

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRANE HEALTHCARE CO. and/or EBENSBURG
CARE CENTER, LLC d/b/a CAMBRIA CARE
CENTER, Single Employer,

and

Case Nos. 6-CA-36803,
6-CA-36915

SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC.

MOTION FOR RECONSIDERATION
ON BEHALF OF THE CHARGING PARTY,
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

Pursuant to Section 102.48(d) of the Rules and Regulations and Statements of Procedure (“Rules & Regs.”) of the National Labor Relations Board (“Board”), the Charging Party, SEIU Healthcare Pennsylvania, CTW, CLC (“SEIU”), herein files this Motion for Reconsideration, of which the following is a statement.

1. The Board’s failure to consider SEIU’s exceptions relating to record evidence that supports the Acting General Counsel’s allegations that the Respondents unlawfully failed and refused to recognize and bargain with SEIU is a clear and unwarranted departure from Board precedent and an extraordinary circumstance that requires reconsideration.

2. On November 30, 2011, the Board served on SEIU its Decision and Order in this case, affirming the decision of Administrative Law Judge David Goldman (“ALJ Goldman”) and adopting his recommended Order as modified. *Cambria Care Center*, 357 NLRB No. 123, slip op. at 1.

3. ALJ Goldman held that the Respondent did not unlawfully refuse to bargain with SEIU as the representative of certain nursing employees following the Respondent’s purchase of

the Laurel Crest nursing home from Cambria County, a public employer, because the Union's "meet and discuss" rights under Pennsylvania labor law did not give rise to a presumption of continuing support for the Union as a collective bargaining representative under the National Labor Relations Act ("Act"). 357 NLRB No. 123, slip op. at 7-9.

4. SEIU and the Acting General Counsel filed exceptions to ALJ Goldman's findings and conclusions with respect to SEIU. (Acting General Counsel's Limited Exceptions at ¶¶ 1-10, 12.) In support of its exceptions, SEIU asserted, *inter alia*, that the Respondent's written agreement "to recognize the Union and accept their Memorandum of Understanding," made in documents effecting the sale of the nursing home which were entered into evidence by counsel for the Acting General Counsel (GCX-19 at 15, Schedule 4.7(b)), provided a factual basis for a presumption of majority status for SEIU: The Respondent in effect acknowledged that SEIU enjoyed such a presumption. (SEIU Br. in Supp. of Limited Exceptions at 23-24.) SEIU also argued that the same agreements precluded the Respondents from challenging their obligation to recognize and bargain with SEIU; and that a petition signed by SEIU members and delivered to Respondent, demanding that it "honor the contracts with employees" (GGX-42), provided further evidence of a presumption of majority support. (SEIU Br. in Supp. of Limited Exceptions at 24-29.) Although counsel for the Acting General Counsel did not articulate precisely these arguments in support of her exceptions, neither did she reject them nor disagree with SEIU in any way.

5. The Board expressly refused to consider these arguments raised by SEIU's exceptions. In affirming ALJ Goldman's findings and conclusions with respect to SEIU, the Board stated:

... The Acting General Counsel's theory was that SEIU enjoyed a continuing presumption of majority status for purposes of collective bargaining under Federal labor law, notwithstanding the limited "meet and discuss" nature of its prior relationship with the County under State labor law covering public employers. On exceptions, SEIU contends that page 40 of its last memorandum with the County contained "successorship" language requiring the Respondent to recognize SEIU and the nursing employees' representative. SEIU also contends that a pre-successorship employee petition directed to the Cambria County Board of Commissioners demonstrates the nurses' actual majority support for SEIU. Both of these contentions, however, expand the Acting General Counsel's theory of the alleged violation, and thus we do not pass on them....

357 NLRB No. 123, slip op. at 1, n. 3.

6. The Board cited two cases for this proposition. In *Kimtruss Corp.*, 305 NLRB 710 (1991), the Board held the ALJ had improperly considered the union's theory that the employer had implemented unilateral changes, when counsel for the General Counsel had stated on the record that the employer had implemented what it said it would implement during bargaining. 305 NLRB at 711. Similarly, in *Nott Co.*, 345 NLRB 396 (2005), the Board refused to consider the union's theory that it had at all times maintained majority status, when the General Counsel's brief had stated that the union had lost majority status. 345 NLRB at 398 n.10. Thus, when the legal theories or factual allegations of the General Counsel and a charging party are mutually exclusive and irreconcilable, the General Counsel's position will control. These cases in no way prohibit a charging party from arguing that *evidence* placed in the record by the General Counsel supports the *same* general legal theories asserted by the General Counsel.

