UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ORNC, LLC, d/b/a CHESTNUT PARK REHABILITATION AND NURSING CENTER,

Employer,

and

UNITED FOOD AND COMMERCIAL WORKERS, DISTRICT UNION LOCAL ONE,

Petitioner.

CASE NO. 03-RC-112695

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S ORDER CANCELING ELECTION

Submitted by:

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RELIEF REQUESTED

ORNC, LLC d/b/a Chestnut Park Rehabilitation and Nursing Center ("Chestnut Park" or "Employer") hereby requests review, pursuant to Section 102.71 of the Board's Rules and Regulations, of the Order Canceling Election issued by the Regional Director of Region 3 on November 5, 2013. It is submitted that the Regional Director's decision to cancel the election should be reviewed and reversed because: (1) the Regional Director departed from officially reported Board precedent; (2) alternatively, if the Regional Director's decision is consistent with Board policy, there are compelling reasons for reconsideration of the policy; and (3) the Regional Director's action is, on its face, arbitrary and capricious. Further, it is requested that the Regional Director be directed to reschedule the election in this matter, previously scheduled for November 8, 2013, as soon as possible.

PROCEDURAL BACKGROUND

On September 6, 2013, a Petition was filed by United Food and Commercial Workers District Union Local One ("Petitioner") seeking to represent a group of individuals employed at Chestnut Park, a long term residential health care facility located in Oneonta, New York. The parties subsequently entered into a Stipulated Election Agreement, which was approved by the Regional Director on September 23, 2013. In the Stipulated Election Agreement, the parties agreed to a prospective bargaining unit of Service and Maintenance employees and Licensed Practical Nurses ("LPNs"). Additionally, the Stipulated Election Agreement provided for an election on October 18, 2013. Due to the Federal government shutdown, the October 18, 2013

election was postponed. Subsequently, the election was rescheduled by the Regional Director for November 8, 2013.

On or about October 18, 2013, Petitioner filed an Unfair Labor Practice Charge (Case 03-CA-114882). This Charge was dismissed by the Board on October 24, 2013 due to lack of merit. On or about October 24, 2013, Petitioner filed another Unfair Labor Practice Charge (Case 03-CA-115469) for allegedly threatening an employee, Ashley Young, on or about September 27, 2013 with termination of employment for engaging in protected union activity and support. On or about October 29, 2013, Petitioner filed an additional Unfair Labor Practice Charge (Case 03-CA-115844) alleging that Chestnut Park's Administrator engaged in conduct on October 28, 2013 in a meeting with Ashley Young that was coercive and interfered with Ms. Young's Section 7 rights.

It is our understanding that the Board intends to issue a Complaint in Case 03-CA-115469, but will be dismissing the Charge in Case 03-CA-115844.

On November 5, 2013, the Regional Director issued an Order Canceling Election and Withdrawing Notice of Election, canceling the November 8, 2013 election. The Regional Director's November 5, 2013 Order is attached at Tab A. On November 5, 2013, legal counsel for Chestnut Park emailed a written request to the Regional Director for reconsideration of her decision canceling the election. A copy of the request for reconsideration is attached at Tab B. The Regional Director responded to the request for reconsideration, via email, on November 6, 2013, denying the request. Annexed at Tab C is a copy of the Regional Director's November 6, 2013 response to the request for reconsideration.

This Request for Review seeks to overturn the Regional Director's Order Canceling Election and directing the Regional Director to reschedule the election as soon as reasonably feasible.

FACTUAL BACKGROUND

The Employer is well aware of the Board's Rule prohibiting the re-litigation of an Unfair Labor Practice Charge in a representation proceeding. However, central to this Request for Review of Regional Director's Order Canceling Election is the factual basis for the decision that the election should not take place as scheduled on November 8, 2013. As noted in the November 6, 2013 correspondence from the Regional Director stating the grounds for denying the Employer's request for reconsideration, the allegations in the underlying Unfair Labor Practice Charge involve a meeting held on or about September 27, 2013 with a voting employee, Ashley Young, who is employed at Chestnut Park as an LPN. Allegedly, at the September 27, 2013 meeting, the Employer threatened to report Ms. Young to a State agency for taking a photo in the workplace in retaliation for her protected activity. Additionally, the Employer allegedly questioned Ms. Young about her union activities at this meeting.

