STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, Employer, and NATIONAL UNION OF HEALTHCARE WORKERS, Petitioner, and SEIU-UNITED HEALTHCARE WORKERS WEST LOCAL 2005, Exclusive Representative.	Case No. SF-DP-294-M Administrative Appeal PERB Order No. Ad-387-M October 25, 2010

Appearances: Ottone Leach Olsen & Ray by Matthew W. Ottone, Attorney, for Salinas Valley Memorial Healthcare System; Siegel & LeWitter by Latika Malkani, Attorney, for National Union of Healthcare Workers; Weinberg, Roger & Rosenfeld by Leslie V. Freeman and Bruce A. Harland, Attorneys, for SEIU-United Healthcare Workers West Local 2005.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by SEIU-United Healthcare Workers West Local 2005 (SEIU) of a Regional Director's administrative determination (attached) on SEIU's objections to the results of a decertification election. The objections alleged that the Salinas Valley Memorial Healthcare System (SVMHS) interfered with employees' free choice in the election by: (1) changing its access rules for non-employee SEIU representatives; (2) allowing a management employee's photograph to be used on a flyer supporting the National Union of Healthcare Workers (NUHW); and (3) discriminating against, retaliating against, and/or

interfering with the rights of several employees who supported SEIU. The Regional Director dismissed SEIU's objections because they failed to establish that SVMHS's conduct interfered with employees' free choice.

The Board has reviewed the administrative determination and the record in light of SEIU's appeal, the responses of SVMHS and NUHW thereto, and the relevant law. Based on this review, the Board finds the Regional Director's administrative determination to be well-reasoned, adequately supported by the record, and in accordance with applicable law. The Board therefore adopts the administrative determination as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

On March 15, 2010, SEIU filed an unfair practice charge (PERB Case No. SF-CE-728-M) alleging that SVMHS changed its worksite access rules for non-employee SEIU representatives after NUHW filed its decertification petition. On May 10, 2010, SEIU amended its charge to also allege that SVMHS discriminated against, retaliated against, and/or interfered with the rights of several employees who supported SEIU.

On May 26, 2010, SEIU filed objections to the results of the decertification election. The facts alleged in support of the objections are identical to the allegations in SEIU's unfair practice charge. SEIU contends on appeal that, because both filings contain the same allegations, the objections should not have been dismissed while PERB's investigation of the charge was still pending.

PERB has never addressed whether findings and conclusions in an election objection decision have any preclusive effect on identical allegations raised in an unfair practice charge. On this issue, the National Labor Relations Board (NLRB) has stated:

> It is well settled that the Board's findings and conclusions with respect to conduct alleged as objectionable in a representation

> proceeding are not binding upon the Trial Examiner in a subsequent hearing where such conduct is alleged as an unfair labor practice, since the issues are different in the two types of proceedings.

(*Viking of Minneapolis* (1968) 171 NLRB 1155, fn. 1.)

The NLRB's approach appropriately recognizes the significant differences between representation and unfair practice proceedings. In ruling on election objections, PERB must determine whether "[t]he conduct complained of interfered with the employees' right to freely choose a representative." (PERB Reg. 61150(c)(1).)[1] Under this standard, PERB may refuse to set aside an election even when the employer's conduct constituted an unfair practice if the conduct did not actually affect, or have a natural or probable effect on, employee free choice. (*Sierra Sands Unified School District* (1993) PERB Decision No. 977; *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.) On the other hand, the employer's conduct need not constitute an unfair practice for PERB to set aside an election. (*State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S.) Thus, although they often arise from the same facts, the issues to be decided in an election objections proceeding are different from the issues decided in an unfair practice proceeding.

Here, the Regional Director did not address whether SVMHS' alleged conduct constituted an unfair practice under applicable PERB standards. Rather, she determined that none of the alleged conduct actually influenced, or had the potential to influence, employee free choice in the decertification election. Therefore, the initial determination of whether the

[1] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. While this regulation only applies to objections to an election conducted by PERB pursuant to the Meyers-Milias-Brown Act (MMBA),* PERB regulations contain identical provisions for election objections under the other collective bargaining statutes administered by PERB. (*The MMBA is codified at Government Code section 3500 et seq.)

conduct alleged in SEIU's charge establishes a prima facie case of an unfair practice has been left to the Board agent investigating the charge. As a result, this decision has no preclusive effect on the pending unfair practice charge in Case No. SF-CE-728-M.

ORDER

The objections by SEIU-United Healthcare Workers West Local 2005 to the election in Case No. SF-DP-294-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, Employer, and NATIONAL UNION OF HEALTHCARE WORKERS, Petitioner, and SEIU-UNITED HEALTHCARE WORKERS WEST, Exclusive Representative.	REPRESENTATION CASE NO. SF-DP-294-M ADMINISTRATIVE DETERMINATION July 27, 2010

Appearances: Ottone Leach Olsen & Ray, by Anne Frassetto Olsen, on behalf of Salinas Valley Memorial Healthcare System; Siegel & LeWitter, by Latika Malkani, on behalf of National Union of Healthcare Workers; Weinberg, Roger & Rosenfeld, by Bruce A. Harland and Leslie V. Freeman, on behalf of SEIU-United Healthcare Workers West.

Before Anita I. Martinez, Regional Director.

This decision addresses election objections filed with the Public Employment Relations Board (PERB or Board) by SEIU-United Healthcare Workers West (SEIU) pursuant to PERB Regulation 61150.[1] Objections filed against the Salinas Valley Memorial Healthcare System

[1] PERB regulations are codified at California Code of Regulations, Title 8, section 31001 et seq. PERB regulation 61150 provides in pertinent part:

> (c) Objections shall be entertained by the Board only on the following grounds:
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> (1) The conduct complained of interfered with the employees' right to freely choose a representative, or
>
> (2) Serious irregularity in the conduct of the election.

