

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

HEALTH ACQUISITION CORP.,  
d/b/a ALLEN HEALTH CARE SERVICES  
Employer

and

Case No. 29-RC-9462

COMMUNITY AND SOCIAL AGENCY  
EMPLOYEES UNION, D.C. 1707, A.F.S.C.M.E., AFL-CIO  
Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy J. Gladstone, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Health Acquisition Corp., d/b/a Allen Health Care Services, herein called the Employer, is a New York corporation, with its principal office and place of business located at 175-20 Hillside Avenue, Jamaica, New York, where it is engaged in operating licensed home health care agencies, providing para-professional health care services to the aged and infirm. During the past year, in the

course and conduct of its operations, the Employer derived gross revenues in excess of \$250,000, and purchased and received at its Jamaica, New York facility, goods and supplies valued in excess of \$5,000 directly from points located outside the State of New York. The parties also stipulated that the Employer is a health care institution within the meaning of Section 2(14) of the Act.

Based on the stipulations and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and is a health care institution within the meaning of Section 2(14) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. In a letter to the Regional Director dated May 1, 2000, the Employer requested an investigation into the validity of the Petitioner's showing of interest. As background, it should be noted that in a prior case (Case No. 29-RC-9419)<sup>1</sup>, the regional office mistakenly gave a copy of the voter eligibility list ("the Excelsior list") to the Petitioner shortly after it was received from the Employer, even though the Petitioner, at that point, had yet to submit an adequate showing of interest for the expanded unit. The Region thereafter instructed the Petitioner to return the Excelsior list, which it did.

In the instant case, the Employer alleges that the Petitioner improperly used a copy of the Excelsior list to solicit additional authorization cards from unit employees, and that the Petitioner's showing of interest is therefore "tainted." In its letter, the

---

<sup>1</sup> In an unpublished Order dated May 12, 2000, the Board denied the Employer's Request for Review of the Regional Director's Order approving the Petitioner's withdrawal of its petition in Case No. 29-RC-9419 without prejudice.

Employer offers to provide employee-witnesses to testify that they received correspondence from the Petitioner at home, although they had never given their address to the Petitioner. The Employer also submitted copies of documents allegedly mailed to unit employees using the Excelsior list. One document is a blank union authorization card. The other document, entitled "DC 1707 UNION SURVEY for Allen Health Care Employees" (attached hereto as Appendix A) states, in part, the following: "If you have received this letter you are on the Allen Health Care Employee Payroll list and you may be owed money by the company." This survey urges employees to fill out the bottom of the form, including their name, address, telephone number, hours of work and other information. The survey form also urges employees to fill out the union card, i.e., the other document enclosed.

The Employer asserts that the first sentence of the survey form is an admission that Petitioner used the "payroll list" to conduct its mailing to employees. Furthermore, the Employer asserts that the statement in the first sentence that employees "may be owed money" is false and misleading, and that it implicitly promises to recover such money if employees sign the enclosed authorization card. In sum, the Employer alleges (1) that the Petitioner improperly used the Excelsior list to contact solicit additional authorization cards at a time when it was not entitled to the list and, (2) the mailing itself constituted a fraudulent inducement to sign authorization cards, and an implicit promise to provide legal services in exchange for union support.

In considering the Employer's letter, I have declined to conduct further investigation regarding the showing of interest. In my view, even if the Petitioner used the Excelsior list to contact employees as described above, the showing of interest was

not thereby "tainted." First of all, merely using an Excelsior list to contact employees is not *per se* objectionable, absent evidence that the contact did not coerce employees or otherwise prejudice their free choice. Finrock Motor Sales, 203 NLRB 541 (1973). As for the content of the mailing itself, it appears that the statement in the first sentence that employees "may be owed money" is, at worst, a misrepresentation. It is well established that the Board does not probe into the truth or falsity of parties' campaign statements, and that false statements or misrepresentations, although not condoned, will not cause an election to be set aside. Midland National Life Insurance Co., 263 NLRB 127 (1982); AWB Metal Inc., 306 NLRB 109 (1992).<sup>2</sup> Thus, even if the statement that employees are "owed money" is false (about which I do not make any determination), that false information would not, by itself, taint the showing of interest. Furthermore, I reject the Employer's contention that the statement constitutes a fraudulent "inducement" to sign the authorization card. On its face, the survey makes no connection whatsoever between signing an authorization card and any implicit or explicit promises. The form simply asks employees who have not filled out a union card to "please send the card back, too," referring to a separate document. Thus, even if the survey is construed as an implied promise to obtain money owed to employees (for example, by filing a Fair Labor Standards Act claim), such promise is in no way conditioned upon signing a card or limited to those employees who have signed authorization cards. Thus, unlike the Savair line of cases, the "promised benefit" is not limited only to "those who have signed up with the union before an election." NLRB v. Savair Manufacturing Co., 414 U.S. 270,

---

<sup>2</sup> A narrow exception to the Midland National rule, regarding forged documents, does not apply in the instant case.

274 (1973). In short, I find that, even if the Petitioner used the Excelsior list to contact employees, the content of the mailing itself did not coerce employees, constitute a "fraudulent inducement," or otherwise improperly interfere with their decision regarding whether to sign an authorization card.

