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7 UNITED STATES OF AMERICA
8 NATIONAL LABOR RELATIONS BOARD
9 REGION 31

11 GOOD SAMARITAN HOSPITAL,) Case No. 31-RD-1555
12 Employer,)
13 v.) SEIU, UNITED HEALTHCARE
14 ALLEN SMITH,) WORKERS --WEST'S ANSWERING
15 Petitioner,) BRIEF IN OPPOSITION TO THE
16 and) EMPLOYER'S EXCEPTIONS
17 SEIU, UNITED HEALTHCARE WORKERS –)
18 WEST,)
19 Union.)
20

21 I. INTRODUCTION

22 On August 7, 2006, the petitioner, Allen Smith, filed a decertification petition in an effort
23 to decertify the SEIU, United Healthcare Workers – West (the “Union”) in NLRB Case No. 31-
24 RD-1555. An election was held on April 29 and March 30, 2008. Following the election, a Tally
25 of Ballots was served on the parties, showing that the Union received a majority of the votes cast in
26 the election. The Union won the election by 29 votes.

27 Following the Tally of Ballots, the employer filed eleven objections to the election. The
28 Regional Director determined that the employer’s objections raised material issues of fact and/or

1 law, and, accordingly, the Regional Director recommended that the employer's objections be
2 resolved by a hearing. A hearing regarding the Employer's objections was conducted on March 2,
3 4, and 5, 2009.

4 The employer did not submit a single shred of evidence on eight of their objections. (Tr.
5 490:2-3). On April 7, 2009, the Administrative Law Judge ("ALJ"), Lana Parke, recommended
6 that the employer's objections be overruled and that the matter be remanded to the Regional
7 Director for appropriate action. (ALJ's Rep. at p. 17). On April 21, 2009, the employer filed
8 exceptions to the ALJ's decision; the employer's exceptions are limited only to the ALJ's findings
9 regarding "Objection Number 3 in its entirety and to her finding that 'Accordingly, I recommend
10 number 3 be overruled.'" (Ers. Exceptions at p. 1 (quoting ALJ's Rep. at pp. 3-10)).

11 II. ARGUMENT

12 A. THE ALJ'S CITATION OF AND RELIANCE ON *EFCO CORP.* DOES NOT 13 SUPPORT THE EMPLOYER'S EXCEPTIONS.

14 In her decision, the ALJ cited *EFCO Corp.*, 185 NLRB 220 (1970) for two propositions.
15 First, for the proposition that the "[p]ermissible and/or obligatory union action is not objectionable
16 conduct 'simply because it is motivated by the union's desire to present itself as a more attractive
17 candidate.'" (ALJ's Rep. at p. 8 (citing *EFCO Corp.*, 185 NLRB 220, 221 (1970))). The ALJ also
18 cited the *EFCO* in a footnote for the proposition that the "Union has protected power to regulate its
19 membership affair and to resolve grievances." (*Id.* at p. 9 (citing *EFCO Corp.*, 185 NLRB at
20 221)). Contrary to the employer's assertion, the Board has never overruled these propositions, and,
21 furthermore, were not primarily relied upon by the ALJ in recommending that Objection 3 be
22 overruled.

23 Although the employer suggests that *EFCO* is no longer sound precedent, this is a complete
24 misreading of the case law. The United States Supreme Court, in *NLRB v. Savair Mfg. Co.*, 414
25 U.S. 270 (1973) overruled *EFCO* only to the limited extent that the case stood for the proposition
26 that a labor organization could condition a waiver of fees or dues on the results of the election.¹

27 ¹ The employer also cites *Children's Servs. Int'l, Inc.*, 2004 WL 1251834 (May 28, 2004) as
28 standing for the proposition that *EFCO* was overruled. *Children's Servs.* does not state that *EFCO*
was completely overruled, as suggested by the employer in its brief, nor does *Children's Servs.*
overrule *EFCO*, especially since it is a decision from an ALJ, not the Board.

1 Here, the ALJ found that the Union did not condition the dues refund on the results of the election.
2 The ALJ's citation to *EFCO* for propositions that still are good law in no way detracts from her
3 conclusion there is no evidence that the refunds had a tendency to interfere with employee's free
4 and uncoerced choice in the election; and, therefore, did not constitute objectionable conduct.
5 Accordingly, the employer's exceptions should be dismissed.

