UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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PAUL MURPHY, Regional Director of Region 3 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Case No.: 3:17-MC-0004

-against-

CAYUGA MEDICAL CENTER

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MEMORANDUM OF LAW/ANSWER RESPONDING TO PETITIONER'S MOTIONS TO DETERMINE PETITION FOR TEMPORARY INJUNCTION ON THE BASIS OF THE ADMINISTRATIVE RECORD AND TO SHORTEN TIME AND FOR AN EXPEDITED HEARING

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PRELIMINARY STATEMENT

On or about February 21, 2017[1], Region Three of the National Labor Relations Board ("Region Three" or "Petitioner") filed a Petition for Injunctive Relief Under Section 10(j) of the National Labor Relations Act ("NLRA" or "Act"), seeking (1) to enjoin Respondent Cayuga Medical Center ("Respondent" or "CMC") from alleged unfair labor practices identified in the petition; (2) reinstatement of two employees; and (3) that the Court's order be read to employees pending final administrative disposition of the underlying unfair labor practice complaint ("Injunction Petition").

At the same time, Region Three made two other motions: (1) to determine the petition on the basis of the administrative record in a pending unfair labor practice proceeding supplemented by affidavits ("Administrative Record Motion") and (2) for an expedited hearing ("Expedited Hearing Motion"). This Memorandum of Law/Answer is submitted by CMC in response[2] to these two motions brought by Region Three.

As discussed below, CMC does not dispute that the District Court may decide a 10(j) injunction on the basis of an administrative record and affidavits.[3] Therefore, Respondent only opposes Region Three's motion to the extent it asks this Court to grant the 10(j) petition on the basis of the underlying administrative record before it is fully developed and the parties are given an opportunity to address the administrative record through briefing. Similarly, CMC opposes

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[1] All dates occur in 2017, unless otherwise indicated.

[2] To the extent the Court's February 22 Order requires an answer from Respondent to the two motions, please consider this submission Respondent's answers to Region Three's two motions.

[3] CMC does not oppose that portion of Region Three's motion that seeks to supplement the administrative record with affidavits to address the "just and proper" prong of the test. Region Three has submitted three such affidavits and does not seek to present any additional evidence. As discussed in its Opposition to the Petition for Injunction, Region Three has failed to establish injunctive relief is "just and proper" through this evidence, and therefore, the Petition should be denied.

Region Three's Expedited Hearing Motion to the extent it requests a hearing on any matter other than Region Three's failure to establish that injunctive relief is "just and proper."

PROCEDURAL BACKGROUND

By way of background[4], this case and the underlying administrative proceeding involve the termination of two Registered Nurses ("RNs") who admittedly failed to follow CMC's mandatory procedures for confirming the accuracy of the blood to be used in a blood transfusion. The RNs also falsified medical records in relation to the incident. The failure to follow the proper procedure was reported by a patient who had received over 20 transfusions at CMC, and therefore recognized the nurses' failure to properly check her blood at her bedside.

The failure to verify the blood occurred on September 11, 2016, and both employees were suspended pending further investigation. After a thorough investigation was conducted, both employees were terminated on October 4 and 5, 2016, respectively. The Union filed a charge that these suspensions were discriminatory on September 29, 2016, and a Charge that the terminations were discriminatory on October 12, 2016. The NLRB investigated and issued its complaint on November 29, 2016. (See Petitioner's Memorandum of Points and Authorities in Support of Petition For Injunctive Relief, Docket # 1, Exs. A-D).

An administrative hearing in this matter is ongoing. Testimony was taken on January 9-12 and it resumed this Monday, February 27. It is scheduled to continue for the entire week plus the following week through its completion. Should any additional days be needed, the ALJ has set aside the week of April 3, 2017 to complete the hearing. Thus, the administrative record will be complete in the near-future. (Declaration of Raymond J. Pascucci, at ¶ 2).

[4] The facts of this case are fully set forth full in CMC's Memorandum of Law in Opposition to Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act.

