

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

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

and

Case No.: 28-CA-23100

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

UNION'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

 A. Mountainview’s Polices/Procedures on the Scheduling of Elective
 Surgeries on Holidays, including Holidays Observed 2

 B. Mountainview’s Past Practice for Staffing in the PPCU on
 Recognized Holidays 3

 C. The Employer’s Decision to Staff the PPCU for Scheduled
 Elective Surgeries on the Recognized Fourth of July Holiday 5

 D. The Absence of Notice to the Union and an Opportunity to
 Bargain over the Decision to Staff the PPCU for Scheduled Elective
 Surgeries on the Recognized Fourth of July Holiday 7

III. ARGUMENT 9

 A. The ALJ Properly Found that Scheduling RNs to Staff Surgeries
 on a Holiday is a Mandatory Subject of Bargaining and is not a
 Core Entrepreneurial Decision..... 10

 B. The ALJ Properly Rejected Mountainview’s Past Practice Defense..... 13

 C. The ALJ Properly Construed Mountainview’s Surgical
 Scheduling Guidelines 15

IV. CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Baptist Hospital of East Tennessee, 351 NLRB 71 (2007) 11, 12

Bloomfield Health Care Center, 352 NLRB 252 (2008) 11

Eugene Iovine, Inc., 328 NLRB 294 (1999) 15

King Scoopers, Inc., 340 NLRB 628 (2003)..... 10

Meat Cutters, Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965) 11

NLRB v. Katz, 369 U.S. 736, 746 (1962) 16

Our Lady of Lourdes Health Center, 306 NLRB 337 (1992) 16

Peerless Publications, Inc., 283 NLRB 334 (1987) 10, 12

STATUTE

National Labor Relations Act, 29 U.S.C. § 151 *et seq* *passim*

I. INTRODUCTION

The California Nurses Association/National Nurses Organizing Committee (CNA/NNOC or Union), the Charging Party in this case, was certified as the exclusive bargaining representative for Registered Nurses (RNs) at Sunrise Mountainview Hospital, Inc. d/b/a/ Mountainview Hospital (Mountainview, Hospital, or Employer) on January 22, 2010. First contract negotiations commenced thereafter on April 7, 2010. Approximately six months after the Union was certified and two months into the course of first contract negotiations, Mountainview violated its own policies and broke with its past practice when it solicited and scheduled non-urgent, non-emergency, elective surgeries on Monday, July 5, 2010 – the Fourth of July holiday observed– and scheduled more than the usual two on-call RNs in the Pre and Post Care Unit (PPCU) to staff those elective surgeries. Mountainview made this change without notifying the Union or providing the Union with an opportunity to bargain. When the Union expressly requested to bargain over the change, Mountainview repeatedly refused.

Pursuant to charges filed by the Union, the Regional Director of Region 28 of the National Labor Relations Board (Board) issued a complaint on September 24, 2010. A hearing was held before Administrative Law Judge (ALJ) Lana H. Parke on Tuesday, November 2, 2010, in Las Vegas, Nevada and post-hearing briefs were submitted on December 7, 2010. On January 10, 2011, Judge Parke issued a decision, concluding that by the above-described actions Mountainview “violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning terms and conditions of employment. . .by unilaterally changing its policy with regard to scheduling employees in the [PPCU] and the Surgical Services Department on an observed holiday, July 5, 2010.” (ALJD 7:15-19)¹.

¹ References to the Decision of the Administrative Law Judge are denoted as ALJD, followed by the page number, a colon, and the line number(s). References to the trial transcript will be

On February 7, 2011 Mountainview filed its exceptions to Judge Parke's decision and its brief in support. The Acting General Counsel filed an answering brief on February 18, 2011. The Union hereby affirms, joins, and adopts the arguments put forth by the Acting General Counsel, and also respectfully files its own answering brief in support of Judge Parke's decision. The Union joins the Acting General Counsel in submitting that Mountainview's exceptions are wholly without merit. The Union asks the Board to affirm Judge Parke's decision in its entirety because the well-reasoned decision is based on proper application of Board precedent and is supported by ample evidence in the record.

