

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEARTLAND HUMAN SERVICES

And

Case 14-CA-087886

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES (AFSCME),
COUNCIL 31, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

I. STATEMENT OF THE CASE

Upon a charge filed on August 22, 2012, and an amended charge filed on September 28, 2012, by American Federation of State, County, and Municipal Employees, Council 31, AFL-CIO (the Union), a Complaint and Notice of Hearing (the Complaint) issued on October 19, 2012, alleging that Heartland Human Services (Respondent), violated Sections 8(a)(1) and 8(a)(5) of the Act. Respondent filed an Answer on October 30, 2012, and an Amended Answer on December 4, 2012.

In its Amended Answer, Respondent admits the factual assertions in the Complaint but denies the legal conclusions. Specifically, Respondent argues that it was not obligated to recognize or bargain with the Union, which lost a decertification election held on June 4, 2012. However, that election has not been certified and the Board affirmed an order to rerun the election.

Counsel for the Acting General Counsel (General Counsel) submits that the pleadings and appendices to the Motion for Summary Judgment demonstrate that there are no issues of fact and an evidentiary hearing is unnecessary. In this brief, General Counsel will set forth:

Respondent's admissions; Respondent's denials and claim; General Counsel's argument regarding why summary judgment is appropriate; General Counsel's argument regarding remedies; and a conclusion.

II. RESPONDENT'S ADMISSIONS

In Respondent's Amended Answer, it admits that the charge and amended charge were filed and served; that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that the Union is a labor organization within the meaning of Section 2(5) of the Act; that executive director Jeff Bloemker and human resources director Debra Johnson are supervisors and agents of Respondent within the meaning of Sections 2(11) and 2(13) of the Act; that the following employees constitute a Unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by Respondent at its Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act;

that the Union was certified as the exclusive collective-bargaining representative of the Unit on February 1, 2006; that the most recent collective-bargaining agreement covering the Unit was effective from August 21, 2009, through August 20, 2011; that the Union has been the exclusive collective-bargaining representative of the Unit at all material times since February 1, 2006, based on Section 9(a) of the Act; that an election was conducted in the Unit on June 4, 2012, pursuant to a petition filed in Case 14-RD-063069; that the tally of ballots disclosed that 19 ballots were cast for the Union, 18 votes cast against the Union, and one ballot was challenged; that the Union filed objections and a hearing on the challenged ballot and objections was held on June 28, 2012; that the Hearing Officer issued a report on July 18, 2012, sustaining three objections and recommending that the challenged ballot be opened and counted and that a rerun election be conducted if the majority of valid votes was not cast in favor of the Union; that

Respondent filed exceptions to the Hearing Officer's report on August 9, 2012; that the Board adopted the Hearing Officer's Report, findings, and recommendations on September 28, 2012; that on October 12, 2012, the challenged ballot was opened and counted, with the revised tally of ballots showing that the majority of valid votes had not been cast for the Union, resulting in a rerun election that will be conducted at an appropriate date, time, and place to be determined by the Regional Director.

Respondent further admits that about August 8, 2012, Respondent, by Executive Director Bloemker, advised employees by memo that in light of the election results, Respondent believed that it was the will of the majority of employees that it not recognize the Union as their representative and that it would take appropriate measures to support that determination; that since about July 9¹, the Union has requested that Respondent furnish the Union with the name, job title, department, division (if applicable), home address, home phone number, work address, work phone number, e-mail address, work shift, seniority date, rate of pay, and pay step number of each employee in the bargaining unit; that the Union reiterated this request by e-mail about July 16; that Respondent has failed and refused to provide the requested information to the Union since about July 9; and that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

Additionally, Respondent admits that about July 16, the Union, by e-mail, advised Respondent that, pursuant to the collective-bargaining agreement, a labor-management meeting was scheduled for July 23; that on about July 23, Respondent failed and refused to attend the labor-management meeting; that this meeting related to wages, hours, and other terms and conditions of employment which are mandatory subjects for the purposes of

¹ All remaining dates are in 2012, unless otherwise specified.

collective-bargaining; and that Respondent engaged in this conduct without prior notice to and an opportunity for the Union to bargain.

Respond also admits that on about July 16, the Union, by e-mail, requested that Respondent provide dates to collectively bargain with the Union as the exclusive collective-bargaining representative of the Unit; that since about July 16, Respondent has failed and refused to bargain with the Union by refusing to schedule dates to bargain; and that on about July 31, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit.

III. RESPONDENT'S DENIALS AND CLAIMS

Respondent's Amended Answer denies that it was interfering with, restraining, and coercing employees in the exercise of protected rights in violation of Section 8(a)(1) of the Act when it announced that it believed that the majority of employees did not support the Union and that it would take appropriate measures to support that determination. Respondent further denies that it has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act. Finally, Respondent denies that the unfair labor practices described in the Complaint affect commerce within the meaning of Section 2(6) and (7) of the Act.

As a defense, Respondent claims that it is not required to recognize and bargain with the Union as the exclusive bargaining agent of its employees after June 4, because it has a reasonable belief that the Union does not enjoy a majority support of employees in the Unit. Respondent bases this belief exclusively on the results of the June 4 election in Case 14-RD-063069.

