1988

Highland Decision; Series I; File 86

Juanita Hunter

#86 HIGHLAND Decision

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Executive Director

Constituent of The American Nurses Association

NEW YORK STATE NURSES ASSOCIATION
2113 Western Avenue, Guilderland, N.Y. 12084, (518) 456-5371

November 9, 1988

TO: Board of Directors

FROM: Martha L. Orr, Executive Director

It is with very great pleasure that I enclose for your information a copy of the November 9, 1988 decision of the United States Court of Appeals Second Circuit in the case of Highland Hospital versus the National Labor Relations Board. By this decision, Highland Hospital's petition to set aside the NLRB's order requiring the Hospital to execute the collective bargaining agreement with NYSNA is denied, and the NLRB's cross-petition for enforcement of its order is granted.

Circuit Court Judge Newman's opinion is clear, concise and unqualified in its confirmation that NYSNA's structure effectively insulates its collective bargaining activity from supervisor influence. The decision and the opinion are excellent, and right on target.

As I am sure you know, the staff and I are extremely pleased. This decision is a significant and valuable reaffirmation of the Association's right to represent nurses for collective bargaining purposes and the Association's ability to preserve the right of nurses to representation of their choice.

MLO:WMB:b
Enclosure

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007 (212) 791-0103

ELAINE B. GOLDSMITH
Clerk

9th November, 1988

RE : HIGHLAND HOSP V NLRB

Docket Nos: 88-4081- 88-4093

Gentlemen:

The court has rendered a decision in the above-entitled case. The decision of the district court has been
Petition to set aside respondent's order DENIED; respondent's cross-petition for enforcement granted by published signed opinoin filed.
Judgment filed.

A copy of the opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with §0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue only to the District Court in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH, Clerk
by

Donna J. Morgan.
Deputy Clerk

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

183, 323 - -- August Term 1988

Argued: October 3, 1988 Decided: November 9, 1988

Docket Nos. 88-4081, 88-4093

- - - - - - - - - - - - - - - - - - - -

HIGHLAND HOSPITAL,
Petitioner,
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
Cross-Petitioner,

NEW YORK STATE NURSES ASSOCIATION,
Intervenor.

- - - - - - - - - - - - - - - - - - - -

Before: FEINBERG, Chief Judge, NEWMAN and GARTH,* Circuit Judges.

Petition for review of an order of the National Labor Relations Board requiring petitioner to execute a collective bargaining agreement with the intervenor.

Petition to set aside respondent's order denied; respondent's cross-petition for enforcement granted.

Eric S. Lamm, New York, N.Y. (Howard G. Estock, Brian J. Clark, Clifton Budd Burke & DeMaria, New York, N.Y., on the brief), for petitioner.

Richard A. Cohen, Natl. Labor Relations Board, Wash., D.C. (Rosemary M. Collyer, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Assoc. Gen. Counsel, Aileen A. Armstrong, Deputy Assoc. Gen. Counsel, Perlstein, Supervisory Atty., National Labor Relations Board, Wash., D.C., on the brief, for respondent.

Richard J. Silber, Albany, N.Y. (Harder, Silber and Gillen, Albany, N.Y., on the brief), for intervenor.

*The Honorable Leonard I. Garth of the Third Circuit, sitting by designation.

JON O. NEWMAN, Circuit Judge:

Highland Hospital ("Highland") petitions for review of an order of the National Labor Relations Board ("NLRB") requiring Highland to sign and execute an agreed-upon collective bargaining agreement with the New York State Nurses Association ("NYSNA"), the certified bargaining representative of non- supervisory registered nurses employed at the hospital. Highland asserts that NYSNA is an illegal bargaining representative under section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2) (1982), because supervisory nurses participate in NYSNA's governing structure.[1/]

This marks the second time that NYSNA has been before this Court because of questions as to the organization's eligibility to be a legal bargaining representative. In an earlier case, NLRB v. North Shore University Hospital, 724 F.2d 269 (2d Cir. 1983) (hereafter North Shore I), we expressed concern about various features of NYSNA's general organizational structure that suggested imminent danger of supervisory influence on employee collective bargaining. The record in this case provides substantial evidence

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that NYSNA has effectively changed its structure to allay the concerns expressed in North Shore I and has insulated its collective bargaining activities from supervisor influence. Accordingly, we deny Highland's petition and grant the NLRB's cross-petition for enforcement of its order.

Background

NYSNA is a multi-purpose professional organization whose membership is open to all licensed registered nurses -- supervisory and non-supervisory -- in New York State. It operates a variety of programs related to nursing care. One of these programs, the Economic and General Welfare Program ("EGW"), includes a collective bargaining arm for member non-supervisory nurses. The collective bargaining arm of a particular NYSNA unit is a Council of Nursing Practitioners ("CNP"). Membership in a CNP is restricted to non-supervisory nurses employed at the particular health facility involved in collective bargaining negotiations. Ultimate bargaining authority rests with the CNP. The CNP is assisted by staff professionals employed by the EGW program. The EGW program staff reports to the program director who, in turn, reports to the NYSNA executive director. The executive director determines what information, if any, is transmitted to the thirteen-member board of directors -- NYSNA's ultimate governing body, which is elected by the full NYSNA membership.

A collective bargaining agreement between Highland and NYSNA was signed in 1983 and lasted until April 1984. Negotiations

for a successor contract agreement commenced in the spring of 1984 and continued into 1985. A tentative agreement was reached in February 1985. In March 1985, after the remand in North Shore I, the NLRB found NYSNA to be an unlawful bargaining representative, in light of this Court's North Shore I analysis. North Shore University Hospital, 274 N.L.R.B. 1289 (1985) (hereafter North Shore II).

