STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU-UNITED HEALTHCARE WORKERS WEST LOCAL 2005, Charging Party, v. WEST CONTRA COSTA HEALTHCARE DISTRICT, Respondent.	Case Nos. SF-CE-641-M SF-CE-648-M PERB Decision No. 2145-M November 30, 2010
SEIU-UNITED HEALTHCARE WORKERS WEST LOCAL 2005, Charging Party, v. NATIONAL UNION OF HEALTHCARE WORKERS, Respondent.	Case No. SF-CO-201-M
WEST CONTRA COSTA HEALTHCARE DISTRICT, Employer, and NATIONAL UNION OF HEALTHCARE WORKERS, Petitioner, and SEIU-UNITED HEALTHCARE WORKERS WEST LOCAL 2005, Exclusive Representative.	Case No. SF-DP-281-M

Appearances: Weinberg, Roger & Rosenfeld by Vincent A. Harrington and Manuel A. Boigues, Attorneys, for SEIU – United Healthcare Workers West Local 2005; Foley & Lardner by Gregory W. McClune and Kristy K. Marino, Attorneys, for West Contra Costa Healthcare District; Siegel & LeWitter by Latika Malkani, Attorney, for National Union of Healthcare Workers.

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

DECISION

DOWDIN CALVILLO, Chair: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by SEIU – United Healthcare Workers West Local 2005 (SEIU) to the proposed decision of an administrative law judge (ALJ). These cases arise out of events that occurred during an election campaign in which the National Union of Healthcare Workers (NUHW) sought to decertify SEIU as the exclusive representative of a bargaining unit of service, maintenance, technical, and professional employees at the West Contra Costa Healthcare District's (District) Doctors Medical Center of San Pablo (Medical Center).

The complaint issued by PERB's Office of the General Counsel in Case No. SF-CE-641-M alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] by adopting a policy that required non-employee SEIU representatives who wished to access non-public areas of the Medical Center to sign in, obtain a badge, and be escorted by Medical Center personnel. The complaint in Case No. SF-CE-648-M alleged that the District violated the MMBA by: (1) allowing non-employee representatives of NUHW greater access to non-public areas of the Medical Center than was granted to SEIU representatives; (2) requiring SEIU representatives to wear hospital-issued badges while not requiring NUHW representatives to do so; and (3) failing to respond to SEIU's concerns about preferential access being given to NUHW representatives.

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

The complaint in Case No. SF-CO-201-M alleged that NUHW interfered with employee rights granted by the MMBA when it distributed a flyer that instructed bargaining unit members to give their ballots in the upcoming decertification election to a "trusted shop steward." SEIU also filed election objections in Case No. SF-DP-281-M contending that the conduct alleged in the three complaints interfered with employee free choice in the election and further that PERB's failure to impound the ballots pending resolution of the unfair practice proceedings constituted "serious irregularity in the conduct of the election."

Following four days of hearing and the submission of opening and reply briefs by the parties, the ALJ dismissed all of the allegations in the complaints. The ALJ also dismissed SEIU's election objections and ordered NUHW certified as the exclusive representative of the bargaining unit.

The Board has reviewed the proposed decision and the record in light of SEIU's exceptions, NUHW's and the District's responses thereto, and the relevant law.[2] Based on this review, the Board affirms the ALJ's dismissal of the complaints and election objections for the reasons discussed below.

[2] NUHW's response to SEIU's exceptions was due April 19, 2010. On that day, NUHW served all parties by mail but inadvertently faxed its response to PERB's San Francisco regional office instead of its Sacramento headquarters office. PERB Regulation 32136 allows the Board to excuse a late filing for good cause.* The Board has found good cause when a party makes a conscientious effort to timely file and the late filing was caused by circumstances beyond the party's control, such as a mailing or clerical error. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.) If the reason for the untimely filing is "reasonable and credible," the Board evaluates whether the opposing party would suffer any prejudice as a result of the excused late filing. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.) Here, the late filing of the response was due to a clerical error and there is no prejudice to the other parties who were served timely by mail. Accordingly, the Board grants NUHW's request to excuse its late filing. (*PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

FACTUAL BACKGROUND

Events Leading up to NUHW's Decertification Petition

SEIU is the exclusive representative of a bargaining unit of service, maintenance, technical, and professional employees at the Medical Center. SEIU and the District were parties to a memorandum of understanding (MOU) for that unit effective October 1, 2004 through September 30, 2008. Negotiations for a successor MOU were not fruitful and ceased sometime in late 2008.

In January 2009, SEIU International ousted the local's officers and placed the local under trusteeship. In the first week of February, the trustees assigned Velvet Hazard (Hazard), an organizer with approximately 11 years of experience, to assess the situation at the Medical Center. Hazard learned that the bargaining unit's MOU had expired and that negotiations had stalled but was unable to assess the status of any pending grievances. Soon after her assignment, Hazard notified Charm Patton (Patton), the Medical Center's interim vice-president for human resources, to direct all organizing issues to her. She also told Patton that Matt Wood (Wood) would be handling negotiations and grievances for SEIU.

