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September 7, 2011

Office of Executive Secretary
National Labor Relations Board
By Electronic Mail only

Re: New Vista Nursing and Rehabilitation 22-CA-29988
Motion for reconsideration

May it please the Board:

Please be advised that the undersigned represents the Respondent in the above referenced matter. This motion is filed for reconsideration of the Board's December 31, 2011 order.

In that order the Board, for the first time, opined on its ability to issue decisions by two members (in this case former member Becker and sitting member Hayes) where a third member (Chairman Peirce) was not on the original panel deciding the case and cannot participate in the case's deliberations because he was recused at all times from matters that involved these parties. The Respondent will be unable to litigate the Board's opinion in the U.S. Court of Appeals unless it seeks reconsideration of this opinion before the Board. *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) see also *NLRB v. Snell Island SNF LLC*. Case number 10-4600 (2nd Cir., decided 12/20/2011)

Reconsideration is sought because while, as the Board notes in its December 31st order, “...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...”, the Supreme Court has also not endorsed such a practice, particularly in circumstances as are present in this case.

In this case, Chairman Peirce did not participate in the August Board decision to grant summary judgement. After Member Leibman departed the Board, Respondent moved for reconsideration on September 9, 2011. The Board waited until December 31, 2011, the last day of Member Becker’s recess appointment to decide the motion for reconsideration. In making that decision the Board asserts that it has “delegated its authority in this matter to a three member panel.” That panel included recused Chairman Peirce who “...did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of this proceeding.” See order on motion for reconsideration dated December 30, 2011 at footnote 2. (date on website is December 31, 2011, however.) Accordingly, Chairman Peirce did not participate, and could not deliberate, on the case that was delegated to the three member “panel”.

“When one member of a group is disqualified, only two members actually participate in the decision. That circumstance thus also presents the problem of the possible *inferiority* of two-member decisionmaking.”

New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 at fn 2 (U.S. 2010) [*emphasis supplied*]. Similarly;

“Congress instead imposed the requirement that the Board delegate authority to no fewer than three members, and that it have *three participating members to constitute a quorum*.”

New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635(U.S. 2010). [*emphasis supplied*].

In this case, there was never a moment that this panel would have “three participating members” deciding the motion for reconsideration. It is respectfully submitted that this is not a “...properly constituted delegee group...” (*Id* at fn 6) where a two member decision could still issue. “In practical terms, petitioner’s case was both assigned to and decided by a two-member delegee group.” *Id* at fn 5. This was therefore improper.

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Accordingly this motion for reconsideration should be granted, the Board's 12/30/11 (or 12/31/11) order should be recalled as improperly issued and the original motion for reconsideration should be determined by a proper quorum.

Very truly yours,

A handwritten signature in black ink, appearing to read 'MT', with a stylized flourish extending from the bottom right.

MORRIS TUCHMAN

MT:pf