

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Legacy Health System and Service Employees International Union, Local 49.** Case 36–CA–10299

July 13, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 11, 2009, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board<sup>1</sup> has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions, as modified below, and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

We agree with the judge that the Respondent’s prohibition against an employee holding dual part-time positions—one job in a unit represented by a union and the other job not represented by a union—constituted a hiring policy that discriminated on the basis of Section 7 considerations and violated Section 8(a)(3) and (1). However, in affirming the judge’s finding of a violation, we find it unnecessary to rely on his finding that the dual-employment policy was “inherently destructive” of the employees’ Section 7 rights under the theory of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34

<sup>1</sup> 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. See *Snell Island SNF LLC v. NLRB*, \_\_\_ F.3d \_\_\_, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed \_\_\_ U.S.L.W. \_\_\_ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08–1162, 08–1214 (July 1, 2009).

<sup>2</sup> In the first sentence of the paragraph preceding the judge’s “Conclusions of Law,” the word “awarded” should be substituted for the word “denied” in order for that sentence to read correctly.

<sup>3</sup> We have modified the judge’s recommended Order to correct a typographical error and to more closely conform to the Board’s standard remedial language. We have also substituted a new notice that corrects certain editorial and spelling errors.

(1967). Even assuming that the dual-employment policy had a “comparatively slight” impact on the employees’ Section 7 rights under *Great Dane*,<sup>4</sup> the burden still rests with the Respondent to establish a “legitimate and substantial business justification” for the policy. In accord with this approach, taken by the Board in *National Football League*, 309 NLRB 78, 81 (1992), we find that Respondent failed to establish, as required by *Great Dane*, the required business justification for maintaining and enforcing the policy and we therefore affirm the 8(a)(3) and (1) violation.

The Respondent asserts that because the terms and conditions of employment governing bargaining unit employees differ from those of nonunit employees, its policy was justified by the need to avoid the “legal uncertainties” that would arise if it permitted dual employment in a unit and nonunit position. The judge rejected this argument, finding that these asserted legal uncertainties—including such questions as whether the employee working both the unit and nonunit position would be covered by a particular collective-bargaining agreement’s overtime, disciplinary, and grievance provisions—were “more in the nature of administrative or labor relations concerns” that could have been resolved through collective bargaining rather than unilaterally implemented. Accordingly, the judge concluded that the Respondent’s proffered defense failed under *Great Dane* as a legitimate and substantial business justification for the policy.

We reject the Respondent’s proffered business justification defense for a reason different from the judge’s and thus find it unnecessary to rely on his rationale. We rely on the judge’s finding that the Respondent’s policy prohibiting dual employment in a unit and nonunit position “does not prohibit employees from simultaneously holding positions within two bargaining units, whether or not represented by the same union.” This finding, to which the Respondent did not except, is critical because it undermines the rationale of “legal uncertainties” on which the Respondent seeks to justify its policy.

The essence of the judge’s finding is that the Respondent permits employees to hold two bargaining unit positions, even in units represented by different unions, i.e.,

<sup>4</sup> Under the policy, employees hired into union-represented positions are ineligible to later apply for part-time, nonunion-represented positions, and employees hired into nonunion-represented positions are similarly ineligible to later apply for part-time, union-represented positions. Thus, as the judge found, an employee’s future, part-time employment opportunities—and the supplemental pay, additional benefits, and/or potential for job advancement that attend those opportunities—are limited by whether or not the employee’s existing position is union-represented. Accordingly, we find that the policy has at least a “comparatively slight” impact on employees’ Sec. 7 rights to seek and support union representation.

in separate bargaining units. But allowing such employment would present the Respondent with precisely the same legal uncertainties that it assertedly sought to avoid by maintaining its policy prohibiting employees from holding a bargaining unit job and a nonunit job. Indeed, Human Resources Consultant Mary Starmont acknowledged that permitting an employee to work in separate bargaining units under different collective-bargaining contracts “would be a problem for the same reasons that the holding (sic) a non-union position and a union position.” Her testimony is confirmed by a review of the union contracts in evidence covering various units of the Respondent’s employees. These contracts contain different employment terms and do not specify which contractual provision pertaining to a particular employment term would apply to the employee when working in one of the units.<sup>5</sup>

