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NATIONAL LABOR RELATIONS BOARD
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March 22, 2012

Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11602
Washington, DC 20570

Re: Pavers & Road Builders District Council
Welfare Fund, Annuity Fund and\
Apprenticeship and Training Fund
Case No. 29-CA-29656

To Whom It May Concern:

On March 14, 2012, the Charging Party, filed a request for review of the Acting General Counsel's denial of its appeal of the Region's November 9, 2011, compliance determination.

The Region submits the attached Response to the Charging Party's filings in this matter.

Respectfully submitted,

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RESPONSE TO COMPLIANCE DETERMINATION APPEAL LETTER AND
REQUEST FOR REVIEW

Re: Pavers & Road Builders District Council Welfare Fund, Annuity Fund and
Apprenticeship and Training Fund
Case No. 29-CA-29656

The Pavers benefit Funds operate an office that is located in Flushing, NY. The Funds employ about ten clerical employees, and an office manager, all of whom are represented by Charging Party Local 175, United Plant & Production Workers, International Union of Journeymen & Allied Trades (“Local 175”). The United States Court of Appeals for the Second Circuit, in Case No. 10-3313, entered a Court Judgment against Respondent Pavers in which it found that it had unlawfully subcontracted medical claims work performed by unit employees. The Judgment included a make whole remedy with respect to the subcontracted work.

There was extensive testimony at the ALJ hearing showing that after the subcontracting occurred, there were no reductions in the number of unit employees or the hours they worked. (Tr.¹ 161-62) The Region, however, determined in its compliance investigation that had the subcontracted work been retained, it would have required unit employees to work an extra 44 hours per week which would have been equally divided among four (4) unit employees, Denise Alioto, Donna Crescenzo, Carmelina Faracci and Ying Ying Wong who were medical claims processors. (Tr. 96, 138) The subcontracting lasted two years from 1/1/09 to 12/31/10. The accrued backpay and interest totaled \$128,383. In response to the Region’s demand letter, Respondent delivered checks for the full amount demanded. The money is being held in escrow pending a resolution of Local 175’s appeal.

Starting in 2007, Respondent had a service contract with Magna Care through which its health plan was able to participate in a discounted network of medical providers. The scope and nature of its contractual relationship with Magna Care expanded effective January 1, 2009; this expanded relationship was the basis for the finding that Respondent had unlawfully subcontracted unit work. In compliance with the Judgment against it, effective January 1, 2011, Respondent rescinded that contract with Magna Care. The subcontracted services consisted of expanded processing of Respondent’s in-network claims and processing of out-of-network claims, work that had been performed exclusively by unit employees.

Based on a review of the ALJ hearing transcript, it is fairly clear that before 2009, processing of medical claims at the funds consisted of:

1. Checking claimant eligibility. (Tr. 87, 94)
2. Review of all claims to avoid duplication or paying Workmen’s Comp claims. (Tr. 95)
3. Out-of-network claims: [non Magna Care]—also check service codes.

¹ Tr. refers to the transcript page of the ALJ hearing held on February 7 and 8, 2009.

4. Preparing a summary payment report on approved claims.
5. Print EOBs [Explanations of Benefits]
6. Print and mail batches of checks.² (Tr. 90-91, 142)
7. Service walk-ins
8. Service callers
9. Respond to provider calls about eligibility and payment.
10. Process appeals from benefit determinations

During calendar year 2007, two unit employees, Elaine Kuper and Frank Fabris, who processed medical claims departed. Kuper and Fabris were interviewed on September 21 and 22, respectively. Kuper said she devoted 60-70% of her time [24-28 hours/week] doing Magna Care work and Frank Fabris claimed that 35 of his 40 hours were spent doing Magna Care work.³ As a result of these two departures, a backlog of unprocessed claims, in-network [Magna Care] and out-of-network, developed. During early 2008, for several weeks, Respondent assigned Saturday work, 5 hours per week, to the same three unit employees, Alioto, Crescenzo and Wong, individuals who processed medical claims during their regular work schedule. In August 2008, Carmelina Faraci returned from maternity leave and did claims processing during her entire 16 hour workweek. According to Faraci, she requested an increase in hours, but Respondent never acted upon her request. Since no additional overtime was assigned after the beginning of the year, Faraci received none. Except for the overtime earned in early 2008 by Alioto, Crescenzo and Wong, no other unit employee worked overtime during calendar years 2007 and 2008.

