

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

In the Matter of:

LATTA ROAD NURSING HOME,

Employer,

-and-

Case No. 3-RD-1590

VIRGINIA K. MILLER

Petitioner,

-and-

1199 SEIU HEALTHCARE WORKERS EAST,

Union.

**UNION'S REQUEST TO REVIEW
THE REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION**

CREIGHTON, JOHNSEN & GIROUX
(Attorneys for Union)
Office and P.O. Address
560 Ellicott Square Building
295 Main Street
Buffalo, NY 14203
Tel No (716) 854-0007

INTRODUCTION

Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, the Union, 1199 SEIU HEALTHCARE WORKERS EAST (hereinafter referred to as the "Union"), hereby submits a request for review of the Regional Director's Decision and Direction of Election. The Union contends that the Regional Director incorrectly found that "unusual circumstances" permit processing of an undisputedly untimely decertification petition filed by the Petitioner, Virginia Miller. The Union contends that the Regional Director improperly relied upon *Vanity Fair Mills, Inc.*, 256 NLRB 1104 (1981), which is distinguishable from the instant matter. Since Petitioner's petition was not properly filed during the window period 90 to 120 prior to expiration of the CBA, it is untimely and should be dismissed.

FACTUAL BACKGROUND

The parties stipulated and the Regional Director correctly found that the Employer is engaged in commerce within the meaning of the Act and that the Board has jurisdiction. The Regional Director properly found that the Employer is a health care institution as defined in Section 2(14) of the Act. The Regional Director properly found that the Union is a labor organization within the meaning of the Act, and is the exclusive collective bargaining representative of all full-time and regular part-time licensed practical nurses and service and maintenance employees at the Employer's 2100 and 2102 Latta Road facilities. The Regional Director correctly found that the Employer and the Union were parties to a collective bargaining

agreement [CBA] for the period May 1, 2005 through April 30, 2008, and that there is a current CBA in effect for the period May 1, 2008 through April 30, 2011.

The Petitioner, Virginia K. Miller (herein “Miller”) is not new to filing decertification petitions. On January 24, 2008, Miller filed a timely decertification petition, 3-RD-1532, Board Exhibit 3. Pursuant to a stipulated election agreement approved on January 31, 2008, Board Exhibit 4, an election was held on February 14, 2008. A certification of representation was signed by the Regional Director on February 26, 2008, Board Exhibit 5.

Petitioner testified that in 2008 she called the Region 3 office and sought information as to filing a decertification petition. Petitioner could not recall who she spoke with. She could not recall if she kept a prior copy of her petition, Board Exhibit 3. It is undisputed that in 2008 Petitioner filed a timely petition and showing of interest. It is further undisputed that the open period in 2008 was January 1, through January 30, 2008.

Petitioner testified that in 2011 she again contacted the NLRB office and spoke with Ron Scott, a field attorney for Region 3, and asked him the procedures for decertifying her union. Mr. Scott informed her that she had until March 2, 2011 to file a petition. He did not state the earliest date she could file; he only expressed the deadline for filing. Board Exhibit 7 is a screen shot of the Region’s case activity tracking system (CATS). Mr. Scott testified that the CATS system shows he received a call from Petitioner on January 18, although the CATS entry does not specify what was discussed. Mr. Scott mailed Petitioner a letter dated January 18, 2011 enclosing two copies of a petition. Board Exhibit 6. Mr. Scott provided his telephone number in the letter. *Id.* The letter does not provide any information as to when a timely petition should be filed.

