

Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village and The Pavilion at St. Luke Village Facility Operations, LLC d/b/a The Pavilion at St. Luke Village and American Federation of State, County and Municipal Employees, District Council 87, AFL-CIO. Cases 04-CA-114317 and 04-RC-101711

December 16, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on September 27, 2013, by American Federation of State, County and Municipal Employees, District Council 87, AFL-CIO (the Union), the General Counsel issued the complaint on October 28, 2013, alleging that Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village and The Pavilion at St. Luke Village Facility Operations, LLC d/b/a The Pavilion at St. Luke Village (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing the Union's request to bargain following the Union's certification in Case 04-RC-101711. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 19, 2013, the General Counsel filed a Motion for Summary Judgment and a memorandum in support. On November 22, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 5, 2013, the Respondent filed a letter in response to the Notice to Show Cause and an amended answer to the complaint. On the same date, the Union filed a brief in support of the General Counsel's Motion for Summary Judgment.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in this proceeding to a three-member panel.

With regard to the motion for summary judgment, the Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its contention in the underlying representation proceeding that the bargaining unit is inappropriate. The Respondent also reiterates its claim in the underlying representation proceeding that all of the Regional Director's and the Board's actions in Case 04-RC-101711 were ultra vires and not

valid because at all times during the processing of Case 04-RC-101711 the Board lacked a quorum under *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), affirmed in relevant part 134 S.Ct. 2550 (2014), and *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013).¹

In a typical unfair labor practice proceeding, a respondent is precluded from raising representation issues that were or could have been litigated in the prior representation proceeding. However, at the time of the Board's June 13, 2013 Order denying the Employer's request for review of the Regional Director's Decision and Direction of Election in Case 04-RC-101711, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, supra, holding that the challenged appointments to the Board were not valid. Under these circumstances, we will not give preclusive effect to the Board's prior denial of the Respondent's request for review, and we will consider anew the Respondent's arguments raised in the representation proceeding.

As an initial matter, the Respondent argues that the Regional Director for Region 4 was appointed to his position at a time when the Board lacked a quorum under *Noel Canning* and, therefore, the Regional Director was acting pursuant to an invalid appointment. We reject this argument for the reasons stated in *Pallet Cos.*, 361 NLRB 339 (2014).

The Respondent further argues that the Board's general delegation of authority to Regional Directors to process representation cases is not valid at a time when the Board lacks a quorum. We reject this argument as well. The Board's delegation of its decisional authority in representation cases to Regional Directors dates back to 1961 and has never been withdrawn. See 26 Fed.Reg. 3889 (1961). Consistent with the 1961 Delegation and the Board's Rules and Regulations, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. Specifically, Section 102.178 provides that "during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law," and

¹ The Respondent also argues that the allegations of the complaint are barred by Sec. 10(b) of the Act. However, the Respondent has not presented any factual or legal basis in support of this defense, and its amended answer admits that the charge was filed on September 27, 2013, and that it has not responded to the Union's letter of June 25, 2013, in which the Union requested bargaining. We therefore find that the Respondent's 10(b) defense is without merit.

Section 102.182 specifies that representation cases should be processed to certification “[t]o the extent practicable.” See also *Durham School Services, LP*, 361 NLRB 702, 702 1 (2014).

With regard to the merits of the representation proceeding, the Union filed a petition to represent a unit of licensed practical nurses (LPNs) at the Respondent’s two skilled nursing homes in Hazleton, Pennsylvania. The Respondent claimed that the petition should be dismissed because the LPNs are supervisors within the meaning of Section 2(11) of the Act, and because the management data set (MDS) nurse-LPNs do not share a sufficient community of interest with the other LPNs to be included in the same unit with them. Following a hearing in which the parties were given the opportunity to present evidence and arguments in support of their respective positions, the Regional Director issued a Decision and Direction of Election on May 16, 2013, concluding that the MDS nurse-LPNs were appropriately included in the unit and that the Respondent had not carried its burden to show that the LPNs were supervisors. Thereafter, the Respondent filed a Request for Review arguing that the Regional Director clearly erred in concluding that the LPNs are not statutory supervisors and that the MDS nurse-LPNs share a community of interest with the other LPNs sufficient to be included in the same bargaining unit.² We deny the Respondent’s request for review as it raises no substantial issues warranting review.

The election was held on June 13, 2013. The tally of ballots showed that of approximately 43 eligible voters, 26 cast ballots for the Union and 12 cast ballots against the Union, with no challenged ballots. No objections were filed by any party. On June 24, 2013, the Acting Regional Director issued the Certification of Representative, certifying the Union.

Although the Respondent disputes the appropriateness of the bargaining unit, it does not dispute that the tally of ballot accurately represents the wishes of the employees participating in the election. There is no question that a majority of valid ballots was cast for the Union, and we see no legitimate reason why we should not rely on the

² Relevant to the alleged supervisory status of the LPNs, the Respondent argues in its request for review that the Regional Director erroneously denied its special appeal from the hearing officer’s ruling quashing a subpoena the Respondent served on the Union.

results of that election. Although there is also no question that the Certification of Representative issued by the Acting Regional Director is substantively correct, in an abundance of caution and in an effort to avoid additional litigation that would only serve to further delay this matter, we will issue a new Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for American Federation of State, County and Municipal Employees, District Council 87, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time LPNs, including pool LPNs (who work an average of four or more hours per week) and MDS Nurse-LPNs, employed by the Respondent at its 1711 East Broad Street and 1000 Stacie Drive, Hazleton, PA facilities, excluding all Registered Nurses, Certified Nursing Assistants, restorative aides, activity aides, beauticians, maintenance employees, clerical employees, confidential employees, guards, and supervisors as defined in the Act.

NOTICE TO SHOW CAUSE

The Respondent stated in its response to the Notice to Show Cause that it has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent’s legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.³

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before February 2, 2015, to conform with the current state of the evidence.

2. The Respondent’s answer to the amended complaint is due on or before February 17, 2015.

³ We recognize that in its response to the Notice to Show Cause, the Respondent agreed that summary judgment was appropriate. It did so, however, because it wanted to present its jurisdictional and substantive arguments directly to a United States court of appeals. In view of the fact that a properly constituted panel of the Board has addressed the Respondent’s jurisdictional arguments, and has considered anew the substantive arguments presented in the underlying representation proceeding, it is possible that this matter could be resolved without further litigation.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before March 10, 2015 (with affidavit of service on the parties to this proceeding), as to why the

Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.