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**New Vista Nursing and Rehabilitation, LLC and 1199 SEIU United Healthcare Workers East, NJ Region.** Case 22–CA–29988

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on May 13, 2011, the Acting General Counsel issued the complaint on May 19, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s requests to recognize and bargain and to furnish relevant and necessary information following the Union’s certification in Case 22–RC–13204. (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.

On June 9, 2011, the Acting General Counsel filed a Motion for Summary Judgment and a Memorandum in Support of Motion. On June 10, 2011, 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.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>1</sup>

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to provide information, but contests the validity of the certification on the basis that the unit is inappropriate.

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, nor 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

<sup>1</sup> Member Pearce is recused and did not participate in the consideration of this case.

representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).<sup>2</sup>

We also find that there are no factual issues warranting a hearing with respect to the Union’s request for information. The complaint alleges, and the Respondent admits, that by letter dated May 3, 2011, the Union requested the following information:

a. Any and all documents, including but not limited to job descriptions and performance evaluations that describe[] the job duties for LPNs.

b. For each employee working in a bargaining unit position, including current probationary employees, such documents as will show the following:

- 1) Job title for each employee;
- 2) Date of hire;
- 3) Current hourly rate of pay;
- 4) Regular hours of work;
- 5) Number of overtime hours worked (on a quarterly basis if possible) [in] 2009 and 2010;
- 6) Home address;
- 7) Whether employee is classified as per diem;

c. Documents showing the total cost to the Employer for each of the following benefits provided to bargaining unit employees for the periods from January 1 through December 31, 2009, and January 1 through December 31, 2010: health, dental, vision, life insurance, and pension/retirement plan.

d. Documents showing the name of each unit employee covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child.

e. Documents showing the health insurance premiums paid by each unit employee, and SPD of the health insurance plan.

f. Documents showing all current unit employees who have opted out of health insurance coverage.

<sup>2</sup> The Respondent’s answer denies complaint par. 8, which sets forth the appropriate unit. The unit issue, however, was litigated in the underlying representation proceeding. (In his Decision and Direction of Election, the Regional Director found the petitioned-for unit to be appropriate, and on April 8, 2011, the Board denied the Respondent’s request for review.) Further, in its email to the Union dated May 13, 2011, a copy of which is attached to the motion as Exh. J, the Respondent informed the Union that “[w]e are testing the certification and will not be bargaining.” The Respondent does not contest the authenticity of this document. Accordingly, we find the Respondent’s denial of the appropriateness of the unit does not raise any issue warranting a hearing.

Member Hayes would have granted review in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding, and that summary judgment is appropriate.

g. Documents showing unit members' current paid time off benefits such as, holidays, vacation, sick days, personal days, and the accrual formula for such paid time off.

h. SPD for the unit employees' life insurance policy.

i. SPD for the unit employees' retirement benefits.

j. Documents showing the date and amount of the last wage increase for each bargaining unit member.

k. Documents showing the overtime policy currently applicable to unit employees.

It is well established that the foregoing types of information sought by the Union are presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003), and cases cited therein. See also *Streicher Mobile Fueling*, 340 NLRB 994, 995 (2003), affd. mem. 138 Fed. Appx. 128 (11th Cir. 2005); *Maple View Manor*, 320 NLRB 1149, 1150–1151 (1996), enf. 107 F.3d 923 (D.C. Cir. 1997). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information.

In its response to the Notice to Show Cause, the Respondent contends that the duties of its LPNs (who comprise the certified unit) were changed on March 25, 2011, between the Respondent's filing of its request for review of the Regional Director's finding in Case 22–RC–13204 that the LPNs were not statutory supervisors and the Board's denial of review of that finding.<sup>3</sup> The Respondent asserts that the LPNs were given supervisory authority over its certified nursing assistants (CNAs) and that this change would require the Regional Director to reach a different result regarding their supervisory status and the appropriateness of the unit, making summary judgment inappropriate. We find no merit in this argument.

The Respondent's attempt to raise alleged changes to its LPNs' duties in this proceeding is procedurally improper. As indicated, the alleged changes occurred *before* the Board denied the Respondent's request for review of the Regional Director's finding that the LPNs were not supervisors. Although the Respondent's re-

<sup>3</sup> The Respondent's contention refers to the Acting General Counsel's issuance of a complaint in Case 22–CA–29845, alleging, in relevant part, that the Respondent violated Sec. 8(a)(3) and (1) by altering the duties of its LPNs on March 25, 2011, to convert them into statutory supervisors in order to prevent them from obtaining union representation. Although the record in Case 22–CA–29845 is not before us here, the Board may take administrative notice of its own proceedings. See *Farmer Bros. Co.*, 303 NLRB 638, 638 fn. 1 (1991), enf. mem. 988 F.2d 120 (9th Cir. 1993).