Soon after imposition of the trusteeship, the local's former officers created NUHW and began to seek support among employees in the local's bargaining units. On March 2, 2009, NUHW filed with PERB a petition to decertify SEIU as the exclusive representative of the Medical Center's Service & Maintenance, Technical & Professional bargaining unit.[3]

[3] SEIU excepts to the ALJ's finding that NUHW is an employee organization within the meaning of MMBA section 3501, subdivision (b). That subdivision defines "recognized employee organization" as "an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency." We agree that NUHW does not fit this definition. However, NUHW does satisfy the definition of "employee organization" under subdivision (a)(2) of that section: "Any organization that seeks to represent employees of a public agency in their relations with that public agency."

Soon thereafter, both SEIU and NUHW sent organizers to the Medical Center. SEIU first sent Rahul Varshney (Varshney); Claude Joseph (Joseph) and Lauren Sullivan (Sullivan) soon took over as the primary organizers, joined at various times by Rhonda Braithwaite, Juliana Lakatosh (Lakatosh), and Todd (last name unknown). NUHW's counterpart to Hazard, Glen Goldstein (Goldstein), sent Kim Tavaglione (Tavaglione), Patrick Doyle (Doyle), Pete Clayton, Allison Pasarante (Pasarante) and Ella Hereth to the Medical Center to organize. All were former organizers/representatives for the SEIU local; Goldstein was also a former SEIU representative and served on NUHW's executive board.

Union Access at the Medical Center

Article 19 of the expired MOU, entitled "Union Field Representative," stated, in relevant part:

> A. The Union Field Representative or qualified representative of the Union shall be allowed to visit the Medical Center for the purpose of ascertaining whether this Agreement is being observed and to observe job conditions under which employees are employed. This privilege shall be exercised reasonably and shall be related to the representative's responsibility for seeing that the Medical Center is in compliance with the Agreement.
>
> B. The Union Field Representative or qualified representative of the Union shall report to a designated management official when entering the Medical Center, and such representative shall not interfere with the normal conduct of work in the Medical Center. The Union Field Representative may confer with employees, including shop stewards, only upon their own free time and in public areas within the Medical Center such as cafeteria or coffee shop or in designated non-work areas.

It is undisputed that SEIU and the District understood "designated non-work areas" to mean break rooms and employee lounges in non-public areas of the Medical Center.

Hazard testified that when she was first assigned responsibility for the Medical Center, she read MOU Article 19 and spoke with Lakatosh, who had been assigned to the Medical

Center previously. According to Hazard, Lakatosh told her that SEIU representatives "had the ability to walk throughout the facility at any time" and that the Medical Center did not enforce the notice requirement.[4] Doyle testified that during his time as a SEIU representative earlier in 2009 he met with employees in break rooms and was never required to check in when he arrived at the Medical Center.

Access Issues During the Election Campaign

In early March, soon after the decertification petition was filed, Patton and Lydia Chan (Chan), the Medical Center's employee and labor relations manager, began receiving complaints from employees about aggressive union organizers in the facility. When Patton and Chan confronted Varshney about the complaints, he shouted at Patton.[5] A similar incident occurred when Patton and Chan confronted Tavaglione about complaints that she was blocking hallways and not letting employees pass unless they took a flyer from her. Chan testified she also received reports that representatives of the rival unions were arguing with each other in and around the cafeteria.

In response to these complaints and incidents, Patton and Chan drafted a memorandum entitled, "NOTICE TO UHW AND NUHW UNION REPRESENTATIVES." The memorandum stated in full:

> We are aware that there is a continuing dispute between [SEIU-]UHW and NUHW over the representation of employees at Doctors Medical Center.
>
> Doctors Medical Center does not take sides in this dispute, will respect the choice of our employees and hopes that it will be resolved quickly.

[4] Lakatosh did not testify.

[5] After this incident, Patton called Wood and asked that Varshney no longer be assigned to the Medical Center; Wood later told Chan that Varshney would no longer be coming to the facility.

Because of this dispute, employees have become upset and have complained to the Medical Center that they feel harassed and threatened. In order to allow the unions to interact with employees but, at the same time, permit employees to go about their work and their lives without feeling harassed, the following rules will apply until further notice:

1. UHW and NUHW representatives are permitted in the cafeteria and the public areas of the Medical Center, such as the parking lot.

2. The representatives are not to talk to any employee who is on duty.

3. If an employee tells a representative that they do not want to talk to them, they must cease at that point and that employee must be left alone.

4. The union representatives are not to interact with visitors or patients.

5. To avoid the possibility of confrontation, the representatives from each union may not interact with representatives of the other while on the premises of the Medical Center.

6. The union representatives must be respectful of the employees, patients and visitors. Raised voices, hostile conduct, and argumentative behavior will not be permitted.

If any union representative does not comply with these rules, the representative will be required to leave the premises and will not be permitted to return.

