UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRANE HEALTHCARE CO. AND/OR EBENSBURG CARE CENTER LLC T/D/B/A CAMBRIA CARE CENTER and LOCAL UNION NO 1305, PROFESSIONAL AND PUBLIC SERVICE EMPLOYEES OF CAMBRIA COUNTY A/W THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA and GRANE HEALTHCARE CO. and/or EBENSBURG CARE CENTER LLC t/d/b/a CAMBRIA CARE CENTER and SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC	Consolidated Case Nos. 6-CA-36791 6-CA-36803 6-CA-36915

RESPONDENTS' ANSWERING BRIEF IN OPPOSITION TO THE LIMITED EXCEPTIONS FILED BY COUNSEL FOR THE GENERAL COUNSEL AND SEIU

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Counsel for the General Counsel and charging party SEIU have both excepted to the Judge's ruling that Respondents have no successor obligation to recognize and bargain with SEIU since SEIU was not, in fact, the collective bargaining representative of nursing employees when the former Laurel Crest facility was owned and operated by Cambria County. There are subsidiary issues arising out of these exceptions: both Counsel for the General Counsel and SEIU contend that the Judge should have determined that the SEIU unit was appropriate for purposes of collective bargaining within the meaning of Section 9(a), and both contend that the Judge should have found that Respondents violated Section 8(a)(5) when it offered Licensed Practical Nurses training in the establishment and maintenance of intravenous (IV) lines. *See*

ALJ Decision at 10-13; Counsel for the Acting General Counsel' Limited Exceptions to the Decision of Administrative Law Judge (GC Exceptions) at 1-3; Limited Exceptions of Charging Party SEIU Healthcare Pennsylvania (SEIU Exceptions) at 2-3. SEIU also argues that Respondents should be "estopped" from denying SEIUs status as bargaining representative because of the terms of the Asset Purchase Agreement with Cambria County, GCX 19, an agreement to which SEIU was not party. SEIU Exceptions at 5.

Reduced to its basics, the position of the General Counsel and SEIU is that because SEIU's status under Pennsylvania law was similar to but not quite what the Act would recognize as a collective bargaining unit, *e.g.*, Brief in Support of GC Exceptions at 15-17; Brief in Support of SEIU Exceptions at 16-19, that status was changed or converted automatically by operation of law into status as collective bargaining representative under Section 9 when Respondents hired a majority of the former County employees and took ownership of the former Laurel Crest facility. This position extends the concept of successorship beyond the already elastic boundaries heretofore approved by the Board, and further underscores the Respondents' contention that cases such as this one, involving questions of representation arising out of the transition from public-to-private employment, are best resolved under Section 9, not through litigation under Section 8(a)(5). The limited exceptions of the General Counsel and SEIU should be overruled.

I. SEIU WAS NOT AND IS NOT A COLLECTIVE BARGAINING REPRESENTATIVE.

The fatal flaw in the theory that Respondents are successors to Cambria County with respect to the SEIU is apparent from both the documentary evidence submitted at trial and an analysis of SEIU's status under the state law which governs the legal rights and obligations of public employers and employees in Pennsylvania. Public Employee Relations Act, 43 Pa.C.S.A. §1101.101 *et seq.*

SEIU was certified by the Pennsylvania Labor Relations Board at case number PERA-R-85-489-W. Stipulation, Joint Exhibit (JX) 2, ¶48; General Counsel Exhibit (GCX) 16. That certification reveals that SEIU was certified "as the EXCLUSIVE REPRESENTATIVE of the employees of [Cambria County Laurel Crest Manor] in the unit described below **for the purpose of meeting and discussing** with respect to wages, hours and other terms and conditions of employment." GCX 16 at 3-4 (capitalization in original, emphasis supplied). The unit certified by the PLRB was described as follows:

> 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 clinics 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 [PERA].

The description in the certification is substantially similar to that which appears in the last Memorandum of Understanding (MOU) between Cambria County and SEIU, GCX 18, at p. 1.[1]

The emphasized language quoted above is a term of art under Pennsylvania's Public Employe Relations Act ("PERA," otherwise known colloquially as Act 195), defined as follows:

> "Meet and discuss" means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employes: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.

