

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UNITED NURSES & ALLIED PROFESSIONALS
(KENT HOSPITAL),

Respondent,

Case No. 1-CB-11135

and

Jeanette Geary, an Individual,

Charging Party.

CHARGING PARTY'S REPLY TO RESPONDENT UNITED NURSES & ALLIED
PROFESSIONAL UNION'S ANSWERING BRIEF TO THE EXCEPTIONS FILED BY
COUNSEL FOR THE ACTING GENERAL COUNSEL AND COUNSEL FOR THE
CHARGING PARTY TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to NLRB Rules and Regulation, Sec. 102.46(h), Charging Party files this brief replying to the Respondent United Nurses & Allied Professionals Union (the “UNAP”; the “Union”) answering brief.

I. Nonmember Objectors Who Are Forced To Pay Union Expenses Are Entitled To A Reliable Statement Of Those Expenses.

In its answering brief, the UNAP argues that no Board decision requires the union to provide proof to nonmember objectors of a “written verification by an independent auditor of the expenses set forth in its audit for Fiscal Year (FY) 2009.” UNAP Answering Brief To Exceptions at 2. The Union’s position is that nonmember objectors are not entitled to any assurance regarding the union’s financial statements. The nonmember objector is not to be provided with proof that the *Beck* financial statement has been looked at by an auditor. The nonmember objector is not to be provided proof that an auditor has looked at the union’s general financial statements. The nonmember objector is not entitled to any assurance of reliability concerning the money he or she is forced to pay the union. The UNAP standard is “just trust us.”

Counsel for the Acting General Counsel, in its brief in support of exceptions to the Administrative Law Judge’s decision argues that, *in fairness*, the Board should adopt the standard in *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003), *cert. denied* 539 U.S. 927 (2003). Exceptions Brief of AGC at 14. In *Cummings*, the court held that requirement of adequate notice to objecting nonmembers entailed an obligation to include with the financial disclosures “a certification from the independent auditor that the summarized

figures [given to objectors] have indeed been audited and have been correctly reproduced from the auditor's report." 316 F3d at 892.

Counsel for the Acting General Counsel then argues that although the *Cummings* standard is the *fair* one, the Union here would fulfill its duty of *fair* representation by doing something less: *i.e.*, providing a verification of whatever audit was performed of the unions' *general expenses*, rather than a verification of an audit of the *financial statements given to objectors*, as required in *Cummings*.

Charging Party urges the Board to reject the UNAP's "just trust us" standard. Under the UNAP's proposed standard nonmember objectors are not entitled to any proof that the numbers they are given by the Union are reliable. The union need not provide verification that any audit has been performed on any financial statement, much less on the financial statement given to objectors.

Charging Party urges the Board to reject the Counsel for the Acting General Counsel's incoherent position: *i.e.*, that the union fulfills its duty of fair representation by providing nonmember objectors verification of a financial statement that is different from the one they are provided in the union's *Beck* disclosures, a position which the Counsel for the Acting General Counsel himself admits is less than fair.

Following Counsel for the Acting General Counsel's suggestion that it would be more fair, the Board should adopt the *Cummings* standard and make the nonmember objector's right to object more than illusory: if nonmember objectors are to be compelled

to pay the union's expenses, they are entitled to a reliable statement of those expenses. To the extent Board precedent is unclear or contradictory, the Board should now set forth a clear standard: 1) unions must provide nonmember objectors with reliable proof that the financial statement provided to the nonmember objectors, listing chargeable and nonchargeable expenses, itself has been audited; 2) The minimum acceptable reliable proof that the financial statement showing chargeable and nonchargeable expenses has been audited is a statement from the auditor that it has done so, *i.e.*, a verification; 3) the standards of auditing and verification should conform to comparable accounting standards applicable outside the context of labor law.

II. None Of The UNAP's Lobbying Is Chargeable To Nonmember Objectors.

In its answering brief, the UNAP argues that political expenses which are "germane to collective bargaining and representational activities" are chargeable to objectors following *Johnson Controls*, 329 NLRB 543 (1999). UNAP Answering Brief To Exceptions at 7.

Charging Party does not concede that the *Johnson Controls* standard is the correct one, or one which would survive scrutiny under applicable federal courts of appeals decisions. Charging Party's and the Acting General Counsel's briefs in support of their exceptions, as well as Charging Party's answering brief to the Union's Exceptions, explain and apply the relevant case law to the lobbying at issue here. Nevertheless, even

under the *Johnson Control's* analysis, the present case is easily distinguishable from Johnson Controls. The UNAP's lobbying should be ruled nonchargeable under any standard.

The expenses deemed chargeable by the Board in *Johnson Controls* were all related to specific actions undertaken on behalf of *represented employees*, and did not have to do with promoting legislation of a general nature before a legislature, where the Union believed said legislation might somehow, eventually benefit its members.

In *Johnson Controls*, by contrast, the Board was ruling on specific instances of engagement of government personnel and its chargeability to nonmembers

- Conversing with Air Force Labor Relations personnel, the purpose of which was working conditions of *represented employees*, i.e., new Air Force Rules restricting the number of overtime hours that contractors could work their employees which were *in direct contravention of the terms of the collective-bargaining agreement between the contractor and Respondent Unions*; the Air Force implementation of a self-help program, the effect of which would be to take away *bargaining-unit work* from the contractor; and the Air Force reduction in ambulance service available on weekends and evenings whereby diminishing the immediate safety responsiveness available for *represented employees*.
- Telephoning Air Force Labor Relations staff primarily to monitor Contract Charge Requests initiated by the Air Force or the contractor, the result of which, when approved, directly impacted on the terms and conditions of *the represented employees*.
- Conversing with the National Aeronautical and Space Administration Labor Relations staff, at their initiation, the purpose of which was general inquiries regarding the Respondent Local 525's representation of *unit employees of their contractors*.

