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Manhattan Health Clean/US Health Clean *and* Harold Gomez *and* Senorina De La Luz. Cases 2–CA–37829 and 2–CA–38134

February 27, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon a charge and amended charges filed by Harold Gomez on August 9, September 28, and October 25, 2006, respectively, and a charge filed by Senorina de la Luz on March 7, 2007, the General Counsel issued the original consolidated complaint on June 29, 2007, against Manhattan Health Clean/US Health Clean, the Respondent. The consolidated complaint alleged that the Respondent violated Section 8(a)(4), (3), and (1) of the Act.

Thereafter, the Respondent and the Charging Parties entered into an informal settlement agreement that was approved by the Regional Director for Region 2 on September 18, 2007. Among other things, the settlement agreement required the Respondent to pay employee Harold Gomez backpay in the amount of $9792 in monthly installments according to a schedule outlined in the agreement.

The settlement agreement contained the following default provision:

> The Charged Party agree [sic] that in case of noncompliance with any of the terms of this Settlement Agreement by the Charged Party, the Regional Director may issue a complaint based upon the allegations of the charge(s) in the instant case(s) which were found to have merit, and/or reissue the complaint previously filed in the instant case(s). Thereafter, the General Counsel may file a Motion for Summary Judgment with the Board on the allegations of the just issued complaint concerning the violations of the Act alleged therein. The Charged Party understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings of fact, conclusions of law, and an Order on the allegations of the aforementioned complaint. On receipt of said Motion for Summary Judgment, the Board shall issue an Order requiring the Charged Party to show cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party defaulted upon the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is customary to remedy such violations, including, but not limited to the remedial provisions of this Settlement Agreement. The parties further agree that the Board's Order may be entered thereon ex parte and that, upon application by the Board to the appropriate United States Court of Appeals for enforcement of the Board's Order, judgment may be entered thereon ex parte and without opposition from the Charged Party.

Since April 28, 2008, the Respondent has failed to remit backpay payments in the amounts and on the terms set forth in the settlement agreement. By letter dated May 30, 2008, the Respondent acknowledged noncompliance with the settlement agreement and requested an extension of time to make the remaining payments due under the terms of the agreement. On July 28, 2008, the Board agent for the Region asked the Respondent to inform him when the Respondent would submit the remaining payments owed under the settlement agreement. The Board agent also informed the Respondent that failure to respond promptly could result in the revocation of the settlement agreement and the reissuance of the consolidated complaint. Thereafter, on July 29, 2008, the Respondent informed the Region that it had closed its business, was going bankrupt, and did not have any assets.[1]

Accordingly, pursuant to the terms of the settlement agreement, on December 16, 2008, the Regional Director

[1] The undisputed assertions in the General Counsel's Motion for Summary Judgment indicate that the Respondent did not provide the Region with any evidence that it had sought bankruptcy protection or any other evidence of its inability to comply with the settlement agreement. The motion further indicates that the Region's efforts to determine whether a petition in bankruptcy had been filed did not yield any results. However, even if the Respondent is in bankruptcy, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *United International Investigative Services,* 340 NLRB 1360 (2003); *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works,* 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Ahrens Aircraft, Inc. v. NLRB,* 703 F.2d 23 (1st Cir. 1983).

issued an Order revoking settlement, reissued the consolidated complaint, and filed a Motion for Summary Judgment with the Board. On December 29, 2008, 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 no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment[2]

According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent has failed to comply with the terms of the settlement agreement by failing to remit the agreed-upon backpay payments to employee Harold Gomez. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the allegations of the consolidated complaint are true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business located at 244 Madison Avenue, Suite 271, New York, New York, has been engaged in providing cleaning services to various health clinics in the New York City area.

Annually, in the course and conduct of its business operations described above, the Respondent provided services valued in excess of $50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that District 6 International Union of Industrial, Service, Transport and Health Employees (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Jose Oscar Alvarado held the position of supervisor, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act.

About February 12, 2007, at the Harlem Health Center, 133 Morningside Avenue, New York, New York, the Respondent, by Jose Oscar Alvarado, interrogated employees regarding their participation in an investigation being conducted by the National Labor Relations Board in Case 2–CA–37829.

On about July 21 and 31, and August 2, 2006, the Respondent, through its officers, agents, and representatives, issued written warnings to Harold Gomez.

On about August 3, 2006, the Respondent, through its officers, agents, and representatives, discharged Harold Gomez, and since that date has failed and refused to reinstate Gomez.

