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December 15, 2010

Executive Secretary
NLRB

By electronic mail only

Re: Regency Grande Nursing and Rehabilitation Center 22-CA-29318
Answer to motion for Summary Judgement

Honorable Sir:

Please be advised that the undersigned represents the Respondent in the
above referenced matter.

Respondent repeats and re-alleges all of the arguments put forward in the

underlying representation case. In addition summary judgement should be denied in this case for further reasons.

Neither the General Counsel, nor the petitioner, excepted to the ALJ's recommendation that the representation matter be remanded to the Regional Director. The failure to except to the recommended order, precludes Board consideration of the ALJ's recommendation. It must be adopted *pro forma*. *Board Rules and Regulations* section 102.46(b)2 and section 102.46(g). *See also* Board Rules and Regulations sections 102.26 and 102.33(d). In fact, the Regional Director's order setting the hearing stated that "...Cases 22- RC-12889 and 22-RC-12895 will be transferred to and continued before the Board in Washington D.C. and that the provisions of Section 102.46 and 102.69(e) of the above mentioned Rules shall govern the filing of exceptions."

Nor did the (two members) Board advise the parties that it was considering, *sua sponte*, to issue a certification and/or request the position of the parties on its doing so. See e.g. FRCP Rule 12(d). The Board should have remanded the matter to the Regional Director and must deny summary judgment.

In *Avante at Boca Raton v. NLRB.*, in a 2002 (2002 U.S. App. LEXIS

21699) and again in a 2003,¹ case ,(54 Fed. Appx. 502) Member Becker represented *this local in the D.C. Circuit*. Local 1115, the “intervener” in both cases, merged with Local 1199 in 1999. The underlying events of those cases took place before the merger. However, the appellate litigation took place afterward. The caption, in 2002 and 2003, reflects “1115 Florida Division of **1199, SEIU, AFL-CIO...**”.²

The underlying events in *this* case took place in 2003-4.

In addition, Member Becker’s “in house” SEIU attorneys represented the “International”, Service Employees International Union (“SEIU”), their employer, in an Article XX proceeding, in 2003, where the United Food and Commercial Workers International Union (“UFCW”) brought charges against SEIU for “raiding” the UFCW. The underlying locals that the “Internationals” were fighting about were the same parties as in this case; 1199 and 300. In essence, the UFCW claimed that the SEIU (by its 1199 local) had “raided” it .

That case was entitled “In the matter of the dispute between United Food and Commercial Workers Union and Service Employees Union” and the case bore case number “02-58”. The case was heard before Paul Weiler, a Harvard Law

¹ The time frame of the underlying earlier case between 1199, 300 and Regency.

² Member Becker also represented the charging party union in this case, 1199, in *Bronx Health Plan v. NLRB*, 1999 U.S. App. LEXIS 25157.

School professor. Hearings were held and briefs were filed. Member Becker was, upon information and belief, an associate general counsel of the SEIU when the case was litigated.

In denying Regency's motion to recuse himself from considering this case, Member Becker opined as follows;

Member Becker played no role in and has no knowledge of the referenced art. XX proceedings. He served as counsel to the Service Employees International Union prior to his service on the Board, but never as general counsel to the Union. Consistent with the principles set forth in Service Employees Local 121RN (Pomona Valley Hospital Medical Center), 355 NLRB No. 40 (2010), the Respondent's request for Member Becker to recuse himself is denied.

Member Becker missed the point twice. Firstly, he was a general counsel when the *international* that employed him as a "party" litigated the article XX proceeding with the UFCW that involved the very same *local* unions. His "side" felt that the UFCW, and 300, had been properly "raided".

300 certification they argued should be set aside and SEIU, and 1199, be permitted to seek an election. 300 had done something wrong, they argued, and should not get the protections of the AFL-CIO constitution.

The case was a case between internationals that revolved around these very same locals. Member Becker was employed by the SEIU as General Counsel when this litigation took place. He wanted UFCW, and 300, to lose and

SEIU and 1199 to win, the litigation. Moreover, he would be privy to his employer's arguments that 300 was "playing games" to get into the affected facility.

Secondly, he represented the *actual local* in this case, 1199, during the same time period that the underlying proceedings being litigated before the Board by 1199 and 300 were taking place; 2003-4. Member Becker would certainly be suspected of bias by a reasonable person with knowledge of the facts. He should have recused himself. His failure to do so "taints" the entire Tribunal's findings and denies due process.

As the Court has long ago held;

The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

The petition to adduce the additional testimony on this point is granted and the case referred back to the Board. The Board should receive the evidence and determine for itself whether, if the facts are established, one of its members is not disqualified from further participation in this case. If such finding is made *the entire case will be reconsidered by the members not so disqualified*.

Berkshire Employees Ass'n v. NLRB, 121 F.2d 235 (3d Cir. 1941) As the Ninth

Circuit has also pointed out;

Other courts have reached the same conclusion as Justice Brennan. In *Cinderella Career and Finishing School v. Federal Trade Comm'n*, the District of Columbia Circuit expressed its view that there is no way of determining the extent to which one biased member's views affect the deliberations of a supposedly impartial Tribunal. 425 F.2d 583, 592 (D.C. Cir. 1970) (citing *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941)). Accordingly, that court vacated the decision of an administrative tribunal, even though the biased member's vote was not necessary for a majority. In *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991), the Tenth Circuit likewise concluded that the plaintiff could make out a due process claim by showing bias on the part of only one member of the tribunal. Relying on *Cinderella Career and Finishing Schools*, the Tenth Circuit concluded that the presence of one biased member on a six-person Tribunal would "taint[] the tribunal" and thereby violate due process, regardless of whether that member cast the deciding vote. Finally, in *Wilkerson v. Johnson*, 699 F.2d 325, 328-29 (6th Cir. 1983), the Sixth Circuit held that barbershop license applicants were denied due process, although only one member of the four-person board had a competitive interest in denying the plaintiffs' license application.

We find the reasoning of these courts, and of Justice Brennan in *Aetna Life*, to be persuasive. Particularly on a small board like the Board before us, a single person's bias is likely to have a profound impact on the decision making process. Cf. *Lam v. University of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994) (evidence of racial and gender bias on the part of one member of fifteen-person faculty precludes summary judgment in Title VII case). As Justice Brennan observed in *Aetna Life*, it is difficult if not impossible to measure the impact that one member's views have on the process of collective deliberation. Each member contributes

not only his vote but also his voice to the deliberative process. Thus, the fact that the tribunal's vote was unanimous does not mean that the bias of one member had no effect on the result.

We therefore hold that where one member of a tribunal is actually biased, or *where circumstances create the appearance that one member is biased*, the proceedings violate due process. The plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. *Whether actual or **apparent**, bias on the part of a single member of a tribunal taints the proceedings and violates due process.*

Stivers v. Pierce, 71 F.3d 732 (9th Cir. Nev. 1995) [***emphasis supplied***]

Accordingly, summary judgement should be denied and the Board should consider these facts. It should deny summary judgement and have the matter heard *de novo* before an impartial panel.

Accordingly, the motion for summary judgement should be denied.

Very truly yours,

MORRIS TUCHMAN

MT:pf

cc: Bernard Mintz, Esq. (By electronic mail only)

Ellen Dichner, Esq. (By electronic mail only)

Very truly yours,

MORRIS TUCHMAN

MT:pf