The Employer denies the allegations made regarding the September 27, 2013 meeting. Importantly, however, the following facts are believed to be uncontroverted:

- The meeting held on September 27, 2013 with Ashley Young was an investigatory meeting to question Ms. Young about a photo she took in the Employer's workplace, using her cell phone
- The Employer's Employee Handbook, for many years, has had a work rule that prohibits using cell phones or taking photographs in the facility, to protect patient privacy

- In approximately July 2013, both the New York State Department of Health and the New York State Attorney General conducted investigations at Chestnut Park that included photographs and/or videos taken by employees in the workplace, due to concerns regarding the violation of patient privacy rights

- In July 2013, well prior to any Employer knowledge of union activity, two employees were terminated from their employment with Chestnut Park due to the use of a cell phone to take a photo in the workplace, which violated the Employer's work rule prohibiting use of cell phones or taking photos

- On or about August 7, 2013, Chestnut Park issued a revised Cellular Phone Policy that prohibits the use of cameras or cell phones to take photographs in the facility

- Following the issuance of the new Policy, all employees, including Ashley Young, were in-serviced regarding the Policy

- At the September 27, 2013 investigatory meeting, Ashley Young admitted to using her cell phone to take a photograph in the facility

- Ashley Young was not terminated nor disciplined for her violation of the Employer's work rule

- The Employer's decision not to discipline Ms. Young was based on Ms. Young's representation during the Employer's investigation that she took the photograph during non-work time in a non-work area of the facility

- The Employer did not report Ashley Young's conduct to any regulatory agency or any authority that could affect her license

- Ashley Young did not suffer any adverse employment action as a result of her conduct

- Ashley Young was the only employee involved in this incident

- Although the investigatory meeting took place on or about September 27, 2013, Petitioner waited until October 24, 2013 to file an Unfair Labor Practice Charge relating to this matter.

ARGUMENT

POINT ONE

THERE IS A SUBSTANTIAL QUESTION OF LAW RAISED BECAUSE OF THE DEPARTURE FROM OFFICIALLY REPORTED BOARD PRECEDENT

It is our understanding that the Regional Director's decision to cancel the election is rooted in the determination that Ashley Young engaged in protected activity when she took a photograph in the Employer's facility using her cell phone. We believe that the Regional Director's decision is based on the fact that Ms. Young took a photograph of campaign literature in the workplace and subsequently posted the photo on her Facebook page. It is submitted that the determination that Ms. Young engaged in protected conduct is not consistent with Board precedent. While posting the photo on Facebook may have rendered Ms. Young's conduct concerted, it does not make it protected or excuse Ms. Young's violation of the Employer's work rule.

The Employer's work rule prohibiting the taking of photographs in the workplace is reasonable and valid. Chestnut Park is a residential health care facility that serves as the home for elderly patients, many of whom do not have the capacity to knowingly consent to a photograph. Chestnut Park is required to comply with New York State Department of Health ("DOH") Regulations that prohibit the taking of photographs in a long term care facility that could violate patient privacy rights. As enforced by Chestnut Park, the rule does not prohibit employees from taking photos during non-work time in non-work areas. During the investigation of the underlying Unfair Labor Practice Charge, the Regional Director was provided copies of applicable portions of the DOH Regulations; specifically 10 N.Y.C.R.R. Part 415.3 (Residents' Rights), Part 415.4 (Resident Behavior and Facility Practices), and Part 415.5 (Quality of Life). Additionally,

the Regional Director was provided with a copy of Federal HIPAA Regulations, 45 C.F.R. §164.501, which also protect patient privacy rights. *See also* 42 U.S.C. §1320d-6 (prohibiting wrongful disclosure of individually identifiable health information). In short, the DOH and HIPAA Regulations are applied by regulatory agencies to prohibit the use of cameras or video in long term care facilities if residents or resident information is captured or potentially captured because most long term care patients do not have the capacity to consent. It is deemed a dignity and quality of life issue basic to patients' rights. This issue is strictly monitored and enforced by regulatory agencies, as was demonstrated by the DOH's and State Attorney General's investigations in July 2013 at Chestnut Park.

