

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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THE WATERBURY HOSPITAL

NLRB CASE NO. 01-RC-105956

AND

CONNECTICUT HEALTH CARE  
ASSOCIATES, NUHHCE, AFSCME,  
AFL-CIO

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JULY 9, 2013

REQUEST FOR REVIEW/ REQUEST TO REOPEN RECORD

Pursuant to Section 102.67 of the Board's Rules and Regulations, The Waterbury Hospital ("the Hospital") hereby requests review of Regional Director Jonathan B. Kreisberg's June 25, 2013 decision that the Radiology Leads employed at the Hospital are not supervisors under the Act. Compelling reasons for review exist because: (1) a substantial question of law and policy is raised because the decision departs from officially reported Board precedent; and (2) the decision is clearly erroneous on the record and such error prejudicially affects the rights of the Company. Section 102.67(c)(1)(ii), (c)(2). The Hospital also moves to reopen the record pursuant to Section 102.65(e)(1) in light of new evidence, specifically that the Hospital eliminated the position of Assistant Director of the Radiology Department. The Regional Director relied heavily on the Assistant Director of the Radiology Department's role at the Hospital in his determination that the Radiology Leads did not have supervisory authority.

I. Background and Procedural History

The Petitioner sought to represent a unit consisting of all regularly scheduled full time and part time technical employees working for the Hospital. The Petitioner sought to include in this technical unit Radiology Leads. The Hospital argued that this is inappropriate because the Radiology Leads are supervisors within the meaning of the Act and should not be included in any unit.

A hearing was held on Tuesday, June 4, 2013. Two witnesses testified at the hearing – Anne Lemelin, Assistant Director of the Laboratory, and Juris Patrylak, Assistant Director of the Radiology Department. On June 25, 2013, the Regional Director issued his decision finding that the Radiology Leads were not supervisors under Section 2(11) of the Act. As detailed below, compelling reasons for review exist because the Regional Director's decision regarding the Radiology Lead's supervisory status departs from officially reported Board precedent and is clearly erroneous and prejudicial. In addition, new evidence regarding the Hospital's elimination of the Assistant Director of the Radiology Department position fundamentally affects the Regional Director's analysis.

II. Compelling Reasons Exist For Review

A. The Regional Director Erred When He Determined That Radiology Leads Were Not Supervisors Under The Act

Radiology Leads should be excluded from the unit because they are supervisors under the Act. As Mr. Patrylack testified and as evidenced by the job descriptions, Radiology Leads are responsible for supervising staff, budgeting, evaluating and purchasing new products, assigning cases to technicians, scheduling the technicians' work and vacation time, and disciplining, training, and evaluating the technicians.

Employer Exhibits 14-17; Transcript, pp. 66-67, 74-75. Mr. Patrylack testified that Radiology Leads participate in the interview process for new technicians. Transcript, pp. 73-74. They also conduct employee evaluations as well as discipline employees. See Employer Exhibits 18-19; Transcript, pp. 67, 72-3. As part of their new position, Radiology Leads attended a management training seminar. Transcript, p. 67.

The Act excludes from coverage “supervisors” who are individuals:

Having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

29 U.S.C. 152(11). This involves three basic questions:

1. Does the employee have the authority to engage in one or more of the activities listed?
2. Does the exercise of that authority require the use of independent discretion and judgment?
3. Does the employee hold the authority to act in the interest of the employer?

NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994).

The Regional Director found that the Radiology Leads were not supervisors under the Act. Decision, pp. 8-11. However, the Radiology Department created the four lead positions in April, 2012 as part of a reorganization of the department and an effort to distribute the administrative workload. Transcript, pp. 69-70. Therefore the Regional Director’s so-called absence of evidence of supervisory authority is a result of the newness of the Radiology Lead position, not that the Radiology Leads do not have the requisite supervisory authority. “[I]t is well settled that it is the authority to act

independently that is determinative of supervisory status rather than the exercise of that authority.” Groves Truck & Trailer, 281 NLRB 1194, n. 1 (1986) (emphasis added). As evidenced by Mr. Patrylack’s testimony as well as the job descriptions admitted into evidence, the Radiology Leads have the authority to act independently—time has simply not provided them with the opportunity to do so.

