

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

**SUNRISE MOUNTAINVIEW HOSPITAL, INC.
d/b/a MOUNTAINVIEW HOSPITAL, INC.**

and

Case 28-CA-23100

**CALIFORNIA NURSES ASSOCIATION
NATIONAL NURSES ORGANIZING
COMMITTEE (CNA/NNOC)**

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

 A. BACKGROUND 2

 B. SURGICAL SERVICES DEPARTMENT 3

 1. Scheduling Surgeries..... 3

 2. Staffing PPCU 5

 C. RESPONDENT ANNOUNCES PPCU WILL REMAIN OPEN JULY 5..... 7

 D. THE UNION REQUESTS BARGAINING..... 10

III. RESPONDENT’S EXCEPTIONS..... 14

 A. SCHEDULING SURGERIES – CORE ENTREPRENEURIAL DECISION 14

 B. BARGAINING OVER THE EFFECTS OF SCHEDULING SURGERIES ON AN OBSERVED HOLIDAY 15

 C. SURGICAL SCHEDULING GUIDELINES – “ELECTIVE SURGERIES” 17

 D. PAST PRACTICE – SCHEDULING SURGERIES AND ADDITIONAL PPCU NURSES 19

 1. The Letter Signed by 13 PPCU Nurses..... 19

 2. Respondent’s On-Call Schedule.....20

 3. Respondent’s Internal E-mails.....22

 4. Respondent’s Surgery Schedule.....24

 E. SURGICAL SCHEDULING SURGERIES - “EXCEPTIONS” 25

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Adair Standish Corp., 292 NLRB 890 (1989) 26
Bloomfield Health Care Center, 352 NLRB 252 (2008) 15
Eugene Iovine, 328 NLRB 294 (1999), enfd. mem. 242
 F.3d 366 (2d Cir. 2001)..... 25
Exxon Shipping Co., 291 NLRB 489 (1988)..... 25
Kendall College of Art, 288 NLRB 1205 (1988) 16
King Soopers, Inc., 340 NLRB 628 (2003)..... 14, 15, 16
KIRO Inc., 317 NLRB 1325 (1995) 16
Meat Cutters, Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965) 15
NLRB v. Katz, 369 U.S. 736 (1962) 26
Our Lady of Lourdes Health Center, 306 NLRB 337 (1992)..... 26
Peerless Publications, 283 NLRB 334 (1987)..... 14, 15

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I. INTRODUCTION

This case is before the National Labor Relations Board (Board) based on a Complaint that Sunrise MountainView Hospital, Inc. d/b/a MountainView Hospital, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by unilaterally failing to adhere to its own policies and past practice by (1) scheduling elective surgeries on July 5, 2010¹, an observed holiday, and (2) scheduling more bargaining unit nurses to work on an observed holiday than its usual two on-call nurses. By decision dated January 10, 2011, Administrative Law Judge Lana H. Parke concluded that Respondent violated the Act, as alleged. Thereafter, on February 7, 2011, Respondent filed timely exceptions wherein it argues that Judge Parke erred in finding that the Respondent did not have the right to take the above-referenced actions without bargaining with California Nurses Association/National Nurses Organizing Committee (CNA/NNOC)(Union).

¹ All further dates are in 2010, unless otherwise noted.

In accordance with Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) respectfully files this answering brief and, for the following reasons, submits that Respondent's exceptions are without merit.

II. STATEMENT OF FACTS

A. BACKGROUND

Respondent is a corporation with a place of business located at 3100 North Tenaya Way in Las Vegas, Nevada, where at all material times it has been engaged in the operation of an acute care hospital providing medical care. (GCX 1(c), (e) and (f))² Respondent employs a bargaining unit of registered nurses that have been represented by the Union since the employees selected the Union as their collective-bargaining representative in an election conducted on January 13 and 14. (GCX 1(c), (e) and (f)) Since that time the Union has been the exclusive collective-bargaining representative of the following employees (Unit):

All full-time, regular part-time, and VSP/Per Diem Registered Nurses employed at the Employer's facility at 3100 N. Tenaya Way, Las Vegas, Nevada. VSP/Per Diem Registered Nurses are eligible if they have worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the eligibility date, i.e., during the periods from Sunday, September 13, 2009 to Saturday, December 12, 2009 or from Sunday, June 14, 2009 to Saturday, September 12, 2009; excluding all other employees, confidential employees, permanent charge nurses, physicians, nurse educators, clinical educators, Emergency Department Educators, nurse coordinators, clinical coordinators, Bariatrics Coordinator, clinical nurse specialists, case managers, utilization review and/or discharge planners, nurse practitioners, Cardiovascular Nurse Practitioner, accounting or auditing RNs, Nurse Auditors, Infection Control Practitioner, Employee Health Coordinator, risk management/performance improvement and/or quality assurance or quality management nurses, Concurrent Review Nurse, Quality Management Coordinators, employees of outside registries and other agencies supplying labor to the Employer, managerial employees, guards and supervisors as defined in the Act.

² References to the trial transcript will be denoted by "Tr." followed by the page numbers. References to Acting General Counsel's exhibits will be denoted by "GCX" followed by the exhibit number. References to Respondent's exhibits will be noted by "RX" followed by the exhibit number. References to the ALJ's Decision will be denoted by "ALJD" followed by the applicable page and line numbers.

The parties have been in negotiations for an initial collective-bargaining agreement since April 7. (Tr. 81-82) As of November 2, the date of the hearing in this matter, an agreement had not been reached and negotiations were ongoing. (Tr. 81-82)

B. SURGICAL SERVICES DEPARTMENT

Respondent's operation includes a surgical services department. (Tr. 20-21, 44-45) The surgical services department covers the entire "intra-operative scope" from pre to post-operative functions. (Tr. 21, 45) This full-service spectrum includes the pre-operative care unit, the operating room, endoscopy and the recovery room. (Tr. 45) The pre-operative unit is referred to as "Pre-op" or "Pre and Post Care Unit" (PPCU). (Tr. 20, 44-45) There are approximately 26 nurses that work within PPCU. (Tr. 21) Respondent tasked these nurses with preparing patients to go into surgery and also with recovering patients in preparation for their departure from the hospital following surgery. (Tr. 45) They also prepare patient charts and perform patient education. (Tr. 45)

1. Scheduling Surgeries

Since its effective date of April 20, 2006, Respondent has maintained surgical scheduling guidelines that apply to its surgical services department, including PPCU. (Tr. 21-22; GCX 3) These guidelines include specific definitions for three types of surgeries: elective, urgent, and emergency. (ALJD 3; Tr. 22-23; GCX 3) The guidelines read as follows:

- a. Elective Surgery: scheduled to be performed at a date in the future mutually agreed upon by patient, physician & hospital.
- b. Urgent Surgery: surgical intervention should take place within a designated time frame (i.e.: within 8 hrs. or within 6 days).

