NATIONAL LABOR RELATIONS BOARD

STAFFCO OF BROOKLYN, LLC, Employer/Petitioner, and NEW YORK STATE NURSES ASSOCIATION, Union.	:	Case No. 29-AC-072241

OPPOSITION OF NEW YORK STATE NURSES ASSOCIATION TO REQUEST FOR REVIEW

Dated: New York, New York
September 11, 2012

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PRELIMINARY STATEMENT

Respondent New York State Nurses Association ("NYSNA") submits this memorandum in opposition to the request by Intervenor United University Professions ("UUP") for review of the Regional Director's Decision and Amendment of Certification dated July 24, 2012. UUP disputes the Regional Director's findings that Staffco of Brooklyn LLC ("Staffco") is an employer within the meaning of the Act, and is the employer of the employees covered by the petitions to amend certification ("AC Petitions") at the Long Island College Hospital in Brooklyn, New York ("LICH").

UUP has failed to establish grounds upon which its request for review could be granted. UUP continues to take the position that the LICH workers became public sector employees after LICH was purchased by State University of New York Downstate Medical Center ("SUNY-Downstate"). The Regional Director's rejection of UUP's position is supported by existing Board precedent and by the factual record in this proceeding.

STATEMENT OF FACTS

The salient facts are undisputed and briefly described below.

Parties and Relevant Entities

LICH was a hospital located in Brooklyn Heights/Cobble Hill, Brooklyn with a longstanding collective bargaining relationship with, among other unions, NYSNA. Tr. 45; UUP Ex. 5.[1] NYSNA represents the Registered Nurses ("RNs") who work at the former LICH. Pet. Ex. 12 (NYSNA-Staffco CBA).

SUNY-Downstate is a New York State operated health care and education institution, with its main campus and medical facilities located in East Flatbush, Brooklyn. Tr. 432.

The Health Science Center at Brooklyn Foundation ("Brooklyn Foundation") provides support to SUNY-Downstate's education, research and health care endeavors. Tr. 271. It administers endowments and is involved in fund-raising for Downstate. Tr. 271.

Petitioner Staffco is a registered Professional Employer Organization under New York State law. Pet. Ex. 4; Tr. 38-39; N.Y. Labor Law §922. Staffco currently employs all of the non-physician personnel at the former LICH hospital site, which amounts to approximately 1,950 employees and approximately 450 RNs who are and have been for many years represented by NYSNA. PEF Ex. 2; Tr. 275.

Purchase of LICH Hospital Assets by SUNY-Downstate

On April 18, 2011, the State University of New York ("SUNY") acquired the assets of LICH from Continuum Health Partners. Pet. Ex. 32. SUNY-Downstate subsequently

[1] The transcript of the hearing at the Region will be referred to as "Tr." Petitioner Exhibits will be referred to as "Pet. Ex." United University Professions exhibits will be referred to as "UUP Ex." Public Employees Federation exhibits will be referred to as "PEF Ex."

began operating the hospital at the former LICH, along with its two other hospital institutions, one at its main campus and another in Bay Ridge, Brooklyn. Tr. 270.

Formation of Staffco

In order to ensure a "seamless transition" at the former LICH site, and to provide effective "heartbeat to heartbeat" patient care, SUNY-Downstate undertook efforts to retain the LICH employees and to ensure that the LICH employees would continue to be represented by their designated union representatives and continue to participate in their same private sector pension plans. Tr. 426-27.

To accomplish these goals, SUNY-Downstate sought to recruit a private contractor to employ the existing non-physician staff. Tr. 427. SUNY-Downstate was unable to reach agreement with any such private company, and at that point the Brooklyn Foundation stepped in to create Staffco. Tr. 427. On January 10, 2011, the Brooklyn Foundation established Staffco as a limited liability company under New York State law, with the sole member being the Brooklyn Foundation—a private entity. Pet. Ex. 16, p.3 (New York State Articles of Organization filing); Pet. Ex. 17 (Limited Liability Operating Agreement of Staffco); Tr. 38. As the sole member of Staffco, the Brooklyn Foundation has the exclusive authority to govern all of the affairs of Staffco. Tr. 427; Pet. Ex. 17, p.3.

