UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of: UNIVERSITY OF LA VERNE, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, Petitioner.	Case Nos. 21-RC-115880 21-CA-121140 21-CA-121145 21-CA-121153 21-CA-121165 21-CA-121679

SERVICE EMPLOYEES INTERNATIONAL UNION'S REQUEST FOR SPECIAL PERMISSION TO APPEAL

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I. INTRODUCTION

Pursuant to Section 102.65 of the NLRB Rules and Regulations, Petitioner Service Employees International Union ("Union") hereby requests special permission to appeal Region 21 Regional Director Olivia Garcia's denial of the Union's request to withdraw Requests to Proceed in five separate unfair labor practice charges filed against the University of La Verne ("Employer" or the "University").

The Union's request to block the election came at a critical time, approximately one week into the two-week mail balloting period. On October 28, 2013, the Union filed a representation petition seeking to represent a unit of approximately 250 part-time adjunct professors employed by the University. Pursuant to a directed election, the parties stipulated to a mail ballot election. The Region mailed ballots to eligible voters on January 31, 2014. Ballots must be returned by February 14, 2014 and will be counted on February 18, 2014.

The unfair labor practice charges allege that the Employer unlawfully solicited grievances, promised benefits, withheld benefits, engaged in unlawful surveillance, and unlawfully promulgated a no-solicitation rule. The Union filed Requests to Proceed in each of the charges.

After filing the Requests to Proceed, however, the Union learned that the Employer's unlawful conduct was more widespread and pernicious than the Union initially understood. As detailed in affidavits given to the Region, in the critical time leading to the mail ballot voting period, the University systematically held small focus group meetings in which administrators, such as the University Provost and the Director of Human Relations, solicited and remedied employee grievances. Moreover, in the week after the Union filed its Requests to Proceed, it

learned that high-level University administrators personally invited eligible voters to attend focus group meetings, thus amplifying the coercive undertone of the meetings. Based on this newly acquired evidence, the Union now believes that the impact of the Employer's unlawful conduct was greater than the Union anticipated when it filed the Requests to Proceed. Indeed, the facts demonstrate that the prevalence of these unfair labor practices, as well as the nature of the coercion involved, has interfered with employee free choice.

For these reasons, the Union requested to withdraw its Requests to Proceed on February 7, 2014. On February 10, 2014, the Region denied the Union's request, despite the agency's general policy of holding the processing of a representation petition in abeyance where, as here, an unfair labor practice charge alleges conduct that interferes with employee free choice. The Union contends that the Regional Director's denial was therefore an abuse of discretion. Accordingly, the Union respectfully requests special permission to appeal the Regional Director's denial of the Union's request to withdraw its Requests to Proceed. Moreover, the Union requests that the ballots be impounded pending completion of the Region's investigation into these serious charges.

II. STATEMENT OF FACTS

A. Procedural History.

On October 28, 2013, the Union filed a petition seeking to represent a unit of approximately 250 part-time adjunct professors employed by the Employer, a private university whose main campus is located in La Verne, California, approximately 30 miles east of Los Angeles. Following a representation hearing, the Regional Director issued a Decision and

Direction of Election on December 17, 2013.[1] The parties stipulated to a mail ballot election. The Region mailed ballots to eligible voters on January 31, 2014. Voters must return their ballots by February 14, 2014. Region 21 will count the ballots on February 18, 2014.

On January 23, 2014, the Union filed four unfair labor practice charges alleging that the Employer unlawfully solicited grievances, promised of benefits, withheld benefits, and engaged in surveillance.[2] On January 30, 2014, the Union filed a Request to Proceed in each of the January 23rd unfair practice charges. On January 31, 2014, the Union filed an unfair labor practice charge alleging that the Employer unlawfully promulgated a no-solicitation rule.[3] On February 3, 2014, the Union filed a Request to Proceed on the January 31st charge.

After filing the Requests to Proceed, the Union continued to assess the scope and impact of the unfair labor practices on the election and determined that the Employer's conduct had significantly interfered with employee free choice. Accordingly, on February 7, 2014, seven days after the Region mailed out ballots, the Union requested to withdraw its Requests to Proceed. On February 10, 2014, the Region denied the Union's request.

B. Ample Evidence Supports the Unfair Labor Practice Charges.

The five unfair labor practice charges allege conduct which, if proven, would interfere with employee free choice in an election. On February 4 and 6, 2014, witnesses gave affidavits

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[1]The Employer has filed a Request for Review of the Regional Director's Decision and Direction of Election which is currently pending before the Board.

[2]The January 23rd unfair labor practice charges were assigned case numbers 21-CA-121140, 21-CA-121145, 21-CA-121153, and 21-CA-121165.