On or around March 20, 2009, Patton and Chan took copies of the memorandum to the cafeteria and distributed it to the union representatives who were there. Patton faxed a copy of the memorandum to Wood; Wood testified that he told Patton by phone that SEIU did not agree with the access changes.[6] On March 24, Patton faxed a copy of the memorandum, along with a cover letter and a copy of the Medical Center's solicitation and distribution policy, to Kim Evon, deputy trustee of the SEIU local. Additionally, the Medical Center mailed a copy

[6] Patton did not testify.

of the memorandum to all employees in the bargaining unit as an attachment to a letter that discussed the steps the Medical Center was taking to minimize disruption from the election campaign.

At a weekly management staff meeting approximately one week later, Chan fielded questions from supervisors about who was allowed in the break rooms; Chan testified that the supervisors had received many questions on the issue from employees. Chan told the supervisors that because SEIU was the recognized employee organization, it was allowed access to the break rooms under the terms of the expired MOU. She told the supervisors to pass this information on to their employees.

Around this same time, an unidentified employee phoned Chan to complain that SEIU representative Joseph was disturbing employees in a break room. Chan called security and met the guard in the break room. In the meantime, Sullivan had exited the elevator, saw the guard walking toward the break room, and followed him. When Chan arrived, there were two or three employees in the room, along with Joseph, Sullivan and the guard.

Chan testified that she asked Joseph and Sullivan not to continue speaking with employees once the employee indicated he or she did not want to speak with them; according to Chan, both denied being disruptive. Chan testified that she then asked Joseph to go to the cafeteria. She then walked Joseph out of the break room to the elevator, rode with him to the first floor where the cafeteria is located, and returned to her office on the second floor after Joseph exited on the first.

Joseph testified that, after Sullivan told Chan they had a right to be in the break room, Sullivan called Wood, who then spoke with Chan. At some point, Wood told Joseph and Sullivan to comply with the directive to leave the break room. According to Joseph, Chan then left and three security guards entered the room shortly thereafter. He testified that the guards

escorted him and Sullivan to the first floor lobby. Sullivan testified similarly, with the addition that Chan handed her a copy of the "NOTICE TO UHW AND NUHW UNION REPRESENTATIVES" memorandum.

On or about April 8, 2009, Medical Center employee and NUHW supporter Roger Allen (Allen) drafted a letter complaining about SEIU representatives' presence in the break rooms; 19 other employees signed the letter. Chan testified that Allen and some of the other signers entered her office that day, presented her with the letter, and angrily demanded that the Medical Center stop allowing SEIU representatives to sit in the break rooms. Chan responded that SEIU was entitled to access the break rooms because it was the currently recognized exclusive representative. Allen testified that he continued to see SEIU representatives in the break rooms after this meeting. Employee and NUHW supporter Bonnie Pelayo also testified that SEIU representatives continued to sit in the break room on her floor after she complained to Chan about them.

Supervisors continued to complain to Chan that they could not tell which union the representatives in the break rooms represented and thus whether the representatives were authorized to be there. In response to these concerns, Chan told SEIU representatives that, upon arrival, they must now sign a log book in the purchasing department and obtain a name badge to gain access to the break rooms. The badge said "authorized sales representative" at the top with blank lines underneath. Sullivan testified that she wrote her name and "SEIU" on the blank lines and that bargaining unit members would occasionally make comments such as "Whatever you're selling, I'm not buying," as she walked past.

Chan testified that she told Wood the purpose of the requirement was to ensure that SEIU representatives continued to have access to the break rooms without being questioned by staff or security. The SEIU representatives complied with the requirement but often

complained about it to Hazard. The parties stipulated that the Medical Center never required NUHW representatives to sign in or wear a badge while on the premises.

Hazard testified that she told Patton she did not believe SEIU should comply with the sign-in and badge requirement but that she would instruct the representatives to do so. She also testified that Patton told her Chan would escort SEIU representatives to the break rooms after they signed in.

On one occasion after the sign-in and badge requirement was adopted, Hazard went to the Medical Center for meetings with employees about the Medical Center's recent bankruptcy settlement. Upon arrival, she went to Chan's office on the second floor. Chan asked if Hazard would like her to show her to the meeting room; Hazard said she would. Chan walked Hazard to a conference room on the first floor and introduced herself to a SEIU attorney who was there. Chan testified that this occasion and the time that she walked with Joseph from the break room to the first floor were the only times she ever escorted a representative of either union. There is no evidence in the record that Medical Center personnel escorted any SEIU representative to or from a break room on any other occasion.

Despite the issuance of the memorandum, Medical Center security and management continued to encounter union representatives in unauthorized areas of the hospital. Doyle testified that he would often take a "circuitous" route around the hospital floors in an attempt to speak with employees. He also testified that at least once a day Chan, Patton, or a security guard would discover him in a non-public area of the Medical Center and direct him back to the cafeteria. Chan testified that she could remember more than 20 different times when she encountered Doyle on the elevator or in non-public areas of the hospital and directed him back to the cafeteria. She also testified that she once found Pasarante in a patient care area and directed her to the cafeteria. Witnesses for both unions testified that they had seen

representatives of the other union in non-public areas; the evidence also shows that representatives of both unions either had the access codes to doors leading to non-public areas or were given access to those areas by employees who knew the codes.

