

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRANE HEALTHCARE CO. and/or EBENSBURG
CARE CENTER, LLC d/b/a CAMBRIA CARE
CENTER, Single Employer

and

Case No. 6-CA-36791

LOCAL UNION NO. 1305, PROFESSIONAL and
PUBLIC SERVICE EMPLOYEES OF CAMBRIA
COUNTY a/w THE LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA

GRANE HEALTHCARE CO. and/or EBENSBURG
CARE CENTER, LLC d/b/a CAMBRIA CARE
CENTER, Single Employer

and

Case No. 6-CA-36803
Case No. 6-CA-36915

SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC.

BRIEF OF THE CHARGING PARTY,
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC, IN SUPPORT
OF LIMITED EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN

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TABLE OF CONTENTS

- I. STATEMENT OF THE CASE..... 1
 - A. Relevant facts... 1
 - 1. Relevant law governing Pennsylvania public employers..... 1
 - 2. Predecessor employer’s relationship with SEIU..... 5
 - 3. The County’s sale of the Facility to Respondents..... 6
 - B. Procedural history..... 9
 - C. The ALJ’s Decision and Recommended Order..... 10
 - 1. Findings and conclusions to which SEIU does not take exception..... 10
 - 2. Refusal-to-bargain allegations 11
 - a. The Laborers unit..... 12
 - b. The SEIU unit..... 13
- II. ISSUES PRESENTED 15
- III. ARGUMENT..... 16
 - A. The ALJ erred by failing to apply a presumption of majority support to SEIU, giving rise to Respondents’ bargaining obligation..... 16
 - 1. The predecessor employer’s legal obligation to “meet and discuss” with SEIU creates a presumption of majority support for SEIU as collective bargaining representative. 16
 - 2. Board law and judicial precedent apply a presumption of majority support to a unit certified under state law regardless of the scope of the attendant representational rights..... 19
 - 3. Record evidence also requires presumption of majority support for SEIU as collective bargaining representative. 23
 - 4. Failure to apply a presumption of majority support strips the SEIU unit members of their chosen representation, a result that is absurd and repugnant to the Act..... 25
 - B. The ALJ erred by failing to estop the Respondents from asserting that they had no bargaining obligation..... 26
 - C. The ALJ erred by failing to make factual findings and legal conclusions with respect to whether the SEIU unit, which includes professional and nonprofessional employees, is appropriate for the purposes of collective bargaining. 29

TABLE OF CONTENTS (CONTINUED)

D. The ALJ erred by failing to make factual findings and legal conclusions with respect to whether the SEIU unit includes supervisory positions. 30

E. The ALJ erred by failing to make factual findings and legal conclusions with respect to whether the Respondents violated the Act by unilaterally implementing IV therapy training and beginning the process of adding IV therapy duties to the work regimen of licensed practical nurses (LPNs)..... 30

IV. CONCLUSION..... 31

TABLE OF AUTHORITIES

Cases

<i>Alpha Assocs.</i> , 344 NLRB 782 (2005).....	27, 28
<i>Auciello Iron Works, Inc., v. NLRB</i> , 517 U.S. 781 (1996).....	11, 18
<i>Commonwealth v. Pa. Labor Relations Bd.</i> , 397 A.2d 858 (Pa. Commw. Ct. 1979).....	18
<i>Dean Transp., Inc.</i> , 350 NLRB 48 (2007)	12, 21
<i>Dean Transp., Inc.</i> , 551 F.3d 1055 (D.C. Cir. 2009).....	12, 21, 22
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	11, 22, 26
<i>Indep. State Store Union v. Pa. Labor Relations Bd.</i> , 547 A.2d 465 (Pa. Commw. Ct. 1988).....	3, 18
<i>JMM Operational Servs.</i> , 316 NLRB 6 (1995).....	12, 21
<i>Lincoln Park Zoological Soc’y</i> , 322 NLRB 263 (1996).....	12, 21, 23
<i>NLRB v. Burns Int’l Sec. Servs.</i> , 405 U.S. 272 (1972)	11
<i>R.P.C., Inc.</i> , 311 NLRB 232 (1993)	27
<i>Red Coats, Inc.</i> , 328 NLRB 205 (1999).....	27
<i>Siemens Techs., Inc.</i> , 345 NLRB 1108 (2005).....	12, 21
<i>St. Joseph’s Hosp.</i> , 221 NLRB 1253 (1975).....	21, 30
<i>Univ. Med. Ctr.</i> , 335 NLRB 1318 (2001)	12, 21
<i>Van Lear Equip., Inc.</i> , 336 NLRB 1059 (2001)	12, 21, 30

Statutes and Ordinances

Cal. Gov. Code § 3533.....	4
43 P.S. § 1101.101.....	1
43 P.S. § 1101.301.....	3, 5, 17, 18
43 P.S. § 1101.401.....	2
43 P.S. § 1101.604.....	2, 3, 5, 30
43 P.S. § 1101.605.....	2
43 P.S. § 1101.606.....	2
43 P.S. § 1101.607.....	2
43 P.S. § 1101.701.....	2, 17, 18, 19
43 P.S. § 1101.702.....	3, 20
43 P.S. § 1101.704.....	3, 17, 18
43 P.S. § 1101.801.....	2
43 P.S. § 1101.802.....	2
43 P.S. § 1101.803.....	2
43 P.S. § 1101.805.....	2
43 P.S. § 1101.903.....	2
43 P.S. § 1101.1001.....	2, 20, 22
City of Phoenix (Ariz.) Code of Ordinances § 2-223–2-235	4
29 U.S.C. § 151	1, 22, 25
29 U.S.C. § 157	2
29 U.S.C. § 158	2, 17, 19

TABLE OF AUTHORITIES (CONTINUED)

Other

Ariz. Att’y Gen. Op. 06-004 (2006)	4
David Lewin, <i>Public Sector Labor Relations</i> 140 (1988)	4

BRIEF OF THE CHARGING PARTY,
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC, IN SUPPORT
OF LIMITED EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. § 102.46, the undersigned attorneys for the Charging Party file this Brief in Support of its Limited Exceptions to the Decision and Recommended Order of Administrative Law Judge David I. Goldman, dated December 16, 2010.

I. STATEMENT OF THE CASE

A. Relevant facts

These Charges arise from the Respondents'¹ purchase of a nursing home, Laurel Crest Rehabilitation & Care Center ("Facility"), from Cambria County ("County"), a political subdivision of the Commonwealth of Pennsylvania. The facts material to these Charges are essentially undisputed.

1. Relevant law governing Pennsylvania public employers

Labor relations between Pennsylvania public employers and certain employees are governed by a state statute, the Public Employe² Relations Act ("PERA"), 43 P.S. §§ 1101.101-1101.2301, rather than the National Labor Relations Act ("Act"). The stated policy of both the state and federal statutes is to encourage harmonious relations between employers and employees and to minimize labor strife by granting certain rights to employees and imposing certain obligations upon employers. *See* 43 P.S. § 1101.101 ("it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employes..."); 29 U.S.C. § 151 ("[i]t is declared to be

¹ The term "Respondents" herein shall be construed as plural or singular, as appropriate.

