San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital *and* District 1199NM, National Union of Hospital and Healthcare Employees. Case 28–CA–22280

June 11, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On November 27, 2009, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in answer to the Respondent's exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this decision and to adopt the recommended Order as modified and set forth in full below.[2]

A. Factual and Procedural Background

On June 30, 2008, the Board issued a Decision and Order finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 28–RC–6518.[3] On March 31, 2009, the General Counsel issued the complaint in the present case, which alleges multiple violations of Section 8(a)(1) and (5) of the Act.[4] At the hearing, the parties entered into a stipulation of facts and agreed that the taking of testimony was unnecessary. The full stipulation is reported in the judge's decision.

The judge found that the Respondent violated Section 8(a)(1) of the Act by informing employees Bernice Abeyta and Regina Gutierrez that their *Weingarten* rights were being denied.[5] The judge also found that the Respondent violated Section 8(a)(5) and (1) by: (1) refusing to provide relevant information requested by the Union; (2) unilaterally changing its practice of allowing employees to have representation during investigative or disciplinary interviews; (3) unilaterally changing its practice concerning fit tests; (4) discharging Abeyta as a result of its changed practice concerning fit tests; and (5) bypassing the Union and dealing directly with Abeyta to resolve a grievance she filed over her discharge. However, the judge recommended dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by denying Abeyta's request for representation at a November 19, 2008 meeting concerning her grievance.

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[1] In sec. III,A of his decision, the judge incorrectly states that the Respondent, in its amended answer, admitted most of the operative allegations in the complaint. The Respondent's amended answer, in fact, specifically denied all of the unfair labor practice allegations, with the exception of the refusal-to-provide information. As to that allegation, the Respondent admitted that the Union requested certain information and that it refused to provide the information, but it denied that the requested information was relevant to the Union's representative duties. We correct this error in the judge's decision.

[2] We shall amend the judge's conclusions of law and remedy, modify his recommended Order, and substitute a new notice to conform to the violations found and to the Board's standard remedial language, and in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co*., 335 NLRB 142 (2001). Among other modifications, we shall substitute a limited bargaining order for the affirmative bargaining order recommended by the judge, which is not necessary to remedy the Respondent's refusal to provide information and unilateral changes in terms and conditions of employment. See, e.g., *Tecumseh Packaging Solutions, Inc.*, 352 NLRB 694, 694 fn. 2 (2008); *Ferguson Enterprises,* 349 NLRB 617, 617 fn. 1 (2007); *Edmonds Villa Care Center*, 249 NLRB 705, 706 fn. 10 (1980), enf. mem. denied in part 692 F.2d 766 (9th Cir. 1982).

[3] *Alta Vista Regional Hospital,* 352 NLRB 809.

The Respondent requests that the instant proceeding be stayed pending resolution of its petition for review filed with the U.S. Court of Appeals for the District of Columbia Circuit in *Alta Vista*, supra. The Respondent's request is denied. It is well settled that collateral litigation does not suspend the duty to bargain under Sec. 8(a)(5) of the Act. See *John Cuneo, Inc*., 257 NLRB 551, 551–552 (1981). See also Sec. 10(g) of the Act, which provides that the commencement of proceedings in a United States court of appeals pursuant to a petition for enforcement or review "shall not, unless specifically ordered by the court, operate as a stay of the Board's order." The Respondent does not assert that a stay of the Board's Order has been issued by the court. The Respondent must therefore honor the certification, and its duty to bargain is not postponed by the pending petition for court review. See *La Gloria Oil & Gas Co.,* 338 NLRB 858, 858–859 (2003); *M. J. Metal Products*, 330 NLRB 502, 502 fn. 2 (2000), enfd. 267 F.3d 1059 (10th Cir. 2001); and *Midland-Ross, Inc*., 243 NLRB 1165, 1165–1166 (1979), enfd. 653 F.2d 239 (6th Cir. 1981).