Chan also testified that Doyle repeatedly complained to her about NUHW's lack of access to the break rooms. Doyle testified that Chan consistently told him that SEIU had break room access because it was the recognized exclusive representative. SEIU representatives also complained to Chan about NUHW representatives being in non-public areas. Chan testified that she would investigate as soon as she received a complaint about either union's representatives but that often the individual had moved on by the time she arrived. Chan also recalled that on two separate occasions Joseph came to her office and reported that NUHW representatives were in a break room; both times Chan called Medical Center security on her speaker phone while Joseph was in the room.

NUHW Flyers

On April 14, 2009, Doyle prepared a flyer informing Medical Center employees of the beginning of the election period and urging them to vote for NUHW. A paragraph near the bottom of the flyer stated:

> You can return your ballot up until May 20th. Be sure to give your ballot to your trusted shop steward.

Doyle made 20 to 30 copies of the flyer and distributed them to NUHW representatives and bargaining unit employees in the Medical Center's cafeteria. After distributing 15 to 20 of the flyers, Doyle received an email from Goldstein with a revised version of the flyer attached. (Apparently, Doyle had emailed a copy of his draft flyer to Goldstein). The revised flyer did not contain the language about returning ballots quoted above. Goldstein testified that he removed the language from the flyer because it was not something NUHW should instruct employees to do.

Upon receiving the revised flyer from Goldstein, Doyle immediately went to Kinko's, where he recycled the rest of his draft flyers and made 80 to 100 copies of the revised flyer. He returned to the Medical Center and gave the revised flyer to other NUHW representatives to distribute; he did not instruct them to retrieve the copies of his draft flyer distributed earlier that day. Joseph and Sullivan testified that they both saw the draft flyer on April 14 and that they continued to see it on tables and posted on a bulletin board for several days thereafter.

On April 23, 2009, NUHW mailed a flyer to all bargaining unit employees entitled "NUHW Voters' Guide to our 2009 Union Election at Doctors Medical Center." In the bottom right corner of the flyer was the following paragraph:

> A version of an NUHW flyer distributed on or about April 14, 2009 stated to return your ballot to your shop steward. This was in error. To clarify, please do not give your ballot to your shop steward. Instead, follow the PERB voting instructions, both those posted at the hospital and those you will receive with your ballot.

Doyle testified that NUHW representatives also hand-distributed this flyer to employees at the Medical Center. Doyle further testified that he never told any employee to give his or her ballot to a shop steward.[7]

[7] Joseph testified that a bargaining unit employee told him that a NUHW representative and someone wearing a "NUHW Shop Steward" button pulled her into a room and told her she needed to return her ballot to her shop steward. The employee did not testify and there is no evidence in the record to corroborate Joseph's testimony. Accordingly, we cannot make a finding that this conversation occurred. (PERB Reg. 32176.)

DISCUSSION

1. Complaints Against the District (SF-CE-641-M & SF-CE-648-M)

The complaint in Case No. SF-CE-641-M alleged that the District violated the MMBA by requiring SEIU representatives to wear a badge and be escorted by staff while inside the Medical Center. The complaint alleged that this conduct: (1) constituted an unlawful unilateral change in terms and conditions of employment: and (2) interfered with SEIU's right to access employees. The complaint also alleged that the District violated its duty of strict neutrality by not requiring NUHW representatives to wear badges while in the Medical Center.

The complaint in Case No. SF-CE-648-M alleged that the District violated the MMBA by: (1) allowing NUHW representatives access to non-public areas of the Medical Center while denying similar access to SEIU representatives; (2) requiring SEIU representatives to wear identification badges while not requiring NUHW representatives to do so; and (3) failing to respond to SEIU's concerns that the District was granting preferential access to NUHW. The complaint alleged that this conduct violated the District's duty of strict neutrality and interfered with employees' and SEIU's rights.

a. Unilateral Change Allegations

A unilateral change in terms and conditions of employment constitutes a "per se" violation of MMBA section 3505 and PERB Regulation 32603(c)[8] if: (1) the public agency breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit

[8] PERB Regulation 32603(c) states that "[i]t shall be an unfair practice for a public agency to . . . [r]efuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505."

members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)[9]

As noted, the complaint in Case No. SF-CE-641-M alleged that the District unilaterally changed its established practice regarding SEIU's access to non-public areas of the Medical Center when it required non-employee SEIU representatives to wear an identifying badge and be escorted by Medical Center staff in order to access employee break rooms. We find that SEIU failed to prove either of these alleged violations.

Identification Badge Requirement

The District altered its own established past practice because it had not previously required SEIU representatives to wear an identification badge to obtain access to employee break rooms. The District made this change without providing SEIU notice or an opportunity to meet and confer over the change. The change generally affected bargaining unit members and had a continuing impact on them. However, the change did not involve a matter within the scope of representation.