² This is the spelling used throughout the statute.

the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining....”) The language and structure of PERA largely mirror those of the Act. *Compare, e.g.*, 29 U.S.C. § 157 and 43 P.S. § 1101.401 (relating to rights of employees). Like the Act, PERA authorizes a body, the Pennsylvania Labor Relations Board (“PLRB”), to determine the appropriateness of bargaining units, conduct representation elections, certify labor organizations as the exclusive representatives of employees and conduct unfair labor practice proceedings. 43 P.S. §§ 1101.604-1101.606. Absent voluntary recognition by an employer, certification of a representative requires a secret-ballot election. 43 P.S. § 1101.605. To protect employees’ free choice of a representative, PERA also provides for the filing of decertification petitions. 43 P.S. § 1101.607.

PERA diverges from the Act in several respects. If an employer and a union cannot resolve a grievance arising under a collective bargaining agreement, binding arbitration is mandatory. 43 P.S. § 1101.903. Units consisting of “guards at prisons or mental hospitals” and “employees directly involved with and necessary to the functioning of the courts” are entitled to binding interest arbitration when bargaining results in an impasse, 43 P.S. § 1101.805, but they are prohibited from striking, 43 P.S. § 1101.1001. In all other instances when bargaining results in impasse, certain pre-strike dispute-resolution procedures are required. 43 P.S. § 1101.801-1101.803. Certain matters deemed mandatory subjects of bargaining under the Act are not bargainable under PERA.³

³ While both PERA and the Act requires employers and employee representatives to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment,” 29 U.S.C. § 158(d), 43 P.S. § 1101.701, PERA states that employers

Most significantly for this case, PERA, unlike the Act, protects the representational rights of certain individuals deemed “first level supervisors.” PERA defines “supervisor” in essentially the same language as the Act.⁴ The statute further defines the “first level of supervision” and “first level supervisor” as “the lowest level at which an employe functions as a supervisor.” 43 P.S. § 1101.301(19). First-level supervisors may “form their own separate homogenous units,” distinct units of other nonsupervisor employees. 43 P.S. § 1101.604(5). Although public employers are not required to “bargain” with units of first-level supervisors, they are “required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act.” 43 P.S. § 1101.704. With respect to meet-and-discuss units, an employer must, upon request, “meet at reasonable times and discuss recommendations submitted by representatives of public employes.” 43 P.S. § 1101.301(17). Any “decisions or determinations” resulting from meet-and-discuss sessions “shall remain with the public employer and be deemed final...” *Id.* Employers and employee representatives may memorialize the results of meet-and-discuss sessions in memoranda of understanding (“MOUs”). *See, e.g., Indep. State Store Union v. Pa. Labor Relations Bd.*, 547 A.2d 465, 466 (Pa. Commw. Ct. 1988). Although MOUs are not binding, they “foster labor peace between public employers and their employees” by memorializing “what would be sound policy for the employer to adopt with respect to issues affecting first-level supervisory employees.” *Id.* at 469.

“shall not be required to bargain over matters of inherent managerial policy,” but must “meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives,” 43 P.S. § 1101.702 (emphasis added).

⁴ Under PERA, a supervisor is “any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.” 43 P.S. § 1101.301(6).

For two decades, Pennsylvania's statutory grant of meet-and-discuss rights to units of first-level supervisors was unique. David Lewin, *Public Sector Labor Relations* 140 (1988).⁵ In 1990, California enacted an Excluded Employee Bill of Rights obligating certain public employers to "meet and confer" with organizations representing supervisors. Cal. Gov. Code § 3533. The statute contains the same essential provisions as PERA:

Upon request, the state shall meet and confer with verified supervisory organizations representing supervisory employees on matters within the scope of representation. Prior to arriving at a determination of policy or course of action directly impacting supervisory employees, the state employer shall provide reasonable advance notice and provide the verified supervisory employee organizations an opportunity to meet and confer with the state employer to discuss alternative means of achieving objectives. . . . "Meet and confer" shall mean that the state employer shall consider as fully as it deems reasonable, such presentations as are made by the verified supervisory employee organization on behalf of its supervisory members prior to arriving at a determination of policy or course of action. The final determination of policy or course of action shall be the sole responsibility of the state employer.

Id. In at least one state where no statute authorizes public employers to bargain collectively with the representatives of *any* employees, local governments have created meet-and-confer processes by ordinance. *See, e.g.*, City of Phoenix Code of Ordinances § 2-223–2-235; *see also* Ariz. Att'y Gen. Op. 06-004 (Oct. 30, 2006) (concluding that county ordinance may establish meet-and-confer process restricted to elected authorized employee representative which does not result in binding collective bargaining agreement). The issue of whether a private-sector successor employer is obligated to bargain with an incumbent union that represented public employees in a meet-and-discuss process appears never to have been litigated before the Board.⁶

⁵ Of course, some state statutes grant the full range of collective bargaining rights to supervisory employees.

⁶ The Board's decision here will potentially determine whether private sector employers must recognize the representational rights afforded to certain public employees under state or local law in Pennsylvania and elsewhere following a privatization, and whether the successor employer must bargain with the exclusive representative selected by those employees.

2. *Predecessor employer's relationship with SEIU*

As operator of the Facility, a 376-bed nursing home, the County was a “public employer” within the meaning of PERA. *See* 43 P.S. § 1101.301(1). The County recognized two unions at the Facility, one of which was SEIU Healthcare Pennsylvania (“SEIU”).⁷ In 1986, the PLRB certified the predecessor of SEIU as the “exclusive representative” of a unit including certain registered nurses and licensed practical nurses⁸ employed at the Facility “for the purpose of meeting and discussing with respect to wages, hours and other terms and conditions of employment” pursuant to PERA. (GCX-16.) This unit comprised about 51 employees during 2009.

Also in 1986, the County and SEIU entered the first in a series of Memoranda of Understanding (“MOUs”) setting forth bargaining unit members’ wages, hours and other terms and conditions of employment. The term of the most recent MOU (GCX-18) spanned January 1, 2007, to December 31, 2009. The MOU is practically indistinguishable from a typical collective bargaining agreement; its provisions include those concerning recognition of the Union, nondiscrimination, union security, dues check-off, wages and classifications, hours of work, sick

⁷ The other was Local Union No. 1305, Professional and Public Service Employees of Cambria County, a/w the Laborers’ International Union of North America (“Laborers”). It was certified by the PLRB in 1971 as the collective bargaining representative of a unit of nonprofessional employees, including nursing aides, housekeepers, dietary employees and maintenance employees. The County and the Laborers were signatories to a number of successive collective bargaining agreements, the most recent of which expired on December 31, 2008. Negotiations toward a new agreement were not successful.

⁸ The unit consisted of “all full-time and regular part-time professional and nonprofessional first level supervisors at Laurel Crest Manor including but not limited to staff RN’s, charge Lpn’s, special clinic Lpn’s, assistant supervisors in dietary and assistant supervisors in laundry; and excluding management level employees, supervisors above the first level of supervision, confidential employees and guards as defined in the [Public Employee Relations] Act.” (GCX-16 at 1.) A majority of the professional employees (RNs) voted for inclusion in the unit with nonprofessional employees (LPNs) on a separate ballot (*id.* at 2), in accordance with PERA. *See* 43 P.S. § 1101.604(2).

leave, vacations, health and welfare benefits, pensions, a complaint procedure, seniority and discipline and discharge. The MOU was executed by representatives of the Union and the County. There is no evidence the County failed to honor it in any way.

