



Michigan Nurses Association

The Power of **> One**
more than

September 4, 2009

Lester A. Heltzer
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington DC 20005

RE: Case No. GR-7-RC-23277
Hackley VNS and Hospice, Inc.

Dear Mr. Heltzer:

Enclosed please find the Michigan Nurses Association's Answer to the Employer's Exceptions to the Regional Director's Report and Recommendations on Objections to Elections, an Affidavit in support of the Answer, and a Certificate of Service for the above referenced case. If you have any questions or concerns, please do not hesitate to contact me. Thank you.

Very truly yours,

Anita Szczepanski
Labor Attorney

c: Stephen Glasser, Regional Director, Region 7
John Karebian, MNA Executive Director
Jessica Salazar, MNA Labor Relations Representative
Daniel Bretz, Clark Hill
Thomas Brady, Clark Hill
Kurt Graham, Clark Hill

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD, WASHINGTON, D.C.
FROM REGION SEVEN
PETITION FOR CERTIFICATION OF REPRESENTATION

HACKLEY VNS & HOSPICE, INC.,

Respondent/Employer,

-and-

NLRB Case No. GR-7-RC- 23277

MICHIGAN NURSES ASSOCIATION,

Petitioner/Union.

**MICHIGAN NURSES ASSOCIATION'S ANSWER
TO EMPLOYER'S EXCEPTIONS TO THE REGIONAL DIRECTOR'S
REPORT AND RECOMMENDATION ON OBJECTIONS TO ELECTION**

INTRODUCTION

On May 19, 2009, the Michigan Nurses Association (MNA) filed a RC petition with Region 7 seeking to represent a bargaining unit of 52 Registered Nurses employed by Hackley VNS and Hospice, Inc. (Employer). The NLRB held an election pursuant to a stipulated election agreement on July 10, 2009. The MNA won the election and the Employer filed objections on July 16, 2009. The Regional Director, after an administrative investigation, issued a report and recommendation overruling the Employer's objections in their entirety and recommending that a Certification of Representative be issued for the MNA. On August 28, 2009, the Employer filed exceptions to the Regional Director's report and recommendations with the NLRB in Washington, D.C. This brief represents MNA's answer to the Employer's Exceptions.

ARGUMENT

The National Labor Relations Board ("Board"), through the Employer's Exceptions, is called upon to decide whether excessive brazenness is sufficient to set aside a stipulated election agreement.

It seems that the Employer, uniquely positioned to "properly understand the facts, namely that the merger was undisputedly going to happen and happen very soon after the election, and properly appreciat[ing] the uniqueness of the facts presented in this case" (Exceptions, at 5), knowingly and freely stipulated to an agreement calling for an election in an appropriate bargaining unit on July 10, 2009. The Employer now wants a "mulligan."

While the Employer submits its motives are not relevant (Exceptions, at 3), one would have to live under a rock to be blind to the possibility that the Employer entered into the stipulated election agreement believing it would win the election, and has only resorted to Plan B once it realized it would lose the election. The Regional Director concluded that the Employer did not seek to have the stipulated election agreement set aside, that there were no special circumstances justifying a rescission of the stipulated election agreement, and that the stipulated election agreement was not contrary to the Act or Board policy. Each of those conclusions is correct.

It appears that "the fourth largest fully integrated Catholic Healthcare institution in the United States" (Exception, at 2), with its army of lawyers, could not figure out how to communicate a coherent request to withdraw from the stipulation. Certainly, no such request -- written or verbal -- was communicated to MNA by the Employer, nor was MNA told by the Board that the Employer had made such a request. (Szczepanski

Affidavit, ¶ 2-3.) To MNA's knowledge, no such request was made.

Nor would it matter if it had. Whatever its motives, the Employer knowingly entered into a stipulated election agreement, and the only "unusual circumstance" that happened after it made that agreement was that MNA's support grew rather than diminished. That is not the kind of circumstance that permits setting aside a stipulated election agreement. *T & L Leasing*, 318 NLRB 324, 324 (1995); *Sunnyvale Medical Clinic, Inc.*, 241 NLRB 1156, 1157 (1979). In fact, the Employer's own claims that the "merger was going to occur shortly after the election" and "was in the final stages of the planning process and imminent," further support the lack of unusual circumstances because it proves that the Employer had the knowledge and opportunity when the RC petition was filed to request a hearing to determine what might be an appropriate unit in light of the alleged pending merger. The very circumstances the Employer asserts are special or unusual circumstances were admittedly decided "in 2008, which was for THHS to assume control of VNS and combine Mercy and VNS operations into a single facility..." (Employer's Memo of Law in Support of Election Objections at 3). The Employer freely and knowingly entered into the stipulated election agreement, agreed to what constituted an appropriate bargaining unit, and never properly requested to be released from that agreement.