The Regional Director's premise that posting a photograph on Facebook, in violation of an Employer's work rule, is protected activity is not consistent with Board precedent. In *Flagstaff Medical Center*, 357 NLRB #65, 2011 NLRB LEXIS 477 (2011), the Board found no violation of Section 7 rights as a result of the employer's prohibition of the use of electronic equipment, including cell phone cameras. The Board held that the privacy interests of hospital patients are "weighty" and the employer had a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography. Significantly, in *Flagstaff Medical Center*, the Board examined when a work rule reasonably tends to chill employees in the exercise of their Section 7 rights:

> An employer violates Section 8(a)1 when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *LaFayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a work rule is unlawful, the Board must, however, "give the rule a reasonable reading." *Lutheran Heritage Village-Livonia*, 343

> NLRB 646 (2004). "It must refrain from reading particular phrases in isolation and it must not assume improper interference with employee rights." *Id.* Under *Lutheran Heritage Village-Livonia*, a work rule is unlawful if it expressly restricts Section 7 activity. Even if the rule does not expressly restrict Section 7 activity, the work rule will be found unlawful upon showing one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activities; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647.

2011 NLRB LEXIS at *20-21. Significantly, in *Flagstaff Medical Center*, the Board took into consideration the fact that the employer involved was a health care facility.

In the present case, like *Flagstaff Medical Center*, it is reasonable to interpret Chestnut Park's cell phone rule as a legitimate means of protecting the privacy of patients in the facility, not as a prohibition of protected activity. There is no evidence here that Chestnut Park employees could reasonably construe the policy to prohibit Section 7 activities, or that Chestnut Park promulgated the cell phone rule in response to Section 7 activity, or that Chestnut Park actually applied the rule to prohibit Section 7 activity.

The Regional Director maintains that the September 27, 2013 meeting was held with Ashley Young in retaliation for her protected activity. However, Ms. Young did not engage in protected activity when she took a photograph with her cell phone in the facility. The meeting held with Ashley Young on September 27, 2013 was to determine if she had violated Chestnut Park's work rule.

The Employer's rule prohibiting the taking of photographs in the workplace is reasonable, given that the facility is the residence for elderly and infirmed patients, and does not interfere with employees' rights to discuss wages, benefits, or other terms and conditions of employment. If Ms. Young had a taken a photograph of the campaign

flyer while she was not in the Employer's facility, the Employer's work rule would not have been applicable.

Accordingly, it is submitted that the Regional Director's decision to cancel the election is based on a departure from officially reported Board precedent.

POINT TWO

ALTERNATIVELY, IF THE REGIONAL DIRECTOR HAS APPROPRIATELY APPLIED BOARD PRECEDENT, THERE ARE COMPELLING REASONS FOR RECONSIDERATION OF THE BOARD'S RULE/POLICY WHEN IT INVOLVES PATIENTS' PRIVACY RIGHTS

As stated above, we submit that the Regional Director's determination that Ashley Young engaged in protected activity when she took a photograph in the Employer's facility, which somehow excused her violation of the Employer's work rule, is inconsistent with Board precedent. If existing Board policy prohibits a health care employer from forbidding employees from taking photographs in the workplace, we respectfully request, for the reasons stated above, that the policy be reconsidered and modified.

POINT THREE

THE REGIONAL DIRECTOR'S ACTION IS, ON ITS FACE, ARBITRARY AND CAPRICIOUS

It is undisputed that the September 27, 2013 investigatory meeting involved one employee, Ashley Young. There was no discipline or adverse employment action taken toward Ms. Young. Even assuming, for the sake of argument, that the allegations of the underlying Unfair Labor Practice Charge have merit, there is no basis to block the election. Even if true, which they are not, the allegations involve mere talk, not actions,

directed at a single employee. Upon reading the Regional Director's November 6, 2013 correspondence (Tab C) responding to Chestnut Park's request for reconsideration, it is evident that the Regional Director has deemed Petitioner's allegations regarding statements made at the September 27, 2013 meeting as meritorious, despite evidence to the contrary. Even assuming, for the sake of argument, that the allegations had merit, they do not constitute the type of conduct that warrants the blocking of an election.