It is well-established that union access rights are within the scope of representation. (*Regents of the University of California* (2004) PERB Decision No. 1700-H; *Davis Joint Unified School District* (1984) PERB Decision No. 474.) Nonetheless, under the MMBA there is no duty to meet and confer unless the employer's action has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." (*Claremont*

[9] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

Police Officers Assn. v. City of Claremont (2006) 39 Cal.4th 623, 638, quoting *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 660.)

In *City of Claremont*, *supra*, the California Supreme Court held that the city was not obligated to meet and confer over a requirement that police officers complete a racial profiling study form for each vehicle stop. (39 Cal.4th at pp. 638-639.) The undisputed evidence showed that the form could be completed in approximately two minutes and that each officer completed between four and six forms per 12-hour shift. (*Id.* at p. 638.) Concluding that the change had a de minimis impact on the workday, the Court held there was no significant and adverse effect on officers' working conditions and therefore the city had no duty to meet and confer over the change. (*Id.* at pp. 638-639.)

We find a similar de minimis impact here. To obtain the identification badge, SEIU representatives were required to go to the Medical Center's purchasing department and sign a log book. Nothing in the record indicates that the additional time required to complete this procedure impacted SEIU representatives' ability to meet with employees. Further, there is no evidence that wearing the badge impeded SEIU representatives' ability to access those areas of the Medical Center to which they were entitled access under the expired MOU and past practice. That the representatives did not like to wear the badges and that they were taunted occasionally by employees who supported NUHW does not constitute a significant and adverse effect on SEIU's right to access employees or employees' right to meet with SEIU representatives. Accordingly, the District had no duty to meet and confer with SEIU before adopting the identification badge requirement.

Escort Requirement

SEIU failed to prove that the District ever required SEIU representatives to be escorted by Medical Center personnel in order to access non-public areas of the Medical Center.

Hazard testified that Patton told her Chan would now be escorting SEIU representatives to break rooms after they signed in at the purchasing department. No SEIU representative testified that Hazard informed him or her of this alleged policy change, nor is there any evidence that the District communicated the alleged change directly to SEIU representatives, as it had done regarding the sign-in and badge requirement. Thus it does not appear that the District actually announced a firm intent to implement an escort policy.

Furthermore, SEIU failed to prove that the District ever implemented such a policy. SEIU relies entirely on two incidents: Chan's escort of Joseph from the break room to the first floor in response to complaints that he was disrupting employees and Chan's escort of Hazard from her office to the conference room where SEIU's attorney was meeting with employees. Neither of these occasions involved an escort from the purchasing department to a break room. Nor is there evidence that any SEIU representative was escorted to a break room on any other occasion or that any SEIU representative was denied access to a break room because he or she lacked an escort. We thus conclude that the District did not require SEIU representatives to be escorted to break rooms. Because there was no change to the existing policy allowing SEIU to access break rooms without an escort, this unilateral change allegation must be dismissed.

Restriction to Public Areas

Finally, although not alleged in either complaint, SEIU argued in its post-hearing briefs that the District unilaterally eliminated SEIU's ability to access break rooms by restricting its representatives to public areas of the Medical Center. In the absence of a motion by SEIU to amend the complaint, the ALJ addressed the argument as an unalleged violation and concluded that the District did not make an unlawful unilateral change to SEIU's access rights.

The Board may only consider an unalleged violation when: "(1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the

subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue." (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation also must have occurred within the applicable statute of limitations period. (*Id.*)

We agree with the ALJ that the standard for addressing an unalleged violation has been met in this case. SEIU raised the restriction of access issue in the original and amended charges in Case No. SF-CE-641-M and in its opening statement at the hearing, the allegation is part of the same course of conduct by the District regarding union access during the decertification election campaign, the issue was fully litigated at hearing, and witnesses were examined and cross-examined on the issue. Because it arises from the same facts as the allegations in the complaint, the unalleged violation is timely.

We also agree that SEIU failed to prove the District unilaterally changed SEIU's access rights. SEIU's argument hinges on the language in item 1. of the District's "NOTICE TO UHW AND NUHW UNION REPRESENTATIVES," which states: "UHW and NUHW representatives are permitted in the cafeteria and the public areas of the Medical Center, such as the parking lot." SEIU argues that, by implication, SEIU representatives were no longer allowed in break rooms.

Unlike SEIU, we find the language quoted above ambiguous regarding SEIU's ability to continue to access the Medical Center's break rooms. This ambiguity led to Chan clarifying to Medical Center management that SEIU was still entitled to access break rooms per the expired MOU. Chan also told both employees and NUHW representatives on numerous occasions that SEIU representatives could be in the break rooms because SEIU was the exclusive representative. Thus, although it never issued written clarification or stated so

directly to SEIU, the District consistently took the position that SEIU retained the access rights it had under the expired MOU.

