

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.

REPLY 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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I. INTRODUCTION

Despite the arguments advanced in the Respondents’ Answering Brief, the Pennsylvania Labor Relations Board (“PLRB”) certification of SEIU as exclusive representative of a unit of employees at the Facility¹ now operated by the Respondents and (2) the Respondents’ agreement as part of the sale transaction with the Facility’s previous owner, Cambria County (“County”), to “recognize the Union and accept their Memorandum of Understanding” with the County,² provide ample legal and factual grounds to impose successor bargaining obligations on the Respondents. The Board must sustain SEIU’s and the Counsel for the Acting General Counsel’s Limited Exceptions to the ALJ’s Decision and Recommended Order.

II. ARGUMENT

A. SEIU’s status as the employees’ exclusive representative under Pennsylvania state law gives rise to a presumption of majority support as a collective bargaining representative under the Act.

The Respondents’ assertion that SEIU was not a “collective bargaining” representative of the unit of employees under Pennsylvania’s Public Employee Relations Act (“PERA”), 43 P.S. §§ 1101.101-1101.2301, hinges on the assumption – embraced by ALJ Goldman – that the ability to enter into a legally enforceable contract with an employer is *the* dispositive characteristic of a relationship cognizable under the Act. This assumption is erroneous. Rather, the Act

¹ As in SEIU’s Brief in Support of its Limited Exceptions, “Facility” refers to the nursing facility now known as Cambria Care Center, formerly Laurel Crest Rehabilitation & Care Center.

² It is otherwise undisputed that the Respondents fulfilled the elements of successorship set forth in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). (ALJ Dec. at 9.) The Respondents, *inter alia*, acquired substantially all the assets of the predecessor employer, continued its business without interruption and hired a majority of its employees in substantially the same capacity.

encompasses a legal relationship through which the exclusive representative of a unit of employees meets and confers with an employer regarding terms and conditions of employment. SEIU acted in precisely such a capacity with respect to the predecessor public employer. It is now entitled to recognition under the Act by the Respondents as a successor employer.

This issue arises because PERA, unlike the Act, provides for somewhat different bundles of representational rights for various categories of employees. Those denominated “first level supervisors,” like the employees in the unit here, may choose a representative “to meet at reasonable times [with the public employer] and discuss recommendations submitted by representatives of public employes,” 43 P.S. § 1101.301(17), regarding “matters deemed to be bargainable for other public employes,” 43 P.S. § 1101.704. Meet-and-discuss representatives may enter memoranda of understanding (“MOUs”) with public employers to memorialize the results of meet-and-discuss sessions, but these MOUs are not judicially enforceable. *Indep. State Store Union v. Pa. Labor Relations Bd.*, 547 A.2d 465, 469 (Pa. Commw. Ct. 1988).

Other types of public-sector employee representatives are entitled to “meet and confer” with the employer regarding terms and conditions of employment, with the goal of executing “a written contract incorporating any agreement reached.” 43 P.S. § 1101.701. But the rights of those representatives and employees are abridged in other respects. Employees of “school entities” may strike only under very limited circumstances.³ Certain other employees, such as guards and court employees, may not strike at all. 43 P.S. § 1101.604(3). PERA also provides for a narrower range of bargainable subjects than the Act. For example, the Act requires an employer to bargain over the effects of its policy decisions, while PERA expressly exempts

³ School employees may not strike if doing so would prevent the school district from providing the number of days of instruction required by law; instead, the parties must submit to interest arbitration. 24 P.S. § 11-1125-A(b).

“matters of inherent managerial policy” from the bargaining obligation. 43 P.S. § 1101.702.⁴ A public employer must only “meet and discuss” regarding these matters, *id.*; in other words, *no* type of employee representative is entitled to enter into a legally binding agreement with respect to the effects of employer policy decisions, as it could under the Act. Despite these differences, the Board has held that a private-sector successor employer was obligated to bargain with an exclusive representative of a unit certified under PERA, *Van Lear Equip., Inc.*, 336 NLRB 1059, 1064 (2001), even though those former school district employees lacked full strike rights, among other rights provided by the Act.

The Respondents ignore that which the several types of employee representatives created by PERA and other state statutes have in common: the exclusive right to meet and discuss (or confer) with an employer regarding terms and conditions of employment. This is indistinguishable from an employer’s core bargaining obligation under the Act, which is 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). Instead, the Respondents emphasize that the predecessor employer here could prospectively alter the unit’s terms and conditions of employment without running afoul of state law or the MOU. As explained in SEIU’s Brief in Support of its Limited Exceptions, the lack of a right to enter into an enforceable agreement with an employer does not mean that SEIU was not a “collective bargaining” representative for the purposes of the Act. Even the Act permits an employer to unilaterally impose terms and conditions of employment under certain circumstances (i.e., a genuine impasse), as long as it fulfills its duty to *meet and confer in good faith* – the same duty that the predecessor employer

⁴ These matters “include but shall not be limited to 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.” *Id.*

here had toward SEIU.⁵ Therefore, the fact that SEIU did not have a binding contract with the County in no way precludes a presumption of majority support for SEIU as collective bargaining representative under the Act, regardless of the label PERA attached to it.

