

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

CLIFF HOUSE SENIOR LIVING, L.P.,
d/b/a RESIDENCES AT CHESTNUT RIDGE

Employer

and

Case 04-RC-080782

DISTRICT 1199C, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE
EMPLOYEES, AFSCME, AFL-CIO

Petitioner

**REQUEST FOR REVIEW OF DISTRICT 1199C, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO**

Respectfully submitted,

Date: September 28, 2012

/s/ Lance Geren

LANCE GEREN
FREEDMAN AND LORRY, P.C.
1601 Market Street, 2nd Street
Philadelphia, PA 19103
(215) 931-2573

*Attorney for District 1199C, National Union of
Hospital and Health Care Employees, AFSCME,
AFL-CIO*

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

CLIFF HOUSE SENIOR LIVING, L.P.,
d/b/a RESIDENCES AT CHESTNUT RIDGE

Employer

and

Case 04-RC-080782

DISTRICT 1199C, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE
EMPLOYEES, AFSCME, AFL-CIO

Petitioner

**REQUEST FOR REVIEW OF DISTRICT 1199C, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO**

I. BACKGROUND

Pursuant to a Stipulated Election Agreement approved by the Regional Director on May 25, 2012, an election by secret ballot was conducted on June 21, 2012, in the following bargaining unit:

Included: All fulltime, regular part-time and per diem care aides, medical technicians, activity aides, dietary aides, including waiters and waitresses, dishwashers, cooks, housekeepers, maintenance assistants and drivers employed by the Employer at its 2700 Chestnut Street, Chester, Pennsylvania facility.

Excluded: All other employees, including registered nurses, licensed practical nurses, managers, office clericals, guards and supervisors as defined in the Act.

The Tally of Ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters.....	60
Void Ballots.....	0
Votes cast for Petitioner.....	28
Votes cast against participating labor organizations.....	29
Valid votes counted.....	57
Challenged Ballots.....	0
Valid votes counted plus challenged ballots.....	57

On June 27, 2012, Petitioner District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, hereinafter the “Union,” timely filed Objections to conduct affecting the results of the election. On July 12, 2012, the Regional Director issued a Notice of Hearing on Objections to Election, and on August 2, 2012, a hearing was held before Hearing Officer Blaine Patterson.

On September 14, 2012, the Hearing Officer issued his Report and Recommendation of Objections to Election. In his Report, the Hearing Officer recommends that all the Objections be overruled, and that a Certification of Results of Election issue. The Union respectfully requests review of the Hearing Officer’s decision, and requests that the Objections be sustained, and that a second election be directed.

II. FACTUAL BACKGROUND¹

Cliff House Senior Living, L.P., d/b/a Residences at Chestnut Ridge, hereinafter the “Employer,” operates an independent living and personal care facility at 2700 Chestnut Street in Chester, Pennsylvania. Upon receipt of the petition in this matter, the Employer commenced a hackneyed anti-union campaign. In the weeks leading up to the election, the Employer enlisted a host of high-ranking managerial personnel in order to dissuade the bargaining unit employees from selecting the Union as their exclusive bargaining representative. This list included executive director David Kolesky and business manager Jackie Ala. In addition, the Employer

¹ This is not intended to be a full recitation of the facts as additional facts are set forth in the argument section below.

brought in outside managers, including regional human resources manager Joy Azikiwe, who works primarily in New Jersey, and Denise Johnson, the director of nursing at one of the employer's other facilities in Millville, New Jersey. Azikiwe, who rarely, if ever, visited the Chester facility, became a fixture at the Employer's facility and began conducting meetings with employees.

In the weeks preceding the election, the Employer, through Azikiwe and Kolesky began holding unimaginative captive audience meetings. Leroy Lawrence, a bargaining unit employee who performs a variety of general duties, including driving and maintenance jobs, attended one such meeting. Lawrence began his employ with the Employer in September 2011, when he was hired as a part-time employee, and he was not initially entitled to health benefits. However, from the beginning of his employment, he worked more than full-time hours, thereby entitling him to health benefits. He learned very early in his tenure that, because of the amount of hours he was working, he should be receiving health benefits. He began discussing the issue with Kolesky and his supervisor Michael Pollard very early in his employment. While Kolesky and Pollard said they would look into it, nothing was done. Month after month, from September 2011, through June 2012, Lawrence continued to inquire into the status of his request for benefits, and each time he was ignored or denied. However, just prior to the election, Lawrence attended a meeting conducted by Azikiwe in which she, in essence, solicited grievances in the fashion of asking the employees if they had any problems they would like to discuss. Lawrence indicated that he had been trying to receive benefits for months, and his requests were ignored. She looked into Lawrence's situation, and made his benefits active effective June 3, 2012. Lawrence told other employees that he had received health insurance, including resident caregiver Audrey Wood.

