UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

THE DANBURY HOSPITAL **Employer** **and** **AFT CONNECTICUT** **Petitioner**	**Case 01-RC-153086**

HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

BEFORE:

Jo Anne P. Howlett, Hearing Officer

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I. INTRODUCTION

On June 19, 2015,[1] an agent of Region One, Subregion 34 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted against representation by the Petitioner. However, the Petitioner contests the results of the election claiming that the Employer engaged in objectionable conduct, and therefore asks that the election be set aside and that a new election be held. Specifically, the Petitioner contends that the Employer: i) failed to comply with the Board's new rule requiring that the Voting List contain any personal employee phone numbers or personal employee email addresses in the Employer's possession; ii) that the Employer solicited grievances and promised benefits to employees; and iii) that the Employer created the impression of surveillance of two activist employees' activities.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Petitioner's objections be sustained in part and overruled in part. The credited evidence supports a conclusion that the Employer had in its possession personal email and telephone information that it failed to include and provide to the Union in the *Voting* list; and that the Employer, by its conduct of altering the job duties of Stan Wilk, created the impression that his union activities were under surveillance, or engaged in the related objectionable conduct of causing his isolation from other employees so as to limit his union or protected concerted activities. With respect to the allegations that the Employer interfered with the election by soliciting grievances and impliedly promising to remedy them and created the impression of surveillance of the activities of activist Jessica Ellul, I recommend that these objections be overruled, as the evidence of dissemination of the alleged promises is insufficient to conclude that, if made, they affected the results of the election and there is no credible evidence that the Employer's actions toward Ellul, who was admittedly on the premises in non-public areas while off-duty without a work related reason for being there, was anything but a lawful effort by the Employer to enforce a valid non-solicitation policy.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections. Then I describe the Employer's operation. I then address the objections.

II. PROCEDURAL HISTORY

The Petitioner filed the petition on May 28. The parties agreed to the terms of an election and the Region approved their agreement on June 8. The election was held on June 19. The employees in the following unit voted on whether they wished to be represented by Petitioner:

[1] All dates are 2015, unless noted.

All full-time, regular part-time, and per-diem non-professional employees employed by the Employer at Danbury Hospital, New Milford Hospital, Danbury Hospital Medical Arts Center, Western Connecticut Imaging of Danbury, Western Connecticut Imaging of Ridgefield, Ridgefield Survival Center, Sleep Disorder Center at Ethan Allen Hotel, Danbury Hospital Vascular Lab, Community Health Center, Western Connecticut Breast Imaging Center, Outpatient Physical Medicine, and Western Connecticut Healthcare Affiliates (Corporate Health at 70 Sandpit Road in Danbury, CT), but excluding physicians, registered nurses, technical employees, skilled maintenance employees, business office clerical employees, and guards, professional employees and supervisors as defined in the Act.

The parties could not agree whether employees in the classification of Administrative Secretary A should be included or excluded from the bargaining unit and agreed that these individuals could vote subject to challenge.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 346 ballots were cast for the Petitioner, and that 390 ballots were cast against representation. There were three non-determinative challenged ballots. Thus, a majority of the valid ballots were cast against representation by the Petitioner.

Objections were timely filed. The Regional Director for Region One ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Petitioner's objections are warranted, I heard testimony and received into evidence relevant documents on July 22 and 23. Parties were permitted to file briefs solely on the question of the sufficiency of information provided by the Employer on the Voting List; briefs were filed by both parties, and they were fully considered.

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76, slip op. at 1 (Apr. 9, 2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden, the objecting party must show that the conduct in

question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. Where the objection is based on the conduct by one of the parties to the election, the test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including, in particular, testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

IV. EMPLOYER'S OPERATION

The Employer is a health care organization that operates New Milford Hospital and Danbury Hospital, and other ambulatory care facilities in Western Connecticut. Since about September 2014, Daniel DeBarba has served as President of the Employer Danbury Hospital and the affiliated Western Connecticut Health Network. Ken Sommerer has been the Employer's Director of Labor Relations for ten years; his duties include handling contract negotiations with respect to the existing bargaining units of nurses and technical employees. Maureen Donahue is the Chief Nursing Officer. Reporting to Donahue is Dawn Martin, the Director of Patient Care Services, (also referred to as the Emergency Room Nursing Supervisor), whose primary responsibility is the Emergency Department (the "ED"), as well as trauma and dialysis; and Maureen Burnett, the Employer's Director of Nursing Operations, who is responsible for all of the budgets, employee relations, staff scheduling, and payroll related to nursing operations. Burnett also works closely with Sommerer on all labor relations issues. Colleen Dewan is the full-time Administrative House Manager from 7 p.m. to 7 a.m. As such, she is the night representative of management and responsible for overseeing all but the ED while the day managers and administrators are off shift; Claire Maggio provides relief to Dewan two nights a week as House Manager; Barbara Rodrigues is Administrative House Manager on the day shift; Additionally, on Floor 11East, Marie Karamintzas is a Manager, and Shelby Newkirk and Deanna Ballard are

assistant Managers; Debra Zilinek is an Assistant Nurse Manager. All of the foregoing named individuals are admitted Supervisors under Section 2(11) of the Act. (Tr. 188).[2]

V. THE OBJECTION THAT THE EMPLOYER FAILED TO PROVIDE A COMPLETE VOTER LIST THAT INCLUDED AVAILABE PERSONAL (CELL) PHONE NUMBERS AND PERSONAL EMAIL ADDRESSES AS REQUIRED BY THE RECENTLY IMPLEMENTED RULES. (OBJECTION 1)

A. FINDINGS OF FACT RELATED TO OBECTION 1

Ken Sommerer prepared the Voting List on behalf of the Employer.[3] The Voter List was timely provided to the Regional Director via email on June 10. He described the process as "labor extensive", requiring several days work. In particular, Sommerer spent a large amount of time verifying the eligibility of about 100 per diem employees, for which he had to pull and analyze 13 weeks of Kronos records to determine whether each had worked sufficient hours for eligibility. The Voter List was created as an Excel spread sheet listing 866 eligible employees, and 4 employees in the position of Administrative Secretary A, which the parties agreed could vote subject to challenge. The list included columns for the employees' name; position title; work location; shift (days, evenings, nights, or "variable"), home address (by street, city, state and zip code), personal email address, home telephone, and cellular telephone. In the column for "personal email addresses", the field is completed for 45 employees. In the column for "cellular telephone" the field is completed for 51 employees. In the column for "home phone" there is an entry for 807 employees. For 48 employees, there is no entry for home phone, cell phone, or personal email address. The record evidence reflects, and I find, that for some employees, what is thought of as one's home phone has been supplanted by the personal cell phone, with the result that the cell phone number appears in the home phone column.[4]

In going about his task, Sommerer relied exclusively on the data available in a software system known as "Lawson", which Human Resources uses as the repository for its employee information. It contains information that employees provide at the time of hire and which they are asked to update once a year. This includes the employee's name, address, and phone numbers, with separate fields to input one's home, work, mobile, and "alternate" phone numbers, a designation of the preferred method of communication, emergency contact information, and email address. There was no indication in any of the record evidence that the provision of a personal email

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[2] I note that the transcript, at p. 188:17, mistakenly has the word "disputed" rather than "undisputed" in the sentence, and hereby correct the record accordingly.

[3] See JX1, Exhibit references are referred to as "BX" for Board exhibits, "JX" for Joint Exhibits "EX" for Employer exhibits, and "PX" for Petitioner's exhibits, followed by the exhibit number.

