UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

HACKLEY VNS & HOSPICE, INC.

Respondent Employer,

and **NLRB Case No. GR-7-RC-23277**

MICHIGAN NURSES ASSOCIATION

Petitioner.

EMPLOYER'S EXCEPTIONS TO REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON OBJECTIONS TO ELECTION

I. INTRODUCTION

On May 18, 2009 the Petitioner, Michigan Nurses Associated ("MNA" or "Union"), filed a representation petition with the National Labor Relations Board ("Board"), requesting an election among all Registered Nurses at Respondent, Hackley VNS Home Care & Hospice, Inc. ("Employer" or "VNS") located at 888 Terrace Street, Muskegon, Michigan. On July 10, 2009, a Secret Ballot Election was conducted, and the tally of ballots showed 23 "no" votes were cast, as compared to 26 "yes" votes for the MNA.

On July 16, 2009, VNS timely filed objections to the July 10, 2009 representation election. One of the reasons for filing objections is the fact that a competing union, SEIU Healthcare Michigan ("SEIU"),[1] will soon, by operation of labor law, represent the VNS Registered Nurses, rendering the election results entirely moot. VNS, through its legal counsel, raised these practical concerns to the Board Agent in charge of the election on June 26, 2009, and requested the Board to cancel the July 10 election.

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[1] SEIU has been the certified representative of all full-time and part-time professional employees, including registered nurses, licensed practical nurses, home health aides, social workers, occupational therapists, physical therapists, and speech pathologists employed by Mercy General Health Partners Amicare Homecare d/b/a Mercy Home Care Muskegon at 684 Harvey Street, Suite 101, Muskegon, Michigan since approximately 2005.

Prior to and during the election campaign, Trinity Home Health Services ("THHS"), a Ministry Organization of Trinity Health[2], has worked steadily to merge VNS into THHS' local Muskegon agency called Mercy Home Care Muskegon ("Mercy") which has a pre-existing bargaining unit represented by SEIU that covers among various job classifications, including Registered Nurses.

Prior to the July 10 election, the SEIU advised the Board that it would ultimately represent the VNS employees after the planned merger and requested that the July 10 election involving VNS and MNA not occur. VNS subsequently confirmed with the Board on June 26, 2009 that following the merger with THHS, its RNs and other employees would be accreted into a single bargaining unit represented by the SEIU. Like the SEIU, VNS also requested that the July 10th election not take place because it was unnecessary and futile in light of the planned merger that would occur very shortly after the election.

The Board ignored both requests and held the July 10th election as originally scheduled – an election that was won by the MNA. On August 14, 2009 the Acting Regional Director issued a Report and Recommendation on Objections to Election ("RD Report") dismissing the Employer's Election Objections. It remains VNS's position that the election was unnecessary and futile and, that the Regional Director has ignored these realities in rendering his decision. The Regional Director should not have certified the election results, but instead allowed the SEIU to represent the impacted employees as required by current labor law. Especially since the VNS Registered Nurses will be accreted into the pre-existing SEIU bargaining unit in just a few days, starting on September 1, 2009. The Board should not devote any more of its time and resources to a representation proceeding that will soon be rendered moot.

[2] Trinity Health in Novi, Michigan is the fourth largest fully integrated Catholic Healthcare institution in the United States, operating 24 Ministry Organizations across the United States, one of which is THHS and another of which is Mercy General Partners or MHP.

Aside from these practical reasons for upholding the Election Objections, the Regional Director also refused to consider, misapplied, or misconstrued critical evidence supporting the Employer's Election Objections. These errors, which are discussed further below, caused the Regional Director to improperly conclude that: 1) the Employer did not seek to have the Stipulated Election Agreement set aside; 2) there are no special circumstances justifying rescission of the Stipulated Election Agreement; and 3) the Stipulated Election Agreement does not contravene the NLRA or Board policy. Based on these erroneous conclusions, the Regional Director improperly denied the Employer's Election Objections. Finally, the Regional Director did not consider all of the Employer's Election Objections, specifically Objection Nos. 6 and 7.

II. DISCUSSION

A. The Employer Sought To Withdraw From The Stipulated Election Agreement.

The Employer submitted evidence that on June 26, 2009, its legal counsel requested the Board, through the Board Agent responsible for conducting the election, to not hold the July 10 election. The request was a clear and unequivocal indication that the Employer wanted the Board to revisit the terms of the Stipulated Election Agreement and cancel the election. Although the Regional Director has questioned the Employer's motives and wondered why it made its request, the motives underlying the Employer's request are not relevant. The bottom line is that the Employer verbally requested the Board to allow it to withdraw from the terms of the Election Agreement, namely by having the Board reconsider the agreed upon July 10 election date. The Board inexplicably never responded to the Employer's request.

The Regional Director, although conceding that a party may request to withdraw from an election agreement, he nevertheless ignored the Employer's verbal request altogether by stating "such informal remarks were not cognizable motions to set aside the Stipulated Election

Agreement." (RD Report at 5, 6). In doing so, the Regional Director cited no legal authority to support his finding that the Employer's verbal statements to the Board Agent were insufficient. There are also no Board policies or procedures specifically requiring an Employer to submit a written request or "formal" motion to withdraw from a Stipulated Election Agreement as the Regional Director has required in this case. (RD Report at 4).

