

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

**MANORCARE OF ALLENTOWN PA, LLC D/B/A
MANORCARE HEALTH SERVICES -
ALLENTOWN**

Employer

and

Case 06-RC-186558

**RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION, RWDSU, UNITED FOOD AND
COMMERCIAL WORKERS, AFL-CIO**

Petitioner

CORRECTED DECISION AND DIRECTION OF ELECTION¹

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board (“the Board”) on Friday, October 28, 2016.

The Retail, Wholesale, and Department Store Union, RWDSU, United Food and Commercial Workers, AFL-CIO, (“the Petitioner”), seeks to represent a bargaining unit of employees employed by ManorCare of Allentown PA, LLC, d/b/a ManorCare Health Services – Allentown (“the Employer”), as set forth below.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 6.

Based on the entire record in this proceeding and the briefs submitted by the parties, I conclude and find as follows:

1. The Hearing Officer’s rulings are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a Delaware corporation with an office and place of business located at 1265 S. Cedar Crest Blvd., Allentown, PA (“the Employer’s facility”), the only facility involved herein. The Employer is engaged in the business of operating a nursing home and rehabilitation facility. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$100,000 from the operation of its facility and receives goods and services in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. Accordingly, I find that the Employer is

¹ This Decision is revised to correctly reflect that withdrawal of the charge referenced in Section II of the Employer’s Statement of Position was approved on November 4, 2016.

engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties, stipulated and I find, that the following unit is an appropriate unit within the meaning of Section 9(b)(3) of the Act:

INCLUDED: All full-time and regular part-time Certified Nursing Assistants (CNAs) employed by the Employer at its 1265 S. Cedar Crest Blvd., Allentown, PA facility.

EXCLUDED: All other employees, guards and supervisors as defined in the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. ISSUES

In this proceeding, there are no disputes regarding the scope or composition of the petitioned-for unit. Rather, this Decision and Direction of Election will only address the procedural issues and arguments that the Employer has raised in Section I of its Statement of Position.

In Section I of the Employer's Statement of Position, the Employer raised several arguments relating to what it has asserted to be procedural irregularities concerning my handling of the recently withdrawn petition in Case 04-RC-159640 and the impact of that case on the instant petition. At the hearing, the parties were each permitted the opportunity to state their positions on record, offer documentary evidence and to address these issues in their briefs. Each of these issues will be addressed below.

In Section II of the Employer's Statement of Position, the Employer asserted that the processing of this petition should be blocked by an unfair labor practice charge that it had filed against the Petitioner on the same date that it filed its Statement of Position. At the hearing, the Hearing Officer advised the Employer that it would not be permitted to litigate that issue at the hearing and referred the Employer to Section 103.20 of the Board's Rules and Regulations concerning the filing of blocking charges. Moreover, on November 4, 2016, the Employer submitted a request to withdraw this charge which I approved.

Finally, in Section III of its Statement of Position, the Employer asserted that the Board's rules, which became effective April 14, 2015, are facially invalid and therefore the petition should be dismissed. However, at the hearing, the Employer did not raise this issue further and it was not addressed in its post-hearing brief. Therefore, it appears that the Employer is no longer

raising this issue as a bar to the processing of this petition. As such, and also because this issue is not litigable, this issue will not be addressed further in this Decision.

II. FACTS

By way of background, on September 9, 2015, the Petitioner filed a petition for election in Region 4, and that petition was docketed as Case 04-RC-159640. Subsequently, an election was conducted on October 1, 2015. On October 7, 2015, the Employer timely filed Objections over the Petitioner's conduct which it claimed affected the election.² On November 3, 2015, the Regional Director of Region 4, Dennis Walsh (herein, "Director Walsh") issued a Decision on Objections to Election and Certification of Representative. Thereafter, on November 17, 2015, the Employer filed a timely Request for Review of the Director Walsh's decision, and on April 7, 2016, filed a Motion for Hearing or to Re-Open the Record to supplement its objections. By Order dated April 20, 2016, the Board set aside Director Walsh's decision in Case 04-RC-159640 and remanded the case for further processing. The gravamen of the Employer's Supplemental Objections was its claim that Director Walsh's decision was tainted by bias.

On April 22, 2016, the General Counsel transferred the case from Region 4 to Region 6 for further processing. More particularly, Region 6 was specifically tasked with hearing the Employer's Objections *de novo*. In preparation for the hearing *de novo* on its Objections, pursuant to Section 102.118 of the Board's Rules and Regulations, the Employer requested the issuance of a subpoena ad testificandum to compel Director Walsh to testify.³ It further requested a subpoena duces testificandum for records held by the Custodian of Records of the Board's Office of the Inspector General and a subpoena ad testificandum for the testimony of the Board's Inspector General, David P. Berry.⁴ A Hearing Officer of Region 6 opened the record on May 25, 2016 for the purpose of taking evidence in support of the Employer's Objections, which involved the Petitioner's alleged conduct, and adjourned the hearing on that same date, pending resolution of the Employer's Section 102.118 subpoena requests. It was understood that, once rulings were issued on the Section 102.118 subpoena requests, the hearing would resume for the purpose of completing the record regarding the Employer's Objections regarding Director Walsh's alleged conduct.

