

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 24

QUALITY HEALTH SERVICES, INC.  
d/b/a HOSPITAL SAN CRISTOBAL

Respondent

vs.

UNIDAD LABORAL DE ENFERMERAS  
Y EMPLEADOS DE LA SALUD

Charging Party

CASES NUM. 24-CA-11438  
24-CA-11507  
24-CA-11537

## RESPONDENT'S EXCEPTIONS TO THE A.L.J. DECISION

Before: **Hon. William N. Cates,**  
Administrative Law Judge

**Mr. José L. Ortiz, Esq.**  
Counsel for the General Counsel  
Region 24, N.L.R.B.  
La Torre de Plaza, Suite 1002  
525 F.D. Roosevelt Avenue  
San Juan, P.R., 00918-1002

**José A. Oliveras-González**  
Counsel for Respondent  
P.O. Box 22792 U.P.R. Station  
Río Piedras, P.R. 00931

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RESPONDENT'S EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE DECISION

TO THE NATIONAL LABOR RELATIONS BOARD:

COMES NOW, Quality Health Services, Inc. doing business as Hospital San Cristóbal (hereinafter to be referred as "Respondent", "San Cristóbal", "the Hospital" or "the employer") through its legal representative and respectfully submits the following exceptions to the Administrative Law Judge decision in the case at bar.

FIRST EXCEPTION

1- The Complaint issued in the case at bar (**Subparagraph 8 (a)**) stated that, in or about November 2009, the "Hospital unilaterally and contrary to its *past practice*, discontinued

grating holiday pay to its employees when a holiday fell on their day off". (See: page 4, lines 30-32 of the ALJ decision).

A- The exception in the present situation consist that the General Counsel did not complied with showing how, why and since when the granting of pay for holidays when such time fell on the employees day off constituted a past practice. Additionally, the situation should had been deferred to arbitration because the collective bargaining agreement was in effect at the time (November 2009) that the claim occurred.

## SECOND EXCEPTION

2- The Complaint issued in the case at bar (**Subparagraph 8 (c)**) stated that on or about January 7, 2010 the Hospital "unilaterally eliminated its *past practice* of allowing employees to use sick leave and/or annual leave for their absences while reported to the Worker's Insurance Compensation Fund". (See: page 6, lines 37-39 of the decision).

A- When analyzing the aforementioned charge the Hon. Administrative Law Judge (ALJ) determined that the receipt of two (2) payments for being out of work "constituted a change from past practice" (see: page 7, line 24 of the decision) and as such its modification or discontinuance had to be bargained with the union. Therefore, according to the ALJ , "the Hospital, by eliminating its *past practice* of allowing employees to use sick leave when receiving workers compensation violated Section 8 (a) (5) of the Act". (See: page 7, lines 39-40 of the decision).

B- The exception in the present situation consist that the General Counsel did not complied with showing how, why and since when the granting of pay of sick leave in addition to the income received by the State Insurance Fund constituted a past practice. Additionally, the situation should had been deferred to arbitration because the collective bargaining agreement was in effect at the time (January 7, 2010) that the claim occurred and required a matter of contract interpretation.

### THIRD EXCEPTION

3- The Complaint issued in the case at bar (**Subparagraph 8 ( f )** allege that on or about May 27, 2010 the Hospital “unilaterally changed and reduced the amount of holidays”. See: page 9, lines 11-12 of the decision).

A- When analyzing the aforementioned charge the Hon. Administrative Law Judge (ALJ) determined that the holidays provided “constituted a *past practice* of the Hospital” which has been followed since 2002 and concluded that the Hospital decision deprived the employees of three and a half days of paid holidays (see: page 9, line 21 of the decision). The ALJ concluded that by changing and reducing the number of holidays the Hospital violated Section 8 (a) (5) of the Act”. (See: page 9, lines 28-37 of the decision).

B- The exception in the present situation consist that the General Counsel did not complied with showing how and why the half day holidays constituted a past practice. Specifically, the General Counsel failed to show the issue of mutuality that develops in a

past practice.

4- Respondent's exceptions to the above-captioned determinations of facts and conclusion of law is based in that these three (3) issues were determined by the ALJ as past practice, but the record of the case at bar is devoid or absent to demonstrate that the General Counsel proffered evidence to demonstrate that such past practices were present in the alleged conduct of respondent.

