

**Beverly Enterprises—Pennsylvania, Inc. d/b/a Beverly Manor of Reading<sup>1</sup> and District 1199P, Service Employees International Union, AFL–CIO, CLC.** Case 4–CA–27383–1

December 21, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge<sup>2</sup> filed on August 17, 1998, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 30, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 4–RC–19181. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On October 29, 1998, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On November 3, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

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

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

<sup>1</sup> As set forth in the Respondent's answer to the complaint and acknowledged by the General Counsel in his Motion for Summary Judgment, Beverly California Corporation is actually the parent corporation of the corporation that owns and operates Beverly Manor of Reading. The correct name of the Employer is as set forth above.

<sup>2</sup> On August 17, 1998, the Union also filed a separate unfair labor practice charge, Case 4–CA–27383–2, alleging that the Respondent is refusing to provide information. The Board has suspended the prosecution of that case pending resolution of the instant Motion for Summary Judgment.

The Respondent's reliance on the adverse decisions of the Third and Sixth Circuits in charge nurse cases fails to consider that the Board's position has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (9th Cir. 1998), enfg. 323 NLRB No. 200 (July 3, 1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (Oct. 15, 1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (July 10, 1996) (not reported in Board volumes). Moreover, we do not agree that the Third Circuit's holding in *Passavant Retirement and Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. to 323 NLRB 598 (1997), that licensed practical nurses in question were statutory supervisors by virtue of their grievance adjustment authority, is necessarily dispositive of this case. The *Passavant* court stated that it was "not creating a per se rule that LPNs are supervisors" and that each case required its own detailed factual analysis. *Id.* at 249. Here, the evidence of grievance adjustment authority cited in the Respondent's request for review was limited to two incidents. The Regional Director reasonably concluded that the record, including these incidents, failed to establish that the nurses "play a significant role in grievance proceeding" and, instead, showed that "in practice all grievances have been submitted at higher levels."

Accordingly, we grant the Motion for Summary Judgment.<sup>3</sup>

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation, has been engaged in providing nursing care, inpatient medical and professional care, and services for the elderly, sick, and infirm at the facility involved herein known as Beverly Manor of Reading, located at 21 Fairlane Road, Mount Penn, Pennsylvania (Reading facility).

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000 and purchased and received at the Reading facility goods

<sup>3</sup> Member Hurtgen did not participate in the underlying representation case. He does not necessarily agree with it. However, he agrees that the Respondent does not raise any new factual matters, and thus summary judgment is appropriate. Similarly, although there are court decisions which may well be inconsistent with the legal conclusion reached in the representation case, Member Hurtgen agrees, for institutional reasons, not to challenge that representation case in this certification-testing 8(a)(5) case. See *Pittsburgh Plate Glass*, supra. Finally, and for the same reasons, Member Hurtgen does not pass on the effort herein to further support the conclusion reached in the representation case.

valued in excess of \$10,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Certification*

Following the election held April 30, 1998, the Union was certified on May 11, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

**Included:** All full-time and regular part-time Licensed Practical Nurses (LPNs) and LPN Charge Nurses employed by Respondent at its Reading, Pennsylvania facility.

**Excluded:** Registered Nurses, professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. *Refusal to Bargain*

On or about July 10, 1998, the Union, by letter, requested that the Respondent bargain, and, since on or about July 10, 1998, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSIONS OF LAW

By failing and refusing on and after July 10, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, Beverly Enterprises-Pennsylvania, Inc. d/b/a Beverly Manor of Reading, Mount Penn, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District 1199P, Service Employees International Union, AFL-CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

**Included:** All full-time and regular part-time Licensed Practical Nurses (LPNs) and LPN Charge Nurses employed by Respondent at its Reading, Pennsylvania facility.

**Excluded:** Registered Nurses, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mount Penn, Pennsylvania, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 10, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX  
 NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government  
 The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District 1199P, Service Employees International Union, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

**Included:** All full-time and regular part-time Licensed Practical Nurses (LPNs) and LPN Charge Nurses employed by us at our Reading, Pennsylvania facility.

**Excluded:** Registered Nurses, professional employees, guards, and supervisors as defined in the Act.

BEVERLY ENTERPRISES—  
 PENNSYLVANIA, INC. D/B/A BEVERLY  
 MANOR OF READING