Finally, it should be noted that the Board's showing-of-interest policy is intended to avoid wasting the agency's resources, in cases where there is inadequate employee interest to warrant holding an election.<sup>3</sup> The showing of interest requirement is essentially an administrative "shield" intended to conserve resources, rather than a "sword" to defeat employees' statutory right to choose whether they want to be represented for collective bargaining purposes. Ultimately, an election is the best way for employees to express their wishes in this regard. Although this office acknowledges its error in furnishing the Excelsior list in connection with Case No. 29-RC-9419, the Petitioner -- and the employees who may desire an election -- should not now be prejudiced now by our error. On one level, it would be unfair to assume that the Petitioner would not have been able to reach those same employees by another method, such as asking their co-workers for names and addresses. Second, if the Petitioner's alleged use of the Excelsior list is considered to have "tainted" the showing of interest, it is not clear, hypothetically, how long any such "taint" would last. Would the Petitioner be forever limited to contacting only the employees it already knew of *before* obtaining the list? It is obvious that these issues would be administratively difficult to resolve, and that continued investigation and litigation of the showing of interest at this point would

---

<sup>3</sup> Section 101.18(a) of the Board's Statements of Procedure cites the Board's "administrative experience" that "the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees."

only waste more resources. On balance, considering all the foregoing factors, including the policies underlying the showing-of-interest requirement, the unfairness of punishing unit employees for an administrative mistake and, most importantly, the interest in protecting employees' right to express their desires in an election, further pursuit of any showing-of-interest issues herein is not warranted.

In short, I have concluded that, even if the Petitioner used the Excelsior list obtained in connection with the prior case to send the mailing described above, the mailing itself did not coerce or defraud employees, and therefore any resulting authorization cards would not be tainted. Furthermore, in considering the policy reasons underlying the showing-of-interest requirement, I conclude that employees' Section 7 rights would not be served by dismissing the petition on this basis.

Accordingly, I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Community and Social Agency Employees Union, D.C. 1707, AFSCME, AFL-CIO, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time "home health aides and personal care aides" employed from the Employer's facilities in Jamaica, NY, Lindenhurst, NY, and Mount Vernon, NY,<sup>4</sup> excluding all other employees, registered nurses, licensed practical nurses, bookkeepers, maintenance employees, guards and supervisors as defined in the Act. Although the parties did not stipulate to the appropriateness of the unit, the Employer stated at one

---

<sup>4</sup> As indicated above, the Employer is engaged in providing home health care. Thus, the vast majority of employees actually work in patients' homes. References to the Employer's facilities in Jamaica, Lindenhurst and Mount Vernon, NY, therefore refer to the Employer's administrative offices, from which employees are assigned, rather than their actual workplace.

point during the hearing that the home health aides and personal care aides have a distinct community of interest because, among other factors, they work in clients' homes, whereas other employees work at the Employer's administrative facilities. In any event, I note that units of home health care aides and personal care aides have been found appropriate by the Board. *See, e.g., People Care, Inc.*, 299 NLRB 875 (1990).<sup>5</sup>

Accordingly, I find that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All full-time and regular part-time<sup>6</sup> home health aides and personal care aides, employed by the Employer from its facilities located at 175-20 Hillside Avenue, Jamaica, NY; 222 Wellwood Avenue, Lindenhurst, NY; and 6 Gramaton Avenue, 4th floor, Mount Vernon, NY, but excluding all other employees, registered nurses (RNs), licensed practical nurses (LPNs), bookkeepers, maintenance employees, guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending

---

<sup>5</sup> In its post-hearing brief, the Employer argues that since the unit issue was not litigated at the hearing, there is no evidence upon which the Region can determine the appropriateness of the unit sought. However, this argument puts the proverbial cart before the horse. A hearing is required only when there is a genuine issue in dispute. Under NLRB Statement of Procedures Sec. 101.20(c), hearings are intended to afford parties an opportunity "to present their respective *positions* and to produce the significant facts in support of their contentions" (emphasis added). In the instant case, the Employer has not alleged that a unit limited to home health aides and personal care aides would be inappropriate -- not at the hearing, and not in its post-hearing brief. As noted in *Bennett Industries, Inc.*, 313 NLRB 1363 (1994), a party's refusal to take a position at a hearing while attempting to introduce evidence may signify a lack of good faith, and the Board may therefore limit litigation to areas actually "in dispute."

<sup>6</sup> As determined in a prior case (29-RC-9419), all "on-call" employees who worked an average of at least four (4) hours per week in the 13 week period preceding the issuance of this Decision will be eligible to vote as regular part-time employees. *Tri-State Transportation Co., Inc.*, 289 NLRB 356 (1988); *Brattleboro Retreat, supra*, 310 NLRB at 627 (eligibility formula for "per diem" employees).

immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Community and Social Service Agency Employees Union, D.C. 1707, AFSCME, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of election eligibility lists, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the lists available to all parties to the election. In addition to a "master list" of all unit employees, the Employer shall file separate sub-lists corresponding to each of the three facilities. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such lists must be received in the Regional

Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before May 23, 2000. No extension of time to file the lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by May 30, 2000.

Dated at Brooklyn, New York, this 16th day of May, 2000.

/S/ DAVID POLLACK

---

David Pollack  
Acting Regional Director, Region 29  
National Labor Relations Board  
One MetroTech Center North, 10th Floor  
Brooklyn, New York 11201

324-4020  
324-8000  
378-4200  
378-9033-5000

470-8300