Facing operating losses at the Facility in recent years, the County considered privatizing it.⁹ SEIU and the County, anticipating that possibility, negotiated a successorship provision as part of the MOU. Titled “Memorandum of Understanding Successorship Sale Transfer of Operations,” it provides in full as follows:

During the term of this Memorandum, should the County lease, sell, including a sale of assets only, transfer or *privatize* the Laurel Crest Rehabilitation and Special Care Center, the successor *shall agree to recognize the Union and accept their Memorandum of Understanding*. The County will place any prospective buyer, lessee, successor or purchaser on notice of this requirement and will obtain a signed document reflecting acknowledgment and *acceptance of this obligation* before a *sale, privatization or transfer* or any legal action affecting the employees is undertaken. A copy of all documents shall be sent to the Union in a timely manner.

MOU at 40 (emphasis added).¹⁰

3. The County’s sale of the Facility to Respondents

In late June 2009, the County, through its elected Board of Commissioners (“Commissioners”), publicly announced that it would either close or sell the Facility by the end of that year. The County solicited bids and entered into an agreement to transfer ownership and operations of the Facility from the County to Respondents at 12:01 a.m. on January 1, 2010. The

⁹ In 2003, the County contracted to sell the Facility to a private health system. The proposed sale was challenged in litigation, however, and the transaction was never consummated.

¹⁰ Apparently because of a clerical error in the Board’s Regional Office, the page of the MOU containing this provision was inadvertently omitted from the copy of the MOU offered into evidence at trial and included in the record as GCX-18. On January 11, 2011, the Union filed a Motion to Correct the Record, asking the Board to include the omitted page in the record as if it had been offered and accepted into evidence at trial. The Motion is pending before the Board as of this date.

County and Grane executed an Asset Purchase Agreement (“APA”) encompassing this transaction on September 11, 2009. Among the APA’s provisions was the following:

(b) Seller and Service Employees International Union District 1199P, CTW, CLC, are parties to a Memorandum of Understanding, (“MOU”). Pursuant to this MOU, Appendix C, Memorandum of Understanding Successorship Sale Transfer of Operations, during the term of the MOU, “the successor shall agree to recognize the Union and accept their Memorandum of Understanding. The County will place any prospective buyer...on notice of this requirement and will obtain a signed document reflecting acknowledgement and acceptance of this obligation before a sale, privatization...affecting the employees in [sic] undertaken.” Buyer agrees to execute a signed document reflecting *acknowledgment and acceptance of this obligation* concurrent with the execution of this Agreement. The MOU shall expire on December 31, 2009[.]

(GCX-19 at 15 (emphasis added).) The APA further provided that, “[a]s a successor, Buyer shall assume each collective bargaining agreement in effect at the Facility. Buyer shall meet its obligations as contained in Section 4.7 (b) and (c).” (*Id.* at 28-29.)

Contemporaneously with the APA, the County and Grane executed an agreement titled “Acknowledgment and Acceptance” and attached it to the APA. (GCX-19 at Schedule 4.7(b).) Paragraph 1 of the Acknowledgment and Acceptance repeated verbatim the text of Section 4.7(b) of the APA (quoted immediately above). The Acknowledgment and Acceptance provided as follows:

1. Seller and Service Employees International Union District 1199P, CTW, CLC, are parties to a Memorandum of Understanding, (“MOU”). Pursuant to this MOU, Appendix C, Memorandum of Understanding Successorship Sale Transfer of Operations, during the term of the MOU, “the successor shall agree to recognize the Union and accept their Memorandum of Understanding. The County will place any prospective buyer...on notice of this requirement and will obtain a signed document reflecting acknowledgement and acceptance of this obligation before a sale, privatization...affecting the employees is undertaken.” Buyer agrees to execute a signed document reflecting acknowledgement and acceptance of this obligation concurrent with the execution of this Agreement. The MOU shall expire on December 31, 2009.

2. This Acknowledgement and Acceptance Form shall serve to document Seller's obligation to place Buyer on notice of the requirements set forth in Paragraph 1 above.

3. This Acknowledgement and Acceptance Form shall further serve to document Buyer's *acknowledgment and acceptance of the conditions set forth in Paragraph 1*, above.

(Emphasis added; ellipses in original.) This document was executed by the County Commissioners and by Grane Healthcare Co. ("Grane") through its chief executive officer, Richard Graciano Jr.

The County notified SEIU that it had entered an agreement to sell the Facility to the Respondents shortly thereafter. An SEIU vice president, Matthew Yarnell, tried on numerous occasions to discuss SEIU's representational status with the Respondents' operating officer. On the first occasion, Oddo told Yarnell he was under strict orders from his attorney not to discuss anything about the Facility. (Tr. 1008.) On a subsequent occasion, Oddo said he would speak to SEIU "once the sales were final." (*Id.* at 1010.) Oddo did not return other calls and messages. (*Id.*) SEIU made at least two formal demands on the Respondents to honor their obligation to commence bargaining with the Union. The first was on October 23, 2009, when an SEIU organizer, Nathan Williams, and a member employed at the Facility, Roxanne Lamer, went to the Respondents' headquarters to seek a meeting with Oddo and deliver a petition from the employees and SEIU demanding, in part, that the Respondents "honor the contracts with employees...." (GCX-42; Tr. 598-99.) Oddo did not meet with the SEIU representatives, nor did he contact them later. The second occasion was on December 23, 2009, when SEIU requested by letter that the Respondents bargain a successor agreement. (SEIUX-2; JX-2 at ¶ 45.)

The sale transaction was consummated on January 1, 2010. Ebensburg Care Center, LLC, d/b/a Cambria Care Center ("Cambria Care"), became operator of the Facility. Cambria Care

employs the administrator of the Facility, Owen Larkin. All other individuals employed at the Facility are employed by Grane pursuant to a management agreement with Cambria Care.

The Respondents did not acknowledge the Union's requests for recognition until January 11, 2010, when their counsel sent the Union a letter stating, *inter alia*, that the Respondents would not recognize or bargain with the Union because "[w]hatever recognitional rights the Union had [vis-à-vis the County] were conferred by state law, not the National Labor Relations Act." (SEIUX-3 at 1; JX-2 at ¶ 46.) The Respondents similarly refused to recognize or bargain with the Laborers.

The majority of the Respondents' employees at the Facility had previously been members of the respective units while employed by the County. (JX-2 at ¶ 41, 42.) However, the Respondents refused to hire certain union members, including 17 members of SEIU.

B. Procedural history

The Laborers filed a timely Charge, upon which the Region issued a Complaint and Notice of Hearing on May 28, 2010. The Complaint alleged, in relevant part, that the Respondents (1) constituted a single employer; (2) are a successor employer to the County; (3) violated Section 8(a)(5) of the Act by failing and refusing to recognize the Laborers as the bargaining representative of an appropriate unit of employees; and (4) violated Section 8(a)(3) of the Act by failing to offer employment to four officers of the Laborers because of their union activities while employed by the County.

