

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ALTERNATIVE COMMUNITY LIVING, INC.,
d/b/a NEW PASSAGES BEHAVIORAL HEALTH
AND REHABILITATION SERVICES,

Respondent,

and

Case No: 07-CA-158059
ALJ: Christine E. Dibble

LOCAL 517M, SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU),

Charging Union.

BATOR LEGAL, P.C.
Gregory J. Bator (P33232)
Christian A. Lobb (P63339)
Attorney for Respondent
400 West Maple
Birmingham, MI 48009
(248) 642-7844

Eric Cockrell (P62662)
Counsel for the General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Bldg.
477 Michigan Ave., Rm. 300
Detroit, MI 48226
(313) 226-6994

**RESPONDENT ALTERNATIVE COMMUNITY LIVING, INC'S
BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respondent Alternative Community Living, Inc., d/b/a New Passages Behavioral Health and Rehabilitation Services (the "Employer"), through counsel Bator Legal, P.C., for its Brief in Support of Exceptions to the Decision of the Administrative Law Judge states as follows:

QUESTIONS PRESENTED BY RESPONDENT'S EXCEPTIONS

Where the parties are subject to a National Labor Relations Board Decision and Order dated March 31, 2015, in Alternative Community Living, Inc. d/b/a New Passages Behavioral Health and Rehabilitation Services and Local 517M, Service Employees International Union (SEIU), 362 NLRB 1 (2015) (Case 07-CA-099976) which found that the Respondent violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act by declaring an impasse on May 5, 2013, and imposing its last, best final offer in the form of a NEW PASSAGES BEHAVIORAL HEALTH & REHABILITATION SERVICES CBA, dated May 5, 2013 to November 30, 2016, which provided for the payment of a bonus to unit employees on the specified date of July 1, 2015, where the Union's second amended charge in Case 07-CA-099976, filed on May 7, 2013, sought to invalidate the imposed agreement and served as notice to all unit employees that the future bonus payments contained therein were subject to invalidation by the Board, where the Board Decision and Order required restoration to the unit employees of the terms and conditions that were applicable prior to May 5, 2013, and where the Respondent restored the New Passages / SEIU RA's Contract 2009-2011 which did not provide for any bonus on July 1, 2015, was it contrary to the competent, material and substantial evidence on the record for the ALJ in Conclusion of Law #3 to conclude that Respondent violated Section 8(a)(5) and (1) by "failing and refusing" to make the bonus payment of July 1, 2015, that was provided in the invalidated agreement, and, had it been paid by the Respondent, would have represented a unilateral change from the 2009-2011 CBA?

RESPONDENT ANSWERS: YES.

CHARGING UNION LIKELY ANSWERS: NO.

STATEMENT OF THE CASE

The Employer, Alternative Community Living, Inc., d/b/a New Passages Behavioral Health and Rehabilitation Services (“New Passages”) is a non-profit Michigan corporation that provides services and housing for persons with developmental disabilities and/or mental illness and the elderly.¹ ALJ’s Decision, p. 2, 8-10. The SEIU, Local 517M (the “Union”), commencing in 2006, represents approximately 315 of New Passages’ employees who work as “rehabilitation assistants” providing personal care and support services to New Passages’ clients. Id. p. 3, 1-6.

The parties had previously entered a collective bargaining agreement effective December 2, 2009, through December 2, 2011. ALJ’s Decision, p. 3, 8-9. The 2009-2011 agreement provided for a one-time monetary payment by New Passages to the unit employees two pay periods after ratification of that contract. ALJ’s Decision, p. 3, 13-20.² On December 5, 2011, in the course of bargaining for a new CBA, the parties signed an extension that maintained the 2009-2011 agreement in place until a successor agreement was reached. Alternative Community Living, Inc. d/b/a New Passages Behavioral Health and Rehabilitation Services and Local 517M, Service Employees International Union (SEIU), 362 NLRB 1, 7 (2015). No additional monetary or bonus payment was inserted as part of, or linked to, that extension.

As recounted in Alternative Community Living, Inc., 362 NLRB 1 (2015), a tentative

¹ The ALJ’s Decision inaccurately states that the Employer provides these services “at its facility”. ALJ’s Decision, p. 2, 8-9. The Employer operates or staffs about 30 group home locations throughout the 12 Michigan counties identified in the bargaining unit description. ALJ’s Decision, pp. 3, 2-4.

² Unit Employees with 5 or less years of service would receive \$150.00. Unit Employees with more than 5 years of service would receive \$200.00 under the 2009-2011 CBA.

agreement dated March 14, 2013, was not ratified by the New Passages Board of Directors. Id., pp. 9-10. In the weeks that followed, the parties did not reach a subsequent agreement. Id., pp. 10-11.