In light of the Respondent’s failure to establish the existence of a coextensive prohibition against dual employment under different union contracts, which the Respondent concedes would create the same “legal uncertainties” that assertedly justified its prohibition against dual unit/nonunit employment, we find that the Respondent has not established a legitimate and substantial justification for its policy that outweighs the adverse effect that it has on the Section 7 rights of its employees, who are effectively penalized with reduced employment opportunities for having chosen union representation. Accordingly, under *Great Dane’s* “comparatively slight” standard, we affirm the judge’s finding that the Respondent’s policy violated Section 8(a)(3).<sup>6</sup>

<sup>5</sup> It is noteworthy that Starmont did not contend, in response to a question by the judge, that the Respondent prohibits employees from working in two units under different contracts. Rather, she stated that she did not “know that it’s ever come up.” However, neither had the issue of dual unit/nonunit employment “come up” before the three unit discriminatees here applied for second part-time nonunit positions in the early months of 2008. Yet the Respondent’s policy prohibiting such employment had existed for many years prior to 2008, according to Starmont, when it was applied to the three discriminatees. There is no evidence that the Respondent had a similar pre-emptive policy prohibiting employees from working two jobs in separate units.

<sup>6</sup> Under this standard, it is unnecessary to decide, after determining that the Respondent has failed to establish its business justification defense, whether the policy was motivated by antiunion considerations. See *National Football League*, supra at 81, fn. 15.

Although Chairman Liebman agrees that it is unnecessary to decide this issue, she nonetheless agrees with the judge that the Respondent’s policy was unlawful under *Great Dane’s* “inherently destructive” standard, and she rejects the Respondent’s argument that there can be no violation because the judge found no proof of antiunion motivation behind its policy. As explained in *Great Dane*, if employer conduct is deemed inherently destructive of Sec. 7 rights, the conduct itself bears its own indicia of unlawful intent and “no proof of antiunion motivation is needed” to find a violation. 388 U.S. at 34. As the Board has explained, “if the employer’s conduct was inherently destructive of union

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Legacy Health System, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a discriminatory policy that deprives employees of job opportunities on the basis of whether their current position is or is not a union-represented position.

(b) Refusing to hire employees into positions for which they would have been hired but for the Respondent’s discriminatory hiring policy.

(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) Within 14 days from the date of this Order, rescind the discriminatory hiring policy, and notify its employees and the unions with which it has collective-bargaining agreements that the policy has been rescinded.

(b) Within 14 days from the date of this Order, offer employees Kathryn Milojevic, Nicole Hauge, and William Youngren the part-time positions for which they applied and would have been hired but for the unlawful enforcement of its hiring policy against them or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(c) Make whole Kathryn Milojevic, Nicole Hauge, and William Youngren in the manner set forth in the remedy section of the judge’s decision.

(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 designated 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, post at its various facilities copies of the attached notice marked

---

rights, the Board could legitimately draw the inference that the employer had the proscribed motivation.” *Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1058 (D.C. Cir. 2003) (emphasis in original). That is what the judge did in finding that the Respondent’s policy was unlawful.

“Appendix.”<sup>7</sup> Copies of this notice, on forms provided by the Regional Director for Region 19, 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 facilities 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 October 30, 2007.

(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. July 13, 2009

\_\_\_\_\_  
Wilma B. Liebman, Chairman

\_\_\_\_\_  
Peter C. Schaumber, Member

(SEAL) 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 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 with us on  
your behalf  
Act together with other employees for your  
benefit and protection

<sup>7</sup> If this Order is enforced by a judgment of the United States court of appeals, the wording 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.”

Choose not to engage in any of these protected activities

WE WILL NOT maintain and enforce a policy that discriminates against employees by denying you the right to simultaneously hold both a union-represented and nonunion-represented position within our organization.

WE WILL NOT refuse to hire current employees for additional part-time positions on the basis of union considerations.

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 notify the unions with which we have collective-bargaining agreements that we have rescinded the policy.

WE WILL offer employees Kathryn Milojevic, Nicole Hauge, and William Youngren the part-time positions for which they applied and would have been hired, and WE WILL make them whole, with interest, for any loss of earnings and other benefits they may have suffered.

LEGACY HEALTH SYSTEM

*Adam D. Morrison and Lisa Dunn, Esqs.*, for the General Counsel.

*Adam S. Collier, Esq. (Bullard, Smith, Jernstedt, and Wilson)*, of Portland, Oregon, for the Respondent.