Johnson Controls at 544. (Emphasis in original; internal numbering of paragraphs omitted)

All UNAP's proposed lobbying charges have to do with introducing or promoting legislation of a general nature, possibly, but not necessarily benefitting at least some nurses, in some way. The political activity carried out by the union in *Johnson Controls* was targeted, and *sui generis*, based on the nature of the relationship with the Air Force, federal contractors, and agencies of the federal government. There is no similar relationship in the present case, and the UNAP does not explain how the "rule" in *Johnson Controls* should apply to such a different employment context and dissimilar political activity, *i.e.*, general promotion of legislation related to nurses, hospitals, and the healthcare industry.

Moreover, the finding of chargeability in *Johnson Controls* was clearly limited to the specific facts and circumstances of the case and not meant to be a general rule on chargeability of lobbying. The UNAP's entire argument in support of chargeability is apparently based on the premise that its lobbying expenses are the legal equivalent of those incurred by the union in *Johnson Controls* and found chargeable by the Board. UNAP Answering Brief To Exceptions at 7-14.

The UNAP's lobbying expenses were for direct promotion of broad legislative initiatives before state legislatures. In *Johnson Controls*, the union charged for direct engagement with government personnel on non-legislative matters related directly to its contracts and its own represented employees. *Johnson Controls* does not stand for the proposition that all political conduct is the same for purposes of determining whether they

are chargeable to nonmember objectors, as the UNAP argues.¹

The duties of a collective bargaining agent are to bargain with the Employer. Where the state is the employer, as in the public sector, some dealings with the employer may take the form of political or legislative activity. Where the employer is in the private sector, no political activity may be construed as bargaining with the Employer. No political activity is necessarily part of the collective bargaining agent's duty. No political activity is therefore chargeable to nonmember objectors.

Finally, none of the UNAP's charged for lobbying is chargeable under *Miller v. Airline Pilots Association*, 108 F.3d 1415 (DC Cir. 1997). Both Charging Party and the Acting General Counsel raised *Miller* in their briefs in support of their exceptions to the ALJ's decision. *See*, Charging Party Exceptions Brief at 41-42; AGC Exceptions Brief at 8; The UNAP does not address *Miller* in its answering brief.

In *Miller* the mere fact that an issue was "taken up in collective bargaining hardly renders the union's government relations expenditures germane." *Id.* at 1422.

III. The UNAP Did Not Address Charging Party's Exceptions

In its answering brief, the UNAP did not make any legal arguments in support of its positions or in opposition to Charging Party's exceptions. The UNAP limited itself to

¹Regarding the chargeability of political activity carried out by the International union in *Johnson Controls*, the Board remanded for further factual findings and did not affirm the ALJ. *See Johnson Controls*, 329 NLRB 543, 545 (1999).

citing the hearing transcript for instances where the Counsel for the Acting General Counsel seemed to agree with the Union on, for example, the ALJ's ruling to revoke Charging Party's subpoena, the ALJ's disallowal of any testimony from Charging Party's witnesses. Charging Party's Exceptions 1-3; UNAP Answering Brief at 15-18.

The arguments raised at trial by counsel are not the only authority on the legal issues raised by Charging Party. Sec. 102.46(d)(2) of the NLRB Rules and Regulations requires that an answering brief "present clearly the points of fact and law relied on in support of the position taken on each question." The UNAP's recitation of exchanges between Counsel for the Acting General Counsel and the ALJ which concord with the union's position is not legal argument. Charging Party contends that the Counsel for the Acting General Counsel undermined Charging Party's case by siding against her on the various evidentiary issues raised, *e.g.*, relevance of the subpoena (Charging Party Exception 1), relevance of the witness testimony (Charging Party Exception 2-3). The statements made at trial mischaracterized Charging Party's motive for presenting her testimony and obtaining evidence, to the severe detriment of her right to present her case, and build a complete record. To the extent Counsel for the General Counsel acted improperly, merely reciting his agreement with the Union on all the evidentiary issues raised at trial is not legal argument.

IV. Conclusion

For the reasons stated above, as well as the arguments made in her Brief in Support

of Exceptions, and Brief In Opposition To the Respondent Union's Exceptions, Charging Party urges the Board to remand this case for trial, reversing the ALJ's decision to revoke Charging Party's Subpoena and not to allow certain testimony. Further, Charging Party respectfully requests that the Board rule all the Respondent's lobbying to be nonchargeable to nonmember objectors. Lastly Charging Party urges the Board to set a clear standard requiring unions to provide nonmember objectors with reliable proof or verification that the financial statement provided to them concerning chargeable and nonchargeable expenses itself has been audited according to professional accounting standards.

Dated this 25th day of May, 2011.

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Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Exceptions and Brief was electronically filed via the NLRB website. A copy of the foregoing was also electronically filed with Region 1, and was sent via e-mail to Don Firenze, Counsel for the Acting General Counsel (Don.Firenze@nrlb.gov) and to Chris Callaci, Counsel for the UNAP, (ccallaci@unap.org) and mailed by US mail, first-class, postage prepaid, to Jeanette Geary, P.O. Box 216, 479 Spring St, #1, Newport, RI 02840.

/s/ Matthew C. Muggeridge

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