ARGUMENT

The NLRB's Administrative Record Motion asks this Court to make a determination on its Injunction Petition on the basis of the underlying administrative record, as supplemented by affidavits. However, none of the administrative record has yet been submitted to the Court and Region Three does not cite to or otherwise rely on that record in its Injunction Petition. Region Three's failure to cite to or otherwise rely on the record in the underlying administrative proceeding may be explained by the fact that the hearing is ongoing and the record is not yet complete and/or that the testimony to date does not support Region Three's factual and/or legal theories. Accordingly, while Respondent does not generally oppose that the Court's determination may be made on the basis of the administrative record and supplemental affidavits, Respondent contends the granting of any injunction must be based on the complete administrative record and that no injunctive relief should be granted until the parties are allowed to address the complete administrative record through briefing.

Significantly, CMC contends that it has set forth sufficient evidence in its Opposition to the Petition for Injunction to show that the Petition should be denied even before the administrative record is developed. That is because the administrative record is necessary to evaluate only whether "reasonable cause" exists to believe an unfair labor practice has occurred, the first prong required for a 10(j) injunction to be issued. However, because Region Three has failed to establish that an injunction would be "just and proper,"[5] the second required prong for a 10(j) injunction to be issued, even if Region Three were to establish reasonable cause to believe an unfair labor practice has occurred, the Petition must be still be denied.

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[5] Region Three submits three affidavits in an attempt to establish that an injunction is "just and proper." See Petition for Injunction, Exs. F-H. Region Three does not request that it be allowed to submit any additional affidavits or evidence regarding the "just and proper" prong, and based on its insufficient showing on this required prong, the injunction should be denied.

In support of its Administrative Record Motion, Region Three cites to Kaynard ex rel. NLRB v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980) for the proposition that it is proper for this Court to base its determination "upon the transcript of sworn testimony before an administrative law judge of the Board, subject to cross examination, in the underlying administrative proceedings." See Memorandum of Points and Authorities In Support of Administrative Record and Expedited Hearing Motions, Docket # 2-1, p. 5-6. However, that case also specifically notes that the district court declined to consider the Board's petition until after the underlying administrative hearing was complete. Palby Lingerie, Inc., at 1050-51 (the District judge "postponed consideration of the [Board's 10(j)] petition pending completion of the Board's administrative hearing on the complaint. The parties later stipulated that the transcript of testimony and the exhibits introduced in the administrative hearing would constitute the record in the § 10(j) proceeding"); see also, Dunbar ex rel. NLRB v. Colony Liquor & Wine Distribs., L.L.C., 15 F. Supp. 2d 223, 231, 237, n. 13 (N.D.N.Y. 1998) (contemplates determination on the entirety of the record following the close of an administrative hearing). Accordingly, CMC maintains that Region Three's Administrative Record Motion and Expedited Hearing Motion should be dismissed to the extent they seek an injunction be granted on the administrative record as it currently stands, prior to the close of the administrative hearing before the ALJ.

The NLRB's own submissions seemingly envision the determination of the "reasonable evidence" prong on the basis of a complete administrative record – as its proposed Order provides that this Court set a date for the Board to file the administrative record at some future date, as well as submit a memorandum of law addressing the administrative record. See Proposed Order, Docket # 2-3. Accordingly, CMC seeks to confirm that no injunctive relief can be granted until both sides have the opportunity to address the administrative record and the first

"reasonable cause" prong of the 10(j) injunction test. However, the Petition may currently be denied based on Region Three's failure to establish that injunctive relief is "just and proper" under the second prong.

Similarly, while Respondent does not generally oppose Region Three's Expedited Hearing Motion, it does so only to the extent the Board is seeking an expedited hearing prior to the close of the administrative hearing unless the hearing is related to the Region's failure to establish injunctive relief as "just and proper" and the dismissal of the Petition.

CONCLUSION

For the reasons set forth above, and the significant patient safety concerns raised if a decision is made to reinstate these nurses, no injunctive relief may be granted until the administrative record is complete and both sides have had the opportunity to address the administrative record through briefs. However, the Petition may currently be denied based on Region Three's failure to establish injunctive relief is "just and proper."

Dated: March 3, 2017

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