II. STATEMENT OF FACTS

A. Mountainview's Policies/Procedures on the Scheduling of Elective Surgeries on Holidays, including Holidays Observed.

Since April 20, 2006, Mountainview has operated under a Policy/Procedure Statement entitled Surgical Scheduling Guidelines, which states that:

Elective surgery will be performed daily Monday – Friday from 700 to 2300 and Saturday from 0700 to 1500. Sunday and **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 exception to this guideline.

(GCX 3, Section B, Subsection 1, emphasis added.) This policy defines elective surgery as “scheduled to be performed at a date in the future mutually agreed upon by patient, physician & hospital.” (*Id.*, Section A, Subsection 1.) Urgent surgery is defined as “surgical intervention [that] should take place within a designated time frame (i.e.: within 8 hrs. or within 6 days).” (*Id.*, Section A, Subsection 2.) And emergency surgery is defined as “a critical or life-

denoted by “Tr.” followed by the page numbers. References to the 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.

threatening condition, which requires surgical intervention as soon as preparations can be made (immediate response).” (*Id.*, Section A, Subsection 3.)

Since May 9, 1999, Mountainview has also operated under a Policy/Procedure Statement entitled Paid Time Off (PTO), which states that the hospital observes six holidays including: New Year’s Day, Labor Day, Memorial Day, Thanksgiving Day, Fourth of July, and Christmas. (GCX 4, Section XI, Subsection A.) If the holiday falls on a Sunday, Monday will be the “recognized day off.” (*Id.*)

July 4, 2010 fell on a Sunday. Pursuant to Mountainview’s PTO Policy, the 2010 Fourth of July holiday should have been “recognized” on Monday, July 5, 2010. Pursuant to Mountainview’s Surgical Services Scheduling Guidelines Policy, as a recognized holiday, no elective surgeries should have been scheduled on Monday, July 5, 2010 – on-call staff should have been available for urgent and emergent cases only.

B. Mountainview’s Past Practice for Staffing in the PPCU on Recognized Holidays.

While the Mountainview Policies/Procedure Statements speak for themselves, they reflect not only the theoretical way staffing is scheduled in the Mountainview PPCU on recognized holidays, but also the actual past practice within the department. (Tr. 27). As Karen Clendenin (“Clendenin”), a registered nurse who has worked in the PPCU at Mountainview for five years, credibly testified, holidays in the PPCU are treated as “on-call days only, with two registered nurses working in [PPCU] and occasionally a backup nurse may be required, but rarely used.” (Tr. 48:21-23). Clendenin’s testimony is corroborated by the PPCU Call Schedule for 2010. (GCX 9). The 2010 Call Schedule shows two on-call nurses for: Monday, May 31, 2010 (Memorial Day); Monday, July 5, 2010 (Fourth of July); Monday, September 6, 2010 (Labor Day); Saturday, December 25, 2010 (Christmas Day); and Saturday, January 1, 2011

(New Years Day). (*Id.*). The 2010 Call Schedule shows only one on-call nurse for Thursday, November 25, 2010 (Thanksgiving Day). (*Id.*) The 2010 Call Schedule was created in March 2010 by manager Donna Kerr. (Tr. 53) Consistent with past practice, the PPCU registered nurses volunteered for first and second on-call shifts for weekends and holidays, including the Fourth of July holiday (Monday, July 5, 2010), through January 1, 2011. (Tr. 53)