SEIU filed timely Charges, upon which a Consolidated Complaint issued on July 1, 2010. Like the Complaint in the Laborers Charge, the Consolidated Complaint alleged, in relevant part, that the Respondents (1) constituted a single employer, (2) are a successor employer and (3) violated Section 8(a)(5) by failing and refusing to bargain with the Union as bargaining

representative of an appropriate unit of employees. The Consolidated Complaint further alleged that the Respondents (4) violated Section 8(a)(5) by implementing a unilateral change in terms and conditions of employment when it trained LPNs to administer and establish intravenous lines in residents/patients without affording the Union notice and an opportunity to bargain; and (5) violated Section 8(a)(3) by failing to offer employment to one employee, Lamer, because of her union activities while employed by the County.

A hearing was held before Administrative Law Judge (“ALJ”) David I. Goldman on July 21 through 23, 2010, resuming August 16 through 19, 2010, in Ebensburg, Pennsylvania.

C. The ALJ’s Decision and Recommended Order

1. Findings and conclusions to which SEIU does not take exception

ALJ Goldman filed his Decision and Recommended Order (hereinafter abbreviated as “Dec.” in citations) on December 16, 2010. The ALJ found, based on the Respondents’ admissions, that the Respondents are employers engaged in commerce within the meaning of the Act; and that SEIU and the Laborers are labor organizations within the meaning of the Act. Dec. at 3. He further found that the dispute affects commerce, giving rise to Board jurisdiction. *Id.* He concluded that Grane and Cambria Care constitute a single employer that is jointly and severally liable for unfair labor practices. *Id.* The ALJ concluded, as the General Counsel had alleged, that the Respondents had violated Section (a)(3) by refusing to offer employment to the four Laborers officers and Lamer,¹¹ the SEIU member, because of their union activities prior to the sale of the Facility. Dec. at 40. The Union does not take exception to these findings and conclusions or the recommendations pursuant to them.

¹¹ The ALJ implicitly found that Lamer was an employee within the meaning of the Act; if Lamer had been a supervisor, retaliation for her union activity would not have been unlawful.

2. *Refusal-to-bargain allegations*

With respect to 8(a)(5) allegations, the ALJ concluded that the Respondents had violated the Act by refusing to recognize and bargain with the Laborers, but not with SEIU. “Although much of the analysis of the duty to bargain with the Laborers is the same as the analysis of the duty to bargain with SEIU, there is one very significant difference...” Dec. at 7. The ALJ first explored the rationale for a successor employer’s obligation to bargain with an incumbent union. Because “[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes ... the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the precondition for service as its exclusive representative.” Dec. at 7, *quoting Auciello Iron Works, Inc., v. NLRB*, 517 U.S. 781, 785-86 (1996). Thus, a union that has been certified through an election process enjoys a presumption of majority support and need not prove its majority status again to trigger an employer’s obligation to bargain. Dec. at 7. As the ALJ noted, the presumption applies despite a change in employer if the new employer acquires substantial assets of its predecessor, continues the predecessor’s business without interruption or substantial change, and employs a majority of the predecessor’s employees. Dec. at 8, *citing NLRB v. Burns Int’l Sec. Servs.*, 405 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987). The presumption is especially critical in the successorship context because an incumbent union “has no formal and established bargaining relationship with the new employer, is uncertain about the employer’s plans, and cannot be sure if or when the new employer will bargain with it.” Dec. at 7-8, *quoting Fall River*, 482 U.S. at 39.

... While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

Id. The ALJ observed that Board law and judicial precedent are “unequivocal” that the initial demonstration of majority support need not have occurred under the Act; thus, “the usual presumptions of majority status apply in successorship situations to ensure stability in collective-bargaining relationships,” even when the predecessor is a public entity governed by state law. Dec. at 10, *citing Lincoln Park Zoological Soc’y*, 322 NLRB 263, 265 (1996), *enforced*, 116 F.3d 216 (7th Cir. 1997); *JMM Operational Servs.*, 316 NLRB 6, 13 (1995); *Van Lear Equip., Inc.*, 336 NLRB 1059, 1064 (2001); *Univ. Med. Ctr.*, 335 NLRB 1318, 1332 (2001), *enforced in relevant part*, 336 F.3d 1079 (D.C. Cir. 2003); *Siemens Techs., Inc.*, 345 NLRB 1108, 1113 (2005); *Dean Transp., Inc.*, 350 NLRB 48, 58 (2007), *enforced*, 551 F.3d 1055 (D.C. Cir. 2009).

a. The Laborers unit

The ALJ found, as the parties had stipulated, that the former County employees constituted a majority of the Respondents’ work force at the Facility. The Respondents did not contest the existence of substantial continuity of operations at the Facility. Rather, the Respondents’ defense was a legal argument: because the County was a public employer subject to state law, it was not an “employer” and had no “employees” within the meaning of the Act. Absent a “predecessor” employer, the Respondents cannot be a “successor” employer; and without “employees” to represent, the Laborers and SEIU are not “labor organizations.” Therefore, the Respondents argued, they had no bargaining obligation toward organizations representing individuals formerly employed by the County.

ALJ Goldman correctly rejected this argument. Instead, he framed the relevant issue as “whether a presumption of majority support by employees for the unions to serve as collective-bargaining representative is applicable to the unions[’] bargaining demands.” Dec. at 10. With respect to the Laborers, the ALJ stated, “the presumption of majority support is unremarkable,” based upon the PLRB’s certification and the County’s recognition of the unit. *Id.* Noting that PERA provides essentially the same safeguards for employee free choice as the Act, and an absence of any basis to rebut a presumption of majority support for the Laborers, the ALJ concluded that the Respondents’ failure to bargain had violated the Act. *Id.* at 10, 13.

b. The SEIU unit

The ALJ considered applying the presumption of majority support to the SEIU unit “a more difficult question”:

It is not that SEIU’s support by a majority of employees is in question—it was certified by the PLRB after a secret-ballot election and continued, without incident or display of dissatisfaction, as far as the record shows, to represent the Laurel Crest unit and sign memoranda with the employer until the transfer of operations. But, while the basis to presume majority support in the SEIU unit is sound, the question must be asked, majority support for what?

Id. at 11. Relying upon PERA’s mandate that “[p]ublic employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss ... on matters deemed to be bargainable for other public employees,” the ALJ drew a distinction between meet-and-discuss and collective bargaining obligations. *Id.* The ALJ characterized the meet-and-discuss obligation as “a process of consultation in which, at all times, the employer retained the right of unilateral and final decisionmaking,” and through which no legally enforceable agreement could be reached. *Id.* While stating that the issue “is not free from doubt,” the ALJ concluded that the County had no collective bargaining obligation toward SEIU because SEIU had not been a collective bargaining representative with respect to the County. *Id.*

at 12. “This history of ‘meet and discuss’ representational status—with no history of collective-bargaining representational status—provides no grounds on which to presume majority employee support for the SEIU to be the employees’ *collective-bargaining* representative.” *Id.* (emphasis in original). The ALJ made this conclusion despite his findings that

... the SEIU was chosen and certified as the “exclusive representative” of the unit employees with respect to conditions of employment. In other words, the SEIU functioned something like a collective-bargaining representative for these employees. The employees chose this representation and there is no indication that they do not wish to continue to be represented. And in this regard, the Board has never required that for a presumption of majority support to be applied in the successorship situation to a union previously operating in the state law context, that the union and employees must have been entitled under state law to exercise the full panoply of rights available under the Act. ... The presumption of majority support could be applied because the union had been—without regard to the specific range of rights permitted under state law—selected and/or designated as the employees’ collective-bargaining representative.

