UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

Fairview Health Services Employer and SEIU Healthcare Minnesota Union and Sharon Kohser Petitioner	Case 18-UD-125545

REPORT AND RECOMMENDATION ON OBJECTIONS

On June 12, 2014 an agent of Region 18 conducted an election among certain employees of the Employer regarding whether the employees wished to withdraw the authority of the Union to require, under the terms of its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs. A majority of employees eligible to vote in the election did not support withdrawing the Union's authority. However, Petitioner contests the results of the election first claiming that the Region failed to conduct an appropriate election by not allowing "absenteeism votes," and second apparently protesting charges filed by the Union which temporarily blocked processing of the petition.

I conclude that Petitioner's objections should be overruled because extant Board law clearly supports the Region's conduct of the election, and Agency guidelines

support the decision to block processing of the instant petition pending the investigation of a charge filed by the Union.

After recounting the procedural history, I discuss what constitutes the record in this matter and then discuss each objection, citing relevant Board cases and Agency procedure which support overruling the objections.

PROCEDURAL HISTORY

The petition in this matter was filed on March 31, 2014 by Petitioner. The parties agreed to the terms of an election and I approved their agreement on May 28, 2014. The election was held on June 12, 2014. The employees voting on whether they wished to withdraw the authority of the Union to require that employees make certain lawful payments to the Union in order to retain their jobs were as follows:

> All Abstractors, Business Office Representatives, Radiology Clerks, HIMS Clerks, Patient Representatives, Surgery Schedulers, RNs, Medical Technologist/CLSs, LPNs, Phlebotomist/Medical Assistants, Station Coordinators, Lab Technician/CLTs, Utilization Assistants, Coders, Radiology Technicians, X-ray Operators, and Ultrasound Technicians employed by the Employer at its clinic located at 303 E. Nicollet Blvd., Burnsville, MN and/or its clinic located at 600 W. 98th Street, Bloomington, MN; excluding guards and supervisors as defined in the Act, and all other employees.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that there were approximately 160 eligible voters; that 57 ballots were cast in favor of withdrawing the authority of the Union, and that 19 ballots were cast against withdrawing the authority of the Union. In addition, there were two non-determinative challenged ballots. Because a majority of the approximately 160 employees eligible to vote did not cast ballots in favor of withdrawing the authority of the Union, Petitioner did not prevail.

Petitioner timely filed objections on June 19, 2014. Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, I have caused an investigation of the objections to be conducted and hereby report as follows.

THE RECORD

Because I have not ordered a hearing on Petitioner's objections, the record in this case will consist of this report, the objections filed by the Petitioner, and the documentary evidence referenced in this report and appended hereto. *Frontier Hotel,* 265 NLRB 343 (1982). The record does not include information or other documents unless specifically referenced in or appended to this recommendation, or unless they are appended to any exceptions or request for review that Petitioner files.

THE OBJECTIONS

First Objection

Petitioner's first objection is that "no absenteeism votes (were) allowed in a de-authorization petition." In support of this objection, Petitioner points out that 57 voters supported her petition in the election and only 19 voters did not. She believes "if we were allowed to use absenteeism votes that the true decision of the majority of our eligible employees would have voted 'yes' to no longer be required to pay our forced union dues to continue our employment with Fairview."

Neither the voter turnout nor the Region's failure to allow "absenteeism votes" warrants setting aside the election. The Board has noted that in considering voter turnout, "[i]t is particularly significant that the election at issue in this proceeding was conducted pursuant to a stipulation entered into by the parties." *Jowa Security*

Services, 269 NLRB 297, 297 (1984). The purpose of the stipulation is that the parties agree in advance to the election procedure, and by signing the Stipulated UD Election Agreement in this case, Petitioner acceded to the terms of the election. If a party brings to the attention unusual circumstances or newly discovered facts prior to the election, that might warrant rescheduling an election not yet held. On the other hand ". . . once the election has been held there is no more reason to negate the results at the behest of the dissatisfied party, because personal matters affecting the opportunity of individual voters to vote, than there would be in the case of a political election. There must be some degree of finality to the results of an election, and there are strong policy considerations favoring completion of representation proceedings." *Versail Manufacturing, Inc.*, 212 NLRB 592, 593 (1974).