[3]The January 31st unfair labor practice charge was assigned case number 21-CA-121679.

supporting the allegations of the unfair labor practice charges. The allegations are discussed in detail below:

1. *Solicitation of Grievances*

The Union alleges that the Employer solicited grievances and complaints from employees during the period of Union organizing activity, making implied – and express – promises that employees' concerns would be favorably resolved. Because they were made for the purpose of influencing employee choice, these implied promises were unlawful unfair labor practices. *See, e.g. Center Constr. Co., Inc.*, 345 NLRB 729 (2005) (employer's direct solicitation of grievances where no such previous mechanism existed was a significant change in policy and unlawful solicitation of grievances); *Alamo Rent-a-Car*, 336 NLRB 1155 (2001) (same).

The adjunct faculty organizing campaign began in late August 2013. As stated in several of the affidavits taken by the Board Agent, prior to the Union's organizing campaign, the Employer did not have any mechanism through which adjunct professors could report concerns regarding working conditions. However, after University administrators learned about the organizing campaign, the University launched "Adjuncts with Excellence" focus groups, hosted by Interim Provost Jonathan Reed ("Reed") and the Director of Human Resources, Jody Bomba ("Bomba"). A copy of the meeting agenda, which has been provided to the Board Agent, listed the following discussion topics: "communication; compensation and benefits; role and responsibilities; training and development; overall satisfaction." As two affiants testified, Bomba asked the focus groups to tell her "what they could change at the University to make things

better." Both affiants candidly discussed improvements the Employer could make.[4] Following the meeting, Bomba and Reed contacted one of the affiants to follow up on concerns raised during the meeting. The University then took steps to remedy those concerns. On or about late January 2013, the University announced the launch of several new University-sponsored professional development courses for adjunct faculty. The evidence suggests that these training opportunities were created and offered in direct response to complaints voiced by adjuncts during the focus group meetings about the need for Employer-provided training and development courses.

After the Union filed the representation petition, the Employer invited all adjuncts to attend "Connect Over Coffee" meetings, also hosted by Provost Reed and Bomba. Once again, adjuncts were invited to share their grievances and concerns. An affiant who attended a Connect Over Coffee meeting testified that, after the meeting, Provost Reed and Bomba followed up and corrected an issue identified by the affiant during the meeting.

After the Union filed the Requests to Proceed, it learned that the coercive nature of these small group meetings had intensified and that participation in the meetings was more widespread than the Union initially understood. Specifically, the Union learned that high-level administrators like the Provost and the Academic Deans personally called voters to invite them to attend the Connect Over Coffee meetings. Adjunct faculty members have reported to the Union that because of the small size of the focus groups, the fact that adjuncts were summoned to the meetings by high-level administrators, the fact that high-level administrators conducted the

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[4]To protect their confidentiality, we will not identify the affiants who gave testimony to the Board Agent by name or discuss the concerns that they shared during the focus group meetings.

meetings, and the overall anti-Union tenor of the administrator's remarks, many adjuncts felt the focus group meetings were inherently coercive. Given the evidence of solicitation, implied promises and threats to withdraw benefits the Union has collected from affiants and others with respect to focus group and coffee meetings, the Union has reason to believe that similar unlawful conduct occurred at the meetings which took place in the critical days leading up to the mail balloting period.

2. *Promises of Benefits/Withholding of Benefits*

The Union alleges that the Employer both promised and withheld benefits in order to improperly influence the adjunct organizing campaign, in addition to the implied promises of benefits and threats of withdrawal of benefits discussed above with respect to the focus group meetings. *See, e.g., Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000) (employer may not promise benefits to influence outcome of election or withhold benefits because of pending election).

On or about January 13, 2013, Interim Dean of the College of Arts and Sciences Felicia Beardsley emailed the adjunct faculty in her school regarding the upcoming election. In her email she stated, "You already know the university's position (that a union is not necessary for you and the university right now, *particularly as the university has just initiated a holistic reform of remuneration for all faculty, including the implementation of best practices*)" (emphasis added). Similarly, affiants have testified that University administrators have stated that the University had plans to increase adjunct faculty compensation but could not implement those plans because the Union filed its petition.

Another affiant testified that University President Devorah Lieberman explained to her that the University had formed a committee to look into making University pay rates comparable with other colleges and universities in the region. President Lieberman told the adjunct, "let me do my job," which the affiant understood to mean that she wanted to be left to run the University without the intervention of a third-party like the Union. Recently, President Lieberman has sent several communications to adjunct faculty describing the so-called compensation task force. One such communication, provided to the Region, states, "while neither the Union nor the University can guarantee more compensation, this Spring the University's Compensation Taskforce will make recommendations to the Board of Trustees designed to ensure that our faculty and staff compensation is competitive with comparative institutions."