Id. at 12-13. But, in the ALJ’s view, PERA provided that SEIU’s representation of the County employees “explicitly and affirmatively did not involve representation for purposes of collective bargaining....” *Id.* at 13. Thus, with respect to the County, SEIU unit members “were not represented for purposes of collective bargaining” and “did not, as far as the record shows, express support for collective-bargaining representation.” *Id.* Because SEIU had not been a “collective bargaining representative,” the ALJ concluded that the Respondents had no obligation to bargain with SEIU and did not violate the Act. *Id.*

Given his conclusion that the Respondents had no bargaining obligation toward SEIU, the ALJ expressly declined to consider whether the unit was inappropriate because it included a combination of professional and nonprofessional employees and/or, as the Respondent had alleged, statutory supervisors. *Id.* at 13, n.15. He also dismissed the Acting General Counsel’s allegation (based on the SEIU Charge) that the Respondents had violated the Act by training

LPNs to administer and establish intravenous lines in residents/patients without affording the Union notice and an opportunity to bargain. *Id.*

II. ISSUES PRESENTED

- A. Did the ALJ err by failing to apply a presumption of majority support for SEIU as collective bargaining representative, giving rise to the Respondents' obligation to recognize and bargain with SEIU, based on the certification of SEIU's predecessor as a "meet and discuss" representative under Pennsylvania labor law? (Exceptions 1, 7, 8)
- B. Did the ALJ err by failing to make factual findings that provide additional bases for a presumption of majority support for SEIU as collective bargaining representative, giving rise to Respondents' obligation to recognize and bargain with SEIU? (Exceptions 2, 7, 8)
- C. Did the ALJ err by failing to conclude that the Respondents were estopped from asserting that they had no legal obligation to bargain with SEIU and by failing to make the factual findings necessary to support that conclusion? (Exception 3, 7, 8)
- D. Did the ALJ err by failing to make factual findings and legal conclusions with respect to whether the SEIU unit, which includes professional and nonprofessional employees, is appropriate for the purposes of collective bargaining? (Exceptions 4, 7, 8)
- E. Did the ALJ err by failing to make factual findings and legal conclusions with respect to whether the SEIU unit includes supervisory positions? (Exceptions 5, 7, 8)

- F. Did the ALJ err by failing to make factual findings and legal conclusions with respect to whether the Respondents violated the Act by unilaterally implementing IV therapy training and beginning the process of adding IV therapy duties to the work regimen of licensed practical nurses (LPNs)? (Exceptions 6, 7, 8)

III. ARGUMENT

The ALJ erred by failing to apply a presumption of majority support to SEIU as collective bargaining representative of an appropriate unit of employees, despite legal and factual bases that required him to do so. Combined with the stipulated fact that the Respondents had hired a majority of unit members and the ALJ's conclusion that substantial continuity existed between the predecessor and successor employer's operations, this presumption obligates the Respondents to recognize and bargain with SEIU. The ALJ erred by failing to estop the Respondents from asserting their defenses in light of the Respondents' agreements as a condition of the sales transaction to recognize SEIU, by which they knowingly created a collective bargaining relationship under the Act. The ALJ erred by failing to make factual findings and legal conclusions with respect to the appropriateness of the SEIU unit. The ALJ erred by failing to make factual findings and legal conclusions with respect to the allegation that the Respondents unilaterally altered certain terms and conditions of employment of the SEIU unit.

- A. The ALJ erred by failing to apply a presumption of majority support to SEIU, giving rise to Respondents' bargaining obligation.**
- 1. The predecessor employer's legal obligation to "meet and discuss" with SEIU creates a presumption of majority support for SEIU as collective bargaining representative.*

The distinction drawn by the ALJ between meet-and-discuss status and a collective bargaining relationship is a false dichotomy. A Pennsylvania public employer's duty to "meet and discuss" with the representative of a unit of "first-level supervisors" falls within the scope of

collective bargaining under both PERA and the Act. This is evident from an examination of both statutes. The Act defines the obligation to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party....” 29 U.S.C. § 158(d) (emphasis added). PERA defines “meet and discuss,” in relevant part, as “the *obligation* of a public employer upon request to *meet at reasonable times and discuss* recommendations submitted by representatives of public employes....” 43 P.S. § 1101.301(17) (emphasis added). The meet-and-discuss obligation requires public employers “*to meet and discuss* with first level supervisors or their representatives, *on matters deemed to be bargainable for other public employes* covered by this act.” 43 P.S. § 1101.704 (emphasis added). Bargainable matters are “wages, hours and other terms and conditions of employment.” 43 P.S. § 1101.701. Clearly, the duty “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment” imposed by the Act is essentially the same as the duty under PERA to “meet at reasonable times and discuss recommendations” with respect to “wages, hours and other terms and conditions of employment.” Thus, “collective bargaining” encompasses a duty to meet and confer (or discuss) with respect to terms and conditions of employment. The obligation to meet and discuss is not, as the ALJ concluded, an “alternative to and distinct from” collective bargaining, Dec. at 11; it is an essential *component* of collective bargaining.

As the ALJ observed, the obligation to “bargain collectively” under the Act (and under PERA) includes “the negotiation of an agreement or any question arising thereunder, and the

execution of a written contract incorporating any agreement reached if requested by either party....” 29 U.S.C. 158(d), 43 P.S. § 1101.701. By contrast, PERA’s obligation to meet and discuss does not include a duty to enter binding agreements, because “any decisions or determinations on matters so discussed shall remain with the public employer....” 43 P.S. § 1101.301(17). The effect of this language, as interpreted by the Pennsylvania courts – along with the proviso that “[p]ublic employers shall not be required to bargain with units of first level supervisors,” 43 P.S. § 1101.704 – is that agreements or MOUs reached through the meet-and-discuss process are ordinarily not judicially enforceable. *Indep. State Store Union*, 547 A.2d at 468.¹² This does not mean that the obligation to meet and discuss is a hollow one; an employer’s failure to meet and discuss in good faith is an unfair labor practice that may be remedied by the PLRB. 43 P.S. § 1101.1201(9); *see, e.g., Commonwealth v. Pa. Labor Relations Bd.*, 397 A.2d 858, 860 (Pa. Commw. Ct. 1979). And, as the Pennsylvania courts have observed, MOUs carry moral, if not legal, weight that “foster[s] labor peace between public employers and their employees.” *Indep. State Store Union*, 547 A.2d at 468. This function of meet-and-discuss representation is essentially the same as the purpose of collective bargaining agreements formed pursuant to the Act: to encourage “industrial peace and stability” by “providing for the orderly resolution of labor disputes between workers and employers.” *Auciello Iron Works, Inc.*, 517

¹² The Pennsylvania courts have not, however, ruled out the possibility that a public employer *can* enter a legally enforceable agreement with a unit of first-level supervisors. The issue of whether a public employer can expressly waive its right under PERA to make final decisions regarding meet-and-discuss matters has never been decided. The fact that courts have cited MOU language invoking these rights suggests that they may be waived. *See id.* (“the Memorandum makes it explicit that the PLCB did not intend to be legally bound in any manner. . . . This evidences an intent by the PLCB to retain all rights it may have under Section 704 [43 P.S. § 1101.704].”). Thus, the ALJ’s statement that “[b]y the terms of the PERA, SEIU could not enter into enforceable agreements with Laurel Crest,” Dec. at 11, is incorrect. The Pennsylvania courts may not *require* a public employer that specifically preserves all of its rights under PERA to abide by the terms of an MOU.