Petitioner has not presented evidence suggesting that any voter was prevented from voting by the conduct of a party. In fact, Petitioner has not presented evidence that any voter who wished to vote did not do so, or that any voter could not vote due to circumstances beyond their control.[1] Petitioner (and for that matter any other party) also did not request, prior to the election, that the Region utilize absentee ballots for certain identified voters because they would be absent on the day of the election. Rather, Petitioner speculates that the results would be different if the Board changed its policy on "absenteeism votes," but fails to even explain how the Region would

[1] On June 26, 2014, Petitioner faxed to the Regional office the following statement: "On my break this afternoon I will send an email to employees to let me know why they were not able to vote. I will send employee statements early next week. Thank you!" This statement clearly supports a conclusion that at the time Petitioner filed her objections, she had no idea why employees did not vote. Because evidence in support of her objections was due at the close of business on June 26, 2014, I reject as untimely any proffer made after June 26.

administer an election using "absenteeism votes," when the Region has no idea prior to conducting an election who will appear to vote and who will not.

Because I may rely on the stipulation of the parties to determine the scheduling of an election and to ensure eligible employees have an opportunity to vote, neither the failure to utilize "absenteeism votes" nor low voter turnout warrants setting aside the election. *Community Care Systems, Inc.*, 284 NLRB 1147 (1987), and cases cited therein at 1147-1148.[2]

Second Objection

Although the point of the second objection is difficult to discern, Petitioner objects to the fact that the Union filed "multiple unfair labor practices towards Fairview after this petition was filed . . . those charges were dropped by SEIU Local 119 . . . the charges were unfounded . . . and SEIU Local 113 has not been as forthright regarding these issues."

In fact, the Union filed one charge after the instant petition was filed. The charge was filed on April 8, 2014 in Case 18-CA-126070. The charge contains three allegations: (1) The Employer told employees that the Employer and Union had not agreed to a new collective bargaining agreement and had failed to implement favorable aspects of the new agreement; (2) The Employer disparately limited use of it email system to employees who favored Petitioner's position and allowed only employees who favored Petitioner's position to use paid work time to express their views; and (3) The Employer unilaterally altered the collective bargaining agreement by limiting Union agent access to its facility. While processing of the petition was blocked due to

[2] I also note that the Union has provided one explanation for the low voter turnout. It urged unit employees who supported the Union to either vote no or to not vote. The Union's literature which it claims to have distributed to unit employees and which contains this message is appended hereto.

the nature of the allegations, once the Union withdrew the charge on May 22, 2014, processing immediately resumed and within six days of May 22, I approved an election agreement, and within 21 days of May 22, the election was held.

While not binding on the Board, the *Casehandling Manual Part One Unfair Labor Practice Proceedings* states, "The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted." (Section 11730) Concededly the Manual also states that there are significant exceptions to this policy. On the other hand the charge filed by the Union in this case alleged conduct that would in fact have interfered with employee free choice if the allegations proved meritorious. Therefore, I concluded that the charge should be investigated and either dismissed or remedied before further processing of the petition. (Section 11730.2) In any event, Petitioner has not suggested any evidence that the delay in conducting the election caused by the filing of the charge affected employee free choice or the turnout for the election.

CONCLUSION AND RECOMMENDATION

In conclusion, I reject Petitioner's objections because they are legally deficient and not supported by Board law or Agency policy. Thus, Petitioner's objections fail to raise substantial and material issues of fact necessitating a formal hearing, and they are without merit and should be overruled.

Based on the foregoing, and as a majority of eligible voters did not cast ballots in favor of withdrawing the authority of the Union to require, under its agreement with the

Employer, that employees make certain lawful payments to the union in order to retain their jobs, I recommend that an appropriate certification issue.

Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **July 11, 2014** at 5 p.m. (Eastern Time), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished no later than 11:59 p.m. Eastern Time** on the due date. Please be

advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Minneapolis, Minnesota, this 27th day of June, 2014.

