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July 26, 2011

Via E-File

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Re: Kaiser Foundation Health Plan, Inc., et al.
NLRB Case No. 32-RC-5775

Dear Mr. Heltzer:

This firm represents Service Employees International Union, United Healthcare Workers – West (the “Union” or “SEIU-UHW”) in the above matter. The Union opposes NUHW’s last minute request for a one-month extension so that it can file exceptions and a supporting brief to Administrative Law Judge (“ALJ”) Lana Parke’s Report and Recommendations on Objections in the above matter. NUHW’s request for an extension is simply an effort to delay these proceedings unnecessarily in order to gain some strategic and tactical advantage.

I. NUHW’s Request for a 30-day Extension.

In support of her request for a thirty-day extension, counsel for NUHW states that the Board should grant her request for an extension because “[t]he process of *potentially* filing exceptions . . . will be extremely time-intensive.” (Emphasis added). In addition, counsel for NUHW vaguely asserts that she, along with her colleagues, “have been occupied with various matters, including filing briefs and responding to discovery on civil matters, investigation and position papers regarding two unfair labor practice charges, and other impending deadlines.” Finally, counsel for NUHW notes that she will be “out of state and unavailable between August 3 through August 22, 2011.” Counsel for NUHW concludes that August 29, 2011 is the earliest date by which NUHW “can sufficiently analyze the underlying decision and, *if necessary*, draft thorough exceptions and supporting briefs” to a decision that recommended setting aside the election. (Emphasis added).

II. SEIU-UHW Opposes NUHW's Request for a 30-day Extension.

A. NUHW's Request for a 30-day Extension is Moot Because Both Kaiser and SEIU-UHW Have Agreed to Accept the ALJ's Report and Recommendation.

The Union opposes the request for an extension for two reasons. The primary reason that SEIU-UHW opposes NUHW's request for an extension is that the request for an extension is now moot. SEIU-UHW has been informed, by service of Kaiser Foundation Health Plan, Inc.'s, Kaiser Foundation Hospital's, Southern California Permanente Medical Group's, and the Permanente Medical Group's (collectively the "employer's" or "Kaiser's") letter to the Executive Secretary, that Kaiser does not intend to file exceptions to the ALJ's Report and Recommendations, and has agreed to stipulate to setting aside the election as well as waive its right to a Board decision on the objections.

By the same token, SEIU-UHW has decided to accept the ALJ's Report and Recommendations, stipulate to setting aside the election, and will waive its right to a Board decision on the objections. Despite SEIU-UHW's disagreement with the ALJ's findings and conclusions of law, Kaiser workers are best served by a quick resolution of this matter and the opportunity, without any further delay, to democratically choose their collective bargaining representative. To this end, given that SEIU-UHW has decided not to contest the ALJ's Report and Recommendations, SEIU-UHW will be filing a Motion For Remand with the Board tomorrow, requesting that the Board promptly remand the case to the Regional Director so that he can schedule an election in accordance with the ALJ's Report and Recommendations. A copy of the Motion for Remand is attached.

Given that both Kaiser and SEIU-UHW have now agreed to accept the ALJ's Report and Recommendations, stipulate to setting aside the election, and waive their right to a Board decision on the objections, NUHW's request for extension and any exceptions filed on behalf of NUHW are now moot. *See* NLRB Casehandling Manual, Part 2, Representation Proceedings at § 11391.2 ("The party/ies other than the objecting party may wish to agree that the election be set aside and a new one be conducted. . . . Written agreement of the objecting party is not required. In the agreement, the party/ies other than the objecting party should waive its/their rights under the Board's Rules to a Regional Director's report or supplemental decision, to file exceptions to a Regional Director's report or a request for review of a supplemental decision and to any right to a hearing in the matter or to a Board decision."); NLRB Casehandling Manual, Part 2, Representation Proceedings at § 11391.3 ("In addition to voluntary resolutions, there may be other circumstances in which a determination to set aside an election based upon one or more of the objections may be readily reached, thereby making it unnecessary to resolve the remaining objections."); *see also* *Presbyterian Univ. Hosp. d/b/a Univ. of Pittsburgh Med. Ctr.*, 317 NLRB 235, n.1 (1995) (detailing the procedural history in a similar case in which the Associate Executive Secretary of the Board notified the objecting party that its exceptions to a decision setting aside the results of an election were moot, because the parties other than the objecting party agreed to set aside the election and waive their rights to a Board decision on the objections).