Thereafter, in May 2011, SUNY-Downstate and Staffco entered into a contract governing Staffco's employment of the LICH employees, the Professional Employer Agreement ("PEA"). Pet. Ex. 1. Pursuant to the PEA, Staffco offered employment to all of the non-physician former LICH employees, and almost all of the former LICH employees accepted. Pet. Ex. 1; Pet. Ex. 18 (sample offer of employment); Tr. 295. Staffco currently employs approximately 1,950 employees at the former LICH site, including approximately 450 RNs. Tr.

275; PEF Ex. 2. Staffco invoices its expenses to its client, SUNY-Downstate, for reimbursement. Pet. Ex. 1 (PEA) at pp.2-3; Tr. 329, 348.

The Amendment of Certification Petitions

On January 5, 2012, Staffco filed seven AC petitions with NLRB Region 29 (for each of its collective bargaining units) to amend its certification to reflect the change in the name of the employer from LICH to Staffco. Two public sector unions, the Public Employees Federation ("PEF") and United University Professions ("UUP"), subsequently sought and were granted leave to intervene in this proceeding by the hearing officer. Tr. 19. PEF and UUP have both filed representation petitions at the New York Public Employees Relations Board ("PERB") seeking to represent the former LICH employees. PEF Ex. 2; UUP Ex. 1. PEF specifically has stated an interest in the RN titles at issue in this particular AC petition. The Regional Director held six days of hearing in this proceeding, on March 27 and 29, April 10, 26 and 27, and May 2, 2012.

Regional Director Decision and Amendment of Certifications

On July 29, 2012, the Regional Director, Region 29 James G. Paulsen issued the Decision and Amendment of Certifications ("RD Decision"). The Regional Director granted Staffco's seven AC petitions, finding Staffco to be a successor employer to LICH, and amended the relevant certifications "to reflect Staffco of Brooklyn, LLC as the employer." RD Decision at p.30. The Regional Director referred to past Board precedent in finding that the AC petition process was appropriate for certification of a successor employer. RD Decision at p.16. The Regional Director then emphasized that Staffco's status as a government contractor would not preclude its coverage as an employer under the Act. *Id.* at pp.17-19. The Regional Director also found that Staffco was not a political subdivision of the state, because it was neither created by the state nor operates as an administrative arm of the government. *Id.* at pp.19-24. Finally, the

Regional Director determined that Staffco and SUNY-Downstate are neither a single employer nor alter egos. *Id.* at pp.24-29.

UUP Request for Review

On August 28, 2012, Intervenor UUP filed a request for review of the RD Decision. PEF, however, declined to file a request for review.[2]

ARGUMENT

I. UUP Fails to Establish Any Basis to Grant Review

The Board will only grant a request for review for "compelling reasons." 29 CFR 102.67(c). Specifically, UUP must establish:

> 1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent[,]
>
> 2. That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party[,]
>
> 3. That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error [or]
>
> 4. That there are compelling reasons for reconsideration of an important Board rule or policy.

Id. Here, UUP seeks to but is unable to establish "compelling reasons" for review under either the first or second prongs of this test. First, UUP argues that the Regional Director "failed to consider material facts" on the record, but then fails to even allege *any* specific instance where the Regional Director's fact-finding was "*clearly erroneous,*" as required by 29 CFR 102.67(c)(2). Request for Review of Intervenor United University Professions ("Request for Review") at p.5. Second, UUP argues that no governing Board precedent exists, and then

[2] While UUP does not seek to represent the RNs in the NYSNA unit (and PEF has declined to file a request for review), NYSNA files this opposition to UUP's request for review because any Board decision will impact all the relevant collective bargaining units at Staffco.

inconsistently also alleges that the Regional director "depart[ed] from principles established by existing precedent." Request for Review at p.11.