The election was postponed once through no fault of the parties. Another delay is contrary to employees' interests to make a decision about representation. Further delay is also very disruptive to the Employer's mission of providing quality patient care due to the continued employee attention devoted to the unsettled representation issue.

Charges have been repeatedly filed by Petitioner to delay the election and interfere with employees' Section 7 rights to participate in an election to determine representation status. The allegations and stall tactics involved simply do not warrant blocking the election in this case. Accordingly, based on the circumstances involved, the decision of the Regional Director to block the election should be deemed arbitrary and capricious.

CONCLUSION

We respectfully request that the Regional Director's Order Canceling Election and Withdrawing Notice of Election, dated November 5, 2013, be rescinded and the Regional Director be directed to schedule the election in this case as soon as reasonably feasible.

Dated: November 7, 2013

Submitted by

BOND, SCHOENECK & KING, PLLC

By: _____

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Syracuse, New York 13202
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STATEMENT OF SERVICE

I, Larry P. Malfitano, Esq., hereby certify that on November 7, 2013, I served a copy of Employer's Request for Review of the Regional Director's Order Canceling Election by sending a true and correct copy of said document to all parties involved, by sending the said document via electronic mail to the following individuals at the email addresses listed below:

Rhonda P. Ley, Esq.
Regional Director
National Labor Relations Board
Region 3
Niagara Center Bldg., Suite 630
130 S. Elmwood Avenue
Buffalo, NY 14202-2387
rhonda.ley@nlrb.gov

Robert Smith, Esq.
General Counsel
United Food and Commercial Workers International Union
5911 Airport Road
Oriskany, NY 13424
Robert_Smith@ufcwny.com.

Dated: November 7, 2013

Larry P. Malfitano, Esq.

Tab A

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

ORNC, LLC, D/B/A CHESTNUT PARK REHABILITATION AND NURSING CENTER

Employer

and **Case 03-RC-112695**

UNITED FOOD AND COMMERICAL WORKERS DISTRICT UNION LOCAL ONE

Petitioner

ORDER CANCELING ELECTION AND WITHDRAWING NOTICE OF ELECTION

On October 21, 2013, the Regional Director issued a Notice of Election in the instant case scheduling an election in the above matter for November 8, 2013; and

On October 24, 2013, a related unfair labor practice charge in Case 3-CA-115469 was filed against the Employer, alleging violations of Section 8(a)(1) of the Act. The charge in Case 3-CA-115469 blocks further processing of the petition; Accordingly,

IT IS HEREBY ORDERED that the election in the above captioned matter, scheduled to be held on November 8, 2013, from 5:30 a.m. to 6:30 a.m., and from 1:30 p.m. to 2:45 p.m. in the Employee Dining Room at the Employer's 330 Chestnut Street, Oneonta, New York location is hereby canceled, and that the Notice of Election previously issued in this matter is hereby withdrawn. This Order should be posted in place of the Notice of Election, so that employees are advised of these actions.

Dated: November 5, 2013

RHONDA P. LEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Tab B

BOND SCHOENECK & KING

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November 5, 2013

VIA ELECTRONIC MAIL

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

Re: *Chestnut Park Rehabilitation and Nursing Center*
Case No. 03-CA-115469

Dear Ms. Ley:

I am writing on behalf of Chestnut Park Rehabilitation and Nursing Center ("Chestnut Park") in the above-referenced case. It is my understanding after speaking with Albany Resident Officer Barney Horowitz this morning that the Board intends to block the election scheduled at Chestnut Park for Friday, November 8, 2013. I am writing to respectfully request that the Board reconsider its decision in this case and the decision to block the election and, instead, allow employees to exercise their Section 7 rights in the scheduled election on November 8, 2013.

The allegations in this case pertain to a meeting held with a Chestnut Park employee, Ashley Young, on September 27, 2013. Ms. Young was not disciplined as a result of the meeting. Rather, this was an investigatory meeting regarding Ms. Young's blatant violation of Chestnut Park's rule prohibiting employees from taking photos with their cell phones in the facility. Ms. Young admitted to using her cell phone to take a photo in the facility on September 26, 2013. Strong business reasons exist for the Employer's rule pursuant to New York State Department of Health Regulations and HIPAA regulations. In fact, just a few months earlier, the State Attorney General and the State Department of Health were at Chestnut Park conducting an investigation of staff taking photos/videos in the facility in violation of patients' privacy rights.

