UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE FINLEY HOSPITAL
Employer

and Case 33-RD-000899

PATRICIA LEHMKUHL
Petitioner

and

SEIU LOCAL 199
Union

ORDER

Petitioner and Employer's Requests for Review of the Regional Director's decision to hold the petition in abeyance pending disposition of the outstanding unfair labor practice cases[1] raise no substantial issues warranting reversal of the Regional Director's determination.

Contrary to our dissenting colleague, we find that the Regional Director did not abuse his discretion by holding the petition in abeyance. The Regional Director correctly applied the Board's blocking charge policy, which precludes holding an election in the face of unremedied unfair labor practice allegations if the Regional Director, as here, determines that employees would not be able to exercise their free choice if an election were held. The Regional Director specifically and correctly rejected the Employer's contention, now renewed by the dissent, that collective-bargaining agreements negotiated between the parties since the filing of the charges had actually satisfied any potential monetary remedy owed the employees from the Employer's alleged unlawful failure to provide wage increases following the expiration of a collective-bargaining agreement. At that time, the Union specifically disputed the Employer's contention. Thus, when the Regional Director decided to hold the petition in abeyance, the issue of whether the employees would be owed a monetary remedy was not, contrary to the dissent, substantially resolved.

Although an election was held on August 29, 2007, 19 months before the present petition was filed and while the unfair labor practice allegations were pending, the circumstances then were very different. As the Regional Director observed, the administrative law judge had just issued his decision and the Union sought to proceed to the 2007 election notwithstanding the pending allegations. Although the Union won that election, the results were close.[2] The Union

[1] On September 28, 2012, the Board issued a Decision and Order in the related case of *The Finley Hospital*, 359 NLRB No. 9 (2012).
[2] The tally indicated that 144 ballots were cast for and 137 against the Union.

did not request to proceed to an election pursuant to this petition, and a substantial additional period of time had elapsed between the unfair practice allegations and the filing of this petition.

The dissent contends that the lapse of time between the Union's filing of the charges in the unfair labor practice case and the petition in this case lessened the likelihood of any adverse effects on employee free choice. We disagree. The Employer's continuing failure to pay contractual wage increases was broad and serious. It adversely affected the entire unit, and continued to do so at the time the Regional Director decided to hold the petition in abeyance.[3] In those circumstances, we cannot say that the Regional Director abused his discretion in concluding that the delay in remedying the Employer's conduct, which the judge had found unlawful, reasonably could have created an impression among unit employees that the Union was ineffectual or incapable of protecting their rights. Nor did the Regional Director abuse his discretion in concluding that the Employer's unremedied violations would have interfered with the holding of a free and fair election under the appropriate laboratory conditions.

Finally, we emphasize that the sole decision we affirm today is the Regional Director's decision to hold the petition in abeyance. Under the Casehandling Manual, the Regional Director has discretion to reassess the holding of the petition in abeyance throughout all steps of the processing of the charge and the petition. Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730.4.

Accordingly, the Regional Director's decision is affirmed.[4]

MARK GASTON PEARCE, CHAIRMAN

SHARON BLOCK, MEMBER

Member Hayes, dissenting:

Employee free choice would have been best served if the petition had been processed three and a half years ago when it was filed. Without passing on the efficacy of the Board's current blocking charge policy in general, I find the Regional Director abused his discretion under that policy by holding this petition in abeyance awaiting resolution of unfair labor practice charges pending before the Board. The charges relied upon to block the petition were significantly remote in time from the filing of the petition, lessening the likelihood of their affecting employee choice.[1] The most significant unresolved allegation – that the Employer unlawfully failed to provide wage increases following the expiration of a collective bargaining agreement[2] -- had been substantially remedied in the meantime by productive negotiations between the parties. Those negotiations resulted in two successor collective bargaining agreements and a series of subsequent wage increases, one of which the parties agreed would be

[3] The Board's decision in *The Finley Hospital* affirmatively orders the Employer to resume giving unit employees annual contractual pay raises and to the make employees whole for any losses sustained. *Id.* slip op. at 10.
[4] We find the Employer's Motion to Recuse former Member Becker is moot.
[1] The petition was filed 2 years after the judge's decision issued finding the charge allegations had merit, and 3 to 4 years after the alleged unlawful conduct occurred.
[2] In contrast to my colleagues in the majority, I would have dismissed this allegation on the merits.

used to partially offset any monetary award that might result from the unfair labor practice litigation. Moreover, a year and a half before this petition was filed the Regional Director permitted a decertification election to proceed in the same unit while the same charges were pending before the Board. The Union won that election. Under these circumstances, I find it was unreasonable to conclude that the delay in the Board's final resolution of the unfair labor practice case would cause employees to believe the Union's representation of employees was ineffectual or would otherwise interfere with employee free choice had an election been held at the time the petition was filed.

BRIAN E. HAYES, MEMBER

Washington, D.C., October 12, 2012.