[4] The Respondent filed an amended answer admitting in part, and denying in part, the allegations in the complaint, and raising the affirmative defense that the certification issued by the Board in Case 28–RC–6518 is invalid. On exceptions, the Respondent argues that the judge erred in refusing to permit it to offer evidence in support of this affirmative defense. As found by the judge, all of the Respondent's arguments challenging the validity of the certification issued in Case 28–RC–6518 were addressed and rejected by the Board in the prior representation or test-of-certification proceedings. See supra, 352 NLRB 809, 809 fn. 3. The Respondent has not offered to adduce any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decisions made in the representation or test-of-certification proceedings. We therefore agree with the judge that the Respondent has not raised any issues concerning the validity of the certification that are properly litigable in this unfair labor practice proceeding.

[5] *NLRB v. J. Weingarten*, *Inc.,* 420 U.S. 251 (1975).

B. Analysis

In the absence of exceptions, we affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by denying Abeyta's request for representation at the November 19 grievance meeting. We also affirm the judge's findings, for the reasons he stated, that the Respondent violated Section 8(a)(5) and (1) by (1) failing to provide information requested by the Union; (2) unilaterally changing its practice concerning fit tests; and (3) discharging Abeyta pursuant to the unilateral change in its practice concerning fit tests. For the reasons stated below, however, we reverse the judge and dismiss the allegations that the Respondent violated Section 8(a)(1) by informing Abeyta and Gutierrez that their *Weingarten* rights were being denied and violated Section 8(a)(5) and (1) by unilaterally changing its practice of allowing employees to have representation during investigative or disciplinary meetings and by dealing directly with Abeyta concerning her grievance.

1. The alleged threat to deny employees their *Weingarten* rights

The complaint alleges that on or about November 19, 2008, the Respondent violated Section 8(a)(1) by threatening and informing employees that the Respondent would not allow them to have representation during investigatory interviews. This allegation pertains to employee Abeyta's request for representation on that date, a request that the judge found did not create a cognizable right to representation under *Weingarten.* As stated above, no exceptions were filed to the judge's dismissal of the allegation that the Respondent unlawfully denied Abeyta's request for representation on November 19.

The parties stipulated that on or about November 19, the Respondent told Abeyta and employee Gutierrez "that their *Weingarten* rights were being denied." The judge found that this statement was unlawful. But, if there was no *Weingarten* right on November 19 in the first instance, as the judge found, the foregoing statement is nothing more than an accurate expression of the Respondent's lawful response to the request of that day. Contrary to the judge, we find that the stipulation is factually insufficient to establish that the Respondent told employees on November 19 that they were not entitled to *Weingarten* rights generally. Accordingly, we reverse the judge and dismiss this allegation.[6]

2. The alleged change in practice regarding employee representation

On this record, we also reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its practice of allowing employees to have another employee present during investigative or disciplinary interviews, as alleged in paragraph 7(f) of the complaint. The judge's determination was based exclusively on his finding that the Respondent's amended answer admitted the relevant complaint allegation. Contrary to the judge, however, the Respondent's amended answer specifically denied the allegation in paragraph 7(f) of the complaint. Furthermore, the record contains no evidence that the Respondent had a practice of allowing employees to have another employee present during investigative or disciplinary meetings, or that the Respondent changed its practice, if any, in this regard. Accordingly, we dismiss this allegation.

3. The alleged bypassing of the Union and direct dealing

The complaint alleges that on or about November 19, 2008, the Respondent bypassed the Union and dealt directly with unit employees by meeting with them to resolve grievances and discipline, in violation of Section 8(a)(5) and (1). The Respondent denied this allegation in its answer.[7] The parties stipulated that "the Respondent dealt directly with Abeyta, regarding her grievance that she filed over her dismissal." The judge relied solely on the stipulation to find that the Respondent violated the Act, as alleged.