43 Pa.C.S.A. §1101.301(17). So-called "meet and discuss" units under Pennsylvania law are not collective bargaining units: "Public employers **shall not be required to bargain with units of first level supervisors or their representatives** but shall be required to meet and discuss with

[1] The differences are: the certification includes "assistant supervisors in dietary and assistant supervisors in laundry", which positions are not mentioned in the agreement's recognition clause; while the agreement refers to "COTA's", which are not mentioned in the certification.

first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act." *Id.* §1101.704 (emphasis supplied).

Consistent with this positive statement of the state law under which SEIU obtained the claimed representational rights it seeks to expand upon through this litigation, there was no evidence submitted at the hearing that SEIU had any status other than "meet and discuss." Indeed, the only other evidence touching on its status while Cambria County operated the facility is the Memorandum of Understanding entered into between SEIU and the County, which recites:

> 22.8 Cambria County intends to abide by the provisions set forth in this Memorandum in good faith, but reserves its right under Section 704 of Act 195 (43 P.S. Section 1101.704) to alter those provisions prospectively at any time after meeting and discussing such changes with the Union.

GCX 18 at p. 35. Thus Cambria County had no obligation under state law to bargain with SEIU, a fact established as both a matter of state labor law and by MOU with the SEIU.

A. SEIU Must Win an Election in Order to Attain Status as Representative Under Section 9(a).

In their Exceptions and Brief in Support, Respondents argued that the Act requires an analytical approach under *Linden Lumber*, instead of under *Burns/Fall River*, to address the question of representation that is raised by transactions from a public employer not covered by the Act to a private employer who is subject to the Board's jurisdiction. *See* Respondents' Brief in Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge, at pp. 8-26. The position of the General Counsel and SEIU in their exceptions demonstrates the proposition.

Simply stated, SEIU has never been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes …." 29 U.S.C. §159(a). Under Pennsylvania's Public Employe Relations Act (PERA), SEIU's

predecessor was selected "for the purpose of meeting and discussing," GCX 16 at 3-4, not for "purposes of collective bargaining." Even assuming *arguendo* that the rebuttable presumption of majority support is a concept applicable in the context of transactions from public to private employment, the concept of majority can not work to change the nature of the object to which it is applied. Further, there was no evidence presented by the General Counsel or SEIU that SEIU functioned as anything other than a "meet and discuss" unit under Pennsylvania law. As the Judge observed, the question "majority support of what?" is unanswered. ALJ Decision at 11.

In *Linden Lumber* the Supreme Court endorsed the Board's position that employers "'should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of [their] refusal to accept evidence of majority status other than the results of a Board election.'" *Id.* (quoting *Linden Lumber Div.,* 190 N.L.R.B. at 721). *Linden Lumber Div., Summer & Co. v. National Labor Relations Board,* 419 U.S. 301, 305 (1974). Given this, it must equally be the case that an employer should not be found guilty of a violation of Section 8(a)(5) by refusing to accept as a section 9(a) representative an organization that has never been designated under any law, state or federal, as a collective bargaining representative.

B. SEIU Did Not "Convert" Into a §9(a) Representative As a Consequence of the Sale from Cambria County to Respondents.

Counsel for the General Counsel and SEIU both argue that SEIU's status was somehow converted into that of collective bargaining representative as a consequence of the purchase of the Laurel Crest by an "employer" under the Act. There is no authority for this contention, and in fact the Board has previously rejected as unworkable a similar approach to imposition of Section 9(a) status. In *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), enf'd, *International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1989), the Board "abandoned" its "conversion doctrine",

under which prehire agreements between a union and a construction industry employer, authorized by Section 8(f) of the Act, 29 U.S.C. §158(f), were held to have "converted" into Section 9(a) agreements in certain circumstances: "conversion required a showing that the signatory union enjoyed majority support, during a relevant period, among an appropriate unit of the signatory employer's employees. The achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process." 282 N.L.R.B. at 1378. The General Counsel and SEIU argue for a similar result here: they presume majority support for SEIU based on its designation under state law as something that was not a collective bargaining representative, and would convert that support to Section 9(a) status without notice, without any contemporaneous showing of majority support for the union, and certainly without the new employer's assent. The Board's unsatisfactory experiences with determining majority status and imposing 9(a) status as discussed in *Deklewa* are sufficient to discredit the General Counsel's and SEIU's exceptions in this case, and to further question the whole basis for the application of successorship principles in any transition from public to private employment.