The Regional Director committed further error by completely ignoring the evidence submitted by the Employer in support of its Election Objections and concluding that "the Employer did not attempt to withdraw from the Stipulated Election Agreement." (RD Report at 6). The evidence clearly shows otherwise. Based on the evidence provided by the Employer in support of its Election Objections, it is clear that the Employer's request to the Board Agent responsible for conducting the election to not hold the election on July 10 constituted a valid request to withdraw from the Stipulated Election Agreement. Since the Regional Director improperly concluded that the Employer never sought to withdraw from the Stipulated Election Agreement, the RD Report should be reversed and the Employer's Objections granted.

B. Special Circumstances Justify Rescission of the Stipulated Election Agreement.

"It is the practice and policy of the Board that a party may withdraw from an election agreement after approval of the agreement, upon an affirmative showing of unusual circumstances." *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 (1979). In refusing to find "unusual circumstances" the Regional Director relied upon several erroneous findings and a fundamental misunderstanding of the facts which made him fail to appreciate the unique factual situation presented in this case. The Regional Director mistakenly found that a merger between VNS and THHS was "mere conjecture," and "the Employer's pleadings and evidentiary proffers suggest that a merger was long on the horizon." (RD Report at 7).

The Regional Director also stated that in the event a merger took place it would not occur until fiscal year 2010 (RD Report at 4). The fiscal year 2010 runs from September 1, 2009, through August 31, 2010. Thus, the evidence shows that the Employer is scheduled to and, in fact, will implement its merger starting September 1, 2009 -- less than two months after the July 10 election. This evidence contradicts the Regional Director's findings that a merger was "long on the horizon" and "mere conjecture." The evidence shows not only that a merger was going to occur shortly after the election, but that it was in the final stages of the planning process and imminent. Once the merger occurs, the VNS RNs will go through a hiring process and ultimately be employed by a new entity, Mercy, which already recognizes the SEIU as the collective bargaining representative of its RNs. The merger will also result in significant changes to the VNS RNs terms and conditions of employment. Thus, the circumstances of this case are certainly unique and the Board's decision to hold an election, particularly where the results are going to be moot and result in the absurdity of Mercy having to recognize and bargain with two separate unions representing the same group of its employees, RNs.

The Regional Director's failure to properly understand the facts, namely that the merger was undisputedly going to happen and happen very soon after the election, and properly appreciate the uniqueness of the facts presented in this case resulted in him erroneously finding that no special circumstances existed to rescind the Stipulated Election Agreement. Since the Regional Director's decision was erroneous, the RD Report should be reversed and the Employer's Objections granted.

C. The Stipulated Election Agreement Is Contrary to the NLRA and Board Policy.

Based largely on the foregoing arguments, the Employer contends that the Regional Director improperly ruled that the Stipulated Election Agreement does not contravene the NLRA

or Board policy. The Stipulated Agreement, specifically the July 10 election date that the Employer was mandated to abide by, is indeed contrary to the NLRA and Board Policy. On June 26, 2009, the Employer objected to the July 10 election date – a term contained in the Stipulated Election Agreement. The Board's refusal to respond to the Employer's request, insistence upon maintaining the July 10 election, and decision to ignore the special circumstances that exist in this matter due to the planned merger shortly after the election resulted in the Employer being required to unnecessarily comply with a July 10 election date.

Since the Board required the Employer to unnecessarily participate in an election it attempted to cancel before the election date and ignored its own precedent by not rescinding the agreement due to special circumstances, the Board has acted contrary to the Act and Board Policy. The Employer was improperly compelled, through the July 10 election date in the Stipulated Election Agreement, to unnecessarily participate in a representation election. As a result, the Regional Director's decision should be reversed and the Employer's Objections granted.

D. The Regional Director Did Not Consider All of The Employer's Objections.

Although the Regional Director referenced all seven of the Employer's Election Objections (RD Decision at 4), he did not address Objections 6 and 7 in his decision. Objection 6 alleges that the Region failed to follow established procedures and regulations in processing the petition. Objection 7 protests any and all conduct that was objectionable during the election campaign. Although the Board never responded to the Employer's request to not proceed with the election, the Regional Director never addressed, or answered why its Board Agent never responded. He also never discussed Objection 6, or explained why there was no basis for him to conclude that the Region did not follow established policies and procedures while processing the

petition. As discussed above, the existence of special circumstances and the Board Agent's failure to respond to the Employer's verbal request to withdraw from the Stipulated Election Agreement are not consistent with Board policy or precedent. At the very least, the objectionable conduct is covered by Objection 7, which was never addressed. As a result, the Regional Director's decision with respect to dismissing Objections 6 and 7 should be reversed and the Employer's Objections granted.

III. CONCLUSION

Based on the foregoing, the Employer requests the Board to reverse the RD Report, grant the Employer's Election Objections, and dismiss the representation petition in this matter.

Respectfully submitted,

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