MNA won the election. It is in a unit appropriate for collective bargaining. MNA's unit includes 52 registered nurses. The union that the Employer favors in this case (SEIU) represents approximately 38 employees in a mixed bargaining unit of professional, technical and service and maintenance employees. (Exceptions at 1; Szczepanski Affidavit, ¶ 4.) The Employer's assertions that a bargaining unit of 38

professional, technical and service and maintenance employees will automatically “by operation of labor law,” swallow up a bargaining unit of 52 registered nurses, who have not had the opportunity to vote as professional employees to be included in a unit with technical and service and maintenance employees, is wholly unsupported by any authority as the Employer has cited none.¹ (Exceptions at 1).² Whatever happens after this point in time, one thing is clear -- the Employer does not get to select its employees' exclusive bargaining representative. The Act guarantees “to employees the fullest freedom in exercising the rights guaranteed by this Act.” 29 U.S.C. § 159(b). And the cases make it clear that these protections were “intended by Congress as a grant of rights to the *employees* rather than a grant of power” to unions or employers. *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 704 (5th Cir. 1968).

The Board has dealt with mergers before and is capable of sorting out the effects of a merger, should it take place, at the appropriate time. The Employer does not get to enter into a legally binding agreement, however, and have the Board bail it out from that agreement simply because it does not like the election results.

¹ The Employer’s incorrectly relies on *Lucent Technologies*, 350 NLRB 168 (2007), *enforced* 563 F.3d 418 (9th Cir. 2009) in its Memorandum of Law in Support of Election Objections. The cited case is quite distinct factually as it involved a larger disparity in the number of acquired employees and it involved only one classification of employees (telephone equipment installers). (Employer’s Memo at 7). In this case, the RNs who choose MNA as their representative did not agree to be included in a unit of non-professionals as required by Section 9(b)(1) of the Act.

² While the Employer claims that the SEIU after consolidation will represent approximately 124 employees, including those RNs who have already chosen MNA as their representative, this assumes facts not proven and ignores the fact that such issues must be litigated through the Board’s proper proceedings. (Employer’s Memo at 5).

The Employer's objections are without merit and should be summarily rejected.

Respectfully submitted,

A handwritten signature in cursive script that reads "Anita Szczepanski".

Anita J. Szczepanski (P58182)
Labor Attorney
Michigan Nurses Association
2310 Jolly Oak Road
Okemos, MI 48864
(517) 349-5640

Dated: September 4, 2009

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

HACKLEY VNS & HOSPICE, INC.,

Respondent-Employer,

-and-

NLRB Case No. GR-7-RC- 23277

MICHIGAN NURSES ASSOCIATION,

Petitioner.

AFFIDAVIT OF ANITA SZCZEPANSKI

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

I, Anita Szczepanski, being first duly sworn, depose and say that I have personal knowledge of the matters set forth below, and if called as a witness, I can testify competently as to the truth of the matters asserted herein.

1. I am and have been at all material times the Labor Attorney for Michigan Nurses Association who serves as the representative for the Hackley VNS and Hospice, Inc., RC petition and all related proceedings. I serve as the sole contact person for all communications with the Employer and the Board on behalf of the MNA.

2. At no time has the Employer ever contacted me, either orally or in writing, indicating it wanted to withdraw from the stipulated election agreement. In fact, the only communications I had with the Employer's legal representative Dan Bretz was

prior to signing the stipulated election agreement for purposes of discussing the make up of the bargaining unit and MNA's position with regards to which classification of employees should be included and excluded.

3. At no time did the Board Agent assigned to this matter ever advise me that the Employer had made a request to the Board to withdraw from the stipulated election agreement. In fact, the Board Agent only indicated he received calls from SEIU concerning the potential merger but never indicated the Employer had any concerns with respect to the election, the merger and the stipulated election agreement.

4. To the best of my information and belief, the SEIU bargaining unit at Mercy Home Care is comprised of approximately 38 employees, 19 of whom are Registered Nurses and 19 of whom are made up Licensed Practical Nurses, Home Health Aids, Social Workers, Physical Therapists, Occupational Therapists, and Speech Pathologists. As a result, the SEIU bargaining unit contains both professional, technical and service and maintenance employees as defined by the Act.

5. Further Affiant sayeth not.


Anita Szczepanski

Subscribed and sworn to before me
this 3 day of September, 2009


Nadine M Peterson, Notary Public
County of: Ingham, Michigan
Acting in Ingham County, Michigan
My Com. Expires: 11-29-2012

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REPRESENTATION PETITION**

Hackley VNS & Hospice, Inc.
Respondent/Employer

Case No. GR-7-RC-23277

v.

Michigan Nurses Association,
Petitioner/Union

CERTIFICATE OF SERVICE

This is to certify that a copy of Petitioner's Answering Brief to the Employer's Exceptions to the Regional Director's Report and Recommendations on Objections to Election was served by means of electronic mail to the following individuals:

Daniel J. Bretz, Esq. (DBretz@ClarkHill.com)	Stephen Glasser, Regional Director
Thomas P. Brady, Esq. (TBrady@ClarkHill.com)	(stephen.glasser@nlrb.gov)
Kurt M. Graham, Esq. (KGraham@ClarkHill.com)	National Labor Relations Board – Region 7
Clark Hill PLC	477 Michigan Avenue – Room 300
500 Woodward Avenue, Suite 3500	Detroit, MI 48226-2569
Detroit, MI 48226	

on this 4th day of September, 2009.



Anita Szczepanski, Labor Attorney