A. The Regional Director's Factfinding is Not Clearly Erroneous

1. The Regional Director Correctly Found that Staffco is a Contractor of SUNY-Downstate Subject to Board Jurisdiction

The RD Decision is consistent with long-standing Board precedent holding that government contractors are not exempt from the Act merely because they provide services to an government entity. *See Recana Solutions*, 349 NLRB 1163, 1165 (2007) (government contractor providing day laborers is "employer" under the Act); *Management Training Corp.*, 317 NLRB 1355, 1358-59 (1995) (government contractor operating job corps center is "employer" under the Act). *See also* RD Decision at p.17 ("where a private employer provides services to … a government agency, the Board will assert jurisdiction over the private employer when that employer meets the definition of 'employer' under the Act and satisfies the monetary jurisdictional requirements").

This principle holds true regardless of whether a government contractor provides labor or other employment services to the government. In *Recana Solutions*, for example, the government contractor at issue contracted with a municipality to provide temporary day laborers. The contractor provided transportation to city jobs, drug and alcohol testing, safety training, and payment to the employees. 349 NLRB at 1163. The municipality, however, selected specific laborers from the pool provided by the contractor and assigned them to municipal work sites, where municipal employees directly supervised them. *Id.* Despite the municipality's direct, prominent role in hiring and supervising these employees, the Board held that the government contractor was an employer covered under the Act. *Id.* at 1165.

Here, there was substantial evidence upon which the Regional Director relied to find that Staffco was "a government contractor, providing services to Downstate, for which it bills Downstate and receives payment[.]" RD Decision at p.24. On the other hand, UUP speculates but cannot point to any actual evidence that could be used to establish that Staffco is anything more than a government contractor providing employment services to SUNY-Downstate.

Moreover, UUP fails to cite, or even allege, any specific "clearly erroneous" factual findings by the Regional Director concerning the relationship between Staffco and SUNY-Downstate. 29 CFR 102.67(c). UUP does argue that the Regional Director "failed to consider the importance" of the PEA, the contract governing Staffco's provision of employment services to SUNY-Downstate. But the PEA simply establishes the parameters of Staffco's provision of services to SUNY-Downstate and SUNY-Downstate's payment for such services. Pet. Ex. 1 (PEA). Moreover the Regional Director did consider, and rejected, UUP's argument that the fact that "SUNY pays or reimburses Staffco for all incurred expenses," Request for Review at p.9, exempts Staffco from coverage under the Act. RD Decision at p.26. Similarly, PEA provisions such as SUNY's authority to remove a Staffco employee from its premises under certain circumstances or SUNY's requirement that Staffco comply with SUNY's policies and procedures, are simply reflections of the Staffco- SUNY-Downstate, contractor-client relationship. Pet. Ex. 1 (PEA) at pp.2, 4. Moreover, these provisions establish *much less* control than the municipality in *Recana Solutions* had over the employees in that case. 349 NLRB at 1163 (municipality selected specific laborers for hire and municipal employees directly supervised laborers). Yet, the Board there still found the contractor to be an employer under the Act. *Recana Solutions*, 349 NLRB at 1165.

UUP next contends that insufficient weight was given to evidence that Downstate and Staffco officials discuss finances in connection with collective bargaining negotiations. Request for Review at pp.10-11. Yet, it is undisputed that SUNY-Downstate provides financial information to Staffco during collective bargaining negotiations simply to inform Staffco of financial considerations from SUNY-Downstate's perspective. RD Decision at p.17. UUP admits that this consultation occurs "to see what room Staffco has in negotiating new agreements, because SUNY pays for all of StaffCo's costs." Request for Review at p.11. Pursuant to the clear terms of the PEA, however, Staffco has ultimate responsibility for "the negotiation and administration of any collective bargaining agreements." Pet Ex. 1 at p.2. Even if SUNY-Downstate mandated specific wage rates to be paid by Staffco, the Board has found that even this amount of control from a government client is insufficient to exempt a government contractor from coverage under the Act. *See Management Training Corp.*, 317 NLRB at 1356 (rejecting previous Board doctrine that exempted government contractors with wage rates dictated by the government from Board jurisdiction).