On June 6, 2016, by letter to the Employer, the General Counsel ruled on the Employer's 102.118 subpoena request for Director Walsh's testimony and authorized the Hearing Officer to allow the Employer to make an Offer of Proof. On August 9, 2016, the Solicitor's Office denied the Employer's request for the issuance of a subpoena duces tecum to the Custodian of Records

² In issuing this Decision and Direction of Election, I have taken Administrative Notice of the filings associated with Employer's Objections in Case 04-RC-159640.

³ This request was considered and ruled on by the Board's General Counsel, Richard F. Griffin, Jr.

⁴ This request was considered and ruled on by the NLRB's Solicitor, William B. Cowen.

of the Board's Office of the Inspector General and also denied the Employer's request for the issuance of a subpoena ad testificandum for the testimony of the Board's Inspector General, David P. Berry. On August 30, 2016, the Hearing Officer served on all the parties to the proceeding, a request that the Employer submit its Offer of Proof regarding the testimony of Director Walsh by noon on September 7, 2016. On September 6, 2016, the Employer submitted its Offer of Proof with respect to its request for the appearance of Director Walsh.⁵

Prior to the Hearing Officer's issuance of a ruling on the Employer's Offer of Proof in Case 04-RC-159640, the parties engaged in settlement discussions that would result in setting aside the first election and proceeding directly to a second election, which the Employer had sought when filing its Objections and supplemental Objections. As reflected in Employer Exhibit 8 in the record, a letter from the Employer dated September 27, 2016, the parties' settlement discussions began on September 21, 2016. In its September 27th letter, the Employer placed certain conditions on its willingness to enter into a Stipulation and Waiver, among which was a requirement that Director Walsh provide a written admission of wrongdoing. The Employer further insisted that a full hearing on its Objections was required and asserted that it would object if the Region unilaterally scheduled a re-run election, as I am permitted to do.

In view of the parties' unsuccessful attempts to reach an agreement to resolve the Objections and proceed to a second election, on October 20, 2016, the Petitioner submitted a withdrawal request for the petition that it filed in Case 04-RC-159640, which I approved that same day. On October 21, 2016, I issued an Order Approving Withdrawal Request and Withdrawing Notice of Representation Hearing, without prejudice.⁶ Additionally, the Petitioner filed the instant petition supported by a new showing of interest, seeking to represent the same unit as the one it sought to represent in Case 04-RC-159640.

By Order dated October 27, 2016, the General Counsel directed that, in light of the events described above regarding Case 04-RC-159640, in accordance with the Rules and Regulations of the National Labor Relations Board, and to avoid unnecessary costs and delay, "Case 06-RC-186558 be processed in Region 6 as though it were originally filed in Region 4 and then immediately transferred to Region 6 by the undersigned."

⁵ The Employer's Offer of Proof included a brief position statement, along with a list of 47 reasons that the Hearing Officer should permit Director Walsh to testify at the Objections hearing.

⁶ On October 28, 2016, I issued an Amended Order Approving Withdrawal Request, Revocation of Certification of Representative and Withdrawing Notice of Representation Hearing, which approved the Petitioner's request to withdraw the petition, revoked any Certification of Representative that may have been issued by Director Walsh, and withdrew the Notice of Representation Hearing previously issued in this matter.

III. PARTIES' POSITIONS AND ANALYSIS AND CONCLUSIONS

The Employer disputes the validity of the procedural events described above.⁷ First, the Employer argues that the instant petition should be barred because Case 04-RC-159640 had not been withdrawn until a day after the instant petition was filed. The Petitioner asserts that the Employer is not raising any material complaints and has suffered no detriment in the manner in which the instant petition has been processed. I find that the Employer is factually mistaken in proffering this argument. The Petitioner requested to withdraw the petition in Case 04-RC-159640 on October 20, 2016, the same date that it filed the instant petition. Although the Order approving the Petitioner's withdrawal request did not issue until October 21, 2016, I actually approved the Petitioner's withdrawal request on October 20, 2016. In any event, the Order itself was but a formal notification documenting an event that took place the previous day.

The Employer further contends that Region 6 engaged in "great procedural irregularities" by failing to revoke the Certification of Representative issued by Director Walsh in Case 04-RC-159640 when I issued the October 21, 2016, Order Approving Withdrawal Request and Withdrawing Notice of Representation Hearing. It argues that my Amended Order, dated October 28, 2016, was but an attempt to correct the defects contained in the initial Order Approving Withdrawal Request dated October 21, 2016. In its brief, the Petitioner cites Section 11110 of the Case Handling Manual in support of its argument that its withdrawal request and the manner in which the Regional Director approved the withdrawal were proper. The Employer's argument in this regard fails to address the fact that when Case 04-RC-159640 was transferred from Region 4 to Region 6, I was specifically charged with handling the Objections *de novo* i.e. to process the election objections without regards to Director Walsh's Decision, with the attached Certification.

