

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 24, 2009

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Stanford Hospital and Clinics 530-6067-0100
Case 32-CA-24617 530-6067-9500
530-8045-3700
530-8045-3725

This Section 8(a)(5) case was submitted for advice as to whether the Employer was privileged to unilaterally modify the dress code for its ambulatory care department nurses under the Provena St. Joseph Medical Center,¹ clear and unmistakable waiver standard.

We conclude that the Employer was privileged to unilaterally change the dress code because under Provena, the Union clearly and unmistakably waived its right to bargain over the matter.

FACTS

Stanford Hospital and Clinics (the Employer) and the Committee for Recognition of Nursing Achievement (the Union) are signatories to a collective-bargaining agreement covering a unit of the Employer's registered nurses. The contract is effective from April 1, 2007, through March 31, 2010. The unit includes registered nurses working in a number of outpatient clinics, referred to as the Employer's ambulatory care department.

Section 26 of the parties' contract entitled, "Notice of Personnel Guidelines and Procedure Changes," describes the Employer's right to modify guidelines and procedures that affect nurses represented by the Union:

[The Union] recognizes that, except as provided in this Agreement, the Employer establishes and maintains

¹ Provena St. Joseph Medical Center, 350 NLRB 808 (2007).

personnel guidelines and procedures of general application to all the Employer's employees including nurses, and, subject to this Agreement, the Employer retains the sole discretion to add to, delete from, or otherwise change the provisions of these guidelines and procedures. The Employer will notify [the Union] in writing at least forty-five (45) calendar days in advance of implementation of any changes in those personnel guidelines and procedures which apply to nurses covered by this Agreement and upon request meet with [the Union] to discuss [the Union's] recommendations and suggestions concerning the proposed changes. Upon request by [the Union], the Employer will meet with [the Union] to discuss current hospital and department policies which apply to nurses covered by this Agreement to discuss [the Union's] recommendations and suggestions regarding the current policies with the goal of achieving consistency. The Employer's discretion with regard to personnel guidelines and procedures shall not otherwise be subject to review under this Agreement.

Based on the Region's investigation, the language in Section 26 was first negotiated in the 1980s and has been perpetuated in all successive contracts without discussion.

Section 34 of the contract entitled, "Reserve Rights Of Stanford Hospital and Clinics," states in pertinent part:

It is agreed that this Agreement sets forth expressly all restrictions on the functions and rights of the Employer and no implied restrictions or obligations exist or may be relied upon in interpreting or applying this Agreement.

On March 31, 2009,² the Employer notified the Union by e-mail that it had prepared and updated its dress code policy for its ambulatory care employees, which includes bargaining unit and non-bargaining unit employees, and that it planned to implement the updated policy in May. A copy of the proposed undated policy was attached. Since 2002, the Employer has had a dress code policy for its ambulatory care operations, of general application to all ambulatory care employees, but with specific provisions covering the

² All dates hereafter are 2009.

subject of dress by various different types of clinic employees, including nurses.

The Union requested bargaining over the proposed changes to the policy, asserting that the dress code policy was a mandatory subject of bargaining. The Employer disagreed with the Union's position that the dress code modification was a mandatory subject of bargaining because Section 26 of the parties' contract contemplates and allows for changes in personnel guidelines and procedures. The Employer indicated that it was willing to meet with the Union to discuss any suggestions or recommendations that it might have regarding the dress code.

On April 17, the Union sent the Employer an e-mail advising the Employer of the Union's position that Section 26 did not apply in this circumstance because the provision was only applicable where guidelines applied to all employees of the Employer, and here, the proposed revision would apply only to ambulatory employees.

On April 27, the parties met to discuss the proposed dress code, including the Union's specific concerns. The Employer addressed some of the Union's concerns and said that it would get back to the Union later regarding its other concerns.

On May 12, the Employer e-mailed the Union a summary of the changes that it planned to make to its dress code, which addressed some of the concerns that the Union raised at the April 27 meeting. The Employer also indicated that the new dress code would be in place beginning May 17.

On June 10, the Employer informed the Union by e-mail that it had implemented the new guidelines as of May 17 and that they were implemented only after the Employer was given a 45-day notice of the proposed change as required by Section 26. The Employer said that the parties, through bargaining, had developed a process for changing guidelines and that the process was followed.

On June 30, the Union filed a charge in the instant case alleging that the Employer violated Section 8(a)(5) of the Act by unilaterally implementing the modified dress code policy.

ACTION

We conclude that the Employer was privileged to unilaterally change the dress code because under Provena, the Union clearly and unmistakably waived its right to bargain over the matter.³

Here, the lawfulness of the Employer's May 17 implementation of the modified dress code for the ambulatory employees' turns on the interpretation of Section 26, which grants the Employer the right to establish and maintain "personnel guidelines and procedures of general application to all the Employer's employees including nurses." If, as the Union asserts, Section 26 is applicable only when the guidelines and procedures apply to all Employer's employees, the Union did not waive its right to bargain over the modification. If, as the Employer maintains, this provision encompasses the dress code modification, the Union waived its right to bargain about the modification so long as the Employer followed Section 26's procedures.