The Respondent engaged in the conduct described in the two preceding paragraphs because Gomez supported and assisted the Union and engaged in concerted activities for the purpose of collective bargaining, and to discourage employees from engaging in such activities.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their participation in an investigation conducted by the National Labor Relations Board, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.[3]

2. By disciplining and discharging employee Harold Gomez for supporting and assisting the Union and for engaging in concerted activities for the purpose of collective bargaining, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(3) and (1) of the Act.

4. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Harold Gomez, we shall order the Respondent to make him whole for any loss of

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] We find it unnecessary to pass on whether the Respondent's interrogation of its employees also violated Sec. 8(a)(4) of the Act because the remedy for that violation would be essentially the same as the remedy for the 8(a)(1) violation. See, e.g., *Alcoa, Inc*., 352 NLRB 1222 fn. 4 (2008); *Benjamin Coal Co*., 294 NLRB 572 fn. 2 (1989).

earnings and other benefits suffered as a result of the Respondent's unlawful action against him. In this regard, the Respondent agreed in the settlement agreement that it would pay Gomez $9792 in backpay to cover the period from his discharge to the date of the settlement agreement. As indicated above, the Respondent has not paid Gomez in the amounts and on the terms set forth in the settlement agreement, and therefore we shall order the Respondent to pay him the remaining amounts owed under the terms of the agreement.

We find, however, that the backpay due Gomez should not be limited to these amounts. As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could issue an Order "providing full remedy for the violations found as is customary to remedy such violations, including, but not limited to the remedial provisions of this Settlement Agreement." Thus, under this language, it is appropriate to provide the "customary" remedies of reinstatement, full backpay, expungement of the Respondent's personnel records, and notice mailing.[4]

The additional backpay due shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). However, because we shall order the Respondent to pay the liquidated backpay amount specified in the settlement agreement, the applicable backpay period will commence on September 18, 2007, the day the Regional Director approved the settlement agreement. We find it necessary to impose this limitation to prevent an unintended double recovery for the period running from the date that Gomez was discharged to the effective date of the settlement agreement.

We shall also order the Respondent to offer Gomez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

In addition, to the extent that it has not already done so, the Respondent shall be required to remove from its files all references to the unlawful discipline and discharge of Gomez and notify him in writing that this has been done and that the unlawful discipline and discharge will not be used against him.

Finally, we shall order the Respondent to preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

ORDER

The National Labor Relations Board orders that the Respondent, Manhattan Health Clean/US Health Clean, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their participation in investigations conducted by the National Labor Relations Board.

(b) Disciplining or discharging or otherwise discriminating against employees for supporting and assisting the Union, for engaging in concerted activities for the purpose of collective bargaining, or for discouraging employees from engaging in these and other protected activities.

(c) 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) Remit to Region 2 the remaining backpay owed to Harold Gomez in accordance with the September 18, 2007 settlement agreement, and make Gomez whole for any loss of earnings and other benefits suffered since September 18, 2007, as a result of the Respondent's unlawful action against him, with interest as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, offer Harold Gomez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge of Harold Gomez, and within 3 days thereafter notify him in writing that this has been done and that the unlawful discipline and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

[4] See *L.J. Logistics, Inc.*, 339 NLRB 729, 731 (2003). Although the settlement agreement indicates that Gomez waived his right to reinstatement, the settlement has been set aside. Thus, we shall order the Respondent to offer Gomez reinstatement as part of the customary remedy for his unlawful discharge. In addition, although the settlement agreement required the Respondent to mail a notice to employees, the Motion for Summary Judgment is silent regarding the Respondent's compliance with that requirement. Further, the settlement notice differs in material respects from the notice that is warranted in view of our findings and Order herein. Accordingly, we find that a notice-mailing remedy is appropriate here.

nated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[5] to all employees who were employed by the Respondent at any time since July 21, 2006.

(f) 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.

Dated, Washington, D.C. February 27, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Mailed 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees regarding their participation in investigations conducted by the National Labor Relations Board.

WE WILL NOT discipline, discharge, or otherwise discriminate against employees for supporting or assisting the Union, District 6 International Union of Industrial, Service, Transport and Health Employees, for engaging in concerted activities for the purpose of collective bargaining, or to discourage employees from engaging in these and other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL remit to Region 2 the remaining backpay owed to Harold Gomez in accordance with the September 18, 2007 settlement agreement, and make Gomez whole for any loss of earnings and other benefits suffered since September 18, 2007, as a result of his unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Harold Gomez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and discharge of Harold Gomez, and WE WILL, within 3 days thereafter, notify him in writing, that this has been done and that the discipline and discharge will not be used against him in any way.

MANHATTAN HEALTH CLEAN/US HEALTH CLEAN

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."