UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

800 River Road Operating Company LLC **D/B/A Woodcrest Health Care Center** Employer,	**Case No. 22-RC-073078**
And **199 SEIU, UNITED HEALTHCARE** **WORKERS EAST,** Petitioner	

EMPLOYER'S MOTION TO REOPEN THE RECORD

Respondent 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center ("Woodcrest" or "Employer") moves to reopen the record herein. In doing so, it relies upon the instant Motion; the supporting attorney certifications submitted by Jedd Mendelson, Esq., James Monica, Esq., and Jason Stanevich, Esq.; the attachments to the supporting certifications, including the statement of Dawn Marie Sormani that is appended as Exhibit A to the Monica Certification; and its June 26, 2012 Exceptions to the Report and Recommendation of the Hearing Officer herein (which is appended to the Mendelson Certification, dated February 13, 2013, as Exhibit D).[1]

On January 15, 2013, Respondent received a copy of the Board's Decision. The Board there found that during the hearing the Hearing Officer had erred by refusing to issue subpoenas requested by Woodcrest. However, the Board further found that the "error was harmless because the Employer was not prejudiced." Having learned on January 15, 2013 that the Board was not

[1] Woodcrest submits this Motion without prejudice to (and specifically reserves) its position that the Board had no power to issue its January 9, 2013 Decision and Certification of Representative ("Decision"), which is reported at 359 NLRB No. 48 (2013) and is the subject of a Motion to Vacate that Woodcrest filed on February 13, 2013.

going to remand the matter for further hearing with an instruction to the Hearing Officer to issue the subpoenas that had been wrongfully denied, the only recourse left to Woodcrest was to attempt once more, without the benefit of subpoena power, to question employees it believes have knowledge in an attempt to secure information relating to former supervisor Israel Vergel de Dios' activities on behalf of Petitioner United Healthcare Workers East ("Union").

Accordingly, on or about January 29, 2013, Woodcrest's counsel sought to conduct interviews with employees in the environmental department, who Vergel de Dios had managed prior to his discharge on or about August 10, 2012, as well as other employees who Woodcrest believed might have knowledge. (Mendelson Certification, ¶2). Counsel provided each employee they attempted to interview with a written statement of the employee's *Johnnies' Poultry* rights and either read or summarized that statement to each employee. (Mendelson Certification, ¶4). Thereafter counsel further informed the employees that they should feel freer to speak now than they had previously because not only was Vergel de Dios no longer their supervisor but, additionally, he had recently withdrawn an unfair labor practice charge that he had filed challenging his discharge and this made it even more unlikely that he would resume supervising them. (Mendelson Cert, ¶4; also ¶3 and Exhibits A and B). As detailed in the attorney certifications, several employees nonetheless refused to be interviewed (Mendelson Cert, ¶5; Stanevich Cert, ¶4; Monica Cert, ¶4). Others who agreed to be interviewed indicated a reluctance to speak candidly. (Mendelson Certification, ¶6). However, Dawn Maria Sormani, who was not part of the environmental department, provided a statement concerning pre-election conduct in which she recalled personally observing Vergel de Dios telling assembled employees, including at least four employees who were part of the environmental department and had been managed by Vergel de Dios, that "they should vote in favor of the union so that they could

receive better wages and health benefits." (Monica Certification, Exhibit A). She also recalled personally observing Vergel de Dios in another instance "randomly telling people that they should vote in favor of the union" while standing in the basement hallway where many environmental department employees worked. *Id*.

After the above-referenced Sormani statement was secured, Woodcrest counsel Mendelson requested second interviews that very same day with the four (4) employees Sormani identified as having been present for the first of the above-referenced instances in which Vergel de Dios had told his subordinates to vote for the Union. (Mendelson Certification, ¶7). Three of the four employees who had earlier refused to interview once again refused to do so. *Id*. Although the one employee who had previously interviewed once again signed a *Johnnie's Poultry* statement, Mendelson sensed that this employee was reluctant to discuss his communications with Vergel de Dios during the election campaign candidly. (Mendelson Certification, ¶7). In part because of language issues, the employee telephoned his adult daughter. After the employee spoke with his daughter in a language other than English, counsel spoke with her (in English) on a speaker so that the employee could hear the discussion. The employee's adult daughter told counsel that her father had no reason to cooperate with Woodcrest regardless of what he might know. Counsel asked her to speak with her father further, expressing the hope that they would realize that in view of Vergel de Dios' separation from Woodcrest her father had no reason to fear retaliation from him on the job and that he should cooperate by revealing what he knows. Subsequent attempts to speak with this employee and/or his daughter, which were fruitless, continued until February 13. (Mendelson Certification, ¶6).

On or about February 7, 2013, Vergel de Dios filed another unfair labor practice charge

with the Board challenging his discharge. (Mendelson Certification, ¶3 and Exhibit C). As detailed in the Mendelson certification, counsel has a concern that Vergel de Dios remains in communication with some of the environmental department employees that he formerly managed (Mendelson Certification, ¶3). In this regard, it seems more than coincidental that Vergel de Dios has filed an unfair labor practice charge challenging his discharge (after withdrawing a previously-filed charge) when only one week earlier Woodcrest counsel had informed his former subordinates that he had withdrawn that charge and that this indicated that he would not be returning to the site. (Mendelson Certification, ¶3). Significantly, the correspondence informing Woodcrest counsel of the newly-filed unfair labor practice charge indicates that Vergel de Dios has so proceeded without representation of the attorney who had filed the initial unfair labor practice charge on his behalf. (Mendelson Certification, Exhibit C). Woodcrest respectfully submits that the circumstances suggest that Vergel de Dios' filing of the second unfair labor practice charge is motivated, at least in part, by a desire to convey to his former subordinates that he intends to return to the site and that they should not speak candidly about his conduct during the election campaign.