SEIU presented no evidence that any of its representatives was ever denied access to a Medical Center break room during the election campaign. SEIU nonetheless relies on the Joseph incident as evidence of a District policy to exclude SEIU representatives from the break rooms. This argument relies primarily on Sullivan's testimony that Chan handed her a copy of the "NOTICE TO UHW AND NUHW UNION REPRESENTATIVES" before she walked Joseph to the first floor. The mere handing of the memorandum to Sullivan does not establish that Chan or the District was enforcing item 1. of the memorandum. Instead, in light of the complaint that Joseph was being disruptive, it is reasonable to conclude that Chan was enforcing the memorandum's prohibition on disturbing employees who did not want to speak with SEIU representatives.

Based on the District's consistent position that SEIU retained the right to access break rooms and the complete lack of evidence that SEIU was ever denied access to break rooms, we conclude that the District did not unilaterally change SEIU's access rights. Consequently, because there was no change in policy, this unilateral change allegation must be dismissed.

b. Interference Allegations

The complaint in Case No. SF-CE-641-M alleged that the District interfered with SEIU's right to access employees and employees' right to meet with SEIU representatives when it required non-employee SEIU representatives to wear an identifying badge and be escorted by Medical Center staff in order to access employee break rooms. The test for whether an employer has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of [MMBA] section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that [the] employer's conduct was not justified by legitimate business reasons.

(*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 807.)

Employees have a protected right to discuss union matters with union representatives on the employer's premises subject to the employer's reasonable time and place restrictions. (*Omnitrans* (2009) PERB Decision No. 2030-M.) Because SEIU failed to prove that the District required SEIU representatives to be escorted by Medical Center staff in order to access break rooms, the allegation that such a requirement interfered with SEIU's and employees' rights must be dismissed.

As for the identification badge allegation, we find the District's requirement distinguishable from the identification card requirement struck down by the Board in *Long Beach Unified School District* (1980) PERB Decision No. 130. In that case, the school district required non-employee union representatives to obtain an identification card from the district in order to meet with employees on campus. The Board noted that it is clearly within the employer's legitimate authority to require union representatives to identify themselves to school administrators. The Board nonetheless held that the identification card requirement interfered with the union's access rights because the card procedure was more onerous than identification requirements placed on other campus visitors.

Here, the District required SEIU representatives who wished to access employee break rooms, which are located in non-public areas of the Medical Center, to obtain and wear a sticker that said "authorized sales representative" with two blank lines below for name and organization. As indicated by the title on the sticker, this is the same requirement imposed on

sales representatives who wished to access non-public areas of the Medical Center. Thus, SEIU representatives faced no more onerous burden than other non-employees who accessed the Medical Center's non-public areas. Moreover, the badges facilitated SEIU representatives' access by signaling to Medical Center staff and security that the representatives were authorized to be in the break rooms. This evidence fails to establish that the District's badge requirement actually interfered, or tended to interfere, with SEIU's access rights. Accordingly, this allegation must be dismissed.

c. Alleged Neutrality Violations

The remaining allegations allege that the District violated its duty of strict neutrality by granting preferential access to NUHW, not requiring NUHW representatives to wear badges, and ignoring SEIU's complaints about NUHW's preferential access. In cases where two employee organizations are competing for the right to represent the same employees, the test for determining whether the employer has unlawfully dominated or assisted one of the organizations is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other;" in such cases the employer's intent is irrelevant.[10] (*County of Monterey* (2004) PERB Decision No. 1663-M; *Santa Monica Community College District* (1979) PERB Decision No. 103.) We apply this test to each of the allegations in turn.

NUHW's Access to Non-Public Areas

SEIU contends that the District allowed NUHW representatives to access non-public areas of the Medical Center while limiting SEIU representatives to public areas and employee break rooms. According to SEIU, this diminished SEIU in the eyes of bargaining unit

[10] PERB Regulation 32603(d) states it is an unfair practice for a public agency to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507."

members by implying that NUHW had "a special status with the District" and that NUHW was more powerful because the District could not enforce the access restrictions against it. We find no merit in this argument.

The record clearly establishes that NUHW representatives regularly accessed non-public areas of the Medical Center. Doyle admitted to being discovered by Medical Center staff and security in such areas on a daily basis; Chan testified that she encountered Doyle in non-public areas at least 20 times. Chan also saw at least one other NUHW representative in a patient care area.

The record fails to establish, however, that the District knowingly allowed NUHW representatives to access public areas or ignored when they did so. Chan testified that she and Patton, along with the three security guards on duty at any given time, were responsible for investigating reported access violations. On any given day there were three to five NUHW representatives at the Medical Center. When Chan received a report that a NUHW representative was in a non-public area, she would investigate but often the individual had moved along by the time she arrived. As Doyle testified, every time Chan spotted him, she told him to return to the cafeteria; Doyle also admitted to being a particularly aggressive and evasive organizer. Under these circumstances, we cannot fault the District for its failure to stop every incursion into a non-public area by a NUHW representative.