Marlin O. Osthus, Regional Director
National Labor Relations Board
Eighteenth Region
330 South Second Avenue, Suite 790
Minneapolis, MN 55401-2221

Attachments

June 19, 2014

Case # 18-UD-125545

Fax 612-348-1785

National Labor Relations Board,

I wish to appeal the 6-12-2014 vote on this petition. I also wish to appeal the 1935 NLRB rule stating that no absenteeism votes be allowed in a de-authorization petition. I was told by an NLRB staff that when this rule was made in 1935 that our communications did not allow voters to get up to the minute information that may be needed in making an educated decision on a vote such as this. As we all know in 1935 we did not have the internet communication modalities that we have come to depend on in our everyday lives today.

We had 164 eligible voters for the 6-12-2014 election. We received 57 "yes" votes and 19 "no" votes. I believe if we were allowed to use absenteeism votes that the true decision of the majority of our eligible employees would have voted "yes" to longer be required to pay our forced union dues to continue employment with Fairview.

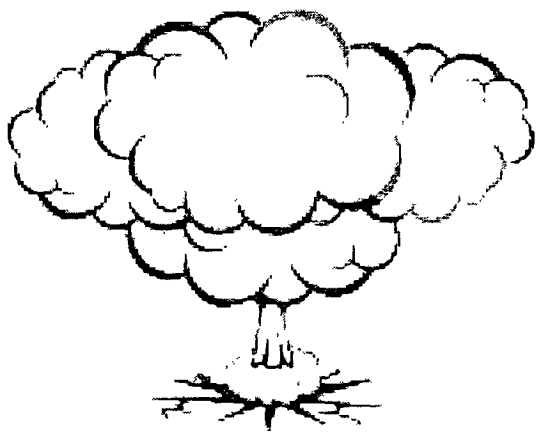
Furthermore SEIU Local 113 filed multiple unfair labor practices towards Fairview after this petition was filed. I am under the understanding those charges were dropped by SEIU Local 113. I was not privy to the reasoning as to why they dropped but would like to contend that the charges were unfounded. I have informed multiple NLRB staff that Fairview in no way shape or form has encouraged the filling of this petition. I believe Fairview has been doing everything they can possibly do to not to interfere with the employees rights to their opinion. In my opinion SEIU Local 113 has not been as forthright regarding these issues.

Thank you,

Sharon Kohser

SEIU member & Fairview Employee for over 20 years.

HAVE YOU HEARD?



FAIRVIEW IS ASKING YOU TO DESTROY YOUR UNION!

What's in it for Fairview? Fairview knows that if we De-authorize our Union we will significantly weaken our Union and could lose it all together!

Why Does Fairview Care??

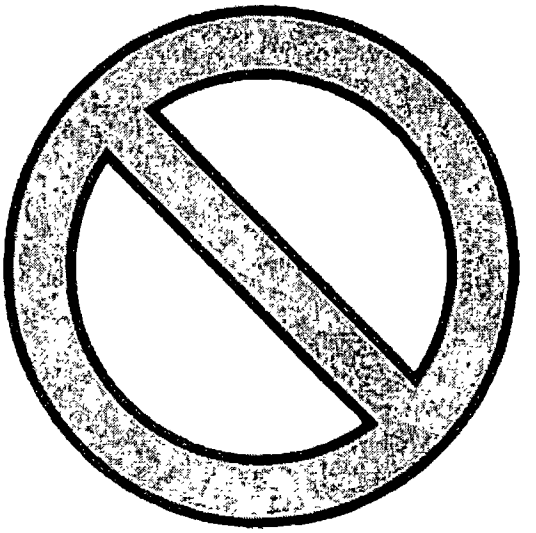
- Without a Union contract they have the power to discipline and terminate employees for any reason or no reason at all. You have no ability to challenge their decisions.
- They also have the unilateral power to change our benefits, our hours and our working conditions without us having a vote.
- Fairview would have the right to FREEZE our wages at any time.
- Fairview wants the power to make changes without us, the workers, having any power to negotiate for a better deal for ourselves.

When workers do have a Union and a contract, Fairview prefers to see us divided. They know that the Union is only as powerful as its members. If more than half of the members decide not to participate in the Union any longer, that will give them more power to get what they want in future negotiations. We encourage everyone to take what Fairview says during this process with a huge grain of salt. The only way that management can have the power to make changes without us, is if we vote to give up our right to negotiate. In essence, they are encouraging us to vote to give up our right to have votes in the future.