- c. Emergency Surgery (Bump): a critical or life-threatening condition, which requires surgical intervention as soon as preparations can be made (immediate response). (GCX 3, p. 1-2)

The guidelines further detail the operational process with respect to when surgeries are to be scheduled by Respondent. (Tr. 23-24; GCX 3, p. 2) Specifically, Respondent's guidelines state:

Elective surgery will be performed daily Monday – Friday from 700 to 2300 and Saturday from 0700 to 1500. Sunday & Holidays, there will be no elective surgery. Surgical & Anesthesia staff will be available for urgent & emergency cases only. Administration in conjunction with the Surgical Services Director will evaluate any exceptions to this guideline. (Tr. 23-24; GCX 3, p. 2)

Respondent recognizes six holidays on an annual basis. (ALJD 3; Tr. 24) The holidays observed by Respondent include New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving and Christmas, and are set forth in Respondent's Paid-Time Off policy. (Tr. 24-25; GCX 4, p. 2) If a holiday falls on a Saturday, Respondent observes the holiday on the preceding Friday. (Tr. 26, 54; GCX 4, p. 4) If a holiday falls on a Sunday, Respondent observes the holiday on the following Monday. (Tr. 26, 54; GCX 4, p. 4)

Respondent has historically scheduled weekday elective surgeries from 7 a.m. to approximately 8 p.m. and from 6 a.m. to 2:30 p.m. on Saturdays. (Tr. 48) As described by Karen Clendenin, a registered nurse who has worked in Respondent's PPCU for almost five years, "Elective surgery is a surgery that would be non-life threatening that could be scheduled as much as two months in advance up to probably a day in advance." (Tr. 46) Examples include hernia repairs, tonsillectomies, lumpectomies, a biopsies, gall bladder removals, etc. (Tr. 46) As further detailed by Clendenin, "I've seen [elective surgeries scheduled] as far out as two months, but generally within a month of the -- the surgeon will ask for it about a month before, up to a day before, but generally, but generally about a week

or two out.” (Tr. 48) Historically, Respondent has not scheduled elective surgeries on a holiday or observed holiday. As credibly testified to by Clendenin:

Q And based on your time with MountainView, are elective surgeries scheduled in advance so that they’re going to take place on a holiday?

A No.

Q On an observed holiday?

A No. (Tr. 49)

Although Respondent historically has not scheduled holiday elective surgeries in advance, it is possible that an elective surgery could end up on the schedule for a holiday.

(Tr. 49) If an operating crew is already present with an emergency or urgent case, an elective case or case that would not otherwise be scheduled can be added to the current case load.

(Tr. 49) But such a surgery would not be added to the schedule until the day in question or the day before, at the very earliest. (Tr. 49)

2. Staffing PPCU

Respondent staffs its PPCU Monday through Friday from 5:30 a.m. to 10:30 p.m. with regularly scheduled registered nurses. (Tr. 50) Although staff arrives as early as 5:30 a.m., elective surgeries do not take place until 7 a.m. on these days. Only urgent or emergency cases are handled after 10:30 p.m. and those cases are handled by operating room nurses. (Tr. 45-46) There are no nurses that are considered “on-call” during the weekdays. (Tr. 50) “On-call” means that a nurse is only utilized if there is an urgent or emergency case that comes through the door. (Tr. 50-51) Respondent utilizes on-call nurses to staff its PPCU on Saturdays and Sundays. Respondent traditionally staffs PPCU with on-call nurses on holidays. (Tr. 48) As described by Clendenin, “The holidays are treated as on-call days only, with two registered nurses working in Pre-Op and occasionally a backup nurse may be

required, but rarely used.” (Tr. 48) In essence, Respondent considers PPCU “closed” by Respondent on observed holidays. With respect to a department being “open” or “closed”, Clendenin provided the following explanation:

“Open is when we have regular scheduled full-time and part-time RNs who have set schedules that are working in the department and elective cases and emergent cases can be scheduled during that time. To be closed, we don’t staff past 10:30 at night, so we are closed from 10:30 at night until again at – when the nurses arrive at 5:30 in the morning. Anything done during that time would have to be treated like an emergency. Also on Sundays and holidays we are closed. We don’t staff with regularly scheduled registered nurses. We only use on-call nurses...” (Tr. 49-50)

Respondent always has staffed PPCU with only two on-call nurses on observed holidays, except for the rare exceptions when a third nurse might be required as a backup on-call person. (Tr. 52) Respondent utilized the same method in determining which PPCU nurses would work on an observed holiday in calendar year 2010, that it followed in previous years. (Tr. 52-53) As Clendenin described:

Q For example, for calendar year 2010, this year, how was it determined who was on call for a particular holiday?

A In March of 2010, Donna Kerr was the manager, the Charge Nurse. She put a projected call schedule out for the rest of the year up until January 1st (2011) and we volunteered to put ourselves on-call for the holidays based on her past practice of projecting the holidays and how busy they are and we filled it out up until the end of December -- January 1st.

Q And to be clear, how many would be filling out per holiday?

A Two.

Q Was this any different of a process than prior to calendar year 2010?

A No. (Tr. 53).

In March, two PPCU nurses signed up to be on-call on Monday, July 5:

Bianca Hall and Deborah Lewis. (Tr. 54-55; GCX 9) Respondent initially scheduled no other nurses to work on that day.