*Giles Gibson, Esq. (Carney, Buckley, Hayes, Marsh & Gibson)*, of Portland, Oregon, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Portland, Oregon, on December 9, 2008. The charge was filed by Service Employees International Union, Local 49 (the Union) on April 30, 2008. Amended and second amended charges were filed by the Union on May 5 and July 21, 2008, respectively. Thereafter, on September 30, 2008, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Legacy Health System (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent is a State of Oregon corporation with places of business in and around Portland, Oregon, where it operates acute care hospitals and rehabilitation centers. In the course and conduct of its operations the Respondent annually derives gross revenues in excess of \$250,000, and annually purchases and receives at its Portland, Oregon facilities goods valued in excess of \$50,000 directly from points outside the State of Oregon. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

*A. Issues*

The principal issue in this proceeding is whether the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act by maintaining and enforcing a practice or policy of prohibiting employees from simultaneously holding both unit and nonunit positions.

*B. Facts*

The Respondent, a hospital system based in the Portland metropolitan area, operates five hospitals, a research facility, and a number of clinics and labs. It employs a total of over 9000 employees. It maintains seven different collective-bargaining agreements with various labor organizations, including two agreements with the Union herein. There are also many positions and/or departments that are not represented by a labor organization.

For a number of years the Respondent has maintained an unwritten policy or practice of prohibiting employees from simultaneously holding both bargaining unit and nonbargaining unit positions. This policy however does not prohibit employees from simultaneously holding positions within two bargaining units, whether or not represented by the same union; nor does it prohibit employees from simultaneously holding two nonbargaining unit positions. Such occurrences happen regularly.

There is no record evidence that the Respondent has ever advised its employees or the various unions that represent its employees of the existence of such an exclusionary policy, except as set forth below.

While the length of time this policy has been in existence is unknown, the record shows it has been in existence for at least approximately the last 9 years. Also unknown is the rationale underlying the practice; however Respondent's witnesses presumed that it was designed as a practical and expedient means of avoiding difficulties in administering the wage and benefit programs, and grievance/disciplinary procedures, which differ

according to whether or not such matters are governed by collective-bargaining agreements. The parties agree that such matters, including the terms and conditions of employment of an employee who is both a unit and nonunit employee, are mandatory subjects of bargaining.

The Union did not become aware of the policy until so notified by a unit employee who had been told by a human resources representative that her application to hold a part-time nonunit position had been denied because she currently occupied a unit position.

Employee Kathryn Milojevic is a certified nursing assistant (CNA) who has worked for the Respondent at its Emanuel Hospital facility for 13 years. She is a unit employee. Employees have access to Respondent's online job postings, and may apply for jobs online. In January 2008, Milojevic applied for a part-time position as a massage therapist at another facility operated by the Respondent. Thereafter she was scheduled for an interview with Manager Cheryl Doten. According to Milojevic the interview ended "very positively." However the following day, January 15, 2008, Milojevic received an email from Doten, as follows:

Our recruiter said: Unfortunately because she [Milojevic] is in a union position at Emanuel [Hospital] we cannot put her in a non union position. Therefore, we are unable to proceed with reference checks, etc. for the on-call position. Thank you for coming in to meet with us today. We wish you well in your future.

Milojevic then followed up on this rejection and was referred to Carole Ann Rogge, Employee Relations Consultant. Rogge sent Milojevic the following email dated January 31, 2008:

I'm sorry for your situation. I understand your disappointment. You are currently under a bargaining unit contract in your CNA position. You could apply for any other positions covered by the union contract, but you cannot have one position under a union contract, and one not under a contract. I can explain this further if you would like to give me a call.

Milojevic did phone Rogge about the matter. Rogge reiterated the substance of the foregoing email, and also stated, according to Milojevic, "if I were to work there in that non-represented position, that the union could take over that department or that job because I'm already in the union and that's not what they want."<sup>1</sup> According to Milojevic, this is the only rationale Rogge gave, and Rogge did not mention anything about the possible confusion or difficulties to the Respondent that could result from an employee having both a unit and nonunit job.

Rogge testified that during her phone conversation with Milojevic she relayed her understanding of the rationale behind the Respondent's policy, as follows:

We had a practice of not allowing employees to hold both union and non-union positions because we could not administer

<sup>1</sup> The complaint does not allege that this statement by Rogge is an independent violation of Sec. 8(a)(1) of the Act, or that the Respondent's policy when originally adopted was discriminatorily motivated. Therefore, it appears unnecessary to determine whether or not the statement was made.

all the collective bargaining contractual agreements in a non-bargaining position.

