

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 SUPPORTING BRIEF
TO THE EXCEPTIONS
OF 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

Supporting Brief

Table of Contents

<u>Subject</u>	<u>Page</u>
I. First Exception	
A. Item (Subparagraph 8 (a)	1
B. Facts.....	2
C. Statement of the Exception.....	2-3
II. Second Exception	
A. Item (Subparagraph 8 (c)	3
B. Facts.....	2-3
C. Statement of the Exception.....	4
III. Third Exception	
A- Item (Subparagraph 8 (f).....	4
B- Facts.....	5
C. Statement of the Exception.....	5
D- Exception for the conclusions of Law.....	6
IV. Arguments for the exceptions.....	6-8
V. Fourth Exception	
A- Item (Deferral ro Arbitration).....	8
B. Argument.....	9-10

Supporting Brief

Table of Cases and Authorities

<u>CASES</u>	<u>Page</u>
1- <u>Eugene Iovine, Inc. v. Local Union No. 3</u> , 328 NLRB 39.....	6
2- <u>Torrington Co. v. United Automobile Workers</u> 62 LRRM 2495.....	7
3- <u>15th Avenue Iron Works, Inc.</u> , 301 NLRB 878.....	9
4- <u>Wright v. Universal Maritime Service Corp.</u> , 525 U.S. 70.....	10
5- <u>United Technologies Corp.</u> , 268 NLRB 557.....	10
6- <u>Collyer Insulated Wire</u> , 192 NLRB 837.....	10
 <u>AUTHORITIES</u>	
1- <u>Labor & Employment Arbitration</u> , Vol. 1, Borstein, Gosline & Greenbaum, Lexis-Nexis.....	7
2- NLRB General Counsel Memorandum 73-17 (May 10, 1973).....	9

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

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

RESPONDENT'S SUPPORTING BRIEF
TO THE EXCEPTIONS OF THE A.L.J. 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 30-33 of the ALJ decision).

Facts

The collective bargaining agreement in Art. XIX refers to the granting of holidays and lists 12 full-fay holidays and 9 half-day holidays. According to the hospital officers there was a mistaken interpretation of the union contract and it was decided, thru an internal memorandum issued on **October 1, 2009** to correct the situation. The union was informed about this interpretation and correction by the unionized employees but did not file a grievance and alleged that it learned about the memorandum after the five days limitation period established in the union contract. Therefore, the union resorted to file an unfair labor practice alleging that since **November 2009** the Hospital had changed the past practice about the granting of holidays when such time fell on their day off.

When analyzing the aforementioned charge the Hon. Administrative Law Judge (ALJ) determined that “the Hospital, by altering its *past practice* and ceasing to pay holiday pay to employees whose day fell of on a holiday without notice to and bargaining with the Union, violated Section 8 (a) (5) of the Act. (See: page 5, lines 33-35 of the decision).

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”.

Facts

In the present allegation the Hospital issued on January 7, 2010 a general memorandum to its employees informing them about an interpretation about the use of sick leave to cover those employees absences while reported to the state Worker’s Insurance Compensation Fund¹. (The premiums for these state insurance are solely paid by employers). Some sort of practice was developed by some union employees to resort to file a claim under Puerto Rico’s workmen compensation, to be out of work while collecting monies paid by the state agency handling job accidents and illnesses and at the same time claim to the hospital to pay them sick leave. The hospital tried to curtail

¹ This state program is managed and regulated by Puerto Rico’s State Insurance Fund (SIF) which provides medical, medicines, rehabilitation and an monthly stipend to workers that file a claim before this state agency.

this expensive practice and expenditure by issuing a memorandum that it was not economically acceptable for some employees be receiving two (2) payments for being out of work.

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).

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).

Facts

Around May 27, 2010 the Hospital issued a memorandum informing all employees about the need to consolidate nine (9) half-days holidays into full days. As a result of this measure three (3) full days were added (that is 6 half-days were consolidated into three) and remained day and a half holiday (three half-day holidays pending to be accredited).

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).

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. Eugene Iovine, Inc. and Local Union No. 3, 328 NLRB 39. 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.

Legal Basis for Respondent's Exceptions

In order to consider the existence of a past practice the party asserting such claim has to show (1) the frequency of the practice or situation, (2) the consistency of the practice, (3) the longevity of the practice, (4) the circumstances surrounding the creation of the practice and (5) whether the continuation of the practice has been discussed in negotiations or during the grievance and arbitration procedure. Labor & Employment Arbitration, Vol. 1, Chapter 10 (Past Practice), pag. 10-6, Borstein, Gosline & Greenbaum (Gen. Ed.), Lexis-Nexis, May 2010. See also, *Torrington Co. v. United Automobile Workers, Local 1645*, 62 LRRM 2495 (1971). In order to be considered a past practice the Board requires that the practice be so commonplace as to be a basic part of the job itself, *KDEN Broadcasting Co.* 225 NLRB 25 (1976) and the employer's discretion is seriously limited as to require bargaining with the union.

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 complied 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.

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".

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".

