

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAN FRANCISCO HEALTH CARE &
REHAB, INC.

(Respondent)

and

Case 20-CA-35415
Case 20-CA-35418

SEIU UNITED HEALTHCARE WORKERS-
WEST

(Charging Party)

**REQUEST FOR PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE
ETCHINGHAM'S ORDER DENYING RESPONDENT SAN FRANCISCO HEALTH
CARE & REHAB, INC.'S MOTION TO RESCHEDULE HEARING**

Pursuant to Sections 102.26, 102.16(b) and 102.24(a) of the National Labor Relations Board's Rules and Regulations, SAN FRANCISCO HEALTH CARE & REHAB, INC. ("Respondent") requests special permission from the National Labor Relations Board to appeal Administrative Law Judge Etchingham's Order Denying Respondent's Motion to Reschedule the Hearing in the above referenced matter for October 17, 2011.

1, **REQUEST FOR SPECIAL PERMISSION TO APPEAL**

As an initial matter, the Board should grant Respondent special permission to appeal Judge Etchingham's order because Section 102.26 of the Board's Rules and Regulations permit Respondent to file a special appeal and because failure to consider the appeal and grant Respondent a postponement of the Hearing until October 17, 2011 will result in Respondent suffering irreparable harm that cannot be remedied after the close of the Hearing. Respondent's Executive Vice President and Chairman of the Board of Directors for Respondent is Stan Stukov and Mr. Stukov is current recovering from knee surgery and will be unavailable to attend the Hearing until October 17, 2011. Mr. Stukov is the architect of Respondent's acquisition of Helping Hands assets and the individual who is responsible for guiding the transformation of the facility from a long-term skilled nursing center into a non-acute care, short-term care and rehabilitation facility. The unfair labor practice charges directly concern Respondent's acquisition of Helping Hands assets and Respondent's subsequent operation of the facility. Thus, Mr. Stukov is essential to Respondent's defense --- not only to testify at the Hearing but to prepare for and assist during the Hearing. Should the Board deny Respondent's request for special permission to appeal, Respondent would be denied due process as the case will already have been litigated by the time Respondent can raise these issues in exceptions.

1. APPEAL OF ALJ ETCHINGHAM'S ORDER DENYING RESPONDENT'S MOTION TO RESCHEDULE THE HEARING AND REQUEST THAT THE BOARD GRANT RESPONDENT'S MOTION AND RESCHEDULE THE HEARING FOR OCTOBER 17, 2011

As is noted above and as Respondent has consistently noted in its many motions to the Region 20 and to the Division of Judges, this postponement is necessitated by the fact that Mr. Stukov is currently recovering from knee surgery and will be unable to attend the Hearing prior to October 17, 2011 as indicated by a doctor's note submitted by Mr. Stukov's treating physician, Doctor Halbracht, dated September 23, 2011. At present Mr. Stukov is confined to his home and is still taking pain and other powerful medications that predictably prevent him from thinking clearly. Given that Mr. Stukov is critical to Respondent's case not only for his testimony but also in preparing for the Hearing and assisting the undersigned at the Hearing, Respondent submits that an October 17, 2011 start date would be appropriate as it would give Mr. Stukov additional recovery time and allow Respondent to adequately defend itself.

At a September 12, 2011 conference call Administrative Law Judge Etchingham indicated that in order for him to move the start date for the Hearing from October 5 to October 17 he would need a note from Mr. Stukov's doctor providing a date certain for which Mr. Stukov could appear. Respondent provided the required note. Nonetheless, Judge Etchingham denied the request adopting verbatim counsel for the Acting General Counsel's rationale for postponing the start date 12 days and ignoring Respondent's valid arguments.

First, counsel for the Acting General Counsel's accused Respondent of employing an inconsistent, shifting and suspicious justification for postponement. Respondent has since its initial request for rescheduling on June 20, 2011 indicated that knee surgery and recuperation from knee surgery have necessitated rescheduling. Unfortunately complications from Mr. Stukov's initial knee surgery required a follow up surgery and a lengthy recovery period. Respondent has never asserted that Mr. Stukov would positively be recovered in time for the initial August 1, 2011 Hearing date or the

subsequent October 5, 2011 date. Rather, Respondent was pressured into attempting to provide a date certain for his recovery for purposes of providing a specific Hearing date. Respondent concedes that the undersigned's and Mr. Stukov's availability and travel plans provided further basis for rescheduling the initial August 1, 2011 Hearing date, but Mr. Stukov's availability for medical reasons has at all times remained an issue and ultimately the surgery and complications from the surgery prevented Mr. Stukov from taking the contemplated trips. It is unfortunate that the surgeries coincided with counsel for the General Counsel's schedule for conducting the Hearing, but the surgeries were necessary and require recovery time. Any assertion that Mr. Stukov's surgery and recuperation from surgery has not been the recurrent basis for postponement from the outset is based on a misreading of the motions and misstatements based thereon.

Second, counsel for the Acting General Counsel was mistaken in his assertion that the first continuance was granted because the undersigned represented that they would be ready for trial by October 5, 2011. The undersigned made clear to counsel for the Acting General Counsel and Associate Chief Administrative Law Judge Cracraft that although it was anticipated that the October 5, 2011 date would be acceptable and that Respondent and Mr. Stukov would be ready for Hearing, the undersigned could make no guarantees with respect to Mr. Stukov's availability for Hearing. Associate Chief Judge Cracraft acknowledged this and said that the presiding Judge in that event could address that issue when it arose, including rescheduling the Hearing.