Even after Magna Care expanded its claims processing services for Respondent in 2009, Magna Care could not disburse payment until a unit employee reviewed each claim and approved it. (Tr. 112, 156) Magna Care sent out the benefit checks with EOBs after the claims were approved and Respondent wired it the funds to pay the claims.(Tr. 153) In other words, starting on 1/1/09, items 3 to 6 listed above were done exclusively by Magna Care, but the balance of the items continued to be performed by unit employees.

The Region concluded that the departure of Kuper and Faraci resulted in 60 hours less unit time being devoted to claims processing which was offset by Faraci's 16 hours, leaving a weekly shortfall of 44 hours devoted to Magna Care work. Had additional claims processing not been subcontracted to Magna Care effective January 1, 2009, 44 hours of work opportunity would have been needed to avoid creating a claims backlog. We presumed that Respondent would have continued its demonstrated 2008 practice of tackling claims backlogs by evenly assigning them to its claims processors Alioto, Crescenzo Wong, and Faraci. Faraci was included because she also did this work in 2009 and 2010, and because she had requested additional hours.

² This work was done primarily by the claims processing team, but other unit employees were cross-trained and occasionally performed this task.

³ The funds manager, Joe Montelle, insists Fabris spent only 20 hours per week doing Magna Care work, but believes Kuper worked 40 hours on medical claims which also totals 60 hours.

Local 175 takes exception to the Region’s determination of the number of additional weekly hours that would have been needed to complete processing the subcontracted Magna Care work, and to the number of employees among who these hours should be apportioned. Local 175 does not dispute that other than the group of four that we selected to share in the settlement that other unit employees required training in claims processing in 2011, in order to help clear the claims backlog that was created after the Magna Care contract was terminated and claims had not been processed for four months. Rather, Local 175 asserts that other employees who performed functions that were ancillary to claims processing are entitled to share in any settlement

Local 175 prepared and presented affidavits from employees who it asserts did Magna Care work and should have shared in the overtime. The fallacy in Local 175’s argument in support of expanding the payout group is that with the exception of printing checks and stuffing envelopes, those employees who did some Magna Care related work before January 2009 continued to do that same work during the two year subcontracting period, including processing disability, Medicare and COBRA claims (Tr. 182). In addition, the asserted claims by many of the affiant s that prior to the subcontract, they performed the subcontracted work is suspect because that position is inconsistent with job descriptions they gave a consultant in 2008, shortly before subcontracting began (January 2009). Those self-described job descriptions were published in a report (GC. 5).⁴ In addition, one affiant Carol Cosares’ assertions are inconsistent with her sworn testimony before the ALJ.⁵

Below is a chart comparing what unit employees told the consultant in 2008, and what is contained in their recently given affidavits.

Unit Employees	2008 Consultant Report	Local 175 Affidavits
Denise Alioto	Medical Claims Processor	
Diane Baccari (p/t)	Clerk and COBRA	Check Claims status and eligibility inquiries
Mario Briceno	Contributions Processor and Translator	Answer member questions,. Solve eligibility issues.
Carol Cosares	Rx/Vision claims and Eligibility	Everything but enter claims and print checks
Donna Crescenzo	Claims Processor	All phases of claims processing
Dina Fabris	Office Manager	Answer claims status questions, print checks
Frank Fabris		Repricing accuracy etc.
Carmelina Faraci		Claims Processing

⁴ The relevant pages are attached.

⁵ Cosares testified that her job was to handle prescription drug claims and receptionist. In processing drug claims, she mailed checks, prepared reports and checked the claimant’s eligibility. (Tr. 69-77) Both Faraci and Montelle confirmed Cosares job was processing prescription drug claims (Tr. 100, 186) Prescription drug work was also illegally subcontracted, but the ALJ Order and Court Judgment provided no remedy for that violation.

