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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 31

GOOD SAMARITAN HOSPITAL Employer, ALLEN V. SMITH Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION Union.	CASE NO. 31-RD-1555 **GOOD SAMARITAN HOSPITAL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE LANA PARK'S REPORT AND RECOMMENDATIONS ON OBJECTIONS AND BRIEF IN SUPPORT THEREOF**

Good Samaritan Hospital (the "Hospital" or the "Employer") hereby Excepts pursuant to the National Labor Relations Board Rule 102.69(e) to the findings and conclusions of Administrative Law Judge Lana A. Park (the "ALJ") set forth in her April 7, 2009 Report and Recommendation on Objections to Conduct Affecting the Results of the Election as to Employer's Objection Number 3.

EXCEPTIONS TO FINDING ON EMPLOYER'S OBJECTION NUMBER 3

The Employer excepts to the findings of the ALJ regarding Employer's Objection Number 3 in its entirety and to her finding that "Accordingly, I recommend that objection number 3 be overruled." (Report at pgs. 3-10; See evidence set forth in Good Samaritan Hospital's Post Hearing Brief, pgs. 1-21).[1]

The Employer excepts to the findings of the ALJ on the grounds that the evidence presented overwhelmingly demonstrates that during the critical period, the Union attempted to bribe and coerce employees into voting for the Union by mailing checks in varying amounts to employees' homes. The Employer bases these exceptions upon its arguments and evidence submitted in its Post Hearing Brief Submitted to the ALJ on March 19, 2009. In addition, the employer would like to point to three specific exceptions to the ALJ's findings and recommendations.

1) In making her recommendation that Objection Number 3 be overruled, The ALJ relies primarily upon *EFCO Corp.*, 185 NLRB 220, 221 (1970) in finding that "permissible and/or obligatory union action is not objectionable election conduct 'simply because it is motivated by the union's desire to present itself as a more attractive candidate.'" (Report at pg. 8). The ALJ's reliance upon *EFCO* is misplaced for two reasons. First, *EFCO* was overruled by *Savir Mfg. Co.*, 414 U.S. 270, 277-278 (1973). See *Children's Services International, Inc.*, 2004 NLRB Lexis 290 at *9 (holding that dues rebates prior to an election tended to unlawfully influence the outcome of the election). Therefore, in making her recommendation, the ALJ impermissibly relied upon a case that has been overruled. Second, the amounts of the checks provided by the Union to the employees were thousands of dollars more than the dues reimbursement amounts actually owed to the employees, as the ALJ admitted in the Report. (Report at pg. 7). Furthermore, the money was distributed to a number of employees who were not entitled to any reimbursement and no checks were provided to some employees who were owed reimbursements, including decertification supporters. Therefore, the checks were clearly not a "permissible and/or obligatory union action."

[1] For ease of reference, the ALJ's April 7, 2009 Report and Recommendation On Objections is cited herein as the "Report"; the transcript from the hearing in case number 31-RD-1555 is cited as "Tr."; and Good Samaritan Hospital's Post Hearing Brief regarding the Employer's Objections in 31-RD-1555 are cited as "Post Hearing Brief."

2) The ALJ based her decision in part upon her finding that "there is no evidence the refunds were likely to cause fear among employees or to generate a feeling of moral indebtedness to the Union." (Report at pg. 9). However, as set forth in the Employer's Post Hearing Brief, an employer is not required to present direct evidence of changes in employees' votes. An employer is only required to provide evidence that the Union's action was likely to result in an impermissible influence upon employees sufficient to affect the results of the election. See, e.g., *Nestle Ice Cream v. NLRB*, 46 F.3d 578 (148 LRRM 2454) (6th Cir.1995); *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975); *Children's Services International, Inc.*, 2004 NLRB Lexis 290 at *13. Given the widespread distribution of the checks and that a shift in as few as 12 votes would have changed the results of the election, the Employer submitted more than enough evidence that the results of the election were likely affected.

3) The ALJ excluded the Employer's evidence regarding the background of the parties' dispute regarding the reimbursements and evidence proving that SEIU's reimbursement checks were incorrect. See Tr. Vol I, 67:21-69:17; 70:22-79:5;80:21-81:20; 82:14-83:11. The ALJ excluded the employers evidence in this regard and yet relied heavily in her Report upon the purported history between the parties and based her finding against the Employer upon this incomplete history.

EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO FINDING ON OBJECTION 3

Employer Objection 3 relates to the Union attempt to bribe and coerce employees into voting for the Union by mailing checks in varying amounts to employees' homes. The Union purported that the checks were dues reimbursement checks. By its own admission, the Union mailed checks to at least 126 bargaining unit employees' homes on April 10, 2008, just two weeks before the election with no explanation and no cover letter. The Union presented absolutely no evidence and provided no witnesses to testify regarding how the check amounts were calculated or why they chose to provide the checks just before the election, despite a previous agreement not to do so. More importantly, the Union's vague and unsubstantiated argument that the checks were for dues reimbursement amounts to which the employees were entitled is demonstrably false. Each of the 126 checks the Union sent out was for greater amounts, up to $355.00 more, than the amounts to

which employees were actually entitled. Furthermore, a number of employees who were not owed any reimbursement received checks. In addition, a number of employees who were owed reimbursements did not receive them, including known decertification supporters and terminated employees. Essentially, the Union chose to send out the exaggerated reimbursement checks only to employees who might would vote for the Union. The Employer excepts to the ALJ's entire ruling recommending that the Employer's Objection Number 3 be overruled for the reasons set forth in its closing brief. In addition, the Employer sets forth specific argument below regarding three specific issues raised by the ALJ's Report.

1) The ALJ relies upon *EFCO Corp.*, 185 NLRB 220, 221 (1970), and only *EFCO,* in holding that the permissible and/or obligatory union action is not objectionable election conduct simply because it is motivated by the union's desire to present itself as a more attractive candidate" and in holding that "The Union has a protected power to regulate its membership affairs and to resolve grievances." (Report at pg. 8 and 9). However, *EFCO*'s holding that "the alteration in dues structure was an otherwise permissible exercise by the Union of its protected power to regulate its membership affairs" was overruled by *Savir Mfg. Co.*, 414 U.S. 270, 277-278 (1973) and *Children's Services International, Inc.*, 2004 NLRB Lexis 290 at *9, which held that SEIU's dues rebates provided just prior to an election tended to unlawfully influence the outcome of an election, despite the fact that the rebates were not tied to the employees' vote in the upcoming election. Therefore, in making her recommendation, the ALJ has inexplicably and impermissibly relied upon a case that has been overruled by subsequent Board law. Neither the Union, nor the ALJ cited to any case law, other than *EFCO*, which has been overruled, to support this fundamental argument.

The ALJ's reliance upon *EFCO* is also misplaced because the Union's provision of checks in excess of the reimbursement amounts owed to the employees was clearly not permissible and/or obligatory union action. As set forth in the Employer's Post Hearing Brief, SEIU's distribution of checks well in excess of the amounts owed to the employees, were clearly not benefits already owed to the employees. In fact, the ALJ admits that the checks were for greater amounts than the amounts to which the employees were entitled and were sent to employees who were not owed a reimbursement. (See Report pg. 7 indicating that the employees were overpaid by $12,834.84).

The ALJ also acknowledges that the Union's checks were not for the correct amounts as the Union did not have the information necessary to correctly calculate the amounts. For example, the Report states "At the hearing, the Union explained neither the basis for its refund calculations nor its distribution timing. However, it is reasonable to infer that the Union calculated the refunds without the benefit of the payroll information it had earlier sought and that the closely approaching decertification election hastened dues refund distributions." The ALJ's report also states "The fact that prior to April 10 the Union had been waiting for the Employer to furnish it with payroll information from which the Union could formulate refunds, coupled with the fact that the Union did not have the requested payroll information when it issued the refunds, raises a suspicion that the Union may have rushed to refund overdeducted dues without having a thorough basis for guaranteeing refund accuracy. The Employer's overdeduction calculations tend to support such a suspicion, as does the absence of evidence as to what information the Union based its refund calculations on." (Report pgs. 8-9)

The ALJ cites no authority for the proposition that payments made to bargaining unit employees in excess of what the employees are due is not financial benefits simply because it is purported to be owed to the employees. In addition, the ALJ ignores substantial case law setting forth the well settled principal of Board law that conferring a benefit to which employees are not entitled right before an election is likely to have an impermissible effect on the results of an election. See, .e.g., *Children's Services International, Inc.*, 2004 NLRB Lexis 290 at *9; *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967); See, *Revco D.S., Inc. (DC) v. NLRB*, 8 30 F 2d 70, 72 (6th Cir. 1987) (union offer of $100); *General Cable Corp., supra* 170 NLRB 1682 ($5 gift certificate to employees by the union before the election was an objectionable inducement to vote for the union); *Mailing Services, Inc. and Food and Commercial Workers, Local 888*, 293 NLRB 465 (1989); *Freud Banking Co. v. NLRB*, 165 F.3d 928, 160; *McCarty Processors Inc.* and *McCarty Farms Inc.* and *Flossie Hawkins*, 126 LRRM 1211 (1987); *Owens-Illinois,* 271 NLRB 1235 (1984), and *General Cable Corp.*, 170 NLRB 1682 (1968); *Star Inc., Lighting the Way* and *New England Health Care Employee's District 1199*, 179 LRRM 1387 (2006).