[4] See for instance, PX3 (cross-referenced to JX1), reflecting that for six employees the number listed in the "home phone" column of JX1 is shown as the employee's cell phone number on PX3.

address or personal cell number into the Lawson system was mandatory by an employee. Additionally, the record reflects that not all employees were diligent about updating their Lawson information as requested, with no consequence.[5]

Aside from Lawson, the Human Resource department utilizes an Applicant Tracking software system to process and track internal employee applications for open positions. Internal applicants apply for open positions, changes in shift or changes in hours via the Employer's website. Last year, the employer received over 36,000 applications for 400 open positions. Of those, the Applicant Tracking system differentiates between internal and external applications. Included in the submitted information for an internal candidate is the employee applicant's personal email, and upon completion of the application, an email indicating receipt of the application is sent to the employee applicant. Unlike in Lawson, the provision of an email address is a required field in the Applicant Tracking system. (See PX1, p.2) Notably, the information obtained through the application tracking system is not fed into Lawson, even for internal applicants. It is undisputed, and I find, Sommerer did not consider or include available contact information for employees from this system in creating the Voting List.

Outside of Human Resources, aside from Lawson, other departments use other systems to collect and manage employee information and to communicate with employees, with the choice of method driven primarily by the communication needs at issue. Director of Patient Care Services Dawn Martin was aware that in the ED, the Surgical department, and Trauma Attendings, a software system called "Mutare" is used to "blast" information over multiple formats: sms (text), email, or voice call, to large numbers of employees via a single message.[6] Employees willing to be contacted for available shifts are required to fill out a form indicating their preferred method of contact: be it email, text, or phone call, and the necessary information for such contact is put on a list, by position title, which lists are relied on to blast messages using the Mutare software. In this way, instead of making individual calls to 30 people, the Employer can notify numerous employees via multiple formats in a single message. Mutare is not linked with the Lawson software system. Mutare is also used by the hospital for emergency preparedness, such that there may be widespread exposure and use of this system in other departments as well. Sommerer was unfamiliar with the system, and the Employer did not collect any employee contact information obtained by the departments for use in the Mutare program to include in the Voting List.

The Staffing office is responsible for coordinating the schedules for everyone working on the nursing floors. As such, their need for employee contact information is

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[5] Elizabeth Duarte testified that she has not updated her Lawson information annually as requested. (Tr. 161). The Voter List included a home number that was disconnected seven years ago. She provided her cell phone to her manager and is contacted by Staffing on it.

[6] Tr. 283-287

both immediate and compelling. The Staffing office uses a scheduling program called ANSOS. ANSOS initially gets "fed" phone numbers through Lawson.[7] When managers need to contact an employee by phone, they obtain the phone number from ANSOS.[8] Numerous witnesses testified, and I find, that Staffing supplements and maintains contact information, including personal cell phone information, through sources other than Lawson. For instance, proposed unit employee Nerval White, who works as a multi-assist in ICU, is routinely contacted by Staffing about working extra shifts on his cell phone; White's cell phone number was not provided on the Voting list. White testified, and I find, that a telephone log of ICU employees that includes White's cell number is kept in a desk at the ICU nursing station, and that Staffing contacts him on this cell number. Similarly, nursing assistant Elizabeth Duarte, who works on 12 Tower, is routinely contacted on her cell phone by Staffing and her manager, and her cell number and that of other 12 Tower employees is on list of contact numbers kept at the nursing station. Duarte's cell number was not provided on the Voting List.

Entered into the record as PX3 is a list of contact numbers for managers, nurses, and aides who work on Floor 11East. The list is kept in a desk at the nurses' station, and is accessible to all, including managers. The list has been maintained and updated for a number of years, and is updated any time a new staffer joins the 11th floor. It is created by the Unit Coordinator, (a unit position), and managers have access to both the physical and electronic copies of the document, which is called "11 East Staff Phone Numbers" (Tr. 185-187) This contact list contains available phone information- both home and/or cell- for twenty employees in the proposed unit on Floor 11E. A comparison of PX4 and JTX1 reveals that phone contact information for 7 out of 20 (35%) of Floor 11E employees was not included on the Voting list.[9]

Entered into the record as PX4 is a mass email dated April 29, sent by Administrative Assistant Linda Main to about forty-four non-supervisory employees in the Emergency Department, thirty-five of whom are in the proposed bargaining unit and appear on JX1. (Tr. 290-291). Dawn Martin, who authenticated the email, testified that Main supervises patient care techs in the ED and routinely sends emails of this sort in planning their schedules. This email concerned the proposed schedule for May 10, through June 6,. Of the 35 eligible voters who received this email, 32 received the email via a personal email address. However, the Employer provided only 3 of these 32 personal email addresses on the Voting List, omitting 29, or 88%.[10]

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[7] Sommerer testified that he was unfamiliar with how ANSOS works, and could not answer a question as to whether the Staffing office was able to add phone numbers to those it received from Lawson. (Tr. 397) This, obviously, does not establish that it could not.

[8] Maureen Burnett testified that when she needed to call Stan Wilk (when he was off work), she obtained his phone number from ANSOS, which is available to all managers via the computer system, (Tr. 343).

[9] PX2 includes eight phone numbers for seven proposed unit employees that are not provided on JTX1: cell numbers for Thamra R Beauliere, Ester Mark-Gbeh, Sarah Olson, Maria Ramirez, Ahmed Shahin; home and cell numbers for Cherryl Shaw, and a different cell number for Itza Ramos than that which appears on JTX1.

[10] JTX1 shows a personal email address for Kurt Steiger, Nancy Lescrynski, and Kristen Gerrish.

As the Employer points out in brief, the Union organizer received this email not later than May 14, from a supportive employee in that department, who was willing to share the information. However, there is no evidence with respect to other departments.

Sommerer did not reach out to the department managers to determine if they kept other contact information. He acknowledged awareness that the Staffing office maintained their own list of employees, and that Staffing relies on ANSOS, but added that the Staffing office is fed by Lawson. He explained "when a person is hired, the information is downloaded and goes to, you know, the staffing office.'[11] Significantly, it is undisputed in the record that in July, *after the election*, employees were sent an email notifying them of the need to update their contact information in Lawson, as this information was going to be used for scheduling. (Tr. 161). I find that Sommerer's testimony on this point was designed to obfuscate, and that by adding that Staffing is "fed by Lawson" he was trying to hide his awareness that Staffing's lists would, by necessity, be more current or comprehensive than information contained in Lawson. Sommerer did not request a list of contact information for employees from Staffing, or otherwise seek to determine whether their information was more complete than the information submitted into Lawson.

Prior to submitting the list to the Regional Director, Sommerer had discussions with the Union and an agent of the Region to confirm that the list included all eligible voters, and whether individuals should be included or deleted, but these discussions did not address the inclusion of employees' personal phone numbers or email addresses. Including the 29 personal email addresses on PX34, the union obtained 90 personal email addresses independent of the 45 provided on the Voting List. Including the 51 identified cell phone numbers provided on the Voting List, the Union obtained 280 cell phone numbers. Until the objections were filed, no one from the Union contacted Sommerer with concerns about missing phone numbers or personal email addresses.

B. RELEVANT LEGAL PRINCIPLES

Under modifications to the Representation Case Procedures that went into effect April 14, 2015, §102.67(l) of the Board's Rules and Regulations provides that:

> Absent extraordinary circumstances, within 2 business days after issuance of the direction of election, the employer must provide the regional director and the parties a list of the full names, work locations, shifts, job classifications, and contact information (including home address, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters and, in a separate section of the list, the same information for any employees directed to vote subject to challenge.

[11] Tr. 394.

In its explanation of the basis and purpose of the Final Rule, the Board responded to public comments related to the obligation to provide personal email addresses and cell phones.[12] The Board explained that this requirement is imposed to help advance the principal objectives behind the original *Excelsior* requirement, which established the initial rule than an employer must file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters. The primary rationale for requiring production of the list of eligible voters was stated as follows:

> [W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also free from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice
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> As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party might be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious--that the access of all employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation. *Excelsior Underwear,* 156 NLRB 1236, 1240-41 (1956)(footnotes omitted).[13]

The Board further noted that *Excelsior* was decided almost 50 years ago, well before the advent of either email or cell phones, and since that time the Board has not significantly altered its requirements despite these "transformative changes in communications technology" [14] In short, the Board's modifications to the Voter List requirements have been made "in recognition of how individuals, employers, and institutions now communicate with one another."

