

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEARTLAND HUMAN SERVICES

and

Case 14-CA-096323

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 January 14, 2013, by American Federation of State, County, and Municipal Employees, Council 31, AFL-CIO (Union), a Complaint and Notice of Hearing (Complaint) issued on March 21, 2013, alleging that Heartland Human Services (Respondent), violated Section 8(a)(1) and 8(a)(5) of the Act. Respondent filed an Answer on March 25, 2013, and an Amended Answer on May 3, 2013.

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 because the Union lost a decertification election held on June 4, 2012. However, that election has not been certified and the Board directed a rerun election. In addition, on March 18, 2013, the Board issued a Decision and Order in Case 14-CA-087886, reported at 359 NLRB No. 76, finding that the Respondent's July 31, 2012

withdrawal of recognition of the Union was unlawful in light of the uncertified results of the June 4, 2012 decertification election.¹

Counsel for the Acting General Counsel (General Counsel) submits that the pleadings and exhibits attached to the Motion for Summary Judgment demonstrate that there are no issues of fact and an evidentiary hearing is unnecessary.² In this brief, General Counsel will set forth Respondent's admissions, Respondent's denials and defense, General Counsel's argument regarding why summary judgment is appropriate, and the conclusion and appropriate remedies.

II. RESPONDENT'S ADMISSIONS

In Respondent's Amended Answer, it admits that the charge was 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, Human Resources Director Debra Johnson, and Director of Business Services Charles A. Siler 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

¹ On May 3, 2013, the Board filed an application for enforcement of its order in the United States Court of Appeals for the Seventh Circuit. On May 17, 2013, Respondent filed a cross-application for enforcement and petitions the Court to review and set aside the Board's Decision and Direction adopting the hearing officer's report in Case 14-RD-063069 and directing a rerun election.

² The Motion was delayed by the charge the Union filed in Case 14-CA-104729 on May 9, 2013. This case was withdrawn on June 14, 2013.

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 were 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, recommending that the challenged ballot be opened and counted and that a rerun election be conducted if the majority of valid votes had not been cast for the Union, having further recommended that three objections be sustained; 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 the challenged ballot was opened and counted on October 12, 2012, the revised tally of ballots disclosed that a majority of valid votes had not been cast for the Union, and a rerun election will be conducted at an appropriate date, time, and place to be determined by the Regional Director; and that on March 18, 2013, the Board issued a Decision and Order in Case 14-CA-087886, finding, inter alia, that Respondent had violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the Unit.

Respondent further admits that about August 8, 2012, Respondent ceased giving employees raises on their anniversary dates as required by the wage and step schedule set forth in Appendix A of the collective-bargaining agreement; that since about September 21, 2012, Respondent changed its 401(k) plan and provider; since about September 22, 2013, Respondent increased the premium for family and dependent health insurance benefits; that the anniversary raises, 401(k) plan and provider, and the premium for family and dependent health insurance benefits are subjects related to wages, hours, and other terms and conditions of

employment of the Unit and are mandatory subjects for the purpose of collective bargaining; and that Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity for the Union to bargain.

III. RESPONDENT'S DENIALS AND DEFENSE

Respondent's Amended Answer 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. Respondent further 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 collective-bargaining representative of its employees because it has a reasonable belief that the Union does not enjoy the majority support of the Unit. This reasonable belief is based exclusively on the results of the June 4, 2012 election in Case 14-RD-063069. Respondent contends that the hearing officer's report recommending that a rerun election be conducted and the Board's direction of a rerun election are erroneous.

IV. GENERAL COUNSEL'S ARGUMENT

Respondent's Amended Answer denies no genuine material facts that prevent summary disposition of this matter. The pleadings and exhibits 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, 2012 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, 18 votes against the Union, and one challenged ballot. When the challenged ballot was opened on October 12, pursuant to a hearing officer's report adopted by

the Board, the revised tally of ballots established that the majority of employees had not voted for the Union. Further, pursuant to timely-filed objections that were sustained in the hearing officer's report, the Board adopted the hearing officer's recommendation that a rerun election be conducted at such time as the Regional Director deems appropriate.

