NOT INCLUDED
IN BOUND VOLUMES

PBH
Bound Brook, NJ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING
COMPANY, LLC d/b/a SOMERSET VALLEY
REHABILITATION & NURSING CENTER

Employer

and Case 22-RC-13139

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NEW JERSEY REGION

Petitioner

ORDER DENYING MOTION

On August 26, 2011, the National Labor Relations Board issued a Decision and Certification of Representative adopting the hearing officer's recommendations and certifying the Petitioner as the exclusive representative of an appropriate unit of the Employer's employees.[1]

On September 9, 2011, the Employer filed a motion for reconsideration and stay of the Petitioner's certification. The grounds for this motion are twofold: (1) Member Becker should have recused himself from this case because of his prior employment as counsel to the Service Employees International Union (SEIU), the international union with which the Petitioner

[1] *Somerset Valley Rehab & Nursing Center*, 357 NLRB No. 71.

is currently affiliated; and (2) the Board erroneously failed to address, or find merit in, certain of the Employer's objections. The Employer asks the Board to sustain those objections, as well as an objection the Board expressly rejected, and to order a second election. The Petitioner filed a brief opposing the motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the parties' arguments and has decided to deny the Employer's motion.[2] We begin with the Employer's second point. As stated in the August 26 decision, the Board reviewed the record in light of the parties' exceptions and briefs, and it *adopted* the hearing officer's findings and recommendations. Thus, the hearing officer's decision became the decision of the Board, and there is no merit

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[2] Chairman Pearce, who is recused and did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of the Employer's motion.

In *New Process Steel v. NLRB*, _ U.S. _, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

to the Employer's argument that the Board failed to address its objections.

The Board's decision did further discuss the Employer's Objection 1, relating to a campaign flyer distributed by the Petitioner, to expand on the hearing officer's rationale and to answer Member Hayes's dissent on that objection. The Employer's motion merely expresses its disagreement with the majority's finding, which clearly is not a ground for reconsideration.[3]

Second, the issue of Member Becker's recusal is addressed in his statement below. We note, however, that the Employer did not move for recusal until after the Board issued the underlying decision. Nor does it assert any potential grounds for recusal that could not reasonably have been discovered earlier.

Having duly considered the matter, we find that the Employer has not presented "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations. Accordingly,

IT IS ORDERED that the Employer's motion for reconsideration is denied.

Dated, Washington, D.C., November 16, 2011.

[3] Although Member Hayes adheres to the views expressed in his dissent regarding Objection 1, he agrees that the Employer has not established grounds warranting reconsideration of that issue under the standard set by Sec. 102.48(d)(1) of the Board's Rules and Regulations.

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Craig Becker, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BECKER, statement regarding motion.

Having carefully considered the matter, I find no basis for the Employer's argument that I should have recused myself from the Board's underlying decision because of my prior employment as counsel to SEIU.

Initially, I find the Employer's recusal argument untimely. The Employer knew or reasonably should have known that I might participate in the underlying case. See, e.g., *Loyalhanna Care Center*, 355 NLRB No. 102, slip op. at 1 fn. 2 (2010) (explaining that all Board Members, even those not initially assigned to a panel, may participate in the adjudication of the case); see also Fischer, Garren & Truesdale, *How To Take A Case Before The NLRB* 39-40 (8th ed. 2008). The Employer's argument, moreover, is based exclusively on information known to it at the time it filed its exceptions to the hearing officer's report. The Employer, however, did not raise any issue over my participation until after receiving the Board's August 26 decision. Cf. *Schurz Communications, Inc. v. Federal Communication Commission*, 982 F.2d 1057, 1060 (7th Cir. 1992) (Posner, ruling on motion) ("Litigants cannot take the heads-I-win-tails-you-lose position

of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them."); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-1296 (9th Cir. 1992) (post-judgment recusal motion found untimely); see also *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998) (rejecting post-decision claim that FLRA member was biased).[4]

Even assuming the timeliness of the Employer's argument, though, the argument lacks merit. Local labor organizations affiliated with SEIU are separate and distinct legal entities from the International Union. See *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40, slip op. at 9 (2010). Under 5 C.F.R. Part 2635 and Executive Order 13490, I must recuse myself if SEIU was a party to a case at any time during the 2 years following my appointment to the Board on April 5, 2010. Id. I am not required, however, to recuse myself from cases simply because, as here, a local union affiliated with SEIU is a party. Id. at 10. Pursuant to Executive Order 13490, I have also pledged to recuse myself from any matter involving a party who was a former client that I represented in the 2 years prior to becoming a Board Member. I

[4] Although the statutory standards applicable to Article III judges do not apply to employees of the executive branch like myself, I have previously observed that those standards and their construction by the courts offer useful guidance. See *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40, slip op. at 6 (2010).

did not represent 1199 SEIU United Healthcare Workers East, New Jersey Region at any time between April 5, 2008, and April 5, 2010. Accordingly, I was not required to recuse myself from this proceeding.

Dated, Washington, D.C., November 16, 2011.

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Craig Becker, Member