Finally, UUP alleges that Staffco "is not properly categorized as a government contractor" because it exclusively relies on Downstate for revenue. Request for Review at p.16. UUP cites no case law in support of this proposition, which if adopted by the Board could then lead to exemption of a broad swath of government contractors from coverage under the Act. There is no requirement under Board law that a government contractor cannot be designated as such unless it has more than one client, or sources of revenue.

2. Staffco's Creation by and Relationship with the Brooklyn Foundation Does Not Preclude Board Jurisdiction

It is undisputed that the Brooklyn Foundation, a private entity, created Staffco to act as a contractor for SUNY-Downstate. RD Decision at p.21. UUP, however, relies on the

Limited Liability Company Operating Agreement of Staffco, a routine corporate document created by the Brooklyn Foundation in the course of forming Staffco, to argue that the Regional Director erred in "ignoring" the Brooklyn Foundation's creation of Staffco to benefit SUNY-Downstate. Request for Review at p.10; Pet Ex. 17. UUP makes the bold pronouncement that "if the document had been considered [by the Regional Director], the matter would have resulted in a different outcome." Request for Review at p.10. Board precedent, however, is clear that an entity established to benefit a city or state, or even "organized … at the instance of" a city or state, is not exempt from coverage under the Act. *See Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570, 572 (8th Cir. 1981) (non-profit corporation established to take over hospital from city in order to obtain federal funding and private grants not political subdivision). *See also Research Foundation of City University of New York*, 337 NLRB 965, 970 (2002) (research foundation to benefit CUNY not political subdivision). Similarly, the overlap in Board members between Staffco and the Brooklyn Foundation exists by virtue of Staffco's creation of and ongoing relationship with this private entity and has no impact on Staffco's coverage under the Act.

B. The RD Decision is Consistent with Board Precedent

1. Staffco and SUNY-Downstate Are Not a Single Employer

The Regional Director correctly noted that in order to establish a single employer relationship, it was incumbent upon UUP to prove that Staffco and SUNY-Downstate constituted "a single integrated entity." RD Decision at p.24. The existence of such integration is measured by consideration of: "(1) common ownership; (2) common of management; (3) functional interrelation of operations; and (4) centralized control of labor relations." *Research Foundation*, 337 NLRB at 970 quoting *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001) (hospital and MRI clinic created by hospital were not a single employer). The most important

factor in the test is "centralized control over labor relations." *Research Foundation*, 337 NLRB at 970. In *Research Foundation*, the Board held that CUNY and the CUNY Foundation (created to support the mission of CUNY) did not constitute a single employer, relying on: (1) their lack of "common ownership" as neither entity was owned by shareholders, (2) the lack of overlap of CUNY's Board of Trustees and the CUNY Foundation's Board of Directors, (3) the CUNY Foundation's independent administration of labor relations policies and practices, and (4) the separate daily operations of the two entities, including the housing of the CUNY Foundation administration in a separate building. *Id.*

The Regional Director properly rejected UUP's argument that the simple contractor-client relationship between Staffco and SUNY-Downstate necessarily integrates these two separate entities into a single employer. Relying on *Research Foundation*, the Regional Director found that "the day to day operations" of Staffco are overseen by Staffco staff separate and apart from SUNY-Downstate, and that "isolated examples" of interactions between Staffco and SUNY-Downstate are insufficient to establish functional interrelation. RD Decision at p.25. Moreover, common management does not exist as the Staffco Board of Directors is completely separate and independent from the SUNY Board of Trustees (with no overlapping membership) and Staffco managers do not report to SUNY-Downstate. *Id.* at p.26. *See also* Pet. Exs. 19, 20; *Research Foundation*, 337 NLRB at 970 (relying on lack of overlap between CUNY's Board of Trustees and the employer's Board of Directors). Finally, the Regional Director found a total lack of evidence of either centralized control of labor relations or common ownership. *Id. See also Research Foundation*, 337 NLRB at 971 (relying on separate human resources department, with separate employee policies).

