

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**MCKENZIE-WILLAMETTE REGIONAL
MEDICAL CENTER ASSOCIATES, LLC, D/B/A
MCKENZIE-WILLAMETTE MEDICAL CENTER**

**Cases 19-CA-077096
19-CA-095797**

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 49, CTW-CLC**

**AFFIDAVIT OF SERVICE OF: Order Referring Petition to Revoke Subpoena Duces
Tecum to Administrative Law Judge, dated March 7, 2013**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on March 7, 2013, I served the above-entitled document(s) by e-file and e-mail, upon the following persons, addressed to them at the following addresses:

E-FILE:

Gerald M. Etchingham
Associate Chief Administrative Law Judge
National Labor Relations Board, Division of
Judges
901 Market Street, Suite 300
San Francisco, CA 94103

E-MAIL:

Bryan Carmody , Attorney
134 Evergreen Ln
Glastonbury, CT 06033-3706
Email: bryancarmody@bellsouth.net

Gene Mechanic , Esq.
Mechanic Law Firm
210 SW Morrison St Ste 500
Portland, OR 97204-3149
Email: gene@mechaniclaw.com

March 7, 2013

Date

Christina E. Brown, Designated Agent of
NLRB

Name

Christina E. Brown

Signature

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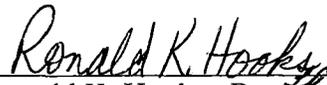
**SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 49, CTW-CLC**

**ORDER REFERRING PETITION TO REVOKE
SUBPOENA DUCES TECUM TO ADMINISTRATIVE LAW JUDGE**

A Petition to Revoke Subpoena Duces Tecum B-712405 having been filed with the Regional Director for Region 19 on March 4, 2013, by Counsel for the Respondent, McKenzie-Willamette Regional Medical Center Associates, LLC dba McKenzie-Willamette Medical Center;

IT IS ORDERED, pursuant to Section 102.31(b) of the Board's Rules and Regulations, that the Petition is hereby referred to the Administrative Law Judge for ruling.

Dated: March 7, 2013



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave, Ste 2948
Seattle, WA 98174-1006

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MCKENZIE-WILLAMETTE REGIONAL	:	Case Nos.
MEDICAL CENTER ASSOCIATES, LLC d/b/a	:	
MCKENZIE-WILLAMETTE MEDICAL CENTER	:	19-CA-077096
	:	19-CA-095797
<i>and</i>	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL	:	
UNION, LOCAL 49, CTW-CLC	:	

**RESPONDENT’S PETITION TO REVOKE SUBPOENA DUCES
TECUM NO. B-712405**

As the Respondent in the above-captioned case, McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical (hereafter, “McKenzie-Willamette” or the “Hospital”) hereby petitions, by and through the Hospital’s Undersigned Counsel, for revocation of Subpoena Duces Tecum Nos. B-712405 (hereafter, the “Subpoena”), which was issued by Chairman Mark Pearce on February 22, 2013, and later served by the Acting General Counsel (hereafter, for ease of reference, the “General Counsel”), acting through the Regional Director (hereafter, the “Regional Director”) for Region 19 (hereafter, the “Region”) of the National Labor Relations Board (hereafter, the “Board”).

BACKGROUND

On March 22, 2012, SEIU, Local 49 (hereafter, the “Union”), as the Charging Party in Case No. 19-CA-77096, filed an Unfair Labor Practice Charge (hereafter, at times, the “First Charge”), which alleges that McKenzie-Willamette has violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”), by virtue of the Hospital’s refusal to provide the Union with information and documentation that related to a Grievance (hereafter, the “Grievance”) the Union had filed on behalf of Ms. Melissa Frost, who formerly worked in the Hospital’s CVOR. On May 23, 2012, the Union filed an Amended Charge, which set forth further allegations as to the Hospital’s refusal to provide the Union with information and documentation that related to the Grievance. On June 21, 2012, the Regional Director issued a Complaint that incorporated the Union’s allegations. In response, McKenzie-Willamette filed a timely Answer, which denied the material allegations of the Complaint. The hearing was originally scheduled for August 28, 2012, but through Orders issued by the Regional Director, was ultimately rescheduled for March 12, 2013, i.e., the current hearing date.

On January 3, 2013, the Union, as the Charging Party in Case No. 19-CA-095797, filed an Unfair Labor Practice Charge (hereafter, at times, the “Second Charge”), which alleges that McKenzie-Willamette has violated Sections 8(a)(1) and 8(a)(5) of the Act by virtue of the Hospital’s refusal to provide the Union with information that relates to health benefits offered to employees who are represented by the Union. On February 19, 2013, the Regional Director issued a Consolidated Complaint (hereafter, for ease of reference, the “Complaint”), whereby he incorporated the allegations of the Second Charge and consolidated those proceedings with the prior proceedings arising from the First Charge. Tomorrow (March 5, 2013) is the deadline for the Hospital’s Answer, which will deny the material allegations of the Complaint, as well as set forth a number of Affirmative Defenses.