In internal communications management decided between April 19 and May 20, 2010 – without first providing the Union notice and an opportunity to bargain and contrary to its past practice – that it would prefer to have an elective surgery room open on holidays that fall on a weekend. They further decided that the PTO Policy requiring observance of a holiday that falls on a Sunday to take place the following Monday did not apply to the PPCU because PPCU was a “7 day per week department.” (GCX 7, 8). This rationalization defies logic; the PPCU is closed on Sundays. (Tr. 48, GCX 9). As Clendenin testified, the PPCU is “open” Monday through Friday from 7:00 a.m. to 10:00 p.m. and Saturday from 6:00 a.m. to 2:30 p.m. and is fully staffed for elective surgeries as well as urgent and emergent surgeries at those times. (Tr. 48-50). The PPCU is “closed” Saturday after 2:30 p.m. and all day Sunday, meaning it is staffed with two on-call registered nurses for urgent and emergency cases only. (Tr. 48-50). Because the department is closed on Sundays, when the Fourth of July holiday (or any holiday) falls on a Sunday, there is logically no way to recognize the holiday in the PPCU without observing it on another day. Per Mountainview’s own PTO policy and past practice, that day should have been Monday, July 5, 2010.

C. The Employer’s Decision to Staff the PPCU for Scheduled Elective Surgeries on the Recognized Fourth of July Holiday.

On June 15, 2010, Clendenin heard a rumor that, contrary to its past practice, the hospital intended to schedule elective surgeries and keep the PPCU open on the recognized Fourth of July holiday (Monday, July 5, 2010). (Tr. 55:11-13). Clendenin checked the surgery schedule and indeed saw that as of June 15, 2010, five elective surgeries were scheduled for July 5, 2010. (Tr. 67). Clendenin sought clarification from her Charge Nurse, Christine Wahinehookae (“Wahinehookae”). (Tr. 55). Wahinehookae directed Clendenin to speak directly with Director of Surgical Services, John Paul Draves (“Draves”), and also affirmed that she shared Clendenin’s understanding. (Tr. 56).

Clendenin did take the matter up with Draves – on the afternoon of June 15, 2010 Draves came to Clendenin’s office and Clendenin brought the PTO and Surgical Services Scheduling Guidelines policies to his attention (Tr. 56-57). Draves refused to take the highlighted copies of the policies Clendenin offered him and stated that he was there to tell her that she was the sixth person on-call for Monday, July 5, 2010. Clendenin then asked Draves if he intended to violate the policies she showed him and break with past practice by continuing to schedule elective surgeries in the PPCU on the recognized Fourth of July holiday. (Tr. 57). In response, Draves indicated he felt the PPCU needed to be open on Monday, July 5, 2010 for “monetary purposes” and reminded her again that she was the sixth on-call RN. (*Id.*) Regarding the scheduling of elective surgeries on a holiday, Draves stated that he was the one who made the decision to schedule elective surgeries on July 5, 2010 and that Robert Nettles (“Nettles”), Human Resources Director at Mountainview, had given him permission to do so. (Tr. 58).

On June 19, 2010, Clendenin delivered a letter to Draves, on CNA/NNOC letterhead, signed by 13 PPCU registered nurses, including Clendenin. (GCX. 5, Tr. 61). In the letter, the

nurses reminded Draves again that the past practice within the PPCU was to be closed on holidays – meaning two on-call registered nurses would be available for urgent and emergent cases only – and that this was consistent with the posted 2010 Call Schedule. (GCX 5). In response, Draves sent an email to the entire PPCU staff regarding July 5, 2010 staffing. (GCX 6). Draves cryptically indicated that the unit would be staffed on July 5, 2010 based on “anticipated volume and patient care needs.” (*Id.*) Draves further indicated he intended to add four RNs to the on-call schedule for July 5, 2010, volunteers first, and if there were insufficient volunteers, nurses not already on call would be assigned in reverse seniority order. (*Id.*) Draves reminded the nurses they were fortunate to have an increase in the volume of procedures given the time of year and what other hospitals were experiencing. (*Id.*)

On July 2, 2010, Draves left Clendenin a voicemail stating that he would not need her to work on Monday, July 5, 2010, after all. (Tr. 62). Unfortunately this notice was too late for Clendenin to reinstate her holiday travel plans that she informed Draves about during their June 15, 2010 conversation – non-refundable plans she made before she became aware that Mountainview intended to unilaterally change its holiday staffing policy on the Fourth of July holiday. (Tr. 64). Both Clendenin and Draves testified that in the end, on Monday, July 5, 2010, the recognized Fourth of July holiday, four PPCU RNs were scheduled to work and three actually worked. (Tr. 42, 65). These three PPCU RNs assisted in four elective surgeries, as defined by Mountainview’s Surgical Scheduling Guidelines policy. (RX 1, GCX 3).