Third, counsel for the Acting General Counsel is not a doctor and has no medical training and is relying on online medical literature which the undersigned asserts he is not professionally qualified, or trained to interpret or assess its accuracy or meaning relative to the exact nature of the surgical procedure performed. The undersigned understands that counsel for the Acting General Counsel has not spoken with orthopedic surgeons as to recovery times in cases where second corrective surgeries

were necessary after first corrective surgery failed. Rather, the unprofessionally obtained literature provides useless and suspect generalities as to the anticipated normal recovery time. The literature is not based on Mr. Stukov's case history and his actual condition. Mr. Stukov's recovery has been slow, particularly because the first corrective surgery failed, and the undersigned recognizes counsel for the Acting General Counsel's frustration with Respondent's inability to commit to a hard and fast date for Mr. Stukov's availability. Medical recovery provides no certainty as desired by counsel for General Counsel. Because of the nature of recovery, Mr. Stukov's physician has been reluctant to commit to hard and fast dates despite counsel for the General Counsel's apparent belief that such hard and fast dates should be available based on this "thorough" on-line medical research, which typically does not address process of recovery from a surgery following failed first corrective surgery. Nonetheless in an effort to appease counsel for the Acting General Counsel and Judge Etchingham, Dr. Halbracht indicated barring any unforeseen complications that Mr. Stukov's work-related restriction would be lifted and that he would be free to return to work and consequently the Hearing on October 17, 2011 and not before.

Fourth counsel for the undersigned takes issues with Judge Etchingham's apparent acceptance of counsel for the Acting General Counsel's assertion that Mr. Stukov's doctor's notes should be rejected because they were not provided in affidavit form and sworn under oath. Respondent was never asked to supply such an affidavit. In fact, counsel for the Acting General Counsel has not even asked to speak with the physician. Surely, it was improper for the Judge to infer that Mr. Stukov's need for additional recovery time was not genuine based on Respondent's failure to produce a document that has heretofore not been requested.

Fifth, counsel for the Acting General Counsel's and the Judge's proposed accommodation that the Region provide Mr. Stukov video connection to the Hearing so that he can participate remotely is not a genuine alternative to viewing and consulting

during the hearing. It is Court TV to the extreme. This is all a device of the NLRB Region and the ALJ division to control 12 days of their calendar to the exclusion of due process.

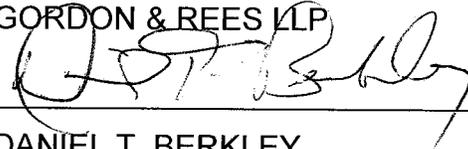
The undersigned is sympathetic to the fact that any remedy that the alleged discriminates and the Charging Party may be entitled to may be delayed a few additional weeks by another postponement of the Board processes. However, the Board processes are time consuming; a few more weeks will hardly impose an irreparable injury on the Charging Party and the alleged discriminates. Denial of Respondent's constitutional due process however at this stage will cause irreparable injury or potentially further delay resolution of this matter.

For the above cited reasons, the undersigned respectfully requests that the Board provide Respondent special permission to appeal Administrative Etchingam's order denying Respondent's Motion to Reschedule the Hearing to October 17, 2011 and that the Board reset the Hearing in the above-referenced case for October 17, 2011.

Dated: September 28, 2011

Respectfully submitted,

GORDON & REES LLP



DANIEL T. BERKLEY

ATTORNEY FOR SAN FRANCISCO
HEALTH CARE & REHAB

CERTIFICATE OF SERVICE

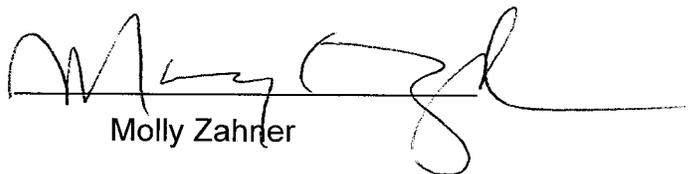
The undersigned hereby certifies that pursuant to NLRB Rules and Regulation Sections 102.16, 102.24, 102.114(i), a signed copy of the **ORIGINAL** of the following document was electronically filed with the NLRB in Washington D.C., before 5:00 p.m., on September 28, 2011.

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The undersigned hereby certifies that a true and correct copy of the above document was duly served upon the following parties by transmitting via email (or facsimile where noted) to the email address(es) set forth below on this date before 5:00 p.m., pursuant to NLRB Rules and Regulations Section 102.114(i):

<i>Charging Party:</i> SEIU, UHW - West 560 Thomas L. Berkley Way Oakland, CA 94612 Donna Mapp SEIU Representative Email: dmapp@seiu-uhw.org	<i>NLRB:</i> David Reeves NLRB, Region 20 901 Market Street, Suite 400 San Francisco, CA 94103-1735 Email: nlrb20@nrlb.gov
<i>Counsel for Charging Party:</i> Bruce Harland, Esq. Weinberg Roger & Rosenfeld 1001 Marina Village Parkway, # 200 Alameda, CA 94501-1091 Email: bharland@unioncounsel.net	<u>Via Facsimile: Fax: 415-356-5254</u> Judge Etchingham Administrative Law Judge 901 Market Street, Suite 300 San Francisco, California 94103-1779

DATE: September 28, 2011


Molly Zahrtler