As noted above, the Subpoena was received, and therefore, under the Board’s Rules and Regulations, served on Monday, February 25, 2013. See Section 102.31(b). Through the Subpoena, the General Counsel seeks production of essentially the following documentation:

- 1.) In the context of the First Charge, documents that relate to the Grievance and / or the work environment in the Hospital’s CVOR;

- 2.) In the context of the First Charge, documents that relate to one of the Union's information requests, specifically their request of February 23, 2012;
- 3.) In the context of the First Charge, documents that relate to another of the Union's information requests, specifically their request of May 14, 2012;
- 4.) In the context of the Second Charge, documents that relate to communications between the Hospital and the Union with regard to proposed changes to health insurance; and
- 5.) In the context of the Second Charge, documents that relate to the Union's information request of November 21, 2012

As explained below, the Subpoena lacks any validity due to the fact the Board presently lacks the quorum required by Section 3(b) of the Act. Alternatively, to the extent the Subpoena is valid, the Requests are vague or ambiguous, seek information not relevant to the questions at hand, and / or seek information / documentation protected from the disclosure on account of the attorney / client privilege and / or the attorney work product doctrine. Additionally, the Requests are overly burdensome.

ARGUMENT

In Noel Canning v. NLRB, Case No. 12-1153, the U.S. Court of Appeals for the District of Columbia Circuit held that two of the Board's current Members, namely Member Sharon Block and Member Richard Griffin, were appointed by the President in violation of the U.S. Constitution. Insofar as the Board is currently comprised of only one other Member, namely Chairman Mark Pearce, the Board lacks the quorum required by Section 3(b) of the Act. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

In these circumstances, the Board lacked the authority to issue the Subpoena. Although Section 11(1) of the Act provides that the Board, "or any Member thereof," may issue subpoenas, Congress obviously would not intend for a Member's power to issue subpoenas to exist in circumstances where the agency itself lacked any legal existence. In any case, even under the presumption, solely for the sake of argument, that the Chairman held the power to issue the Subpoena in spite of the lack of the required quorum, the General Counsel, acting through the Region, lacked the power to serve the Subpoena. The Subpoena was served upon McKenzie-Willamette as part of the General Counsel's prosecution of the Complaint. However, as Section 3(d) of the Act makes clear, the General Counsel carries out prosecutions of

alleged unfair labor practices on behalf of the Board. Insofar as the Board is not currently operative on account of the lack of the statutory quorum, as the necessary corollary, the General Counsel's authority to prosecute the Complaint has also been deactivated.

In summary, due to the absence of the necessary quorum, the Board lacked the authority to issue the Subpoena and / or the General Counsel lacked the authority to serve the Subpoenas as part of his prosecution of the Complaint. Either way, the Subpoenas are *ultra vires* and must be revoked.

Even under the presumption, solely for the sake of argument, that the Subpoena is, somehow, immune from the Board's lack of a quorum, the Board should revoke the Subpoena because each Request is vague and / or ambiguous, does not seek documentation relevant to the above-captioned proceedings, and seeks information / documentation protected by the attorney / client privilege and / or the work product doctrine. In addition, the Requests are, individually and collectively, overly burdensome. Accordingly, under the standards set forth by Section 102.31(b), the Subpoena must be revoked.

CONCLUSION

For all the reasons set forth above, the Subpoena should be revoked in its entirety.

Dated: March 4, 2013
Glastonbury, Connecticut

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan T. Carmody", is written over a horizontal line. The signature is stylized and includes a large, sweeping flourish at the end.

Bryan T. Carmody, Esq.
Attorney for Respondent
134 Evergreen Lane
Glastonbury, Connecticut 06033
(203) 249-9287
bryancarmody@bellsouth.net

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<i>and</i>	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL	:	
UNION, LOCAL 49, CTW-CLC	:	

CERTIFICATE OF SERVICE

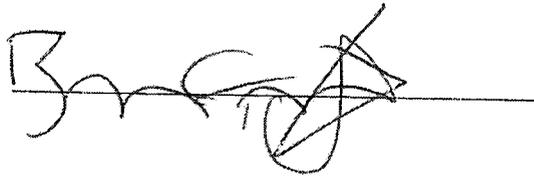
The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Petition to Revoke Subpoena No. B-712405 (hereafter, the “Petition to Revoke”) was e-filed this date with the following through the website of the National Labor Relations Board (www.nlr.gov):

Ronald K. Hooks
Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078

The Undersigned does hereby further certify that, on March 4, 2013, a copy of the Petition to Revoke was served upon Counsel for the Acting General Counsel, Adam Morrison, via email at Adam.Morrison@nlrb.gov

Dated: Glastonbury, Connecticut
March 4, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan T. Carmody", is written over a horizontal line. The signature is stylized and somewhat cursive.

