



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3



<p>Orchard Manor ALP, LLC d/b/a Orchard Manor Rehabilitation & Nursing Center</p> <p>Employer</p> <p>and</p> <p>CSEA, Local 1000, AFSCME, AFL-CIO</p> <p>Petitioner</p>	<p>Case 03-RC-110739</p>
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**ORDER DIRECTING HEARING ON OBJECTIONS
AND NOTICE OF HEARING**

Pursuant to a Stipulated Election Agreement approved by me on August 21, 2013, a secret ballot election was conducted on September 19, 2013, among the employees in the following described appropriate collective-bargaining unit:

All full-time and regular part-time Licensed Practical Nurses (LPNs) (except whose primary job assignments is a Charge Nurse) Certified Nurses Assistants (CNAs), Cooks, Food Service Workers, Physical Therapy Aides, Physical Therapy Assistants, Activities Aides, Dietary Aides and Maintenance workers employed by the Employer at its Medina, New York facility, excluding Registered Nurses (RNs), Charge Nurses (including LPNs whose primary job assignment is Charge Nurse), confidential employees, managers, and guards and supervisors as defined in the National Labor Relations Act.

The Tally of Ballots prepared at the conclusion of the election revealed that of approximately 109 voters, 102 cast ballots, of which 48 cast ballots for the Petitioner, 40 cast ballots against the Petitioner, and there were 14 challenged ballots, which were sufficient in number to affect the results of the election. Pursuant to a stipulation approved by me on October 30, 2013, the Employer and the Petitioner agreed to sustain the 14 challenged ballots for the

purposes of rendering a final tally, reducing the number of challenged ballots to 0. Therefore, a majority of valid ballots cast, plus challenged ballots, has been cast for the Petitioner.

On September 26, 2013, the Employer filed timely Objections to Conduct Affecting the Results of the Election, copies of which were duly served upon the parties. A copy of the Objections is attached hereto as Exhibit 1.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, a preliminary investigation of the Objections has been conducted, and I hereby make the following conclusions.

In support of its Objections, the Employer presented evidence that during the critical period, the Petitioner engaged in acts and conduct specified in the Objections.¹ Inasmuch as the evidence offered with respect to the Objections raises issues of act and credibility which I cannot resolve ex parte, I shall order that these issues be resolved at a formal hearing before a hearing officer to be designated by me.

IT IS HEREBY ORDERED, pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, that on **Thursday, November 7, 2013**, at 10:00 a.m. and on consecutive days thereafter until concluded, at the Hearing Room, Niagara Center Building, 130 S. Elmwood Ave., Suite 630, Buffalo, NY 14202, a hearing will be held before a designated hearing officer of the National Labor Relations Board on issues relating to the Employer's Objections. At the hearing, the parties will have the right to appear in person or otherwise and give testimony and call, examine and cross examine witnesses and present oral arguments pertaining to the issues raised by the Employer's Objections. Accordingly,

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting this hearing shall prepare and cause to be served upon the parties a report containing

¹ Objection 1 questions the Regional Director's authority to certify the results of the election, and is not related to the Petitioner's conduct during the critical period.

resolutions of credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of the Objections.

Within fourteen (14) days from the issuance of such report, any party may file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy with the Regional Director and upon each of the parties, and shall file a statement of service with the Board. If no exceptions are filed to such report, the Board may, upon the expiration of the period for filing of exceptions, decide the matter forthwith upon the record or make other disposition of the case.

Dated at Buffalo, New York this 30th day of October, 2013.

/s/Rhonda P. Ley

RHONDA P. LEY, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 3
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September 26, 2013

Rhonda P. Ley, Regional Director
Region 3
National Labor Relations Board
Niagara Center Building
130 South Elmwood Avenue (Suite 630)
Buffalo, NY 14202-2387

BY FAX TO: (716) 551-4972

Re: OBJECTIONS TO ELECTION HELD SEPTEMBER 19, 2013
ORCHARD MANOR REHABILITATION AND NURSING CENTER
CASE NO. O3-RC-110739
Our Matter No. 448-13

Dear Regional Director:

Our Firm represents the Employer, Orchard Manor ALP, LLC d/b/a Orchard Manor Rehabilitation and Nursing Center. On behalf of the Employer and pursuant to Sections 11392.4 *et seq.* (relating to resolution of post-election objections) of the Board's Casehandling Manual, we are filing Objections to the Election and request that the Election be invalidated and rerun for reasons stated below. These Objections are being filed within seven (7) days of the vote count involved in this matter as required by Section 11392.2(a)(2) of the Casehandling Manual.

OBJECTION NO. 1 - In light of the decisions in Hooks v. Kitsap Tenant Support Services, Case No. C13-5470, U.S. District Court for the Western District of Washington at Tacoma, entered August 13, 2013 (copy attached) (granting Motion to Dismiss Regional Director's petition for preliminary injunctive relief); Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S.Ct. 2861 (2013); NLRB v. New Vista Nursing and Rehabilitation, 719 F.3d 203 (3rd Cir. 2013); NLRB v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609 (4th Cir. 2013), and New Process Steel, L.P. v. NLRB, ___ U.S. ___, 130 S.Ct. 2635 (2010), the Employer concludes and avers that the Regional Director is without authority to determine or certify the results of the election held on September 19, 2013, pursuant to 29 U.S.C. § 153(b), because, when she was appointed in 2009, the NLRB did not have a lawfully constituted Quorum to take any action at all, including the appointment of Regional Directors, since it had only two (2) members during that entire year, and because her official biography on the Board's Website does not indicate that she was properly appointed thereafter.

Rhonda P. Ley, Regional Director

Region 3

National Labor Relations Board

Re: OBJECTIONS TO ELECTION HELD SEPTEMBER 19, 2013

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Page Two

OBJECTION NO. 2 – The Board’s Website information titled “Conduct Elections,” indicates that the Board will set aside the results of an election if conduct by the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees’ freedom of choice. In this case, the union and its supporters had contacts during work hours, made calls on and telephone calls to fellow employees who were eligible to vote in the election at their homes, close to the election, threatening bodily injury and reprisals through work-related complaints to employees who did not support the union in the election. One of the union supporters advised a maintenance employee: “She said if I don’t get the union, she would kick my butt.” They also advised employees in a union Facebook post that: “Well if the union does NOT get voted in 30 people are losing their jobs.” The Facebook posting was untruthful, widely disseminated, and apparently widely believed by employees eligible to vote in the election. Every eligible union voter had access to the Facebook posting.

An employee who expressed her opposition to unionization reported that her car was “keyed” in the facility parking lot and she was threatened by union supporters. Such conduct has been proscribed by the Board and found sufficient to set aside an election. Another employee, who acted as an Observer, was threatened and followed home immediately after the election by union supporters who dispersed when the employee turned into a parking lot where there was a police car. The union’s conduct interfered with the absolute right of eligible voters to make a free choice in the election. See: 177 NLRB 942, 942-943 (1969); 234 NLRB 178 (1978); 342 NLRB No. 58 (2004). The Employer will be supplementing this Objection with documents, a list of witnesses, and a brief description of the testimony of each, pursuant to the requirements of Section 11392.6.

Wherefore, the Employer requests that the results of the election held on September 19, 2013 be set aside and not certified and that a rerun election be scheduled.

Respectfully submitted,



Bruce G. Baron.
[Attorney for Employer]

cc: Anna Falicove, Esquire (Union Counsel)
Brian J. Cornelius (Union Representative)
Orchard Manor ALP, LLC