We find that the stipulation is factually insufficient to overcome the Respondent's denial of the complaint allegation. Standing alone, the stipulation does not clearly establish the factual elements necessary to find a violation. It recites only that the Respondent "dealt directly with Albeyta" regarding her grievance—which, in the ordinary meaning of the phrase, could mean simply that the Respondent communicated with Albeyta without an intermediary, such as the Union. Nothing in the stipulation, or elsewhere in the record, provides the further in-

[6] The judge's reliance on *Dish Network Service Corp*., 339 NLRB 1126 (2003), is misplaced. There, the Board found that an employer's statement—that a shop steward could not be present at a meeting because the parties had no contract and the respondent did not recognize the shop stewards—was unlawful because it tended to create the impression that contract negotiations had to be completed before the respondent would recognize the union's shop stewards. The respondent thus communicated to employees the futility of trying to deal with the respondent through their designated representatives. 339 NLRB at 1127–1128. Here, by contrast, the Respondent's statement that Abeyta's and Gutierrez' *Weingarten* rights were being denied, in circumstances where they were not actually entitled to representation under *Weingarten*, does not, by itself, carry a message of futility.

[7] The Board considers the following criteria in assessing such an allegation: (1) whether the employer was communicating directly with union-represented employees; (2) whether the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the union's role in bargaining; and (3) whether such communication was made to the exclusion of the union. See *Southern California Gas Co*., 316 NLRB 979 (1995).

formation necessary to establish that the communication constituted direct dealing in the legal sense, as defined by Board doctrine. To find a violation, our law requires (among other things) that the employer have engaged in a discussion with the employee that was for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the union's role in bargaining. *Southern California Gas Co.*, supra. Given the stipulation's complete lack of detail, coupled with the Respondent's denial of the complaint allegation, we are unwilling to infer the additional facts necessary to construe the stipulation as effectively *admitting* the violation. In these circumstances, the General Counsel has not met his evidentiary burden of establishing that the Respondent bypassed the Union in violation of Section 8(a)(5) and (1). Accordingly, we shall reverse the judge and dismiss this allegation.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusions of Law (b), (c), and (f), and reletter the remaining paragraphs.

AMENDED 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 steps to effectuate the policies of the Act. Specifically, having adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union relevant and necessary information requested on or about January 12, 2009, we shall order the Respondent to furnish the Union with the requested information. In addition, having adopted the judge's finding that the Respondent unilaterally changed its practice concerning fit tests, without first giving the Union notice and an opportunity to bargain about such changes, we shall order the Respondent, before implementing any changes in wages, hours, or other terms and conditions of employment, to notify and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees. We shall also order the Respondent to rescind the unilateral change in its practice concerning fit tests and to restore the status quo ante. Further, having adopted the judge's finding that the Respondent discharged Bernice Abeyta pursuant to the unilateral change in its practice concerning fit tests, we shall order the Respondent to offer Abeyta and any other unit employees who were discharged pursuant to the unilateral change full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, we shall order the Respondent to make those employees who were discharged pursuant to the unilateral change whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files and records any and all references to the unlawful discharges, and to notify the affected employees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital, Las Vegas, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with District 1199NM, National Union of Hospital and Healthcare Employees (the Union) by failing and refusing to provide requested information that is relevant and necessary to the Union as the collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

(b) Unilaterally changing wages, hours, and other terms and conditions of employment of employees in the above-described unit, including its practice concerning fit tests, without first giving the Union notice and an opportunity to bargain about such changes.

(c) Discharging employees in the above-described unit pursuant to the unlawful unilateral change in its practice concerning fit tests.

(d) 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) Furnish the Union with the information that it requested on or about January 12, 2009.

(b) Before implementing any changes in unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

(c) Rescind its unlawful unilateral change in its practice concerning fit tests, and restore the status quo ante.

(d) Within 14 days from the date of this Order, offer Bernice Abeyta and any other unit employees who were discharged as a result of the Respondent's unlawful unilateral change in its practice concerning fit tests full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make unit employees whole for any loss of earnings and other benefits suffered as a result of such discharges.

(f) Within 14 days from the date of this Order, remove from its files any reference to discharges resulting from the Respondent's unlawful unilateral change in its practice concerning fit tests, and within 3 days thereafter notify the affected employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) 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 determine the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Las Vegas, New Mexico, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 facility 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 1, 2008.

(i) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 11, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] 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."