IV. GENERAL COUNSEL'S ARGUMENT

Respondent's Amended Answer denies no genuine material facts that prevent summary disposition of this matter. The pleadings and appendices attached to the Motion for Summary

Judgment conclusively demonstrate that the singular issue raised by Respondent is whether it had an obligation to recognize the Union and bargain in good faith when it had a purportedly reasonable belief that the Union no longer represented the majority of employees in the Unit based on the results of the June 4 election in Case 14-RD-063069.

A review of the record in that case establishes that the June 4 election resulted in 19 votes for the Union and 18 votes against the Union with one challenged ballot. When the challenged ballot was opened on October 12, pursuant to a July 18 Hearing Officer's report, the revised tally of ballots established that the majority of employees had not voted for the Union. However, the election was ordered to be rerun pursuant to timely-filed objections that were sustained in the same Hearing Officer's report. The Board adopted the Hearing Officer's report on September 28.

Respondent's lone reason for refusing to recognize the Union and to bargain in good faith is the June 4 election results, which Respondent asserts establish that the majority of employees no longer wish the Union to be their exclusive collective-bargaining representative. If Respondent's defense fails, then it violated the Act by withdrawing recognition of the Union, and by refusing to bargain in good faith when it failed to respond to the requests for relevant information, failed to meet pursuant to the contract, and did not respond to a request to schedule dates to bargain.

Here, no certification has issued for the June 4 election. Respondent's withdrawal of recognition, based on the results of an uncertified election, is not supported by established case law. "It is well-established that election results are not final until the certification is issued. Such a rule promotes stability and certainty during the transition period when, due to the existence of objections or determinative challenges, the employees' choice of representative is in doubt." *W.A. Krueger Co.*, 299 NLRB 914, 915 (1990). Further, the Board has stated that once a union has been certified as an exclusive bargaining agent, as the Union here was, it "ought not to be

deterred from its representative functions even though its majority status is under challenge.” *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982). The presumption of continued majority support “is not rebutted by an election that is contested by the filing of objections or by determinative challenged ballots. Accordingly, an incumbent union is entitled to be treated as the employees’ bargaining representative until a final determination is made that the union is no longer the employees’ representative.” *W.A. Krueger Co.*, *supra* at 916. Here, Respondent acted unlawfully when it withdrew recognition from the Union based solely on the results of an uncertified election.

Respondent also acted unlawfully when it failed to bargain collectively and in good faith with the Union by refusing to provide the Union relevant information, when it failed to attend a contractually scheduled meeting without prior notice to the Union and an opportunity to bargain, and when it refused to schedule dates to bargain. Respondent admits the underlying actions, but argues that it did not have an obligation to bargain with the Union after June 4, based on the election results. As the Board noted in *W.A. Krueger Co.*, Respondent is obligated to continue treating the Union as the employees’ representative until a final determination is made that the Union is no longer the employees’ representative. 299 NLRB at 1227. No such determination has been made in this case. Accordingly, Respondent’s failure to bargain collectively and in good faith violated Section 8(a)(1) and (5) of the Act.

As a defense, Respondent asserts that it was not required to either recognize or bargain with the Union because the Union did not receive the majority of votes cast in the June 4 election. Issues arising from the June 4 election, however, have already been litigated and decided by the Board in Case 14-RD-063069. Respondent had a full opportunity to present evidence and in fact filed exceptions to the Hearing Officer’s report, which sustained three of the Union’s objections. The Board in that case adopted the hearing officer’s report and ordered the election to be rerun at such time as the Regional Director deems appropriate. It is well settled

that absent any newly discovered or previously unavailable evidence or special circumstances, the respondent in an 8(a)(5) case is not entitled to relitigate issues which were, or could have been, litigated in a prior representation hearing. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 161-62, 61 S. Ct. 908, 85 L. Ed. 1251 (1941); *Computer Sciences Raytheon & Local 2088, Int'l Bhd. of Elec. Workers, Afl-Cio*, 348 NLRB No. 65 (2006). Here, the validity of the June 4 election was already litigated before the Board in Case 14-RD-063069. Respondent has neither presented any new evidence that was previously unavailable nor asserted any special circumstances that would warrant reconsideration of the earlier decision. Accordingly, it may not now reargue that the Union lost the June 4 election as a defense to these 8(a)(5) allegations because the Board has already settled that question in the representation case. *Id.*

As no factual matter is in dispute, a hearing is unnecessary and the Board may properly determine the case on the face of the pleadings and the appendices to the Motion for Summary Judgment. *Sanitas Serv. Corp.*, 272 NLRB 119, 120 (1984); *The Wood Schools*, 222 NLRB 1124 (1976).

V. REMEDY

As Respondent announced its withdrawal of recognition of the Union in an e-mail to all employees, the remedial order should be electronically posted on the intranet and e-mailed to all employees. Further, because the withdrawal was announced by Respondent's Executive Director, he should be required to read the Notice to Employees on working time in the presence of a Board agent. *HTH Corp.*, 356 NLRB No. 182 (2011); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995).

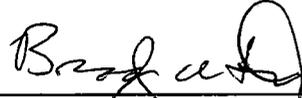
VI. CONCLUSION

The pleadings present no disputed issues of fact which would warrant a hearing. The Board should grant Counsel for the Acting General Counsel's Motion for Summary Judgment to decide this case on the basis of the pleadings and appendices attached thereto. The Board

should find that Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in the Complaint, and enter the appropriate remedial order.

Dated at St. Louis, Missouri, this 10th day of December 2012.

Respectfully submitted,



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