**C. RESPONDENT ANNOUNCES PPCU WILL REMAIN OPEN
JULY 5**

The Fourth of July holiday fell on a Sunday in 2010. Therefore, pursuant to Respondent's past practice and its policies, the holiday was observed on the following Monday. However, on or around June 15, Clendenin heard a rumor that PPCU would remain "open" on Monday, July 5. (Tr. 55) Clendenin heard that Respondent planned to schedule elective cases on July 5 "as opposed to emergen[cy]³ cases only, per our past practice." (Tr. 55) Clendenin confirmed this scheduling plan when she contacted Charge Nurse Christine Wahinehookae. (Tr. 55) Wahinehookae informed Clendenin that she had heard the same rumor, but that Clendenin would need to clarify it with Director of Surgical Services John Paul Draves. (Tr. 56) Clendenin subsequently met with Draves in her office later that afternoon. (Tr. 56) Clendenin showed Draves Respondent's surgical scheduling guidelines and paid-time off policy. (Tr. 36, 56-57; GCX 3, GCX 4) Clendenin specifically brought to Draves' attention the provisions that holidays that fall on a Sunday are observed on the following Monday and explained that elective surgeries should not be scheduled on a holiday. (Tr. 36, 56-57; GCX 3, GCX 4) Clendenin attempted to give him copies of the policies in question, but Draves simply responded that she would be on-call on July 5. (Tr. 57).

Clendenin testified to the following exchange that then took place:

A I asked him if he was going to choose past practice and to violate these policies and continue to schedule elective cases on that day, and pointed out that we did have elective cases scheduled, which is a violation of our past practice. There shouldn't have been anything on the schedule.

Q Did he have any response to this?

³ While the transcript reads "emergent," it is clear from the testimony that the testimony references emergency.

A Just told me I was going to be the sixth call person on call, and that he felt that he needed to remain open for essentially monetary purposes, that we needed to have an income, or create an income that day by allowing doctors to schedule cases on that day. (Tr. 57)

Draves informed Clendenin that he had been given permission to schedule surgeries on July 5, from Director of Human Resources Robert Nettles. (Tr. 58) Clendenin advised Draves that this decision needed to be negotiated with the Union. (Tr. 58) Draves admitted that he was aware that Clendenin was a member of the Union's bargaining committee. (Tr. 35) She cautioned Draves that what he intended to do on July 5, constituted "a unilateral change and a deviation from past practice and that we, this wasn't something that anyone could make a decision about, that it had to be negotiated and discussed with the union." (Tr. 58) Draves would not relent, even though Clendenin explained to him that she and her fellow PPCU co-workers had already made plans to be out of town for the holiday based on their expectations that Respondent would be following past practice in staffing of the department on July 5. (Tr. 64) Clendenin then went to discuss this matter with other registered nurses within PPCU, some of whom have worked in the department for over 14 years. (Tr. 58) Following her discussions with other experienced PPCU nurses, Clendenin drafted a letter to Draves addressing his announced July 5 changes. (Tr. 60; GCX 5) She showed the letter to her co-workers and between June 16 and June 19, approximately 13 fellow PPCU nurses signed Clendenin's letter. (Tr. 61; GCX 5) After obtaining the signatures, Clendenin placed the letter in Draves' mailbox. (Tr. 61) Draves testified that he received the letter. (Tr. 40-41) Clendenin communicated with the Union several times with respect to this issue, specifically addressing the fact that Respondent had announced that it intended to act in a manner counter to policy and past practice on July 5. (Tr. 61) Clendenin and the rest of the bargaining unit

nurses within PPCU received an e-mail from Draves on June 25, concerning Respondent's intentions for staffing PPCU on July 5. (Tr. 62; GCX 6) Draves wrote, in part:

“As is and has been our practice, we staff based on anticipated volume and patient care needs, and our approach to determining staffing needs for July 5th will not vary from this. I have reviewed some historical information about caseload in similar situations, and have determined that our current level of 2 RN's on call on July 5th will not be sufficient staffing. Therefore, in anticipation of our projected volume and in order to ensure that we can meet the needs of our patients, we will need to add 4 more people to the on call staff on July 5th. We will solicit volunteers for those slots, but if we do not have sufficient volunteers, RN's not already on call that day will be assigned call in reverse order of seniority.” (GCX 6)

Clendenin did not receive any further communication from Draves with respect to nurse staffing in PPCU on July 5 until July 2, just three days prior to the observed holiday, when she received a voicemail message from Draves while she was home sick with a migraine. (Tr. 62) Draves informed Clendenin that she did not need to work on July 5, and that she should have a nice 4-day weekend. (Tr. 62, 63-64) Following receipt of this voicemail, Clendenin called and spoke to registered nurse Deborah Lewis. (Tr. 64) Lewis informed Clendenin that Respondent had four nurses scheduled to be on-call on July 5, including Lewis. (Tr. 65) Ultimately, Respondent required three of these nurses to report to Respondent's facility on July 5, to cover the surgeries scheduled for that day. (Tr. 65)

Subsequent to Clendenin's initial conversation with Draves on June 15, she reviewed Respondent's PPCU surgery staffing schedule on a daily basis, “sometimes twice and three times a day.” (Tr. 65-66) She checked the holiday on-call schedule to see if they remained the same. (Tr. 66) At no point did Clendenin observe that the PPCU's holiday on-call schedule had changed, as only two nurses – Deborah Lewis and Bianca Hall – remained on-call for July 5. (Tr. 66) However, on the regular schedule, the number of nurses on-call for July 5, continued to change. Clendenin observed:

It was changed so many times I actually couldn't keep up with it. There were two call people, then there were six call people, then the actual individuals that were on call were changed. At one point, one of the people who was on call was out on medical leave with a broken pelvis and I was trying to understand how that person was going to work. And the order of the people on-call changed. (Tr. 66)

With respect to surgeries scheduled for July 5, Clendenin noticed that on June 15, the day of her initial conversation with Draves, five patients had been scheduled for surgeries to take place on July 5. (Tr. 66-67)