quest for review had already been filed, it could have filed a motion to reopen the record. The Respondent did not file such a motion, however, or make any other effort to bring the alleged changes to the Board's attention.<sup>4</sup> Thus, the Respondent is improperly attempting to raise an issue that could have been litigated in the representation proceeding. Cf. *East Michigan Care Corp.*, 246 NLRB 458, 459 (1979), enf. 655 F.2d 721 (6th Cir. 1981) (refusing to consider pre-certification changes to nurses' duties that allegedly made them supervisors where the employer did not seek to introduce evidence of those changes in the representation proceeding by a motion to reopen the record or otherwise). Accord: *TEG/LVI Environmental Services*, 328 NLRB 483, 483 fn. 3 (1999) (observing that employer had failed to explain why asserted change affecting unit was first brought to the Board's attention in the employer's response to the notice to show cause).<sup>5</sup>

Accordingly, we grant the Motion for Summary Judgment, and we will order the Respondent to bargain with the Union and to furnish the Union with the information requested.<sup>6</sup>

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 Newark, New Jersey (the facility), has been engaged in the operation of a nursing home and rehabilitation center.

<sup>4</sup> There were only 4 nondeterminative challenged ballots among the 26 ballots cast in the election, indicating that the Respondent did not challenge all the LPNs on the ground that they were statutory supervisors, despite the Regional Director's ruling to the contrary, based on their allegedly changed duties.

<sup>5</sup> Even apart from the procedural deficiencies in the Respondent's argument, we observe, as noted above, that the complaint in Case 22–CA–29845 alleges that the changes to the LPNs' duties were made unlawfully to prevent them from obtaining union representation. In light of these allegations, the Respondent is in an even weaker position to assert those changes as a defense to its failure to recognize and bargain with the Union. Cf. *Telemundo de Puerto Rico v. NLRB*, 113 F.3d 270, 279 (1st Cir. 1997) (the Board was justified in refusing to revisit appropriateness of unit based on employer's proffer about changes in employee's duties; any such changes would have been made unlawfully).

Member Hayes joins his colleagues in granting the Acting General Counsel's Motion for Summary Judgment. However, in his view, there will be circumstances in which an employer may lawfully change the duties of a certain job classification—adding Sec. 2(11) authority—in response to a Board ruling that the job classification is not supervisory. An employer may lawfully act—based on legitimate business reasons—to insure that it has supervisors with undivided loyalty present to oversee and direct its operation.

<sup>6</sup> Thus, we deny the Respondent's request that the complaint be dismissed in its entirety.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$100,000, and purchased and caused to be delivered to the facility goods and supplies valued in excess of \$50,000 directly from suppliers located 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 a health care institution within the meaning of Section 2(14) of the Act, and that the Union, 1199 SEIU United Healthcare Workers East, NJ Region, 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 8, 2011, the Union was certified on April 18, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Licensed Practical Nurses employed by Respondent at its Newark, New Jersey facility, excluding all other employees, guards, and supervisors as defined by 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

About May 3, 2011, the Union, by letter, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit and to provide the Union with specific information. On May 13, 2011, the Respondent sent an email to the Union stating that it would not bargain and was testing the Union's certification.

Since about May 13, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and to provide the Union with the requested information. We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since about May 13, 2011, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and to provide the Union with the information it requested about May 3, 2011, 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.

## 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 recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. In addition, we shall order the Respondent to furnish the information requested by the Union.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by 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).

## ORDER

The National Labor Relations Board orders that the Respondent, New Vista Nursing and Rehabilitation, LLC, Newark, 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 Healthcare Workers East, NJ Region as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to furnish the Union with information that is relevant to and necessary for its role as the exclusive collective-bargaining representative of the unit employees.

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

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

(a) On request, recognize and bargain with 1199 SEIU United Healthcare Workers East, NJ Region 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 employed by Respondent at its Newark, New

Jersey facility, excluding all other employees, guards, and supervisors as defined by the Act.

(b) Furnish the Union the information it requested in its letter dated May 3, 2011.

(c) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the attached notice marked "Appendix."<sup>7</sup> 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 email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>8</sup> 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 the facility 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 May 13, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 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.

<sup>7</sup> 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."

<sup>8</sup> 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. August 26, 2011

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Wilma B. Liebman, Chairman

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Craig Becker, Member

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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 Healthcare Workers East, NJ Region, as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union with information that is necessary for and relevant to its role as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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 employed by us at our Newark, New Jersey fa-

cility, excluding all other employees, guards, and supervisors as defined by the Act.

WE WILL furnish the Union the information it requested in its letter dated May 3, 2011.

NEW VISTA NURSING AND REHABILITATION, LLC