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12 See 79 Fed. Reg. 74337

13 Id.

14 Id.

The Board believes that the provision of only a physical home address no longer serves the primary purpose of the Voter List. Communications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior.* As Justice Kennedy observed in *Denver Area Educational Telecommunications Consortium, Inc. v. FTC*, 518 U.S. 727m 802-803 (1996)(Kennedy, J., dissenting) (internal citation omitted):

> Minds are not changed in streets and parks as they once were. To an increasing degree, the most significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.

In responding to concerns that these requirements would be overly burdensome to Employers given the move from 7 calendar days to 2 business days for compliance, the Board pointed to the changes brought about by the computer, changes in recordkeeping and retrieval technology, and the fact that in most cases, the list will be produced electronically from information that is stored electronically.[15] Additionally, the Board made it "presumptively appropriate to produce multiple versions of the list when the data required is kept in separate databases, thereby reducing the amount of time that employers might need to comply with the Voter List requirement."[16]

The instant case is one of first impression, as it requires an interpretation of an Employer's obligation to provide all "available" email and personal telephone numbers under the Final Rule that went into effect April 14, 2015. Accordingly, existing precedent concerning an Employer's obligation to provide accurate and timely information under the Excelsior rule is informative, but not necessarily dispositive, as it must be applied in conjunction with the articulated purpose of the Board in issuing the final rule itself, and take into account the ways in which the new rules have altered the landscape which is the footing of existing precedent.

Under existing precedent, the Board distinguishes between omitted or inaccurate names, and omitted or inaccurate addresses of eligible employees. Where the Employer omits names from the Voter List, the Board presumes that a lack of substantial compliance has a prejudicial effect on the election, without regard to whether the Union separately identified omitted voters or the voters were able to be informed of the issues without communication from the union. *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971). The Board has long observed that the omission of eligible names from the voter list is more serious than the omission of addresses, because the provision of names "provides the Union with a key piece of information that it can use to identify and communicate with the person other than by mail." *Women in Crisis Counseling,* 312 NLRB 589 (1993). Historically, the Board tended to rely primarily on the percentage of omissions in determining whether an election should be set aside. In *Woodman's Food*

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15 79 Fed. Reg. 74353.

16 79 Fed. Reg. 74354, at fn. 227.

Market, 332 NLRB 503, 504 (2000), the Board revised its approach to include other factors as well:

> [W]e will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions. *Woodman's,* supra, at 504.

The Board is less strict where the inaccuracies have related to addresses rather than omitted names, as the Board has normally found that an inaccuracy rate of 40% or more will warrant a new election. The Board's greater tolerance of address inaccuracies in *Excelsior* lists reflects a pragmatic recognition that an employer reasonably should know the names of employees in its current work force but may be less able, without prompt disclosure from the employees themselves, to maintain a completely accurate list of their current addresses. *Id.*

The Board has stated, "[t]he *Excelsior* rule imposes a simple duty upon employers which can be satisfied by the application of a reasonable amount of diligence. *Sonfarrel, Inc.,*188 NLRB at 970. In *Merchants Transfer,* 330 NLRB 1165 (2000), the Board found an Employer's actions to be gross negligence, where the company president knew that the list of address contained inaccuracies, the Employer itself did not rely on the information it provided to the Union to communicate with employees, and the Employer did not take steps readily available to it to verify the addresses on the list, such as contacting the supervisors who routinely called employees by phone to adjust their schedules.

Despite a greater tolerance with respect to inaccurate or omitted addresses, the Board has previously explained "It is extremely important that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters." *Mod Interiors,* 324 NLRB 164 (1997). In *Mod Interiors*, the Board ordered a new election in the absence of bad faith, where the original *Excelsior* list contained 40 percent inaccurate addresses; a corrected list was only available to the union 8 days before the election; and the election was decided by a close margin. The Board noted that, "The *Excelsior* rule is not intended to test employer good faith or 'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights" (id. at 164). Clearly, to the Board, the high percentage of inaccurate addresses overrode the employer's claim of good-faith compliance with the rule. "Evidence of bad faith and actual prejudice is unnecessary because the rule is essentially prophylactic, i.e., the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply." Citing *Thrifty Auto Parts*, 295 NLRB 1118, 1118 (1989).

C. RECOMMENDATION

The Employer's argument is threefold: 1) the implementing authority explaining the new rule should be interpreted to mean that Sommerer was not required to look beyond Lawson to determine what was available, 2) what was provided amounts to substantial compliance with the requirements of Excelsior, and 3) even acknowledging some omissions, the Union has failed to demonstrate any prejudicial effect.

The Employer points to various references in the Final Rule and the considerable guidance contained in the FAQ portion of the Board's website in support of its position that Sommerer was not obligated to look beyond Lawson for "available" contact information. The Employer points to the Board's use of the word "merely" in a footnote that "the amendments merely require an employer to furnish its employees' 'available personal email addresses' (and 'available home and personal cellular ('cell') telephone numbers'), addresses and numbers, it does not need to ask its employees for them." (See Employer's Brief at p. 10, citing 79 Fed. Reg. at 74338, fn. 146). The Employer opines that these references by the Board support Sommerer's sole reliance on the Lawson database, arguing that they made clear that he would not have been expected to collect and assemble lists that were available beyond the Human Resource department, as such an obligation would have been overly burdensome and time consuming. The Employer points also to the Board's mention in the Final Rule that half the units for which lists need to be produced contain less than 28 employees, and that assembling the information for such lists should not be time consuming.

With respect to the argument of substantial compliance, the Employer argues that because it provided addresses for each employee, and at least one phone number for 94% of employees, under existing precedent it has substantially complied with its obligations, and the objection should be overruled. It likens any omissions or inaccuracies in phone numbers and personal email addresses to inaccurate addresses.

The Employer contends that because it has been shown that for a number of employees, what is identified as the "home phone" was in fact the cell phone, the Union's contentions regarding missing cell numbers are largely speculative, and that the Union has no real knowledge of the extent to which the contact information is deficient.

I find that the Employer has not substantially complied with §102.67(l), and its obligation to provide available personal email addresses and available personal cellular numbers, of eligible employees. The record readily establishes that the information contained in the Lawson database relied on by the Employer was not the Employer's most current or accurate contact information; that substantially more and better contact information was available, and that the Employer made no effort whatsoever to include this in the Voting List submission. Personal email addresses were provided for less than 5% of the 866 eligible voters. Including these 5%, the Union obtained personal email addresses for 15% (135) of eligible voters. Record evidence establishes that for a single classification of employees in ED (patient care techs), the Employer had personal email addresses, which it regularly used to schedule employees, for 32 of 35 eligible voters

(91%) and only provided personal email addresses for 3 of them (9%). And while the Union had obtained these personal email addresses for that particular department, the striking disparity in percentages (91% compared to 9%) between email addresses provided by and available to the Employer cannot be overlooked. Notwithstanding that these disparities are for only a single classification in the ED, there is no reason to think, and the Employer makes no argument to suggest, that the percentage of personal email addresses for patient care techs in the ED would not be a representative sample of available personal email addresses beyond that classification, or that department. Extrapolating conservatively, and assuming the Employer may have email addresses at only ½ the percentage shown here (45%), would have produced an additional 345 emails, which far exceeds what the Union obtained (including the 45 provided by the Employer) by over 200, far beyond the total needed to change the outcome of the election.[17]

Similarly, the phone list for Floor11E, a document that was readily available to managers, and easily identified as "11 East Staff Phone Numbers" reflects that the Employer omitted available phone numbers for 35% of eligible voters in that department. The Employer's claim of substantial compliance by providing "phone numbers" for "94%" of eligible employees is disingenuous, as it does not capture the fact that the Employer made no effort to ensure that it was providing the Petitioner what it must have known was likely the most current and complete contact information that it had available, that which the Employer itself relied on to communicate readily with employees. Indeed, that the Employer, the month following the election sent an email to employees advising them to update Lawson, as it was now going to be used for scheduling, belies their awareness that Lawson was unreliable for that purpose.

