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**Community Options NY, Inc. and Albert Maul Teekasingh and Community and Social Agency Employees' Union, District Council 1707, American Federation of State, County and Municipal Employees Union.** Case 29–RD–066106

July 16, 2013

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The National Labor Relations Board has considered an objection to an election held November 10, 2011, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 33 for and 21 against the Union, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Certification of Representative.

The hearing officer recommended sustaining the Employer's Objection 2, which alleges that during the decertification election campaign the Union offered to waive dues for the first 6 months after the effective date of a collective-bargaining agreement, in a coercive attempt to influence the vote. Contrary to the hearing officer, we find no merit in the Employer's objection. Accordingly, we shall overrule the objection and issue a certification of representative.<sup>1</sup>

Facts

The Union was certified in November 2009 to represent approximately 60 employees who work at four of the Employer's facilities in the New York City area. The parties subsequently reached final agreement on the terms of an initial contract, which required employee ratification to take effect. The employees ratified the contract at a meeting held on October 20, 2011.<sup>2</sup>

Meanwhile, a decertification petition had been filed on October 5, and the vote was held on November 10. During the period leading up to the contract ratification vote

<sup>1</sup> The Employer filed no exceptions to the hearing officer's overruling of the only other objection that was scheduled for hearing.

<sup>2</sup> All dates are in 2011, unless stated otherwise. The contract was not asserted as a bar to the election in this matter.

and the decertification election, an issue arose regarding the payment of dues. The Employer informed employees in a "Negotiations Update" memo that "tentative agreement" had been reached on various contract terms, including a "Union Security Clause [that] requires all employees to pay Union dues within thirty (30) days of the ratification of the Agreement or thirty (30) days from the start of employment."

Concerned about this requirement, employees asked Union Official Michael Green about the dues obligation at a union meeting preceding the October 20 ratification vote. Green provided employees with copies of the agreement, which contained a union-security provision, but he told the employees that the Union was waiving the payment of dues for 6 months. Green and other union officials informed employees during the ratification session that the waiver was to offset the negative impact of the limited wage increases that had been negotiated in the contract. The employees voted to approve the contract.

The parties continued to campaign on the issue of union dues prior to the November 10 decertification election. The Employer distributed a leaflet to employees asserting that the annual cost of their dues would exceed their contractual yearly wage increase and urging them to vote against the Union. The Union countered with leaflets promoting the benefits of their new contract; the leaflet reminded employees that dues were being waived for 6 months.

The Hearing Officer's Findings and the Union's Exceptions

The hearing officer found that the Union's waiver of dues was objectionable as it constituted a tangible economic benefit intended to induce employees to vote for the Union. In support, the hearing officer relied in particular on precedent concerning union waivers of accrued back dues during the critical period preceding a decertification election. *Go Ahead North America*, 357 NLRB No. 18 (2011).

The hearing officer interpreted the contractual union-security clause as taking effect on October 20, when the contract was ratified, so that each employee owed 3 weeks of back dues—totaling between \$18 and \$30 per employee, depending on the employee's wage rate—as of the November 10 election. Alternatively, assuming that the union-security clause was not effective until 30 days after the contract's ratification, i.e., November 20, the hearing officer found that the 6-month dues waiver was nevertheless objectionable as a tangible economic benefit under *Go Ahead North America*, supra.

The Union argues on exception that under the first proviso to Section 8(a)(3), it could not enforce the union-security clause until 30 days after the effective date of

the contract. Because dues were not owed by employees as of the election date, the Union argues that *Go Ahead* is distinguishable and that the waiver here did not confer an objectionable tangible economic benefit. For the reasons discussed below, we agree that the waiver was not objectionable.

### Analysis

#### I. THE DUES WAIVER WAS NOT A FINANCIAL BENEFIT<sup>3</sup>

The Board has long held that:

[a] union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election. See *Mailing Services*, 293 NLRB 565, 565 (1989)(free medical screenings); *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235–1236 (1984)(jackets); *General Cable Corp.*, 170 NLRB 1682, 1682–1683 (1968)(gift certificates); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967)(life insurance). It is, like an employer, barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled. *Mailing Services*, supra. [Footnote omitted.]

*Go Ahead North America*, slip op. at 1–2.