The arcane and statutorily suspect conversion doctrine raised "several serious shortcomings" under the Act: it did not "fully square" with the legislative history of Section 8(f) or the actual language of the Act; it "inadequately serve[d] the fundamental statutory objectives of employee free choice and labor relations stability"; and it increased "the frustration of statutory policies" because of "the administrative and litigational difficulties created by current law." *Id.* at 1379, 1380.

These criticisms are equally applicable to the successorship issue here. Successorship applied in the context of public-to-private transactions perpetuates state-law relationships that by

the terms of the Act are expressly excluded from its coverage, and thus does not "fully square" with the law.

Successorship in this context ignores "employee free choice" because it simply presumes continued support of the state-sanctioned relationships even though the rights and obligations of the parties may be dramatically or even entirely different under the Act than they were at state law. The *Deklewa* Board noted "serious practical problems with the reliability and relevance of evidence purporting to establish majority status" in its 8(f) jurisprudence, problems which are equally present with the position espoused by the General Counsel and SEIU in their exceptions. Of fundamental concern to the Board in *Deklewa* was whether the evidentiary factors it had theretofore relied on "in the context of an 8(f) bargaining relationship, justifie[d] a finding of majority support sufficient to make Section 9(a) fully applicable." In particular, the Board noted that union membership is not a reliable indicator of majority status because "'[i]t is well established that union membership is not always an accurate barometer of union support.'" *Id.* at 1384-85 (quoting *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 906 (9th Cir. 1979)). The deficiencies with its Section 8(f) jurisprudence led the Board to conclude that "the majority status finding that is a necessary predicate for conversion often is based on a highly questionable factual foundation." *Id.* at 1385 (footnote omitted). The same is true here. Evidence of membership in SEIU's "meet and discuss" unit (of which there is none in the record) is a "highly questionable" proxy for determining support for SEIU as a bargaining representative under a vastly different legal framework. Neither the Judge, the General Counsel, nor SEIU explain why the evidence of majority support in this case – which is simply presumed to exist after having

once been established under a legal regime alien to and excluded from the Act[2] – is entitled to greater deference than the evidence that the Board found unreliable in *Deklewa*.

Finally, "labor relations stability" is not served by application of successorship to public-to-private transactions because the labor relations of the former public employer are of no legal significance under the Act. The Act's statutory objectives become applicable only when the new employer which is subject to the Act commences its operations; it is then, as *Linden Lumber* teaches, that the Act becomes concerned with "getting on with the problems of inaugurating regimes of industrial peace …." *Linden Lumber,* 419 U.S. at 307. Instead, successorship in this context saddles the new employer with the legacy of the now defunct state-law regulatory scheme, which under the General Counsel's theory apparently includes bargaining units and other relics that would not pass muster under the Act.

According to the Judge, in successorship cases "it is the application of [the] presumption of majority support which is the issue." ALJ Decision at p. 10. The Judge, General Counsel and SEIU all assume that the presumption applies regardless of whether the union's status was originally a product of state law, in spite of the fact that there is no empirical or statutory basis for the extension of the presumption to such circumstances. The litany of difficulties recited in *Deklewa,* which were encountered while the Board sought to reconcile application and interpretation of two different sections of the Act, are only compounded with this attempt to apply principles developed under the Act to transactions for which they were not contemplated and are not appropriate.

[2] SEIU contends that GCX 42 "contains evidence of *actual* majority support for SEIU" that was delivered to Respondents. SEIU Brief at 24 (emphasis in original). Under *Linden Lumber* this contention, even if true, is irrelevant, since an employer is entitled to reject any evidence of majority support short of a Board-conducted election. Moreover, GCX 42 is a petition addressed to the Cambria County Commissioners, not to Respondents. There is no indication on the document that the signatories are employees of the County, and Respondents are not mentioned on it; the petition does not designate SEIU as a collective bargaining representative of the signatories. In fact, the document would be insufficient as a showing of interest under the Board's election procedures, since it fails to indicate that the signatories have designated SEIU as their representative for purposes of collective bargaining.

C. SEIU's "Recognition by Estoppel" Argument Fails.

SEIU contends that Respondents should be "esstopped from challenging their obligation to recognize and bargain with it" because the terms of the Asset Purchase Agreement ("APA") between Cambria County and Grane Healthcare required Grane to do so. SEIU Brief at 26. This theory of successorship is not set forth in the Consolidated Complaint; there is no claim of "recognition by estoppel" fairly discernible from that pleading, and the issue certainly was not tried by consent. SEIU additionally misconstrues the terms of the APA and the terms of its own Memorandum of Understanding ("MOU") with Cambria County. Further, there is no evidentiary support for SEIU's contention that it "mistakenly believe[d] that the Respondents would in fact recognize and bargain with the Union …." *Id.* at 29. SEIU's contention must be rejected.