As set forth in the Employer's Closing brief, such a grant of a benefit is impermissible, even

if it is not conditioned upon a showing of support for the union. See, e.g., *Children's Services International, Inc.*, 2004 NLRB Lexis 290 at *9; *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967); *Mailing Services, Inc. and Food and Commercial Workers, Local 888*, 293 NLRB 465 (1989); *Freud Banking Co. v. NLRB*, 165 F.3d 928, 160. Because SEIU provided the employees' with reimbursements that were in excess of the amounts they were entitled, the checks were clearly not permissible or obligatory union action. The fact that the checks were for the incorrect amounts, were universally overpayments to the employees and were provided to employees not due any reimbursement cuts directly against the ALJ's holding that the checks were a permissible/obligatory union action and indicates that they were a benefit bestowed upon the employees just before an election and were thus objectionable.

2) The ALJ based her decision in part upon her finding that "there is no evidence the refunds were likely to cause fear among employees or to generate a feeling of moral indebtedness to the Union." (Report at pg. 9). However, as set forth in the Employer's Post Hearing Brief, an employer is not required to present direct evidence of changes in employees' votes. An employer is only required to provide evidence that the Union's action was likely to result in an impermissible influence upon the employees, sufficient to affect the results of the election. See, e.g., *Harborside Health Care, Inc.*, 343 NRLB 906, 908-909 (2004)(holding that a party need not introduce proof of actual coercion in order to show that a parties' conduct likely affected the results of an election and thus warranted overturning the election), *Nestle Ice Cream v. NLRB*, 46 F.3d 578 (148 LRRM 2454) (6th Cir.1995); *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975) (holding that the "evil which arises from excessive Union payments to employees during an election campaign is that they tend to influence votes without relation to the merits of the election."); *Children's Services International, Inc.*, 2004 NLRB Lexis 290 at *13; *Freud Banking Co. v. NLRB*, 165 F.3d 928. The ALJ ignores this case law which is directly on point and holds the Employer up to an impossible standard that is not mandated by the relevant case law.

3) The ALJ routinely excluded the Employer's evidence regarding the background of the parties' dispute about the reimbursements and background evidence proving that SEIU's reimbursement checks were incorrect. In addition, the ALJ excluded testimony and evidence from

the Employer showing that the purported delay by the Employer in providing the payroll information was not due to any wrongdoing on the part of the Employer and that the Employer had fully cooperated with the Union in attempting to resolve the dues deduction issue. See Tr. Vol I, 67:21-69:17; 70:22-79:5;80:21-81:20; 82:14-83:11. The ALJ excluded the Employer's evidence in this regard and yet relied heavily in her Report upon the incomplete history between the parties that she did allow into the record. (See, *e.g.*, Report pgs. 3-7)

For example, the ALJ relied upon the history of the parties' disagreement regarding the reimbursements in finding that the provision of reimbursements were permissible and obligatory union action, stating "For nearly two years prior to the decertification election, the Employer and the Union had worked toward resolving the Union's class action grievance concerning overdeducted dues, resulting in a conclusion that certain employees were entitled to refunds of overdeducted dues. That conclusion was reached well before the critical period." (Report pg. 8). In addition, the Report states it is clear "that by February 29 . . . the Union anxiously awaited payroll information the Employer had agreed to provide . . ." Report pg. 7. Yet the ALJ precluded the employer from providing evidence regarding the history of these communications or an explanation as to why it took the employer considerable time to prepare the payroll information and provide it to the Union.

CONCLUSION

Based upon the foregoing, the Hospital respectfully requests that the Board sustain its Exception regarding the Hospital's Objection Number 3 and determine that the Hospital's Objection Number 3 is grounds for directing a new election.

DATED: April 21, 2009

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7th Floor, Los Angeles, California 90067.

On April 21, 2009 I served the document(s) described as **GOOD SAMARITAN HOSPITAL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE LANA PARK'S REPORT AND RECOMMENDATIONS ON OBJECTIONS AND BRIEF IN SUPPORT THEREOF** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

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☒ (BY EMAIL) I caused to be transmitted each document listed herein via the email address(es) listed above.

Executed on April 21, 2009 at Los Angeles, California.

TIFFANY DAY

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