The Employer additionally asserts that the Petitioner has engaged in "forum shopping" in violation of Section 102.60(a) of the Board's Rules and Regulations by filing the instant petition in Region 6 as opposed to Region 4, the jurisdiction where the petitioned-for unit exists. It further contends that such filing has effectively blocked any potential interveners from having knowledge that the petition is pending. The Petitioner asserts that these issues were dealt with in the context of the Motion to Transfer the Case and the Petitioner's Opposition thereto, and that the Employer's proposal to now transfer the case to Region 22 is absurd. In this regard I note that during the processing of the petition in Case 04-RC-159640, the Employer, by its own Motions and Objections, argued that Region 4 should not be handling the matter even though it involved the same petitioned-for unit. Indeed, upon the Employer's Motion for Hearing or to Re-Open the Record of Case 04-RC-159640, the General Counsel addressed the Employer's concerns of bias and neutrality by transferring the case to Region 6 for further proceedings and to hear the

⁷ Additionally, the Employer contends that I erred in directing the Hearing Officer not to take testimony concerning the withdrawal of Case 04-RC-159640 but to address the issue in their briefs; which I have considered.

Employer's objections *de novo*. It is only logical and necessary that the instant petition involving the same petitioned-for unit as Case 04-RC-159640 remain with Region 6 to avoid any future objections the Employer might have regarding Director Walsh's conduct, and to avoid any unnecessary delay.

The Employer also argues that the showing of interest in support of the instant petition was tainted because the Employer's Objections in Case 04-RC-159640 had not yet been resolved at the time the showing of interest was gathered. These objections concerned Director Walsh's conduct and the potential bias that could result by the agency not making its internal disciplinary process public. The Petitioner argues that the Employer has no evidence to show that these concerns are real, and that the Employer is proceeding in bad faith by continuing to raise these issues. It should be noted that the Employer's objections were pending at the time when Region 6 was attempting to negotiate a stipulated election agreement in Case 04-RC-159640, and that the Employer made representations to Region 6 that it would not participate in any election, would not post any election notices and would not allow Board agents on its property to conduct an election because of the alleged taint caused by Director Walsh's conduct in Case 04-RC-159640. After this message was communicated to the Petitioner, the Petitioner requested withdrawal of the petition in Case 04-RC-159640, and filed the instant petition with a new showing of interest. As Case 04-RC-159640 is now closed, Director's Walsh is not handling the instant petition, and the showing of interest is not a litigable issue, the Employer's continued arguments regarding taint will not prevent the instant petition from moving forward.

The Employer made various other objections and arguments on the record regarding the investigation and handling of Director Walsh's alleged misconduct and perceived bias in regard to his involvement with the Peggy Browning Fund, including an objection to not having received from the Board the Inspector General's report concerning Director Walsh's conduct; an objection that the Inspector General's report was not properly placed under seal; and an objection that there has been collusion between Region 4 and Region 6 to create a "wall of silence" regarding Director Walsh. I shall not further examine these objections here, as they are not relevant to determining whether a question concerning representation exists and are thus not litigable in a representation case proceeding. Moreover, the record reveals no evidence of any collusion between Director Walsh and me.

Finally, I have considered whether the Notice of Election in this matter should contain language reflecting the procedural events of this case, including the Employer's Objections to election in Case 04-RC-159640, pursuant to the decision in *Lufkin Rule Co.*, 147 NLRB 341 (1964). In *Lufkin*, the Board added language to the notice of an election to "provide official notification to all eligible voters, without detailing the specific conduct involved, as to the reason why the elections were set aside." See *Lufkin*, 147 NLRB 341, at footnote 2. Here, in order to assist the petitioned-for unit employees to fully understand the reasons that the election that took place on October 1, 2015 in Case 04-RC-159640 was rendered moot, and in view of the lack of hiatus between the Petitioner's withdrawal request and the filing of the instant petition, I shall direct that the Notice of Election contain the following language:

NOTICE TO ALL VOTERS

This election is, essentially, a re-run of the election conducted on October 1, 2015, in Case 04-RC-159640. Specifically, the Petitioner withdrew the petition in Case 04-RC-159640 and filed the instant petition rather than further challenge the objections filed by the Employer to the October 1, 2015, election alleging that certain conduct of the Petitioner and an agent of the Board interfered with the employees' exercise of a free and reasoned choice. An election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

IV. DIRECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Retail, Wholesale and Department Store Union, RWDSU, United Food and Commercial Workers, AFL-CIO.

A. Election Details

The election will be held on **Tuesday, November 29, 2016 from 6:00 a.m. to 8:00 a.m., and 2:00 p.m. to 4:00 p.m.** at the employee break room located on the first floor of the Employer's Allentown facility.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **November 8, 2016**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the

strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Friday, November 18, 2016**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election, in both English and Spanish, accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are

customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: November 16, 2016



NANCY WILSON
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