We haven't walked away from this contract because we believe you support our union. Let's send Fairview a clear message on Thursday. Let's PROTECT our Union and show our support by Not Voting or Voting NO!

Minnesota **SEIU** Healthcare United for Quality Care kh/opeiu#12

JUST SAY NO!



Dear Co-Worker,

This week is it. We have to stand together and shout NO to Fairview's attempt to destruct our Union. Fairview's hostility to our union is reflected in its out and out lies bout what a De-Authorization means for our clinics.

In 1999 the National Labor Relations Board ruled that:
"a union may disclaim its role as a collective-bargaining representative and may do so even in apparent response to the employees' filing of a deauthorization petition or the loss of a deauthorization election. We further hold that a union may so inform employees without providing them with objective evidence that its continued representation of them would be infeasible ." Production and Maintenance Union, Local 101, *329 NLRB 247, 248 (1999)*

FACT: SEIU Healthcare MN Executive Board Members have the right to DISCLAIM INTEREST if we vote to De-authorize our Union.

FACT: DISCLAIMING INTEREST means that our contract would disappear.

FACT: Seniority, Longevity and our Guaranteed Union Raises and Wage Scales will no longer exist. **Fairview could freeze our wages or even CUT them and there is nothing we could do to stop it from happening.**

FACT: The enforcement of due process and Just Cause provision in our contract would be history. Fairview **could terminate any of us for anything at any time** without the ability to grieve or arbitrate the termination.

This election is not about one member disliking another member or about rumors, miscommunications or lies. This election is about protecting what we have and making sure that **nothing** can be taken away from us. If we don't have a contract, **Fairview can make us every *promise* in the world and never have to come through, because there is nothing legally requiring them to do the right thing.**

The best way to show your support for your Union is to NOT vote on Thursday or just vote NO!

From,

Fairview Oxboro and Ridges Steward Group

Minnesota **SEIU***Healthcare*
United for Quality Care

kh/opeiu#12

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
18-CA-126070	April 8, 2014

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Fairview Clinics Bloomington/Burnsville

b. Tel. No. 952-885-5101

c. Cell No

f. Fax No. 952-400-4120

d. Address (Street, city, state, and ZIP code)
303 East Nicollet Avenue
Burnsville, MN 55337

e. Employer Representative
Melissa Lallak

g. e-Mail
mlallak@fairview.org

h. Number of workers employed
170-180

i. Type of Establishment (factory, mine, wholesaler, etc.)
Health care clinic

j. Identify principal product or service
Health care

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a) subsections (1) and (list subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

See Appendix A (attached).

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
SEIU Healthcare Minnesota

4a. Address (Street and number, city, state, and ZIP code)
345 Randolph Avenue, Suite 100
St. Paul, MN 55102

4b. Tel. No. 651-294-8100

4c. Cell No

4d. Fax No. 651-294-8200

4e. e-Mail
james.bialke@seiuhcmn.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Deborah Prokopf — Deborah Prokopf, Attorney
(signature of representative or person making charge) (Print/type name and title or office, if any)

Address 920 2nd Ave S, Suite 1245, Minneapolis, MN 55402

4/7/14 (date)

Tel. No. 612-465-0108

Office, if any, Cell No.

Fax No. 612-465-0109

e-Mail
deborah@cummins-law.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

APPENDIX A

Since about March 1 and continuing to the present, the Employer has refused to bargain in good faith by failing to implement the terms and conditions of the parties' new collective bargaining agreement, including terms related to wages and bonuses, and by deliberately misrepresenting to bargaining unit employees that the parties have no collective bargaining agreement.

Since about March 18, 2014 and continuing to the present, the Employer has interfered, coerced and restrained employees in the exercise of their section 7 rights by allowing union opponents access to the employer's e-mail and fax systems and paid work time to organize and express their anti-union views while limiting access to the Employer's email system by pro-union employees to express their pro-union views and denying similar access to Employer resources.

From about March 21, 2014 until April 7, 2014, the Employer made unilateral changes in terms and conditions of employment to restrict access by a union business representative to the Employer's facilities pursuant to a contractual visitation clause.