Further, she did not tell Milojevic that if she went to work in a nonunion position, the Union could take over that position.

Nicole Hauge, while continuing her classes in nursing school at a nearby community college, began working for the Respondent in February 2008 as a part-time emergency room technician, a unit position. In April 2008, she applied for an externship position, a paid position within the Respondent's "Bridge to Practice Program," so that when she graduated from nursing school in 2009 she would be hired by the Respondent as a registered nurse. Shortly after submitting her application she received a phone call from Jamie Dreyer, Respondent's recruitment consultant, who explained that the Respondent had a policy against employees holding both a union and a nonunion position. Dreyer advised her that she had the option of choosing one position or the other, but not both. Hauge, fearful of leaving her secure job before knowing whether she would be hired as an extern, decided to withdraw her application and remain at her current position.

William Youngren began working for the Respondent in 1989, and is currently a secretary in Neonatal Intensive Care, a unit position. On July 24, 2008, he applied for a part-time position as a hearing screening tech in the audiology department, a nonunion position. Apparently he was initially accepted for the position as he received a phone call from Shauna Anderson, manager of the department, and he and Anderson agreed upon a time for Youngren's training the following week. That same day, however, Youngren received a call from someone in Respondent's human resources department who told him he was ineligible for the position "because they just don't mix a union/non-union job because . . . it was a messy thing and they didn't like to do it." Youngren asked whether it was possible to make an exception because there was an immediate need to have someone administer infant hearing screening tests to babies before they are released from the hospital. He was told there could be no exceptions to the policy. He was given no other reason for being rejected.

The Union, upon learning of the policy from unit members and confirming with the Respondent that such a policy did in fact exist, filed the instant charge. Further, it requested bargaining over the issues presented by its unit members occupying dual positions, one within and one outside the coverage of the collective-bargaining agreement. After extended negotiations the Respondent and Union resolved their differences, agreed that unit members would not be precluded from holding nonunit positions, and incorporated the understanding in the 2008–2011 collective-bargaining agreement between Legacy Emanuel Hospital and the Union, as Article 20.7, entitled "Holding a Position Inside and Outside of the Bargaining Unit at the Same Time." However the policy continues to apply to employees who are not Emanuel Hospital unit employees represented by the Union.

#### Analysis and Conclusions

It may reasonably be concluded that the Respondent's policy is discriminatory and inherently destructive of important employee rights: the right to be free from union-based hiring criteria

for job opportunities. Under the policy, once an employee has obtained an initial job with the Respondent, his or her future part-time employment opportunities become limited by whether or not that initial job happens to be a union-represented position. Thereafter, unless the employee elects to relinquish his current position, the employee is "locked in" to either union or nonunion-represented jobs for the duration of his or her employment.

The substantial and adverse effects of the policy are graphically shown by the situations in which employees Milojevic, Hauge, and Youngren found themselves: they were unable to supplement their income, advance their careers, and/or enjoy other benefits of part-time employment of their choosing simply because they happened to occupy unit positions. Conversely, the future job opportunities of employees who happen to occupy nonunit positions are similarly affected because of union considerations. Moreover, the policy is neither innocuous or limited in effect: it applies to some 9000 employees and affects the long-term livelihoods of those who could otherwise have availed themselves of the opportunity for dual employment within the Respondent's organization.<sup>2</sup>

Accordingly, it is clear that the adverse effects of the discriminatory conduct on employees rights is substantial, rather than "comparatively slight." Therefore no proof of antiunion motivation is needed to establish a violation of the Act, and the burden shifts to the employer to produce evidence of legitimate and substantial business justification for its conduct. *Great Dane Trailers*, 388 U.S. 26 (1967).

In *Honeywell, Inc.*, 318 NLRB 637 (1995), the Board, relying on *Great Dane Trailers*, supra, found a violation in a clearly analogous "inherently destructive" situation. In that case the employer, which was undergoing downsizing, maintained a discriminatory policy which allowed unrepresented employees to bid on certain available unrepresented positions at other locations of the employer (including subcontractors of the employer), while precluding union-represented employees from bidding on the same jobs.

