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**Regency Grande Nursing and Rehabilitation Center
and 1199 SEIU United Health Care Workers
East, New Jersey Region, Service Employees In-
ternational Union. Case 22-CA-29318**

April 28, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

This is a refusal-to-bargain case in which Regency Grande Nursing and Rehabilitation Center (the Respondent) is contesting the certification of 1199 SEIU United Health Care Workers East, New Jersey Region, Service Employees International Union (the Union) as bargaining representative in the underlying representation proceeding. *Regency Grande Nursing & Rehabilitation Center*, 355 NLRB No. 109 (2010).

Pursuant to a charge filed on February 12, 2010, the General Counsel issued a complaint on March 2, 2010, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's original certification in Cases 22-RC-12889 and 22-RC-12895.¹ (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

¹ *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB No. 75 (2009). Therein, the Board issued a Decision, Order, and Certification of Representative, which affirmed the judge's rulings, findings, and conclusions regarding ballot challenges, objections, and unfair labor practices in this consolidated proceeding, and adopted the judge's recommended Order as modified, including the judge's recommendation for a broad remedial order. *Id.*, slip op. at 2 fn. 10. The Respondent filed a request for reconsideration of this decision which was denied by unpublished order dated October 20, 2009. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the Board issued an order setting aside the above-referenced decision and order, and retained this case on its docket for further action as appropriate.

On August 23, 2010, a three-member panel of the Board issued a further Decision, Order, and Certification of Representative in the underlying consolidated Cases 22-CA-28331, 22-CA-28384, 22-RC-12889, and 22-RC-12895 which is reported at 355 NLRB No. 109.

On March 16, 2010,² the General Counsel filed a Motion for Summary Judgment and a Memorandum in Support. On March 19, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. Following the issuance of the Board's August 23 Decision, Order and Certification of Representative in the underlying representation proceeding,³ the Board issued a revised Notice to Show Cause in this proceeding, dated November 16, granting the General Counsel leave to amend its complaint to conform with the current state of the evidence, setting a due date for the Respondent's answer to the amended complaint, and notifying the parties that cause be shown, in writing, on or before December 17, as to why the motion for summary judgment should not be granted.

On November 23, the Acting General Counsel filed a first amended complaint in this matter which was identical to the original complaint, except that paragraph 7 alleged August 23 as the date of the Union's certification, paragraph 8 alleged August 23 as the beginning of the Union's representative status under Section 9(a) of the Act, and a new paragraph 10 alleged that the Union again requested recognition and bargaining on about September 14. On December 7, the Respondent filed its answer, which admitted the new allegations of the first amended complaint, denied the allegations that it failed and refused to recognize and bargain with the Union or that any such action was unlawful, and asserted as an affirmative defense that the certification was invalid because Member Becker should have recused himself from the underlying representation proceeding.

The Respondent filed a response to the Revised Notice to Show Cause on December 15.⁴ Thereafter, on December 17, the Acting General Counsel submitted a Supplemental Memorandum in Support of Motion for Summary Judgment.

² All dates refer to 2010, unless otherwise indicated.

³ *Regency Grande Nursing & Rehabilitation Center*, 355 NLRB No. 109 (2010).

⁴ In its response to the Revised Notice to Show Cause, the Respondent states that it "repeats and re-alleges all of the arguments put forward in the underlying representation case," and argues that summary judgment should be denied for further reasons. In this regard, Respondent argues that the Board was procedurally barred from issuing a certification of representative in the underlying representation proceeding, and that the Union was not properly certified by the Board because Member Becker should have recused himself. Each of these arguments was or could have been raised in the underlying representation proceeding. Moreover, other than the argument regarding Member Becker's failure to recuse himself, the Respondent did not raise these issues in its answer to the amended complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.⁵

Ruling on Motion for Summary Judgment

The Respondent admits in its answer to the original complaint that it refused to bargain, but denies that the Union is the exclusive collective-bargaining representative of the unit employees. In its answer to the amended complaint, however, the Respondent generally denies that it has failed and refused to recognize and bargain with the Union, but it admits that the Union is the exclusive collective-bargaining representative of the unit. Although the Respondent's answer to the amended complaint appears to indicate that an issue of fact exists regarding whether the Respondent has refused to bargain with the Union, we find that one does not. In this regard, notwithstanding its answer to the amended complaint, the Respondent does not further argue that it has or is prepared to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, and it continues to argue that the Union's certification was not valid due to Member Becker's refusal to recuse himself. In all the circumstances, we find that the Respondent's answer to the amended complaint does not raise any issues warranting a hearing.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence; neither does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161–162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁶

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation with an office and place of business in Dover, New Jersey, has been engaged in the business of operating a nursing home and rehabilitation center.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenue in excess of \$100,000,

and purchased and received at its Dover, New Jersey facility goods valued in excess of \$5000 directly from points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act. We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on April 10, 2008, the Union was certified on August 23, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time licensed practical nurses, certified nursing assistants, housekeeping employees, dietary employees, cooks, laundry aides, recreational aides, nurses aides, and maintenance employees working at the Respondent's 65 North Sussex Street, Dover, New Jersey facility excluding registered nurses, all other professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated January 5, the Union requested the Respondent to recognize and bargain with it as the exclusive collective-bargaining representative of the unit, and, about September 14, 2010, by letter, the Union repeated this request. Since about January 5, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.⁷

⁵ Member Pearce is recused and took no part in the consideration of this case.

⁶ The Respondent's request that the complaint be dismissed in its entirety is therefore denied.

⁷ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).⁸

ORDER

The National Labor Relations Board orders that the Respondent, Regency Grande Nursing and Rehabilitation Center, Dover, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 SEIU United Health Care Workers East, New Jersey Region, Service Employees International Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

⁸ For the reasons stated in the underlying proceeding, we find that a broad order is warranted here because of the Respondent's continuing interference with its employees' statutory rights. *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB No. 75, slip op. at 2 fn. 10, incorporated by reference in 355 NLRB No. 109 (2010).

Member Hayes would not give a broad cease-and-desist order. Such an order would be redundant of the outstanding order against the Respondent and is inappropriate to address the sole violation at issue here involving the Respondent's refusal to bargain in order to test the Union's certification.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time licensed practical nurses, certified nursing assistants, housekeeping employees, dietary employees, cooks, laundry aides, recreational aides, nurses aides, and maintenance employees working at the Respondent's 65 North Sussex Street, Dover, New Jersey facility excluding registered nurses, all other professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Dover, New Jersey, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.¹⁰ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁰ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Dated, Washington, D.C. April 28, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU United Health Care Workers East, New Jersey Region, Service Employees International Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time licensed practical nurses, certified nursing assistants, housekeeping employees, dietary employees, cooks, laundry aides, recreational aides, nurses aides, and maintenance employees working at our 65 North Sussex Street, Dover, New Jersey facility excluding registered nurses, all other professional employees, guards and supervisors as defined in the Act.

REGENCY GRANDE NURSING AND
REHABILITATION CENTER