(SVMHS or Hospital)[2] allege that: (1) SVMHS failed and refused to recognize SEIU as the employees' exclusive representative once the decertification petition was filed; (2) SVMHS unilaterally changed SEIU's pre-existing access rights without giving prior notice or an opportunity to bargain; (3) SVMHS violated its duty of strict neutrality by allowing a management employee to appear on a National Union of Healthcare Workers' (NUHW) flyer advocating support for NUHW; and (4) SVMHS interfered with, intimidated, restrained, coerced, and discriminated against SEIU members because of the exercise of their rights under Section 3502 of the Meyers-Milias-Bown Act (MMBA).[3]

> (d) The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also describe with specificity how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.
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> (f) At the direction of the Board, facts alleged as supportive of the election conduct objected to shall be supported by declarations. Such declarations must be within the personal knowledge of the declarant, or must otherwise be admissible in a PERB election objections hearing. The declarations shall specify the details of each occurrence; identify the person(s) alleged to have engaged in the allegedly objectionable conduct; state their relationship to the parties; state where and when the allegedly objectionable conduct occurred; and give a detailed description of the allegedly objectionable conduct. All declarations shall state the date and place of execution and shall be signed by the declarant and certified by him or her to be true under penalty of perjury.
>
> (g) The Board agent shall dismiss objections that fail to satisfy the requirements of subsections (a) through (d). The objecting party may appeal the dismissal to the Board itself in accordance with Chapter 1, Subchapter 4, Article 3 of these regulations.

[2] An objection that PERB had engaged in serious irregularity in the conduct of the election because it failed to impound the ballots, despite pending unfair practice charges against SVMHS, was withdrawn by SEIU on June 21, 2010.

[3] Unless otherwise indicated, all statutory references are to the Government Code. The MMBA is codified at Government Code section 3500 et seq.

SEIU alleges that all of the foregoing conduct interfered with employees' right to freely choose a representative. Based upon its objections, SEIU urges that the election results be voided and that no new election be conducted until the unfair practice charges are brought to a conclusion and appropriate remedial actions are taken. Alternatively, SEIU requests that the election results be voided and a new election scheduled after an appropriate hiatus. For the reasons discussed below, the objections to the election filed by SEIU are hereby dismissed.

PROCEDURAL HISTORY

On December 23, 2009, NUHW filed a decertification petition seeking to represent SVMHS employees currently represented by SEIU.[4] On January 5, 2010,[5] SVMHS confirmed in writing to PERB that the Ordinance adopted by the District's Board of Directors pursuant to Section 3507 (Resolution No. 92-02) did not apply to petitions for decertification.[6]

On January 7, PERB provided both SVMHS and SEIU an opportunity to confirm or refute information contained in the petition and to set forth any other pertinent facts or issues to be addressed during the investigation of the petition. In response, SVMHS confirmed on January 13, that there were 868 employees in the bargaining unit and that the Memorandum of Understanding (MOU) between SVMHS and SEIU had effective dates of August 14, 2006 – August 8, 2010.

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[4] The unit was titled "Technical, Service and Maintenance, and Clerical" in the Consent Election Agreement and includes classifications within the following major groupings: Dietary; Environmental Services and Laundry; Materials Management; Nursing and Surgery; Surgical Sterile Processing; Rehabilitation Services; Cardiology; Radiology, Pharmacy; Clerical; and Respiratory Therapy.

[5] All dates refer to calendar year 2010 unless otherwise noted.

[6] As SVMHS does not have local rules regarding decertification petitions, PERB has authority to process the instant decertification petition. (MMBA section 3509, subdivision (b); PERB Regulation 61000.)

After requesting and receiving an extension of time, SEIU filed its position statement on January 25. SEIU disputed the number of unit employees provided by SVMHS, alleging the correct number to be as many as 1000 employees. It also maintained that the MOU served as a contract bar to the decertification petition and declared that it would, upon request, provide authority to substantiate these positions. SEIU's statement in support of its position was filed with PERB on February 2.

SMVHS and NUHW filed responses to SEIU's opposition to the decertification petition on February 17 and February 22, respectively. In short, both parties disputed each of SEIU's contentions. Before these issues could be decided by PERB, the parties agreed to discuss the conduct of an election. A conference call was conducted by PERB on March 15, during which the terms of a Consent Election Agreement (CEA) were discussed and agreed upon by the parties. The CEA was approved by PERB on March 18. The CEA provided that ballots: (1) would be mailed to employees' home addresses on April 22; (2) were due back at PERB no later than May 13; and (3) would be counted on May 17 at the PERB Oakland office. PERB prepared notices of the election which were to be posted by SVMHS conspicuously on employee bulletin boards no later than April 12.

On May 17, PERB counted all timely received ballots and issued a tally of ballots. The tally reflected the following totals: SEIU – 242; NUHW – 408; No Representation 13; and three challenged ballots. Since NUHW garnered a majority of the valid ballots cast and the number of challenged ballots would not have affected the results of the election, NUHW was declared the winner.

On May 26, SEIU timely filed objections pursuant to PERB Regulation 61150. SVMHS and NUHW were afforded an opportunity by PERB to respond to the objections by close of business on June 16. After requesting and receiving extensions of time, SVMHS and

NUHW filed their responses on June 21 and June 22, respectively. SEIU filed additional documentation in support of its objections on June 21.

FINDINGS OF FACT

SEIU and NUHW are employee organizations within the meaning of MMBA section 3501(b). SVMHS is a public agency within the meaning of MMBA section 3501(c). The Hospital includes a main campus and has some departments housed in several buildings near the main campus.

SVMHS' Post-Petition Conduct Towards SEIU

On December 28, 2009, Lauren Sullivan (Sullivan) introduced herself to Ann Kern (Kern), Executive Administrative Director of Human Resources, and Michelle B. Childs (Childs), Assistant Director of Human Resources, as the new authorized non-employee representative for SEIU. A letter dated December 24, 2009, from Dave Regan (Regan), Trustee of SEIU, confirmed this appointment and also removed two hospital employees as SEIU Chief Shop Stewards. Subsequently, in a letter dated January 5, Regan informed Kern that another 18 employee shop stewards had been removed as authorized representatives. Kern accepted the changes and advised administrative executives, department heads and administrative supervisors about this information.