3. *Unlawful Surveillance*

The Union alleges that the Employer engaged in unlawful surveillance. On or about December 2, 2013, a University student group organized a campus event which involved painting a slogan on a large boulder that rests on the lawn outside the offices of the University President and Provost. Painting the boulder is a campus tradition, and during the event in question students and faculty painted the slogan "We Love Our Adjuncts" to support the adjunct organizing campaign. During the event, a group of approximately 10 students and adjunct faculty gathered to paint the boulder. Several affiants testified that during the event, two campus security officers parked their vehicle in view of the participants and watched the group for at least 45 minutes. The affiants also testified that they had attended numerous other rock painting events but had never before seen security guards present.

4. *Unlawful No-Solicitation Rule*

On or about January 30, 204, Felicia Beardsley, Interim Dean of the College of Arts and Sciences, emailed all eligible voters in her school to address procedures for the upcoming mail ballot election. In her email, she stated "[t]he attached letter explains the pending voting period for the unionization ballot and provides an example of what the ballot will look like. *It also describes the two-week voting period as a quiet time when all parties are supposed to refrain from solicitation of either pro- or anti-union messaging*" (internal quotations omitted) (emphasis added). As a result of this email, adjunct faculty believed, as one affiant testified, that they could not discuss the Union with their coworkers during the critical two week voting period.

III. ARGUMENT

For the reasons identified below, the Union respectfully submits that Regional Director Garcia abused her discretion by declining to hold the instant representation case in abeyance pending resolution of the concurrent unfair labor practice charges.

"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the *uninhibited* desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948) (emphasis added). To protect employee free choice, "[t]he Board's general policy is to hold the processing of a representation petition in abeyance if there are concurrent unfair labor practice charges that allege conduct which, if proven, would interfere with employee free choice if an election were to be held." *Mark Burnett Productions*, 349 NLRB 706, 706 (2007) (*citing* NLRB

Casehandling Manual section 11730). There are, however, exceptions to this general policy and regional directors are afforded discretion in its application.

One such exception is where a charging party files a request to proceed. *See* Casehandling Manual Sections 11730.2, 11731.1(a). Despite filing a request to proceed, a party may later request to rescind its request to proceed. When that occurs, the Casehandling Manual directs the regional director to take the following steps:

> The Regional Director should rule on the request to rescind, *applying the same considerations outlined in Sec. 11730 regarding the Agency's blocking charge policy.* The charging party's prior willingness to attempt to continue with processing the petition should not, in and of itself, be viewed as a reason not to honor the charging party's subsequent attempt to rescind its request to proceed. It may contend, for example, that with the passage of time the unfair labor practices have had a tendency to interfere with the free choice of employees in an election.

Casehandling Manual Section 11731.1(b) (emphasis added).

Therefore, in assessing whether or not to grant a charging party's request to withdraw a request to proceed, the regional director must apply the same considerations outlined in Section 11730; that is, whether the charges allege conduct which, if proven, would interfere with employee free choice if an election were to be held. Here, the charges unquestionably allege conduct that, if proven, would impede employee free choice. *See, e.g., U Save Foods*, 341 NLRB 161, 162 (2004) (noting that "[t]he Board will infer that an announcement or grant of benefits during the critical period is objectionable"); *Save Mart Supermarkets*, 326 NLRB 1146 (1998) (holding that employer engaged in objectionable conduct warranting re-run election where it solicited grievances of employees during the critical period); *Gerkin Co.*, 279 NLRB 1012

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(1986) (holding that employer engaged in objectionable conduct warranting re-run election where it withheld previously planned benefits because of pending union election).

A. The Employer's Conduct Has Significantly Impacted Employee Free Choice.

A regional director may determine that an election should proceed because, under the circumstances, employees can exercise free choice notwithstanding the pendency of the unfair labor practice charges. *See* Casehandling Manual Section 11731.2. To make such a finding, a regional director must consider the factors set forth in Section 11731.2 to determine whether employees could, under the circumstances, exercise free choice despite the conduct alleged in the unfair labor practice charges. Among the factors to be considered are:

(a) The character, scope, and timing of the conduct alleged in the charge, and the conduct's tendency to impair the employees' free choice;

(b) The size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge;

(c) Whether the employees were bystanders to or the actual targets of the conduct alleged in the charge;

(d) The entitlement and interest of the employees in an expeditious expression of their preference regarding representation;

(e) The relationship of the charging parties to labor organizations involved in the representation case;

(f) The showing of interest, if any, presented in the R case by the charging party;

(g) The timing of the charge.

Casehandling Manual Section 11731.2.

Here, the factors weigh heavily in favor of blocking the election. The alleged unfair labor practices are widespread, with some conduct, such as the Employer's unlawful communications, affecting the entire group of eligible voters. In all charges, the employees themselves are the actual targets of the alleged conduct. The Union filed a sufficient showing of interest to merit an election. Last, the Union filed the unfair labor practice charges as soon as it had sufficient evidence to support the charges.