The Employer argues that Sommerer had no obligation to look beyond Lawson, and that he "was not even aware that some units in the Hospital maintained their own discrete list of contact information for employee contact information." (Employer's Brief at p. 10). In essence, the Employer's position is that providing the union with "a telephone number" for 94% of the eligible voters, is sufficient to comply with the primary rationale of *Excelsior* and the new rule.

I find that such actions are not consistent with the newly implemented obligations. First, as noted, the record readily supports, and I find, that the Employer itself does not rely on the Lawson database to communicate with employees on a regular basis; it relies on the information from Staffing. To wit, Burnett testified that when she needed to call Wilk while off duty, she got the number from ANSOS, and not Lawson. Sommerer did not even make an inquiry of the Staffing department, which is the department that, by necessity, kept the most up to date and reliable contact information for all employees. It is undisputed that Sommerer *was aware* that Staffing relied on ANSOS, a separate system than Lawson. And regardless of whether Lawson "fed" its information to ANSOS, common sense and a "reasonable amount of diligence" would have led Sommerer to at least *inquire* of Staffing whether they had better or different contact information than that which originated in Lawson. See *Merchant's*

[17] 866 x .45 = 390, minus 45 provided emails = 345.

Transfer, supra. Moreover, as noted, I find that Sommerer was aware that Staffing had better information than Human Resources respecting this data. Burnett, who relies on ANSOS to communicate with employees, works closely with Sommerer over labor relations issues. The notion that he could not have quickly and easily ascertained that ANSOS is more current than Lawson is absurd.

Second, the record establishes that the non-Lawson information was available from the different departments in some sort of electronic format, and therefore, assuming he could not have accessed it himself, it could have been emailed to Sommerer with very little effort. Moreover, in recognition of the type of circumstance Sommerer faced, the Board made it "presumptively appropriate to produce multiple versions of the list when the data required is kept in separate databases, thereby reducing the amount of time that employers might need to comply with the voter list requirement." 79 Fed. Reg. 74354, at fn. 227 Additionally, the new rules specifies that under "extraordinary circumstances" an Employer may take longer than two days to provide the required information, and a unit of 866 employees under the circumstances confronting Sommerer might have qualified as the type of circumstances warranting additional time. However, the Employer did not request additional time.

Nor am I am persuaded, given the lack of effort to provide available information under the new rule, that the Union is obligated to show prejudicial effect. In this case, the Union lost by 45 votes, with three non-determinative challenges. Absent a finding on the challenges, and recognizing the possibility that those for whom available cell phone or email addresses were not provided nonetheless voted, the election could have been decided differently based on as few as 23 voters voting for rather than against the Petitioner. The Board's normal approach to calculating margins of victory in election objections cases, is to view the facts in the light most favorable to the objecting party. *Chinese Daily News,* 334 NLRB 1071, 1072-1073 (2005); *Harborside Healthcare, Inc.,* 343 NLRB 906 913 fn. 23 (2004). In this regard, given that 736 unquestionably eligible voters cast ballots, that represents a margin of as low as 3%. This was a close election.

In explaining its rationale for the new requirements under 102.67(l), the Board made clear its view that the provision of available personal cell phone and email addresses advances the "primary purpose" of the *Excelsior* rule, which is to allow for employees to make an informed choice. I do not believe that the Board intended its new rule to privilege an employer's inattentiveness to records it maintains to the extent that I find here. The implementing regulation is quite specific that the required contact information that the Employer is to provide includes "home address, available personal email addresses, **and** available home **and** personal cellular telephone numbers" To overrule the Petitioner's objection based on this argument would require me to decide that "and" was the equivalent of "or" in the implementing regulation, which I am not willing to do.

Avon Products, 262 NLRB 46, 47-48 (1982) cited by the Employer, offers little support of its position. In that case, the only issue was whether the Petitioner suffered prejudice in its election campaign because it received an *Excelsior* list which the

Board's Decision on Review, by expanding the scope of the appropriate unit, rendered deficient. Notably, in *Avon,* the margin of error was more than double the number of excluded names, such that the number would have been insufficient to affect the outcome. Overturning the Regional Director, the Board ruled the Union was prejudiced. The Board noted that "it is the degree of prejudice to these channels of communication, and not the degree of employer fault, must ultimately determine, in any given case, whether the Board's *Excelsior* policy has been undermined." In that case, however, the reference to Employer fault centered on the fact that the Employer had fully complied with the *Excelsior* requirements, and neither the Region nor the Union had requested the supplemental names and addresses following the expansion. In my view, the Board's rationale in *Avon* cuts against the Employer, particularly with respect to personal email addresses, as the Employer's failure to include personal addresses used by schedulers, the Staffing department, or the Applicant Tracking system resulted in a high degree of prejudice to personal email as a channel of communication.

Additionally, the Employer contends that the burden of checking the accuracy of eligibility lists rests with the participating unions, citing *Kennecott Copper Corp.,* 122 NLRB 370, 372 (1959). That case, however, dealt with the inclusion of the name of a newly employed ineligible employee on the list, whose status was readily ascertainable by the Union through its members at the plant. The circumstances before us are very different. The list contains over 860 names, and it would have been virtually impossible for the Petitioner to determine whether the numbers provided were the most current available cell numbers. Historically, Union's have been able to determine inaccurate addresses because mailings are returned undeliverable, an approach that has no equivalent with personal cell numbers. Moreover, while it is often possible to determine an invalid email address, because a message will bounce back almost immediately, here, the problem was the failure to provide available email addresses, not that they were inaccurate.

The Employer asserts that it acted in good faith, and without neglect, because Sommerer relied on the "main repository" for employee information, but consistent with Board precedent, I do not find the Employer's good faith material to the resolution of this issue. Lawson was neither the most accurate system or even the most relied on by the Employer's own managers when it sought to communicate with employees. The record evidence readily reflects that the Employer had in its possession, in electronic format, a great deal more. Under these circumstances, I find that the Employer failed to establish substantial compliance with the Board rule. Given the closeness of the election and the potentially large amount of excluded contact information that is at issue, I recommend that this objection be sustained.

VI. THE OBJECTION THAT THE EMPLOYER SOLICITED GRIEVANCES AND PROMISED REMEDIES IF THE UNION WAS REJECTED (OBJECTION 3)[18]

A. Findings of Fact

1. The Town Hall Meetings

In early June 2015, the Employer's President Dan DeBarba held several "town hall" style meetings, in which DeBarba attempted to share with the audience of administrators, employees and managers his perception of the values of the organization, such as respect, compassion, and team work, and to get a sense of the extent to which the employees shared and/or believed the organization and its employees were "living" these values, or not, and areas where they could improve. His presentation included an interactive power point display that allowed the audience members to respond electronically and give feedback, which was displayed instantaneously as part of the power point presentation. As he explained, the point of the meeting was to understand why the morale at Danbury Hospital was so challenged. One of these meetings was attended by Stan Wilk and several other members of the organizing committee, including Anna Princiotti, Donna Quinn, and Liz (last name unknown). Wilk and the others stayed afterwards and had a discussion with DeBarba in which they raised the issues as DeBarba testified "that were bothering them"

Wilk conveyed his upset about pay practice changes that had been implemented about 18 months prior, under which the income of the night and evening shift employees was reduced, primarily through the elimination of bonus pay and differentials. The changes were substantial, causing Wilk a loss of about $10,000 per year. In this discussion, Wilk offered to provide documentation that would verify the loss of income that he suffered and that resulted in Wilk being eligible for the "earned income credit" which he viewed as welfare. DeBarba opined that had he been President at the time, he would not have implemented the changes as they had been done.