Kern had all locks to SEIU bulletin boards changed and gave the new keys to SEIU's designated representatives. From January 16 through March 22, Kern received from and/or sent 55 e-mail messages to SEIU representatives. During this same period, Kern had at least 25 meetings with SEIU representatives concerning employee issues, and was in almost daily telephone contact with SEIU representatives.

Since January 1, SEIU has filed 21 grievances. For each grievance, Kern has met and/or discussed their disposition with SEIU representatives. Seventeen of the grievances have

been resolved and SEIU has moved four to arbitration. When contacted by Sullivan or another SEIU representative regarding access to employees, Kern authorized appropriate access sites and informed appropriate hospital personnel and departments. Kern authorized release of employee work schedules to SEIU representatives and authorized access to off-site locations in the Accounting, Business Services and Education departments for SEIU meetings. When SEIU requested access to pharmacy employees, Kern arranged for them to meet in the pharmacy lobby during employee meal periods and breaks. Kern sent e-mail messages to all Hospital management employees on January 8 to inform them of the filing of the petition and their obligation to remain neutral. In addition, Kern gave Sullivan her home and cell numbers in order to be accessible to her, even when Kern was not physically at the Hospital.

SVMHS' Access Policy

Article 26 Union Representative of the MOU provides in pertinent part:

> A. The business representative of the Union shall be permitted to enter the institution while it is in operation to see that the provisions of this Agreement are being observed, after first having reported to the appropriate representative of President/Chief Executive Officer or designee, and provided this is done at reasonable times and there is no interference with Hospital routine, performance of employee duties or Hospital activities and operations.

The events in question occurred between approximately December 24, 2009, through March 16, during the unions' respective election campaigns.

Prior to the filing of the decertification petition, SEIU representatives would contact the Human Resources department before obtaining access to the Hospital. SEIU representatives would enter the Hospital for scheduled labor/management and disciplinary meetings, usually held in the Hospital's Human Resources office or the particular manager's office in the case of disciplinary meetings. SEIU representatives would occasionally contact administration or human resources management to arrange meetings with an employee(s) in a specific

department for a specific purpose. If requested, management personnel would facilitate arrangements for a conference or meeting room to provide privacy. Upon meeting Sullivan, Childs informed her that SEIU representatives were allowed to meet with employees during their meal and rest periods in the public areas of the Hospital, but could not access patient care areas.

SVMHS does not allow members of the public access to patient care areas, including representatives of the unions (SEIU, California Nurses Association and Operating Engineers Local 39) that represent its employees. Employee break rooms are small and are primarily located in patient care areas. They are used by all employees, including supervisors and managers, as additional work areas for discussion of patient health information, as well as for breaks.[7]

Denial of access to break rooms and corridors in patient care areas to the public protects the confidentiality of patient care information.[8] Since at least 1993 (and possibly as far back as 1976), no union representative, including SEIU representatives, appears to have been granted access by SVMHS to any break room in order to conduct union-related business. No union, including SEIU, has filed a complaint or grievance challenging the Hospital's past practice of denying it access to employee break rooms.

Prior to the filing of the decertification petition, SEIU representatives used the public areas of the Hospital such as lobbies, Starbucks or the cafeteria in order to administer its MOU, or arranged for the use of conference or meeting rooms as mentioned above. After the filing of the petition, SEIU had many new and different representatives visiting the Hospital. In

[7] The Nutritional Services and Environmental Services departments do not have any break rooms and instead use the cafeteria for all breaks and meal periods.

[8] SVMHS is legally required under both federal and state law to assure the confidentiality of patient care information.

response to the petition and the many new representatives for both unions, Bev Ranzenberger (Ranzenberger), Senior Vice President/Operations for SVMHS, advised SEIU and NUHW that they could have equal access to the cafeteria, Starbucks and other areas open to the public but they could not access non-public areas for solicitation purposes. A memorandum containing this information was sent to managers, supervisors and department managers on December 28, 2009. Meeting rooms were arranged in the Business Services, Accounting and Education departments since they are not located in patient care areas and these employees do not use the cafeteria for their breaks.

Finally, there are other locations within SVMHS where employees gather for different purposes. The back office of the Wound Care Center is a small space that seats a maximum of six people. Physicians regularly use the room for dictation and documentation, staff education, educational reference storage, equipment storage and staff breaks. The room is also used on a daily basis by other personnel. At the Comprehensive Cancer center there is a small meeting room located near the nurses' station which seats approximately seven people. The room is used on a regular basis for staff reports, educational classes, staff meetings and breaks by employees. The Respiratory Care department does not have a separate break room. While not private, a portion of a work room is utilized as a break area. Since discussion of patient cases and confidential patient information occurs in these locations, the public is not allowed access to them. At Level II (Stepdown Unit), a room directly off the Level II nurses' station can seat eight people and contains a locked bulletin board for posting of information. The room is used on a daily basis by employees for reports, educational sessions, staff meetings and breaks. At the Heart Center, a small meeting room seating four to five people is centrally located behind the nurses' station. The room is used for shift reports, educational sessions, exchange of confidential patient information and employee breaks. The NICU and Pediatrics departments

each has a meeting room, the first seating five or six people and the second seating nine or ten people. The NICU room is used on a regular basis for reports, educational sessions and change of shift reports. The room in Pediatrics is used for reports and discharge rounds, along with breaks. In the Ortho Neuro Spine department, a small room with a table seats three people and a small love seat seats two. The room is used for charge nurse shift-to-shift handover, discussion of confidential patient information among staff and/or with physicians, brief in-services and PCC education, employee breaks, and discussion of patient care during the Joint Commission surveys. None of these eight rooms was accessed by union representatives prior to the filing of the petition.