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

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with District 1199NM, National Union of Hospital and Healthcare Employees, by failing and refusing to provide requested information that is relevant and necessary to that Union as the collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of employees in the above unit, including our practice concerning fit tests, without first giving notice and an opportunity to bargain about such changes to the Union.

WE WILL NOT discharge employees in the above unit pursuant to our unlawful unilateral change in our practice concerning fit tests.

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 furnish the Union the information it requested on or about January 12, 2009.

WE WILL, before implementing any changes in unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL rescind the unilateral change that we made in our practice concerning fit tests.

WE WILL, within 14 days from the date of the Board's Order, offer Bernice Abeyta and any other employees in the above unit who were discharged as a result of the unlawful unilateral change in our practice concerning fit tests full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any such employees whole, with interest, for any loss of earnings and other benefits suffered as a result of their discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to such discharges, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the discharges will not be used against them in any way.

SAN MIGUEL HOSPITAL CORP. D/B/A ALTA VISTA REGIONAL HOSPITAL

Lisa Walker-McBride, Esq., for the General Counsel.
Donald T. Carmody, Esq., of Brentwood, Tennessee, for the Respondent.
Shane Charles Youtz, Esq., of Albuquerque, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Las Vegas, New Mexico, on August 19, 2009, upon the complaint, issued on March 31, 2009, by the Regional Director for Region 28.

The complaint alleges that San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying the request of its employee to be represented by the District 1199NM, National Union of Hospital and Healthcare Employees (the Union) during an interview that could reasonably lead

to discipline and by threatening employees that they could not have representation during an investigatory interview. The complaint also alleges Respondent violated Section 8(a)(1) and (5) of the Act by, by refusing to provide information to the Union necessary and relevant to its duties as collective-bargaining representative, by unilaterally changing its practice with regard to fit tests, by terminating an employee as a result of its changed practice concerning fit tests, by unilaterally changing its practice with regard to allowing employees to have representation during investigative or disciplinary interviews and by bypassing the Union and dealing directly with unit employees by meeting with them to resolve grievances and discipline. In its answer, as amended, Respondent admitted most of the operative allegations of the complaint but denied it had violated the Act.

FINDINGS OF FACT

Upon the entire record herein,[1] including the briefs from the General Counsel[2] and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is a New Mexico corporation, with an office and place of business located in Las Vegas, New Mexico, where it is engaged in the operation of an acute care hospital. Annually, Respondent in the course of its business operations derived gross revenues in excess of $250,000 and purchased and received at its facility goods valued in excess of $50,000 in directly from points outside the State of New Mexico.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

On March 4, 2008, the Board issued its decision in San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital, Case 28–RC–6518 where it certified the Union as the collective-bargaining representative of the following unit of employees of Respondent (the unit):

> All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and non professional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

After the Union was certified, Respondent refused to bargain with the Union. Thereafter, on June 30, 2008, the Board issued its decision in *Alta Vista Regional Hospital*, 352 NLRB 809 (2008), in which it held that since March 4, 2008, the Union has been the exclusive representative under Section 9(a) of the Act of the employees in the unit described above, and since March 12, 2008, Respondent has engaged in unfair labor practices by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees in violation of Section 8(a)(1) and (5) the Act. Respondent has requested review of this decision and the Board has filed a cross-application for enforcement of this decision in the District of Columbia Circuit Court. (D.C. Cir. No. 08-1245.)

On March 31, 2009, the Regional Director for Region 28 issued the complaint herein, alleging that Respondent had violated Section 8(a)(1) and (5) of the Act.

On August 7, 2009, counsel for the General Counsel filed a "Motion to Strike Portions of Respondent's Answer to Complaint and For Partial Summary Judgment." On August 12, 2009, Respondent filed a "Motion to Dismiss Complaint and Notice of Hearing, Alternatively, Respondent's Motion to Stay."