In *Go Ahead*, the Board found that the union committed objectionable conduct during the critical period before a decertification election by offering employees a waiver of “delinquent” dues, i.e., dues that had accrued but that the employer had not deducted from employees’ paychecks as required by the collective-bargaining agreement and the employees’ dues withholding authorizations. Although the union knew that the employer had failed to deduct and remit the dues, it did not offer to waive their payment until after the decertification petition was filed, 6 months after the dues obligation had accrued. The Board concluded:

In these circumstances, . . . employees reasonably would infer that the purpose of the Union’s expressed willingness to forgive the obligation was to induce them to support the Union [and] therefore . . . the back-dues waiver constituted an objectionable grant of a tangible financial benefit.

357 NLRB No. 18, slip op. at 2.

A waiver of union dues will constitute an objectionable financial benefit, however, only if the employees

<sup>3</sup> Because, as discussed in part II below, Member Block would find the dues waiver unobjectionable, she finds it unnecessary to pass on whether the waiver constituted a financial benefit and, therefore, declines to join part I of the decision.

already have an enforceable legal obligation to pay the dues. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 418 (2004). In such circumstances, the waiver provides an immediate enhancement of the employees’ economic position. Accordingly, the Board found the waiver objectionable in *Go Ahead*, where the employees’ obligation to pay back dues was enforceable under the union’s constitution. Similarly, waivers offered during the critical period constituted objectionable financial benefits in *McCarty Processors*<sup>4</sup> and *Loubella Extendables*,<sup>5</sup> because the employees in both cases were obligated under existing contractual union-security clauses to pay their back dues.

Conversely, forgiveness of an unenforceable debt provides employees no financial benefit, and is not objectionable. In *Andal Shoe*,<sup>6</sup> for example, employees who were suspended from the union based on their dues delinquency were not obligated under the union’s constitution to pay back dues upon rejoining, nor did the union typically seek to collect them. The union’s offer to waive the payments during the critical period was therefore not objectionable.

Here, as in *Andal Shoe*, when the Union announced the 6-month waiver at the October 20 contract ratification meeting, employees owed no dues to the Union. Indeed, there was never a contractual obligation to pay dues that did not include the Union’s simultaneous offer to waive them for the 6-month period. Both outcomes were controlled by the employees. Only by ratifying the contract would they incur an obligation to pay dues, and any such obligation would be subject to an automatic 6-month waiver. Because there was no enforceable obligation to pay dues at the time the Union announced the waiver, we find that the waiver did not constitute an objectionable financial benefit.<sup>7</sup>

#### II. THE DUES WAIVER WAS NOT OBJECTIONABLE

Even assuming, however, that the dues waiver could be viewed as a financial benefit, we would nonetheless

<sup>4</sup> 286 NLRB 703 (1987).

<sup>5</sup> 206 NLRB 183 (1973).

<sup>6</sup> 197 NLRB 1183 (1972).

<sup>7</sup> To the extent that the hearing officer found that the obligation to pay dues under the union-security clause took effect immediately when the contract was ratified on October 20, she erred. “Under Section 8(a)(3) of the Act, a union-security clause must give employees at least 30 days to become union members. This 30-day grace period commence[s] with the date that agreement . . . becomes effective, i.e., the execution date.” *Typographical Union No. 16 (Continental Composition)*, 268 NLRB 347, 348–349 (1983). The union-security clause in the ratified contract “track[s] the statutory language” of Sec. 8(a)(3) and necessarily encompasses the 30-day grace period. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46–47 (1998). As such, the contractual obligation to pay dues took effect 30 days after October 20.

find it unobjectionable. The Board has held that the “mere fact that a payment in cash or in kind has been made to an eligible voter during a preelection campaign does not require a *per se* finding that the employee’s right to make a free and uncoerced choice of a bargaining representative has been destroyed.” *Gulf States Cannerys*, 242 NLRB 1326, 1327 (1979), *enfd.* 634 F.2d 215 (5th Cir. 1981), *cert. denied* 452 U.S. 906 (1981). Rather, the Board determines whether the benefit has the impermissible “tendency to influence the outcome of the election,” considering “whether the size of the benefit conferred bears a proper relationship to the actor’s stated purpose in conferring it, the number of employees receiving the benefit, the views of the employees concerning the purposes of the payments, and the timing of the payments.” *Id.* at 1326. See also *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984). When the timing of the benefit is such that it is announced or conferred during the critical period, the Board draws an inference that the benefit is coercive, but permits the granting party “to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefit.” *B & D Plastics*, 302 NLRB 245, 245 (1992).