On May 4, 2013, New Passages declared an impasse and imposed the final offer contained in the form of the "2013-2016 CBA". ALJ's Decision, p. 3, 26-29. Three days later, on May 7, 2013, as part of its Second Amended Complaint in Case 07-CA-099976, the Union filed its charge against New Passages that the 2013-2016 CBA was imposed without reaching a valid impasse in violation of Sections 8(a)(5) and (1). Id.

While the Union's charge was pending, New Passages followed the terms of the imposed 2013-2016 CBA. The 2013-2016 CBA provided for three separate annual monetary payments to the bargaining unit employees scheduled for two pay periods after each of July 1, 2013, July 1, 2014, and July 1, 2015. ALJ's Decision, pp. 3-4, 45-46, 1-37.³ The First Payment was granted on or about July 1, 2013. Id., pp. 4-5, 39-41, 1-7. The Second Payment was granted on or about July 1, 2014. Id., p. 5, 9-18.

On March 31, 2015, prior to granting the third payment under the 2013-2016 CBA the NLRB issued its Decision and Order in Alternative Community Living, Inc., 362 NLRB 1 (2015) that held the impasse was invalid. ALJ's Decision, p. 3, 31-36. As part of the remedy for that violation the NLRB ordered that New Passages shall:

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

(b) Restore to the unit employees the terms and conditions of employment that were in effect prior to May 5, 2013, and continue them in effect until the parties reach either an agreement or a valid impasse in

³ The amount of each of the payments ranged from \$100.00 to \$125.00 based upon Employee years of service.

bargaining. Nothing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013. Alternative Community Living, Inc., 362 NLRB No. 55 (2015) p. 21.

In compliance with the NLRB's order, New Passages restored and continued the extended 2009-2011 CBA that had set forth the terms and conditions of employment that were in effect prior to declaration of the impasse on May 5, 2013. The 2009-2011 CBA referenced only a "one-time" monetary payment which was granted in 2010 and did not provide for any further monetary or bonus payments to the unit employees after that date. ALJ's Decision, p. 3, 13-20. New Passages did not seek rescission of the payments granted under the 2013-2016 CBA on July 1, 2013, and on July 1, 2014. Pursuant to the restored 2009-2011 CBA, New Passages did not grant any monetary payment to unit employees in July 1, 2015. ALJ's Decision, p. 5, 20-22. New Passages, as ordered, also resumed bargaining in good faith with the Union. Alternative Community Living, Inc., 362 NLRB 1, 21 (2015).

Shortly thereafter, the Union filed its current Complaint, alleging that the monetary payment terms of the rescinded 2013-2016 CBA remained effective. The Union seeks to preserve the monetary payment terms of the 2013-2016 CBA after it previously charged, and the NLRB agreed via its March 31, 2015, Decision and Order in Case No. 07-CA-099976, that the 2013-2016 CBA was imposed as the result of an invalid declaration of impasse.

The current Complaint was tried before the ALJ on June 16, 2016. The ALJ issued the Decision on September 29, 2016, against which New Passages now files these Exceptions. New Passages takes Exception specifically to Conclusion of Law #3:

By failing and refusing to make bonus payments to employees on July 1, 2015, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changed (*sic*) employees' terms and conditions of employment without affording the Union a good faith opportunity to bargain." ALJ's Decision, p. 9, 4-6.

The ALJ's Decision arbitrarily re-imposes the monetary payment term in the 2013-2016 CBA in contravention of the NLRB's prior Decision and Order in Case No. 07-CA-099976 which invalidated that entire agreement. The ALJ found, contrary to the record, and despite the Union Complaint seeking invalidation of the 2013-2016 CBA, "it was not unreasonable for them (the Employees) to expect" that they would receive the third bonus payment even if the 2013-2016 CBA was invalidated. ALJ's Decision, p. 7, 18-19. This conclusion ignored the plain language of the NLRB's Decision and Order in Case 07-CA-099976 and departs from the doctrine that spares only benefits already granted to employees from rescission when a contract is invalidated. In addition, the Employees could not have expected to receive the Third Payment where the Union had filed its Second Amended Complaint on May 7, 2013, seeking to invalidate the 2013-2016 CBA containing the annual bonus payment system. The ALJ's Decision must be reversed.