On the day of the election, resident caregiver La'Keiya Hudson was scheduled to work her regular shift of 3:00 p.m. to 11:00 p.m. However, Ala called Hudson at home and asked her to come in early. When she arrived at 1:00 p.m., she was escorted to Ala's office, where she met with Ala and Johnson. Ala encouraged Hudson to vote. Ala then left, and Johnson began discussing the Union election, which was already underway. Johnson told Hudson to "do the right thing," and, as Ala had done, encouraged Hudson to vote. The Employer, through Johnson, continued this routine throughout the day. As employees entered the facility, Kolesky pointed out some of them to Ala or Johnson, and they were escorted back to Ala's office. In total, Johnson met with approximately 10 employees on the day of the election, including Hudson and Sekona Gale.

Additionally, on the day of the election, the Employer posted a notice indicating that it would be having an in-service meeting from 2:00 p.m. to 3:00 p.m. Hudson attended the meeting with a full room of employees, mostly dietary employees.

III. ARGUMENT

The proponent of an election objection has the burden of proving that the conduct complained of had the tendency to interfere with the employees' freedom of choice. *Lily Transportation Corp.*, 352 NLRB 1028, 1030 (2008). That burden is a heavy one because there is a strong presumption that ballots cast under Board Rules and supervision reflect the true desires of the electorate. *Id.* citing *Safeway, Inc.*, 338 NLRB 525 (2002). In this matter, the Employer engaged in sufficient objectionable conduct warranting a second election. In considering whether the election was conducted in the necessary "laboratory conditions," the Board will consider a variety of factors, including the closeness of the election. In fact, in *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 2-3 (2011), the Board directed a new election

where an employer maintained unlawful policies in its handbook prohibiting solicitation and fraternization, but where there was no evidence that any employee's activities were, in fact, quelled as a result of these policies. The Board focused only on the fact that, as here, the election was decided by one vote, and the employer's policies may have had a tendency to chill pro-union activity. Here, the Employer's objectionable conduct, coupled with the fact that the election was decided by one vote, warrants a second election.

A. Objection 2²

In Objection 2, the Union alleges that, during the critical period, the Employer offered a promotion to bargaining unit employee Leroy Lawrence. The Board has long held that the promise of a promotion or other benefits acts to unlawfully dissuade employees from engaging in protected or Union activity, much like "a fist in a velvet glove." *See NLRB v. Exchange Parts*, 375 U.S. 405 (1964).³ In *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2 (2010), the Board held that the granting of health benefits during the critical period creates an inference of objectionable conduct. An employer may rebut the inference by showing some alternative explanation other than the pending election. *Id.*, citing *Sun Mart Foods*, 341 NLRB 161, 162 (2004).

The facts regarding this Objection are not generally in dispute. As part of its anti-union campaign, the Employer had Azikiwe conduct regular meetings with employees to discuss the Union and to see if there were areas in which the Employer could improve. During one such meeting, Lawrence approached Azikiwe and explained that he had been trying to get health insurance for months because he had always worked over the required 30 hours per week. At the

² The Union withdrew Objection 1 at the hearing.

³ The Hearing Officer correctly found that the granting of benefits to be "sufficiently related" to the Union's claim that Lawrence was granted a promotion. *See Precision Products Group*, 319 NLRB 640 fn. 3 (1995).

hearing, Azikewe explained that the threshold for health benefits was 80 hours in a two-week period, which Lawrence also met. Azikiwe quickly looked into the matter, and was able to provide the health benefits that were due to Lawrence. Lawrence shared this with his coworkers, including Wood. Simply stated, the Employer granted a benefit to Lawrence that he had been attempting to secure for over 10 months. This action by the Employer had the likely effect of showing employees that their grievances could be redressed without the assistance of the Union.