5- Additionally, in the decision of the case at bar exception is taken as to the conclusions of law that reads as follows:

"the Hospital, by altering its *past practice* and ceasing to pay holiday pay to employees whose day off fell on a holiday, by eliminating its *past practice* of allowing employees to use sick leave when receiving workers compensation...and by reducing the number of employees' holidays...has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act". (See: Page 9, line 43 to 49 of the ALJ decision). (Emphasis in italics are provided).

#### ARGUMENTS FOR THE EXCEPTIONS

According to the Board case law the burden of proof to show the existence of any given past practice falls upon the General Counsel. That is, the party asserting a past practice

has the burden of proving that the past practice exists largely because a past practice represents implied agreement by mutual consent.

In the case at bar such a process of proof never happened but nonetheless, the ALJ predicated his findings and conclusions of law upon a showing and existence of said past practices. General Counsel's position was to claim in its pleadings that there were past practices in regard to allowing employees to use sick leave and/or annual leave for their absences while reported to the Worker's Insurance Compensation Fund, a practice of granting holiday pay to its employees when a holiday fell on their day and a practice to grant union employees a given number of holidays. Nonetheless, the General Counsel never discharged its obligation to show how, why and since when the allegations of the unfair labor practices constituted a past practice.

The General Counsel failed to comply with its burden to show the frequency, consistency and longevity of the aforementioned past practices but the ALJ based its decision assuming or taking for granted that the General Counsel did prove or comply with its burden of proof of asserting the past practices frequency, consistency and longevity. There is nothing on the record to support the requirement that the General Counsel proffered evidence to comply the demonstrating of the past practice as established by the previously authorities.

#### Deferral to Arbitration

6- Exception is also raised to the ALJ decision not to defer to arbitration allegations of the complaint in subparagraphs 8 (a) and 8 (c). See: page 4, lines 1-12 of the decision.

A- Subparagraph **8 (a)** of the complaint is about a claim that in or about November 2009 Respondent, unilaterally and contrary its past practice, discontinued granting holiday pay to its employees when a holiday fell on their day off’.

B- On the other hand, Subparagraph **8 (c)** of the Complaint is about a claim that “in or about January 7, 2010, Respondent, unilaterally eliminated its past practice of allowing employees to use sick leave and/or annual leave for their absences while reported to the Workers Insurance Compensation Fund”.

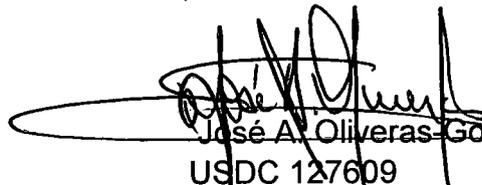
C- The ALJ reasoned that since there was a bifurcation of union contract interpretation and statutory issues (namely, an allegation to refuse to provide information pertaining the alleged issues), there was no need to defer to arbitration the matter.

The exception in the present situation consist that the ALJ did not deferred to arbitration those situations or grievances that occurred during the existence or duration of the collective bargaining agreement and required contract interpretation. The Hospital and the Union were involved in the handling and airing of other union contract grievances that were germane or contemporaneous to the unfair labor practices that were filed before the NLRB.

Factual grounds for these exceptions as well as legal basis and citation of authorities are provided in a separate cover in a supporting brief.

WHEREAS, the Hon. Administrative Law Judge did not considered that the record is devoid about the General Counsel's obligation to assert its burden of proof to demonstrate the frequency of the past practice as well as the consistency and longevity of said practice, and the circumstances surrounding the creation of each practice; the decision issued in the case at bar should be revoked. Additionally, since two of the unfair labor practices were subject to arbitration these two particular items as listed in the decision in the instant case should have been removed to arbitration.

RESPECTFULLY submitted this 6<sup>th</sup> day of December, 2010.



José A. Oliveras-González  
USDC 127609  
P.O. Box 22792 U.P.R. Station  
Rio Piedras, P.R. 00931  
(787) 319-4698  
[JAOliveras@Caribe.Net](mailto:JAOliveras@Caribe.Net)

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of this Respondent's Brief of Exceptions has been filed and served; at Region 24 of the National Labor Relations Board located at Suite 1002 at La Torre de Plaza, Plaza Las Américas Mall at 525 F.D. Roosevelt Avenue, San Juan, P.R. 00918-1002.

Dated this 6<sup>th</sup> day of December, 2010, at San Juan, Puerto Rico.



José A. Oliveras-González  
Attorney for Respondent  
P.O. Box 22792 U.P.R. Station  
Río Piedras, P.R. 00931  
(787) 319-4698  
JAOliveras@Caribe.Net

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