

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

MARS HOME FOR YOUTH

and

Case 6-CA-37135

PENNSYLVANIA SOCIAL SERVICES UNION,
LOCAL 668, A/W SERVICE EMPLOYEES
INTERNATIONAL UNION

MOTION FOR SUMMARY JUDGMENT

Counsel for the Acting General Counsel, pursuant to Sections 102.24, 102.26 and 102.50 of the Board's Rules and Regulations, Series 8, as amended, makes this motion to transfer this case to the Board and to grant judgment against Respondent based on the pleadings and related documents which accompany this Motion. In support of this Motion, Counsel for the Acting General Counsel submits that the pleadings raise no material issues of either fact or law, and states the following:

1. On September 9, 2009, Pennsylvania Social Services Union, Local 668, a/w Service Employees International Union (herein called the Union) filed a petition and on September 28, 2009 filed an amended petition in Case 6-RC-12692, seeking an election among all full-time and regular part-time Residential Advisors and Assistant Supervisors employed by Mars Home for Youth (herein called the Employer or Respondent) at its Mars, Pennsylvania facility and excluding all office clerical employees, therapist, teachers, and guards, professional employees and supervisors, as defined by the National Labor Relations Act.

2. Following a hearing lasting nine days, beginning on September 29, 2009 and ending on October 22, 2009, that resulted in over 2,000 pages of transcript and voluminous exhibits, on December 3, 2009, the Regional Director for Region Six of the National Labor

Relations Board issued a Decision and Direction of Election finding that Respondent is an employer engaged in commerce within the meaning of the National Labor Relations Act, as amended (herein called the Act), that the Union is a labor organization claiming to represent certain employees of Respondent, and that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time residential advisors and assistant residential program managers employed by the Employer at its Mars, Pennsylvania, facility; excluding office clerical employees, therapists, teachers and guards, other professional employees and supervisors as defined in the Act and all other employees.

3. On or about December 17, 2009, Respondent timely filed with the Board a Request for Review of the Regional Director's Decision and Direction of Election. Thereafter, on or about December 28, 2009, the Union filed an opposition to Respondent's Request for Review of the Regional Director's Decision and Direction of Election.

4. On January 5, 2010, the election was held as scheduled and all ballots were impounded.

5. On August 4, 2010, the Board issued its Order finding that Respondent's Request for Review raised no substantial issues warranting review. In denying review, the Board found that the Employer had failed to establish that Assistant Residential Program Managers (ARPM's) have ever exercised independent judgment with regard to any kind of written discipline or to the effective recommendation of discipline.

6. On August 9, 2010, the ballots were tallied and a majority of the employees in the Unit described above in paragraph 2 designated and selected the Union as their representative for the purposes of collective bargaining with Respondent.

7. Respondent filed no objections to the conduct of the election or to conduct affecting the results of the election.

8. On August 19, 2010, the Acting Regional Director for Region Six issued and served on the parties a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of the employees employed by Respondent in the Unit described above in paragraph 2.

9. At all times since August 19, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit described above in paragraph 2.

10. On or about October 4, 2010, and continuing to date, and more particularly by email dated October 4, 2010, (a copy of which is attached hereto as Exhibit "A"), the Union requested, and continues to request, that Respondent bargain collectively with it as the exclusive collective-bargaining representative of the employees in the Unit described above in paragraph 2 with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

11. Since on or about October 21, 2010, and continuing to date, and more particularly by letter dated October 21, 2010, (a copy of which is attached hereto as Exhibit "B"), Respondent has failed and refused, and continues to fail and refuse to recognize and bargain collectively with the Union as the duly certified exclusive collective-bargaining representative of all employees in the Unit described above in paragraph 2.

12. On October 25, 2010, the Union filed an unfair labor practice charge, and on November 1, 2010, the Union filed an amended unfair labor practice charge, against Respondent in Case 6-CA-37135, alleging violations of Sections 8(a)(1) and (5) of the Act by Respondent's failure and refusal to recognize and bargain collectively with the Union. On November 4, 2010, the Regional Director for Region Six, acting for and on behalf of the Board, issued a Complaint on the basis of that charge. The Complaint alleges, inter alia, the appropriateness of the Unit, majority designation evidenced by Board certification, the request for bargaining and the refusal to bargain as set forth above in paragraphs 2, 8, 9, 10 and 11.

The Complaint further alleges that Respondent thereby violated, and is violating Sections 8(a)(1) and (5) of the Act.

13. On November 18, 2010, Respondent filed its Answer to the aforesaid Complaint admitting:¹

- (a) Receipt of the charge filed by the Union in this matter;
- (b) Facts and conclusions as to commerce;
- (c) The labor organization status of the Union;
- (d) The supervisory and agency status of Respondent's Director of Human

Resources, Elizabeth S. Hays;

(e) The certification of the Union as the exclusive collective-bargaining representative of the Unit;

(f) That on or about October 4, 2010, the Union, by email, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the Unit;²

(g) That since on or about October 21, 2010, Respondent, by letter, has failed and refused recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

14. Respondent's Answer denies the allegations contained in paragraphs 8 and 10 of the Complaint, asserting as affirmative defenses that the Unit as found by the Regional Director and the Board is not an appropriate unit within the meaning of Section 9(b) of the Act, and that the certification is invalid because alleged supervisors were included among the eligible employees and that number was sufficient in number to affect the outcome of the election.

¹ The Answer admits paragraphs 1, 2, 3, 4, 5, 6, 7, 9 and 12.

² The Answer denies the averments as stated but admits that on August 4, 2010 the Union requested to arrange a meeting to begin collective bargaining. On November 19, 2010 Respondent's attorney orally confirmed that the request actually was made on October 4, and that Respondent's reference to August 4 was an inadvertent error.