The surgeries were elective, not urgent or emergent, per the Surgical Scheduling Guidelines policy because all four were scheduled more than six days in advance. (*Id.*) These four elective surgeries were scheduled on June 9, 21, and 28, 2010 – all more than one week

before July 5, 2010.² Although managers testified that the hospital does not classify surgeries as elective, urgent, or emergent and does not discuss such classifications with the surgeons when the surgeries are scheduled, the Surgical Services Guidelines policy conflicts with this testimony and speaks for itself.

D. The Absence of Notice to the Union and an Opportunity to Bargain over the Decision to Staff the PPCU for Scheduled Elective Surgeries on the Recognized Fourth of July Holiday.

On Sunday, June 22, 2010, at 1:29 p.m., the Union, through its agent, Lisa Morowitz (“Morowitz”), notified the Employer, through its agent, Nettles, that it was aware that Mountainview was informing the registered nurses in the PPCU that the unit would be open for business on Monday, July 5, 2010, (the observed Fourth of July holiday) and that the nurses would be expected to work.³ (GCX 2-A). Morowitz informed Nettles that it was the Union’s position that this change to the holiday schedule was a deviation from past practice and therefore required negotiation with the Union. She requested Nettles provide her with available dates for bargaining. (*Id.*) Nettles responded to Morowitz on June 25, 2010, at 2:29 p.m. and informed Morowitz that she had received incorrect information. (GCX 2-C). Nettles stated that Mountainview would not deviate from its past practice on July 5, 2010. (*Id.*) He stated that the PPCU would be staffed with on-call staff on that day. (*Id.*)

On June 26, 2010, at 6:12 p.m., CNA/NNOC agent Renee Ruiz (“Ruiz”) notified Nettles that contrary to his email to Morowitz on June 25, 2010, the PPCU manager posted a schedule indicating that staffing for the July 5, 2010, holiday would deviate from the on-call status quo.

² A fifth arguably elective surgery was scheduled on June 29, 2010. However, pursuant to Mountainview’s Surgical Scheduling Guidelines policy this surgery was scheduled within 6 days of the day it was performed thus barely qualifying it as urgent, rather than elective, surgery.

³ Morowitz first attempted to contact Nettles on June 20, 2010 at 11:15 p.m., but the email address she used was incorrect. Morowitz then forwarded her June 20, 2010 email to Nettles’ correct email address on June 22, 2010. (GCX 2-A and 2-B).

(GCX 2-D). She informed Nettles that she would be at his office at 9:00 a.m. on Monday, June 28, 2010, to reach a resolution on the Fourth of July scheduling matter. (*Id.*) Also on June 26, 2010, Morowitz forwarded Ruiz’s email to Nettles to Michael Bishop, in-house counsel for Hospital Corporation of America (“HCA”), Mountainview’s parent company. (GCX 2-E). Morowitz reiterated the Union’s urgent desire to negotiate over the holiday schedule in light of the posting of the PPCU schedule for Fourth of July which showed “everyone on and the unit fully open for business” despite Nettles’ assurance to Morowitz that staffing in the PPCU on the Fourth of July would not deviate from past practice. (*Id.*)

On Monday, June 28, 2010, at 8:56 a.m., Nettles emailed Ruiz, Morowitz, and Bishop reporting that the schedule was “posted in error” and would be “rectified today.” (GCX 2-F). On June 28, 2010, at 9:07 a.m., Bishop responded to Morowitz’s email indicating that he understood that the notice was posted in error and that it had been removed. (GCX 2-G). On June 28, 2010, at 3:40 p.m., Morowitz emailed Bishop informing him that the schedule was “still up and nurses were being told they have to work.” (GCX 2-H).

