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

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

and

Case 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 t/d/b/a CAMBRIA CARE CENTER

and

Case 6-CA-36803
and 6-CA-36915

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF

Submitted by:

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Region Six
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Dated at Pittsburgh, Pennsylvania,

this 25th day of February 2011

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Counsel for the Acting General Counsel hereby submits this Reply Brief in the above-captioned matter.

I. STATEMENT OF THE CASE AND ARGUMENT

In its Answering Brief to Counsel for the Acting General Counsel's Limited Exceptions and Brief in Support Thereof, Respondents mischaracterize the position of Counsel for the Acting General Counsel (hereinafter called the General Counsel) with respect to the bargaining status of the SEIU Healthcare Pennsylvania, CTW, CLC which represented a unit consisting of Staff Registered Nurses and Licensed Practical Nurses employed by the predecessor. Through this mischaracterization, Respondents claim that the General Counsel's exceptions would result

in an expansion of the successorship doctrine "beyond the already elastic boundaries" that the concept employs (Respondents' Answering Brief at page 2). In fact, the General Counsel is not requesting any such expansion. To the contrary, the underlying contention of the General Counsel's exceptions is that the Administrative Law Judge (hereinafter called the ALJ) erred by failing to recognize and apply well-established Board precedent that the successorship doctrine is appropriately applied to public-to-private transactions even in the presence of state law limitations on some aspects of collective-bargaining rights under the predecessor. *Lincoln Park Zoological Society*, 322 NLRB 263 (1996); *JMM Operational Services, Inc.* 316 NLRB 6 (1995); *Morris Healthcare & Rehabilitation Center, LLC*, 348 NLRB No. 96 (2006); *Dean Transportation, Inc.*, 350 NLRB 48 (2007) enf'd 551 F.3d 1055 (2009); *Specialty Hospital of Washington Hadley, LLC*, 2009 WL 2767339 (JD-39-09, August 26, 2009).

Respondents' further attempt to buttress its contention that the extant precedent of applying the successorship doctrine to public-to-private transactions should be overruled by emphasizing that the SEIU's certification was for what is called a "meet and discuss unit" under applicable state law is misleading (Respondents' Answering Brief at page 3). In this respect, while under applicable state law the full panoply of collective-bargaining rights was not available to the SEIU-represented unit, the SEIU was nonetheless, certified as the "exclusive representative of that unit." Thus, contrary to Respondents' claim, the predecessor employer was not free to ignore its obligation to recognize the SEIU as such representative. Indeed, under applicable state law, the predecessor was required to meet and discuss wages, hours and other terms and conditions of employment with the SEIU before implementing any proposals or changing existing terms (See General Counsel's Brief-In-Support of Limited Exceptions at pages 16-18). It noteworthy that while Respondents chose to emphasize that the predecessor could ultimately change terms without the agreement of the SEIU, in its certification of the SEIU unit, the State chose to emphasize the fact that the SEIU was the "Exclusive Representative" of the unit by capitalizing these words in the official certification while giving no

added emphasis to the description of the unit as a meet-and-discuss unit (See Respondents' Answering Brief at page 3; GCX-16). Additionally, Respondents' focus on the inability of the SEIU, representing the meet-and-discuss unit under the predecessor, to obtain a restoration of the status quo remedy for unlawful unilateral changes and mid-term contract modifications. However, as more fully discussed in General Counsel's Brief In Support of Exceptions, this difference is really a difference in available remedies, not a difference in the public employers' legal obligation to recognize the SEIU as the employees' exclusive collective-bargaining representative (Brief in Support of Limited Exceptions at pages 16-18). Moreover, there is very little practical difference between an employer's right under the Act to implement its last, best and final offer upon reaching a valid impasse and that of the predecessor to implement its proposals having met and discussed those proposals with the exclusive representative of its employees. Even under the Act, imposition of specific terms is not an available remedy for surface bargaining cases. Rather, similar to the authority of the state labor board, under the Act, the Board is only authorized to order that the parties return to the bargaining table.