On January 25, Childs was contacted by Brenda Dumpit (Dumpit), a Hospital Business Office supervisor, regarding SEIU representative Sue Madaus'(Madaus) request for access to the break room. Madaus was not given permission to use the room to meet with employees but was given permission to access the SEIU bulletin board located within it.

Alleged Violation of Strict Neutrality

Deborah Carpenter (Carpenter) is a registered nurse at SVMHS. She has been a long time shop steward (23 years) for the California Nurses Association (CNA), the exclusive representative for registered nurses, and has also served as a member of the CNA bargaining committee. Carpenter is not a SVMHS management employee. Carpenter's photograph and the following statement appeared in a NUHW flyer:

> I personally think it would be a huge mistake if my coworkers voted in SEIU-UHW. Vote NUHW.

Interference and Discrimination Allegations

1. Jim Stogner (Stogner)

Stogner is a per diem[9] surgery attendant with the least amount of seniority in his classification. Under Article 13 of the MOU, a per diem employee can petition to have his/her status changed from per diem to a benefited position. The change is based upon the number of hours worked during thirteen consecutive pay periods if the hours meet certain criteria. All requests for reclassification are reviewed and decided by the Human Resources department.

On January 18, Stogner attended a disciplinary meeting with Sullivan and Candace Samudio (Samudio), Senior Administrative Director for Surgical Services, concerning two co-workers. In her declaration, Sullivan states that Stogner was there as a SEIU steward and vigorously advocated in favor of the employees.[10] Stogner was also featured on a flyer in support of SEIU that was widely distributed throughout the Hospital.

On February 5, Stogner filed to be reclassified as a part-time benefited employee. On March 3, Kern informed Stogner that he did not meet the necessary criteria. Stogner did not follow up with the Human Resources department, nor did he file a grievance regarding the denial of his request.

In 2010, SVMHS has experienced a decline in the number of surgeries. In February, SVMHS modified the employees' work schedule to reflect the decrease in volume and need in the department, resulting in fewer work hours for employees. On April 12, 15, 19, 22, and 26,

[9] Per diem employees do not receive benefits.

[10] Samudio's declaration states the following: (1) the meeting concerned one employee; (2) Sullivan informed Samudio that Stogner was in training to become a shop steward and was there to observe; and (3) Stogner quietly observed the meeting and asked clarifying questions.

and May 3 and 12, Stogner was offered the opportunity to work additional shifts, but in each instance he declined the offer.

2. Unnamed employee

On February 17, an unidentified SEIU member was prevented from obtaining a copy of the MOU from Goka because Margaret Sanders (Sanders), Director of Level 2, denied Goka access to the Level 2 break room.

3. Two SEIU members in Surgery Break Room

On February 18, two unidentified SEIU members were speaking to Sullivan in the Surgery break room. They told Sullivan they were uncomfortable talking to her in the break room.

4. Antonio Rodriguez (Rodriguez)

On March 4, Vivian Waters (Waters), Administrative Supervisor, observed Rodriguez and Contreras conversing while Rodriguez was on duty in front of a patient's room. Waters reminded Contreras about the union's notification requirement, access limitations and the appropriate times to contact employees.

5. Angie Fernandez (Fernandez)

Fernandez has been employed as a computer clerk in the Cardiology department for nine years and is an SEIU member. The department maintains a board on which employees indicate when they leave for rest or meal periods. Employees take thirty minutes for lunch and fifteen minutes for breaks. On March 16, an issue arose as to whether Fernandez had signed out for her lunch break and whether she had exceeded her break time. Fernandez was not disciplined for either incident.

6. Zedrick Zapata (Zapata)

Zapata is a patient transporter and an SEIU Contract Action Team member. Zapata filed a grievance on February 22 alleging that he was not contacted for work on February 12. The telephone number the Hospital had on file for him was no longer correct. The grievance was settled on March 29 with SVMHS agreeing (on a non-precedent setting basis) to pay Zapata for the eight hours of work that he missed, with a reminder that he was responsible for updating his contact information.

On March 16, Andrea Huston (Huston), assistant head nurse for the Float Pool/Transport department and Zapata's supervisor, met with Zapata after he overstayed his 15 minute break in the cafeteria.[11] After checking the Medi-tech tracking system which tracks patients assigned to transporters, Huston learned that Zapata had been called for a transport and should not have been in the cafeteria. Huston decided to "coach"[12] him again concerning his work performance, so that he would have clear direction on how and when to take breaks. Huston prepared a Transport Goal Action Form and assured Zapata that he was not being disciplined. Zapata refused to sign the form.[13] Huston had never observed Zapata conferring with a union representative, including Sullivan on March 16.

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[11] Huston previously had several meetings with Zapata concerning his work performance.

[12] Coaching is a process utilized by SVMHS to help employees when work-related problems arise prior to commencing any disciplinary process. Huston had previously coached Zapata on September 24, 2009 regarding several issues and prepared a coaching document titled "Transport Goal Action Form" for his review and record. Zapata refused to sign the form.

[13] Huston's declaration states that Zapata did not request a union representative. Zapata's declaration states that he asked for representation. This discrepancy is not a material one for purposes of addressing the objections herein.

SEIU's Objections

1. SVMHS' Alleged Failure and Refusal to Recognize SEIU

SEIU contends that the Hospital failed and refused to recognize it as the employees' exclusive representative by imposing access restrictions and denying its representatives access to the facility necessary for them to enforce the terms of the MOU.