2. The Scheduling and Meeting on June 11 Between Wilk and DeBarba

Subsequent to the meeting, Wilkes did in fact email DeBarba his tax return. His email went unacknowledged by DeBarba, a fact that he raised in discussion with Colleen Dewan, the House Manager to whom he reports and has worked well with for twenty-five years. Dewan conveyed these criticisms to her boss, Maureen Burnett. Burnett then intervened, suggesting that DeBarba meet with Wilk, and contacted Wilk to say that she had scheduled a private meeting between Wilk and DeBarba for Thursday, June 11. (Tr. 362)

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[18] The facts related to Objection 3 provide some background to the facts related to Objection 2, so I am addressing them in this order.

Prior to the arranged meeting, DeBarba contacted Ken Somerrer to request advice in how to approach the meeting. Sommerer responded via email on June 10. Among his suggestions were the following, which he offered as "talking points/strategy":

> Acknowledgement. I would recommend that you acknowledge Stan may have sent an email, but that you have been unable to locate it. However, you thought it best to meet him directly rather than discuss indirectly by email. Maureen has shared with me Stan's concerns about invasion of privacy. You may also want to note that you are not happy about the disclosure of personal contact information (i.e. unwanted home visits and phone calls) and how the Hospital has been blamed for such disclosure.
>
> Nothing in Writing. Stan may ask for a list of economic reductions that have affected pay and benefits. I would recommend that you tell Stan that we cannot place anything in writing at this time due to the fact that an election is scheduled. In addition, you may want to reference that the reductions he is referring to occurred before you became president of DH.
>
> No Promises / Solicitation of Grievances. I would recommend that you state clearly that you cannot make any promises or solicit any grievances. (Also, after the meeting, I recommend that you and Maureen quickly summarize in writing what was discussed during the meeting in the event the Union files an unfair labor practice charge mischaracterizing what was said during the meeting.)(Emphasis in original).
>
> Vision. I would recommend that you provide a two-minute elevator speech re your vision for the Hospital and why you think the Union is not the answer (maybe give an example). You can let Stan know that you have not had a real opportunity to deal directly with anyone yet due to the tech election and the on-going organizing efforts by the service employees. You are committed to make DH the employer of choice but do need time to implement your vision.
>
> Closing. Perhaps consider closing the meeting by asking Stan to vote NO and to give you a chance to implement your vision for DHY Also, perhaps reference how this direct type of meeting may not be possible in a Union environment.

The following morning, Thursday June 11, Wilk presented himself at the Staffing office, and Burnett accompanied him to a conference room where they met DeBarba. DeBarba asked him what it was that Wilk had expected DeBarba to get back to him about, and Wilk explained that he had emailed his tax returns as promised, to show that he was in fact eligible for government entitlement to the earned income credit (which Wilk characterized as welfare). DeBarba acknowledged that the email had likely been sent, but overlooked, and suggested in the future he send things with bold text and his name in the subject line of the email. DeBarba asked if there was anything else, and Wilk said no.

Next, DeBarba said that he would like to take the opportunity to discuss the union election that he was organizing. DeBarba expressed his view that it would not be in the best interest of the employees or the hospital to have another union (the nurses were already organized, by a different union), and asked Wilk why he thought it was beneficial. Wilk responded by again referring to the changes in pay practice that had resulted in loss of income for the lower earners back in 2013. He handed him a letter he had recently been sent which he described as identical to one he had received back in 2013, prior to the implementation of the much bemoaned pay practices.[19] DeBarba assured him that as long as he was President, cuts would not again be made on the backs of lower paid employees, and that in an organization of that size, certainly the money could be found elsewhere. DeBarba then referred to the organizing campaign, adding that he would not want to be President of the largest unionized hospital in Connecticut.[20]

DeBarba also advised Wilk that there would be significant changes in the current management, some of which he had already begun to implement in the human resource department. He told Wilk that his goal was to fix the things that were broken, to remove those managers that should not be there, to restore pay practices to be more in line with the way they were and the way they should be. He stated that these were his goals, and that "I guess I'm pleading with you guys to just give me two years."

To this, Wilk responded that a [union] contract was the only form of security that he could see. Wilk cited the example of about six years prior when a large number of non-union employees-- most of whom were over 50 and had double-digit seniority-- were terminated, or laid off only to be replaced within several months by new employees. He asked DeBarba "how you fix that?" He then gave another example of when 85 [unionized] nurses were given 45 days advance notice of their impending layoff, but could transfer into any position they were qualified for, with the result that only two nurses were laid off, and those were by choice.

DeBarba then told Wilk that he would find a way to prevent the situation Wilk described from happening and asked again for the chance to do so. He assured him that he would find the money to make it work. He said that he wished he had a blank check book so that he could fix what had been done to Wilk. Wilk reiterated that all he wanted was a contract so that they could have a set of rules that are in writing, negotiated between the hospital and the union.

Wilk then expressed his view that while he believed DeBarba was an honest man, he did not believe that he had the authority to make those decisions; that he makes recommendations but that authority lay with Dr. Murphy and the Board of Trustees. And, as he said "should we vote yes, you will be leaving." Near the end of their discussion, DeBarba expressed his concern that a lot of what he was saying might be illegal, that perhaps he should not have said it, and his hope that it would not go

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[19] Petitioner did not enter the letter into the record.

[20] A different Union represents the nurses at Danbury; the Petitioner represents a unit of technical employees.

outside that room. To this Wilk pointed out that there were three people in the room, indicating Burnett.

Following the meeting, Wilk shared his experience with six other members of the organizing committee. He told others about the fact of the meeting, but not the content. He explained that he viewed the meeting as being between himself and DeBarba. (Tr. 61). I credit Wilk's testimony that it is his regular practice to type notes of events that occur into his ipad mini, for future reference and to help him recall dates, times and places and what was said, and that he memorialized the above exchange within 24 hours of when it occurred, and on June 14, several days before the election, he copied his notes to an email and sent them to Ole Hermanson. (EX1, p. 2) The notes corroborate Wilk's testimony on this issue, except in two respects - in testimony he recalled that DeBarba told him to "call off the dogs", a statement does that does not occur in his notes. I do not credit his testimony regarding this statement, and view it as an embellishment of DeBarba having referenced the Union campaign in connection with his preference not to be the President of the largest Union in Connecticut. Also, in testimony, Wilk recalled the date as June 12, but his notes indicate the meeting occurred on June 11. Additionally, Sommerer's email to DeBarba (ER 11) dated June 10 has the subject line "Re: Meeting with Stan Tomorrow" I find that the meeting took place on June 11, and that Wilk's recollection of the 12th was a simple mistake.

In all other respects, I credit Wilk's account, and where there is divergence between testimony, whether his or others, I credit his written recollection of events (EX 1). His testimony was thoughtful and in many respects specific in detail; his demeanor was non-evasive. In crediting Wilk's version over Burnett's and DeBarba's, I note in particular the notes that he took shortly after what occurred. The Employer argues that Wilk should be discredited based on inconsistencies between his testimony and an affidavit prepared for him by Union counsel. Wilk did not prepare this statement, and I attribute any discrepancies to the misunderstandings of the preparer rather than the trustworthiness of Wilk.