LEGAL ARGUMENT

- I. **The plain language of the Decision and Order of the NLRB of May 31, 2015, restored and continued the 2009-2011 CBA and did not preserve the Third Payment from the invalidated 2013-2016 CBA.**

The NLRB's Decision and Order of March 31, 2015, concluded that New Passages invalidly declared an impasse in May, 2013, thereby rendering the 2013-2016 CBA containing the disputed Third Payment void. As a result, New Passages was ordered as follows:

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

(b) Restore to the unit employees the terms and conditions of employment that were in effect prior to May 5, 2013, and continue them in effect until the parties reach either an agreement or a valid impasse in bargaining. Nothing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013. Alternative Community Living, Inc., 362 NLRB 1, 21 (2015).

The terms and conditions of employment between the parties that were in effect prior to May 5, 2013, are found in the extended 2009-2011 CBA which did not include any annual bonus payment for the Employees. The Union's Complaint ignores the restoration and continuation of the extended 2009-2011 Contract by alleging that nonpayment of the Third Payment from the 2013-2016 CBA violates Sections 8(a)(1) and (5) as a failure and/or refusal to bargain collectively and in good faith on a mandatory subject for the purposes of collective bargaining. (See Complaint ¶¶8-10).

New Passages adhered to the terms and conditions of the 2009-2011 CBA in compliance with NLRB v. Katz, 369 US 736 (1962). This is not a case that falls under the Katz prohibition because New Passages did not unilaterally change the terms and conditions of the restored and continued 2009-2011 CBA. In fact, New Passages acted in good faith by following the terms and conditions of the 2009-2011 CBA which does not allow for an annual bonus payment. On July 1, 2015, when the Third Payment would have been due under the 2013-2016 CBA, the parties had not reached either a successor agreement or impasse. Under the NLRB's Order, the parties had restored and continued and were operating under the extended 2009-2011 CBA on July 1, 2015.

It is undisputed that the extended 2009-2011 CBA did not provide for any monetary payment to employees on that date. With respect to interpreting collective

bargaining agreements, “traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies.” Maurer v. Joy Technologies, 212 F3d 907, 914-915 (6th Cir. 2000). The explicit language of a collective bargaining agreement must be reviewed in the context that gave rise to its inclusion to determine the intent of the parties. Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. (UAW) v. Yard–Man, Inc., 716 F.2d 1476, 1479 (6th Cir.1983).

The 2009-2011 CBA explicitly provides for a “one-time” monetary payment which was provided in the context of the bargaining unit employees ratifying the contract. The Article itself is entitled in the singular form “One Time Monetary Payment”. ALJ’s Decision, p. 3, 13-20. The plain language of the One Time Monetary Payment provision called for a single payment to each bargaining unit employee two pay periods after ratification. There was no provision in the 2009-2011 CBA for annual monetary payments to employees or for a monetary payment in connection with the date of July 1, 2015.

Moreover, the plain language of the Board’s Decision and Order of March 1, 2015, did not preserve the future Third Payment from the voided 2013-2016 CBA. Had the Board intended to keep the Third Payment in place, it could have stated that clearly in its Decision and Order of March 1, 2015. Instead the Board stated only that “[N]othing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013.” Alternative Community Living, Inc., 362 NLRB 1, 21 (2015). In compliance with that language, New Passage did not seek rescission of the July 1, 2013, and July 1, 2014, bonus payments. The plain language of the Board’s Decision and Order did not require that New Passages grant the Third Payment under the 2013-2016 CBA.

II. As of the March 31, 2015, NLRB Decision and Order, the Third Payment under the voided 2013-2016 CBA had not been granted by New Passages and is not subject to payment under Mining Specialists III or Mego Corp.

The plain language of the NLRB's Decision and Order provides: "Nothing herein shall require the rescission of any ratification bonus of other benefits **granted** after May 5, 2013." (Emphasis Added). Alternative Community Living, Inc., 362 NLRB 1, 21 (2015). As of the date of the Board's Decision and Order, the Third Payment had not been "granted". The Third Payment was not scheduled until July 1, 2015. Therefore, the reinstatement of the 2009-2011 CBA after March 1, 2015, voided the 2013-2016 CBA and the Third Payment contained therein.

A. The appropriate test for whether employee benefits survive the invalidation of a collective bargaining agreement, or may be revoked by an employer if they existed outside of a collective bargaining agreement is if they have been granted, or inured, to the employees.

The Board's Decision and Order of March 1, 2015, specified that "Nothing herein shall require the rescission of any ratification bonus of other benefits **granted** after May 5, 2013." (Emphasis Added). Alternative Community Living, Inc., 362 NLRB 1, 21 (2015). The language concerning rescission is consistent with Mining Specialists, Inc. (Mining Specialists III), 335 NLRB 1275, 1283 (2001), which states, "it would contravene the purpose of the Act if the involved employees were penalized by an order that on its face would seem to require the respondent employer to withdraw certain benefits **which have inured** to the employees outside the lawful agreement." (Emphasis Added). *Id.* at 1283, *citing* Mego Corp., 254 NLRB 300 (1981).