The Board's March 18, 2013 Decision and Order in Case 14-CA-087886 found, *inter alia*, that Respondent's withdrawal of recognition on July 31, 2012 was violative of Section 8(a)(1) and (5) of the Act on the basis that no final certification has issued in the decertification case. Respondent was not entitled to question the Union's majority status or withdraw recognition until such final certification issues.

Respondent's sole reason for continuing to refuse to recognize the Union and to bargain in good faith are the results of the June 4 election, which Respondent asserts establishes that the majority of employees no longer wish the Union to be their exclusive collective-bargaining representative. In Case 14-CA-087886, the Board found Respondent's defense without merit because the results of the election were not certified, and Respondent violated the Act by withdrawing recognition of the Union, and failing and refusing to recognize and bargain in good faith when it failed to respond to the requests for relevant information, failed to attend a scheduled labor-management meeting, and failed and refused to schedule dates to bargain.

"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 was here, 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, and the Board has concluded such.

In the current case, Respondent also acted unlawfully since on about August 8, 2012, when it ceased giving employees raises on their anniversary date as required by the wage and step schedule set forth in Appendix A of the collective-bargaining agreement; since about September 21, when it changed its 401(k) plan and provider; and since about September 22, when it increased the premium for family and dependent health insurance benefits. Respondent engaged in all of this conduct without prior notice to the Union and without affording the Union an opportunity to bargain. Respondent admits the underlying actions, but argues that it did not have an obligation to give prior notice to or 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 916. 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 collectively and in good faith 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 *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Computer Sciences Raytheon*, 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 exhibits attached to the Motion for Summary Judgment. *United Sanitation Services, a Division of Sanitas Service Corp.*, 272 NLRB 119, 120 (1984); *The Wood Schools*, 222 NLRB 1124 (1976).

V. CONCLUSION AND REMEDIES

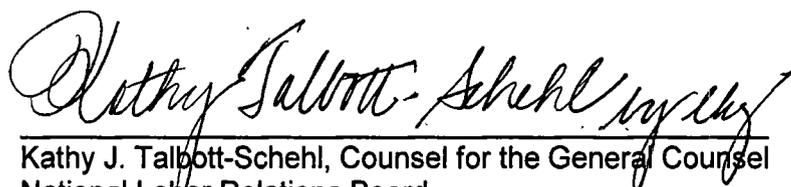
The pleadings present no disputed issues of fact which would warrant a hearing. The Board should grant Counsel for the Acting General Counsel's Motion for Summary Judgment to decide and determine this case on the basis of the pleadings and exhibits; and find that Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in the Complaint, and enter the appropriate remedial order.

In the Board's Decision and Order in Case 14-CA-087886, where Respondent announced its withdrawal of recognition of the Union in an email to all employees, in addition to physical posting of paper notices, the remedial order required that notices shall be distributed electronically such as by email, posting on an intranet or an internet site, and/or other electronic means. Further, because the withdrawal of recognition was announced by Respondent's

executive director, the Board's remedial order required the executive director to read the remedial notice to the Respondent's employees or, at the Respondent's option, a Board agent in the executive director's presence. *HTH Corp.*, 356 NLRB No. 182 (2011), *enfd.* 693 F.3d 1051 (9th Cir. 2012); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). These remedies continue to be appropriate in this case.

Dated at St. Louis, Missouri, this 19th day of June 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

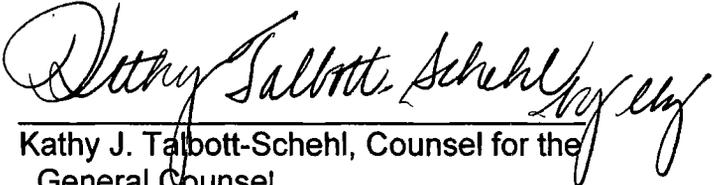
I hereby certify that a copy of the Counsel for the Acting General Counsel's Brief in Support of Motion for Summary Judgment was served via electronic and regular mail on this 19th day of June, 2013 on the following parties:

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