First, the gravamen of the SEIU's argument as it is articulated here is that Cambria County breached its Memorandum of Understanding with SEIU by failing to secure Grane Healthcare Co.'s compliance with what SEIU contends is required by Appendix C.[3] By its terms, Appendix C of the MOU between Cambria County and SEIU was operative only "during the term of this Memorandum." GCX 18 at p. 40. The MOU expired by its terms on December 31, 2009; the transaction was consummated on January 1, 2010. Hence, the Memorandum did not apply. Moreover, Respondents were not party to the MOU and so were not bound by it.

Further, the MOU was not enforceable under Pennsylvania law. "A Memorandum of Understanding arrived at through the 'meet and discuss' process is neither a collective bargaining agreement nor a contract." *Shaffer v. Pennsylvania Liquor Control Bd.*, 92 Pa.Cmwlth. 374, 378-379, 500 A.2d 917,920 (1985) (footnote omitted). *See also Pennsylvania*

[3] That claim is the subject of litigation currently pending in the United States District Court for the Western District of Pennsylvania, Civil Action No. 3:10-cv-113-KRG.

Liquor Control Bd. v. Clark, 97 Pa.Cmwlth. 320, 324, 509 A.2d 928, 931 (1986) ("a Memorandum of Understanding is *not* a collective bargaining agreement and cannot be considered to have the same effect as a collective bargaining agreement; neither is it a contract")(emphasis in original). Because public employers have no duty to bargain with meet and discuss units, the agreements that may be reached as a result of meeting and discussing are voidable. In *Pennsylvania Association of State Mental Health Physicians v. PLRB*, 125 Pa.Cmwlth. 276, 282-283, 557 A.2d 825, 827-828 (1989), the Commonwealth Court explained it in this fashion:

> The Memorandum [of Understanding] ... represents a memorialization of the views arrived at by the public employee labor organization and the public employer after discussion as to what would be sound policy for the employer to adopt with respect to issues affecting first-level supervisory employees. This is so despite the fact that the public employer is not bound to accept the proposal contained in the Memorandum, and the public employees union has no right to insist the public employer implement such proposals. See *Independent Association of Pennsylvania Liquor Control Board Employees v. Commonwealth*, 35 Pa. Commonwealth Ct. 133, 384 A.2d 1367 (1978). **Memoranda of understanding are viable not because such documents are legally binding upon the public employer, since they are not**, *id*., but because the public employer makes a good-faith effort to resolve matters affecting the public employer's first-level supervisory employees in a manner agreeable to such employees. [Citation omitted].
>
> Inasmuch as *Independent State Stores* instructs us that memoranda of understanding are non-binding and unenforceable … **[t]he Commonwealth would not be bound by such a proposal even if it were included in a fully executed memorandum of understanding.** For this same reason we likewise reject the Association's argument that the Board's order requiring the Commonwealth to meet and discuss the pay range issue is insufficient. Given the non-binding effect of memoranda of understanding it is the only meaningful remedy available.

125 Pa.Cmwlth. at 282-283, 557 A.2d at 827-828 (quoting *Independent State Store Union v. Pennsylvania Labor Relations Board*, 119 Pa. Cmwlth. 286, 293-294, 547 A.2d 465, 469 (1988) (first emphasis in original, second emphasis added)).

There is no evidence in the record establishing any of the elements of estoppel. No representations were made by Respondents to SEIU; the entirety of the claim is based on SEIU's interpretation of its agreement with the County and the commercial documents effecting the transaction between Cambria County and Grane Healthcare Co. SEIU is not a party to the APA on which it relies, and in fact the APA contains terms that negate any contention that SEIU or any other entity was a third party beneficiary to the contract. GCX 19 at §11.16 ("it is not the intention of the Parties to confer third-Party beneficiary rights upon any other Person ….").