Respondents' ultimate contention is that in public-to-private transactions, the recognized representative of the predecessor's unit employees must re-establish its representative status through a Board-conducted election (Respondents' Answering Brief at page 4). To support this position, Respondents mistakenly rely upon the Board's decisions in *Linden Lumber Div., Summer & Co,* 194 NLRB 718 (1971) and *John Deklewa & Sons*, 282 NLRB 1375 (1987) (Respondents' Answering Brief at pages 4-8). Because the General Counsel has addressed Respondents' mistaken reliance upon *Linden Lumber*, in the Answering Brief to Respondents' Exceptions that argument will not be repeated herein (General Counsel's Answering Brief at pages 19-20).

Just as Respondents' reliance upon *Linden Lumber* is wholly inapplicable to the present case, so is its reliance upon *Deklewa*. Respondents argue that the Board's rationale for the abandonment of its "conversion" doctrine in *Dekelwa* should also apply here and thus require

the abandonment of the successorship doctrine where there is a public-to-private transaction. However, there are several dispositive differences between the conversion of a Section 8(f) bargaining relationship to a Section 9(a) bargaining relationship and the continued recognition of an established bargaining representative in successorship situations. The most notable difference is that recognition of a union as the employees' representative without either a certification or voluntary recognition based upon a showing of a union's majority status outside the context of Section 8(f) would most likely constitute unlawful recognition. Thus, Section 8(f) is a unique provision of the Act which allows a construction employer to make an agreement with a union representing construction employees even though the union's majority status has not been established prior to the making of the agreement. It was designed to allow employers in that industry to secure employees to staff construction projects from a bank of skilled craftsmen through their respective craft unions tailored to meet the needs of differing construction projects. In this way, skilled employees are readily available to the construction employer and steady employment for those craftsmen is more likely since multiple employers will be seeking their employment through a common source, the hiring hall. Thus, although employees may not work consistently for any one employer, they may nevertheless work consistently for a variety of employers on various construction projects. Additionally, a Section 8(f) bargaining relationship is created by contractual agreement between the construction employer and trade union. Thus, when the 8(f) agreement expires, the construction employer's obligation to recognize the union and the union's obligation to supply labor when requested by the employer also expires.

In a successorship situation, the predecessor's recognition of a union will have been based upon either a certification resulting from an election or voluntary recognition. Thus, the successor's obligation to recognize and bargain with the employees' representative is not a conversion of that union's representative status, it is instead a continuation of its status. Additionally, in the instant matter, there was in fact an election conducted among the eligible

voters using a state-conducted election process that is remarkably similar to that used by the Board. Thus, a refusal to apply the successorship doctrine in this instance effectively nullifies that election. Finally, the predecessor employer's obligation to recognize the SEIU as the "exclusive representative" of unit employees existed before, during and after the term of any memorandum of understanding reached between the parties. Moreover, the predecessor was not free to withdraw recognition from the SEIU and ignore its obligation to meet and discuss terms and conditions of employment with the SEIU.

In summary, the General Counsel's position with respect to the recognition of the Laborers' Union and SEIU is that the Board should continue to apply the successorship doctrine to public-to-private transactions. In so doing, the Board continues to give force and effect to the employees' selection of their respective union to represent them and promotes industrial peace through collective bargaining. Contrary to Respondents' claims, the General Counsel has not asked for an expansion of the successorship doctrine but merely the continued application of the successorship doctrine. Additionally, Respondents' claim that the imposition of a bargaining obligation with respect to the SEIU unit will effectively convert the SEIU's representative status from something short of a Section 9(a) status to a 9(a) status is clearly erroneous. Instead, it is the General Counsel's position that the imposition of a bargaining obligation with respect to the SEIU unit is the enforcement of the SEIU's representative status that was established through an election process that mimics the Board's own process. Accordingly, the employees' selection of their exclusive representative should be honored, especially where, from their perspective, there has been no substantial change to their jobs.