The Respondent in its brief distinguishes *Honeywell* from the instant situation, maintaining that in *Honeywell* the union-represented employees who could not bid on nonunion jobs would no longer be employed, whereas employees of the Respondent, under its policy, are not in jeopardy of losing their jobs and are not precluded from applying for and transferring to other jobs within the Respondent's system. The similarity between *Honeywell* and the instant case, however, is the discriminatory job-bidding policy itself and the fact that in both situations employees have been adversely effected. As the Board stated, "The policy was discriminatory by virtue of limiting use of the [job bidding] procedure to employees not represented by the Union." Further, in the instant case, the effect of the discriminatory policy on employees, while not identical to the situation in *Honeywell*, is nevertheless real, immediate, and substantial.

<sup>2</sup> As the General Counsel's brief amply shows, dual function employees have historically been included in bargaining units; therefore it follows that their employers must conform company policies to deal with such situations.

The Respondent, citing cases that validate an employer's hiring policy of denying employment to individuals who intend to simultaneously work for two different employers,<sup>3</sup> maintains that it may similarly preclude its employees from simultaneously holding a unit and nonunit position. Clearly the two situations are not analogous. In the former, the employers' hiring policies are facially valid and are not premised on union considerations; in the latter the Respondent's hiring policy is premised on union considerations and is therefore facially discriminatory.

Maintaining that its policy is premised upon "legitimate concerns and valid reasons," the Respondent lists and specifies eight distinct "legal uncertainties that could arise by allowing employees to simultaneously hold unit and non-unit positions," as follows:

- Whether the daily overtime provisions of the collective-bargaining agreement would apply if the employee worked more than eight total hours per day in the two positions;
- Whether time spent working in a non-unit position would count as hours worked for benefits eligibility provisions under the collective-bargaining agreement;
- Whether time spent working in a non-unit position would count toward seniority under the eligibility provisions of the collective-bargaining agreement;
- Whether the employee would be terminated from the bargaining unit position if he/she was terminated from the non-unit position;
- Whether the discipline in the non-unit position would count toward progressive discipline in the bargaining unit position;
- Whether the "just cause" provisions of the collective-bargaining agreement would apply if the employee was disciplined in the non-unit position;
- Whether the grievance procedure would apply to issues arising in the non-unit position such as discipline; and
- Whether the employee would have the right to union representation in disciplinary meetings.

The Respondent then goes on to argue that these valid concerns and legal uncertainties both legitimize its policy, and demonstrate the difficulties inherent in simply rescinding the policy without first having negotiated and resolved these matters with the other unions that represent the Respondent's employees.

Essentially, the enumerated items, which appear to be more in the nature of administrative or labor relations concerns rather than "legal uncertainties," all have as their underlying basis the question of the extent to which the provisions of the various collective-bargaining agreements would carry over to the employees' nonunit jobs. That these matters may be problematical, however, or, as the Respondent maintains, difficult to re-

solve through bargaining, does not thereby justify the existence of the Respondent's discriminatory policy. Clearly, on balance, the Respondent's professed administrative or labor relations difficulties do not outweigh the fact that, as noted above, an indeterminate number of employees have been, and likely are continuing to be, denied job opportunities because of a facially discriminatory policy. Further, as noted above, the matters that trouble the Respondent are clearly resolvable because each concern has in fact been satisfactorily resolved with the Union and incorporated into the parties' collective-bargaining agreement. Accordingly, I find that the Respondent has not demonstrated a "sufficient showing of legitimate business objectives to justify the discriminatory aspect of the policy." *Honeywell*, supra at 638; *Great Dane Trailers*, supra. Therefore I conclude that by maintaining the policy the Respondent has violated and is violating Section 8(a)(1) of the Act, as alleged in the complaint.

The Respondent's related argument goes to the remedy in this matter. As noted, the Respondent has resolved such matters with the Union, one of several unions representing its employees, and has, in effect, rescinded its policy vis-à-vis the unit employees covered by its collective-bargaining agreement with the Union. With regard to the other unions, the Respondent would retain the status quo by continuing to maintain and enforce the policy, until such time as each other union requests bargaining over the subject and the parties have reached agreement. To be required to simply rescind the policy on an employer-wide basis, it is argued, without having resolved such matters with the other unions, would lead to an abundance of ad hoc grievances under the various collective-bargaining agreements and would present additional costly and time-consuming administrative difficulties. Once again, the Respondent appears to contend that its perceived administrative or labor relations concerns override the detrimental effects to those employees who will continue to be eliminated from consideration for part-time jobs because of the Respondent's discriminatory policy. I do not agree. Moreover, to maintain an interim status quo would not further the Respondent's interests; rather, it would seem to invite further unfair labor practice charges. I find no merit to the Respondent's argument.