U.S. at 785. Significantly, neither the Act nor PERA requires any employer to reach a binding agreement with a labor organization; the duty is merely to meet and confer in good faith, at least until such negotiations result in impasse. Both statutes, in fact, affirm that the duty to bargain collectively “does not compel either party to agree to a proposal or require the making of a concession.” 43 P.S. § 1101.701; 29 U.S.C. § 158(d). An employer and a labor organization could meet and confer in good faith without *ever* achieving consensus and executing a collective bargaining agreement.¹³ Therefore, a legally enforceable agreement between an employer and a labor organization cannot be the dispositive characteristic of collective bargaining, as the ALJ seems to have assumed. Rather, collective bargaining is a legally recognized relationship between an employer and a labor organization through which the parties in good faith seek mutual agreement. Because meet-and-discuss status possesses these qualities, it requires a presumption of majority support that gives rise to a successor employer’s obligation to bargain collectively.

2. *Board law and judicial precedent apply a presumption of majority support to a unit certified under state law regardless of the scope of the attendant representational rights.*

Meet-and-discuss rights under PERA are completely subsumed by collective bargaining rights, rather than distinct from them. Both meet-and-discuss and “bargaining” representatives are entitled to meet and confer with the employer at reasonable times regarding terms and conditions of employment. The employer must do so with both. The pertinent difference here is that only collective bargaining representatives are entitled to reduce this understanding to a

¹³ Indeed, the County and the Laborers – which the ALJ concluded is a collective bargaining representative – were unsuccessful in negotiating a successor CBA after their contract had expired.

legally enforceable agreement.¹⁴ Thus, an employer's obligation to a meet-and-discuss representative differs from that to a bargaining representative not in nature, but only in scope. Board law is clear that such a difference in scope does not defeat the Act's presumption of majority support for a certified unit. As the ALJ correctly stated,

... the Board has never required that for a presumption of majority support to be applied in the successorship situation to a union previously operating in the state law context, that the union and employees must have been entitled under state law to exercise the full panoply of rights available under the Act.

Dec. at 12. Nor should the Board impose such a requirement now.

The Act grants employees rights that many state labor relations statutes do not, as the ALJ pointed out. Some limit the range of bargainable subjects; some bar certain employees from striking. PERA does both. It expressly excludes "such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel" from bargaining. 43 P.S. § 1101.702. Public employers are required only to meet and discuss, even with *bargaining* representatives, over the effects of such policy matters on terms and conditions of employment, *id.*, while an employer subject to the Act must bargain over such issues. PERA also prohibits strikes by units of court-related employees and "guards at prisons or mental hospitals" and, in the event of such a strike, *requires* a public employer pursue injunctive and other relief in court. 43 P.S. § 1101.1001. No such restriction on labor's economic weapons exists under the Act. These are all issues of scope, as is true of the issue here: the obligation to "bargain" as opposed to "meet and discuss."

In the ALJ's words, such differences have "not been deemed significant." Dec. at 13. Rather, the Board's inquiries with respect to the bargaining obligation in public-to-private

¹⁴ This is not the only difference, though; *see infra*.

successorship situations are limited to whether state representation proceedings violate due process or any specific mandate of the Act. *St. Joseph's Hosp.*, 221 NLRB 1253, 1253 (1975) (reversing an ALJ's decision recommending dismissal of refusal-to-bargain complaint because of alleged inappropriateness of unit). "... [I]t is not a touchstone of comity that the procedures and policies of a state agency be identical to those of the Board." *Id.* More recent Board cases requiring a private-sector successor employer to bargain with a unit previously in the public sector lack any comparative analysis of federal- and state-law rights. *JMM Operational Servs.*, 316 NLRB at 11; *Lincoln Park Zoological Soc'y*, 322 NLRB at 265; *Univ. Med. Ctr.*, 335 NLRB at 1332; *Siemens Techs., Inc.*, 345 NLRB at 1113; *Dean Transp., Inc.*, 350 NLRB at 58. In the only recent case in which it considered whether a private employer was obligated to bargain with the representative of a unit certified under Pennsylvania labor law, the Board concluded that the PLRB's procedures had complied with due process and the Act's mandates without so much as citing, let alone analyzing, the statute. *Van Lear Equip., Inc.*, 336 NLRB at 1064. Likewise, the D.C. Circuit has found no basis in Board law for the argument that a state statute's prohibition of a right available under the Act relieves a private-sector successor employer from its obligation to bargain with a unit previously certified in the public sector. *Dean Transp., Inc.*, 551 F.3d at 1063. In enforcing the Board's order requiring the employer to bargain, the court refused to consider the argument that "employees who acquire the right to strike under the NLRA may not want to be represented by the same union that represented them under a state statute that barred strikes." *Id.* The court observed that "none of the Board precedents discussing the impact of a public-to-private change on the issue of successorship addresses the right-to-strike point...." *Id.*

Here, there is no evidence – or even a contention – that the PERA certification process with respect to the SEIU unit ran afoul of the Act's mandates or due process. In fact, the ALJ

accorded comity to the PLRB's certification of the Laborers unit, noting that PERA "provides essentially the same safeguards for employee free choice as the Act" and is "clearly modeled upon the Act." Dec. at 10, n.12. Under the cited precedent cited, the ALJ's findings require the Board to extend comity to the PLRB's certification of the SEIU unit. The ALJ's focus on the one right the SEIU did *not* have under PERA, separate and apart from all the others which it did, exceeded the bounds of the inquiry permitted.

The basis for this precedent and policy is sound. The reason majority support for an incumbent union is presumed in successorship situations is to protect vulnerable employees during a time of transition. *Fall River*, 482 U.S. at 39. By adopting the ALJ's analysis here, the Board would encourage private employers to refuse to bargain with incumbent public sector unions not because of a good-faith doubt of majority support for the union, but because of perceived differences between the rights conferred by state labor relations statutes and those conferred by the Act. This result would be especially undesirable in the current economic climate, in which state and local governments face increasing financial pressures which undoubtedly will lead to increased privatization of services. Could a private enterprise taking over a formerly public detention facility, for example, refuse to recognize an incumbent union because its members were prohibited by state law from striking? *See* 43 P.S. § 1101.1001.¹⁵ Or because the relevant state statute permitted or required bargaining over a much narrower range of issues than the Act? Such uncertainty surrounding whether successor employers in the private sector will continue to recognize incumbent unions certified as representatives of public employees, and whether the Board will require them to do so, can only destabilize labor relations. Such a scenario defies the purpose and the policy of the Act. *See* 29 U.S.C. § 151.

¹⁵ This was precisely the argument the employer attempted to make before the D.C. Circuit in *Dean Transportation, Inc.* 551 F.3d at 1063.