In finding that the Radiology Leads did not have supervisory authority, the Regional Director focused on Mr. Patrylack’s involvement in the discipline, hiring, and evaluation process. However, Mr. Patrylack was involved in employee evaluations because these were the first evaluations performed after the creation of the position. Transcript, pp. 69-70. As evidenced by Exhibit 18, the Radiology Leads are listed as the evaluator, and in fact there is not even a line for Mr. Patrylack’s signature on the competency forms. Exhibit 18. Regarding hiring, the Radiology Department has only hired one person since the creation of the Radiology Lead position. Transcript, p. 79. Finally, Mr. Patrylack did not recall a time when he disagreed with a Radiology Lead’s recommendation for discipline, and in fact Exhibit 19 demonstrates that Radiology Leads can issue discipline without Mr. Patrylack’s participation in the meeting. Transcript, p. 92; Exhibit 19.

#### B. New Evidence

The Hospital also has new evidence that substantively affects the Regional Director’s decision. As stated above, the Regional Director relied heavily on Mr. Patrylack’s presence as a factor that weighed against the Radiology Leads being supervisors under the act. Subsequent to the hearing, on June 26, 2013, the Hospital eliminated the Assistant Director of the Radiology Department position. As a result, the Radiology Leads will report to the director of diagnostic services and will no longer have

Mr. Patrylack's involvement in their hiring, direction, and discipline of employees. The Hospital would be prejudiced if the Regional Director did not consider this new evidence, given the fact that it directly addresses a key part of the Regional Director's ruling and would require the Regional Director to find that the Radiology Leads are in fact supervisors.

III. The Board Does Not Have Authority To Direct An Election

In light of Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), cert. granted NLRB v. Canning, 2013 U.S. LEXIS 4876 (U.S. June 24, 2013), the Board currently does not have a quorum and the Regional Director and the Board do not have authority to process representation petitions.

The Hospital has the right to petition the Board to review the Regional Director's decision and direction of election. Noel Canning calls into question the Board's authority and ability to provide meaningful review of the Regional Director's decision. With the Board's authority in question, it should hold the petition in abeyance until a quorum is reached.

The Hospital recognizes that the Board has previously rejected the argument that the Regional Director lacks authority to process representation petitions in Fordham Hill Owners Corp., 02-RC-098661, 2012 NLRB LEXIS 290, at \*1 n. 1 (NLRB April 29, 2013). However, the cases cited in Fordham Hill Owners Corp. are distinguishable, in that they either did not specifically address this issue or involved the delegation of authority to seek an injunction under Section 10(j), not representation petitions. See New Process Steel L.P. v. NLRB, 130 S.Ct. 2635, 2643 n.4 (2010) ("The [prior delegations of authority to regional directors] implicates a separate question that our decision does not address."); Frankl v. HTH Corp., 650 F.3d 1334, 1354 (9th Cir. 2011); Osthus v.

Whitesell Corp., 639 F.3d 841, 844 (8th Cir. 2011); Overstreet v. El Paso Disposal, LP, 625 F.3d 844, 853 (5th Cir. 2010) (injunction under Section 10(j)). Accordingly, and in light of the Supreme Court's grant of certiorari in Noel Canning, the Hospital requests that the Board rescind the direction of election or hold the petition in abeyance until a quorum is reached.

IV. Conclusion

For the foregoing reasons and pursuant to Section 102.67, the Hospital requests the Board review the Regional Director's decision, stay the election pending its determination, and find that the Radiology Leads are supervisors and therefore excluded from the Bargaining Unit. The Hospital also requests that the Board reopen the record in light of new evidence.

THE WATERBURY HOSPITAL

By 

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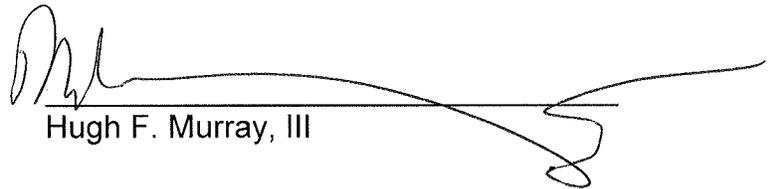
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Review by the Waterbury

Hospital was served by email and overnight mail on July 9, 2013 to:

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