SEIU therefore could not reasonably rely on anything in the APA. More to the point, the County and Grane Healthcare do not interpret the APA in the same manner SEIU contends here. Schedule 4.7(a) to the APA lists the MOU with SEIU and the County's expired agreement with Local 1305 as "Contracts", and contains the notation "See Schedule 1.1(e)." GCX 19 at Schedule 4.7(a). Schedule 1.1(e) sets forth the contracts to be assumed by the Buyer, and the SEIU's MOA is not listed among them. The Acknowledgment and Acceptance on which SEIU relies recites in its first paragraph the successorship language from Appendix C of the MOU, including the operative phrase "during the term of the MOU." Paragraph 2 of the Acknowledgment documents "Seller's obligation to place Buyer on notice of the requirements set forth in Paragraph 1, above." Paragraph 3 in turn is Buyer's "acknowledgment and acceptance of the conditions set forth in Paragraph 1," which as noted were effective only "during the term of the MOU." There was no violation of any obligation imposed by the APA,

nor was SEIU's purported reliance on a commercial document to which it was not a party justified.

The estoppel cases on which SEIU relies all address situations where the Board applied estoppel to prevent an employer from withdrawing recognition it had previously conferred. Thus in *Lehigh Portland Cement Co.*, 286 N.L.R.B. 1366 (1987), the Board agreed that the employer was "estopped from challenging the merger between the Cement Workers and the Boilermakers" because "[a]lthough Respondent was fully aware of the relationship between the two international unions, it continued to bargain with the Cement Workers for a year after the merger took place." 286 N.L.R.B. at 1366 n.3, 1382. *R.P.C., Inc.*, 311 N.L.R.B. 232 (1993) utilized estoppel to prevent the employer from withdrawing recognition from the incumbent union after it had affiliated with the UAW. The employer had notice of the affiliation, agreed to change the identity of the union on the cover page of the contract, and began dues checkoff for the newly affiliated union. "Thereafter, the Respondent dealt with Local 2286 as the bargaining representative of the unit employees." 311 N.L.R.B. at 232-233. The Board concluded that these actions "estopped [Respondent] from contesting the validity of the Union's affiliation process." *Id.* at 233. In *Red Coats, Inc.* 328 N.L.R.B. 205 (1999) estoppel was applied where the employer initially agreed to bargain with the union over single-location units, but later refused to bargain, claiming that only a multi-site unit was appropriate. The Board found that by its initial agreement to bargain at single-location units the Respondent received a benefit – "the avoidance of a companywide union organizing campaign and the stabilization of labor relations," – and therefore was estopped from withdrawing recognition at the single-location units. 328 N.L.R.B. at 207. *Alpha Associates*, 344 N.L.R.B. 782 (2005) is similar. The employer acknowledged that it had previously recognized the union, but withdrew that recognition and

made unilateral changes on the basis that its earlier recognition was invalid "as the Union never demonstrated, or offered to demonstrate, that it represented a majority of the unit employees." 344 N.L.R.B. at 782. The Board applied estoppel: "the Respondent's conduct of bargaining with the Union for more than a year prior to repudiation of the bargaining relationship (via its unilateral actions) surely induced the Union to believe that the Respondent would forego any subsequent challenge to the propriety of the unit or to the Union's majority status at the time of recognition." *Id.* at 783-784.

Here, the situation is not the same. SEIU does not contend that Respondents recognized it, commenced bargaining, and later repudiated the relationship. This whole litigation is centered on Respondents' initial refusal to recognize SEIU, not on a repudiation of a previously acknowledged relationship. Estoppel is inapplicable in these circumstances.

II. THE SEIU UNIT IS INAPPROPRIATE.

The unit SEIU contends it represents is legally inappropriate on its face, since it is a unit of "first level supervisors." The demand for recognition, in the form of Matthew W. Yarnell's December 23, 2009 letter to Leonard Oddo (as Chief Operating Officer of Grane Healthcare, not as Vice President of Ebensburg Care Center, LLC d/b/a Cambria Care Center), SEIU Exhibit (SEIUX) 2, is written "on behalf of the nurses" at the Laurel Crest facility and seeks to schedule dates to meet about the "nurse's [*sic*] contract." The only nurses under "contract" at the former Laurel Crest facility were those in the SEIU meet and discuss unit certified by the PLRB to include supervisors. Inasmuch as the agreement between Cambria County and SEIU by its terms covered supervisors, and the Act expressly states that no employer "shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining," 29 U.S.C. §164(a), Respondents were privileged to

decline SEIU's request to bargain. *E.g., Russelton Medical Group, Inc.*, 302 NLRB 718 (1991).

