UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

VERITAS HEALTH SERVICES, INC. D/B/A CHINO VALLEY MEDICAL CENTER, **Employer** **and** **UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS NUHHCE, AFSCME, AFL-CIO,** **Charging Party.**	**CASE NO. 31-CA-29937** **RESPONSE TO OPPOSITION TO PETITION TO REVOKE SUBPOENA *DUCES TECUM***

I. INTRODUCTION

Veritas Health Services, Inc., d/b/a Chino Valley Medical Center ("Employer") hereby responds to the Regional Director's Opposition to Employer's Petition to Revoke Subpoena *Duces Tecum* dated December 16, 2010 ("Opposition").

A. Requiring the Employer To Produce Documents In Response To The Regional Director's Subpoena Will Violate The Employer's Right To Due Process of Law

1. The Board's Investigatory Subpoena Process Violates Due Process Because It Allows The General Counsel To Engage In Pre-Hearing Discovery While Denying The Charged Party The Equivalent Right

Due process demands that all parties be placed on an equal footing and have equivalent rights before a tribunal. The Board's rules permitting the utilization of subpoenas to obtain evidence to be presented at a representation or unfair labor practice hearing, returnable at

the hearing itself, satisfies this requirement because all parties have the same rights. For example, both the employer and the petitioner in a representation case have the right to subpoena evidence for a hearing pursuant to Section 102.66(a) of the Board's Rules and Regulations. Similarly, the respondent, the General Counsel and the charging party in an unfair labor practice case all have the right to subpoena evidence for a hearing pursuant to Section 102.31(a) of the Board's Rules and Regulations. However, and assuming *arguendo* that the issuance of a pre-complaint investigatory subpoena is permitted under the terms of the Act and the Board's Rules and Regulations,[1] a charged party has no corresponding right. Instead, only the Board or his agents are permitted to subpoena evidence at the investigatory stage of an unfair labor practice matter.

The lack of due process described above is exacerbated when, as here, the Board is called upon to rule on issues regarding a subpoena that was initially requested by the Board's own agent. One need look no further to the simultaneous filing with the Board of the Regional Director's Order Referring Petition to Revoke Subpoena Duces Tecum to the National Labor Relations Board ("Regional Director Order"), and the Regional Director's Opposition, to see the lack of due process that is inherent in the procedure being employed in this case. In proceedings in which due process is present, a tribunal issues an order. That order is then served on the parties to the proceeding, at which point the parties may respond to the order as appropriate. Here it is obvious that the Regional Director advised his agent, in advance and on an *ex parte* basis, that the Order would be filed with the Board, thereby allowing his agent to prepare the Regional Director's Opposition so it would be filed at the same time as the Order itself.

[1] The structure of the Board's Rules and Regulations strongly suggests that the provisions of Section 102.31(b) apply only after a complaint has been issued, not before.

Moreover, the Board is now called upon to rule on the legitimacy of the Subpoena even though that Subpoena was issued by the Board's own agent! See Order, exh. A [noting that Subpoena was requested by "a Board Agent of the National Labor Relations Board"]. The Employer can hardly expect a fair hearing on its Petition to Revoke[2] in these circumstances; at the very least, the process being utilized by the Board here certainly creates the impression of impropriety.

Although the Opposition references the Employer's due process contention, it does not otherwise address it. Opposition, p. 6. Moreover, while the Opposition cites numerous federal cases involving Board subpoenas, only one of those, *NLRB v. Martins Ferry Hospital Assn.*, 649 F.2d 445 (6th Cir. 1981), involves a pre-complaint investigatory subpoena. Additionally, the subpoena at issue in *Martins Ferry* only sought W-4 forms in order to verify employee signatures on union authorization cards and the employer therein did not raise a due process objection to the subpoena. Accordingly, *Martins Ferry* does not approve of the manner in which the Regional Director is attempting to utilize a Board subpoena in this matter.

In sum, the Employer's Petition to Revoke should be granted in its entirety because the use of an investigatory subpoena, at least in the circumstances of this case, violates the Employer's right to due process of law.