D. THE UNION REQUESTS BARGAINING

On or around June 20, Clendenin contacted the Union's HCA⁴ Division Director Lisa Morowitz concerning Draves' proposed July 5 holiday schedule change for PPCU nurses. (Tr. 82) Prior to receiving this information from Clendenin, Respondent had not provided the Union with any notice of its July 5 plans. (Tr. 82) In response to the bargaining unit's communicated consternation, on June 20, Morowitz e-mailed Human Resources Director Robert Nettles. (Tr. 83; GCX 2, Exhibit A) Morowitz sent this e-mail "to clarify with him exactly what the practice was going to be, vis-à-vis that holiday Monday, the observance of July 4th, and to notify him that if the intent was in fact to change the scheduling, that we needed to commence bargaining." (Tr. 83) Morowitz's e-mail to Nettles reads, in part:

Bob – it has just come to our attention that MountainView has notified nurses in Pre-Op that it will be open on Monday, July 5 for business and they will be expected to work. This is a deviation from past practice and this change requires negotiation. (GCX 2, Exhibit A)

After she did not receive a response from Nettles, Morowitz contacted Respondent's attorney Michael Bishop on Tuesday, June 22. (Tr. 83) Bishop encouraged Morowitz to phone Nettles directly, and she did so later that day. (Tr. 84) When Morowitz reached Nettles, she learned that she had sent her June 20 e-mail to the wrong e-mail address. (Tr. 84-

⁴ HCA stands for Hospital Corporation of America, the operator of Respondent, according to its website www.hcahealthcare.com.

85) Morowitz then forwarded her June 20 e-mail to Nettles' correct address on June 22.

(Tr. 85; GCX 2, Exhibit B)

Morowitz was not the only representative for the Union that communicated with Respondent concerning the July 5 holiday scheduling change. (Tr. 86) Morowitz communicated on a daily basis with a member of the Union's field staff assigned to Respondent's facility, Renee Ruiz, and Ruiz also communicated directly with Respondent concerning this issue, as seen by her e-mail to Robert Nettles on June 25. (Tr. 86; GCX 2-1, p. 3) Ruiz reminded Nettles that the Union had informed him "of the need for a time to negotiate over the policy change in Pre-Op regarding the unit being opened and fully staffed on 7/5/10, the Federal Observance of July 4th." (GCX 2-1, p. 3) She continued:

The RNs on the unit have not received any written notice, working on the National Holiday has not been the past practice, and CNA/NNOC has not received notice of a time to negotiate this policy change, therefore the RNs will proceed with their plans to not report in on 7/5. (GCX 2-1, p. 3)

Nettles responded to the Union with an e-mail later in the day that Respondent would staff PPCU on July 5, with on-call staff, "just as we typically do on days that immediately precede or immediately follow a holiday occurring on a Saturday or Sunday." (Tr. 87; GCX 2, Exhibit C) He explained that staffing for the PPCU on that date would be based on anticipated volume and patient care needs and that such staffing was consistent with Respondent's past practice. (GCX 2, Exhibit C) Morowitz understood Nettles to be saying that Respondent did not intend to change its past practice with respect to the holiday schedule in PPCU in that they would keep the same on-call status with two nurses as they had always done. (Tr. 87)

Although the Union understood Nettles to have advised that Respondent would maintain the status quo, that is not what the Union had been informed by its bargaining unit.

(Tr. 87-88) Morowitz testified that she and Ruiz were told by PPCU nurses that Respondent had posted a schedule for July 5, showing additional nurses scheduled to be on-call, that Respondent had been soliciting surgeries to be scheduled for July 5, and that the unit would remain open on that day. (Tr. 88; GCX 10) After receiving this information, Ruiz e-mailed Nettles on June 26 and advised that subsequent to his June 25 e-mail that the status quo would remain, Draves posted a work schedule for July 5, that contradicted the status quo. She asked Nettles if his information was incorrect or if Draves had failed to follow Respondent's policies and Nettles' directive. (Tr. 87-88; GCX 2, Exhibit D) She cautioned Nettles that the nurses within PPCU "are not prepared to comply with these abrupt and unilateral changes and neither are we." (GCX 2, Exhibit D) Ruiz informed Nettles that she would be at his office on June 28, at 9 a.m., in order to reach a resolution on the issue. (GCX 2, Exhibit D) Morowitz also sent Ruiz's June 26 e-mail to Michael Bishop to let him know that what the Union heard from its nurses did not correspond to the information it had received from Nettles. (Tr. 88-89; GCX 2, Exhibit E) Morowitz wanted Bishop to know that the parties had come "full circle" with the need to "negotiate promptly." (Tr. 89; GCX 2, Exhibit E) Both Nettles and Bishop responded via e-mail on June 28, that the schedule that had been posted by Draves had been posted in error and that it had been or would be removed. (Tr. 89; GCX 2, Exhibits F and G) However, the Union's information was to the contrary. (Tr. 89) PPCU nurses told their Union representatives that Respondent had not removed the posted work schedule showing that the department would be staffed with more than just two on-call nurses on July 5. (Tr. 89-90; GCX 10) Ruiz e-mailed Nettles and Draves late in the afternoon on June 28, advising them that there appeared to be an issue with communication. (GCX 2-1, p. 4) Ruiz wrote that Draves had not rescinded the schedule for July 5, and that he was calling RNs who were off

work on medical leave to be on-call that day. (GCX 2-1, p. 4) Morowitz also sent an e-mail to Bishop to inform him that the schedule remained posted and that nurses were being told they had to work on July 5. (GCX 2, Exhibit H) Additionally, Morowitz called Bishop about the situation, and he asked that she send him an e-mail regarding the current status of the July 5 holiday scheduling. (Tr. 89-90) In her June 29 e-mail to Bishop, Morowitz wrote:

“Mike – Manager John Paul has told the RNs that PPCU is fully open and operational July 5, contrary to past practice and written hospital policy (which says that this unit on holidays and Sundays is only for emergencies procedures, not scheduled). He is soliciting business for that day as if it were a regularly scheduled Monday and the schedule he posted for July 5 (holiday observed) shows all Monday employees on duty. Volunteers are not being solicited and employees are not be assigned (sic) in reverse order of seniority. In fact, Stephanie Kohl RN who is on workers comp. because of a fall in the hospital was called at home and told by John Paul that she will be the 4th call person that day (sic). When the RNs asked why Manager Paul was not following the past practice as HR indicated they would, he advised he hadn’t heard that from Nettles.” (Tr. 90; GCX 2, Exhibit I)