Elaine Kuper		Claims adjuster
Marie Mossa (p/t)	Backs up bookkeeper and annuity contributions	Process return checks, including dental and prescription. Prepare NYS Pool Tax Form
Joan Petrocelli	Employer Relations and contributions, Eligibility	Claims status questions, secure hours for benefit eligibility
Cynthia Wong	Accounting and customer service	Acct. reconciliation and reports. Mail checks
Ying Ying Wong	Medical Claims Processor	

Our compliance investigation concluded and we still believe that had Respondent not subcontracted certain claims processing functions to Magna Care, starting in January 2009, Respondent would have been required to assign 44 extra hours of work to its claim processors, and that it would not have assigned any of that work to the balance of the unit, given that when the Respondent assigned overtime hours to unit employees in 2007, to make up for the loss of hours due to the departure of Kuper and Fabris who had done Magna Care work, it was only assigned to Alioto, Crescenzo and Wong.

If the supporting affidavits of Kupfer and Frank Fabris were credited, we would need to distribute an additional 14 hours per week among Alioto, Crescenzo, Faraci and Wong. However, given that in their September interviews with the Region, Kuper and Fabris represented that their combined hours devoted to claims processing totaled 60, the same amount estimated by the funds administrator, although based on different calculations, we believe the 60 hours is more reliable and a reasonable basis upon which to resolve this case.

Operational and Organizational Assessment

As mentioned earlier, Segal conducted staff interviews on-site at the Fund Office on April 7 – 8, 2008. As part of the process, Segal interviewed all staff members in the following job categories:

- Assistant Fund Administrator
- Office Manager/Pension Processor
- Bookkeeper/Annuity Processor
- Medical Claims Processors
- Employer Contributions Processors
- Eligibility Processors
- Part-time clerks

Below is a high-level overview of staff job duties and functions.

Overall Staffing

The Fund Office currently has a total staff of nine (9) full-time employees (including the Assistant Fund Administrator) and three (3) part-time employees. In addition, there are three (3) former or retired employees that work once a week at the Fund Office as temporary help. The following table provides an overview of the duties currently performed by each staff member.

Staff	Title	Years of Service	Job Duties
Joseph Montelle	Assistant Fund Administrator	FT, 10 years	<p>Joe is responsible for the day-to-day management/administration of the Funds. His time is split between the Funds (6 hours) and the Training Fund (2 hours) each day.</p> <p>Duties include daily interaction and problem solving with office staff, Trustees, vendors, contractors, members, lawyers, actuaries, and consultants. Handles issues dealing with billing, calculations, qualifications, sign-offs (checks, annuity, compensation, etc.), Express Scripts, SPDs, PPA, Holding Corporation (building) allocations, anything legislative in nature or non-routine.</p> <p>Training Fund duties include serving as Training Director; meeting with Mario and Robert regarding training issues or needed items (books, supplies, etc.); booking cars, and other travel reservations.</p>

Staff	Title	Years of Service	Job Duties
Dina Fabris	Office Manager	FT, 10 years	<p>Dina works primarily in Pension (with Joe), Dental (with Betty), and Customer Service/Office Management. Dina does not handle Medical claims.</p> <p>Pension duties include coordination with Joe on all issues, pension calculations, and qualifications; coordination and written correspondence with lawyers, actuaries and consultants and members; setting up members in the system; running and reconciling reports; printing and mailing checks; reciprocity.</p> <p>Dental duties include processing claims, correspondence with Dental Consultant on approvals and guidelines for claims; coordination and written correspondence with members; running and reconciling reports; printing and mailing checks.</p> <p>Office Manager duties include customer service (window, phones, etc.), tracking vacation and absences, vendor and machine maintenance/management. In addition, keeps petty cash, orders food, and types out OSHA cards for Training Fund.</p>
Cynthia Wong	Accounting	FT, 13 years	<p>Cynthia processes all invoices/bills for the Funds and Holding Corp. She receives most of her salary from the Welfare Fund and a small paycheck from the Holding Corp.</p> <p>Duties include responsibility for issues regarding bookkeeping, accounts payable, banking, taxes, bills, checks, allocations, disbursements, reconciliations, and petty cash (Holding Corp). She interacts with office staff, accountants, lawyers, vendors (such as payroll) and members. She processes annuity applications and handles annuity questions/calls and customer service (phones and window).</p>
Denise Alioto	Medical Claims Processor	FT, 9 years	<p>Denise handles claims from hospitals, doctors (in and out of network). In addition, she handles special claims such as chiropractic and anesthesia.</p> <p>Duties include opening and reviewing all claims, separating claims into Medicare, Magnacare, and in-house staff, negotiations of claims, reviewing hospital batch claims, running and sending monthly reports on eligibility, payments, etc., running checks for all claims, reconciliations, and working with high dollar claims, ordering office supplies, helping with window and phones.</p>