Ms. Miller testified that on January 31, 2011 employee David Morton called her and said that there was a rumor going around the employer's facility that January 31 was the last date to file a petition. Of course, had Petitioner filed a Petition on January 31, it would have been untimely as the last day to file a timely petition was January 30. Petitioner testified that her second telephone call to Mr. Scott was January 31, when she told him about the rumor at the facility that this was the last day to file the petition. She testified that Mr. Scott reassured her that it was safe to file by March 1, 2011. Mr. Scott had a vague recollection of receiving such a call from the Petitioner, but his CATS records do not reflect that he received a phone call from Petitioner on January 31. Rather his records show that he received a call from Petitioner on January 26, wherein he advised petitioner that she was permitted to file a petition by fax, but not the showing of interest by fax. See Board Exhibit 8. It is the Union's contention, at any rate, that any communication with the regional office after January 30, is irrelevant because the parties were already in the insulated period.

Petitioner testified that she could not recall if she had a sufficient showing of interest on January 30, 2011.

Petitioner filed her petition on February 22, after meeting with all of the other employees who were collecting signatures for a decertification petition. She then mailed the petition to the Region 3 office.

ARGUMENT

The Regional Director Should have Found the Petition Untimely and the Petition Should Be Dismissed

It is well established that an existing collective bargaining agreement acts as a bar to an election within the unit covered by the CBA, and precludes the filing of a petition for any such

election. Under the well established Board law, the current decertification petition is barred by the current existing CBA. There are a few qualifications to the Board's general proposition. One qualification is the Board has created an open period during which period the existence of the contract will not act as a bar to a petition for election. *Leonard Wholesale Meats*, 136 NLRB 1000 (1962). In general, to be timely with respect to an existing contract having a term of 3 years or less, the petition must be filed more than 60 but less than 90 days before the expiration of the date of the contract. *Id.* In a health care facility, the open period is 90-120 days prior to the expiration of the contract *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

During the final 90 days of the contract, the contract again becomes a bar to petitions for elections. This is commonly called the insulated period. The insulation period was adopted to afford the parties to an expiring collective bargaining agreement an opportunity to negotiate and execute a new or amended agreement without the disrupting effect of a petition. See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958); *Crompton Co.*, 260 NLRB 418, 418 (1982). The insulated period is strictly construed so that a petition received in the Regional Office on a Monday which was the 59th day before the expiration of existing contract was dismissed as untimely. *Brown Co. (KVP Division)*, 178 NLRB 57 (1969).

Section 101.17 of the Board's Rules and Regulations require that evidence that a petition to decertify a collective bargaining representative is supported by 30% of the unit employees must be filed within 48 hours of the filing of the petition, but in no event later than the last day on which the petition might be timely filed. *Mallinckrodt Chemical Works*, 200 NLRB 1 (1972); *Excel Corp.*, 313 NLRB 588 (1993). In situations involving an established collective bargaining relationship between an employer and an incumbent union, the Board has consistently required petitioners to submit their signatures prior to the commencement of the insulated period. *Excel*,

supra. The strict application of the Board rule establishes a reasonable and predictable test and discourages unsupported petitions which might cause disruption in the existing collective bargaining relationship. In *Mallinckrodt Chemical Works*, *supra*, the Board found the petitioner's showing of interest untimely when it was submitted 2 days after the execution of a new agreement. In so finding, the Board noted that the "Petitioner, faced with the long bargaining history between the Employer and Intervenor [Union] and the persistent efforts of the latter to reach agreement, had adequate knowledge of the risk involved in any dilatory action and should not be relieved from compliance with our rules." *Id.*

The Union and employer are parties to a collective bargaining agreement which is effective for the period May 1, 2008 through April 30, 2011. For this 3 year contract, the open period is 90 to 120 days prior to the expiration of the CBA, or from January 1, 2011 to January 31, 2011. On February 22, 2011 Virginia Miller filed a decertification petition under 9(c) of the Act. The Union contends that the petition is untimely and that there is a contract bar because the petition was not filed during the open period.

Petitioner contends that she relied upon the faulty advice of board attorney Ron Scott in filing a late petition. The Regional Director incorrectly found that the circumstances of the instant case are similar to those in *Vanity Fair Mills*. The Regional Director found that the petitioner "understandably followed the Board agent's advice in the reasonable expectation that she was acting in accordance with Board requirements." DDE, p. 8, *citing, Vanity Fair*.