As cited above, the Casehandling Manual and Board precedent recognize the absurdity of allowing a party to appeal a decision that it won, when the other parties involved have accepted the decision and waive their right to appeal the decision. It now appears that all of the non-objecting parties are in agreement to set aside the results of the first election and re-run the election, making NUHW's request for an extension moot.

Therefore, SEIU-UHW requests that the Executive Secretary deny NUHW's request for an extension, and that the Board remand this case to the Regional Director for Region 32 so that an election can be promptly scheduled.

B. NUHW's Last Minute Request for a 30-day Extension is Not for Good Cause.

Even if one ignored Kaiser's and SEIU-UHW's decision to not appeal the ALJ's Report and Recommendations, NUHW's request for an extension was made at the last minute and is not for good cause. NUHW, like the other parties in this matter, was served with a copy of the ALJ's Report and Recommendations on July 14, 2011. After being served with a copy of the ALJ's Report and Recommendations on July 14, counsel for NUHW presumably knew that both she and her colleagues were "occupied with various matters" and that she would be "out of the state between August 3 through August 22, 2011." Yet, NUHW filed its request for extension on the evening of July 25, 2011 – basically two business days before the deadline to file exceptions and 11 days after the parties were served with the ALJ's Report and Recommendations.

Moreover, NUHW's request is based on vague references to being "occupied with various matters" that actually seem to be routine legal matters that any typical law office would handle in the regular course of business. There does not appear to be anything extraordinary about the "various matters" that counsel for NUHW mentions.

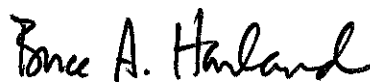
Lastly, counsel for NUHW argues that because of the unprecedented scope of the election, "[t]he process of *potentially* filing exceptions . . . will be extremely time-sensitive." (Emphasis added). While it is true that the election was unprecedented in scope, the legal and factual issues were thoroughly briefed by all parties – NUHW, for example, filed a 154 page brief – and, therefore, well known to the parties.

Simply put, NUHW's request for an extension is an effort to get thirty more days so that it can consider whether or not it will appeal a decision that recommended setting aside the election – a remedy that NUHW requested. As counsel for NUHW's letter suggests, the thirty day delay will allow NUHW the opportunity to evaluate "[t]he process of *potentially* filing exceptions" and the ability to "sufficiently analyze the underlying decision and, *if necessary*, draft thorough exceptions and supporting briefs." (Emphasis added). Requesting more time to evaluate a case, which was thoroughly briefed like this case, does not constitute proper grounds for an extension, especially in a representation matter.

III. Conclusion

NUHW's request for a thirty-day extension so that NUHW can analyze whether or not it will appeal a decision that it won should be denied because it is now moot. In addition, the request for an extension should be denied because there is not good cause to grant the extension. Although counsel for NUHW states that NUHW does "not believe this will prejudice any of the parties nor the Board in their handling of this matter," the fact is that any delay now will prejudice the 43,000 Kaiser employees – whether they be NUHW or SEIU-UHW supporters – who seek to have an election as expeditiously as possible so that they can resolve the issue of who their collective bargaining representative will be.

Sincerely,

A handwritten signature in black ink that reads "Bruce A. Harland". The signature is written in a cursive, slightly slanted style.

Bruce A. Harland

Enclosure
1/629808

PROOF OF SERVICE

I am a citizen of the United States, and a resident of the State of California. I am over the age of eighteen years, and not a party to the within action. My business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On July 26, 2011, I served upon the following parties in this action:

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Shelley Coppock, Assistant Regional
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copies of the document(s) described as:

[X] E-MAIL: I caused to be transmitted each document listed herein via the email address(es) listed above or on the attached service list.

I certify that the above is true and correct. Executed at Oakland, California, on July 26, 2011.