Staff	Title	Years of Service	Job Duties
Dianne Baccari	PT Clerk	PT, 10 years	<p>Dianne works two days per week and handles the mail and COBRA.</p> <p>Duties include handling and sorting mail, filing contributions, generating a billing report once a month, generating an eligibility report twice a year, COBRA applications and billing, managing form letters, creating and maintaining master files, answering phones, and customer service at window if needed.</p>
Mario Briceno	Contributions Processor (Allocates 50% to Funds and 50% to Training Fund)	FT, 8 years	<p>Mario handles the pay stubs and employer reports. He is bilingual and takes calls that need a Spanish speaker. His time is split between the Funds and the Training Fund.</p> <p>Duties include handling and scheduling appointments for the Training Fund, creating, entering and maintaining employer reports, entering and maintaining life cycle of pay stub information from members, creating and maintaining special forms with discrepancy notes, coordination of and sending out discrepancies, tracking hours, taking member calls, customer service at the window with Spanish and Portuguese speaking members.</p>
Carol Cosares	Rx/Vision Claims and Eligibility	FT, 8 years	<p>Carol handles the walk-in window, RX claims, and screens incoming calls.</p> <p>Duties include answering incoming calls, ordering cards for prescriptions, directing members, faxing forms, making packets for members, updating member information, benefits counseling, handling basic eligibility, handling all prescriptions, filing of birth certificates, updating records, paying invoices for vision claims, generating weekly reports for receipts and checks, handling and entering Rx claims into system, reimbursing members, and helping with customer service.</p>

Staff	Title	Years of Service	Job Duties
Donna Crescenzo	Claims Processor – out of network and supplemental claims	FT, 8 years	<p>Donna handles out-of-network claims, Medicare supplemental claims, customer service, and the walk-in-window. Donna started out part-time and four years later, her hours were increased, and she was trained to do medical claims. Some of the below duties include those from her prior part-time status.</p> <p>Duties include checking and entering pay stub hours, entering reports from employers, doing work required for local 1042 (including per capita reports, new initiations, suspensions, etc.), working on Medicare claims, running check registers, getting checks out, generating unpaid reports and reviewing them, printing and handling EOBs, processing and checking the accuracy of out-of-network claims on a weekly basis, handling member maximums, coordinating and negotiating with Maxon, creating and maintaining worksheets to be sent over to Maxon, handling some aspects of disability and compensation pay stubs, and helping with customer service.</p>
Nicole Mano	Filing Clerk	PT, 2 years	<p>Nicole handles the filing of all Welfare Fund claims, makes copies, retrieves files, etc. Nicole was a full-time employee for 8 years, prior to returning to work as a part-time employee for the last 2 years.</p> <p>Duties include copying, sorting and filing, organizing and maintaining claims, member correspondence, employer reports, etc., and assisting in special projects.</p>
Marie Mossa	Backup Bookkeeping and Annuity	PT, was FT for 24 years	<p>Marie handles contributions, Annuity, SUB checks, bank transfers, and the check registers. Marie is currently working three days per week.</p> <p>Duties include assisting other staff members with employee contributions, allocation of monies needed to go to Funds and miscellaneous Funds, copying and sending out separate checks to the different associations, assisting with Annuity and SUB checks, helping with positive pay issues and uploading files, handling adjustments, updating information in Union Networking System if needed, doing reconciliation and management of checks every month, handling certifications that go along with checks, handling tax forms, sending out NY State pool/GME taxes, dealing with accountants, and providing customer service via phone and walk-in window.</p>