2. SVMHS' Alleged Change of Access Rights

Commencing on December 27, 2009, SEIU asserts that SVMHS denied it access to enforce the terms of the MOU. SEIU alleges that:

(a) Sullivan was told by Childs that her access would be restricted to the public areas of the Hospital, including lobbies, the cafeteria and Starbucks;

(b) On December 31, 2009, Sullivan was told by Ranzenberger that she could not "solicit" in the Hospital and that she could set up tables in the cafeteria;

(c) On or about January 25, Madaus was denied access to an employee break room;

(d) On or about February 8 and 9, SEIU Representative Robin Goka (Goka) was denied access to the Respiratory Department break room;

(e) On or about February 17, Goka accessed the Level 2 break room in order to deliver a copy of the MOU to an employee who had requested it. Goka was confronted by a management employee, told to leave and asked the name of the employee, whom she declined to name;

(f) On or about February 18, Sullivan accessed the Surgery break room. After speaking with two employees, Sullivan was confronted by a supervisory employee and told that pursuant to an e-mail message from Kern, Sullivan was not allowed to access the break room;

(g) On or about February 19, Contreras was conducting SEIU business on the third floor when she was confronted by nurse Kim Allered, who demanded that she leave the floor;

(h) On or about February 20, Goka was conducting SEIU business in the break room of the 4th/5th Towers and instructed to leave by Nursing Supervisor Amy Benano (Benano);

(i) On or about March 4, Contreras was speaking with Rodriguez who had requested to speak with her. Contreras was confronted by Walters who instructed her to not access the floors and to speak with employees only in the cafeteria or the lobby when they are on break.

3. SVMHS' Alleged Violation of its Duty of Strict Neutrality

SEIU claims that Carpenter is an agent and representative of SVMHS and that as a member of management, she appeared on a NUHW flyer supporting NUHW.

4. SVMHS' Alleged Unlawful Actions Against SEIU Members

SEIU asserts that starting in January, SVMHS intimated, restrained, coerced and discriminated against employees as follows:

(a) Stogner was regularly scheduled approximately .5 FTE until he became a steward and actively involved in the election campaign. Stogner was denied a benefited position and had his hours reduced after he participated in a discussion regarding two co-workers with Samudio and Sullivan on January 18 and featured on a flyer supporting SEIU;

(b) An unidentified SEIU member was prevented from obtaining a copy of the MOU from Goka on February 17;

(c) Two unidentified SEIU members informed Sullivan on February 18 that they were uncomfortable speaking with her in the Surgery break room;

(d) Rodriguez was prevented from discussing his concern with Contreras on or about March 4;

(e) Fernandez had her meeting in the cafeteria with Sullivan interrupted by her supervisor when she was told to end her lunch break; and

(f) Zapata was warned of possible discipline by his supervisor and asked to sign a "coaching" document after he was seen speaking with Sullivan in a hallway.

POSITIONS OF THE PARTIES

SEIU argues that SVMHS engaged in the unlawful misconduct summarized above and that such conduct had a natural and probable impact of discouraging employee support for SEIU in the election. SEIU maintains that SVMHS repeatedly denied the union its collectively bargained access rights, thereby suggesting to employees that the Hospital was in control and able to deny SEIU its rights and raising doubt over SEIU's ability to represent employees. SEIU also charges that SVMHS interfered with, intimidated, restrained, coerced, and discriminated against union activists. SEIU asserts that these actions by the Hospital contributed to a widespread perception that support of SEIU would incur management's wrath and result in discrimination and retaliation from the Hospital.

NUHW contends that SEIU's objections either cannot be proven or fail to allege specific conduct that had the natural and probable effect of affecting employee free choice. It urges that the objections be administratively dismissed and that NUHW be certified as the exclusive representative of the bargaining unit.

SVMHS asserts that SEIU has failed to establish facts sufficient to overturn the election. SVMHS states that: (1) it continued to recognize SEIU as the exclusive representative for the bargaining unit members after the filing of the petition; (2) it did not change SEIU's access rights; (3) Deborah Carpenter is not a management employee; and (4) it

did not interfere with, intimidate, restrain, coerce or discriminate against bargaining unit members because of their support for SEIU. Therefore, the Hospital requests that the objections be administratively dismissed.

DISCUSSION

Pursuant to PERB Regulation 61150(c), objections to the conduct of an election are entertained by PERB on only two grounds:

> (1) The conduct complained of interfered with the employees' right to freely choose a representative, or
>
> (2) Serious irregularity in the conduct of the election.

PERB Regulation 61150(d) mandates that:

> The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also *describe with specificity* how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.

(Emphasis added.) Finally, PERB Regulation 61150(f) provides that:

> At the direction of the Board, facts alleged as supportive of the election conduct objected to shall be supported by declarations. Such declarations must be within the personal knowledge of the declarant, or must otherwise be admissible in a PERB election objections hearing. The declarations shall *specify* the details of each occurrence; *identify* the person(s) alleged to have engaged in the allegedly objectionable conduct; state their relationship to the parties; state *where* and *when* the allegedly objectionable conduct occurred; and give a detailed description of the allegedly objectionable conduct.

(Emphasis added.)

PERB regulations require the Board agent to dismiss election objections that do not "satisfy the requirements of subsections (a) through (d)" of PERB Regulation 61150. Even if not subject to dismissal under PERB Regulation 61150, objections are to be dismissed by the Board agent if, after investigation, the objections "do not warrant setting aside the election."

(PERB Regulation 61155(f).) Alternatively, the Board agent may set aside the election if the results of the investigation warrant such action. (PERB Regulation 61155(g).) Where substantial and material factual disputes exist, a Board agent may schedule a hearing. (PERB Regulation 61155(h); *Los Angeles Unified School District* (1993) PERB Decision No. Ad-250.)

A party objecting to an election result must first present a prima facie showing of conduct that constitutes one or both of the two grounds set forth in PERB Regulation 61150(c). This includes a factual showing that employee choice was affected or that the conduct complained of had the natural and probable effect of affecting employee choice. (*Pasadena Unified School District* (1985) PERB Decision No. 530; *Jefferson Elementary School District* (1981) PERB Decision No.164 (*Jefferson*); *San Ramon Valley Unified School District* (1979) PERB Decision No.111 (*San Ramon*); *Santa Monica Unified School District and Community College District* (1978) PERB Decision No. 52.)[14] The determination of probable impact is made based on consideration of the facts submitted by the objecting party, which may include, for example, the number, nature and timing of the improper acts, and the number of employees affected by or aware of the acts. (*Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333.)

