Comprehensive at Orleans, LLC *and* Willis A. Heise, Sr. Case 03−CA−196513

January 15, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. A charge was filed by employee Willis A. Heise, Sr. on April 10, 2017, alleging that Comprehensive at Orleans, LLC (the Respondent) violated Section 8(a)(3) and (1) of the Act by refusing to grant Heise a contractual wage increase because he refrains from being a member of the Civil Service Employees Association Local 784 (the Union), thereby discriminating against him to unlawfully encourage union membership. The charge also alleged that the Respondent violated Section 8(a)(5) and (1) by unilaterally modifying and failing to provide the contractual wage increases to bargaining unit employees as agreed upon in its collective-bargaining agreement with the Union.

Subsequently, the Respondent and Charging Party Heise executed an informal settlement agreement, which was approved by the Acting Regional Director for Region 3 on July 11, 2017. Among other things, the settlement agreement required the Respondent to make whole employee Heise, and any other bargaining unit employee affected by its failure to pay the contractual wage increases, by payment of backpay incurred from January 1, 2017, until the date the Respondent begins to pay the required wage rates.

The settlement agreement also contained the following provision:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

On July 11, 2014, the compliance officer for Region 3 sent a compliance package to the Respondent's administrator containing copies of the settlement agreement and the Notice to Employees, Certification of Compliance forms to be completed by an official of the Respondent and returned to Region 3, and a detailed letter describing the Respondent's obligations under the settlement agreement. The letter requested payroll records for the period between December 31, 2016, to the present for employee Heise and any other bargaining unit employees affected by the Respondent's unlawful modification to the contractual wage provisions, including employees listed in the letter. The letter requested that the Respondent provide the payroll records no later than July 19, 2017.

By letter and email dated July 20, 2017, the compliance officer advised the Respondent of its failure to comply with the terms of the settlement agreement, and further advised the Respondent that, consistent with the terms of the settlement agreement, if its noncompliance was not cured by August 3, 2017, the Region could seek default judgment. By email dated July 25, 2017, the compliance officer again advised the Respondent of its failure to fully comply with the terms of the settlement agreement. The Respondent failed to comply.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, the Regional Director issued a Complaint Based on Breach of Affirmative Provisions of Settlement Agreement (complaint) on August 16, 2017. On September 26, 2017, the General Counsel filed a Motion for Default Judgment with the Board. On September 29, 2017, the Board issued an Order

Transferring the Proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

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

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to fully comply with the terms of the settlement agreement by failing to make whole employee Willis A. Heise, Sr., and any other affected bargaining unit employees. It has failed to pay the contractually required wage rates, calculated pursuant to the formula set forth in the settlement agreement, has failed to provide the requested payroll records that are necessary to apply this formula, and has failed to file with the Regional Director a completed report of the amounts paid.[1] Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the complaint are true.[2] Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a limited liability company with a place of business in Albion, New York, has been engaged in the operation of a nursing home.

Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $100,000, and purchases and receives at its Albion, New York, facility products, goods, and materials valued in excess of $5000 directly from points outside the State of New York.

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 healthcare institution within the meaning of Section 2(14) of the Act, and that Civil Service Employees Association Local 784 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Brian Reader held the position of the Respondent's Administrator and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time employees, part-time employees, wage-incentivized full-time employees, and wage-incentivized part-time employees, excluding all guards, watchmen, and confidential employees as defined by the Act and excluding department heads.

At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in a collective-bargaining agreement effective from January 1, 2015, through December 31, 2019. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

1. (a) About January 1, 2015, the Respondent and the Union entered into the collective-bargaining agreement described above, encompassing the terms and conditions of employment of the unit.

(b) About January 1, 2017, the Respondent failed to continue in effect all the terms and conditions of the agreement described above by modifying the wage provision.

(c) The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining.

(d) The Respondent engaged in the conduct described above without the Union's consent.

2. (a) About January 1, 2017, the Respondent failed to increase the wage of its employee Heise in conformity with the terms of the collective-bargaining agreement described above.

(b) The Respondent engaged in the conduct described above because Heise refrained from joining the Union and engaging in concerted activities, and to encourage employees to engage in these activities.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 1(b) and (d), the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

2. By the conduct described above in paragraph 2(b), the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby encouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

[1] The General Counsel indicates in his motion that the Respondent has posted the required notice to employees and provided a payment to Heise, but the accuracy of the payment cannot be verified without the requested payroll records.

[2] See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to comply with the unmet terms of the settlement agreement approved by the Acting Regional Director for Region 3 on July 11, 2017, by making Heise and any other affected bargaining unit employee whole in the manner prescribed in the settlement agreement, providing records necessary to analyze the amount of backpay due, and filing a report of backpay with the Regional Director.

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the settlement agreement to seek "a full remedy for the violations found as is appropriate to remedy such violations." However, in his Motion for Default Judgment, the General Counsel has not sought such additional remedies and we will not, sua sponte, include them.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Comprehensive at Orleans, LLC, Albion, New York, its officers, agents, successors, and assigns shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Make whole Willis A. Heise, Sr., and any other bargaining unit employee affected by the Respondent's failure to pay the contractual wage increases, by payment to them, covering the period January 1, 2017, until the Respondent starts to pay them the contractually required wage rates, in an amount to be determined by applying the following formula: (number of regular hours worked) x (12/31/16 hourly wage x .0125) + (number of contractual holiday hours or overtime hours worked) x (12/31/16 hourly wage x .01875), plus interest, to be calculated in the manner set forth in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent is responsible for paying its share of FICA and will make appropriate withholdings from the backpay portion due to Willis A. Heise, Sr. and any other affected bargaining unit employee. The Respondent will remit separate checks for the interest portion of the backpay due, from which no withholdings shall be made.

2. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

3. File with the Regional Director for Region 3 a completed "Report of Backpay Paid Under the National Labor Relations Act," which the Regional Director will file with the Social Security Administration for the purpose of allocating the payment to the appropriate calendar year(s).

Dated, Washington, D.C. January 15, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

The Board's decision can be found at www.nlrb.gov/case/03-CA-196513 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.

[3] See, e.g., *Benchmark Mechanical, Inc*., 348 NLRB 576 (2006). The General Counsel specifically requested in his motion for default judgment that the Board issue an Order "containing findings of fact, conclusions of law, ordering Respondent to comply with the terms of the Settlement Agreement by providing employee payroll records and making the employees whole in accordance with the backpay formula specified in the Settlement Agreement." Further, although the settlement agreement does not explicitly state that the Respondent must provide employee payroll records, the General Counsel stated in his motion that the Respondent has failed to provide the requested payroll records, which are needed to calculate the backpay due under the formula set forth in the settlement agreement. Accordingly, as the payroll records are essential to enforcing the unmet make-whole provision of the settlement agreement, the order includes the Board's standard language requiring the Respondent to provide such records.