Moreover, the record does not show that NUHW representatives were able to spend any significant amount of time in break rooms as were the SEIU representatives. Indeed, the constant presence of SEIU representatives in the break rooms was an irritant to employees who supported NUHW. Because of SEIU's ability to access the break rooms, employees were likely to view SEIU as the more powerful union, and as the union with employer support. We therefore conclude that the District's inability to enforce the access rules against NUHW on

every occasion did not indicate a preference for NUHW or tend to influence employees to support NUHW over SEIU.

NUHW's Exemption from the Badge Requirement

SEIU argues that requiring its representatives to wear identification badges while not requiring NUHW representatives to do so indicated to employees that NUHW was more powerful and that SEIU representatives were not trustworthy enough to access the Medical Center without signing in. SEIU also asserts that the badges caused employees to think SEIU was a third party at the Medical Center just like an outside vendor. We find no merit to these arguments.

Under the expired MOU and past practice, SEIU representatives were entitled to access the break rooms to meet with employees. Chan testified that the District implemented the identification badge requirement so that SEIU representatives could continue to access the break rooms without causing confusion among staff about whether they were authorized to be there. Thus, the badges actually confirmed SEIU's status as the incumbent union and signaled to employees that the District was granting SEIU access it was not granting to NUHW. Further, the occasional taunts SEIU representatives would receive because of the badges did not indicate diminished status in the eyes of employees because the taunts came from employees who already supported NUHW and there is no evidence that employees who did not support NUHW heard the comments. Under these circumstances, we conclude that the badge requirement did not indicate a preference for NUHW or tend to influence employees to support NUHW over SEIU.

Ignoring SEIU's Complaints about NUHW Access

The record evidence on this issue is slim. Joseph testified that he told Patton and Chan on separate occasions that he had seen NUHW representatives in non-public areas of the

Medical Center.[11] He testified that both told him they would look into it but neither followed up with him about what, if anything, had been done. Chan testified that on two separate occasions Joseph came to her office and complained that NUHW representatives were in the break rooms. According to Chan, she called security on her speaker phone while Joseph was in the room; security responded that they would take care of it. Based on this evidence, we find that the District did not fail to respond to SEIU's concerns about NUHW representatives accessing the non-public areas of the Medical Center.

2. Complaint Against NUHW (SF-CO-201-M)

The complaint in Case No. SF-CO-201-M alleged that NUHW's distribution of a flyer that instructed bargaining unit members to give their mail ballots in the upcoming decertification election to a "trusted shop steward" interfered with employee rights guaranteed by the MMBA. As noted above, to establish interference in violation of MMBA section 3506, the charging party must show that: (1) employees engaged in protected activities; (2) the respondent's conduct tends to interfere with, restrain or coerce employees in the exercise of those activities; and (3) the respondent's conduct was not justified by legitimate business reasons. (*Board of Supervisors*, *supra*, 167 Cal.App.3d at p. 807.)

Employees have a protected right to participate in a PERB-conducted representation election to determine an exclusive representative in their bargaining unit. (*The Regents of the University of California* (1997) PERB Decision No. 1188-H.) NUHW offered no justification for its statement that ballots should be returned to a shop steward. Thus, the issue before us is whether the statement tended to interfere with employees' right to participate in the decertification election. In ascertaining whether a misrepresentation by a party during an election campaign interferes with employee rights, PERB looks to whether the statement was

[11] Joseph did not give dates for these conversations in his testimony; presumably these were the two occasions referenced by date in the complaint in Case No. SF-CE-648-M.

made in a fraudulent manner that would prevent an employee from evaluating the truth of the statement. (*Poway Unified School District* (2001) PERB Order No. Ad-310; *Pasadena Unified School District* (1985) PERB Decision No. 530.)[12] Applying this standard, we find no interference in this case.[13]

Whether intentional or not, the statement on NUHW's April 14, 2009 flyer directing employees to give their ballots to a "trusted shop steward" was clearly a misrepresentation of PERB's mail ballot procedure. NUHW issued a revised flyer the same day that omitted the ballot directions but did not indicate that the earlier flyer was incorrect. Approximately 9 days later, NUHW mailed to all bargaining unit employees a flyer which included a statement (albeit a small one in the bottom right corner) that the ballot instructions on the April 14 flyer were incorrect and that employees should follow the ballot procedures contained in their PERB ballot and posted at the Medical Center. Based on NUHW's April 23, 2009 correction of the April 14 flyer's misstatement and the availability to all bargaining unit members of PERB's mail ballot instructions, both at the Medical Center and in their individual ballots, we find that NUHW's misstatement was not made in a way that prevented employees from assessing its truth. Accordingly, we conclude that NUHW's April 14, 2009 flyer did not interfere with employees' right to participate in the decertification election.

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[12] In both cases, the Board quoted from and relied upon the National Labor Relations Board's (NLRB) decision in *Midland Nat'l Life Ins. Co.* (1982) 263 NLRB 127. In that decision, the NLRB held that it would not probe the truth or falsity of election campaign statements and would only set aside an election when "a party has used forged documents which render the voters unable to recognize propaganda for what it is." (*Id.* at p. 133.)