In Mego Corp., the Board invalidated a collective bargaining agreement where the union was not certified as representing a majority of the unit employees. The invalidated

collective bargaining agreement provided increased pay and provided new health care benefits to employees. The Board held that although the contract could not be given effect until the union was certified, the increased wages must remain in place and the employer must arrange for substitute health coverage as those benefits “have inured to the employees under the agreement unlawfully applied to them”. Mego Corp. at 301. To allow the employer to withdraw the increased wages and health coverage already granted to the employees would have penalized the employees for the employer’s unlawful implementation of the collective bargaining agreement. Id.

The use of the past tense verbs “granted” in the Board’s Decision and Order of March 1, 2015, and “inured” in Mego Corp. establish that the Board was concerned with benefits that have already been received by the employees. Unlike the present case, the wage increases and health coverage provided under the invalid contract in Mego Corp. were ongoing. The employees had been granted those particular benefits from the time that contract was implemented on July 1, 1979, until the Board issued its Decision and Order nearly 19 months later on January 14, 1981. The employees had lived with the increased wages and health coverage for that 19 month period. Rescission of those inured benefits would have negatively impacted the employees.

In the present case, the Employees are not penalized by the restoration and continuation of the 2009-2011 CBA because the Third Payment under the invalid 2013-2016 CBA had not been granted and/or had not inured to them. It was not an ongoing or previously implemented wage increase or health benefit as in Mego Corp. The Third Payment was a discrete and particularized bonus payment that was still three (3) months away from inuring to the New Passages Employees when the 2009-2011 CBA

was restored and continued. New Passages did not withdraw any benefit that had inured or been granted to the Employees. Because New Passages restored and continued the 2009-2011 CBA, the Third Payment is not an extra-contractual benefit implemented side-by-side with a valid collective bargaining agreement. Under the plain language of the Board's Decision and Order of March 1, 2015, the Third Payment had not been "granted" and does not survive the invalidation of the 2013-2016 CBA by the Board.

B. The "reasonable assumption" that the employees relied on the Third Payment as articulated by the ALJ is not supported by Mining Specialists III, Mego Corp. or the competent, material and substantial evidence on the record.

The appropriate test of whether a benefit has been "granted" or "inured" was side-stepped by the ALJ's unsupported conclusion that the Third Payment was "reasonably assumed" to have been granted by the New Passages Employees because it appeared in the invalidated 2013-2016 CBA. ALJ's Decision, p. 6, 25-29; p. 7, 14-17. That conclusion is directly contrary to the record in this case which does not support any finding that the unit Employees relied on the Third Payment after the Union sought to invalidate the 2013-2016 CBA. The ALJ's Decision attempts to finesse the "granted or inured" test by opining that the Employees in this case "reasonably assumed" that they would receive the Third Payment. This flawed reasoning depends upon a presumption that the unit Employees lacked knowledge of the substance of the Union's charge that the 2013-2016 CBA was invalidly imposed. As of May 7, 2013, when the Union filed its Second Amended Complaint to challenge New Passages' declaration of impasse, the unit Employees had notice that 2013-2016 CBA, and all of the terms and conditions contained therein, was subject to being invalidated. There is no basis to conclude that the

unit Employees would have assumed that any of the bonus payments that had not inured to them would survive invalidation of the 2013-2016 CBA.

Mining Specialists III concerned benefits that had already been granted to employees outside of a valid collective bargaining agreement through a bonus system where a specified level of monthly performance (excavation of 50,000 tons of clean coal) triggered a monthly bonus payment. The respondent employer coal mining company unilaterally installed this monthly bonus system after the close of the record in a prior unfair labor practice case.⁴ The prior case involved the union's charges that a collective bargaining agreement between the respondent employer and the union also applied at a new mine location operated by the respondent employer under an alter ego corporation. The respondent employer maintained the unilateral monthly bonus system for six (6) months after the Board issued its decision in Mining Specialist I that the new location was subject to the existing collective bargaining agreement. Mining Specialists III at 1277.

Because the monthly bonus system continued in place for six (6) months after the Board ordered in Mining Specialist I that the collective bargaining agreement controlled the terms and conditions of employment, the Board held that the bonus system was an extra-contractual term that could only be rescinded through bargaining. Id. at 1283. That conclusion was based on: 1) the implicit message sent by the respondent employer during the 6 month period that the bonus system would coexist with the collective bargaining agreement; and 2) because employees worked harder to attain the monthly production goal in reliance on the ongoing bonus system. Id.