3. ***Record evidence also requires presumption of majority support for SEIU as collective bargaining representative.***

Although SEIU's certification as a meet-and-discuss representative provides the basis for a presumption of majority support, the record contains additional factual bases for a presumption of majority support. ALJ Goldman failed to consider them.

The MOU between the Union and the County anticipated the privatization of the Facility and recognition of the Union as a collective bargaining representative by stating that "should the County ... *privatize* the [Facility], the successor shall agree to *recognize the Union and accept their Memorandum of Understanding.*" (GCX-18 at 40.) The MOU obligated the County to put any prospective on notice of this "requirement" and "obtain a signed document reflecting acknowledgment and acceptance of this *obligation* before a ... privatization ... is undertaken." (*Id.*) The County did so through the APA and the Acknowledgment and Acceptance, both of which the Respondents executed during the sale process. (GCX-19 at 15, Schedule 4.7(b).) By agreeing to "recognize" SEIU, the Respondents knowingly entered into a collective bargaining relationship. This relationship is necessarily governed by the Act, because the Respondents are subject to it, regardless of the scope of rights SEIU had under state law.

The Respondents' agreement to honor the "obligation" to "recognize the Union" upon privatization of the Facility and "accept" SEIU's MOU with the County, contained in two documents, both executed with all legal formalities (*see* APA at 15, Schedule 4.7(b)), is, *standing alone*, evidence of majority support for SEIU as collective bargaining representative. It is well-established that a presumption of majority support may rest upon "voluntary or historical recognition and contractual relationships." *Lincoln Park Zoological Soc'y*, 322 NLRB at 265. In that case, the Board based a presumption of majority support on the predecessor public employer's voluntary recognition of the union and the subsequent bargaining history. *Id.* By

executing these documents, the Respondents here effectively acknowledged that SEIU had majority support. The Respondents' recognitional agreements were communicated to SEIU, which requested bargaining with the Respondents on multiple occasions. The Respondents did nothing to disavow the recognitional and bargaining obligations they had assumed in the APA and Acknowledgment and Acceptance. Surely, if a *predecessor* public employer's voluntary recognition of a union gives rise to a successor employer's bargaining obligation under the Act, the *successor* private employer's specific agreement to voluntarily recognize the union must create such an obligation. No employer that truly doubted the union's majority status would enter into such agreements.

The record also contains evidence of *actual* majority support for SEIU. A petition bearing the signatures of most of the SEIU unit members, demanding that the Respondents "honor the contracts with employees," clearly demonstrates the employees' preference for SEIU as their collective bargaining representative with respect to Respondents. (*See* GCX-42.) This petition was delivered to the Respondents by SEIU representatives. (Tr. 598-99.)

The ALJ's conclusion that the Respondents had no obligation to recognize the union fails to consider the effect of the MOU successorship provision, the Respondents' several commitments during the privatization to honor the "obligation" to "recognize" SEIU and accept its MOU with the County, and the employee petition expressing majority support for SEIU as collective bargaining representative of the unit. The Respondents stipulated to the authenticity of these documents. (Tr. 30, 599.) Therefore, the ALJ's Decision gives insufficient weight to record facts and must be modified accordingly.

4. ***Failure to apply a presumption of majority support strips the SEIU unit members of their chosen representation, a result that is absurd and repugnant to the Act.***

A core purpose of the Act is to “protect[] the exercise by workers of ... designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151. The ALJ’s Decision deprives employees of this critical right.

It is undisputed that a majority of unit members chose SEIU as a representative with respect to the County as their employer. The Respondents did not even attempt to argue that the state representation proceedings through which the Union was certified did not comport with due process or the Act’s mandates, and there is no evidence of such. As the ALJ found, “the SEIU was chosen and certified as the ‘exclusive representative’ of the unit employees with respect to conditions of employment. ... The employees chose this representation and there is no indication that they do not wish to continue to be represented.” Dec. at 12. Under Pennsylvania law, the employees enjoyed representation by the exclusive representative which they selected. As a result of the ALJ’s decision, those same employees have *no* representation. Because the scope of the employees’ representation under state law was different from that afforded by federal law, according to the ALJ’s reasoning, the employees now have no representation at all. This cannot be acceptable under the Act.

Implicit in the ALJ’s reasoning is the concern that applying a presumption of majority support here would deny employees the right to choose a bargaining representative. Ostensibly in the interest of protecting the employees’ right to choose a bargaining representative, the ALJ strips them of the exclusive representative they have already chosen. This is an absurd result. There is no reason to believe the employees would not have chosen the Union as their collective

bargaining representative had Pennsylvania labor law allowed them to do so. The ALJ’s findings and conclusions rest on speculation that the employees, given the right to enter into a legally enforceable contract with the employer, might choose a different representative.¹⁶ It is this speculation – not a presumption of majority support for the Union – that is without legal, factual or logical bases. The result is to deprive employees of their chosen representative during an “unsettling transition period” when representation is needed most. *See Fall River*, 482 U.S. at 39.

B. The ALJ erred by failing to estop the Respondents from asserting that they had no bargaining obligation.

ALJ Goldman failed to consider the legal impact of the Respondents’ agreement, as part of the transaction through which the Facility was to be privatized, to “accept” the Union’s MOU with the County, which set forth a successor employer’s “obligation” to “recognize” the Union. (GCX-19 at 15.) Having agreed to voluntarily recognize SEIU and accept the MOU, the Respondents necessarily created a collective bargaining relationship under the Act. They must now be estopped from challenging their obligation to recognize and bargain with it.

SEIU had secured the assurance that, in the event of a “privatization,” the County would obtain any successor employer’s written agreement “to recognize the Union and accept their Memorandum of Understanding.” (GCX-18 at 40.) The County honored that obligation by securing a contract requiring the Respondents “to execute a signed document reflecting acknowledgment and acceptance of this obligation,” referring to the MOU successorship

¹⁶ The safeguards contained in the Act – which were also available, but not exercised, under PERA – are protection enough against the theoretical possibility that a majority of the unit employees would not support SEIU as a collective bargaining representative. If SEIU were certified, a representation petition could be filed upon a showing of good-faith doubt of majority status after a reasonable period. Or another union could file a representation petition based on its own showing of interest. These mechanisms would protect employee choice without depriving employees of representation during the crucial transition period of privatization.

provision. (GCX-19 at 15.) The APA reiterated that “Buyer shall meet its obligations” with respect to the successorship provision. (*Id.* at 28-29.) The Respondents concurrently executed an Acknowledgment and Acceptance agreement and attached it to the APA to “document Buyer’s acknowledgment and acceptance of the conditions set forth ... above” – namely, recognizing the Union and accepting its MOU. (*Id.* at Schedule 4.7(b).) As required by the MOU, these documents were provided to the Union. Based on the manifestation that the Respondents would recognize the Union, a Union organizer and a vice president requested in writing and by phone that the Respondents commence bargaining toward an agreement to succeed the expiring MOU. (JX-2 at ¶ 45; SEIUX-2; GCX-42; Tr. 598-99, 1008-10.) To the extent the Respondents acknowledged those requests, their reply was to state that they would speak to the Union after the sale was consummated. (Tr. 1010.) The Respondents waited until after they had begun operating the Facility to inform the Union they would not bargain with it. (JX-2 at ¶ 46; SEIUX-3.) By this time, the Union had lost access to the Facility and the employees it had represented.

