UNITED STATES OF AMERICA
Before The
NATIONAL LABOR RELATIONS BOARD

MARS HOME FOR YOUTH,	)	
	)	
and	)	
	)	**Case No. 6-CA-37135**
PENNSYLVANIA SOCIAL SERVICES UNION, LOCAL 668, a/w SERVICE EMPLOYEES INTERNATIONAL UNION	)	
	)	

CHARGING PARTY'S BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Respondent, Mars Home for Youth, is contesting the certification of the Charging Party and Movant, Pennsylvania Social Services Union, Local 668, a/w Service Employees International Union, CTW, CLC ("Union"), as exclusive collective bargaining representative of an appropriate unit of the Respondent's employees. Because the Respondent raises no genuine factual issues and is improperly attempting to relitigate issues litigated in the underlying representation proceeding, the Union and the Acting General Counsel are entitled to summary judgment.

II. RELEVANT FACTS

On September 9, 2009, the Union filed a Petition (Case No. 6-RC-12692) seeking to be certified as the exclusive collective bargaining representative of an appropriate unit of employees of the Respondent. In lengthy representation proceedings before Region Six, the Employer contended that individuals in the job classification of Assistant Residential Program Manager ("ARPM") were supervisors within the meaning of Section 2(11) of the Act. The supervisory

status of ARPMs was the only issue contested in the representation hearing, which spanned nine dates between September 29, 2009, and October 22, 2009, resulting in a transcript of more than 2,200 pages. The Respondent and the Union each examined and cross-examined numerous witnesses, introduced dozens of documents as exhibits and filed post-hearing briefs. In a Decision and Direction of Election dated December 3, 2009, the Regional Director concluded that ARPMs are not supervisors and found the proposed unit appropriate for the purposes of collective bargaining.

The Employer filed a Request for Review of the Decision and Direction of Election, arguing that the Regional Director had erred in concluding that ARPMs were not supervisors. The Union filed a Statement in Opposition. A representation election took place on January 5, 2010, but the ballots were impounded pending resolution of the Request for Review. The Respondent did not file post-election objections. On August 5, 2010, the Board denied the Request for Review in an unpublished decision, and on August 9, 2010, the ballots were tallied. Having received a majority of votes, the Union was certified on August 19, 2010, as exclusive collective bargaining representative of an appropriate unit consisting of "[a]ll full-time and regular part-time residential advisors and assistant residential program managers employed by Mars Home for Youth 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."

On or about October 4, 2010, the Union requested by e-mail that the Respondent commence bargaining with the Union, proposing nine dates for bargaining meetings. On October 21, 2010, the Respondent, by letter from its counsel, refused to bargain. The letter stated, in relevant part:

> 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.

Letter from Ronald J. Andrykovitch, Esquire, to Al J. Smith Jr., Business Agent (Oct. 21, 2010). Since that date, the Respondent has continued to refuse to bargain with the Union. On October 25, 2010, the Union filed a Charge of Unfair Labor Practices[1] alleging the Respondent's refusal to bargain with it. A Complaint issued on November 4, 2010.

In its Answer, the Respondent admitted[2] its refusal to bargain with the Union as collective bargaining representative of the unit. (Answer ¶ 12.) The Respondent denied, *inter alia*, that the unit was appropriate for collective bargaining (*id*. ¶ 8) and that the Certification was "proper, correct or legally enforceable" (*id*. ¶ 9). The Respondent denied other allegations generally. (*Id*. ¶¶ 10, 13-15.) The Answer raised three defenses: (1) The Respondent did not violate its bargaining obligation because the unit is not appropriate for collective bargaining; (2) the certification of the unit is invalid because supervisors were included in the unit in a number sufficient to affect the outcome of the election; and (3) the certification is invalid because "the inclusion of supervisors in the voting group had a coercive effect on the outcome of the election." (*Id.* at 2-3.)

The Union and counsel for the Acting General Counsel filed Motions for Summary Judgment. On November 30, 2010, the Board issued an Order transferring this proceeding from the Region and a Notice to Show Cause by the Motions should not be granted.