However, Respondent has failed to state with any specificity the basis for its contention that the Unit, found by the Regional Director and the Board, is not an appropriate unit within the meaning of Section 9(b) of the Act. Moreover, it is submitted that the determination of the Union's Section 9(a) status, as alleged in paragraph 10 of the Complaint, is a legal issue not requiring an evidentiary hearing.

15. Respondent further denies that its actions constitute a violation of Sections 8(a)(1) and (5) of the Act or that this conduct affects commerce within the meaning of the Act. Again, these are legal conclusions not requiring an evidentiary hearing in this matter.

16. Respondent's Answer does not allege that there is any newly discovered or previously unavailable evidence to support Respondent's assertion that the unit, found by the Regional Director and the Board, is not an appropriate unit within the meaning of Section 9(b) of the Act. Nor does the Answer allege the existence of any special circumstances justifying a reconsideration of the issues raised in the hearing which preceded the issuance of the Regional Director's Decision and Direction of Election.

17. The Board and the Courts have consistently held that issues which were raised, or could have been raised, in a prior representation proceeding cannot be relitigated in a subsequent unfair labor practice proceeding arising out of an employer's attempt to challenge the Board's finding in this regard. *Magnesium Casting Company v. NLRB*, 401 U.S. 137 (1971), reh. den. 402 U.S. 925 (1971); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Country Ford Trucks, Inc.*, 330 NLRB 328 (1999); *Lily Industrial Coatings, Inc.*, 300 NLRB No. 79 (1990); *California Teamsters Local Union 911 (General Felt Industries)*, 275 NLRB 980, 981 (1985) enf. 794 F.2d 682 (9th Cir. 1986) (unpublished); *Frontier Hotel*, 242 NLRB 590, 591 (1979), enf. denied on other grounds sub nom. *Summa Corp. v. NLRB*, 625 F.2d 293 (9th Cir. 1980). With regard to Respondent's assertion that the inclusion of alleged supervisors in the voting group had a coercive effect on the outcome of the election, it is clear that Respondent was afforded the opportunity to file Objections to the election and that it failed to do so.

18. Finally, Respondent does not advert to, nor do any special circumstances exist, requiring the Board to re-examine its determinations made in Case 6-RC-12692, or requiring that Respondent be exempted from enforcement of Section 102.67 (f) of the Board's Rules and Regulations and Statements of Procedures, Series 8, as amended. *Super K-Mart*, 322 NLRB 583 (1996); *Pittsburgh Plate Glass Co. v. NLRB*, supra.

WHEREFORE, Counsel for the Acting General Counsel respectfully moves:

1. That the Board grant this Motion for Summary Judgment;
2. That the Board find that the Unit described above in paragraph 2 constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that the Union is the duly certified bargaining representative of the employees in said Unit;
3. That all material allegations in the Compliant with Respondent has admitted in its Answer, or which are supported by the record herein, be deemed to be admitted to be true; and
4. That Respondent be further found to have violated Sections 8(a)(1) and (5) of the Act in the manner alleged in the instant Complaint, and that the Board issue an appropriate remedial Order.

Dated at Pittsburgh, Pennsylvania, this 23rd day of November 2010.

Respectfully submitted,



 Clifford E. Spungen
 Counsel for the Acting General Counsel

NATIONAL LABOR RELATIONS BOARD
 Region 6
 William S. Moorhead Federal Building
 1000 Liberty Avenue, Room 904
 Pittsburgh, Pennsylvania 15222

Attachments

Subj: **Fwd: Bargaining Dates - Mars Youth Home**
Date: 10/28/2010 9:38:14 A.M. Eastern Daylight Time
From: Mccordm668@aol.com
To: SmithAl668@aol.com

From: Mccordm668@aol.com
To: randrykovitch@cohenlaw.com
CC: SmithAl668@aol.com
Sent: 10/4/2010 10:39:53 A.M. Eastern Daylight Time
Subj: Bargaining Dates - Mars Youth Home

Dear Ron,

Per our conversation I am sending the proposed bargaining dates:

October 18, 19, 26, 28
Nov. 4, 9, 10, 16, and 17

Please let me know your client's availability.

Sincerely,

Al J. Smith, Jr.
Business Agent
SEIU 668 PSSU
412-201-4407 - Office
412-201-4840 - Fax
412-605-4635 - Cell
smithal668@aol.com

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performance

RONALD J. ANDRYKOVITCH
Direct Dial 412-297-4936

E-mail: randrykovitch@cohenlaw.com
Direct Fax 412-209-1847

October 21, 2010

Via Electronic Mail: smithal668@aol.com

Al J. Smith Jr., Business Agent
SEIU Healthcare
429 Forbes Avenue, Ste 1600
Pittsburgh, PA 15219-1623

Re: Mars Home for Youth

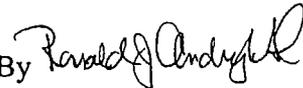
Dear Mr. Smith:

This is in response to your recent request to schedule a meeting to commence contract negotiations between Mars Home for Youth ("MHY") and the Pennsylvania Social Services Union, Local 668 a/w Service Employees International Union.

After careful consideration, MHY has decided that it will exercise its right to appeal the NLRB Certification in NLRB Case 6-RC-12692. MHY feels very strongly that the NLRB has erred by including the position of Assistant Program Manager in the collective bargaining unit. Thus, MHY declines your invitation to meet to begin negotiations.

Sincerely,

COHEN & GRIGSBY, P.C.

By 

Ronald J. Andrykovitch

RJA:mjp

cc: Ms. Elizabeth S. Hays

EXHIBIT B

625 Liberty Avenue • Pittsburgh, PA 15222-3152 • Main 412.297.4900 • Fax 412.209.0672

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