7. A charging party does not unilaterally enlarge the complaint "simply because [a] theory is not pressed or espoused by General Counsel," if the party's position "readily falls within the broad scope of the issues framed by the complaint...." *Illinois Bell Tel. Co.*, 179 NLRB 681, 684 n.14 (1969). "Once the Board files a complaint on the charge presented, the charging party is entitled to have a chance to be heard." *Inter'l Union, United Auto, Aircraft and*

Ag. Implement Workers of Am., CIO [Borg-Warner Corp.] v. NLRB, 231 F.2d 237, 242 (7th Cir. 1956); *see Marine Eng'rs' Beneficial Ass'n No. 13 [Taylor & Anderson] v. NLRB*, 202 F.2d 546, 549 (3rd Cir. 1953). The General Counsel "cannot [any longer] limit the scope of the decision which may be rendered upon the evidence adduced.... The proof having been admitted ... what is to be done with it is no longer a part of the prosecution of the cause." *Frito Co., W. Div. v. NLRB*, 330 F.2d 458, 464 (9th Cir. 1965); *see NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-309 (1959).

8. In a proceeding before an ALJ, "Counsel for the General Counsel, *all parties to the proceeding*, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge." Board Rules & Regs. § 101.10 (emphasis added).

9. Here, the Acting General Counsel's Complaint alleged, in relevant part, that Respondent had entered into an agreement with Cambria County, Pennsylvania, to purchase the Laurel Crest nursing home; that Respondent had in fact purchased Laurel Crest, continued to operate it and employed a majority of former Laurel Crest employees; that Respondent is a successor employer to Laurel Crest; that, with respect to the predecessor employer, SEIU had been certified as a collective bargaining representative as an appropriate unit of employees; that SEIU had remained the collective bargaining representative of those employees following Respondent's purchase of Laurel Crest; that SEIU had requested recognition from and bargaining with Respondent following the purchase; and that "[s]ince on or about January 1, 2010, Respondent has failed and refuse to recognize and bargain collectively and in good faith

with the Union as the exclusive collective-bargaining representative of the unit.” (Consol. Compl. ¶¶ 5, 6, 15, 18-20.) While implicitly alleging that SEIU enjoyed a presumption of majority support that gave rise to Respondent’s obligation to bargain, the Complaint did not identify the specific bases for such a presumption of majority support.

10. The arguments raised in SEIU’s exceptions support the *same* legal theory embraced by the Acting General Counsel: that the Respondent was obligated to bargain with SEIU because SEIU enjoyed a presumption of majority status. These arguments are based on record evidence introduced by the Acting General Counsel. They are complementary to and in no way inconsistent with the Acting General Counsel’s allegations. Although these arguments were not “pressed or espoused by General Counsel,” they “readily fall within the broad scope of issues framed by the complaint” – the Respondent’s refusal to recognize or bargain with SEIU despite SEIU’s presumption of majority status. *See Illinois Bell Tel. Co.*, 179 NLRB at 684 n.14. To refuse to consider SEIU’s arguments, which support the Acting General Counsel’s refusal-to-bargain allegations, renders the charging party’s “chance to be heard” superfluous at best and meaningless at worst. *See Borg-Warner Corp.*, 231 F.2d at 242. Characterizing SEIU’s exceptions as an impermissible expansion of the Acting General Counsel’s legal theories is not supported by the cases cited by the Board and is contrary to the precedent cited herein.

11. An error of law that is a clear departure from Board precedent constitutes an extraordinary circumstance that merits reconsideration. *See, e.g., AM Prop. Holding Corp.*, 352 NLRB 279, 280 (2008) (granting reconsideration of decision in which Board held, contrary to precedent, that General Counsel had waived certain issues on exceptions); *see also Washoe Med. Ctr., Inc.*, 337 NLRB 944, 945 n.1 (2002) (Cowen, dissenting) (asserting that “unwarranted

departure from longstanding Board precedent without reasoning or explanation” constitutes extraordinary circumstance). The Board has made such an error here.

12. Counsel for the Acting General Counsel has been made aware of this Motion and has expressed no objection.

WHEREFORE, the Union respectfully requests that the Board reconsider its Decision and Order in the above-captioned matter, and in doing so address all arguments raised in SEIU’s Limited Exceptions.

Respectfully Submitted,

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Dated: December 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2011, I electronically filed the foregoing Motion for Reconsideration and served copies upon the following:

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