On Tuesday, June 29, 2010, at 5:02 p.m., Morowitz informed Bishop that Draves had informed the RNs that the PPCU would be fully open and operational on July 5, 2010, contrary to the hospital’s past practice and hospital policy. (GCX 2-I). She further informed Bishop that Draves was soliciting business as if it were a regularly scheduled Monday and that the schedule for July 5, 2010, showed all Monday employees on duty – volunteers were not being solicited and assignments were not being made in order of reverse seniority. (*Id.*) Morowitz also reported that when RNs asked Draves why he “was not following past practices as HR indicated they would, he advised he hadn’t heard that from Nettles.” (*Id.*) Bishop responded to Morowitz that he had forwarded her email. (*Id.*)

On June 30, 2010, Morowitz informed Bishop that no one from Mountainview had gotten back to her, and that despite the assurances from both Bishop and Nettles that the hospital would not deviate from the status quo and that there was therefore no need to negotiate, the RNs in the PPCU were still being told that July 5, 2010, would be a regular workday. (GCX 2-J(1)) Morowitz informed Bishop that the Union considered this a violation of both their Election Procedures Agreement and Labor Relations Agreement and would arbitrate the matter. (*Id.*) Following a decision by the Arbitrator that proved unsatisfactory to the hospital, a dispute arose over the nature of the proceedings before the Arbitrator – i.e., whether the proceedings were a binding arbitration or a non-binding mediation. (Tr. 93-94)

Ultimately, on July 5, 2010, Mountainview proceeded with its plan to keep the PPCU open on the Fourth of July holiday (Monday, July 5, 2010). (Tr. 65, RX 1, GCX 3). In violation of its own policies and contrary to its past practice, Mountainview unilaterally changed the holiday staffing in the PPCU for the 2010 Fourth of July holiday when four PPCU RNs were scheduled and three reported to work to perform pre-op duties for the four pre-scheduled elective surgeries. (Tr. 42, 65, RX 1, GCX 3). In response, the Union filed the underlying unfair labor practice charge. (Tr. 93-94).

III. ARGUMENT

Although Mountainview lists 23 separate exceptions to Judge Parke’s decision, its primary legal argument is that it was not obligated to bargain with the Union over either the holiday schedule itself or over the effects of such a change to the holiday schedule, because such a decision is a core entrepreneurial one. This argument is entirely specious and contrary to established Board precedent. In making its argument, Mountainview confuses the scheduling of surgeries with the scheduling of RNs to staff surgeries on an observed holiday. As the Board has already determined, holiday staffing is a recognized mandatory subject of bargaining within

the meaning of Section 8(d) of the Act. Mountainview also makes another feeble attempt to argue a past practice defense. However, as the ALJ correctly adduced from the evidence, “mere managerial discussion of a possible policy change cannot create an established past practice.” (ALJD 6:33-34).

A. The ALJ Properly Found that Scheduling RNs to Staff Surgeries on a Holiday is a Mandatory Subject of Bargaining and is not a Core Entrepreneurial Decision. (Exceptions 8-10, 12, 13, 17-20, 23)

The ALJ properly analyzed and disposed of Mountainview’s argument that the scheduling of RNs to staff surgeries is a core entrepreneurial decision and thus not subject to bargaining by explaining that, “[t]he Board has declined to apply the *Peerless* rationale broadly.” (ALJD 6:21-22 citing *King Scoopers, Inc.*, 340 NLRB 628, 629-30 (2003)). In fact, to adopt Mountainview’s argument here would render any and all decisions regarding the work schedules of surgical employees subject to managerial prerogative. Board precedent clearly disavows extending *Peerless* in such a sweeping and unbounded way. *King Scoopers* at 629 (“Moreover, we find 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.”)

Even assuming it applied here, Mountainview’s argument nonetheless fails both prongs of the *Peerless* test. Rendering any and all decisions regarding the work schedules of surgical employees under the rubric of core entrepreneurial decisions is by definition neither “(1) narrowly tailored in terms of substance to meet with particularity only the employer’s legitimate and necessary objectives, without being overly broad, vague, or ambiguous; [nor] (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.” *Peerless Publications, Inc.*, 283 NLRB 334, 335 (1987).

