

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCT - 6 2016

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED
OCT - 6 2016
CLERK

PRUITTHEALTH-VIRGINIA PARK,
LLC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

16-1350

Case No. _____

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Pruitthealth-Virginia Park, LLC, (herein "Petitioner") hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of an Order of the National Labor Relations Board (herein "Respondent" or "NLRB") in the matter styled Pruitthealth-Virginia Park, LLC, and Retail, Wholesale and Department Store Union/UFCW Southeast Council, NLRB Case No. 10-CA-173537, reported in a Decision and Order at 364 NLRB No. 125, dated September 22, 2016. *See Exhibit A* attached hereto. The Corporate Disclosure Statement is attached as **Exhibit B**.

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB's Decision and Order is a final order. 29 U.S.C. §160(f). Petitioner is a party aggrieved by said Decision and Order. Venue in this Court is proper pursuant to 29 U.S.C. §160(f).

The NLRB's Decision and Order against Petitioner is not supported by substantial evidence and is contrary to law. Respondent is not the properly certified representative of the employees in question and Petitioner is not obligated under Section 8(a)(5) of the Act to bargain with a union that has been improperly certified.

WHEREFORE, Petitioner respectfully prays that this Court review and set aside the Decision and Order of the NLRB which found that Petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) and (1), and receive any further relief to which it may be entitled.

Respectfully submitted,

LITTLER MENDELSON, P.C.



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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petition for Review was served via email and Federal Express overnight delivery on October 6, 2016 to the following individuals:

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Jonathan E. Kaplan

EXHIBIT A

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner PruittHealth - Virginia Park, LLC, is engaged in the business of operating a skilled nursing and rehabilitation center in Atlanta Georgia. PruittHealth - Virginia Park, LLC's only parent company is United Health Services of Georgia, Inc., which is not a public corporation.

Respectfully submitted,

LITTLER MENDELSON, P.C.



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Attorneys for Petitioner

EXHIBIT B

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

PruittHealth-Virginia Park, LLC and Retail, Wholesale and Department Store Union/UFCW Southeast Council. Case 10–CA–173537

September 22, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

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 by Retail, Wholesale and Department Store Union/UFCW Southeast Council on April 8, 2016, and amended charges filed on May 9 and 12, 2016, the General Counsel issued the complaint on May 12, 2016, alleging that PruittHealth-Virginia Park, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 10–RC–156997. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and asserting affirmative defenses.¹

On June 24, 2016, the General Counsel filed a Motion for Summary Judgment. On June 28, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain,² but contests the validity of the Union's certification on the basis

¹ The Respondent's answer denies knowledge or information sufficient to form a belief concerning the dates that the charges were filed or served upon the Respondent. Copies of the charges and affidavit of service of the charges are included in the documents supporting the General Counsel's motion, showing the dates as alleged, and the Respondent has not challenged the authenticity of these documents.

² The Respondent's answer denies the allegations in complaint pars. 10 and 11. These paragraphs state, respectively, the legal conclusions that the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Sec. 8(a)(5) and (1) of the Act, and that the unfair labor practices of the Respondent affect commerce within the meaning of Sec. 2(6) and (7) of the Act. Elsewhere in the answer, however, the Respondent admits its refusal to bargain and that it is an employer engaged in commerce. Accordingly, the Respondent's

of its objections in the underlying representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).³ Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Atlanta, Georgia (the Respondent's facility) and has been engaged in the business of operating a nursing home for the care of the elderly.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$100,000 and purchased and received at the Respondent's facility goods valued in excess of \$5000 from suppliers located outside the State of Georgia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on August 20, 2015, the Union was certified on October 27, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit (the unit):

denials with respect to the allegations in pars. 10 and 11 do not raise any material issues of fact to be litigated in this proceeding.

³ Member Miscimarra agrees that summary judgment is appropriate in this unfair labor practice case because the Respondent has not presented any new matters that were not previously resolved in the prior representation case. Member Miscimarra did not participate in the prior representation case, and does not reach or pass on the merits of the Board's decision in that case.

All full time and regular part time CNA's, restorative aides, activity assistants, medical record clerks, and service and maintenance employees employed by the Employer at its facility located at 1000 Briarcliff Road N.E., Atlanta, GA, but excluding all RNs, LPNs, charge nurses, confidential employees, professionals, office clerical employees, guards and supervisors as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About November 10, 2015, January 15 and February 17, 2016, the Union, by letter, requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.⁴

Since about November 20, 2015, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about November 20, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certifi-

⁴ The Respondent's answer admits that the Union requested that the Respondent recognize and bargain with it as the exclusive representative of the unit, but denies that the Union requested to bargain by letter on the dates identified in the complaint. Copies of the letters requesting to bargain are included in the documents supporting the General Counsel's motion, showing the dates as alleged, and the Respondent has not challenged the authenticity of these documents.

cation as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, PruittHealth-Virginia Park, LLC, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Retail, Wholesale and Department Store Union/UFCW Southeast Council as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time and regular part time CNA's, restorative aides, activity assistants, medical record clerks, and service and maintenance employees employed by the Employer at its facility located at 1000 Briarcliff Road N.E., Atlanta, GA, but excluding all RNs, LPNs, charge nurses, confidential employees, professionals, office clerical employees, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Atlanta, Georgia, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

PRUITTHEALTH-VIRGINIA PARK, LLC

as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 20, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 22, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra Member

Lauren McFerran, Member

ion/UFCW Southeast Council as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full time and regular part time CNA's, restorative aides, activity assistants, medical record clerks, and service and maintenance employees employed by us at our facility located at 1000 Briarcliff Road N.E., Atlanta, GA, but excluding all RNs, LPNs, charge nurses, confidential employees, professionals, office clerical employees, guards and supervisors as defined by the Act.

PRUITTHEALTH-VIRGINIA PARK, LLC

The Board's decision can be found at www.nlr.gov/case/10-CA-173537 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

- FEDERAL LAW GIVES YOU THE RIGHT TO
 - Form, join, or assist a union
 - Choose representatives to bargain with us on your behalf
 - Act together with other employees for your benefit and protection
 - Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Retail, Wholesale and Department Store Un-

