

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

QUALITY HEALTH SERVICES OF P.R., INC.
D/B/A HOSPITAL SAN CRISTOBAL

Respondent

and

UNIDAD LABORAL DE ENFERMERAS (OS) Y
EMPLEADOS DE LA SALUD

Charging Party

Cases 24-CA-11438
24-CA-11507
24-CA-11537

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Comes now Counsel for the General Counsel and respectfully submits to the Board this Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision whereby it requests that Respondent's exceptions be dismissed in their entirety and the Administrative Law Judge's decision in this case be affirmed. In support of this position, Counsel for General Counsel (CGC) offers the following:

I. PROCEDURAL STATEMENT

The Regional Director for the 24th Region of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing on August 20, 2010, based on charges filed by Unidad Laboral de Enfermeras(os) y Empleados de la Salud (hereinafter "Union") against Quality Health Services of P.R., Inc., d/b/a Hospital San Cristobal (hereinafter "Respondent") in Cases

24-CA-11438, 24-CA-11507, 24-CA-11537 and 24-CA-11549. The Consolidated Amended Complaint alleges that Respondent committed several violations to Section 8(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment of unit employees without prior notification to the Union or affording it an opportunity to bargain.

The hearing on this matter was held before the Honorable Administrative Law Judge William N. Cates on September 15 and 16, 2010, in San Juan, Puerto Rico. Prior to the conclusion of the hearing, Judge Cates authorized a partial non-Board settlement reached by all the parties of several allegations set forth in the Consolidated Amended Complaint, specifically those alleged in sub-paragraphs 8(d) and 8(g), and paragraphs 9 and 10. Thus, the allegations contained in paragraphs 8(a), 8(b), 8(c), 8(e), and 8(f) of the Consolidated Amended Complaint were left to be decided and resolved by Judge Cates.

On November 9, 2010, Judge Cates issued his decision in this case whereby he found that Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes to its employees' terms and conditions of employment without having given the Union prior notice or the opportunity to bargain, including 1) eliminating its past practice of granting holiday pay even to those employees that were on their day off work; 2) implementing a new policy that eliminated its past practice of allowing employees to use sick leave when reported to the Workers Insurance Fund; 3) eliminating permanent shifts in the Respiratory Care department; and 4) implementing a new holiday calendar. On December 7, 2010, the Respondent filed exceptions to Judge Cates' decision.

II. ISSUES RAISED BY RESPONDENT IN ITS EXCEPTIONS

Respondent's exceptions address three of four changes that Judge Cates found to be implemented unilaterally in violation of Section 8(a)(5) of the Act, specifically those alleged in subparagraphs 8(a), 8(c) and 8(f) of the Consolidated Amended Complaint. Respondent did not file exceptions to Judge Cates' finding that it unilaterally eliminated the permanent shifts in the Respiratory Care department as alleged in subparagraph 8(e) of the Consolidated Amended Complaint.

The arguments in support of the Respondent's exceptions are essentially two fold. The first issue raised by Respondent is that Counsel for General Counsel failed to show evidence of "...how, why and since when..." the past practices existed prior to the change. Secondly, Respondent argues that the unilateral changes alleged in subparagraphs 8(a) and 8(c) should be deferred to arbitration. As explained below, both arguments lack merit.

III. GENERAL COUNSEL MET ITS BURDEN TO PROVE PAST PRACTICE AND UNILATERAL CHANGES

Respondent does not dispute that an employer may not unilaterally change employees' wages, hours, and other terms and conditions of employment without first affording their collective-bargaining representative timely notice and a meaningful opportunity to bargain over any proposed changes. NLRB v. Katz, 369 U.S. 736, 743 (1962); Cook Dupage Transportation Co., 354 NLRB No. 31, slip op. 10 (2009). Nor does it dispute that this bargaining obligation extends to an employer's regular and longstanding practices concerning wages, hours, and other terms and conditions of employment, even if not required by a collective-bargaining agreement. Sunoco, Inc., 349 NLRB 240, 244 (2007); see also Coastal International Security, Inc., 352 NLRB 289, 294

(2008). Respondent's sole argument is that the General Counsel was required to show the frequency and consistency of the practice, the circumstances surrounding the creation of the practice and whether it had been discussed during the negotiations with the Union. However, Respondent seems to overlook the fact that its Human Resources Director, Candie Rodriguez, admitted during the hearing to all of the past practices alleged in subparagraphs 8(a), 8(c) and 8(f) and to the changes that Respondent subsequently implemented without any prior notice to the Union.