In its amended answer, Respondent admitted the Board's jurisdiction, the Union's labor status, the supervisory status of Respondent's agents as alleged in complaint paragraph 4, that the Board issued its certification of the Union as the collective-bargaining representative of the unit on March 4, 2008; that the Union, by its January 12 written request, requested from Respondent a list of unit employees and a list of employees separated since the Union was certified; that since January 12, Respondent has refused to provide the requested information to the Union; that Respondent has required employees to take fit tests; fired Abeyta, changed its practice by denying employees requests to have employees present during investigative or disciplinary meetings; and bypassed the Union and dealt directly with unit employees by meeting with them to resolve grievances and discipline without notice to or bargaining with the Union.

On August 14, 2009, Respondent filed an "Opposition to Counsel for the General Counsel's Motion to Strike Portions of Respondent's Answer to Complaint and for Partial Summary Judgment," and counsel for the General Counsel filed "General Counsel's Opposition to Respondent's Motion to Dismiss

[1] On September 30, 2009, counsel for the General Counsel filed a "Motion to Correct the Record." Good cause having been shown and no opposition filed, the motion is granted.

[2] On October 14, 2009, counsel for the General Counsel filed an "Errata to the Post Hearing Brief." As the errata correct a clerical error and there is no opposition, I accept the errata.

Complaint and Notice of Hearing, Alternatively Respondent's Motion to Stay."

On August 19, 2009, I issued an "Order Granting Counsel for the General Counsel's Motion to Strike Portions of Respondent's Answer to Complaint and for Partial Summary Judgment" in which I found that Respondent could not herein raise the appropriateness of the unit or the Union's certification as the representative of unit employees. I also found that the Union's January 12, 2009 request for employee names is necessary and relevant to the Union's duty as collective-bargaining representive and that no factual issue concerning complaint paragraphs 7(a) through (c) remain. I also found that employee testing, employee discipline, employer work rules, and grievance resolution are related to wages, hours, and other terms and conditions of employment and are mandatory subjects of bargaining as alleged in complaint paragraph 7(h). In addition, I ruled that neither Respondent's first nor the second affirmative defense would be considered in the instant hearing. (Attacking the Board's certification of the Union as the collective-bargaining representive of the unit in Case 28–RC–6518 and attacking the authority of the General Counsel's authority to issue, serve, and prosecute the complaint.)

Also on August 19, 2009, I issued my "Order Denying Respondent's Motion to Dismiss Complaint and Notice of Hearing, Alternatively Respondent's Motion to Stay." In addition, at the start of the hearing on August 19, 2009, Respondent amended its amended answer to admit complaint paragraphs 1(a) and (b) regarding the filing and service of the charge and amended charge in this matter.

At the hearing, the parties entered into stipulations of fact that made the taking of testimony unnecessary. The stipulations are:

> 1. In October 2008, Respondent changed its policy regarding Fit Testing[3] without providing notice and an opportunity to bargain to the Union. Prior to October 2008 employees were not required to pass the Fit Test to continue their employment with Respondent. After October 2008 Respondent's employees were required to pass the Fit Test to continue employment.
>
> 2. Fit Testing is governed by Federal OSHA regulations.
>
> 3. On about November 14, 2008, Respondent discharged Abeyta as a result of its change in policy regarding Fit Testing.
>
> 4. On about November 19, 2008, Respondent and Abeyta had a meeting discuss a grievance regarding her dismissal.
>
> 5. Prior to the November 19, 2008 meeting, Abeyta requested employee Regina Gutierrez (Gutierrez) be present at the meeting as her witness.
>
> 6. Respondent denied Abeyta's request for the presence of Gutierrez.
>
> 7. Since Respondent refuses to recognize the Union, Respondent would have refused Abeyta's request for a Union representative at the grievance meeting scheduled on November 19, 2008.
>
> 8. On about November 19, 2009, Respondent dealt directly with Abeyta, regarding her grievance that she filed over her dismissal.
>
> 9. On about November 19, 2008, Respondent told Abeyta and Gutierrez that their Weingarten rights were being denied.

[3] The parties stipulated that the fit test consists of testing a mask over an employee's face to ensure that the mask seals out airborne disease.