⁴ Mining Specialists, Inc. (Mining Specialist I), 314 NLRB 268 (1994).

Mining Specialist III is readily distinguishable from the present case because in that case the respondent employer continued paying the unilaterally imposed monthly bonus for six months after the Board issued its order that the collective bargaining agreement covered the new mine location where the bonus was implemented. The monthly bonus was an ongoing, performance-based component of the employees' wages. The employees worked at a presumably higher than average performance level during the preceding month to secure that bonus. The promise of the bonus was relied upon on a daily basis by the employees who calibrated their performance effort accordingly.

In the present case, however, New Passages' immediately restored and continued the 2009-2011 CBA as ordered by the Board on March 1, 2015. Unlike the respondent employer in Mining Specialist III which continued to make monthly bonus payments outside of the collective bargaining agreement, New Passages did not make any commitment to keep the Third Payment in place. The Third Payment existed only within the context of the 2013-2016 CBA which the Union sought to invalidate in its entirety as being incorrectly imposed.

Moreover, unlike the monthly bonuses in Mining Specialist III, the Third Payment was not linked to employee performance. The Third Payment, through its terms, did not provoke any reliance or dependence by the Employees that would trigger extra work effort. There also could be no reasonable reliance by the employees on receiving that future benefit as the nature of the Union's Complaint in Case No. 07-CA-099976 was to invalidate the imposed 2013-2016 CBA in which the Third Payment provision was contained. It is not reasonable for a party, the Union in this case, seeking to invalidate a

contract to expect to retain benefits contained therein. From the filing of the Complaint in Case No. 07-CAQ-099976, the Employees had reason to know that invalidation of the 2013-2016 CBA sought by their Union would terminate the bonus payment plan contained in that document.

The Union expressly sought to invalidate the 2013-2016 CBA from its May, 2013 filing of the Complaint in Case 07-CA-099976 alleging that the agreement was imposed as a result of an invalid impasse. The ALJ does not cite any authority that a benefit survives the Board's invalidation of a contract if it was "reasonably assumed" by Employees. The test from Mining Specialists III and Mego, Inc., is whether the benefits had been granted or inured to the Employee. As the Employees had not received the Third Payment, or any extra contractual bonus payment after restoration of the 2009-2011 CBA, and as the Employees had no cause to adjust their performance and effort in anticipation of the Third Payment, there is no basis for the Third Payment to be gifted to the Employees by the Board.

C. Granting the Third Payment on July 1, 2015, after the restoration and continuation of the 2009-2011 CBA would have violated Katz.

If New Passages made the Third Payment on July 1, 2015, after the extended 2009-2011 CBA was restored and continued, then the Katz prohibition on unilateral changes to terms and conditions of employment during bargaining would apply. New Passages agrees with the ALJ that the Third Payment in the voided 2013-2016 CBA was a bonus, and as such, a mandatory subject of bargaining. ALJ's Decision, p. 7-8, 37-44, 1-5. Payment of that bonus would violate Sections 8(a)(1) and (5) because New

Passages would have changed terms and conditions of employment on a subject of mandatory bargaining.

Had New Passages continued to implement the invalid 2013-2016 CBA by completing the Third Payment on July 1, 2015, it would have unlawfully bypassed the Union and demonstrated to the Employees that it is the sole provider of benefits. NLRB v. Fitzgerald Mills Co., 313 F2d 260, 267 (2^d Cir. 1963). New Passages followed the explicit language of the restored 2009-2011 CBA by recognizing that the Third Payment was no longer a term or condition of the employment of the bargaining unit employees and that granting that bonus payment would have violated Katz.

WHEREFORE, Charging Union's Complaint must be dismissed, with further relief to be sought by Respondent as may be just and proper.

Respectfully submitted,

BATOR LEGAL, P.C.

By: 

Gregory J. Bator (P33232)
Christian A. Lobb (P63339)
Attorneys for Respondent
400 West Maple Rd.
Birmingham, MI 48009
(248) 642-7844

Dated: October 25, 2016

CERTIFICATE OF SERVICE

I certify that on the 25th day of October 2016, I served copies of Respondent Alternative Community Living, Inc's Exceptions to the Decision of the Administrative Law Judge, Respondent Alternative Community Living, Inc's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, and Proof of Service on the following parties of record by electronic mail:

Eric S. Cockrell, Counsel for the General Counsel
E-mail: Eric.cockrell@nlrb.gov

Danny Ritter, Labor Relations Specialist
E-mail: dritter@seiu517m.org

By: 

Gregory J. Bator (P33232)
Bator Legal, P.C.