In apparent recognition of the fact that on its face the SEIU unit as certified by the PLRB was not appropriate under the Act (and that the Act actually forbids an order "compelling" Respondents to recognize the unit as it existed when Cambria County operated the facility), there was much effort expended at trial by the General Counsel and SEIU to demonstrate that the unit as certified under state law was different than what actually existed. *E.g.*, Transcript (Tr.) Vol. IV at 800-811; Vol. V at 984-1002. This effort was in derogation of the Consolidated Complaint, which at Paragraph 15 asserts that the claim that SEIU is a collective bargaining representative is premised on the certification by the Pennsylvania Labor Relations Board. Now that the PLRB certification is shown to be demonstrably insufficient to establish Respondents' alleged obligations to recognize and bargain with SEIU, the General Counsel and SEIU deem it necessary to attempt to prove that it is a legal nullity.[4] But the allegation in the Consolidated Complaint is that the "Unit" as "certified by the Pennsylvania Labor Relations Board" and "more

[4] It is instructive to observe that the effort to avoid the terms of the certification would fail under the PERA:

> The Commonwealth Court has held that in the absence of certification a purported bargaining representative of "public employes" which was not in existence in 1970 at the passage of PERA, negotiates at its peril subject to a right of the public employer to withdraw recognition in the absence of a certification. *Professional Public Service Employees Union Local 1300 v. Trinisewski, et al.*, 504 A.2d 391 (Pa. Cmwlth. 1986). Accordingly, we do not find the authority relied upon by USWA supports its contention for purposes of PERA that in the absence of certification it possesses an enforceable right to bargain on behalf of the bargaining unit in question.
>
> The USWA further relies on authority derived under the National Labor Relations Act and the Pennsylvania Labor Relations Act. It is clear that a bargaining obligation may arise under those acts pursuant to recognition by the employer in the absence of an election and certification of the bargaining representative. Once the employer extends recognition and bargains with a representative of its employes, it may not thereafter withdraw its recognition simply because the representative is not certified. However, this rule has no application under PERA and the law is clear that a bargaining representative may be established and possesses an enforceable right to bargain based either upon being in existence in 1970 when PERA was enacted or having obtained certification since PERA's enactment.

Ford City Borough, No. PERA-C-98-293-W, 30 PPER ¶30,031 (Final Order, 1999).

particularly described in the most recent collective-bargaining agreement *[sic]* between Laurel Crest and the Union[5], constitutes an appropriate unit for the purposes of collective bargaining within the meaning Section 9(b) of the Act." Consolidated Complaint, ¶¶15, 16. The claim pleaded in the Complaint is that Respondents are obligated to bargain with the unit certified by the PLRB, not some other unit that General Counsel and SEIU attempted to prove at trial. Further, the undertaking by the proponents of successorship to discredit the pre-existing unit certification is apparently unique in the reported cases; heretofore it has always been the province of the successor employer to challenge the appropriateness of the existing unit as a defense to the successorship determination,[6] although it must be observed that in none of the reported cases was the unit at issue so patently offensive to the policies of the Act as this one is. The absurdity of the General Counsel and SEIU contesting the efficacy, and indeed the veracity, of the very document that they contend establishes Respondents' obligation to bargain is readily apparent, and serves to emphasize the illegitimacy of the effort to apply the *Burns/Fall River* successorship principles to circumstances that were never contemplated by either the Board or the courts when those principles were developed.[7] The claim of successorship falls apart in the face of these facts.

The claimed bargaining obligation with the unit described in the PLRB certification also fails because that unit is composed of both professional and nonprofessional employees. The Act provides that "the Board shall not … decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are

[5] GCX 18 is that agreement, and it simply refers to the PLRB certification for the unit description. Article 1, Section 1.1, p. 1 recites that the County recognizes SEIU "as the exclusive representative of the employees of Laurel Crest Rehabilitation and Special Care Center as certified by the Pennsylvania Labor Relations Board for the purpose of meeting and discussing with respect to wages, hours and other terms and conditions of employment."

[6] *E.g., Indianapolis Mack Sales,* 288 NLRB 1123 (1988).

[7] The exercise by SEIU and the General Counsel also establishes Respondents' contention that the proper forum for resolution of cases such as this is an R-Case, not an unfair labor practice proceeding under Section 8(a)(5).

not professional unless a majority of such professional employees vote for inclusion in such unit …." 29 U.S.C. §159(b)(1). There quite obviously has been no Board conducted election in this unit, since the Board had no jurisdiction over the facility when it was owned by Cambria County. Further, the election conducted by the PLRB described in the certification, GCX 16, is not a lawful substitute for an election under Section 9(b) because the PLRB election was not conducted for the purpose of designating a collective bargaining representative under Section 9(a), but instead selected the "meet and discuss" agent under the PERA. Absent an election that comports with the strictures of Section 9(b), Cambria Care Center cannot be compelled under a misapplication of the successorship doctrine to recognize the SEIU. *Russelton Medical Group*, 302 NLRB at 718.