B. The Analysis

Having previously resolved in my order of August 19, 2009,[4] that complaint allegations paragraphs 7(a)–(c) and (h) were not in issue and that the information the Union sought is presumptively relevant,[5] I find that in refusing to provide the Union with the requested information, Respondent has violated Section 8(a)(1) and (5) of the Act. I will discuss the remaining complaint allegations in the order they are set forth in the complaint.

1. The denial of Abeyta's request to be represented

It is alleged in complaint paragraphs 6(a) and (b) that on or about November 19, 2008, the Respondent denied employee Abeyta's request to be represented by the Union during an interview that Abeyta had reasonable cause to believe would result in disciplinary action being taken against her.

Counsel for the General Counsel argues that Abeyta was entitled to the presence of a representative at the grievance interview dealing with her discharge under *Weingarten*. Respondent contends that since Abeyta was no longer an employee and since the grievance meeting was not an investigative interview, she was not entitled to representation.

In *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975), the Supreme Court held that Section 8(a)(1) of the Act provides employees the right to be accompanied and assisted by their union representative at investigatory meetings that the employee reasonably believes may result in disciplinary action.

In *Party Cookies, Inc.,* 237 NLRB 612, 619 (1978), the Board affirmed the administrative law judge who found that *Weingarten* did not apply to a postdischarge interview that was not investigative in nature. In dicta, in *Seattle-First National Bank*, 268 NLRB 1479, 1481 (1984), the administrative law judge suggested that a postdischarge internal review hearing could constitute a *Weingarten* type interview since the internal review committee did more than merely rubber stamp terminations and that the employee could reasonably believe that her employment status could be affected. Respondent's citation to *IBM Corp*., 341 NLRB 1288 (2004), is misplaced as *IBM* stands only for the proposition that unrepresented employees have no right to a representative at an investigatory interview. *Polson Industries,* 242 NLRB 1210, 1211 (1979), is also distinguishable as the employee there had voluntarily resigned and was not an employee. Here, it is alleged that Abeyta was unlawfully fired and thus retained her rights as an employee.

In this case, Abeyta had been terminated at the time of the November 19, 2008, postdischarge disciplinary grievance in-

[4] ALJ Exh. 1.

[5] *River Oak Center for Children*, 345 NLRB 1335 (2005).

terview. The record is silent as to whether the grievance process was investigative or merely pro forma or whether the Respondent's grievance procedure had authority to rescind the discipline. Accordingly, I find that *Weingarten* does not apply to the Respondent's grievance procedure that occurred after Abeyta's discharge and I will dismiss this complaint allegation. *Party Cookies, Inc.,* supra.

2. The threats to employees that Respondent would not permit representation during investigatory interviews

In complaint paragraph 6(c) it is alleged that on or about November 19, 2008, the Respondent threatened employees by informing them that the Respondent would not allow them to have representation during investigatory interviews.

Statements to employees that they are not entitled to representation under *Weingarten* because Respondent does not recognize the Union as the employees' collective-bargaining representative violate Section 8(a)(1) of the Act. In re *Dish Network Service Corp*., 339 NLRB 1126 (2003); In re *Fruehauf Trailer Services,* 335 NLRB 393 (2001).

Respondent stipulated that when Abeyta requested that Gutierrez be present as her witness at the November 19, 2008 grievance meeting, it told Abeyta and Gutierrez that their *Weingarten* rights were being denied. This statement violated Section 8(a)(1) of the Act.

3. Respondent's change in practice concerning fit tests

It is alleged in paragraph 7(d) that between about June 16 to November 14, 2008, the Respondent changed its practice regarding fit tests by requiring unit employees having direct contact with patients to take and pass a fit test or be discharged.

Counsel for the General Counsel contends that Respondent's unilateral change in requiring employees, a condition of employment to take fit tests violates Section 8(a)(1) and (5) of the Act. Respondent argues that it was required by Federal law to require employees take the fit test and it is not, therefore, obligated to bargain with the Union.