Finally, Respondents' more traditional claims that it is privileged to deny recognition based upon its claim that the unit is an inappropriate unit are unsupported by the record. Initially, it must be noted that while the Pennsylvania Labor Relations Board's certification refers to employees in the SEIU unit as consisting of "first level supervisors," there is no evidence to indicate that this description accurately reflects that at the time of the certification these

employees would have been found to be supervisors within the meaning of Section 2(11) of the Act. Rather, the record reveals that for the period immediately preceding Respondents' assumption of operations, through and including the time of the underlying hearing, staff registered nurses, whose status was in question, did not exercise any supervisory authority in order to be found Section 2(11) supervisors. Lacking any evidence that Respondents' staff registered nurses possess supervisory authority, Respondents rely entirely upon the wording of the Pennsylvania Labor Relations Board's (PLRB) certification to support their claim of supervisory status. However, Respondents are and were in the best position to present evidence about the alleged supervisory status of their staff registered nurses, and did not do so. Additionally, because Respondents managed the facility for the predecessor, they cannot claim that they were unfamiliar with the job duties and responsibilities of the staff registered nurses as they existed under the predecessor. Thus, their bald reliance upon the wording of the PLRB certification to support a claim that the unit is an inappropriate unit because it includes Section 2(11) supervisors in the face of evidence to the contrary should be rejected.

Further, it is settled that the existence of significant bargaining history weigh heavily in favor of a finding that a historical unit is an appropriate unit and the party challenging the unit bears the burden of showing that the unit is no longer appropriate. *Canal Carting, Inc.*, 339 NLRB 969, 970 (2003). Additionally, the Board has held in successorship situations that the presence of a few supervisors in a unit does not render the entire unit inappropriate. *Puerto Rico Hotel Assn.*, 259 NLRB 429, 447 (1981), revd. on other grounds 690 F.2d 318 (2d Cir. 1982); *Burlington Food Store*, 172 NLRB 781 (1968). While Respondents may be privileged to exclude statutory supervisors from the unit when bargaining commences, they are not privileged to deny recognition on this basis unless the entire unit consists of supervisors and/or the exclusion of such persons would negate the union's majority status. See, *Stanford Realty Associates, Inc.*, 306 NLRB 1061, 1066 (1992). Moreover, Respondents did not rely upon the claimed presence of supervisors in the unit in its refusal to recognize the SEIU outside the

context of the instant unfair labor practice case (SEIUX-40). *Stanford Realty*, ibid. citing *David Wolcott Kendall Memorial School*, 866 F.2d 157, 161, 162 (6th Cir. 1989). It is submitted that under these circumstances, Respondents' unsupported claim that the unit is inappropriate because it purportedly includes statutory supervisors should be rejected.

Respondents' additional claim that the unit is an inappropriate unit because it is comprised of both professional and non-professional employees should also be rejected for the reasons set forth more fully in the General Counsel's Brief In Support of Limited Exceptions. Respondents' assertion that the election conducted by the Pennsylvania Labor Relations Board providing professionals the choice of whether to be included in a mixed unit was legally insufficient based on the "meet and discuss" nature of the SEIU's representation status should also be rejected. Regardless of the nature of the represenatation, the plain truth is that the professionals chose the SEIU to be their "Exclusive Representative" and also chose to be included with non-professionals. As revealed by the PLRB's certification, the question of inclusion with nonprofessionals was squarely presented to the professionals and they overwhelmingly chose to be included in a mixed unit. Based thereon, there is no reason to now disturb the historical unit (GCX-16).

II. CONCLUSION

As more fully detailed in the General Counsel's Brief in Support of Limited Exceptions, the uncontroverted record evidence and relevant legal authority fully support a finding that Respondents unlawfully failed and refused to recognize the SEIU as the exclusive collective-bargaining representative of a unit of staff registered nurses and licensed practical nurses. Respondents' attempt to undermine such a finding by the mischaracterization the General Counsel's contentions in this regard should be rejected. Moreover, Respondents' reliance upon *Linder Lumber* and *Deklewa* should also be rejected as these cases are wholly inapplicable to an analysis of whether the successorship doctrine is appropriately applied in public-to-private

transactions. To the contrary, the continued application of current Board sucessorship precedent in public-to-private transactions is necessary to promote the fundamental policy of the Act; i.e., to promote the industrial peace and stable labor relations through collective bargaining.

Dated at Pittsburgh, Pennsylvania this 25th day of February 2011.

Respectfully submitted,

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FORM NLRB-877
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AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic and postpaid ~~certified~~ mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 25th day of February, 2010.	Dee Mallen