If this threshold showing is made, PERB will assess "the totality of circumstances . . . 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*); *State of California (Departments of Personnel Administration, Developmental Services, and Mental*

[14] PERB looks for guidance, *inter alia*, to federal labor law decisions, including National Labor Relations Board (NLRB) precedent, in election objections cases. (See, e.g., *State of California* (1982) PERB Decision No. 198-S.)

Health) (1986) PERB Decision No. 601-S (*State of California*).) Unlike the NLRB, PERB has long declined to adopt a per se rule.

PERB regulations and legal standards exist to ensure that elections are conducted without undue interference from parties, but also to ensure that employees' votes are not unnecessarily set aside. (*State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S.) Election objection cases involve a balancing of competing interests, and therefore PERB must weigh whether alleged misconduct was sufficient to affect the outcome. For improper conduct to warrant setting aside the results of an election, the moving party has the burden of proving that the conduct had a prejudicial impact on employees' ability to freely choose their collective bargaining representative. (*Clovis*, *supra*, PERB Decision No. 389.)

In *Clovis*, *supra*, PERB Decision No. 389, the Board upheld the decision of an administrative law judge (ALJ) ordering that an election be rerun. In that case, the ALJ found that the employer showed favoritism toward the Faculty Senate in preference to the challenging union by eliminating a required workday (grant of benefits), threatening a union organizer, and making a captive audience speech within 24 hours of the election. Taken collectively, these actions were more than adequate to establish a probable impact on the vote under *Jefferson*, *supra*, PERB Decision No. 164. As the *Clovis* Board stated:

> Most egregiously, by meeting and conferring exclusively with the Faculty Senate about the Saturday workday, then eliminating that required work day, long a matter of keen employee interest, the District clearly encouraged employees to stay with the Senate and reject the Association. Then, if any employee had missed the point, the District expressly credited the Senate with having eliminated the Saturday workday – both in a mandatory meeting ten days before the election and in a mailing to teachers two weeks before the election. Finally, the morning of the election, Principal Frugman conducted a mandatory faculty meeting in which he urged the teachers to vote for no representation.

> We find it highly probable that this entire course of conduct interfered with employees' opportunity to exercise free choice in the election.

In *San Ramon, supra*, PERB Decision No. 111, the Board overturned an ALJ's decision and ordered that an election be rerun. The Board there held that the employee organization had satisfied its burden of proving probable impact on the vote where the employer's conduct was "intimately related to the election itself." (*Ibid.*) In that case, the employer had initially agreed to a training session to be held on the day of the election, because otherwise the employees in the unit would have had to come in to vote on a non-work day. Shortly before the election, the training session was cancelled, and this action was found by the Board to sustain a charge of bargaining in bad faith. (*Ibid.*) The Board further held:

> Thus, where the training session was inexorably linked to the election itself, where the apparent acquiescence and delay in cancellation caused confusion and discord which remained throughout the election proceedings, and where the results of the election were such that the margin by which the organizational security clause was defeated was so narrow, the Board finds it sufficiently likely that the objectionable conduct did influence the vote so that it cannot be said with assurance that the employees would have voted as they did absent the influence caused by the employer's unlawful conduct.

(*Ibid.;* citation omitted.)

Both *Clovis* and *San Ramon* involved improper conduct by the employer that was in close temporal proximity to the actual voting. In contrast, the Board in *State of California, supra*, PERB Decision No. 601-S found that, even though the employer had committed several unfair practices in the course of the election period, including: interference with and a unilateral change in union access rights; unlawful support for one union in preference to another; and interference with available bulletin board space, the wrongful conduct did not have a probable impact on the vote. The Board noted that its conclusion may have been different if the employer in that case had been a small school district with several hundred

employees in the bargaining unit. (*Ibid.*) However, because the bargaining unit included several thousand employees in two large State departments, widespread impact throughout the unit was not demonstrated. (*Ibid.*) The Board concluded:

> There was no pervasive system-wide or hospital-wide anti-CWA or pro-CAPT behavior. For the most part, the violations occurred at low levels within the departmental administration and were not reflective of any anti-CWA conduct by the Department of Personnel Administration. ...
>
> The unilateral changes which occurred, while significant to the organizers they affected, had no widespread impact throughout the unit. For the most part, the unlawful practices were isolated and minimal in their impact. On this record, there could be no basis for setting aside the election result.

(*Ibid.*)

Likewise, in *Sierra Sands Unified School District* (1993) PERB Decision No. 977, the Board upheld an ALJ's refusal to set aside the results of an agency fee election, despite a finding of improper conduct by the employer. In that case, the employer had committed an unfair practice by denying access to employee mailboxes to distribute literature in opposition to the imposition of agency fees by a group of opposed employees. Nevertheless, the Board sustained the ALJ's conclusion that such action by the employer did not likely impact the vote. (*Ibid.*) The ALJ reasoned:

> Mr. Roberts and members of the Concerned Teachers got some leaflets into teacher mailboxes and distributed prior to when the ban went into effect. They even had limited access to mailboxes in some schools after the ban. They were permitted to use District facilities for meetings and they were permitted to put literature in teacher lounges. They successfully placed an article explaining their position in a local newspaper. There is no evidence that Concerned Teachers encountered any restrictions upon personal solicitations of support from co-workers during non-work periods. Under these circumstances, there is no evidence that would establish a probable or actual impact upon the election result.

(*Ibid.*)

It is against these standards that SEIU's objections must be considered.

Failure to Recognize SEIU as Exclusive Representative

PERB has stated that representation elections impose on the employer a special duty to maintain strict neutrality without regard to the motive or intent of its actions. (*Santa Monica Community College District*, (1979), PERB Decision No. 103.) Failure to uphold this obligation may lead to PERB finding that the employer committed the unfair practice of encouraging employees to join or support one employee organization in preference to another.