An employer who refuses to bargain with the Union as the exclusive bargaining representative of its employees during a test of certification does so at its own risk and may violate Section 8(a)(5) of the Act. In re *Food & Commercial Workers Local 1996 (Visiting Nurse Health System)*, 336 NLRB 421 (2001); *Hankins Lumber Co.*, 316 NLRB 837, 861 (1995); *Proof Co.*, 115 NLRB 309 (1956). Thus, an employer's obligation to bargain attaches at the time the union wins the election, and the employer acts at its peril when it makes unilateral changes while postelection proceedings are pending. In re *Food & Commercial Workers (Visiting Nurse Health System)*, supra; *Proof Co.*, supra.

The parties stipulated that in October 2008, Respondent changed its policy regarding fit testing without providing notice and an opportunity to bargain to the Union. Prior to October 2008, employees were not required to pass the fit test to continue their employment with Respondent. After October 2008 Respondent's employees were required to pass the fit test to continue employment. Such conduct constitutes an unlawful unilateral change.

However, Respondent contends that Federal regulations dealing with protective masks privilege its unilateral acts.

Under the OSHA regulations it is stated that "[a] respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee." 29 CFR § 1910.134(a), (2); see also 29 CFR § 1910.132(a) ("[p]rotective equipment, including respiratory devices shall be provided whenever it is necessary by reason of hazards of environment capable of causing injury ").

In *Quality House of Graphics,* 336 NLRB 497, 498 (2001), the Board held that there are circumstances where an employer may act unilaterally if the employer can establish extraordinary events which are an unforeseen occurrence that require the company to take immediate action. The requirements of complying with other Federal statutes do not fall within this exception. There is also another category of exigency identified in *Quality House of Graphics* that are not sufficiently compelling to excuse bargaining altogether but that require prompt action and cannot await final agreement or impasse on the collective-bargaining agreement as a whole. In such cases, the Board still requires notice to and bargaining with the union.

The first category of circumstances of *Quality House of Graphics* does not apply in this case since there was no extraordinary event that was unforeseen by Respondent that required implementing the rule that employees pass the fit test as a requirement of employment. Rather the OSHA regulation only mandates that employees be provided with protective masks. There is nothing in the record that the OSHA regulation required Respondent to take immediate action. Indeed, it appears that prior to October 2008, Respondent administered the fit test but did not condition employment upon passing the test. Even assuming, arguendo, that this case might fall under the second set of *Quality House of Graphics* exigencies, in the absence of notice to and bargaining with the Union concerning the new rule requiring passing the fit test as a condition of employment, Respondent violated Section 8(a)(1) and (5) of the Act in unilaterally implementing such a requirement.

4. The discharge of Abeyta

It is alleged in paragraph 7(e) that on or about November 14, 2008, as a result of Respondent's conduct described above in paragraph 7(d), the Respondent discharged Abeyta.

If it is found that an employer unilaterally changes terms and conditions of employment in violation of Section 8(a)(5) of the Act, the discharge of employees pursuant to such unlawfully imposed rules also violates Section 8(a)(1) and (5) of the Act. *Great Western Produce*, 299 NLRB 1004, 1005 (1990). In *Great Western,* supra at 1005, the Board said:

> We shall continue to apply the following test for analyzing discharges and other discipline alleged to violate Section 8(a)(5) If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5).

It was stipulated that Respondent unilaterally implemented the change to its fit testing rules and that Abeyta was discharged for violation of the rule. Having found that the rule

was implemented unlawfully, I find that Abeyta's discharge violated Section 8(a)(1) and (5) of the Act.

5. The change in practice regarding employee representation at investigative meetings

It is alleged in paragraph 7(f) that on or about November 19, 2008, the Respondent changed its practice by denying employees' requests to have employees present during investigative or discipline meetings.

In its answer, Respondent admitted that it changed its practice concerning employees' rights to be represented at investigative meetings that could result in discipline. Since this policy affects terms and conditions of employment, it is a mandatory subject of bargaining. Failure to accord the Union notice and a meaningful opportunity to bargain violates Section 8(a)(1) and (5) of the Act. I find Respondent in unilaterally changing its practice regarding employee representation at a *Weingarten* type meeting violated Section 8(a)(1) and (5) of the Act.