6 **B. THE ALJ PROPERLY CONCLUDED THAT THE EMPLOYER FAILED TO**
7 **SHOW THAT THE DUES REFUNDS HAD A REASONABLE TENDENCY TO**
8 **INTERFERE WITH THE EMPLOYEE'S FREE AND UNCOERCED CHOICE IN**
9 **THE ELECTION.**

10 The employer also takes exception to the ALJ's decision on the basis that she allegedly
11 required the employer to "present direct evidence in changes in employee's votes." (Ers.
12 Exceptions at p. 2). The employer completely misreads the ALJ's decision. Nothing in the ALJ's
13 decision indicates that Objection 3 was overruled because the employer failed to present direct
14 evidence in changes in employee's votes.

15 On the contrary, the ALJ distinguished from the instant matter the cases cited by the
16 employer, which involved labor organizations providing or promising to provide "employees with
17 economic benefits in exchange for their support." (ALJ's Rep. at p. 8).

18 Moreover, even assuming for the sake of argument that the Union's "refund calculations
19 were ill-founded," the ALJ concluded that the refunds did not have a tendency to interfere with
20 employee's free and uncoerced choice in the election for several reasons. (*Id.* at p. 9). The ALJ
21 found that there was "no evidence to suggest that the refunds were likely to cause fear among
22 employees or to generate a feeling of moral indebtedness to the Union." (*Id.*). Second, the ALJ
23 noted that employees anticipated dues refunds and the refund checks specified that they were
24 refund checks. Finally, the ALJ noted that there was no reason for employees to suspect or to draw
25 invidious inferences that the Union "cobbled together the refunds without regard to fiscal
26 accuracy." (*Id.*). On this basis, the ALJ concluded that it was reasonable that employees inferred
27 that the refund checks were simply an effort by the Union to "restore to employees erroneously
28 deducted dues." (*Id.*).

After reviewing the evidence and arguments presented by the parties, the ALJ found that the

1 employer did not meet the burden of demonstrating that the refunds had a tendency to interfere
2 with employees' free and uncoerced choice in the election. This conclusion was not based on the
3 lack of direct evidence showing that employees changed their votes after receiving the refunds, but
4 on the factors enumerated in *Taylor Wharton Div. Hrasco Corp.*, 336 NLRB 157, 158 (2001).
5 Accordingly, the Board should dismiss the employer's exceptions and direct the Region to certify
6 the election results.

7 **C. THE ALJ DID NOT IMPROPERLY EXCLUDE IRRELEVANT EVIDENCE, AND**
8 **ALLOW THE EMPLOYER TO INTRODUCE RELEVANT EVIDENCE RELATED**
9 **TO THE UNION DUES DISPUTE.**

10 The employer also suggests that the ALJ improperly excluded background evidence of the
11 parties' dispute regarding the refunds and evidence that allegedly proved that the Union's refund
12 checks were incorrect. The employer further claims that the ALJ relied heavily upon the
13 "purported history between the parties and based her finding against the Employer upon this
14 incomplete history." (Ers. Exceptions at p. 2). Again, the employer simply misreads the ALJ's
15 decision.

16 The ALJ admitted relevant evidence related to the dues dispute, and properly rejected
17 irrelevant evidence related to the bargaining history. Moreover, the ALJ even assumed for the sake
18 of argument that the dues refund calculations were ill-founded. (ALJ's Rep. at p. 9). The ALJ
19 found that employees were aware of the dues refund issue and, in fact, were expecting a dues
20 refund. The ALJ assumed for the sake of argument that the Union's calculation of the dues refund
21 amounts was ill-founded. Nevertheless, she concluded that the refunds did not have a tendency to
22 interfere with employees' free and uncoerced choice in the election. The bargaining history that
23 would have allegedly explained "the history of the communications" between the parties or "why it
24 took the employer considerable time to prepare the payroll information and provide it to the
25 Union,"² (Ers. Exceptions at p. 6), is simply irrelevant to the analysis; and, therefore, the ALJ
26 properly excluded evidence that focused on the basis of the dues dispute.

27 ² The employer was not prohibited from calling witnesses to explain why they wrote various
28 communications or why it took so long to prepare the calculations. In fact, the employer
introduced multiple e-mails related to the dues issue and called several witnesses related to why it
took so longer to prepare payroll information.

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III. CONCLUSION

For all the foregoing reasons, the Union requests that the Board affirm the ALJ's decision and dismiss the employer's exceptions in their entirety, and certify the election results.

Dated: April 28, 2009

WEINBERG, ROGER & ROSENFELD
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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On April 28, 2009, I served upon the following parties in this action:

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copies of the document(s) described as:

SEIU, UNITED HEALTHCARE WORKERS --WEST'S ANSWERING BRIEF IN OPPOSITION TO THE EMPLOYER'S OBJECTIONS

- BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.
- BY EMAIL** I caused to be transmitted each document listed herein via the email address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on April 28, 2009.


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