In response to the filing of the decertification petition, SVMHS took several affirmative actions to ensure that it complied with its obligations towards SEIU. As demonstrated by Kern's declaration, the Hospital acknowledged the change in SEIU leadership and informed its administrative personnel of the same, reminded its management and administrative personnel of their obligation to remain neutral during the election campaign, changed locks on all SEIU bulletin boards and gave the keys to the new SEIU-designated representatives so that SEIU could communicate with employees, and released employee work schedules to SEIU representatives. SVMHS management personnel continued to communicate with SEIU representatives to resolve issues, including the exchange of approximately 55 e-mail messages, the conduct of 25 meetings, and the resolution of 17 of 21 grievances filed between January 16 and March 22 alone. Kern was in almost daily telephone contact with Sullivan, and gave Sullivan her personal numbers in case she needed to reach her after hours or when not on site. The Hospital also authorized and facilitated appropriate access sites, such as the pharmacy lobby, when requested by SEIU and authorized access to departments located at off-site locations.

All of these proactive actions can hardly be seen as indicative of the Hospital's failure to deal with SEIU as the incumbent employee organization, nor can they be touted as having

somehow affected employee free choice to the detriment of SEIU. (*Pleasant Valley Elementary School District, supra*, PERB Order No. Ad-333.) SEIU has not refuted any of the factual points from Kern's declaration nor has SEIU advanced any other information suggesting, through declarations under penalty of perjury, that SVMHS failed to recognize SEIU as the exclusive representative. SEIU has therefore failed in its burden of proving that the conduct by SVMHS had a prejudicial impact on employees' ability to freely choose their representative. (*Clovis, supra*, PERB Decision No. 389.)

Access Issue

The MMBA grants employee organizations a right of access, subject to reasonable regulation. (*Omnitrans* (2009) PERB Decision No. 2030-M.) The MMBA provides that public agencies may adopt reasonable rules and regulations for, among other things, access of organization officers and representatives to work locations.[15] Employee organizations are generally entitled to reasonable access to employees during employees' non-working time, including before and after work and during breaks and lunches, subject to advance notice to the employer and provided that such access does not impede employees' performance of duties. (*California Department of Transportation* (1981) PERB Decision No. 159b-S; *Marin Community College District* (1980) PERB Decision No. 145; *Long Beach Unified School District* (1980) PERB Decision No. 130; *California Department of Corrections* (1980) PERB Decision No. 127-S.)

Access to employee work locations is subject to reasonable restrictions, particularly in the hospital setting, where considerations of patient care, privacy and security have primacy. (*Regents of the University of California* (2004) PERB Decision No. 1700-H; *UCLA Medical Center*, (1983), PERB Decision No. 329-H.)

[15] Government Code section 3507(a)(6).

Article 26 of the SVMHS/SEIU MOU provides union representatives access while the Hospital is in operation to be sure the provisions of the MOU are being observed, subject to notice, reasonable time restrictions, and a requirement that access not interfere with "Hospital routine, performance of employee duties or Hospital activities and operations." The past practice of the parties, including the requirement for reporting their presence and restriction on meeting locations, was consistent with these contractual requirements. Going back to 1993 if not before, all unions representing Hospital personnel were prohibited from accessing patient care areas, including break rooms and corridors in those areas. SEIU, and presumably other unions, were allowed to meet in public areas, including lobbies, the cafeteria, and the on-site Starbucks. None of SEIU's nine allegations of access denials described above suggests improper employer conduct. Five of the alleged access denials concerned SEIU efforts to access break rooms which were inappropriate for union/employee meetings because of the presence of other staff on breaks, ongoing work activities, and/or confidential records and other information. Denial of access under these circumstances was not improper.

Moreover, under the parties' pre-petition practices, SEIU had never accessed any of the rooms to which SEIU now claims it should have had access. Four of the alleged access violations concerned SEIU efforts to access or solicit in patient care areas. As is the case with respect to break rooms, discussed immediately above, none of these denials was improper. Indeed, SEIU concedes that in three of these four incidents, the management representative advised the SEIU representative of alternative locations (e.g., cafeteria, lobby, Starbucks) where solicitations were permitted. Also noteworthy is the fact that SEIU has made no claim of more favorable granting of access to NUHW by the Hospital.

SEIU's allegations regarding denial of access boil down to the assertion that the new organizers hired to replace prior SEIU personnel were unaware of the access practices and

policies underlying the existing MOU, and therefore were not held to the terms of those provisions or practices. As the Hospital properly points out, it would have been a violation of the Hospital's duty to maintain relative neutrality if the Hospital had modified its access practices, in the face of the decertification petition, to favor SEIU. And in any event, ignorance of the parties' past practice stemming from Article 26 is no excuse, and is certainly no basis for claiming more beneficial access rights than SEIU had agreed to and lived by for so many years.

Carpenter Issue

In her declaration, Carpenter states that she is not a SVMHS management employee and serves as a union representative for the California Nurses Association. As an employee and representative of another SVMHS union, Carpenter was free to express her opinion to other employees. SEIU's claim that Carpenter was an agent of SMVHS and illegally advocated for NUHW is clearly misplaced. SEIU provides no facts to demonstrate that Carpenter is a management employee. Therefore, this objection has no validity and is hereby dismissed.

Issues as to Various Employees

Under the MMBA, it is unlawful to discriminate against, interfere with, threaten, or take reprisals against employees because of their participation or non-participation in activities of employee organizations, including recruitment or organizational activities on behalf of a union. (PERB Regulation 32603(a); *County of San Joaquin (Health Care Services)* (2003) PERB Decision no. 1524-M.) However, even the probable existence of such illegal conduct does not necessarily mean that an election that occurred close in time to the discriminatory action must be overturned. Such conduct can result in overturning an election only if it is so severe as to have had the natural and probable consequence of affecting employee choice.