6. Bypassing the Union

Paragraph 7(g) alleges that on or about November 19, 2008, the Respondent bypassed the Union and dealt directly with unit employees by meeting with them to resolve grievances and discipline.

The Board has continued to hold that an employer violates Section 8(a)(1) and (5) by dealing directly with its employees. *Dayton Newspapers,* 339 NLRB 650 (2003).

It was stipulated that on about November 19, 2009, Respondent dealt directly with Abeyta, regarding her grievance that she filed over her dismissal. I find that Respondent violated Section 8(a)(1) and (5) of the Act in dealing directly with Abeyta concerning her grievance.

CONCLUSIONS OF LAW

Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by, (a) refusing to provide information to the Union necessary and relevant to its duties as collective-bargaining representive; (b) threatening employees that they could not have representation during an investigatory interview; (c) unilaterally changing its practice with regard to the right of employees to be represented in *Weingarten* type meetings; (d) unilaterally changing its practice with regard to fit tests; (e) terminating an employee as a result of its changed practice concerning fit tests and by bypassing the Union; and (f) dealing directly with unit employees by meeting with them to resolve grievances and discipline. Respondent has not otherwise violated the Act and the remaining allegations of the complaint are dismissed.

The above are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital, Las Vegas, New Mexico, its officers, agents, successors and assigns, shall

1.Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with National Union of Hospital and Health Care Employees District 1199NM (the Union) as the exclusive collective-bargaining representive in the following appropriate unit:

> All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheritization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by us at our hospital in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to provide information to the Union that it needs to perform its duties as the exclusive bargaining representative of the current bargaining unit described above.

(c) Unilaterally changing the wages, hours, or working conditions of unit employees without first notifying the Union of planned changes and providing the Union with a meaningful opportunity to bargain over these changes and the effects of the changes.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above described unit.

(b) Provide the Union with the information it requested of us on January 12, 2009, and any other information the Union requests that it needs to represent you.

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[6] 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.

(c) Reinstate Bernice Abeyta to her former position with full seniority and all other rights and privileges previously enjoyed by her.

(d) Make Bernice Abeyta whole, with interest, for any loss of earnings or benefits resulting from her discharge.

(e) Remove and physically remove from our files any references to the discharge of Bernice Abeyta and notify her, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against her or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference seeker.

(f) Within 14 days after service by the Region, post at its facilities in Las Vegas, New Mexico, copies of the attached notice marked "Appendix." [7] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Company's authorized representative, shall be posted by the Company immediately on receipt 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 Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendancy of these proceedings, the Company have gone out of business, closed a facility involved in these proceedings, or has laid off employees, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since October 1, 2008.

(g) 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 Respondents have taken to comply.

Dated, Washington, D.C., November 27, 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.

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 do anything that interferes with these rights. More particularly:

WE WILL NOT threaten employees that they have no right to union representation at an investigatory meeting that may reasonably lead to disciplinary action.

WE WILL NOT refuse to recognize and bargain with District 1199NM, National Union of Hospital and Health Care Employees as the exclusive bargaining representative, of the following collective-bargaining unit (the unit):

> All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheritization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by us at our hospital in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide information to the Union that it needs to perform its duties as the exclusive bargaining representative of the current bargaining unit described above.

WE WILL NOT unilaterally change the wages, hours, or working conditions of unit employees without first notifying the Union of planned changes and providing the Union with a meaningful opportunity to bargain over these changes and the effects of the changes.

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 recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the unit.

WE WILL immediately provide the Union with the information it requested of us on January 12, 2009, and any other information the Union requests that it needs to represent you.

WE WILL immediately reinstate Bernice Abeyta to her former position with full seniority and all other rights and privileges previously enjoyed by her.

WE WILL make Bernice Abeyta whole, with interest, for any loss of earnings or benefits resulting from her discharge.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted Pursuant to an 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."

WE WILL remove and physically remove from our files any references to the discharge of Bernice Abeyta and notify her, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against her or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference seeker.

SAN MIGUEL HOSPITAL CORP. D/B/A ALTA VISTA REGIONAL HOSPITAL