Importantly, Ms. Young suffered no adverse employment action as a result of the meeting held on September 27, 2013. She was not disciplined and her conduct was not

reported to any regulatory authorities. There was no violation of Ms. Young's statutory rights and there is no basis for issuance of a complaint.

More significantly, assuming for the sake of argument that the allegations of the unfair labor practice charge were accurate, there is no basis to block the election under Section 11730 of the NLRB's Casehandling Manual. We believe that charges have been repeatedly filed by Petitioner to delay the election and to deprive employees' Section 7 rights to participate in an election to determine representation status. For example, Petitioner also filed baseless allegations in Case 3-CA-114882 and 3-CA-115844. In the present case, Petitioner waited until October 24, 2013, almost a month after the September 27, 2013 investigatory meeting, to file a charge.

The allegations in this case do not involve any adverse employment action and only pertain to a single employee. We submit it is inappropriate to delay employees' Section 7 rights to participate in an election based on the allegations and stall tactics involved. Therefore, we respectfully request that the election proceed as scheduled on November 8, 2013.

Thank you for your consideration in this matter.

Very truly yours,

BOND, SCHOENECK & KING, PLLC

Larry P. Malfitano

LPM/edv

cc: Barney Horowitz (via electronic mail)

Tab C

United States Government

NATIONAL LABOR RELATIONS BOARD
Region 3 - Albany Resident Office
Leo O'Brien Federal Building Rm 342
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Albany NY 12207-2350

LARRY P. MALFITANO, Esq.
BOND SCHOENECK & KING
1 LINCOLN CTR
SYRACUSE, NY 13202-1324

November 6, 2013

RE: Chestnut Park Rehabilitation and Nursing Center
03-CA-115469; 03-RC-112695

November 5, 2013

Dear Mr. Malfitano:

This office is in receipt of your letter dated November 5, 2013 requesting a reconsideration of my determination to block the election scheduled for November 8, 2013 in Case 3-RC-112695 due to the pendency of the unfair practice charge filed in 03-CA-115469. The decision to block the election results from the Region's determination that there is sufficient evidence to conclude that reasonable cause exists to believe that the Employer committed independent violations of Section 8(a)(1) of the Act and that complaint should issue, absent settlement. In addition, the alleged violations have the potential to interfere with employee free choice in an election if one was conducted.

I have reviewed your request for reconsideration, but am adhering to my decision to block the election in the interest of ensuring the employees' exercise of free choice. In this regard I note the investigation revealed evidence that on September 26, 2013, the Employer threatened to report an employee to a State agency with the power to revoke her license in retaliation for her protected activity. Further, on the same date and in the same meeting, the Employer unlawfully questioned her about her union activities and suggested that her activities suggested that she was ungrateful for the opportunity she had been given when she was hired. Most importantly, the investigation revealed that this employee disseminated what transpired during the meeting at which this alleged conduct occurred to other eligible voters in the appropriate bargaining unit. Therefore, the potential impact of this alleged unlawful conduct is more widespread than your request for consideration suggests.

You note in your request for reconsideration that two other recently filed charges were found to be without merit, and were facially baseless. Although, the Region is not prepared to issue complaint in these two cases,

those determinations have no bearing on the potential impact of the alleged violations in 03-CA-115469. You also observe that the Union did not file the charge in the latter case until October 24, 2013 despite the unlawful conduct occurring almost a month earlier. It is matter of public record that the NLRB and this office were closed the first 16 days in October due to the absence of an appropriation. Furthermore, the charge was filed more than two weeks before the scheduled election, rather than on the eve of the event and the case has been fully investigated and a reasonable cause determination has been made. Therefore, your request for reconsideration is respectfully denied.

As you were previously informed, you are entitled to file a request for review of my decision to hold this petition in abeyance and to postpone the election pursuant to Section 102.71(b).

Very truly yours,

Rhonda P. Ley

RHONDA P. LEY
Regional Director