(*Santa Monica Unified School District and Community College District*, *supra*, PERB Decision No. 52; *San Ramon*, *supra*, PERB Decision No. 111; *Jefferson*, *supra*, PERB Decision No. 164; *Pasadena Unified School District*, *supra*, PERB Decision No. 530.)

SEIU makes six allegations in support of its claim that SVMHS took unlawful action against SEIU members/employees and argues that such actions warrant overturning the election. Each of these allegations is addressed below.

First, SEIU alleges that Stogner was denied a benefited position and that his hours were reduced as a result of his involvement in the election campaign, specifically, having a discussion with management regarding one or two co-workers on January 18 and being featured in a flyer supporting SEIU. The most junior per diem surgery attendant, Stogner asked to have his status changed in order to receive benefits. When his request was denied, he did not follow up with Human Resources (who made the decision), nor did he file a grievance regarding the denial. While the *specific* reasons for denial are not part of the record (e.g., the criteria that have to be met, how many hours Stogner had worked during the applicable thirteen consecutive pay periods, how many hours he needed to qualify for the change), Stogner apparently accepted the determination that his hours had not met the necessary criteria.

As mentioned above, the Hospital had experienced a decline in the number of surgeries in 2010 resulting in fewer work hours for employees. Stogner's stated desire to qualify to become a benefited employee (as evidenced by his request for change in status) in *future* thirteen consecutive pay periods is undercut by the fact that SVMHS offered him additional shifts seven times during the election period, and he declined each offer.

SEIU has made no showing that this isolated situation regarding Stogner had any material affect on the election or employee free choice. Militating against that conclusion are the facts that: (1) Stogner was not terminated but simply was not granted status as a benefited

position because he did not meet the necessary hours criteria; and (2) there is no evidence that employees as a whole knew or were affected by this isolated action involving Stogner.

Second, SEIU alleges that an unnamed employee was prevented from obtaining a copy of the MOU from Goka on February 17 when Sanders denied access to the Level 2 break room. Here the employer was simply enforcing its long standing policy to deny access to break rooms. SEIU did not provide facts to demonstrate that the unnamed employee even became aware of the exchange between Goka and Sanders or that other employees witnessed the incident.

Third, SEIU alleges that two unnamed SEIU members told Sullivan that they were uncomfortable speaking with her in the Surgery break room. This allegation appears to describe a union representative attempting to engage employees in a work location where meetings with union representatives were not allowed. Employee discomfort in this situation does not suggest unlawful conduct by the employer, but rather employee sensitivity about Hospital rules and the need for privacy in order to engage in the discussion.

Fourth, SEIU alleges that Waters illegally interrupted the conversation between Rodriguez and Contreras while Rodriguez was on duty in front of a patient's room. The supervisor, Waters, reminded Contreras about the notice requirement, access limitations, and appropriate times to speak with employees. This appears to have been consistent with Hospital policy and practice, including the MOU, and SEIU's objections do not suggest that the employee was in any way affected by the alleged events.

Fifth, SEIU alleges that a supervisor illegally interrupted a meeting between an employee (Fernandez) and union representative (Sullivan), and brought to the employee's attention that her lunch period was over. There is no allegation that the employee was disciplined or suffered any repercussions as a result of this event, nor that employee free

choice was adversely affected or that the conduct had the natural and probable effect of affecting employee free choice.

Last, SEIU alleges that Zapata received a counseling memo after being seen talking to Sullivan in a hallway. According to the employer's unrefuted declaration, Zapata was coached as a result of overstaying his break in the cafeteria by 15 minutes, during a time when he had been called to transport a patient. This isolated action appears to have been minor, corrective in scope and justified by an appropriate business reason.

In sum, all of these allegations appear to largely cover matters which appear, from the standpoint of participants in the election, to have been non-events. In each instance, the allegedly affected employee(s) was a member and supporter of SEIU, not someone whose vote might have been swayed against SEIU because of the employer's action. Each instance involved a situation in which, seen in a light most favorable to SEIU, management made a decision according to a set policy (process required to change status to a benefited employee, issuance of coaching memos) or corrected an access violation perpetrated by SEIU. There is no evidence that these events would affect employees who may have been on the fence about which union to support, or that word of these isolated events spread through the bargaining unit's rumor mill in a manner that undermined employee free choice. In any event, the facts and allegations do not remotely support any inference that employee free choice was compromised in this election.

CONCLUSION

Like the NLRB, PERB "goes to great lengths to ensure that the manner in which elections are conducted raises no reasonable doubt as to their fairness or validity." (*Gilroy Unified School District* (1991) PERB Order No. Ad-226, quoting *Brink's Armored Car. Inc.* (1986) 278 NLRB 141; citations omitted.) Nevertheless, both PERB and the NLRB have long

recognized that an election need not be perfect to be fair. (*County of Imperial* (2007) PERB Decision No. 1916-M; *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)*, *supra*, PERB Decision No. 601-S.) The conduct by SVMHS alleged by SEIU was not of sufficient weight or seriousness to sustain the objections, nor is it reasonable to infer that the conduct had any natural or probable impact on employee choice.

Under the totality of circumstances raised and the cumulative effect of the conduct in this case, the misconduct alleged against SVMHS does not rise to the level under PERB precedent to disturb the results of this election. Therefore, for the reasons discussed above, the objections to the election filed by SEIU pursuant to PERB Regulation 61150 are hereby DISMISSED.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also

places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal. (Cal. Code Regs., tit. 8, § 32360, subd. (c).) An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request. (Cal. Code Regs., tit. 8, § 32370.)

If a timely appeal is filed, any other party may file with the Board an original and five copies of a response to the appeal within ten calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered, or when deposited in the mail or with a delivery service properly addressed, or when sent by facsimile transmission in accordance with the requirements of California Code of Regulations, title 8, sections 32090 and 32135, subdivision (d).

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause

for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Anita I. Martinez
Regional Director