More specifically, when testifying about subparagraph 8(a), Director Rodriguez acknowledged the past practice of granting holiday pay to those employees on their day off work and explained how and why Respondent decided to change such policy (tr. 27-30, 97-99).¹ In regards to subparagraph 8(c), Director Rodriguez admitted that she prepared and sent a memo to the unit employees which reflects Respondent's past practice of allowing employees to use sick leave when reported to the Workers Insurance Fund and its reasons for eliminating such practice (tr. 41, GC-7). Finally, when addressing subparagraph 8(f), the record shows that the expired collective bargaining agreement, which had been followed since at least 2002, provided a list of the holidays to which unit employees are entitled, specifying that certain holidays were granted for a full work day, while others were granted for only half a day (GC-41). Director Rodriguez admitted that she prepared and sent a memo to the unit employees announcing Respondent's change to its holiday calendar, including removing holidays from the list of observed holidays and converting four half day holidays to a full day (GC-16).

¹ Record references are as follows: "GC" refers to General Counsel's exhibits and "tr" refers to the transcript of the hearing.

Rodriguez further admitted not sending any prior notification regarding this matter to the Union (tr. 58-60).

Inasmuch as Respondent admits to the existence of the past practices and its decision, without any prior notice to the Union, to change such practices, the General Counsel effectively met its burden of showing they were longstanding practices. See Regency Heritage Nursing & Rehabilitation Center, 353 NLRB No. 103, slip op. 2 (2009); Sunoco, Inc., *ibid.* Therefore, Respondent's argument lacks any merit.

IV. DEFERRAL TO ARBITRATION IS NOT APPROPRIATE

Respondent argues that the unilateral changes alleged subparagraphs 8(a) and 8(c) should have been deferred to arbitration since they occurred while the collective bargaining agreement was still in effect.² However, under the circumstances of the present case, Judge Cates correctly determined that deferral was not appropriate.

It is well settled that the Board has "considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." Wonder Bread, 343 NLRB 55, 55 (2004) (citations omitted). As the Board has held, deferral is appropriate when the following factors are present:

"[T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution." *Id.* (citing United Technologies Corp., 268 NLRB 557, 558 (1984)).

² Subparagraph 8(a) pertains to Respondent's elimination of its past practice of granting holiday pay even to those employees that were on their day off. Subparagraph 8(c) refers to the implementation of a new policy that eliminated Respondent's past practice of allowing employees to use sick leave when reported to the Workers Insurance Fund.

Applying the above principles to the present case, Respondent's multiple instances of unilateral changes, before and after the collective bargaining agreement expired, clearly show its abrogation of the parties' contract in effect at the time of the violations. Furthermore, the Consolidated Amended Complaint contained more than mere changes to some terms of the collective bargaining agreement. The allegations of Respondent's refusal to provide information specifically related to the allegations herein and its failure to meet and bargain under Section 8(d) of the Act, albeit settled by a non-Board settlement prior to the conclusion of the hearing, involves conduct amounting to a de facto rejection of the bargaining relationship between the Respondent and the Union. United Cerebral Palsy of New York City, 347 NLRB 603 (2006).

In addition to the above, the record is devoid of evidence that would show that the parties' expired contract contained an arbitration clause that would encompass the dispute at issue. Thus, it cannot be said that such disputes are even arguably arbitrable. Furthermore, in regards to the allegation of the change in past practice of granting holiday pay to employees on their day off, even assuming *arguendo* that the contract specifically encompassed such an issue as Respondent claimed, then arbitration would be unnecessary as there would be nothing to interpret and deferral would still be inappropriate. Caritas Good Samaritan Medical Center, 340 NLRB 61, 63 (2003). Regarding the implementation of a new policy affecting sick leave, the record does not reflect that the contract even addressed such an issue.

Accordingly, deferral is not appropriate for any of the allegations set forth in the Consolidated Amended Complaint. As pointed out by Judge Cates, Board policy

disfavors bifurcation of proceedings that entail contractual and statutory questions.
Citing Avery Dennison, 330 NLRB 389, 390 (1999).

V. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully requests that Respondents' Exceptions to the Administrative Law Judge's Decision be dismissed.

Dated at San Juan, Puerto Rico this 21st day of December 2010.

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CERTIFICATE OF SERVICE

I hereby certify that the “GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION” has been served on by e-mail to Jose A. Oliveras at JAOliveras@Caribe.Net and Unidad Laboral de Enfermeras y Empleados de la Salud at contacto@unidadlaboral.com.

Dated at San Juan, Puerto Rico this 21st day of December 2010.

_____/s/
Jose L. Ortiz
Counsel for the General Counsel