Bruce A. Harland

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7 UNITED STATES OF AMERICA
8 NATIONAL LABOR RELATIONS BOARD

9 Kaiser Foundation Health Plan, Inc.; Kaiser
10 Foundation Hospitals; Southern California
11 Permanente Medical Group; The Permanente
12 Medical Group, Inc.,
Employer,
13
and
14 Service Employees International Union, United
Healthcare Workers -- West
15
Petitioner,
16
and
17 Service Employees International Union, United
18 Healthcare Workers -- West
19
Intervenor/Incumbent.
20

Case No. 32-RC-5775
SEIU, UHW – WEST’S MOTION FOR
REMAND OF CASE TO THE
REGIONAL DIRECTOR FOR
REGION 32

1 **I. INTRODUCTION**

2 Intervenor, Service Employees International Union, United Healthcare Workers – West
3 (“SEIU-UHW” or the “Union”) files this Motion to Remand in light of the fact that neither SEIU-
4 UHW or Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Southern California
5 Permanente Medical Group, and The Permanente Medical Group, Inc. (collectively the “employer”
6 or “Kaiser”) seek to challenge Administrative Law Judge (“ALJ”) Lana Parke’s Report and
7 Recommendations on Objections (“Report”). Both SEIU-UHW and Kaiser stipulate to setting
8 aside the election, and waiving their right to receive a Board decision on the objections. Given this
9 fact, any exceptions filed by Petitioner, National Union of Healthcare Workers (“NUHW”), would
10 be moot, and this matter should be remanded to the Regional Director so that he can promptly
11 schedule an election.

12 **II. PROCEDURAL HISTORY**

13 On June 29, 2010, NUHW filed a petition seeking to represent approximately 43,000
14 Kaiser employees who worked in the service and technical bargaining unit and were represented by
15 Intervenor, SEIU-UHW. A mail ballot election was conducted between September 13 and October
16 4, 2010. The Tally of Ballots revealed that out of 42,977 eligible voters, 18,290 voters cast a ballot
17 for SEIU-UHW, 11,364 voters cast a ballot for NUHW, and 365 voters cast a ballot for Neither.

18 Following the Tally of Ballots, on October 14, 2011, NUHW timely filed 118 objections to
19 the election, requesting that the election be set aside and a new election be ordered. Thereafter, the
20 Regional Director for Region 32 set various objections for hearing. A hearing was held on
21 NUHW’s objections on February 14, 2011 before ALJ Lana Parke.

22 Following the submission of post-hearing briefs, ALJ Parke issued her Report on July 14,
23 2011. In her Report, ALJ Parke overruled all of NUHW objections, except for three (Objections 2,
24 3 and 5). In sustaining Objections 2, 3, and 5, ALJ Parke recommended setting aside the results of
25 the election, notwithstanding SEIU-UHW’s large margin of victory. Pursuant to the provisions of
26 Section 102.69 of the Board’s Rules and Regulations, exceptions to the ALJ Parke’s Report are
27 due on Thursday, July 28, 2011.

1 On the evening of July 25, 2011, NUHW filed with the Executive Secretary a two page
2 letter, requesting that it be granted a thirty-day extension of time to potentially file exceptions and
3 a supporting brief to ALJ Parke's Report. In addition, the employer, on July 26, 2011, notified the
4 Board and the Executive Secretary that it opposed NUHW's request for an extension because the
5 request for an extension of time is, among other things, moot, because Kaiser is willing to stipulate
6 to setting aside the election and will waive its right to a Board decision on the objections.

7 SEIU-UHW has also filed an opposition to NUHW's request for an extension because the
8 request for an extension is moot and because it is not based on good cause. SEIU-UHW also files
9 this instant Motion for Remand, because it too, like the employer, agrees to accept the ALJ's
10 Report, stipulate to setting aside the election, and waive its right to receive a Board decision on the
11 objections. To that end, SEIU-UHW requests that the Board promptly remand the instant matter to
12 the Regional Director so that he can schedule a second election as quickly as possible.