Bishop responded that he had forwarded her e-mail to Respondent. (Tr. 90-91; GCX 2, Exhibit I) After not hearing anything further from Respondent by 5 p.m. on June 30, Morowitz sent Bishop an e-mail advising that she had not heard back from Respondent on this issue that the parties had been discussing for 11 days. (Tr. 91-92, GCX 2, Exhibit J(1)) Morowitz testified that the nurses within PPCU were concerned because the holiday was quickly approaching and many had made plans but were now being told they were required to work. (Tr. 91) Pursuant to a dispute resolution procedure in place between Respondent and the Union, Morowitz informed Bishop that the Union sought to have this matter resolved by an arbitrator because it believed that Respondent had an obligation to negotiate over the proposed change in scheduling. (Tr. 91-92; GCX 2, Exhibit J(1)) The parties were not able to reach a meeting of the minds with respect to the decision that was rendered pursuant to the dispute resolution procedure, and, as a result, the Union filed the instant unfair labor practice

charge against Respondent as a result of Respondent keeping PPCU open on Monday, July 5, and scheduling more PPCU employees to work on the observed holiday than the usual holiday schedule of two on-call nurses, without notice to or bargaining with the Union, in violation of Section 8(a)(1) and (5) of the Act.

III. RESPONDENT’S EXCEPTIONS

Respondent’s Exceptions and its Brief in Support of its Exceptions attack Judge Parke’s conclusion that Respondent had an obligation to bargain with the Union over the scheduling of elective surgical procedures and additional PPCU nurses on July 5.

A. SCHEDULING SURGERIES – CORE ENTREPRENEURIAL DECISION (Exceptions 8-10, 12, 13, 17-20, 23)

Respondent argues that the ALJ erred in that she failed to conclude that Respondent did not have a duty to bargain with the Union over the scheduling of elective surgical procedures because it was a “core entrepreneurial decision” and therefore exempt from any obligation to bargain. General Counsel supports the ALJ’s decision and analysis as her conclusion mirrors Board precedent.

Respondent asserts that scheduling surgeries is not a mandatory subject of bargaining because it is “essential to the operation of the Hospital and its core function of providing patient care.” One of the primary cases cited by Respondent is *Peerless Publications*, 283 NLRB 334 (1987). As the ALJ wrote in her decision, “the Respondent argues that its change in scheduling policy was a core entrepreneurial decision designed to protect the viability of its surgery services and that it met the ‘narrowly tailored’ and ‘appropriately limited’ factors enunciated by *Peerless*.” (ALJD 6: 17-21). The ALJ properly found that the Board has declined to apply the *Peerless* rationale broadly. See *King Soopers, Inc.* 340 NLRB 628, 629-

630 (2003). Respondent is simply trying to carve out a custom-made exception to the traditional obligation to bargain. The Board narrowly construes its *Peerless* finding for a reason, and Respondent's argument confirms why. Employers would attempt to tie every action they made to the "core function" of their enterprises, regardless of topic, severity and nexus to terms and conditions of employment. The *Peerless* principle is not the presumption, but the exception. The Board in *King Soopers* found "that *Peerless Publications* was decided within the unique context of the newspaper industry and is of limited applicability outside of the narrow factual situation presented in that case." *King Soopers* at 629. Clearly, as the ALJ stated in her decision, "employee work schedules, even in a surgery department, are vital aspects of working conditions and are mandatory subjects of bargaining." (ALJD 6:22-24) *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *Bloomfield Health Care Center*, 352 NLRB 252, 256 (2008). Respondent cannot isolate scheduling surgical procedures and hide under the umbrella of "core entrepreneurial decisions" when such decisions have a direct nexus to mandatory subjects of bargaining for employees within the Unit.

B. BARGAINING OVER THE EFFECTS OF SCHEDULING SURGERIES ON AN OBSERVED HOLIDAY (Exceptions 8-10, 12, 13, 17-20, 23)

Respondent disputes the ALJ's conclusion that even assuming it did not have an obligation to bargain with the Union over the scheduling of surgical procedures, it was obligated to bargain over the effects of scheduling surgeries. Again, blindly relying on *Peerless Publications*, 283 NLRB 334 (1987), Respondent argues that the ALJ failed to consider or apply Board law that allows for the unilateral imposition of decisions that affect terms and conditions of employment if the decision goes to the "protection of the core

purposes of the enterprise.” So not only does Respondent take the position that it can schedule surgeries within PPCU whenever it chooses, but also that it has no obligation to bargain with the Union over the consequences those surgeries will have on the terms and conditions of the Unit’s employment. Respondent’s argument ignores the fundamental purpose of the Act – to promote and encourage collective bargaining. As the ALJ found, “Even assuming the Respondent did not have to bargain about its surgery-scheduling policy, it had an obligation to engage in effects bargaining over a managerial decision that has an impact on terms and conditions of employment.” *King Soopers, Inc.* 340 NLRB 628, 629 (2003). (ALJD 6:24-26) In *King Soopers*, the employer installed in its pharmacies prescription accuracy scanners that were used by pharmacists when filling prescriptions. *Id.* at 628. After installing the scanners, the employer issued a policy pertaining to the scanners. The policy in question was zero tolerance in nature and failure to comply would be grounds for discipline up to and including termination. *Id.* The Board stated in that case, “Because the Scanner Policy, which was promulgated pursuant to the Respondent’s decision to install the scanners, authorizes the discipline of employees who fail to use the scanners, the Respondent was required to bargain over the policy prior to its implementation.” *Id.* at 629-630. Citing *KIRO Inc.*, 317 NLRB 1325, 1327 (1995) (employer was required to bargain over effects of its decision to produce additional weekday news program, where production of program resulted in increased work loads, split shifts, and greater productivity demands on employees). See also *Kendall College of Art*, 288 NLRB 1205, 1210 (1988) (effects of expansion of curriculum). Although the General Counsel supports the ALJ’s finding that Respondent was obligated to bargain over the scheduling of elective surgeries on July 5, it is

without question that Board precedent further requires Respondent to bargain over the effects of such a change.