For the reasons set out below, the Union does not believe that *Vanity Fair* applies to the instant case.

Vanity Fair Mills Is Distinguishable

The facts in *Vanity Fair Mills* are clearly distinguishable from the instant case. In that case, the Petitioner telephoned his regional office seeking information on the filing of a decertification petition. The board agent informed the petitioner of a 60-90 day open period prior to expiration of the contract and asked the petitioner to call back regarding the expiration date of the contract. The board agent failed to ask the petitioner the duration of the contract. The petitioner called the regional office back again and told a second board agent the expiration date of the contract. The second board agent failed to ask the duration of the current contract. The Region sent the petitioner a letter with an enclosed petition and reiterated that the petition “[could] not be properly filed in any time period other than 60-90 days prior to the expiration of the contract or any time subsequent to the contract expiration.” Petitioner then filed a flawed decertification petition. Once again the region instructed the petitioner in writing that he “must file [the petition] with our office between the 60th and 90th day of the expiration date of the union contract. Petitions which are filed outside of this period will be dismissed as untimely.” Petitioner filed a second decertification petition. The petition was untimely because it was not filed during the 60-90 day open period prior to the third anniversary of the start of the existing contract. The Board found that an “unusual circumstance” existed because the petitioner relied upon faulty advice from the Region and directed an election. The Board found that the Petitioner had no reason to suspect that, if he acted on such advice, his petition would be rejected as untimely.

The facts in this case are clearly distinguishable. First, unlike *Vanity Fair Mills*, the Region 3 office did not set out *in writing* the open period for filing of the petition. In *Vanity Fair Mills*, the region incorrectly informed the petitioner twice in writing of an inappropriate time to

file, which included a start and end time for filing (60-90 days). Mr. Scott never gave Petitioner written information as to the open period for filing a petition.

Second, in *Vanity Fair Mills*, the petitioner was given the wrong advice repeatedly during a time when the petitioner *could have* filed a timely petition. In this case, Petitioner only recalls calling Mr. Scott on one instance prior to January 30. This is not the case where the Region was repeatedly giving bad advice which caused the late filing of the petition. Any information which Mr. Scott gave Petitioner *after* the open period ended is irrelevant to Petitioner's argument that she relied to her detriment on faulty advice.¹ Thus, since Petitioner was not provided faulty information on a repeated basis, or faulty information in writing, this case is distinguishable.

A third distinguishing fact is that in *Vanity Fair Mills* the petitioner was provided with a begin date to file and an end date to file a petition. In this case, Petitioner testified that she was only provided with a March 2, deadline, but no limit on a start time to file. Petitioner acknowledged that she believed she could file any time from when she first spoke to Mr. Scott in mid January until a (faulty) March 2, 2011 deadline. She herself chose to wait to file until February 22, more than a month after she spoke first with Ron Scott, and received a mostly prepared petition in the mail.

Why did the Petitioner wait to file? Petitioner provided no rational reason for her failure to file before January 30. Long before January 30, Petitioner had received a copy of the petition from Mr. Scott and had also called him to discuss filing the Petition by fax (Bd. Ex. 8). Petitioner was not told she could not file before January 30. No information from the Board prevented Petitioner from filing by January 30. This is an important distinction from the *Vanity*

¹ For example, when Petitioner called Mr. Scott on January 31, the parties were already in the insulated period. Therefore, any information provided to Petitioner on that date would be irrelevant.

Fair Mills case. Petitioner cannot claim she failed to file the Petition by January 30, based on faulty advice from the Region.

A fourth distinction is that Petitioner failed to provide an adequate showing of interest to the Region by the January 30 deadline to file. Board law required Petitioner to submit her signature *prior to the commencement of the insulated period* on January 30. *Excel, supra*. The Regional Director states that she is “administratively satisfied, based on a review of the Petitioner’s showing of interest, that she had an adequate showing as of January 30.” DDE, p. 6. Mr. Scott never told Petitioner that she could not file before January 30. Plaintiff understood she could file by January 30, and yet she failed to file on that date, and she failed to file her showing of interest by that date.