Bryan T. Carmody, Esq.
Attorney for Respondent
134 Evergreen Lane
Glastonbury, Connecticut 06033
(203) 249-9287
bryancarmody@bellsouth.net

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records
McKenzie-Willamette Medical Center
1460 G Street, Springfield, OR 97477-4112

As requested by Adam D. Morrison, Counsel for the Acting General Counsel

whose address is 915 Second Ave., Rm. 2948, Seattle, WA 98174
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE _____

an Administrative Law Judge of the National Labor Relations Board

at Courtroom 3, U.S. District Court, 405 E. 8th Avenue

in the City of Eugene, OR

on the 12th day of March 2013 at 9:00 (a.m.) (~~p.m.~~) or any adjourned

or rescheduled date to testify in McKenzie-Willamette Regional Medical Center Associates, LLC
d/b/a McKenzie-Willamette Medical Center
(Case Name and Number)
Cases 19-CA-077096 and 19-CA-095797

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

****SEE ATTACHED****

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

B - 712405

Issued at Portland, Oregon

this 22nd day of February 2013



Paul H. Paine
Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

ATTACHMENT

DEFINITIONS AND INSTRUCTIONS

As used in this document, "Respondent" refers to McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center, and its agents, managers, supervisors, and/or representatives. The term "Union" refers to the Service Employees International Union, Local 49, CTW-CLC.

"Documents" includes all material defined in Rule 34 of the Federal Rules of Civil Procedure, and are not limited to the specific examples listed. We seek production of all requested documents and communications within your possession, custody and/or control without regard to who has physical possession of them or who prepared the documents and wherever retained.

"Communications" means any oral or written exchange of words, speeches, correspondence of any nature, thoughts or ideas to another person(s), whether person-to-person, in a group, by telephone, by letter, by telex, facsimile transmission, by e-mail, or by any other process, verbal, written, electronic, or otherwise.

Documents and communications produced should be grouped and in the order that they are maintained in the normal course of business, and should include all files and file labels in which the documents, and extra copies of them, are located.

For any document withheld on a claim of privilege and/or under the work-product doctrine, identify the date, author, recipients, title, general nature and privilege claimed.

If additional documents are discovered that fall within the terms of this request, the additional items also shall be produced immediately.

Unless otherwise indicated this subpoena covers the period of January 1, 2011, through the return date of this subpoena.

DOCUMENTS TO BE PRODUCED

1. For the period from January 1, 2012, to September 23, 2012, documents and communications, including but not limited to grievances, grievance responses, grievance appeals, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to grievances related to Melissa Frost ("Frost") and/or the work environment in the Cardiovascular Operating Room ("CVOR").

2. For the period from February 23, 2012, to September 23, 2012, documents and communications, including but not limited to requests for information, responses to requests for information, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to the Union's request of February 23, 2012, that Respondent furnish the Union with the personnel files of Frost, Aden Davis ("Davis"), and/or Aden Galor ("Galor").
3. For the period from May 14, 2012, to September 23, 2012, documents and communications, including but not limited to requests for information, responses to requests for information, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to the Union's request of May 14, 2012, that Respondent furnish the Union with the following information:
 - (a) any and all documents supporting the assertions Respondent made in its February 21, 2012, grievance response letter concerning Frost's work performance and behavior;
 - (b) the personnel files of Frost, Davis, and/or Galor; and
 - (c) the weekly CVOR department schedules for January and February 2012.
4. For the period from January 1, 2012, to the return date of the subpoena, documents and communications, including but not limited to memoranda, correspondence, letters, emails, meeting minutes, and notes, related to contact and/or communications between Respondent and the Union concerning proposed changes to health insurance.
5. For the period from November 21, 2012, to the return date of the subpoena, documents and communications, including but not limited to requests for information, responses to requests for information, memoranda, correspondence, letters, emails, meeting minutes, and notes, related to the Union's request of November 21, 2012, that Respondent furnish the Union with the following information:
 - (a) Copy of the Summary Plan Description;
 - (b) Financial impact of the plan design and employee contribution rate changes;
 - (c) Actuarial value of the plan;
 - (d) Cost of the plan to McKenzie-Willamette;
 - (e) Method for fixing plan cost to McKenzie-Willamette;
 - (f) Reserves (for payment of claims);
 - (g) Experience (reporting figures);
 - (h) Medical claims cost and administrative expenses;

- (i) Medical claims incurred for services at CHS-affiliated hospitals;
- (j) Actual cost to supply services provided at CHS-affiliated hospitals;
- (k) Contractual discounts for services provided at CHS-affiliated hospitals; and
- (l) Prices to the plan of services provided at McKenzie-Willamette entities, other network providers, and non-network providers.

6. In lieu of providing the records and documents requested above, the custodian of records may make the records and documents and/or true copies of such records requested herein available at a mutually agreeable location and time in Eugene, Oregon no later than Monday, March 11, 2013, to an agent or agents of the National Labor Relations Board for inspection, copying and use in connection with these proceedings. Provided further, that such records and documents requested herein will not be required to be produced at the hearing in this matter if Respondent and the Counsel for the Acting General Counsel arrive at a written stipulation with regard to the information contained therein and such stipulation is received in evidence by the Administrative Law Judge hearing this matter.