An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment, which includes a dress code, unless authorized to do so by a union waiver of bargaining rights.⁴

In Provena, the Board reaffirmed its long-held position that a union may waive its right to bargain over mandatory subjects only if the waiver is "clear and unmistakable."⁵ This standard "requires bargaining partners

³ This case is not subject to deferral since the Employer refuses to waive its procedural defenses, and the Union has not filed a grievance regarding the matter.

⁴ A dress code is mandatory subjects of bargaining. See Public Service Co. of New Mexico, 337 NLRB 193, 199-200 (2001); St. Luke's Hospital, 314 NLRB 434, 440 (1994); United Technologies Corp., 286 NLRB 693, 694 (1987); Valley Oil Co., 210 NLRB 370, 379 (1974).

⁵ Provena, 350 NLRB at 811; see also Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("It is well settled that the waiver

to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.”⁶ Waiver of statutory rights will not be “lightly inferred,”⁷ and the employer bears the burden of establishing that waiver has occurred.⁸

Although a waiver must be clear and unmistakable, it need not be explicit. As noted in Provena, the Board can find a waiver if the contract either “expressly or by necessary implication” confers on management a right to unilaterally take the action in question.⁹ As Provena illustrates, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past dealings; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue.

Applying those factors here, we conclude that the Union clearly and unmistakably waived its right to bargain over the modification to the dress code for the ambulatory care employees.

of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable.”).

⁶ Provena, 350 NLRB at 811.

⁷ New York Mirror, 151 NLRB 834, 839 (1965).

⁸ Beverly California Corp., 326 NLRB 153, 153 n.3 (1998).

⁹ Provena, 350 NLRB at 812, n.19, (citing New York Mirror, 151 NLRB at 839-40).

With respect to the first factor, Section 26 contains language that provides that "the Employer establishes and maintains personnel guidelines and procedures of general application to all the Employer's employees including nurses," and grants the Employer "the sole discretion to add to, delete from, or otherwise change guidelines and procedures" the Employer has implemented, which would include a dress code. We note that Section 26 uses the word "all" in describing the types of employees to which the general application guidelines and procedures apply. Contrary to the Union's argument that "all" should be read as applying to every employee, no matter where employed, we read "all" as dictating that Section 26 applies to personnel guidelines that apply generally to more than just the bargaining unit nurses represented by the Union. Support for such a reading is provided by the second sentence of Section 26, which, in describing the Employer's notification obligation, states that the Employer will notify the Union of any changes "in those personnel guidelines", i.e., the guidelines referenced in the preceding sentence, that apply to unit nurses. This sentence indicates that personnel guidelines could fall within the scope of the first sentence of Section 26 that do not apply to all employees. Thus, Section 26 contemplates that "personnel guidelines and procedures" might apply to some but not all of the Employer's employees, i.e. certain departments or classifications of employees, but not others.

Section 26 also contains language that limits the Union's ability to review the Employer's modifications to the right "to discuss its recommendations and suggestions concerning the proposed changes," that requires the Employer to provide 45-days notice of a change, and that provides that the "Employer's discretion with regard to personnel guidelines and procedures shall not otherwise be subject to review under this Agreement." Here, the Employer provided 45 days notice and met with the Union to discuss suggestions. Thus, the plain language of Section 26 indicates that the Union waived its right to bargain over this issue and the Employer complied with the meeting and notice requirements of Section 26.

As to the second factor, there is no evidence that the parties discussed or explored the Employer's right to unilaterally modify dress codes. However, the Employer has

had a dress code since 2002 for its ambulatory care operations of general application to all ambulatory care employees but with specific provisions covering the subject of dress code by various different types of clinic employees, including nurses. Thus, the parties' past dealings indicate that the Employer clearly has had a practice of implementing departmentalized policies and procedures such as dress code policies.

As to the third factor, there is no evidence about the parties' bargaining history that shed any light on whether the Union waived its right to bargain about the Employer's ability to unilaterally modify its dress code for ambulatory care employees.

As to the fourth factor, Section 34 of the contract entitled, "Reserve Rights Of Stanford Hospital and Clinics" further supports the Employer's position that it had authorization to change the dress code without bargaining. Section 34 states that the parties agreed that the "Agreement set forth expressly all restrictions on the functions and rights of the Employer and no implied restrictions or obligations exist or may be relied upon in interpreting or applying this Agreement." Section 26 does not expressly place any restrictions on the Employer as to which guidelines and procedures that it may alter.

For these reasons, we conclude that the Union clearly and unmistakably waived its right to bargain over the modification of the dress code under these circumstances. Therefore, the Employer did not act unlawfully when it modified the dress code. Accordingly, absent withdrawal, the Region should dismiss the allegation.

/s/
B.J.K.