13 **III. LEGAL ARGUMENT**

14 **A. KAISER'S AND SEIU-UHW'S STIPULATION TO SET ASIDE THE ELECTION, 15 AND WAIVE THEIR RIGHT TO A BOARD DECISION ON THE OBJECTIONS 16 RENDERS THE INSTANT MATTER MOOT.**

17 Given that both Kaiser and SEIU-UHW have agreed to accept the ALJ's Report, stipulate
18 to setting aside the election, and waive their right to a Board decision on the objections, NUHW's
19 any that exceptions that NUHW may file would be moot. The NLRB Casehandling Manual, prior
20 Board precedent, and common sense clearly provide support for proposition that an objecting party
21 cannot seek to delay an election by appealing a decision that recommended setting aside an
22 election when the non-objecting parties agree that the election should be set aside.¹

23 Section 11391.2 of the NLRB Casehandling Manual ("CHM"), Part 2, Representation

24 _____
25 ¹ The Board attempts to resolve representation issues and schedule representation elections as
26 quickly as possible. For example, if a petitioner is not prepared to proceed to an election promptly,
27 then that is grounds for dismissal of the petition. *See, eg.*, 11302.1 of CHM ("The petitioner, as the
28 moving party in representation cases, whether union, employer, or employee, must be prepared to
proceed to an election promptly. Refusal of a petitioner to agree to an early date in an election
agreement (to which all other parties are willing to agree) is grounds for dismissal of the petition,
in the absence of valid reasons for the position taken.")

1 Proceedings, states in relevant part:

2 The party/ies other than the objecting party may wish to agree that the
3 election be set aside and a new one be conducted. . . . *Written agreement of*
4 *the objecting party is not required.* In the agreement, the party/ies other
5 than the objecting party should waive its/their rights under the Board's Rules
6 to a Regional Director's report or supplemental decision, to file exceptions
7 to a Regional Director's report or a request for review of a supplemental
8 decision and to any right to a hearing in the matter or to a Board decision.

9 (Emphasis added). Section 11391.3 of the CHM further states that "[i]n addition to voluntary
10 resolutions, there may be other circumstances in which a determination to set aside an election
11 based upon one or more of the objections may be readily reached, thereby making it unnecessary to
12 resolve the remaining objections." Thus, the CHM makes it crystal clear that where there is no
13 dispute by the parties that the election should be set aside, it is unnecessary for the Board to resolve
14 any remaining objections.²

15 In at least one reported case, the Board has described the procedural history of nearly the
16 same factual situation that we find ourselves in the case. See *Presbyterian Univ. Hosp. d/b/a Univ.*
17 *of Pittsburgh Med. Ctr.*, 317 NLRB 235, n.1 (1995). In *Presbyterian Univ. Hosp.*, the employer
18 and the Intervenor filed objections to the conduct of an election. The Hearing Officer overruled all
19 of the Intervenor's objections, but sustained two of the objections filed by the employer, and,
20 therefore, recommended setting aside the election. The employer then filed exceptions. The
21 Petitioner agreed to set aside the election and waived its right to a Board decision on the
22 objections. Shortly thereafter, the Associate Executive Secretary of the Board advised the
23 employer "that its exceptions to the hearing officer's report and recommendation were therefore
24 moot." *Id.*

25 Simply put, *Presbyterian Univ. Hosp.* and the various provisions of the CHM make clear

26 ² It would be hard to imagine that NUHW would file objections challenging the ALJ's Report with
27 respect to the objections she sustained. NUHW may claim that it wants to file exceptions to the
28 ALJ's recommendation for a *Lufkin* notice. This claim would be meritless for two reasons. First,
such an exception would not go to the merits of the whether or not the election should be set aside
and can be worked out at the Regional Office level, if necessary. Second, the ALJ's recommended
Lufkin notice basically tracks the suggested language found in the CHM. Finally, NUHW may
take exception that the ALJ did not order a Notice posting. That exception would similarly be
meritless, as this is not an unfair labor practice proceeding. Moreover, NUHW did not request
such a remedy at the hearing; and, therefore, any request now should be deemed waived.

1 that it is nonsensical for a party who has asked for an election to be set aside to, then, turn around
2 and file an appeal in an effort to prevent a new election – the remedy that they sought – from
3 taking place.

4 **IV. CONCLUSION**

5 Accordingly, for all of the reasons stated, SEIU-UHW requests that this matter be
6 remanded to the Regional Director for Region 32 so that he can promptly schedule a new election
7 in accordance with the ALJ's Report and Recommendations.

8 Dated: July 26, 2011

9
10 WEINBERG, ROGER & ROSENFELD
A Professional Corporation

11 By: Bruce A. Harland
12 BRUCE A. HARLAND
13 Attorneys for Intervenor/Incumbent
14 SEIU, UHW – West

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16 1/629697