The Board has applied equitable estoppel to bar an employer from disavowing its obligation to bargain after agreeing to recognize a union. *See, e.g., Alpha Assocs.*, 344 NLRB 782, 783-84 (2005); *R.P.C., Inc.*, 311 NLRB 232, 233 (1993); *Red Coats, Inc.*, 328 NLRB 205, 206-207 (1999). This principle precludes “a party that, in obtaining a benefit, engages in conduct that causes a second party to reasonably rely on the ‘truth of certain facts’ that are assumed” from “controvert[ing] those facts later to the prejudice of the second party.” *R.P.C. Inc.*, 311 NLRB at 233, *citing Lehigh Portland Cement Co.*, 286 NLRB 1366, 1382-83 (1987). Hence, the elements of estoppel are knowledge, intent, mistaken belief and detrimental reliance. *Id.* The Board found all these elements to exist when, for example, the employer voluntarily recognized a union as bargaining representative of certain units, bargained with the union for more than a

year, and then refused to bargain on the bases that the union had not demonstrated majority support and that the represented units were inappropriate. *Alpha Assocs.*, 344 NLRB at 783. The employer's admitted voluntary recognition of the union established the knowledge and intent elements of estoppel. *Id.*

Further, the Respondent's conduct of bargaining with the Union for more than a year prior to its repudiation of the bargaining relationship (via its unilateral actions) surely induced the Union to believe that the Respondent would forgo any subsequent challenge to the propriety of the unit or to the Union's majority status as of the time of recognition. ... Thus, the Union, acting in reliance on its mistaken belief as to the Respondent's intentions, relied to its detriment on the Respondent's actions. Had the Respondent promptly challenged the propriety of the unit or the Union's majority status, the Union would have been in a stronger position to establish its authority through the Board's processes.

Id. at 783-84 (citations omitted). By recognizing the union, the Board observed, the employer had received the benefits of avoiding litigation or an organizing campaign. *Id.* at 784. Therefore, the employer was foreclosed from asserting that the union lacked majority support at the time of recognition and that the represented units were inappropriate.

Here, because the Facility was being privatized, the County required the Respondents to executed formal legal documents in which they manifested their intent to assume the "obligation" of recognizing the Union and accepting its MOU, creating a collective bargaining relationship under the Act. (GCX-19 at 15, Schedule 4.7(b).) Obviously, if an employer that purchases and subsequently operates a county nursing home agrees to recognize a union (and honor the predecessor's terms and conditions of employment), the successor employer has *necessarily done so under the Act*. There can be no issue of the obligation the Respondents undertook in order to consummate its purchase of the Facility from the County.¹⁷ The

¹⁷ The Respondents are not inexperienced in labor relations. They own and/or operate other unionized facilities (Tr. at 1006) and have retained able labor and employment counsel for many years (*id.* at 934).

successorship provision of the MOU, referenced in the sale documents, reinforced the nature of this obligation by plainly stating that in the event of a “privatization,” the successor employer “shall agree to recognize the Union and accept their Memorandum of Understanding.” (GCX-18 at 40.)

These documents were provided to the Union, as contemplated by the MOU (*id.*), inducing it to mistakenly believe that the Respondents would in fact recognize and bargain with the Union, as evidenced by its requests to begin bargaining. (JX-2 at ¶ 45; SEIUX-2.) The Respondents did nothing to contradict this belief until well after it began operating the Facility. (SEIUX-3.) As a result, the Respondents deprived the Union of the opportunity to demonstrate its majority support while still incumbent at the Facility while ridding themselves of any obligations to the employees’ chosen representative.

Equity demands that an employer not be permitted to renege on such an agreement to recognize a union without a good-faith factual basis for doing so. The ALJ should have estopped them from disavowing their obligation to recognize and bargain with the Union.

C. The ALJ erred by failing to make factual findings and legal conclusions with respect to whether the SEIU unit, which includes professional and nonprofessional employees, is appropriate for the purposes of collective bargaining.

Because the ALJ concluded the Respondents had no obligation to bargain with SEIU, he declined to consider the Respondents’ defense that the unit was inappropriate for purposes of collective bargaining because it included a combination of professional and nonprofessional employees. Dec. at 13, n.15. SEIU reiterates and herein adopts by reference counsel for the Acting General Counsel’s position, as set forth in its Limited Exceptions and Brief in Support thereof, that the Pennsylvania statute under which SEIU was certified as representative of an appropriate unit requires essentially the same procedure as the Act with respect to units including

professional and nonprofessional employees. *See* 43 P.S. § 1101.604(2). The professionals in this unit did, in fact, vote for inclusion in a unit along with nonprofessionals. (GCX-16 at 2.) The Board should extend comity to the PLRB's determination that the mixed unit is appropriate, *see St. Joseph's Hosp.*, 221 NLRB at 1253, and *Van Lear Equip., Inc.*, 336 NLRB at 1064, without remanding to the ALJ.

D. The ALJ erred by failing to make factual findings and legal conclusions with respect to whether the SEIU unit includes supervisory positions.

The ALJ likewise declined to consider whether the Respondents' defense that the unit was inappropriate for purposes of collective bargaining because it included statutory supervisors. Dec. at 13, n.15. SEIU reiterates and herein adopts by reference counsel for the Acting General Counsel's position, as set forth in its Limited Exceptions and Brief in Support thereof, that the record contains facts that allow the Board to conclude that the unit does not include supervisory positions. (*See* Tr. 802-03, 805, 816, 977-79, 987-89, 992-95, 997-99, 1037; SEIUX-14.) The Board may make such findings and conclusions without remanding to the ALJ.

E. The ALJ erred by failing to make factual findings and legal conclusions with respect to whether the Respondents violated the Act by unilaterally implementing IV therapy training and beginning the process of adding IV therapy duties to the work regimen of licensed practical nurses (LPNs).

Given his conclusion that the Respondents had no bargaining obligation toward SEIU, the ALJ dismissed the Consolidated Complaint allegations that the Respondents had violated the Act by training LPNs to administer and establish intravenous lines in residents/patients without affording the Union notice and an opportunity to bargain. Dec. at 13, n.15. SEIU reiterates and herein adopts by reference counsel for the Acting General Counsel's position, as set forth in its Limited Exceptions and Brief in Support thereof, that the record contains facts that allow the

Board to conclude that the Respondents' unilateral change violated the Act. (*See* Tr. 631-33, 801-02.) The Board may make such findings and conclusions without remanding to the ALJ.

IV. CONCLUSION

ALJ Goldman's Decision that the Respondents had no obligation to recognize and bargain with SEIU is contrary to the record, Board and judicial precedent, as well as the purpose and policy of the Act. The ALJ's findings of fact, conclusions of law and Recommended Order must be adopted only to the extent consistent with the foregoing. The Board should overrule the factual findings and make additional findings as is necessary to conclude that the SEIU unit is appropriate for collective bargaining purposes. The Board should modify the ALJ's Recommended Order to require the Respondents to bargain in good faith with SEIU.

Respectfully Submitted,

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Dated: January 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2011, I electronically filed the foregoing Brief in Support of Limited Exceptions to the ALJ's Decision and Recommended Order and caused copies to be served upon the following:

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