The information provided by Dawn Marie Sormani in her written statement, coupled with the continued resistance of environmental department employees to providing Woodcrest counsel with pertinent information, demonstrates that the Board erred in concluding that the Hearing Officer's error was "harmless." At least one employee has now confirmed that Woodcrest correctly understood that Vergel de Dios urged employees, including those under his supervision, to vote for the Union. When the Employer sought to confirm this with other employees identified as having heard Vergel de Dios' comments, several either refused to speak to Woodcrest counsel or indicated a reluctance to speak candidly. This buttresses Woodcrest's

contention that issuance of the requested subpoenas was necessary for it to compel employees, who were reluctant to testify against their supervisor, to testify under oath. Even now, despite the fact that Woodcrest discharged Vergel de Dios and he no longer is their manager, environmental department employees are reluctant to speak about his conduct. The circumstances related in the attorney certifications that accompany this Motion--Vergel de Dios' appearance at the Dunkin Donuts adjacent to Woodcrest the morning that counsel were readying to enter the site to interview personnel as well as his decision (without representation) to file a second unfair labor practice charge after counsel informed employees that Vergel de Dios' withdrawal of his previously-filed charge indicated that Vergel de Dios would not be returning as their manager--most certainly suggests that he has not distanced himself from his former subordinates. These circumstances not only underscore why the Hearing Officer's error was not "harmless" but, further, demonstrate that even now the environmental department employees are deterred from revealing their knowledge in the absence of legal process compelling them to do so.

In view of the above, Woodcrest respectfully submits that it has met the requirements of Section 102.65(e) of the Board's Rules and Regulations to reopen the record. The Board itself has already found that the Hearing Officer erred in not providing Woodcrest with the subpoenas it requested during the hearing. The newly-discovered evidence secured on January 29, 2013 makes clear that the Hearing Officer's refusal to issue the subpoenas was **not** harmless error. To the contrary, Sormani's statement confirms that Vergel de Dios engaged in the very conduct that the Employer has alleged. The continued resistance of other employees, including environmental department employees Vergel de Dios managed and who were present when he encouraged employees to vote for the Union, to interview or speak candidly even when

interviewed underscores that the Hearing Officer's refusal to issue the requested subpoenas was prejudicial.

Woodcrest was previously unable to secure the evidence that it has now collected because of the manifest reluctance of employees to disclose the conduct of a manager who had retaliatory power that he could exercise against them. The record at the representation hearing also established that Vergel de Dios controlled many of his subordinates, exercising significant influence over their thinking (Mendelson Certification, Exhibit D at 5-6, 10-12, 15, 17-18). Even now, with Vergel de Dios no longer employed at Woodcrest, it is apparent that some environmental department employees are concerned about reprisal, whether through his return to employment at the site or otherwise, and others may remain under his influence. The single employee, Sormani, who has gone on record through her written statement is not an environmental department employee. Woodcrest did not previously secure the information Sormani recently imparted about Vergel de Dios' activity in support of the Union for several reasons: its counsel interviewed between 100 and 150 employees over a mere 4 days; Sormani is a unit clerk; as a result, when she was initially interviewed she and counsel focused her attention on allegations of pro-Union supervisory conduct involving three nurses with whom she was quite familiar (Bonita Thornton, Jane Cordero, and Janet Lewis) rather than Vergel de Dios, with whom she had limited contact; and because Sormani was among the first employees interviewed, when Woodcrest counsel previously interviewed her the allegations against Vergel de Dios were not as well-developed as they subsequently became. (Mendelson Certification, ¶6).

Under Board precedent, Woodcrest would succeed in overturning the election if it showed that Vergel de Dios' objectionable conduct was heard by and could have affected the votes cast by 20 election-eligible employees. *Harborside Healthcare, Inc.*, 343 NLRB 906 n. 13

(2004). Since Vergel de Dios managed 24 employees, urged at least four environmental department employees to vote for the Union during the first communication Sormani heard, and spoke "randomly" to passing employees in the basement (which is near where most of the environmental department employees worked) during the second set of communications that Sormani heard, the evidence Woodcrest has presented herein provides a good faith basis for it to contend that Vergel de Dios very well may have coerced an outcome-determinative number of election-eligible employees to vote in favor of the Union. Furthermore, in its Exceptions to the Hearing Officer's Report and Recommendations, Woodcrest pointed out that the record established that Vergel de Dios "covered up" his pro-Union conduct (Mendelson Cert, Exhibit D at 2, 4-6, 11-12, 15, 17-18, 20, 22) and the evidence unearthed by Woodcrest at this time demonstrates that Vergel de Dios continues to engage in conduct designed to continue to deter employees with knowledge from sharing that information with Woodcrest. On this showing, then, the Board necessarily must reopen the hearing to permit Woodcrest, with the benefit of subpoenas, to compel the testimony of employees in order to demonstrate that Vergel de Dios's support of the Union unlawfully influenced employees he controlled to vote for the Union.

CONCLUSION

For the reasons set forth herein, the Board should reopen the record, resume the hearing, and permit the Employer to proceed with its case with the benefit of subpoenas that the Board has already determined were wrongfully withheld from it earlier in this proceeding.

Dated: March 2, 2013

/s/Jedd Mendelson
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of March 2013, the Employer's Motion to Reopen the Record, accompanied by supporting Certifications of Jedd Mendelson, Esq., James M. Monica, Esq., and Jason Stanevich, Esq., was e-filed with the National Labor Relations Board and served on the following via electronic filing:

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