Inasmuch as Mountainview would like to reserve for itself the ability to decide at any moment not to honor the established holiday work schedules of its surgical employees so that it can accommodate its physician customers without question and thereby plump its bottom line, it simply cannot do so under the Act. Mountainview’s right to schedule surgeries does not swallow up the right of surgical RNs to bargain collectively over vital aspects of their working conditions, which by definition include their work schedules. As the ALJ properly found, “[e]mployee work schedules, even in a surgery department, are vital aspects of working conditions and are mandatory subjects of bargaining.” (ALJD 6:22-24 citing *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *Bloomfield Health Care Center*, 352 NLRB 252, 256 (2008)). To the extent that the scheduling of elective surgeries on a holiday necessitates a change in staffing for those surgeries, that change necessarily impinges upon a mandatory subject of bargaining and thus requires good faith bargaining. As the ALJ correctly found, when Mountainview made staffing changes for the Fourth of July without notifying the Union and providing the Union an opportunity to bargain and then flatly refused the Union’s request to bargain over the changes, it violated Sections 8(a)(5) and (1) of the Act.

There is also additional support in Board precedent for the ALJ’s determination that RN work schedules (particularly holiday work schedules) are a mandatory subject of bargaining. In *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 (2007), the ALJ found, and the Board affirmed, that the hospital’s unilateral implementation of a change in scheduling holiday shift work for radiology unit employees “constituted a substantial and material change to a mandatory subject of bargaining affecting employees’ working conditions.” Under that change “employees were scheduled to cover holiday work shifts by the team leader, a statutory supervisor, without regard to employee preference or seniority. . .” *Id.* at 75.

The ALJ ultimately did not find an 8(a)(5) violation in *Baptist Hospital*, despite his finding that the hospital had made a unilateral change to a mandatory subject of bargaining when it changed the holiday shift scheduling for its radiology unit. *Id.* at 71, 72. The ALJ determined there was no violation because “the parties’ contract clearly specified management’s right to make schedule changes, and that this clause ‘clearly afforded the Respondent the right to make the schedule change as it did in this case.’” *Id.*

Unlike the parties in *Baptist Hospital*, no collective bargaining agreement existed between Mountainview and CNA/NNOC. The parties were barely two months into first contract negotiations when the unilateral change was made and the Employer repeatedly refused to bargain. The Employer cannot defend its action on the basis of a contractual waiver by the Union of its bargaining rights. There is no contract. Absent a contractual waiver, Mountainview was obligated to notify and provide the Union with the opportunity to bargain over any proposed changes to its holiday staffing policy in the PPCU for the Fourth of July, a mandatory subject of bargaining.

Mountainview also challenges the ALJ’s decision that “[e]ven 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.’” (ALJD 6:24-26). This exception highlights Mountainview’s utter failure to comprehend its collective bargaining obligations under the Act. Not only is the argument immaterial, because as the ALJ correctly found, “[e]mployee work schedules, even in a surgery department, are vital aspects of working conditions and are mandatory subjects of bargaining” (ALJD 6:22-24), but it is also meritless because nothing in the *Peerless* decision even remotely supports Mountainview’s position that it is entitled to such a bargaining exemption.

B. The ALJ Properly Rejected Mountainview's Past Practice Defense. (Exceptions 1-7, 11-17, 19, 21-23)

As the ALJ properly found, Mountainview did not establish that it had a past practice of scheduling elective surgeries on holidays and increasing its RN staffing to cover those surgeries. (ALJD 6:29-34 (“mere managerial discussion of a possible policy change cannot create an established past practice.”)). Mountainview asserts that the record evidence does not support the ALJ’s finding, however, it fails to point to any record evidence that supports its own position. That is because none exists.