**C. SURGICAL SCHEDULING GUIDELINES – “ELECTIVE SURGERIES”
(Exceptions 1-7, 11-17, 19, 21-23)**

Respondent asserts that the ALJ erred in concluding that its surgical scheduling guidelines “provided that surgeries scheduled to take place more than 6 days from the booking date would be designated as “elective” and would not be performed on Sundays and holidays.” (ALJD 6: 43-45) Respondent argues that the ALJ’s interpretation cannot be accepted due to the evidence set forth in the record. Although the General Counsel supports the ALJ’s finding in this regard, the record supports the ALJ’s ultimate conclusion beyond any written definition of an “elective” surgery. During the hearing, Respondent never provided evidence to substantiate that the surgeries scheduled for July 5, were either “urgent” or “emergency” surgical procedures. Nor did Respondent explain why its own records indicate that July 5, was scheduled in a manner different than any previous observed holiday.

Respondent Exhibit 1 is a report generated by Respondent in response to a subpoena from the General Counsel showing all surgeries conducted on a holiday, observed holiday, or a Sunday from October 1, 2008 to the present. (Tr. 116-117; RX 1) Other than July 5, every single observed holiday at Respondent’s facility is similar in at least one way: the surgeries scheduled for those days are “booked” anywhere from a few days in advance to the day of the holiday itself. (RX 1) In fact, a vast majority of those surgeries are scheduled the preceding day or the day of the holiday. (RX 1) Of the 11 holidays shown in RX 1, only July 5 stands

out in regards to scheduling of surgeries.⁵ In fact, the manner in which July 5, differs is staggering with respect to how far in advance surgeries were scheduled for that date. As shown on page 17 of RX 1, Respondent scheduled surgeries as early as June 21, almost two full weeks prior to July 5. (RX 1, page 17) It scheduled more surgeries for that day on June 28 and 29, almost a full week in advance. (RX 1, page 17) However, the most telling evidence of the difference between how Respondent has historically treated its observed holidays compared to July 5, is the testimony of Draves. Draves admitted that during his conversation with Clendenin on June 15, the two discussed surgeries Respondent had already scheduled for July 5. (Tr. 36-38) That meant surgeries were scheduled almost three weeks in advance of the holiday.

Respondent has failed to establish that the surgeries scheduled almost three weeks in advance of July 5, constitute either an “urgent” or “emergency” surgery. Draves did not have first hand knowledge with respect to the surgeries scheduled for July 5, nor could he provide a reason why surgeries were scheduled almost three weeks in advance of July 5. Again, a common sense “reasonable person” standard must apply here. Respondent incredibly takes the position that it has the right to schedule urgent and emergency surgeries on a holiday, it has done so in the past, and it did so on July 5. Such a position is without logic. If it has done so in the past, why are there no other examples of Respondent’s scheduling surgeries three weeks in advance of an observed holiday? Why were the nurses so disturbed with Respondent’s decision to schedule more than two nurses to be on-call on July 5? Absolutely no evidence supports Respondent’s general assertions. However, the General Counsel’s position is supported by the specific testimony of Clendenin. Clendenin’s testimony in this

⁵ RX1 does not indicate that any surgeries were performed on January 1, 2009.

regard is supported by the overwhelming circumstantial evidence, including Respondent's pattern of scheduling surgeries over the past two years.

D. PAST PRACTICE – SCHEDULING SURGERIES AND ADDITIONAL PPCU NURSES (Exceptions 1-7, 11-17, 19, 21-23)

Respondent argues that it followed past practice in scheduling surgeries and additional nurses in PPCU on July 5. As Judge Parke found, this position is not supported by the evidence. A basic review of the record and Respondent's history supports the ALJ's findings.

Registered nurse and unit member Clendenin has worked in Respondent's PPCU for almost five years. (Tr. 44-45) Since the start of her employment in December 2005, Clendenin has first hand knowledge of how her department has operated on 27 separate observed holidays over that time period. Clendenin's testimony that Respondent has historically considered her department "closed" during observed holidays by (1) not scheduling elective surgeries in advance of that date and (2) not scheduling more than the standard two on-call nurses, is corroborated by a mountain of evidence.

1. The Letter Signed by 13 PPCU Nurses

The letter signed by 13 nurses within the unit (Tr. 60-61; GCX 5) corroborates Clendenin's testimony that Respondent deviated from its past practice in PPCU on July 5. This letter speaks volumes in that those nurses, some with as many as 14 years of service with Respondent, viewed Draves' decision to keep the department "open" and schedule more than two on-call nurses on July 5, as changes to the status quo. Draves even conceded during his testimony that nurses had complained to him that they had made plans to go out of town that day. (Tr. 136) After Draves initially advised Clendenin that she would be the sixth nurse on call that day, Clendenin informed him that she had made plans to travel to Southern

California. (Tr. 64) Clendenin's fellow co-workers, based on their past experience, also made plans that had to be changed and "deposits were actually lost on hotels, plane tickets." (Tr. 64) Common sense alone supports the conclusion that if there was a chance that nurses would be called into work on July 5, they would not make plans to be out of town that day, particularly plans that could result in lost deposits. Furthermore, making such plans would put the nurses in jeopardy because Respondent reserves the right to discipline a nurse who is on-call and fails to report or is unavailable if they are called in to work. (Tr. 38-39)