In notable contrast to Wilk's note taking, and despite the specific, emphasized advice from Sommerer to DeBarba and Burnett to summarize what was said in the upcoming meeting in writing, neither did so. When asked if he had followed Sommerer's outline, DeBarba admitted "probably not perfectly. I didn't bring it with me." (Tr. 373) I surmise that the reason they did not record what was said afterwards was because had such a record been created, it would not have been favorable. DeBarba admitted that much of the meeting, he did not recall, and therefore speculated as to what he "would have said" (Tr. 367-368) He did not deny mentioning the Union election. (Tr. 374), or that he did not want to be President of the largest Unionized hospital in Connecticut. In short, other than denying making an explicit promise to Wilk, his testimony does not contradict Wilk's at all.

Burnett's testimony on the key question of DeBarba's response to Wilk's grievances was vague, evasive, lacking in detail, awkward, unconvincing, and stammering. She testified "You know, Dan kind of took it all in and said to him that, you

know, he's been here for only seven months. However, you know, employee engagement and relations was very important to him and he just said, you know, if you give me a chance to, you know, look at, you know, the culture here and let me see, you know, how we can work together to make it a better place to work, that was pretty much the gist of the conversation." As discussed below with respect to the surveillance allegation, her testimony on other key points was also contradictory, and I do not credit her version on any disputed issue.

B. Board Law

The Board summarized the applicable standards for evaluating solicitation of grievances, and impliedly promises to remedy those grievances in *Mandalay Bay Resort and Casino,* 355 NLRB 529, 530 (2010).

> The Board has long held that, in the absence of a previous practice of doing so, an employer's solicitation of grievances during an organizational campaign is objectionable when the employer expressly or impliedly promises to remedy those grievances. See, e.g., *Majestic Star Casino, LLC,* 335 NLRB 407, 407 (2001), citing *Maple Grove Care Center,* 330 NRLB 775 (2000); *Uarco, Inc.,* 216 NLRB 1, 2 (1974). An employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements at issue were not promises. See *Maple Grove Health Care Center*, supra at 775. While an employer that has had a past practice and policy of soliciting grievances may continue to do so during an organizational campaign, an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the union campaign." *House of Raeford Farms,* 308 NLRB 568, 569 (1992), enfd. mem. 7 F. 3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994). Further, "the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary." *Majestic Star Casino*, supra at 407-408, citing *Uarco*, supra at 1-2.

C. Recommendation

By its closing argument, the Petitioner argued that in this meeting, DeBarba promised to straighten out the pay problem if the union (dogs) were called off. The Employer, citing *Weather Shield Mfg,* 292 NLRB 1, 2 (1988) *Crown Chevrolet Co.,* 255 NLRB 826 (1981), and *El Cid, Inc.*, 222 NLRB 1315 (1976), argues that DeBarba's comments to Wilk cannot be viewed as a promise, because they were nothing more than a promise to maintain the status quo, and were therefore not objectionable. These cases are inapposite, however, as each deal with statements made prior to a decertification election.

Here, the evidence is undisputed that Wilk raised his concern about the past pay cuts, and the prospect of future pay cuts in response to DeBarba's query as to why Wilk thought a Union would be beneficial. This potential for detrimental pay changes was a primary issue for Wilk and others, as he had raised it at the town hall meeting as well. In their private meeting, Wilk presented DeBarba with a letter he recently received that he thought was identical to one that he had received prior to the cuts 18 months before. The credible record evidence establishes that DeBarba assured Wilk that "as long as he was President" cuts would not again be made on the backs of lower paid employees such as Wilk. DeBarba then tied his continued presence with the Employer to the success or failure of the Union campaign, by indicating that he did not want to be the President of the largest unionized hospital in Connecticut. I find that in these statements, DeBarba linked his commitment to avoiding future pay cuts to the failure of the union campaign, and indeed that is how Wilk understood it, hence his comeback that "as [you] said, should we vote yes, you will be leaving." It also clear that Wilk did not believe that DeBarba had the authority to follow through on his promise. The best he could do was recommend, and it was others who would decide. I find that notwithstanding this limitation, DeBarba was implying a promise. In the end, his promise would best be understood as "If the Union loses, I will stay on as President and recommend against any future pay cuts for the lowest earners." However, as there is no evidence to suggest that DeBarba's comments were disseminated beyond the six members of the organizing committee, the evidence is insufficient to show it would have impacted the outcome of the election. *Crown Bolt Inc.,* NLRB 776 (2004)(Holding that objecting party will have the burden of proving dissemination of coercive statement and its impact on the election); *M.B. Consultants, Ltd.,* 328 NLRB 1089 (1999)(plant manager's promise of benefits to two employees who did not disseminate, where the union lost by six votes, unobjectionable). I therefore recommend that this objection be overruled.

VII. THE EMPLOYER CREATED THE IMPRESSION OF SURVEILLANCE of STAN WILK AND JESSICAL ELLUL AND THE RELATED ALLEGATION THAT THE EMPLOYER RESTRICTED THE MOVEMENTS OF STAN WILK

Objection 2 alleges the impression of surveillance of two employees, Stan Wilk and Jessica Ellul. I first address the allegation related to Wilk, and then Ellul. For the reasons below I recommend sustaining an objection that the Employer isolated and restricted the movement and isolated Stan Wilk, and overruling the objection of surveillance of Jessica Ellul.

A. THE IMPRESSION OF SURVEILLANCE/RESTRICTION OF MOVEMENT OF STAN WILK

Stan Wilk is a twenty seven year employee who, for the past 17 years has worked full-time as a "multi-assistant" (or multi-assist) at the Danbury hospital campus from 9 pm to 7 am. His "multi-assist" position is only staffed on the night shift, and effectively serves the functions of all day-time transporters, nursing assistants, and unit

secretary/coordinators – normally filled by about 25 employees. Witnesses for the Employer universally acknowledged that there are no complaints about his responsiveness or performance, and he enjoys a good reputation with the Employer. He is also a member of Petitioner's organizing committee and an outspoken supporter of the effort to unionize. His name is well known to DeBarba and Burnett as appearing in the newspaper taking pro-union positions. (Tr. 362)

As a multi-assist, he works under the direct supervision of the Administrative House Manager, Colleen Dewan, or her relief, Claire Maggio. Wilk responds to pages and calls from departments on all 15 floors of the Hospital, including, as needed, the ED. In the course of his night shift he assists in "Code Blues", (cardiac arrest or respiratory arrest) and fire codes, assists in the transporting of patients, and runs blood samples and lab items. A specific part of his job description normally includes "rounding for specimens" However, in addition to looking for specimens to deliver to the lab, he looks for potential problems and solutions (he is referred to as a "troubleshooter" by the Employer); he might find a patient who is short of breath, or fallen on the floor, he might provide assistance to a PCT, or help someone who doesn't know how to do an EKG. In the course of a normal evening, he would have done rounds all night long, effectively meeting every employee on the night shift one or two times a night. The voter list shows there are a total of 69 other eligible voters who work the night shift with Wilk at Danbury Hospital.

1. The "Pilot Program"

Several days after the petition was filed, the Employer implemented a "patient placement initiative" intended to maximize the achievement of efficient "throughput", which is the placement of patients in the appropriate beds as quickly and accurately as possible. In essence, the program was to ensure that patients are put in the proper beds, on the proper floors, thereby eliminating the need to re-move the patients at a later point from one floor to another. On June 4, a staff meeting was held by Maureen Burnett, with Administrative House Manager Colleen Dewan in attendance, and Relief House Manager Claire Maggio participating via conference call, in which the program was among the topics discussed. The program brought about Staffing changes, particularly on the day shift, from 7 a.m. to 7 p.m., and Dewan explained, what the "whole pilot program was really about, to have two administrative house managers there [in the ED]. One to strictly manage the bed portion and the bed control and really look at the patients coming in. .So one person did that particular part of the job. And the other person was really kind of out doing the rest of what our job entails." (Tr. 254) On the night shift, additional transportation employees came in to assist with the transport, and were specifically assigned to the emergency room.