UUP continues to argue that Staffco and SUNY-Downstate are a single employer, yet again fails to identify *any* specific evidence in the record to support this argument. Request for Review at pp.11-14. Moreover, UUP does not even identify which specific single employer factors the Regional Director allegedly erred in considering, preferring to make the vague and unsubstantiated allegation that the Regional Director applied a "formalistic … rigid approach." *Id.* at p.12. In *Research Foundation*, the Board explicitly stated that it did not "reach" the question of whether the single employer doctrine was even applicable in situations where the issue at stake is whether a party is a public entity exempt from the Act. 337 NLRB at 970.

2. Staffco is Not a Political Subdivision

The Regional Director properly found that Staffco is a political subdivision exempt from the Act. To qualify as a political subdivision, an entity must be either "(1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." RD Decision at p.19 quoting *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604–05 (1971). The Regional Director first noted that Staffco was not created by a legislative act or public official action, but by the Brooklyn Foundation, a private entity. *Id.* at p.21. The Regional Director then stated that Staffco "operate[d] independently of SUNY," relying on Staffco's: (1) separate Board of Directors, private retirement plans, personnel policies, legal representation and office space, and (2) authority to make all personnel decisions, "including hiring, promotions, discipline and terminations, without any oversight from SUNY." RD Decision at pp.21, 22.

UUP incorrectly contends that the Regional Director "failed to consider that the … Foundation is controlled by SUNY." Request for Review at p.5. Rather, the Regional Director considered and rejected UUP's contention "that the Foundation is merely an agent of

SUNY and so the Foundation acts as the state." RD Decision at p.21. The Regional Director relied on *Research Foundation*, 337 NLRB at 970 to hold that "[w]hile the Foundation supports a public entity, Downstate, this fact does not render the Foundation's activities state action." RD Decision at p.21. The record evidence cited by UUP (the "Foundation Agreement" and accompanying "Guidelines for Campus-Related Foundations"), merely restate this basic undisputed proposition that the mission and purpose of the Brooklyn Foundation is to support SUNY Downstate.

The Regional Director then analyzed the second prong of the *Hawkins County* test and found the relevant inquiry to be whether members of Staffco's Board of Directors are "appointed by and subject to removal by public officials." RD Decision at p.23 quoting *Research Foundation*, 337 NLRB at 969. Because the Brooklyn Foundation appointed Staffo's first Board of Directors and the Board is now self-perpetrating with current directors voting on individuals to become future directors, the Regional Director found that Staffco failed to satisfy the second prong of the political subdivision test as well.[3] RD Decision at p.23. The Regional Director found SUNY-Downstate's employment of Staffco Board members to be irrelevant because "[t]he record shows that these individuals' membership on the Staffco board is independent of their employment relationship with Downstate." RD Decision at p.23; Tr. 438 (testimony of Board President Lisnitzer that if he lost his job at SUNY Downstate, he could remain on the Board of Staffco if he desired). *See also Research Foundation*, 337 NLRB at 970 (members of CUNY Foundation's board of directors who were also CUNY officers not

[3] UUP's argument that the governance policy of Staffco requiring two members of Staffco's Board of Directors to be SUNY-Downstate employees somehow satisfies the *Hawkins County* test fails. First, regardless of this requirement, all members of the Staffco Board of Directors are appointed by the Staffco Board itself, not any public sector entity. Second, this requirement only impacts two out of the four current Staffco Directors. Pet Ex. 19.

"responsible to CUNY in their capacity as board members" because were only subject to removal pursuant to a board vote).