In his decision, the Hearing Officer credited Lawrence and found that he learned that he would be granted health benefits prior to the election. Curiously, the Hearing Officer then goes on to find that the Employer's conduct of granting a benefit during the critical period was not objectionable. In support of his finding, the Hearing Officer incorrectly deduces that Lawrence would have received the benefit anyway, had his request, as Azikiwe testified, fallen through the cracks.

The Hearing Officer's reasoning begs that an honest reader take an illogical leap and ignore 10 months of history. While the Hearing Officer opined that Lawrence would have ultimately received the health benefits, as Lawrence described, he had been attempting to get the health benefit issue resolved since his employment began 10 months before the Petition was even filed.⁴ The Hearing Officer also seemed to rely on the fact that it was Lawrence, and not Azikiwe, who initiated the discussion regarding his health benefits. However, even as the Hearing Officer explained, the only reason Azikiwe was at the facility, and the only reason she held the meetings, was due to the Union election. Moreover, because she was there dealing with the Employer's anti-union campaign, she was able to quickly resolve Lawrence's complaint

⁴ Lawrence was subpoenaed to testify at the hearing and was a very reluctant witness on the stand. While the subjective impact of the Employer's objectionable conduct is not relevant, in his careful responses, Lawrence demonstrated the persuasive effect of the Employer's grant of his benefits.

within days when Lawrence had been working with local management for nearly a year. Using a simple “but for” analysis, it appears to be a simple exercise in drawing a causal connection between the Union’s petition, the Employer’s anti-union campaign, and the granting of Lawrence health benefits. In other words, the Employer would not have granted Lawrence health benefits but for the Union’s filing of the petition. Notably, as the election was decided by just one vote, granting just one employee benefits, or assisting them in getting benefits after they had been denied for 10 months, certainly had an impact on the election. Accordingly, the Union respectfully requests that the Hearing Officer’s recommendation be overruled, and that Objection 2 be sustained.⁵

B. Objection 3 and 4

In Objections 3 and 4, the Union alleges that the Employer polled and interrogated bargaining employees up to, and including, within 24 hours of the election, and selectively polled and interrogated employees in one-on-one meetings during the election. The Board has long held that an employer is prohibited from conducting captive audience meetings within 24 hours of the polling period. *See Peerless Plywood*, 107 NLRB 427 (1953). As the Board explained in *Peerless Plywood*’s companion case *Livingston Shirt*, 107 NLRB 400, 408 (1953):

[F]or reasons more fully set forth in *Peerless Plywood*, we believe that experience in holding elections has shown that elections are likely to more truly reflect employee desires if the employees are afforded a brief breathing spell from employer or, indeed, union speeches at their place of work during working hours immediately

⁵ The Hearing Officer makes two additional assertions, both of which must be rejected. First, the Hearing Officer highlights that the health benefits were “basic” benefits offered to all employees, and therefore would not be viewed by other employees as an improvement. This ignores the fact that Lawrence, who had no benefits for 10 months, was receiving an improved benefit from none, to some. Second, the Hearing Officer asserts that there was insufficient evidence showing that other employees were influenced by or knew about Lawrence receiving his benefits, and that Lawrence himself, believed he secured the benefits “because I earned them.” This logic misses the point and fails to truly understand the persuasive power explained in *Exchange Parts*. Lawrence attempted to secure this “basic” benefit, and was denied or ignored for 10 months. With the filing of the petition, he was able to secure the health benefits after his initial conversation with Azikiwe. The simple non-verbal message sent by the Employer was that Lawrence did not need the Union because they would resolve his issues for him.

before the election. This will not in our opinion unduly restrict employers and unions in their right to publicize their point of view, but will at the same time provide a measure of protection for the employee, whose rights are after all paramount, from last-minute blandishments which he may feel compelled to hear and which may becloud his judgment and interfere with his thoughtful weighing of the issues involved.

An employer may, however, engage in conversations with employees about the election, provided, that the conversations are on the employee's own time and that they are voluntary.

Foxwoods Resort Casino, 352 NLRB 771, 771, 780-781 (2008).

