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

HEARTLAND-PLYMOUTH COURT MI, LLC, d/b/a HEARTLAND HEALTH CARE CENTER-PLYMOUTH COURT,	)	
Respondent,	)	
and	)	**Case No. 07-CA-070626**
SEIU HEALTHCARE MICHIGAN,	)	
Charging Union.	)	

RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES Heartland-Plymouth Court MI, LLC, d/b/a Heartland Health Care Center-Plymouth Court, Respondent herein, and files the following exceptions to the Administrative Law Judge's (ALJ's) Decision, which issued on March 12, 2013:

1. Respondent excepts to the ALJ's drawing of an adverse inference from Respondent's failure to question witness Karen Szkutnik regarding statements made during a telephone conversation, on the grounds that Fowlkes' testimony on this issue was simply not controverted by Respondent and drawing an "adverse inference" was inappropriate and unnecessary. (JD 2: 21-26).

2. Respondent excepts to the ALJ's drawing of an adverse inference from Respondent's failure to call former Administrator Bret Lucka as a witness, on the grounds that Fowlkes' testimony was simply not controverted by Respondent and drawing an "adverse inference" was inappropriate and unnecessary. (JD 2: 27-33).

3. Respondent excepts to the ALJ's improper conclusion that "Finley's bi-monthly hours were reduced from 80 to between 54 and 60," on the grounds that this finding is not supported by the record evidence and is clearly erroneous. (JD 3: 40-41).

4. Respondent excepts to the ALJ's reliance on *Good Samaritan Hospital,* 335 NLRB 901 (2001), and his characterization of that decision as standing for "the proposition that effects bargaining is required even when the employer has no obligation to bargain about the decision itself because of contractual management-rights language," on the grounds that such reliance is erroneous as a matter of law . (JD 6: 12-20).

5. Respondent excepts to the ALJ's refusal to consider or follow the decision of the D.C. Circuit Court of Appeals in *Enloe Medical Center v. NLRB,* 433 F.3d 834 (D.C. Cir. 2005), on the grounds that ignoring controlling precedent is erroneous as a matter of law. (JD 6: 30-34).

6. Respondent excepts to the ALJ's finding/conclusion that neither the management-rights article nor the zipper clause address effects bargaining, on the grounds that this finding/conclusion is not supported by the record and is erroneous as a matter of law. (JD 6: 45-47)

7. Respondent excepts to the ALJ's reliance on *Good Samaritan Hospital,* 335 NLRB 901 (2001), and his conclusion that Respondent did not adequately distinguish that decision, on the grounds that this conclusion is unsupported by the record and is erroneous as a matter of law. (JD 7: 1-9).

8. Respondent excepts to the ALJ's finding/conclusion that, while "the Union never specifically requested effects bargaining per se, such a request was implicit in its grievance and its request that the status quo ante be restored," on the grounds that this finding/conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 7: 20-23).

9. Respondent excepts to the ALJ's refusal to "find that Respondent has met its burden of establishing that the union 'clearly intend[ed], express[ed], and manifest[ed] a conscious relinquishment' of its right to engage in effects bargaining," on the grounds that a finding of waiver is established by the record and is required as a matter of law. (JD 7: 25-28).

10. Respondent excepts to the ALJ's refusal to consider the record evidence from the underlying Arbitration hearing and his findings/conclusions that the "record is totally devoid of any foundational requirement necessary for admissible evidence in a formal proceeding;" that the testimony of Malone at the Arbitration hearing was "not sufficiently developed … to constitute admissible evidence in a formal proceeding," and that "Fowlkes was the only witness who testified, without controversion, about communications that the union had with management over the reduction in hours," on the grounds that these findings and/or conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 7: 29-42).).

11. Respondent excepts to the ALJ's findings and/or conclusions that "the Union was deprived of the opportunity to engage in effects bargaining at a point where it might have been able to secure ameliorating circumstances for the affected employees," on the

grounds that these findings and/or conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 7: 45-48).

12. Respondent excepts to the ALJ's improper application of *Olin Corp*, 268 NLRB 573 (1984) and his improper finding that the General Counsel met its burden of proof in opposing deferral, on the grounds that these findings and/or conclusions are not supported by record evidence and are erroneous as a matter of law. (JD 8: 7-45).

13. Respondent excepts to the ALJ's finding that "there can be no doubt that the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing," on the grounds that this finding is not supported by the record evidence and is erroneous as a matter of law. (JD 8: 43-45).

14. Respondent excepts to the ALJ's findings/conclusions that "the scope of the arbitration hearing was limited to contractual interpretation and that the evidence necessary for a resolution of the instant ULP was not the same evidence that was presented to, and considered by, the arbitrator" and that "the issue of whether the Respondent violated its duty to engage in effects bargaining remains litigable before the Board," on the grounds that these findings/conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 9: 1-7).

15. Respondent excepts to the ALJ's conclusion that "the Respondent's failure to provide the Union with prior notice and an opportunity to bargain over the effects of the reduction in hours violated Section 8(a)(5) and (1) of the Act," on the grounds that these findings and/or conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 9: 8-12).

16. Respondent excepts to the ALJ's Conclusion of Law Number 3, on the grounds that it is not supported by the record evidence and is erroneous as a matter of law. (JD 9: 18-23).

17. Respondent excepts to the ALJ's proposed *Transmarine* remedy, on the grounds that the Remedy is inconsistent with the record evidence, erroneous as a matter of law, and does not effectuate the purposes of the Act.[1] (JD 9: 24-50; 10: 1-28).

18. Respondent excepts to the ALJ's proposed Order on the grounds that the Order is inconsistent with the record evidence, erroneous as a matter of law, punitive in nature, and does not effectuate the purposes of the Act. (JD 10: 33-50; 11: 1-40).

19. Respondent excepts to paragraph 2 (a) of the ALJ's Order to make employees whole, on the grounds that this remedy is inconsistent with the record evidence, erroneous as a matter of law, punitive in nature, and does not effectuate the purposes of the Act. (JD 11: 5-10).

20. Respondent excepts to the ALJ's failure to apply a "contract coverage" analysis, on the grounds that this is the proper standard under the Act.

21. Respondent excepts to the ALJ's refusal to defer to Arbitrator Glendon's decision, on the grounds that deferral is required as a matter of law.

22. Respondent excepts to the ALJ's failure to dismiss the complaint in its entirety, on the grounds dismissal is required by the record and established law.

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[1] *Transmarine Navigation Corp.,* 170 NLRB 389 (1968).

23. Respondent excepts to the ALJ's proposed Notice To Employees, on the grounds that the record fails to support any unfair labor practice findings and a make-whole remedy is inappropriate.

Respectfully submitted this 16th day of April, 2013.

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CERTIFICATE OF SERVICE

I, Charles P. Roberts III, do hereby certify that the foregoing Exceptions has this day been served by electronic filing to the Executive Secretary, National Labor Relations Board, and that the following persons have been served via electronic copy:

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Dated this 16th day of April, 2013

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