Indeed, the only factor that merits additional discussion is the employees' interest in the quick resolution of the election. As the Board has stated with regard to this factor, "employees have a right to and an interest in an expeditious vote on their preference regarding their representation. But, employees also have the right to an election that reflects their untrammeled views. In order to effectuate this right, the Board's blocking charge procedures fulfill its longstanding policy that elections should be conducted in an atmosphere free of *any* type of coercive behavior that could affect employee free choice sufficiently to sway the outcome of the election." *Mark Burnett Productions*, 349 NLRB 706, 707 (2007) (emphasis in original). Here, just as in *Mark Burnett*, employees' interest in a speedy election is outweighed by their interest in a *fair* election. Because of the pervasiveness of the alleged unlawful conduct, the potential that it will significantly impact employee free choice is high. Furthermore, the Employer's alleged unlawful conduct not only continued but in fact escalated during the days leading up to the mail balloting period.

Although the Region did not provide a specific reason for its denial of the Union's request to rescind its requests to proceed, it is important to note that the Union's previous willingness to

continue with the election would not have been a proper basis for the Regional Director to deny the Union's request to rescind its requests to proceed. *See* Casehandling Manual Section 11731.1(b). The Union made a good faith effort to move forward with the election as scheduled, and should not be penalized for the Employer's escalating unlawful conduct. Indeed, the fact that the Union had previously agreed to continue with the election has no bearing on the question of whether the charges, if proven, would tend to impede employee free choice. Nor does the fact that the Union attempted to withdraw its request to proceed one week after the ballots were mailed out bear on the question of employee free choice, the critical factor in assessing the appropriateness of holding a representation proceeding in abeyance pending the resolution of concurrent unfair labor practice charges. The Regional Director's analysis must be limited to the impact of the Employer's alleged conduct on employee free choice. For these reasons, the election should be blocked pending the resolution of the unfair labor practice charges.

B. The Regional Director Should Impound the Ballots Until Resolution of the Charges.

A regional director may also determine that charges should not block an election in situations where an election is pending and unfair labor practice charges are filed too late to permit the region to investigate prior to the election. *See* Casehandling Manual Section 11731.5. In such cases, a regional director may "(a) postpone the election pending disposition of the charge; (b) hold the election as scheduled and impound the ballots until after disposition of the charge; or (c) conduct the election, issue the tally of ballots and, in the absence of objections,

issue a certification; and then proceed to investigate the charge." *Id.* In applying this exception to the general rule, a regional director must consider the following factors:

(1) The extent to which substantial evidence in support of the allegations is submitted by the charging party with its charge;

(2) The passage of time between the alleged conduct and the filing date of the charge;

(3) The seriousness of the allegations and the evidence submitted with the charge as to its dissemination.

Id.

Here, the only reasonable option for the Regional Director is to hold the election as scheduled and impound the ballots pending the resolution of the unfair labor practices. Indeed, option (a) makes little sense. Postponing the election is not an option because it is a mail ballot election and ballots had already been out for a week when the Union requested to withdraw its request to proceed. Likewise, option (c) makes little sense. Allowing the election to proceed in the face of widespread unfair labor practice charges would undermine the primary goal of a representation proceeding, namely, providing "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB at 127. Hence, the only remaining option is option (c) – impounding the ballots pending resolution of the concurrent unfair labor practice charges.

Importantly, the charges allege serious and pervasive Employer misconduct that create a substantial risk that employee free choice has been stifled. Ample evidence supports the Union's allegations. The Union has already supplied the Region with substantial evidence in support of

the allegations, both through sworn affidavits and documentary evidence. As discussed above, affiants have provided the Region with testimony and evidence supporting each of the unfair labor practice allegations. The Union has provided testimony that the Employer held employee focus groups and "Connect Over Coffee" sessions during which it solicited employee grievances. Affiants have also testified that high-level University administrators followed up on the concerns voiced at these focus groups and, in some cases, remedied them. The Union has also provided information that the University launched a series of professional training programs directly in response to complaints made by employees during the focus groups and coffee sessions.

For these reasons, the Regional Director erred in denying the Union's request to block the election. The ballots should be impounded pending the outcome of the investigation into the unfair labor practice charges.

IV. CONCLUSION

For the reasons stated above, the Union respectfully requests that the National Labor Relations Board grant its request for special permission to appeal the Regional Director's denial of the Union's request to rescind its requests to proceed.

Dated: February 14, 2014

JUDITH A. SCOTT
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By /s/
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Re: University of La Verne
Case No. 21-RC-115880, et al.

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On February 14, 2014, I served the foregoing document described as **SERVICE EMPLOYEES INTERNATIONAL UNION'S REQUEST FOR SPECIAL PERMISSION TO APPEAL** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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(By Mail)

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 14, 2014.

Dorothy A. Martinez

DOROTHY A. MARTINEZ