2. Respondent's On-Call Schedule

Clendenin credibly testified that with respect to Respondent's staffing of PPCU on observed holidays, prior to July 5, Respondent consistently utilized two on-call nurses on those days, with the rare exception that a third might be required. (Tr. 52) Clendenin described the process wherein early in calendar year 2010, nurses volunteered to work observed holidays for the remainder of the year, through New Years Day of 2011. (Tr. 52-53) That schedule is maintained in a locked bulletin board on the second floor of Respondent's facility. (Tr. 53) Clendenin testified that the holiday on-call schedule for PPCU nurses remained posted at the time of the hearing. (Tr. 53) General Counsel requested Respondent's holiday on-call schedule pursuant to paragraph 5 of his subpoena duces tecum. Although Respondent provided similar schedules for its PACU department, it failed to provide the holiday on-call schedule for PPCU with the incredible assertion that it "produced everything we have." (Tr. 15-16) Although Respondent did not provide the holiday on-call schedule that was still posted within PPCU, the department's regular on-call schedule corroborated Clendenin's testimony and the assertions of the PPCU nurses in their letter submitted to Draves. (GCX 9) GCX 9 is the weekend on-call schedule for nurses within the PPCU

department, projected through calendar year 2010 until January 16, 2011. (Tr. 67-68)

However, the exhibit shows that Respondent included observed holidays within this schedule, including those observed holidays that took place on a weekday. (GCX 9) Respondent's on-call schedule for the PPCU department confirms that Respondent has a past practice of assigning two on-call nurses to the unit for an observed holiday. All six observed holidays are identified on the schedule: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving and Christmas. (GCX 9) For each and every one of those holidays, two on-call nurses were scheduled to work with the exception of Thursday, November 25 (Thanksgiving), as only one nurse was scheduled to be on-call that day. (GCX 9) Just like all the other observed holidays for 2010, two on-call nurses were scheduled to work on Monday, July 5. (GCX 9) Any argument by Respondent that Monday, July 5, was treated like any other weekday is contradicted by its own posted schedule. If Monday, July 5, was to be treated like any other weekday, there would be no purpose in including that date on the weekend on-call schedule for 2010. Again, common sense must prevail. Monday, July 5, was included in this schedule for the same reason that Memorial Day, Labor Day, and Thanksgiving were included: it was the observed holiday for the Fourth of July and GCX 9 confirms the past practice of Respondent.

With Debra Lewis and Bianca Hall scheduled to be on call that day, Respondent changed its practice when it scheduled more on-call nurses. As Draves explained to Clendenin on June 16, she was scheduled to be the *sixth* on-call nurse scheduled for that day. (Tr. 57) Respondent even posted a new schedule noting which six nurses would be on-call. (GCX 10) Ultimately, Respondent required four nurses be on-call. Respondent attempt to avoid the change by claiming the nurses' participation on July 5, as "volunteering," is a

stretch. It is clear from Draves' e-mail to PPCU that he was determined to schedule more than two on-call nurses on July 5, to cover the surgeries he permitted to be scheduled almost a month in advance of the observed holiday, and if volunteers were not received, nurses would be forced to work in reverse seniority. (GCX 6) Respondent's reasons for how it ultimately staffed PPCU on July 5, are irrelevant. What matters is the fact that they staffed the department on an observed holiday in a manner that was a change from the status quo, and they did so without notice to or bargaining with their newly selected Union.

3. Respondent's Internal E-mails

Any argument that Respondent simply followed the status quo or a past practice within the PPCU on July 5, is further contradicted by internal e-mails among Draves, Nettles, and Chief Operating Officer Joseph Melchiode. (GCX 7, GCX 8) Draves was new to Respondent's facility as he started his employment on December 21, 2009. (Tr. 19) GCX 7 and GCX 8 are very telling with respect to Respondent's stance on its past practice. On April 19, 2010, Draves e-mailed Melchiode with an attached holiday calendar. (Tr. 31-32) Draves' e-mail reads as follows:

"Here is the 2010 Calendar. What is our status when a holiday falls on a weekend? Do we recognize the holiday Friday/Monday. I have worked where if the holiday falls on a weekend we are open both Friday and Monday, what has been the status quo here? Are we looking to change anything? Let me know but as for the calendar I made, we are not being closed if the holiday falls on the weekend, also the day after Thanksgiving we are open." (GCX 7)⁶

Clearly Draves, being new as of December 2009, had no idea how Respondent handled such a situation. However, Melchiode's response overwhelmingly supports the

⁶ During the hearing, when Draves was asked whether he was familiar with the concept of a department being "open," he responded that Respondent's facility is a 24/7 operation. As is plainly obvious from GCX 7, where he used the term twice, Draves clearly knows the meaning of the phrase "open" and his testimony otherwise was an attempt to mask the realities of this case.

conclusion that Respondent saw the July 5 scenario as a gray area, not as a past practice.

Melchiode responded, in part:

“I guess we need to discuss some of these since July 4th, Christmas, and New Year’s Day all fall on a weekend day. I think it may depend on the holiday, but my preference is to have at least 1 elective room. If nobody schedules, then put people on call. Doesn’t make sense to recognize July 4th on the 5th, it will probably be a lighter day with long weekends but we need elective capability. Christmas Eve and New Year’s Eve maybe a different story.” (GCX 7)

Melchiode also warned Draves, “Prepare yourself now because the staff may not be too happy.” (GCX 7) Why would the staff not be happy with the status quo? Melchiode’s response strikes a blow to Respondent’s position that it simply followed the status quo on July 5. Clearly, Respondent did not know how to handle scheduling or staffing on July 5, and attempted to create the standard on the fly. It is apparent that Melchiode and Draves were shooting from the hip in making decisions as to how to handle holiday scheduling and staffing on July 5. This is further confirmed in Draves’ e-mail to Melchiode on Thursday, May 20.

(GCX 8) Draves wrote to Melchiode:

I placed the holiday schedule out for the year and had some discussions with the staff about working on the Mondays after the holiday or the Fridays before the Holiday. The staff were very upset about this. I know we had discussion about not wanting to loose (sic) volume, but the staff are saying that do not (sic) work on the Monday after July 4th and that it was written in our hospital policies. I did look and it did indeed say that if the holiday falls on a Sunday the Monday after is the recognized holiday, and if the holiday falls on Saturday the holiday is recognized on Friday. I need to make sure that this is something that we want to do and can do. I would like to tell staff that we are working on July 5th but think that we would have to pay time and a half. (GCX 8)

In the months before July 5, Respondent was attempting to reach a meeting of the minds within its own management concerning how it should handle July 5. In Melchiode’s response to Draves e-mail set forth in GCX 8, he took the position that Respondent’s holiday policy did not include the surgical services staff, which encompasses PPCU. Such an

assertion is not supported by the substantial contradictory aforementioned evidence, including Respondent's posted on-call schedule, and the nurses' concerted complaints regarding Respondent's July 5 plans.