III. THERE IS NO DUTY TO BARGAIN OVER TRAINING OFFERED TO LPNS TO ESTABLISH AND MAINTAIN INTRAVENOUS (IV) LINES.

Paragraphs 21 to 23 of the Consolidated Complaint allege an 8(a)(5) violation because Cambria Care Center began "training of LPNs to administer and establish intravenous lines in residents/patients," thereby "implement[ing] a decision to change the job duties of its LPNs," all without bargaining with SEIU. First, it is apparent that this issue is subsumed by the overall claim that Respondents have a bargaining obligation to SEIU, and is peripheral to that claim. Assuming, *arguendo*, that such an obligation exists, this task does not trigger it.

On the merits, the law requires bargaining over changes to job duties only when such changes effect a "material, substantial, and significant" change to the job. *See, e.g., Alamo Cement Co.,* 277 NLRB 1031 (1985) "A change is measured by the extent to which it departs from existing terms and conditions affecting employees." *Southern California Edison,* 284 NLRB 1205, 1205 n.1 (1987). The remarkable ambiguity of these "legal" standards suggests the elasticity of the requirement of bargaining over job content, as opposed to rates of pay and hours.

The Board focuses the inquiry on these latter items in these types of cases. *E.g., Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1065 (2006). There is no claim here that any LPN's pay or schedule was changed.

LPNs are authorized under Pennsylvania's Practical Nurse Law to "perform venipuncture and administer and withdraw intravenous fluids" after appropriate training. 49 Pa. Code §21.145(f). Such training has been required for all graduates of LPN programs in Pennsylvania since 1991, and it is a subject on the licensing examination. Tr. Vol. IV at 801. LPNs at Cambria Care Center already administer subcutaneous injections. Tr. Vol. IV at 821. Inasmuch as the ability to perform IV maintenance has been a licensing requirement of nursing graduates for 20 years it is difficult to comprehend how the introduction of that task at Cambria Care Center could be a "material, substantial and significant" change to the LPN job at the facility. Administration of intravenous lines, although different, is not a "material, substantial and significant" change to the LPN current duties, and there is no testimony in the record to establish such a distinction. The General Counsel simply argues the proposition: "[R]equiring LPNs to puncture veins and arteries when they had never performed this duty before is a material and substantial change to their job duties." GC Brief at 22. SEIU adopts the General Counsel's argument. SEIU Brief at 30.

Furthermore, the claim itself is speculative, since the record shows that there were no LPNs who were establishing and maintaining IVs at Cambria Care Center. Tr. Vol. IV at 821-822. Management has simply offered training to those interested on a voluntary basis, and only one group of four LPNs had actually been trained at the time of the hearing. Tr. Vol. VI at 1095-1097. Respondents are unaware of any authority establishing that an employer's offer of voluntary skills training to its employees is a mandatory subject of bargaining. The General

Counsel has failed to prove the 8(a)(5) violation alleged in connection with the intravenous training.

IV. CONCLUSION

This case is (or should be) an R-Case. For the reasons recited above, and for those previously articulated in their Brief in Support of Exceptions, Respondents contend that all cases involving the transition from public to private employment raise questions of representation affecting commerce that should be resolved under Section 9. Moreover, SEIU was never a collective bargaining representative under any law. The unit for which it did possess certain recognized rights under the PERA is inappropriate on its face under Section 9, the Complaint asserts that it is that unit which the General Counsel contends is appropriate, and for this reason Respondents had no duty to recognize and bargain with SEIU. The SEIU's estoppel argument fails on the merits and because it was not a theory pleaded in the Complaint nor litigated at the trial. The training offered to LPNs in the establishment and maintenance of IV lines does not require bargaining, even assuming SEIU was considered a bargaining representative.

For these reasons, the limited exceptions should be rejected.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Respondents' Answering Brief in Opposition to the Limited Exceptions Filed by Counsel for the General Counsel and SEIU** was served on the below-listed this 11th day of February, 2011 via electronic filing:

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