2. **The Regional Director Is Abusing The Investigatory Subpoena Process**

The Employer recognizes that the Board's *Casehandling Manual for Unfair Labor Practice Proceedings* ("Manual") contains provisions addressing the utilization of a pre-complaint investigatory subpoena in unfair labor practice cases. See, i.e., Manual at sec. 11770

[2] As noted at note 1 of the Employer's December 8, 2010 letter attached to the Regional Director's Order as Exhibit B, it is questionable whether the provisions of Section 102.31 require the filing of a "petition to revoke" to a pre-complaint investigatory subpoena. However, for purposes of this Response it will be assumed that the December 8 letter is properly considered a petition to revoke.

et seq. At the same time, even the Manual itself recognizes that its provisions do not have the force of law and are not binding. Id. at Purpose of Manual ["The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board"]. As most relevant here, however, even the Manual provides that an investigatory subpoena should only be utilized if necessary to allow an administrative determination of whether a complaint should be issued on a charge. Id. at sec. 11770. Here, the Opposition claims that the Charging Party Union has already "provided evidence that the Employer denied the Union access to its premises on various dates in July through October 2010 while allowing other non-employee entities access to the Employer's premises." Opposition, p. 2. If such evidence has in fact been presented, then the Regional Director has all the evidence he needs to make an administrative determination on the charge. Accordingly, the only purpose that can be served by the Regional Director's Subpoena is to allow the Regional Director, on behalf of the General Counsel, to engage in pre-hearing discovery of evidence that the Employer might present in defense of the allegations of the charge at a hearing before an Administrative Law Judge. It is black letter law that the Board does not permit pre-hearing discovery, yet that is exactly what the Regional Director is seeking by the Subpoena. For this additional reason the Employer's Petition to Revoke should be granted.

B. <u>Requiring The Employer To Produce Documents To The Regional Director Will Violate The Privacy Rights Of The Employer And Third Parties</u>

The Subpoena seeks documents detailing business transactions involving the Employer and third parties, including documents showing sales receipts. Subpoena, items C-H.[3]

[3] The Employer has already produced documents responsive to Item B and has also advised the Regional Director that documents responsive to Item A will be produced for inspection at the offices of counsel for the Employer or at the Region's offices upon the Regional Director's guarantee that the Employer's custodian of records will be properly reimbursed for doing so. See Declaration of Theodore R. Scott in Support of Response to Opposition to Petition to

Production of these documents will invade the privacy interests of both the Employer and those third parties with respect to private financial information. Moreover, absent a protective order precluding disclosure of such documents in response to a request for same made pursuant to the Freedom of Information Act, providing copies of these documents to the Regional Director in response to the Subpoena will allow anyone to obtain copies of the documents and do with them whatever that individual or entity wishes to do, including posting them on the internet. Indeed, it is for this reason that the Employer has refused to provide the Regional Director with a copy of its lease with the owner of the Hospital property. Declaration of Theodore R. Scott in Support of Response to Opposition to Petition to Revoke Subpoena Duces Tecum ("Scott Decl."), exh. 2.

The privacy objections raised in the Employer's Petition to Revoke are valid and require that the Petition be granted. Indeed, even the *Martins Ferry* court recognized that the Board is not entitled to information that contains private financial information. Id. at 449 [court orders that private information contained on W-4 forms be redacted prior to production].

C. <u>All Factual Assertions Made In The Regional Director's Opposition Should Be Stricken Because The Regional Director Has Not Provided Any Evidence In Support Of The Opposition</u>

The Opposition asserts a number of matters involving purported communications between the Regional Director's agent and the Employer's counsel, allegations relating to a pending representation case, and allegations relating to other unfair labor practice charges pending against the Employer. Opposition, pp. 1-4. However, the Regional Director has not submitted any evidence to support these assertions. Accordingly, all assertions set forth in the Opposition which are not fully supported by the Subpoena, Petition to Revoke and/or Unfair Labor Practice Charge in this matter, which documents have been filed as exhibits to the Regional Director's Order and/or the Opposition, should be stricken and disregarded.

Revoke Subpoena *Duces Tecum* filed herewith.

Moreover, the Regional Director has misrepresented the status of the matters at issue pursuant to the Subpoena and Petition to Revoke inasmuch as the Regional Director purposefully neglected to advise the Board in his Opposition or his Order that the Employer has already provided the Regional Director with documents responsive to Item B of the Subpoena and has advised the Regional Director that it will also allow the Regional Director to inspect the documents responsive to Item A. Scott Decl., exh. 1-2. Such gamesmanship by the Regional Director should not be tolerated by the Board. The Employer's Petition to Revoke should be granted for this additional reason.

WHEREFORE, it is respectfully requested that the Regional Director's Opposition be denied and the Employer's Petition to Revoke be granted in its entirety.

Dated: December 27, 2010

Respectfully submitted,

s/ TRS

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