The Respondent also characterizes as "disputable," "doubtful" and "questionable" whether or not each of the three alleged discriminatees, namely Kathryn Milojevic, Nicole Hague, and William Youngren, would have been denied the second position even in the absence of the policy, and maintains that there were other legitimate reasons for the Respondent's refusal to offer them the specific nonunit jobs they sought. As set forth above, the employees were explicitly told by responsible representatives of the Respondent that they could not be hired or considered for the positions because the Respondent's policy precluded them from simultaneously holding both unit and nonunit jobs; and they were given no other reasons for their failure to be hired. The General Counsel having demonstrated that the Respondent's stated reason for its conduct was unlawful, and that the Respondent was seeking to fill the posted positions for which the named employees applied, the burden is then shifted to the Respondent to affirmatively show that the employees would have in any event not accepted the positions

<sup>3</sup> *Willmar Electric Service*, 303 NLRB 245, 246 fn. 2 (1991), enf. 968 F2d 1327 (DC Cir. 1992); *Little Rock Electrical Contractors, Inc.*, 327 NLRB 932 (1999); *Exempla Lutheran Medical Center*, 2007 NLRB LEXIS 272 (2007).

or would have been denied such positions for lawful reasons. The Respondent has not met this burden of proof. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *FES*, 331 NLRB 9, 14 and 17 (2000).<sup>4</sup> Therefore I conclude that by enforcing the policy and denying jobs to these individuals the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a) (1) and (3) of the Act as alleged.

#### THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a) (1) of the Act by maintaining a discriminatory hiring policy, I shall recommend that the Respondent rescind the policy and notify its employees and the unions with which it has collective-bargaining agreements that it has done so. Having found that the Respondent has violated and is violating Section 8(a) (3) and (1) of the Act by its refusal to employ employees Kathryn Milojevic, Nicole Hague, and William Youngren in the part-time positions to which they would have been hired but for the Respondent's enforcement of its unlawful hiring policy, I shall recommend that the said employees be hired into those positions, replacing the current occupants of those positions if necessary. Further, I shall recommend that the named employees be made whole for any loss of earnings or other benefits they may have suffered, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>5</sup>

#### ORDER

The Respondent, Legacy Health System, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a discriminatory policy that

<sup>4</sup> The Board in *FES*, at p. 17, states, "It should have been determined at the unfair labor practice hearing [rather than at the compliance stage of the proceeding] whether the Respondent's failure to hire the discriminatees [applicants for employment] for those positions constituted unlawful refusals to hire warranting backpay and reinstatement."

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

deprives employees of job opportunities on the basis of whether their currently position is or is not a union-represented position.

(b) Refusing to hire employees into positions they would have been hired but for the respondent's discriminatory hiring policy.

(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 which is necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, rescind the discriminatory hiring policy, and notify its employees and the unions with which it has collective-bargaining agreements that the policy has been rescinded.

(b) Within 14 days from the date of this Order, hire employees Kathryn Milojevic, Nicole Hague, and William Youngren in the part-time positions to which they would have been hired but for the Respondent's enforcement of its unlawful hiring policy, replacing the current occupants of those positions if necessary, and make them whole in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of this Order, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its various facilities copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, 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.

(e) Within 21 days after service by the Regional Office, file with the Regional Director for Region 19 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 11, 2009

#### 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 Federal labor law and has ordered us to post and obey this notice.

<sup>6</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."

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and enforce a policy that discriminates against employees by denying them the right to simultaneously hold both a union-represented and nonunion-

represented position within our organization.

WE WILL NOT refuse to hire current employees for additional part-time positions on the basis of union considerations.

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

WE WILL notify the Union with which we have collective-bargaining agreements that we have rescinded the policy.

WE WILL hire employees Kathryn Milojevic, Nicole Hague, and William Youngren in the part-time positions to which they would have been hired, replacing the current occupants of those positions if necessary, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered.

LEGACY HEALTH SYSTEM