Later that afternoon, Burnett sent the following email to the House Managers reiterating the impact of this initiative. (EX 9) The email specified that:

- Multi-assistant should be stationed at the ED for their shift to assist with all transport needs and other duties as assigned to support the throughput initiative

- Transportation will assume last "specimen rounds" of the evening so the multiassistant does not have to round for specimens until the AM unless they are called for a stat specimen.
- They can continue to respond to all the code situations they do presently but all other activity should be in the ED.

The email ended with a note to Colleen [Dewan] saying "Colleen, I would love your feedback as to how that goes tonight." In testimony, Burnett explained that she asked for Dewan's feedback "because she wanted to know are we doing the right thing, or are we not doing the right thing."

Around that evening, Dewan advised Wilk about the new "pilot program" under which he would work in the ED for improving the efficiency of "throughput" at the hospital. He pointed out that he did not have access to the bed board and is not told patients' diagnosis, and his role seemed vague. Dewan revealed to Wilk her view that the program worked on day shift, but that she did not see how it would function on nights. She asked him to try it and see how it goes. He reported to ED as directed that evening, asked what he could do to help, and was told they were fine. Thereafter he was called to assist elsewhere, which he did. He checked in with ED again; they were still fine. Thereafter he was called by many departments and was busy throughout the hospital, and was not able to maintain a presence in the ED again because he was busy doing his job elsewhere.

The following morning Dewan checked with him, and he told about his evening that that he had not been able to stay in the ED. The following evening when he came to work, Dewan expressed some degree of frustration with the directive of the placement initiative, including by stating that she believed that it was a waste of Stan as a resource, and that she was going to talk to Martin about it. (EX 3) Dewan and Wilk recalled instances where his rounding work had resulted in saved lives and made a significant difference. Thereafter, Dewan did not hold him to the requirement to make the ED his home base, but continued to direct him to check in with ED more frequently than normal to offer assistance, which he did. Most notably, she expected him to continue to do his job as he had for years, which included "rounding" Both Dewan and Maggio, Dewan's part-time relief, acknowledged that Wilk does his job, that he has always assisted the ED in throughput whenever needed, and that there have never been complaints from the ED about his responsiveness when needed. Thus I find, contrary to Burnett's suggestion in testimony, that the night House Managers did not solicit this change in the multi-assists duties to augment the support in the ED. (Tr. 315, 317) Additionally, after the first evening, Dewan advised Burnett that she needed Wilk to do his job for her elsewhere in the house more than the ED. (Tr. 318)

2. The June 12 Directive -- Wilk is Reassigned to Work in the ED

On the evening following Wilk's meeting with DeBarba and Burnett, Dewan was off, and relief House Manager Claire Maggio worked. Burnett was there late that evening. Notwithstanding the feedback Burnett had received from Dewan, Burnett

spoke to Maggio, directing her that Wilk was to be stationed in the ED, and that he was not to leave the ED unless called to do so. Maggio subsequently conveyed this directive to Wilk. What was understood from this was that he was not to do "rounds", that he was to stay in the ED unless and until a call came in requiring his services elsewhere, and that he was to then return to the ED. (Tr. 81) She told him that she didn't know why Burnett wanted him in the ED, that she did not want to discuss it, that it was between him and Burnett.

Maggio admits that she was told by Burnett to reassign Wilk to the ED. I do not credit Burnett's testimony framing this directive to Maggio as a suggestion, or that Burnett made clear it was "at her discretion" Burnett's testimony regarding Wilk was evasive and contradictory and on any point in dispute I do not credit her. (Tr. 322-339) Burnett was asked whether she knew of any conversation that Claire Maggio had with Stan Wilk regarding the pilot program [which Wilk testified occurred on June 11 or 12]. Her response was "I do not" Later, she contradicted this response, when in an effort to clarify a question about Maggio's work schedule between June 4 and June 11, she offered "so, you said the time that the email went out [June 4] and the night that she spoke with Stan or no?" (Tr. 331) Her testimony regarding her directive to Maggio was contradictory and patently unbelievable. She testified that she had a separate conversation with Maggio on about June 11 "because Claire was not in attendance at our meeting" (Tr. 320: 3) She later acknowledged that Maggio attended the meeting by teleconference, and had been sent the email directive. (EX 9) She acknowledged that she specifically asked Colleen Dewan for feedback because she wanted to know if they were doing the right thing. (Tr. 334) Colleen gave her the requested feedback, which was to say that it was not realistic for Wilk to remain in the ED.

Later that shift, close to midnight, there was a point that Wilk left the ED to deliver specimens to a lab after being called to do so. While on the 12th floor, he ran into Maggio, who queried him as to why he had left the ED. He responded that he had taken a specimen to the lab, and then went on a fifteen minute break. She asked him if he had punched out for his break, to which he reminded her it was not necessary to punch out for 15 minute breaks. She told him that he belonged in the ED and that was where he should be. Thereafter, he did not do rounds, and only left the ED about four times to respond to calls. At 5 a.m. the next morning Wilk was injured on duty. As a result, he did not work again until after the election.

B. Board Law / Recommendations

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that employees' union activities had been placed under surveillance. See *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999).

With respect to addressing conduct not specified in the objections, the Board will allow consideration of such conduct, where the issue was fully litigated, and is closely related to the objection or objections under scrutiny. See *Pacific Beach Hotel,* 342 NLRB

372, 373 (2004).) In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination, and the size of the unit." *Bon Appétit Management Co.,* 334 NLRB 1042, 1044 (2001)

1. The Impression of Surveillance/Restriction of the Movement of Stan Wilk

The record evidence establishes that on about June 4, Burnett held a staff meeting, and sent an email to the House Administrators that revised the job duties of the night time multi-assistant position filled by Stan Wilk.[21] The revisions to Wilk's duties would restrict him from "rounding for specimens" which is that portion of his job that caused him, in the course of an evening, to do rounds on every floor of the 15 floor hospital, during which he routinely encountered every staff member once or twice a night. Instead, he would remain stationed in the ED all night long, only leaving there to respond to calls made to request his services elsewhere, after which he would return to the ED. The Petitioner's objection alleged this restriction on Wilk's movement as giving the impression of surveillance, but the same facts support the closely related allegation that the alteration of duties was done not only to keep him under surveillance, but also to restrict his movements so that he could not interact with coworkers in support of the Union in the time leading up to the June 19 election. Petitioner's attorney made this assertion in his closing argument. (Tr. 416-417: 22-2) I recognize that my authority to consider issues that are not specifically alleged by the objection is limited, *Precision Products Group,* 319 NLRB 340 (1995), but whether the theory of the objection is the creation of the impression of surveillance or a coercive restriction of Wilk's movement, the facts and defenses to proving each are identical, as both involve the Employer's conduct in reassigning Wilk on the evening of June 12, the motivation for doing so, and the objective effects of the action. Because the Employer's actions and motivation with respect to this conduct were fully litigated, the issue is properly considered in this report. See *Virginia Concrete,* 334 NLRB 796 (2001).

Notably, there were no complaints about Wilk's general responsiveness to the ED prior to the June 4 email. The Employer's explanation was that action was an extension of a pilot program whereby a second House Administrator had been assigned to day shift, allowing them to devote one to ED to focus on "throughput" issues, and Wilk's reassignment was somehow consistent with that. It made little sense, however, and was never adequately explained how the hospital would benefit by preventing Wilk from "rounding" Burnett testified that the program came into being about mid to late May. For reasons that were never explained in the record, the only written expression of this pilot program is the June 4 email, which deals exclusively with the changes to the multi-assist position to eliminate his rounding and restrict him to the ED except for specific calls to leave. As both Maggio and Dewan testified, Wilk could always be counted on to do his job, which *already* included responding to any calls for assistance in transporting patients that might be needed by ED. Additionally, the record establishes that a lot of the services that he provide in the course of an evening are generated through his rounding activities. At the end of her June 4 email announcing

[21] No ULP charges were filed over this alleged misconduct by the Employer.

these changes, DON Burnett asked House Administrator Dewan to "let her know how things go tonight" because, she testified, she wanted to know "if it was going to work, you know, that this was even worth trying to do" (Tr. 318) In response to Burnett's inquiry, Dewan had advised Burnett that she would have Wilk check in more often with ED, which he did, but that she needed him to be able to do his job in other areas. In other words, the feedback she got was that it was not.