Position of Respondent over the Deferral

These two issues—8 (b) and 8 (c)—were supposed to be filed primarily in arbitration by the union since the parties had a collective bargaining agreement in force (*15th Ave. Iron Works, Inc.*, 301 NLRB 878 until **February 28, 2010**). Therefore, at the time of the events in question (the alleged discontinuance of granting holiday pay to its employees when a holiday fell on their day off on **November 2009**) Respondent was bound by the collective bargaining agreement. The same happens with allegation 8 (c) in which Respondent 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 which occurred in **January 7, 2010**. Therefore, such incidents were covered and actionable under the union contract. These two situations were within the union contract jurisdiction, were contractual in nature and the union contract provided for final and binding arbitration. According to the General Counsel's Memorandum 73-17 (May 10, 1973) Arbitration Deferral Policy Under Collyer:

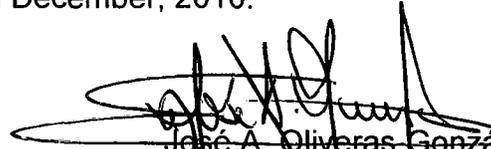
“Deferral of an unfair labor practice charge is warranted if there is a reasonable probability that the unfair labor practice issues raised by the charge could be considered and resolved under contract arbitration procedures in a manner consistent with the standards of Spielberg. This is likely to be true if the unfair labor practice issues and the arbitration issues both turn on the meaning or application of disputed contract provisions and

particularly so if the contract provisions amount to a 'fleshing out' of statutory obligations". (Gen. Counsel Memo at page 10).

The ALJ reasons 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. But even ordinary textual analysis of the agreement may show that matters which go beyond the interpretation and application of contract terms are subject to arbitration, *Wright v. Universal Maritime Service Corp*, 525 U.S. 70, 80. Also, the two allegations of the union were encompassed within the collective bargaining agreement, thus subject to arbitration, *United Technologies Corp*. 268 NLRB 557 (1984). See also: *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). The ALJ should have deferred to arbitration the aforementioned issues since at the time of the purported violation the collective bargaining agreement was in force.

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 6th day of December, 2010.

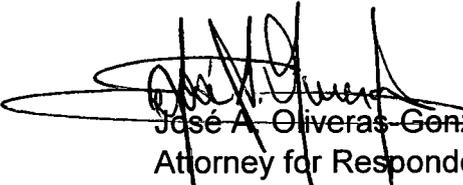


José A. Oliveras González
USDC 127609
P.O. Box 22792 U.P.R. Station
Rio Piedras, P.R. 00931
(787) 319-4698
JAOliveras@Caribe.Net

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of this Respondent's Supporting Brief 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 6th 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

RECEIVED

2010 DEC -7 PM 2:33

NLRB
ORDER SECTION



UNITED STATES POSTAL SERVICE

Flat Rate Mailing Envelope

For Domestic and International



1007

U.S. POSTAGE PAID SAN JUAN, PR 00936 DEC 06, 10 AMOUNT

\$18.30 00069952-16

Label 11-B, March 2004



usec
istor
/m 2



EG 696714206 US



UNITED STATES POSTAL SERVICE®

Post Office To Addressee

DELIVERY (POSTAL USE ONLY)

Delivery Attempt	Time	<input type="checkbox"/> AM	Employee Signature
Mo. Day		<input type="checkbox"/> PM	
Delivery Attempt	Time	<input type="checkbox"/> AM	Employee Signature
Mo. Day		<input type="checkbox"/> PM	
Delivery Date	Time	<input type="checkbox"/> AM	Employee Signature
Mo. Day		<input type="checkbox"/> PM	

CUSTOMER USE ONLY

PAYMENT BY ACCOUNT
Express Mail Corporate Acct. No. **WAIVER OF SIGNATURE (Domestic Mail Only)**
Additional merchandise insurance is void if customer requests waiver of signature.
I wish delivery to be made without obtaining signature of addressee or addressee's agent (if delivery employee judges that article can be left in secure location) and I authorize that delivery employee's signature constitutes valid proof of delivery.

Federal Agency Acct. No. or Postal Service Acct. No.

NO DELIVERY
 Weekend Holiday Mailer Signature

PRESS HARD. YOU ARE MAKING 3 COPIES.

ORIGIN (POSTAL SERVICE USE ONLY)			
PO ZIP Code 00936	Day of Delivery <input checked="" type="checkbox"/> Next <input type="checkbox"/> 2nd <input type="checkbox"/> 2nd Del. Day	Postage \$ 18.30	
Date Accepted 12 6 10	Scheduled Date of Delivery Month 12 Day 7	Return Receipt Fee \$	
Mo. Day Year	Scheduled Time of Delivery <input checked="" type="checkbox"/> Noon <input type="checkbox"/> 3 PM	COD Fee \$	Insurance Fee \$
Time Accepted 9:09	Military <input type="checkbox"/> 2nd Day <input type="checkbox"/> 3rd Day	Total Postage & Fees \$ 18.30	
Flat Rate <input type="checkbox"/> or Weight 29.5 lbs. 5 ozs.	Int'l Alpha Country Code	Acceptance Emp. Initials CAR	

FROM: (PLEASE PRINT) PHONE (787) 319-4698

Jose A. OLIVERAS
P.O. Box 22792
H.P.R. Station
Rw Piedras, P.R. 00931

TO: (PLEASE PRINT) PHONE ()

NATIONAL LABOR RELATION BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1099 14th Street, N.W.
WASHINGTON, D.C. 20570

ZIP + 4 (U.S. ADDRESSES ONLY. DO NOT USE FOR FOREIGN POSTAL CODES.)
20570+

FOR PICKUP OR TRACKING
Visit www.usps.com
Call 1-800-222-1811

FOR INTERNATIONAL DESTINATIONS, WRITE COUNTRY NAME BELOW.



USPS aware for the Form m bdc Create

Please recycle.