Fifth, *Vanity Fair Mills* was decided thirty years ago when average working persons had no access to information such as exists today. Virtually every public library in New York State provides access to the internet and the NLRB website which contains all of the Board’s rules and regulations. Multiple websites discuss labor law issues from which petitioner could have sought information. When the Board decided *Vanity Fair Mills*, the only way employees could access such information was by calling or visiting a local regional office. That is not the case today. Contrary to the Regional Director, the Union contends that it is not difficult for a lay person to understand the application of a complex provision of Board law and procedure. In fact, in 2008 this very Petitioner, Virginia Miller, filed a timely petition. She was already aware of the provisions of Board law and procedure such that she knew there was a period of time within which she needed to file a timely petition.

Most importantly, and in great contrast to *Vanity Fair Mills*, the Petitioner in this case had three years earlier filed a timely decertification petition on January 24, 2008. At the very

least she should have known to look at her previous filing, which she may have had in her possession, and which was clearly available at the regional office. She never informed Mr. Scott that she had filed a previous decertification petition. Had she done so, he would have undoubtedly reviewed the previous petition and noted the date of filing. Petitioner was not a novice. She had experience in filing such petitions before. She knew was aware that there were time limits for filing and should have known the risks involved in any dilatory action and should not be relieved from compliance with Board rules. In *Vanity Fair Mills*, the Board found that the petitioner *reasonably relied* upon the advice of the Regional office for filing a petition and filed an untimely petition. In this case, the Petitioner's reliance on such advice is not reasonable in light of the fact that she had already gone through the process of filing a prior petition in a timely manner. Her failure to disclose her prior filing was also unreasonable. Finally, petitioner was never told she was prohibited from filing in January 2011; she made that decision herself. This is not an "unusual circumstance" where the petition should proceed to election.

The Regional Director improperly failed to consider that Petitioner concealed from the Board Agent that she had filed a prior petition in 2008, and that she did not reveal or recall that her prior petition was filed in January 2008. It is the Union's contention that Petitioner's actions were unreasonable, and that she was in part culpable for the actions which led to an untimely petition. This case is akin to *Mallinckrodt Chemical Works*, supra, where the board noted that the Petitioner had adequate knowledge of Board procedures, and, therefore, "should not be relieved from compliance with our rules." *Id.*

The Regional Director erroneously did not consider that Petitioner's actions were unreasonable. The Regional Director did not properly weigh the Petitioner's actions against the interests of the Union. With the contract set to expire on April 30, 2011, the Union and

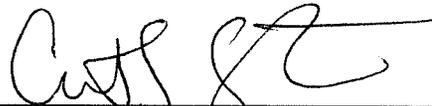
employer should be afforded the time and opportunity to negotiate and execute a new agreement without the disrupting effect of a petition and election. See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958); *Crompton Co.*, 260 NLRB 418, 418 (1982). Holding an untimely election puts the Union at a distinct disadvantage during bargaining because the union is now putting its efforts towards campaigning. The Union urges Board not to accept the Regional Director's Decision and Direction of Election, and not to accept the *Vanity Fair Mills* analysis to the facts of the instant case.

CONCLUSION

For all of the above reasons, the Union contends that the Regional Director incorrectly determined to direct an election among the employees in the stipulated unit. The Union contends that there is a contract bar to the filing of the petition, and that it should be dismissed as untimely. Further, the Union contends that the Regional Director incorrectly relied upon *Vanity Fair Mills*. The Union contends that for all of the reasons set forth herein, and that no unusual circumstances are presented herein to allow the petition to proceed to election.

Dated: Buffalo, New York
April 4, 2011

CREIGHTON, JOHNSEN & GIROUX



Catherine Creighton