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[1] The Charge was amended on or about October 29, 2010.

[2] The Respondent also admitted, *inter alia*, its status as an employer engaging in commerce within the meaning of the Act (Answer ¶ 5), the Union's status as a labor organization (*id*. ¶ 6), the Union's certification as collective bargaining representative of a unit of the Respondent's employees (*id*. ¶ 9),

III. ARGUMENT

A. The pleadings present no genuine factual issues.

Summary judgment is appropriate when the pleadings present no genuine factual issue requiring a hearing. Board Rules & Regs. § 102.24(b). Because no factual issues are present, the Union's and Acting General Counsel's Motions for Summary Judgment should be granted.

1. The Respondent admits the essential allegations of the Complaint.

The Respondent admits its refusal to bargain with the Union as collective bargaining representative of a unit of its employees. It further admits its status as an employer under the Act, the Union's status as a labor organization and the Union's certification as collective bargaining representative of a unit of the Respondent's employees. These facts are sufficient to establish that the Respondent committed an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees.…" 29 U.S.C. § 158(5).

2. The Respondent's general denials must be deemed admissions.

The Respondent generally denies a number of the Complaint's allegations. "[A]ny allegation in the complaint not specifically denied or explained in an answer filed … shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown." Board Rules & Regs. § 102.20. Therefore, the Board must find the Respondent to have admitted all allegations not specifically denied. The general denials, which are deemed admissions, raise no genuine factual issues.

3. The Respondent's denials raise legal arguments rather than factual issues.

To the extent the Respondent specifically denies allegations, it raises legal arguments rather than factual issues requiring resolution through a hearing. The Respondent denies, *inter*

alia, the appropriateness of the unit and the legality of the certification. These "denials" constitute legal arguments, rather than factual disputes, and do not preclude summary judgment.

4. The Respondent did not file post-election objections and adduces no evidence that the results of the election were tainted.

Among its defenses, the Respondent alleges that "the inclusion of supervisors in the voting group had a coercive effect on the outcome of the election." (Answer at 3.) Within seven days of an election, a party may file objections "to the conduct of the election or to conduct affecting the results of the election" and evidence in support thereof. Board Rules & Regs. § 102.69(a). The Respondent did not file such objections, nor does it adduce any evidence that the results of the election were actually tainted. This bare allegation fails to meet the "heavy burden" necessary to challenge the results of a representation election. *See*, *e.g.*, *NLRB v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843, 851 (8th Cir. 2005). The Respondent cannot rely on unspecified conduct, to which it did not timely object, in defending against a refusal-to-bargain charge.

B. The Respondent is improperly attempting to relitigate issues that were fully litigated in the underlying representation proceeding.

When a party has a full opportunity to present evidence and participate in a representation proceeding, it may not relitigate the same issue(s) in an unfair labor practice proceeding absent newly discovered or available evidence. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161-62 (1941). "Nothing more appearing, a single trial of the issue was enough." *Id*. The Respondent had ample opportunity to present its evidence regarding the supervisory status of ARPMs during the lengthy representation proceedings. The voluminous record demonstrates it took full advantage of that opportunity. The Respondent has not offered to adduce any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require re-examination of the representation decision. *See*, *e.g.*, *Mountain City Nursing and*

Rehab. Ctr., 356 NLRB No. 44, slip op. at 1 (December 3, 2010). Therefore, the Respondent has raised no issue that is properly litigable in this unfair labor practice proceeding. *Id.* With such issues lacking, summary judgment is appropriate.

IV. CONCLUSION

The Respondent admits the essential allegations of the Complaint, and its specific denials raise only legal arguments rather than factual issues requiring a hearing. Given this lack of genuine issues, the Respondent is merely attempting to relitigate issues fully litigated in the underlying representation proceeding. This is inappropriate in an unfair labor practice proceeding. The Union and the Acting General Counsel are therefore entitled to summary judgment.

Respectfully submitted,

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Dated: December 14, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing CHARGING PARTY'S BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT has been served upon the following electronically this 14th day of December, 2010:

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