[13] We also note the Board's statement in *Santa Monica Community College District*, *supra*, that a misrepresentation during an election campaign is not in itself an independent violation of the Educational Employment Relations Act. (The Educational Employment Relations Act is codified at Government Code section 3540 et seq.)

3. Election Objections (SF-DP-281-M)

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).)[14] Under this standard, the objecting party must show: (1) improper conduct; and (2) a probable impact on the employees' vote. (*Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333.) If this 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" to decide whether to set aside the election. (*Clovis Unified School District* (1984) PERB Decision No. 389.) 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 and 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.)

SEIU's election objections rely on the same conduct alleged in the complaints. Having found that neither NUHW nor the District committed an unfair practice, we turn to whether their conduct nonetheless justifies setting aside the decertification election.

As discussed above, the District did not grant preferential access to NUHW representatives nor did it restrict the existing access rights of SEIU. On this record, we cannot fairly characterize the District's efforts to remain neutral while respecting its existing

[14] While this regulation only applies to objections to an election conducted by PERB pursuant to the MMBA, PERB regulations contain identical provisions for election objections under the other collective bargaining statutes administered by PERB.

obligations as improper. However, even if this conduct was improper, it did not tend to influence bargaining unit members to support NUHW at the expense of SEIU; if anything, the District's obligation to maintain SEIU's existing access rights would tend to make employees believe that SEIU held a superior position among the competing unions. Therefore, we conclude that the District's conduct did not interfere with employees' right to freely choose a representative.

Nor did NUHW's conduct tend to interfere with employee free choice in the election. NUHW's direction to bargaining unit members to give their ballots to a "trusted shop steward" was clearly improper because it was directly contrary to PERB's mail ballot election process. As discussed above, PERB will not set aside an election based on a misrepresentation during the election campaign unless the misrepresentation was made in such a way that employees would not be able to ascertain the truth of the statement. (*Poway Unified School District*, *supra*; *Pasadena Unified School District*, *supra*.) Here, bargaining unit members received ample information in the weeks following the misstatement to determine whether NUHW's earlier direction should be followed. Nine days after the erroneous flyer was distributed, NUHW mailed a flyer to all unit members in which the error was noted and members were instructed to follow the procedures contained in the PERB ballot and posted at the Medical Center. Even an employee who did not receive NUHW's correction flyer would nonetheless have received PERB's official instructions with his or her ballot. With NUHW's correction flyer mailed to unit members on April 23, 2009 and PERB's ballots mailed on April 29, employees had sufficient time to determine the truth of NUHW's misstatement prior to the ballot return date of May 20. Consequently, NUHW's April 14, 2009 flyer directing employees to give their ballot to a shop steward did not interfere with employee free choice in the election.

Because we have found that the District engaged in no improper conduct during the election campaign, and that neither the District's nor NUHW's conduct interfered with employee free choice, we dismiss SEIU's election objections.

4. Denial of SEIU's Motion to Amend the Complaint

On the third day of hearing, Allen testified about his role in drafting and circulating the petition to ban SEIU representatives from the break rooms. He also testified about his job duties at the Medical Center. At the opening of the fourth day of hearing, SEIU made an oral motion to amend the complaint to allege that, based on Allen's testimony, he was a supervisor and therefore acted as an agent of the District when he circulated the petition. The ALJ denied the motion on the ground that the District would be prejudiced by the amendment since neither SEIU's charges nor its election objections raised the issue of Allen's petition.

PERB Regulation 32648 provides that the charging party may move to amend the complaint by oral motion on the record and that, in ruling on such a motion, the ALJ should consider prejudice to the respondent, among other factors.[15] (*City of Modesto* (2009) PERB Decision No. 2022-M.) In *City of Modesto*, *supra*, the charging party made an oral motion near the end of the second and last day of hearing to amend the complaint to include a retaliation allegation based on evidence adduced at hearing that the employer had removed certain work from the employee. The ALJ denied the motion on grounds of prejudice to the respondent. The Board affirmed, finding that the requested amendment was based on facts not alleged in the charge documents and that allowing amendment late in the hearing would prejudice the respondent.

[15] PERB Regulation 32648 provides in full: "During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent."

This case presents a similar scenario. Nowhere in SEIU's charge documents or its election objections is there mention of Allen's petition, much less his alleged supervisory status. The motion to amend was made at the beginning of the fourth and last day of hearing. In light of the similarity to the facts in *City of Modesto*, *supra*, we agree that amendment would have prejudiced the District and therefore affirm the ALJ's denial of SEIU's motion to amend the complaint.

ORDER

The complaints and underlying unfair practice charges in Case Nos. SF-CE-641-M, SF-CE-648-M, and SF-CO-201-M are hereby DISMISSED.

The objections by SEIU-United Healthcare Workers West Local 2005 to the election in Case No. SF-DP-281-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.