In the wake of North Shore I and North Shore II, Highland filed a motion with the NLRB to revoke NYSNA's certification as bargaining representative. On June 10, 1985, Highland withdrew its recognition of NYSNA and refused to execute a new collective bargaining agreement. NYSNA subsequently filed an unfair labor practice complaint alleging refusal to bargain, and the NLRB consolidated that complaint with the hospital's decertification motion. The issue before the NLRB in the consolidated proceeding was whether changes that had occurred in NYSNA's structure since North Shore II sufficed to satisfy the standards of section 8(a)(2). For the reasons set forth below, we believe that the NLRB had ample evidence upon which to conclude that NYSNA is now a legal bargaining representative.

Discussion

As this Court noted in North Shore I, the structure of a multi-professional organization, such as NYSNA, brings into potential conflict two basic policies promoted by the National Labor Relations Act. On one hand, the Act assures employees freedom of

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choice in selecting a bargaining representative. See NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 425-26 (1947). On the other hand, the Act also seeks to prevent agents of the employer from dominating or interfering with the activities of employees' bargaining representatives. See NLRB v. Link-Belt Co., 311 U.S. 584, 588 (1941). These ostensibly complementary policies may come into conflict in a multi-professional organization where supervisors participate actively in the group's governing structure. See North Shore I, supra, 724 F.2d at 272.

The NLRB's test for illegal supervisor influence is drawn from its ruling in Sierra Vista Hospital, Inc., 241 N.L.R.B. 631 (1979). In challenging NYSNA's certification as a bargaining representative, Highland must show that "'danger of a conflict of interest interfering with the collective bargaining process is clear and present.'" Id. at 633 (quoting NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968)). In North Shore I, we reaffirmed the Sierra Vista test but held that the inquiry as to a conflict of interest in a multi-professional organization should not be limited to inspection of actual bargaining units for evidence of demonstrated interference. Rather, the NLRB's inquiry "must extend to all relevant circumstances, including the governing structure and actual practice of the organization seeking certification as a bargaining representative so far as participation by supervisors is concerned." North Shore I, supra, 724 F.2d at 273.

In North Shore I, this Court expressed concern about

several features of NYSNA's general organizational structure: (1) the board of directors included supervisors; (2) the nominating committee, which has considerable influence in selecting NYSNA officers, was chaired by a North Shore Hospital supervisor; (3) the EGW program staff, who advise the CNP on collective bargaining matters, served at the pleasure of the board of directors; (4) an EGW advisory council and a task force on NYSNA's no-strike policy included supervisors as members; (5) supervisors spoke out about union matters at membership meetings; and (6) there appeared to be resistance on NYSNA's part to cooperating with employers to insure that section 8(a)(2) was not violated. We did not determine that each of these aspects of the prior arrangement necessarily established a violation of section 8(a)(2) but only that the combination of factors then present raised sufficient doubts to warrant further NLRB consideration. We remanded the case to the NLRB for reconsideration of its grant of NYSNA's certification consistent with this broader inquiry.

Since our ruling in North Shore I, there have been significant changes in NYSNA's governing structure, as well as clarifications in the record upon which this Court based its prior decision. Although supervisors (none of whom works at Highland) continue to sit on the NYSNA board of directors, the evidence is now clear that the board of directors is not involved in, nor can it interfere with, collective bargaining matters. It does not vote on collective bargaining agreements, and it does not have authority

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to force a CNP to approve an agreement. The board of directors also has no direct contact with the EGW program. The executive director, who is the only one to report to the board about labor activities, does not inform the board on the particulars of organizing, bargaining, or the handling of grievances.

The nominating committee, which exercises considerable influence in selecting NYSNA officers and committees, does not include any Highland supervisors. Furthermore, NYSNA has instituted a self-nomination procedure so that any member bypassed by the nominating committee may still run.

The EGW program staff serves at the pleasure of the executive director and has no direct contact with the board of directors. The EGW advisory council, which apparently never had any connection to collective bargaining activities, has in any case been abolished. The no-strike task force has been abolished, and participation in task forces relating to labor activities is now limited to those eligible to be in a CNP -- thus excluding all supervisors.

Highland emphasizes that at meetings of NYSNA's general membership each supervisor has a vote and voice equal to that of a non-supervisor. However, we are not prepared to hold that this general participatory right, which is an inherent feature of multi-professional organizations, renders NYSNA an illegal bargaining representative. See North Shore I, supra, 724 F.2d at 275; NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535, 1541 (11th Cir.

1984). NYSNA has enacted internal regulations to prevent supervisors from voting on collective bargaining agreements or becoming involved in bargaining activities. This restriction on supervisor participation is a significant element in NYSNA's overall effort to comply with section 8(a)(2) of the National Labor Relations Act.

Highland also argues that NYSNA had failed to modify its organizational structure at the time that Highland withdrew recognition on June 10, 1985. Our review of the record satisfies us that while some minor modifications to NYSNA's structure took place after June 10, 1985, the major substantive structural changes, which differentiate this case from North Shore I, took place prior to that date.

Applying the substantial evidence standard to the NLRB's determination that NYSNA is a legal bargaining representative under section 8(a)(2), we are satisfied that the Board has properly applied the Sierra Vista test within the general framework suggested by North Shore I. Accordingly, Highland's petition to set aside the NLRB's order is denied, and the NLRB's cross-petition for enforcement of its order is granted.

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FOOTNOTE

1/ Section 8(a)(2) restricts agents of the employer from interfering with or dominating employees' bargaining representative in order to ensure arm's length collective bargaining. It provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer --
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .

29 U.S.C. § 158(a)(2) (1982).