The Respondents point out that SEIU would gain expanded representational rights if successful in this litigation. The Board has never absolved a private sector successor employer of its bargaining obligations because the Act would grant employees or their representative rights they did not enjoy under state law. To the contrary, the Board and the circuit courts have refused to examine differences in the scope of representational rights conferred by the Act and state labor laws. *See, e.g., Dean Transp., Inc.*, 551 F.3d 1055, 1063 (D.C. Cir. 2009), *enforcing* 350 NLRB 48 (2007) (rejecting employer's argument that Michigan law prohibiting strikes precluded successor bargaining obligation to union representing school bus drivers). Yet the Board and the courts have found no distinction between state law and the Act significant, let alone dispositive, in determining whether a private successor employer is obligated to bargain with a union previously certified under a state labor relations statute. *Dean Transp., Inc.*, 551 F.3d at 1063; *Van Lear Equip., Inc.*, 336 NLRB at 1064 (successor obligation imposed based on predecessor's bargaining relationship governed by PERA); *Siemens Techs., Inc.*, 345 NLRB 1108, 1113 (2005) (New York power plant operator required to bargain with union representing former county employees); *Univ. Med. Ctr.*, 335 NLRB 1318, 1332 (2001), *enforced in relevant part*, 336 F.3d 1079 (D.C. Cir. 2003) (successor bar rule applied to require employer to bargain with unit of employees at California hospital formerly owned by county); *Lincoln Park Zoological Soc'y*, 322 NLRB 263, 265 (1996), *enforced*, 116 F.3d 216 (7th Cir. 1997) (operator of zoo required to bargain with union voluntarily recognized by City of Chicago as predecessor employer); *JMM*

⁵ A failure to meet and discuss is an unfair labor practice under PERA, 43 P.S. § 1101.1201(9), just as a failure to bargain is a ULP under the Act, 29 U.S.C. § 158(a)(5).

Operational Servs., 316 NLRB 6, 13 (1995) (wastewater treatment plant operator required to bargain with union certified by Illinois labor board to represent unit of former city employees).

If the Board accepts the Respondents' arguments, SEIU would have no representational rights *at all* – and the employees would have no representation – even though the employees chose SEIU as their exclusive representative with respect to terms and conditions of employment. This result would betray a core purpose of the Act: protecting workers' "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. For these reasons, SEIU's exceptions must be sustained.

1. *The Linden Lumber analysis advanced by Respondents is inapplicable to SEIU.*

The Respondents' reliance on *Linden Lumber Div., Summer & Co.*, 190 NLRB 718 (1971), *enforced*, 419 U.S. 301 (1974), is misplaced for the reasons set forth in the Counsel for the Acting General Counsel's Answering Brief to Respondents' Exceptions. Absent any evidence that the state proceedings through which SEIU was certified violate due process or a specific mandate of the Act, the state certification of SEIU as exclusive representative is entitled to comity from the Board. *E.g., St. Joseph's Hosp.*, 221 NLRB 1253, 1253 (1975).

2. *The concept of "conversion" is inapplicable to this case.*

The Respondents' reliance on *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced*, *Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), is similarly misplaced. SEIU adopts and reiterates the position of the counsel for the Acting General Counsel with respect to this issue. Furthermore, *Deklewa* dealt with the "conversion" of union into a Section 9(a) representative by virtue of a prehire agreement between it and an employer in the construction industry, as authorized by Section 8(f) of the Act.

282 NLRB at 1378. This case has nothing whatsoever to do with Section 8(f), and *Deklewa* is therefore inapplicable. The Respondents contend, however, that the doctrinal difficulties similar to those resolved by the Board in *Deklewa* are present here.⁶ Yet the Board has never struggled in the least to apply the traditional *Burns/Fall River* successorship analysis to a representational relationship established under state law. *See* cases cited *supra* at 4-5. It is the Respondents' position that, if adopted as Board law, would require scrutinizing state labor relations statutes and the bundles of rights conferred by them to discern which relationships constitute "collective bargaining" within the meaning of the Act. The existing Board precedent dealing with public-to-private successorship (cited above) sets forth a bright-line rule that provides predictability for both employers and employees.

The Respondents also contend that applying the *Burns/Fall River* framework in the privatization context does not serve to stabilize labor relations because "successorship in this context saddles the new employer with the legacy of the now-defunct state-law regularly scheme..." (Answering Br. at 9.) The Respondents look at only half of the labor relations equation. They ignore the *employees'* perspective, a critical element of the *Burns/Fall River* analysis. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 43 (1987). "If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Id.* at 43-44. The employees here had no reason to believe SEIU would not

⁶ The Respondents state that the Acting General Counsel and SEIU "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 ... and certainly without the new employer's assent." (Answering Br. at 6.) As discussed above, SEIU's role under state law constitutes collective bargaining within the meaning of the Act. Moreover, as will be discussed *infra*, the Respondents *did* assent to SEIU as a Section 9(a) representative.

continue to act as their exclusive representative with respect to terms and conditions of employment after privatization.⁷ In fact, they demanded in a petition that the Respondents “honor the contracts with employees....” (GCX-42; Tr. 598-99.)⁸ *Fall River* requires that the Board give effect to these expectations by ordering the Respondents to bargain with SEIU.