Here, the announcement of the dues waiver came during the critical period. Accordingly, we infer that it was coercive. We further find, however, that the Union rebutted that inference by explaining that the timing of the announcement was linked to the ratification vote, not the decertification election. Rather than showing impermissible influence on the outcome of the decertification election, the factors discussed above support the finding that the waiver had the permissible tendency to influence the outcome of the ratification election.<sup>8</sup>

First, the credited testimony of union representative Green demonstrates that the articulated purpose of the waiver was to promote ratification of the contract. As discussed above, Green testified that when he and other officials announced the waiver at the October 20 ratification vote, they explained that it was a response to the limited wage increase the Union had obtained for employees in the newly negotiated collective-bargaining agreement.<sup>9</sup> Indeed, Green made the announcement at the ratification meeting in response to questions from unit employees in the process of deciding how to vote on ratification and tied it directly to the contractual wage rate.

<sup>8</sup> No party contends that an offer to waive dues for the purpose of influencing the contract ratification vote is objectionable.

<sup>9</sup> There is no contention that the amount of the dues waiver was inconsistent with its stated purpose.

In assessing how a reasonable employee would perceive the announcement of the dues waiver, we find it significant that the Union never initiated any discussion of the dues waiver in the context of the decertification campaign. The Employer injected the dues-waiver issue into the election campaign. The Union discussed it only in response to the Employer’s campaign literature raising the total cost of union dues for employees. This sequence of events took place after the Union had announced the waiver and specifically linked it to the contract ratification and the wage increase provided for in the contract. The Union’s subsequent reference to the waiver in response to the Employer’s campaign assertions concerning dues was unlikely to create an impression among employees that the Union had granted the waiver for the purpose of influencing their votes in the decertification election.

Based on the foregoing factors, we cannot conclude that employees would have reasonably inferred that the purpose of the waiver was to induce them to support the Union in the decertification election. Rather, the reasonable inference in these circumstances was that the waiver was offered as an encouragement to vote in favor of contract ratification. Accordingly, we find that (1) the Union rebutted the inference that the timing of the announcement of the dues waiver had a reasonable tendency to influence the decertification election and (2) consequently, the dues waiver was not objectionable,<sup>10</sup> even assuming that it constituted a financial benefit.<sup>11</sup> Therefore, we overrule the Employer’s objection.

<sup>10</sup> Nor do we agree with the hearing officer’s finding that the Union’s waiver of initiation fees was objectionable. This conduct was not alleged in Employer’s Objection 2.

<sup>11</sup> Chairman Pearce and Member Griffin do not suggest, by drawing this distinction, that the dues waiver would necessarily have been objectionable if its principal purpose had been to influence employees in the decertification election. In *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), the Court recognized as “legitimate” a union’s interest in waiving an initiation fee in order to remove the “artificial obstacle” to employee support for the union arising from the employees’ natural “reluctan[ce] to pay out money before the union had done anything for them.” *Id.* at 274 fn. 4 (internal quotation marks and citation omitted). The waiver in *Savair* was objectionable, despite its legitimate underlying purpose, because it was limited to those who joined the union before the election. Here, the Union sought legitimately to delay the employees’ dues payment obligation until after they had received the benefits of representation for a period that was appropriate in view of the unexpectedly small wage increase that had been negotiated. The waiver applied to all employees and was not conditioned on their demonstration of support for the Union prior to the election. See, e.g., *L.D. McFarland Co.*, 219 NLRB 575, 576 (1975), *enfd.* 572 F.2d 256 (9th Cir. 1978). Therefore, the waiver would not necessarily have been objectionable even if it had been directed principally at the employees’ vote in the decertification election. Member Block finds it unnecessary to pass on whether the waiver would have been objectionable had it

## CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of valid ballots have been cast for Community and Social Agency Employees' Union, District Council 1707, American Federation of State, County and Municipal Employees Union, and that it is the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time Community Support Staff, Senior Community Support Staff, Day Habilitation Specialists, Senior Day Habilitation Specialists, Day Habilitation Trainers, Senior Day Habilitation Trainers and Maintenance employees employed at the Woodruff Facility located at 161-165 Woodruff Ave., Brooklyn, New York; the Van Buren Facility, located at 292 Van Buren Street, Brooklyn, New York; the Jamaica Facility located at 111-51 156th Street, Jamaica, New York; and, the Woodside Facility, located at 62-60 60th Street, Woodside, New York, but excluding all nurses, case managers, job coaches, coordinators, office staff, clericals, professionals, guards and supervisors, as defined by the Act.

Dated, Washington, D.C. July 16, 2013

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Mark Gaston Pearce, Chairman

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Richard F. Griffin, Jr., Member

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Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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been directed principally at the employees' vote in the decertification election.