The Regional Director also relied on the undisputed fact that no member of the Staffco Board of Directors also serves as a member of the SUNY Board of Trustees, SUNY-Downstate's highest governing body. RD Decision at pp.23-24 citing *Research Foundation*, 337 NLRB at 969. UUP relies on *Rosenberg Library Ass'n*, 269 NLRB 1173 (1984) in support of its farfetched theory that the composition of the Brooklyn Foundation Board, a private sector entity, is relevant to whether Staffco is a political subdivision. In *Rosenberg Library Ass'n*, however, the board of directors in question also explicitly served as the library board for a public sector entity, the county. 269 NLRB at 1175. The lack of any connection here between the Staffco Board and the SUNY Board of Trustees makes *Rosenberg Library Ass'n* entirely inapplicable.

3. New York State Labor and Education Law Do Not Divest the Board of Jurisdiction

UUP next contends that New York State Education and Labor law somehow preclude coverage of Staffco under the Act. Request for Review at pp.14-15. The basis for UUP's position is, first, a routine pronouncement in the New York Education law restating the basic premise that SUNY-Downstate contracts "shall be subject to" the Taylor Law, the New York public employees labor relations law. *Id.* at p.14 (citing New York Education Law §355(16)(a)(3)). Second, UUP cites another New York Law provision regarding professional employer organizations (such as Staffco) stating that "nothing in this article *shall alter* the rights of or obligations of any client, professional employer organization or worksite employee under the national labor relations act or any applicable state law." *Id.* at p.15 (citing New York Labor Law §917) (emphasis added).

Neither statutory provision even arguably supports UUP's position. These provisions merely reiterate that the governing state or federal labor law applies to Staffco and supports the RD Decision.

Moreover, here, the employees at issue are not existing public sector employees who will potentially lose rights under the Taylor law. To the contrary, the Staffco bargaining units consist of private sector employees with long-time collective bargaining relationships with Staffco's predecessor. Consequently, the RD Decision does not even arguably condone the privatization of public employees or undermine the New York Taylor law.

4. The Regional Director Correctly Held that Staffco is a Successor to LICH

Finally, the Regional Director correctly determined that Staffco is a successor employer of the employees in question. The Regional Director first focused on Staffco's continued employment of virtually all the former LICH non-physician employees, "with the same pay and benefits they [formerly] held." RD Decision at pp.28-29. The Regional Director took particular note that these employees "work in the same location under the same supervision and provide the same medical services as they did previously." *Id.* at p.29.

UUP contends that the Regional Director did not and should have given greater consideration to the fact that Staffco never purchased the assets of LICH. But the Supreme Court and the NLRB have repeatedly held that an entity does not have to acquire the assets of another entity to constitute a successor employer under the Act. *See NLRB v. Burns Int'l Sec. Servs, Inc.*, 406 U.S. 272, 281, 286 (1972) (new service contractor is successor to old service contractor where "there was no merger or sale of assets"); *NLRB v. Cablevision Sys. Dev. Co.*, 671 F.2d 737, 738 (2d Cir. 1982) (company that subcontracted operations and then brought operations back in-house was successor to former subcontractor). Rather, when a change in employer occurs due to a transition in a service contract, the proper analysis (which the Regional

Director correctly applied) is whether there is continuity in the workforce and in the nature of the jobs at issue. *See Burns Int'l Sec. Servs*, 406 U.S. at 281; *Cablevision Sys. Dev.*, 671 F.2d at 739.

Similarly, UUP's assertion that Staffco is somehow not a successor to LICH because SUNY-Downstate and Staffco "do not share the same business purpose of running a hospital" fails. Request for Review at p.19. The relevant comparison here is LICH and Staffco. and in a successor analysis, the Board must compare "the specific operations involving the union members" of the two relevant entities. *Cablevision Sys. Dev.*, 671 F.2d at 739. The business purpose of SUNY-Downstate is irrelevant to this analysis.

CONCLUSION

For the reasons stated above, UUP's Request for Review should be denied.

Dated: September 11, 2012
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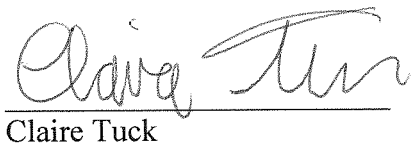

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