3. *The Board may appropriately apply equitable estoppel under these circumstances.*

As recounted in SEIU’s Brief in Support of its Limited Exceptions, the Respondents agreed in both the Asset Purchase Agreement (“APA”) effecting the sale of the Facility and in the appended and incorporated Acknowledgment and Acceptance to assume the “obligation” to “recognize the Union and accept their Memorandum of Understanding” with the County. (GCX-19 at 15, Schedule 4.7(b).) These agreements preclude the Respondents from refusing to recognize and bargain with SEIU. The Respondents claim SEIU is misinterpreting the agreements and was not a party to them.

The agreements’ intent is clear. The MOU between SEIU and the County contemplated a “privatization” of the Facility, providing that the County would put any buyer or lessee on notice of the “requirement” that the successor “agree to recognize the Union” and accept the MOU as a condition of the transaction. (GCX-18 at 40.) The County obtained not one, but two documents executed by the Respondents in which they agreed to be bound by the terms set forth in the MOU. (GCX-19 at 15, Schedule 4.7(b)) The obvious intent of these documents was to ensure that with a “privatization,” the successor – which, as a private-sector employer, would

⁷ As the ALJ correctly stated, “The employees chose this representation [by SEIU] and there is no indication that they do not wish to continue to be represented.” (ALJ Dec. at 12.)

⁸ The Respondents discount this petition as “addressed to the Cambria County Commissioners, not to Respondents.” An SEIU organizer testified without contradiction that the petition was also delivered to the Respondents. (Tr. 598-99.)

necessarily be subject to the Act – promised to recognize and bargain with SEIU as collective bargaining representative of the employees.

The Respondents assert that they had no obligation to recognize SEIU because the APA successorship provision and the Acknowledgment and Acceptance were effective only “during the term” of the MOU, which expired immediately before the sale transaction was consummated at 12:01 a.m. on January 1, 2010. If that were the case, why did the parties include these successorship provisions in the APA and the Acknowledgment and Acceptance at all? What obligation did the Respondents assume when they executed two documents in 2009 in which they agreed, without limitation, to “recognize the Union”? The Respondents offer no explanation. The Respondents understood that they could not purchase the Facility unless they agreed to recognize and bargain with SEIU, but now want to flout the promise they made. The fact that SEIU was not a party to the APA or Acknowledgment and Acceptance is irrelevant because the County, *on behalf of SEIU*, secured the Respondents’ agreement to “recognize the Union.” Moreover, the MOU, incorporated by reference into the agreements executed by the Respondents, also put the Respondents on notice that “[a] copy of all [these] documents shall be sent to the Union in a timely manner.” (GCX-18 at 40.) Having agreed unequivocally to “recognize the Union” in documents secured by the County on behalf of SEIU, which the Respondents knew would be provided to SEIU, the Respondents cannot refuse to bargain now.

The Respondents further contend that estoppel should not apply because the cases cited by SEIU “all address situations where the Board applied estoppel to prevent an employer from withdrawing recognition it had previously conferred” by commencing bargaining. The cited cases in no way limit estoppel to situations in which an employer has withdrawn recognition in the midst of bargaining. Rather, estoppel may be applied in any circumstance in which a party

detrimentally relies on another party's representations. *See, e.g., Manitowoc Ice, Inc.*, 344 NLRB 1222, 1224 (2005) (union estopped from pursuing ULP charge after acquiescing to employer's profit-sharing plan as management prerogative). SEIU, having relied on the Respondents' promise to recognize it and to contact union representatives after their purchase of the Facility was consummated (Tr. at 1010), has unquestionably been prejudiced: It has been stripped of its representational rights and its access to the Facility and the employees. Equity demands that the Respondents be estopped from refusing to recognize and bargain with SEIU.

B. The SEIU unit is appropriate within the meaning of the Act.

SEIU reiterates its position as set forth in its Brief in Support of its Limited Exceptions. SEIU also adopts and reiterates the position of counsel for the Acting General Counsel, as set forth in her briefs in this case.

C. Respondents must bargain over the implementation of IV therapy training and beginning the process of adding IV therapy duties to the work regimen of licensed practical nurses (LPNs).

SEIU reiterates its position as set forth in its Brief in Support of its Limited Exceptions. SEIU also adopts and reiterates the position of counsel for the Acting General Counsel as set forth in her briefs in this case.

IV. CONCLUSION

For the reasons set forth above, SEIU's and the Counsel for the Acting General Counsel's Limited Exceptions to the ALJ's Decision and Recommended Order must be sustained.

Respectfully Submitted,

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Dated: February 25, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2011, I electronically filed the foregoing Reply 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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