the alleged SEIU agents. Under the circumstances here, NUHW's inability to identify by name the individuals involved did not require dismissal of the charge.

#### SEIU's Alleged Campaign Misrepresentations

NUHW alleges that SEIU agents "pervasively falsely told members of the bargaining unit" that, as a consequence of voting for NUHW, they would: (1) lose their health insurance; (2) lose their place on the Kaiser Health Plan waiting list; (3) have their wages reduced to \$8.00 an hour; or (4) lose their jobs entirely. The Board agent determined that NUHW failed to establish a prima facie case of misrepresentation because NUHW did not allege that SEIU used forged documents during the course of the campaign. (*Pasadena.*)

We conclude that NUHW's allegations state conduct which would reasonably tend to interfere with or restrain voters, and does not merely involve representations which voters would assess reasonably as mere electioneering puffery. In these circumstances we do not ask whether the statement was made in a fraudulent manner that would prevent an employee from discerning its misleading character. We do not assess threats under our campaign misrepresentations test,<sup>9</sup> but rather ask whether given the totality of the circumstances the alleged conduct tends to, or does, interfere with employees' right freely to choose a representative. Like the National Labor Relations Board (NLRB), we protect against campaign misconduct such as threats, promises or the like, which interfere with employee free choice, as

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<sup>9</sup> *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145; *Poway*; *Pasadena*.

well as against statements made in a fraudulent manner preventing an employee from evaluating the truth of the statement. (*Midland National Life Insurance Co.* (1982) 263 NLRB 127; see also *Triple E Produce Corp. v. Agricultural Labor Relations Bd.* (1983) 35 Cal.3d 42, 50 [recognizing that a different test applies to campaign misconduct in the form of direct threats to employees in the exercise of their right to vote].)

Here, NUHW alleged that SEIU threatened IHSS providers. We conclude these allegations are within the totality of circumstances supporting our conclusion that NUHW has stated a prima facie case of interference with employees' right to freely choose a representative.

#### Alleged Destruction and Removal Of Personal Property

NUHW alleges that SEIU agents destroyed and removed unit members' personal property. The Board agent, relying on *Tamalpais*, concluded that NUHW failed to show that this conduct "had the natural and probable effect" of discouraging voter participation in the representation election. The Board agent also concluded, relying on *DPA*,<sup>10</sup> that the incidents in the declarations appear to be isolated and that no information is provided to show that a substantial number of voters were aware of the conduct.

We concur with the Board agent that by themselves these allegations would be insufficient to establish prima facie conduct which, if true, interfered with employees' right to freely choose a representative or constituted a serious irregularity in the conduct of the election. But since we assess the totality of conduct, not each allegation separately, these allegations must be part of the overall assessment of SEIU's conduct. (*Clovis; Communication Workers.*)

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<sup>10</sup> In *DPA*, the Board held that where a threat made by a union official is remote in time to the election and not widely circulated to a point where a substantial number of voters even knew about the threat, no impact on the election could be inferred.

## CONCLUSION

Based on review of the entire record, we conclude, with the Board agent, that PERB has jurisdiction over NUHW's allegations as an unfair practice, but not as objections to an election. We hold an assessment of these unfair practice allegations should consider the totality of the circumstances, not weigh the sufficiency of the allegations separately. We hold that at this stage, and on this record, NUHW need not identify by name the persons who allegedly obtained unsupervised access to marked ballots and/or allegedly engaged in coercive behavior and or destruction or removal of private property. Finally, we hold that NUHW has alleged that SEIU agents threatened voters and that such allegations must also be considered in the totality of circumstances when determining whether NUHW has stated a prima facie case of interference with employees' right to freely choose a representative. Therefore, we conclude that a prima facie case of interference has been established.

## ORDER

The Public Employment Relations Board (Board) reverses the Board agent's dismissal of the National Union Healthcare Workers' unfair practice charge and REMANDS the charge to the Office of General Counsel for issuance of a complaint in accordance with this Decision.

Chair Martinez and Member Dowdin Calvillo joined in this Decision.