

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

In the Matter of

735 PUTNAM PIKE OPERATIONS, LLC, d/b/a
GREENVILLE SKILLED NURSING AND
REHABILITATION CENTER

and

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, a/w SERVICE
EMPLOYEES INTERNATIONAL UNION (SEIU)

CASE 1-CA-46619

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT'S
OPPOSITION TO MOTION TO TRANSFER PROCEEDING TO THE BOARD AND FOR
SUMMARY JUDGMENT

NOW COMES Ronald S. Cohen, Counsel for the Acting General Counsel of the National Labor Relations Board (herein the Board), who files this Reply to Respondent's Opposition to Petitioner's Motion for Summary Judgment (herein referred to as Respondent's Opposition), filed on February 24, 2011, in this matter and, in support of this Reply, states the following:

1. Respondent asserts two defenses to its admitted refusal to bargain with the Union in this case. First, it asserts that the certified unit is not an appropriate unit. Second, it asserts that the election results were not properly certified. Respondent's first defense is addressed by Counsel for the Acting General Counsel in his original Motion to Transfer Proceeding to the Board and For Summary Judgment (herein referred to as the Motion), filed in this matter on February 8, 2011, and will not be further addressed herein. Respondent's second defense is addressed below.

2. As stated in Counsel for the Acting General Counsel's Motion, the Tally of Ballots for the election conducted in Case 1-RC-22474 issued On November 23, 2010. Thereafter, due to a clerical error, on November 29, 2010, the Regional Director issued the initial certification of representative in Case 1-RC-22474. A copy of the initial certification of representation is attached as Exhibit "A." This initial certification issued, by regular mail, on the day before the due date (November 30, 2010) for filing Objections to the Election or to Conduct Affecting the Results of the Election (herein collectively referred to as "Objections") in Case 1-RC-22474. See *Casehandling Manual Part Two Representation Proceedings Section 11392.2(a)(2) Timeliness of Filing of Objections.*

3. Regional Office practice is to serve certifications of representation to the parties by regular mail via the United States Postal Service. Therefore, the earliest the initial certification could have reached the Respondent would likely have been November 30, 2010, the date Objections to the Election were due.

4. A Regional Director has authority to correct inadvertent errors in a certification, whether issued by the Board or by the Regional Director. See *Casehandling Manual Part Two Representation Proceedings Section 11478.1 Authority to Correct Certifications.* The corrected Certification of Representative was issued on December 2, 2010.

5. Respondent asserts in its Opposition that the inadvertent issuance of the certification on November 29, 2010 somehow "deprived" it of its right to file Objections. Even though Respondent does not assert in its Opposition, and to Counsel for the Acting General Counsel's knowledge never has asserted, that it had any basis to file any Objections or that it intended to file any Objections, assuming, *arguendo*, that it intended to file Objections in Case 1-RC-22474, the premature issuance of the certification did not prevent Respondent from doing so. Under the

Board's Rules and Regulations, which Respondent was presumably well aware of, Respondent had 7 days from November 23, 2010 to file Objections. The November 29 certification only stated that no timely objections had been filed, which was an accurate statement as of the 29th, but it did not state that Objections could still not be filed.

6. While Respondent now asserts that its being "deprived" of its right to file Objections is a basis for its refusal to bargain, in its post-certification communications with the Union and the Board the *only* reason it asserted as a basis for its refusal was that it disagreed with the Board's decision concerning the status of RN charge nurses and RN supervisors (Motion, Exhibits K and H). The belated assertion that its refusal to bargain was, or is, somehow the result of any denial of a right to file Objections merely highlights the fact that the issuance of the certification on November 29, 2010 had no impact on the filing, or not filing, of any Objections.

7. At no time prior to the filing of its Opposition, to Counsel for the Acting General Counsel's knowledge, had Respondent asserted that the issuance of the initial Certification of Representative a day early prevented it from filing any Objections.

8. At no time prior to the filing of its Opposition, or anywhere in its Opposition, has Respondent stated any grounds for how it was "prevented" from filing any Objections or proffered any factual basis for its allegation beyond a mere assertion.

9. In fact, at no time was Respondent actually precluded from filing Objections to the Conduct of Election on, or prior to, November 30, 2010.

10. Rather, Respondent's raising of this issue of the early certification appears to be merely an afterthought on its part in order to avoid its obligations to bargain under the Act.

11. A party cannot challenge a certification via an unfair labor practice proceeding when it has failed to file any related objections or raised this issue in the prior representation

proceeding. “It is well established that the Board will not consider objections to an election which raise the question of the propriety of the voting groups on which the elections were directed, for the reason that such questions have already been fully considered and litigated in the representation hearing.” See *William R. Whittaker Co.*, 94 NLRB 1151, 1152 (1951).

12. The Board’s premature issuance of a Certification of Representative did not deprive the Respondent of the opportunity to file timely Objections after the election and does not constitute a “special circumstance” warranting a denial of the Motion. Respondent had a reasonable opportunity to file Objections but did not and, despite its assertion that it was deprived of its right to file Objections, has not attempted to file any or moved that the Regional Director, or the Board, permit it to do so.

13. Accordingly, Respondent has not raised any issue that is properly litigable in the unfair labor practice proceeding concerning any of the above matters.

WHEREFORE, Counsel for the Acting General Counsel again respectfully requests that the relief requested in its Motion be granted.

Dated at Boston, Massachusetts this 3rd day of March, 2011.



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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

<p>In the Matter of</p> <p>735 Putnam Pike Operations, LLC , d/b/a Greenville Skilled Nursing & Rehabilitation Center</p> <p style="text-align: center;">Employer</p> <p style="text-align: center;">and</p> <p>New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU)</p> <p style="text-align: center;">Petitioner</p>
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Type of Election
(CHECK ONE)

- CONSENT
- STIPULATED
- RD DIRECTED
- BOARD DIRECTED

(ALSO CHECK BOX BELOW
WHEN APPROPRIATE)

8(b)(7)

CASE 1-RC-22474

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU)

and that it is the exclusive collective-bargaining representative of the Employees in the following appropriate unit.

UNIT:

All full-time and regular part-time registered nurses, including per diem registered nurses, but excluding the director of nursing, day supervisor/unit manager, nurse practice educator, floating shift supervisor, MDS coordinator, guards and supervisors as defined in the Act.



Signed at Boston, Massachusetts

On the 29th day of November, 2010

Rosemary Pyle
Regional Director, Region One
National Labor Relations Board

CERTIFICATE OF SERVICE

I hereby certify that I served the attached Counsel for the Acting General Counsel's Reply to Respondent's Opposition to Motion To Transfer Proceeding to the Board and For Summary Judgment on the parties listed below, by electronic mail, on this 3rd day of March, 2011.

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