Notwithstanding this feedback from Dewan, on July 12, the day after Wilk met with DeBarba in a private meeting arranged by Burnett, Burnett personally directed Maggio, who starts at 7p.m., that Wilk was to be assigned to the ED and that he could leave to respond to calls only. I find that this directive was not to advance an interest in through put, but was directed by Burnett to prevent Wilk from rounding, where he came into contact with other employees all night long and to eliminate opportunities where he might share with other employees his views in favor of the Petitioner in the upcoming election. In making this finding, I rely on the Employer's failure to show that the decision or plan initiative predated the critical period beginning on May 28 with the filing of the petition, as well as the timing of the action by Burnett, which was coextensive to a period in which Burnett was focused on Wilk's role and activities in support of the Petitioner, including by actively intervening to appease his concerns. Most notably, after learning from Dewan that Wilk was complaining about DeBarba's lack of response to his email, she orchestrated a private meeting between DeBarba and Wilk. This meeting occurred only a day before the directive to Maggio, and was unsuccessful as an avenue to dissuade Wilk of the benefit of a union contract as a means of addressing his concerns. Burnett's further restriction of Wilk's mobility following Dewan's feedback undermines a valid institutional basis for this directive.

Given Wilk's highly visible status as a Union activist, and role as a lead organizer, the Employer's action of altering his job duties and sequestering him to the ED would not have gone unnoticed by the 15 floors of fellow employees working the night shift. The Excelsior list reflects that Wilk shared the night shift with 70 other eligible employees at Danbury Hospital, a number well in excess of the 23 necessary to achieve a different outcome in the election. As noted, the election results might have been different with as few as 23. The misconduct occurred close in time to the election, which was only one week away, on June 19. Under such circumstances, the misconduct could have affected the results of the election. *Bon Appétit,* supra. The restriction on Wilk's movement would reasonably have tended to interfere with employee free choice.

C. THE ALLEGED IMPRESSION OF SURVEILLANCE OF JESSICA ELLUL

On the evening of June 10, at about 6:00 pm, employee Jessica Ellul went to Danbury Hospital while off duty to perform what she describes as "union work", which consisted of getting fellow employees to fill out surveys. This was done in the employee lounge located on 11 East. The employee lounge is not a public area of the hospital. It is behind the nurses' station, is used for employee breaks and staff meetings, has computers for nurses to do their charting, and lockers for employees to

keep their personal belongings. If members of the public do happen to go in this room, it is by mistake or invitation only. Martin was advised of Ellul's off duty visit by Colleen Dewan. In response, Martin, who did not know Ellul by face, asked Assistant Nurse Manager Deb Zillinik to accompany her to the 11th floor. En route, they asked another employee if Ellul had been there, and this employee alerted Ellul via text message, that Martin was looking for her.

Martin and Zillinik encountered Ellul in the hallway past the patient rooms, talking with Stan Wilk. After greeting Stan, Martin asked Ellul if she was working. When Ellul said she was not, Martin asked her what she was doing there, and Ellul responded that she was "doing union stuff" Martin's response was to say "you know that you are not supposed to be doing that", to which Ellul responded "and you know you are not supposed to be doing surveillance on me." Martin denied this, pointing out that she had not even aware who she was, and affirmed that Ellul still had to leave. Ellul testified that she also told Martin that she felt threatened by her, and that Martin needed to back up away from her. However, I do not credit this portion of her testimony. It was not corroborated by Stan Wilk, who was present but did not testify on this incident, and it was credibly denied by both Martin and Zillinik. Moreover, even if this portion or her testimony were credited, it does not change the outcome.

Martin's credited testimony is that in the seven years she has been with the Employer, she has not previously known of an employee on the premises without some work related purpose, be it a staff meeting or going to HR, and this was the first time that she had been notified of an employee in the building who was not on duty.

In February,[22] the Employer implemented a non-solicitation policy, which includes the requirement that "[I]n the interests of ensuring safety and privacy for all, employees should be on the premises only when they are on duty, receiving care, visiting a patient or in an area open to the public." (EX 12) Ellul acknowledged being aware of a "broad policy" concerning non-solicitation, and that her access on that evening likely was not in compliance with the non-solicitation policy. Her explanation was to claim that "no one follows" the language that limits access rights for off-duty employees. (Tr. 202). As examples of this Ellul testified that she has been to the hospital while off duty to collect her schedule, and has observed other employees doing the same, that off duty employees have come to lunch in the public café with on duty employees, to join parties on the floor, to visit someone (a patient?---she did not say), to drop off magazines for visitors to read, and to pick something up that they have on hold at the gift shop. She gave no time frames for any of these examples, nor were any solicited. However, none of these examples establish that these visits a)occurred after the February implementation of the "non-solicitation policy, or b) even violated the specific terms of the non-solicitation policy.

[22] On about May 28, when the Petition was filed, the Petitioner stipulated and agreed that it would not raise any allegations of pre-petition conduct to set aside or block the election. (Tr. 194) Accordingly, there can be no contention that the February implementation of this policy, (ER 12) is or was objectionable conduct.

In this case, Martin, was alerted that Ellul was in the building after hours. Martin's query to Ellul was to ask whether she was working at the time, and what she was doing in the building. The Employer has in place a valid non-solicitation policy which it is entitled to enforce, and her questions were clearly aimed at discovering whether Ellul was violating the non-solicitation policy. Ellul volunteered that she was engaging in "union work", admitted that she had been doing so in the employee lounge, a non-public area, and acknowledged that she was likely in violation of the policy. Under these circumstances, it cannot reasonably be found that Martin's actions created the impression of surveillance. Moreover, even if Ellul felt threatened when confronted by management and questioned about facts that would tend to demonstrate she was in violation of the Employer's non-solicitation policy, these feelings do not convert lawful questioning into coercive surveillance. I recommend that this allegation of objectionable conduct be overruled.

VIII. OBJECTION 4

At hearing, Petitioner requested to withdraw Objection 4, which was that the Employer held and election eve speech. I recommend approval of this request.

IX. CONCLUSION

Consistent with my findings above that the Petitioner's objections be sustained insofar as there is sufficient evidence to establish that the Employer's conduct as set forth in Objections 1 and 3 reasonably tended to interfere with employee free choice, I recommend that the election held on June 19, 2015 be set aside and that a new election be conducted.

X. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region One by September 30-, 2015. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region One, 10 Causeway Street, Room 601, Boston, MA 02222-1072.

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

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

Dated: September 16, 2015.

Jo Anne P. Howlett (by mc)

Jo Anne P. Howlett, Hearing Officer
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Region One
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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE

THE DANBURY HOSPITAL **Employer** **and** **AFT CONNECTICUT** **Petitioner**	**Case 01-RC-153086**

AFFIDAVIT OF SERVICE OF HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document electronically or regular mail on the parties listed below at the addresses indicated.

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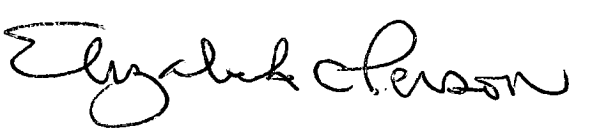
Subscribed and sworn before me on September 16, 2015	DESIGNATED AGENT Elizabeth C. Person  NATIONAL LABOR RELATIONS BOARD