Staff	Title	Years of Service	Job Duties
Yinying Wong	Medical Claims Processor	FT, 10 years	Yinying handles Maganacare claims, phone calls, walk-in window, Medicare (deals with Social Security), customer service, doctors' TIN, and provider record maintenance. Duties include processing Magnacare claims, answering calls and questions associated with eligibility, reconciliation and checking accuracy of all claims information, updating correct information where needed, making and coordinating payments for claims, handling issues regarding stop-payments, issuing checks to providers, creating and sending out correspondences and letters, communication with members and doctors, and helping with customer service via phone and walk-in window.
Joan Petrocelli	Employer relations and contributions processor, Eligibility	FT, 12 years	Joan handles incoming contributions, employer audits, and contracts. Also helps with accounting, eligibility, phone and walk-in window. Duties include handling contributions for different Fund contracts, maintaining copies of agreements with different Funds (such as signature pages), checking and reconciling information with master files and master copies of agreements, generating weekly and monthly reports, creating and maintaining excel spreadsheets of employer information, sending out faxes or forms with regards to mistakes, mailing interest letters or correspondence, handling shortages or overages, speaking with contractors, printing out delinquency reports, sending out grid reports every three months, preparing deposit slips, entering amounts per Fund per employer, handling audit questions or requests pertaining to audits, handling requests from Fund Accountants and Fund Attorneys, communicating with employers and members, helping with customer service via phone and walk-in window.

Findings and Recommendations:

- Overall, we believe that the current Fund Office staffing level may give the impression of being excessive when considering transaction volumes only; however, the staffing level is not excessive when considering the prevalence of manual processes and workarounds, the lack of process continuity due to the high ratio of part-time and temporary employees, and a flat organizational structure. Furthermore, while there is some level of job specialization among staff, there is a lack of organizational structure along functional lines as most employees are basically handling all duties and tasks on an as-needed or ad-hoc basis.

- For example, employees prefer to run their own benefits check printing jobs, and handle the outgoing mail including stuffing the envelopes and applying postage. This process would be more efficient if there was a dedicated person performing this function.
- If the Fund automates more functions to replace manually intense lookup procedures with more comprehensive reports, the Fund should be able to reassign job duties and re-evaluate its staffing levels at that time.
- Many of the Fund Office employees are shared among the Funds and their salaries are allocated among all the Funds and the Union. Staff salaries for full-time employees range from \$33,000 to \$64,000 (excludes Assistant Fund Administrator). In addition, many of the employees have been with the Funds for a long time and are entitled to generous paid time-off benefits, including holiday pay for part-time employees.
- Except for the Assistant Fund Administrator, all employees are collectively bargained, including the Office Manager. It is unusual for management staff (which typically includes Office Managers) to be unionized.
- The Fund Office does not have a dedicated Member Services staff. All staff are responsible for providing customer service support and assisting walk-ins. The Fund should consider dedicating staff to customer service exclusively, or rotate them on a daily basis to avoid disruptions when staff members are processing claims or performing other duties that require concentration.
- There is no dedicated person to handle incoming and outgoing mail on a daily basis and provide other general office support. This function could be performed by a dedicated person or on a rotating basis by more than one person. This would allow higher-skilled individuals to concentrate on more complex job duties.

List of Interview Participants

Meeting Dates: April 7 – 8, 2008
Location: Flushing, NY

Attendees – Fund Office:

- › Joseph Montelle
- › Dina Fabris
- › Cynthia Wong
- › Denise Alioto
- › Yinying Wong
- › Dianne Baccari
- › Mario Briceno
- › Carol Cosares
- › Donna Crescenzo
- › Nicole Mano
- › Marie Mossa
- › Joan Petrocelli

Attendees – Segal:

- › Miriann Yoo
- › Agata Zak