4. Respondent's Surgery Schedule

As described above, RX 1 shows all surgeries conducted on a holiday, observed holiday, or a Sunday from October 1, 2008 to the present. (Tr. 116-117; RX1) Other than July 5, Respondent "booked" surgeries on an observed holiday anywhere from a few days in advance to the day of the holiday itself, with a great majority of those scheduled the day before or the day of the holiday. (RX 1) Plain and simple, Respondent treated July 5 differently. In fact, the manner in which July 5 differs is staggering with respect to how far in advance surgeries were scheduled for that date. RX 1 shows that Respondent scheduled surgeries as early as June 21, two full weeks prior to July 5. (RX 1, page 17) Yet, the testimony of Draves confirms that surgeries were scheduled as early as his conversation with Clendenin on June 15. (Tr. 36-38). That meant surgeries were scheduled almost three weeks in advance of the holiday. As noted, this was a drastic change from the manner in which surgeries have been scheduled on holidays prior to July 5.

The closest thing to a past practice that Respondent can point to with respect to its actions on July 5, is July 3, 2009. In 2009, the Fourth of July fell on a Saturday. Therefore, pursuant to Respondent's policies and practice, the holiday was observed on the preceding Friday, July 3, 2009. Draves testified that Respondent treated July 5, in a similar manner by creating an "exception" for scheduling cases on this date. (Tr. 26-27) However, it is clear from a review of the list of surgeries scheduled by Respondent on July 3, 2009, that Respondent did not operate in a similar manner on July 5. (RX 1) July 3, 2009, fell on a

Friday, and the earliest Respondent scheduled surgeries for the observed holiday were earlier in the week on Monday and Tuesday, June 29 and 30, 2009. (RX 1, page 6) This is far cry from scheduling surgeries three weeks in advance, as it did from June 15 to July 5. Additionally, Respondent provided no evidence to counter the testimony provided by Clendenin that July 5, was the first time where Respondent required more than two on-call nurses to work an observed holiday, other than the occasional rare exception when a third is included. If Respondent had previously scheduled elective surgeries to take place on July 3, 2009, as it did on July 5, it would have scheduled more on-call nurses to work that day to cover not only the elective surgeries, but also the anticipated urgent or emergency surgeries that might come through the door. Yet, there is no evidence in the record to support the conclusion that this occurred.

Even if Respondent acted on July 5, in a manner consistent with July 3, 2009, a single event does not constitute a commonplace practice or custom as to have become a pre-existing term and condition of employment. See *Eugene Iovine*, 328 NLRB 294 (1999) enfd. mem. 242 F.3d 366 (2d Cir. 2001), citing *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988), and cases cited therein. Nor can scheduling on one past holiday overcome the overwhelming past practice evidence which supports the position of the General Counsel.

**E. SURGICAL SCHEDULING GUIDELINES –
“EXCEPTIONS”
(Exceptions 5, 6, 17, 19, 21-23)**

Respondent argues that the ALJ erred in finding that “Draves and Melchiode could not make an exception to the guidelines based on patient care needs.” Respondent takes issue that the ALJ disregarded the actual language of the guidelines and the managerial “exception” it allows. However, the very policy Respondent relied upon in keeping PPCU open on July 5, is

precisely the type in which an employer must bargain with a newly-certified union. To reiterate, the policy reads:

Elective surgery will be performed daily Monday – Friday from 700 to 2300 and Saturday from 0700 to 1500. Sunday & Holidays, there will be no elective surgery. Surgical & Anesthesia staff will be available for urgent & emergency case only. *Administration in conjunction with the Surgical Services Director will evaluate any exceptions to this guideline.* (emphasis added) (Tr. 24; GCX 3, p.2)

The Board has historically found that actions involving unlimited employer discretion are not “practices” that an employer can unilaterally implement, even when there is evidence of such discretionary conduct predating the union’s certification. Such actions are precisely the type of actions over which an employer must bargain with a union. See *Adair Standish Corp.*, 292 NLRB 890 (1989) (employer was obligated to bargain with a newly-certified union and could no longer continue to unilaterally exercise its discretion for layoffs); *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992) (employer unlawfully instituted a new staffing schedule where such an action “entailed the exercise of considerable discretion.”) In *NLRB v. Katz*, 369 U.S. 736, 746 (1962), the Court found that certain merit raises were unlawful because they were not automatic raises that the employer had already committed itself to...“but were informed by a large measure of discretion.” The Court further noted, “[t]here simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.” *Id.* at 746-747. The Union did just that in this case. However, Respondent took the position that it had past practice on its side and its own surgical policies gave it the discretion to do what it wanted with respect to whether PPCU remained open or closed on July 5. The evidence in this matter and the law have clearly established otherwise.

IV. CONCLUSION

General Counsel respectfully submits that the record and Board law support Judge Parke's finding that Respondent's actions in making unilateral changes when (1) scheduling elective surgeries on an observed holiday and (2) scheduling more bargaining unit nurses to work on an observed holiday than its usual two on-call nurses, were clear violations of its duty to notify and bargain with the Union pursuant to Section 8(a)(1) and (5) of the Act. Respondent has failed to establish any evidence to support its claim that its actions were lawful. Accordingly, Respondent violated the Act by engaging in these actions unilaterally, as found by the ALJ and supported by the record.

Dated at Overland Park, Kansas, this 18th day of February 2011.

Respectfully submitted,

/s/William F. LeMaster

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in SUNRISE MOUNTAINVIEW HOSPITAL, INC. d/b/a MOUNTAINVIEW HOSPITAL, INC., Case 28-CA-23100 was served by E-Gov, E-Filing, E-Mail and overnight delivery via United Parcel Service on this 18th day of February 2011, on the following:

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