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7 UNITED STATES OF AMERICA
8 NATIONAL LABOR RELATIONS BOARD
9 REGION 20
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11 SUTTER HEALTH SACRAMENTO SIERRA)
REGION D/B/A SUTTER ROSEVILLE MEDICAL)
12 CENTER,)

13 Employer,)

14 and)

15 KRIS MURPHREE,)

16 Petitioner,)

17 and)

18 SEIU, UNITED HEALTHCARE WORKERS – WEST,)

19 UNION.)
20

Case No. 20-RD-2475

**SEIU, UNITED HEALTHCARE
WORKERS – WEST’S BRIEF IN
SUPPORT OF ITS EXCEPTIONS
TO HEARING OFFICER’S
REPORT AND
RECOMMENDATION ON
OBJECTIONS**

21 **I. ARGUMENT**

22 **A. THE PETITIONER DID NOT ESTABLISH THAT THE UNION CLOTHED**
23 **MELISSA JONES WITH ACTUAL OR APPARENT AUTHORITY TO ACT ON**
24 **THE UNION’S BEHALF.**

25 Contrary to the Hearing Officer’s finding, the Petitioner did not demonstrate that the Union
26 clothed Melissa Jones with actual or apparent authority to act on the Union’s behalf. The burden
27 of proving agency rests with the party asserting agency. *See Millard Processing Servs., Inc.*, 304
28 NLRB 770, 771 (1991), *enf’d*, 2 F.3d 258 (8th Cir. 1993). In her report, the Hearing Officer simply

1 relied upon the testimony of two witnesses who testified that they believed that Ms. Jones was a
2 Union Shop Steward, along with the fact that one of the witnesses testified that Ms. Jones was “a
3 recognizable figure pictured in Union flyers.” (Hearing Officer’s Report at p. 12).

4 The fact that two employees (out of 559 employees who voted) testified that they believed
5 Ms. Jones to be a Union Steward does not establish that the Union clothed Ms. Jones with actual or
6 apparent authority. The Petitioner could certainly have subpoenaed Ms. Jones as a witness, but
7 failed to do so. The Petitioner could have called as a witness an employee who had Ms. Jones
8 represent them in the capacity as a Shop Steward. The Petitioner could have called as a witness a
9 management official who may have dealt with Ms. Jones in her capacity as a Union agent.¹ And
10 the Petitioner could have attempted to establish Ms. Jones’ status as a Union agent through the
11 testimony of the Union’s party representative by calling him as a witness. None of these things
12 were done by the Petitioner.

13 The unnecessary length to which the Hearing Officer travelled in order to find that Ms.
14 Jones was an agent of the Union is underscored by her finding that the testimony regarding Ms.
15 Jones’ status as an agent of the Union “is buttressed by . . . [the] affirmation that Jones is a
16 recognizable figure pictured in Union flyers.” (Hearing Officer’s Report at p. 12). The fact that
17 Ms. Jones appeared in Union campaign literature is not relevant and has no probative value as to
18 her status as a Union agent.

19 The Hearing Officer found that Ms. Jones had actual or apparent authority to act on behalf
20 of the Union based upon the thinnest of evidence: the testimony of two employees who believed
21 that Ms. Jones was a Union agent and the fact that Ms. Jones appeared in pro-Union flyers. The
22 Petitioner failed to meet her burden of proving that Ms. Jones was an agent of the Union.
23 Accordingly, the Board should find that Ms. Jones was not an agent of the Union, and that the
24 election should not be overturned based on Ms. Jones’ conduct.

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27 ¹ Interestingly, at the hearing, the Petitioner designated as her party representative a management
28 official; it is not only troublesome but unclear as to why the Hearing Officer or employer agreed
to this arrangement, given that such conduct is unlawful.

1 **B. THE CONDUCT OF GALEN SMITH DOES NOT WARRANT SETTING ASIDE**
2 **THE ELECTION.**

3 The Union does not take exception to the Hearing Officer's finding that Galen Smith is an
4 agent of the Union; in fact, he testified that he was an agent of the Union. However, the Union
5 does take exception to the Hearing Officer's finding that Mr. Smith's conduct warranted setting
6 aside the election.

7 The Hearing Officer's conclusion that Mr. Smith's conduct warrants setting aside the
8 election results is solely based on testimony of a witness that she, herself, questioned the credibility
9 of. By contrast, she discounts the testimony of Mr. Smith merely because he is a "representative of
10 and with obvious loyalties to the Union." (Hearings Officer's Report at p. 16). Despite finding
11 that Pavel Efremov's testimony was, at best, an exaggeration, the Hearing Officer credited him
12 over Smith in order to support her recommendation that the election results be set aside.

13 By contrast, Smith testified straight-forward. He readily admitted that he was an agent of
14 the Union; but, most importantly, he admitted that he approached workers in the voting line and
15 exchanged social pleasantries with them. And yet simply because Smith works for the Union, the
16 Hearing Officer discredited his testimony and credited the testimony of Efremov over Smith's
17 testimony. Had the hearing officer credited Smith over Efremov, the election results would not
18 have been set aside.

19 Moreover, by crediting Efremov, who the Hearing Officer had already determined
20 exaggerated, she credited his version of how many eligible voters were in line. Had she not done
21 so, she would not have concluded that there were 100 employees exposed to the objectionable
22 conduct. (See Hearing Officer's Report at p. 20). The Union won the election by a 102 vote
23 margin; it is likely, given the testimony of the other witnesses, that only a fraction of eligible voters
24 witnessed Smith, or even, Jones speak with eligible voters. Surely not a number to have effected
25 the results of the election, even if every single one of those voters changed their mind as a result of
26 what they witnessed.

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II. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board reject the Hearing Officer's Report and Recommendations, and certify the results of the election.

Dated: December 17, 2009

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: 

BRUCE A. HARLAND
Attorneys for Union
SEIU, United Healthcare Workers – West

121867/554421

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 December 17, 2009, I served on the following parties in this action:

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copies of the document(s) described as:

**SEIU, UNITED HEALTHCARE WORKERS – WEST’S BRIEF IN
SUPPORT OF ITS EXCEPTIONS TO HEARING OFFICER’S REPORT
AND RECOMMENDATION ON 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 FACSIMILE I caused to be transmitted each document listed herein via the fax number(s) 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 December 17, 2009.


Rhonda Fortier-Bourne

121867/554465