Here, the Hearing Officer found that Johnson held at least 10 one-on-one meetings with bargaining unit employees on the day of the election. Both Hudson and Ala testified that Ala contacted Hudson at home to come to work early in order to attend the meeting with Johnson. When Hudson arrived at 1:00 p.m., she clocked in and was escorted by Ala to Ala's office where she met Johnson. Ala encouraged Hudson to vote, and then left. After Ala left, Johnson engaged Hudson with the Employer's anti-union campaign message. In *Southern Bag Corp.*, 315 NLRB 725, 725-726 (1994), a lead worker met with employees on the day of the election in an effort to persuade them how to vote in violation of *Peerless Plywood*. Further, in *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011), a case similar to the instant one in that employees were required to meet with the employer upon arriving at work on the day of the election, the Board directed a second election, and remanded the issue of holding the second election off site because of the employer's pulling employees into one-on-one captive audience meetings on the day of the election.

While finding that Johnson and Ala met with employees on the day of the election to discuss Union issues, such as the payment of dues, and to hand out campaign fliers, the Hearing Officer found that these meetings were, somehow, not objectionable. The Employer's conduct was violative of the principal set forth in *Peerless Plywood* as employees were not afforded a

“brief breathing spell from employer speeches.” In fact, the Employer’s conduct was even more intimidating as employees were forced to meet with a high-ranking official in a one-on-one capacity only moments before voting. *Cambridge Tool & Mfg.*, 316 NLRB 716 (1995) (objectionable conduct where employer’s high-ranking official engaged in only limited polling and interrogation). Additionally, Kolesky was responsible for directing some employees in to meet with Johnson. Further, the Employer’s conduct was not within the exception of *Peerless Plywood* rule as the employees were not only on the clock, but they were called in to clock in early, and the meetings were not voluntary. Accordingly, the Union respectfully request that the Hearing Officer’s recommendation be overruled, and that Objections 3 and 4 be sustained.

C. Objection 5

In Objection 5, the Union alleges that the Employer held a meeting from 2:00 p.m. to 3:00 p.m. in an effort to demonstrate to employees the Employer’s perceived power and authority over them. In *Rivers Casino*, 356 NLRB No. 142, slip op. at 3 (2011), an employer granted one group of employees an extra break during which time they could vote. Other employees were required to vote during their regularly scheduled break. As the Board carefully explained:

The purpose of a ground rules agreement such as the one entered into in this case is to insure that all parties agree about the details of the election, including whether and how employees will be released from work to vote. Without the agreement of all parties, neither the employer nor the union is permitted to control any aspect of the election process or convey the impression to eligible employees that it does so.

Id. Here, as in *Rivers Casino*, the Employer attempted to demonstrate to employees that they could only vote at the Employer’s “beneficence and discretion,” and that the Employer controlled the election process and when they could vote. *Id.*

The facts in support of this Objection are not in dispute. Both Hudson and Wood described the notice of the in-service meeting posted by the time clock. Additionally, the notice was entered into evidence. Hudson described having to go to the meeting with a room full of dietary employees and other bargaining unit employees. In overruling this Objection, the Hearing Officer found that these training sessions were a regular occurrence and that the meeting did not disenfranchise any employee. However, during the hearing, the Employer acknowledged that the in-services are scheduled only once per month and that the time could have been easily moved to accommodate the election. Further, the Employer attempted to argue that the meeting was not mandatory. However, as acknowledged by Kolesky, it failed to properly notify employees as to whether it was, in fact, mandatory, as Hudson, a relatively new employee, believed that it was. In short, the Employer used the opportunity of the in-service to show the employees the Employer, and not the Board, and certainly not the Union, would dictate how they run their operation. The Hearing Officer, in focusing on the subjective impact of the meeting, failed to note the objective and coercive impact. Accordingly, the Union respectfully requests that the Hearing Officer's recommendation be overruled and that Objection 5 be sustained.

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 28th day of September 2012, a true and correct copy of the foregoing REQUEST FOR REVIEW OF DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO, was served on the following by the method designated:

Gregory S. Richters, Esq. (*Via U.S. Mail*)
Littler Mendelson, P.C.
3344 Peachtree Road, NE
Suite 1500
Atlanta, GA 30326

Dorothy L. Moore-Duncan, Regional Director (*Via U.S. Mail*)
National Labor Relations Board
Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

Dated: September 28, 2012

 /s/ Lance Geren
LANCE GEREN