Mountainview attempts to distinguish July 3, 2009 and July 5, 2010 (the observed Fourth of July holiday in those years) from all other holidays on the calendar recognized by Mountainview because, unlike the others, the Fourth of July was observed (pursuant to Mountainview’s own policy) not on the actual day (July 4th), but on the 3rd in 2009 (a Friday) and on the 5th in 2010 (a Monday). And, Mountainview argues, on all two of those occasions it accepted all surgical cases, including elective ones. Not only is this an entirely meaningless distinction (a holiday is a holiday is a holiday no matter when it is observed by Mountainview) but more to the point, there is not a single shred of evidence in the record that Mountainview accepted elective surgeries on July 3, 2009.

Mountainview itself argues that it does not ask physicians to categorize their procedures as urgent, emergent, or elective, so there is no way Mountainview could have known what kinds of procedures were performed on July 3, 2009. And, even more damningly, the very evidence produced by Mountainview at the hearing shows that of the three surgeries performed on July 3, 2009, none were elective surgeries as defined by Mountainview’s own policy, all three are aptly categorized as urgent or emergent because none were booked more than six days in advance. In its own internal communications, Mountainview demonstrates that its own management is not

entirely clear on what its past practice has been and hints that the change in policy it has in mind will be poorly received by the staff. In response to Draves' inquiry regarding surgical scheduling and staffing on holidays that fall on a weekend, Melchiode responded:

I guess we need to discuss some of these since July 4th, Christmas, and New Year's Day all fall on a weekend. 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. . . . Prepare yourself now because the staff may not be too happy. . . . Again, I'd prefer to let them [the physicians] schedule. (GCX 7).

Why would Mountainview management need to discuss what its past practice was if it was so clearly established? If it was so clearly established, why would following it cause unrest among the staff? The only answer of course is because Mountainview had no such well-established past practice of scheduling elective surgeries on holidays and staffing the PPCU with more than 2 on-call RNs to assist in those surgeries. As the ALJ found, this "mere managerial discussion of a possible policy change cannot create an established past practice." (ALJD 6:33-34).

Furthermore, there is ample evidence on the record to support the ALJ's finding regarding past practice, including credible testimony by RN Karen Clendenin, a 5-year veteran of the Mountainview PPCU. Clendenin, who testified pursuant to a subpoena from the Union, stated that in the time she has worked at Mountainview, prior to the 2010 Fourth of July holiday, no elective surgeries were scheduled on any holidays and that on all previous holidays the PPCU was staffed with two on-call RNs. Clendenin's testimony was further supported by the letter that she and 13 of her colleagues signed and delivered to Draves demanding that Mountainview maintain its past practice of not scheduling elective surgeries on holidays and continue to staff the PPCU with two on-call RNs.

The 2010 holiday on-call list which showed only two RNs scheduled to work on all 2010 holidays, including Fourth of July, is yet more evidence of the hollowness of Mountainview’s feeble past practice defense. And if any question remained as to Mountainview’s past practice, the evidence presented at the hearing by Mountainview itself (pursuant to a subpoena from the Acting General Counsel) demonstrates that it did not schedule elective surgeries on holidays – not a single surgical case on a single holiday between 2008 and 2010 was booked more than six days in advance, with the sole exception of the Fourth of July holiday in 2010.

Finally, even if the evidence demonstrated what Mountainview so strenuously argues it does – that it accepted elective surgeries on one holiday (Fourth of July), in one year (2009) – that is grossly insufficient to establish a past practice defense. “In order to find that a past practice has become a term or condition of employment, the Board generally requires that the practice be satisfactorily established by practice or custom. *See Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) and cases cited therein.” *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999). One instance of deviation from policy and otherwise longstanding practice and custom is not a well-established past practice, it is an exception.

**C. The ALJ Properly Construed Mountainview’s Surgical Scheduling Guidelines .
(Exceptions 1-7, 11-17, 19, 21-23)**

The ALJ found and the record evidence amply supports that Mountainview’s own policies (1) prohibit elective surgeries from being scheduled on Sundays and Holidays; and (2) define elective surgeries temporally, as surgery scheduled to take place more than six days from the booking date. (ALJD 6:43-45). These policies speak entirely for themselves and require no interpretation. The ALJ’s reading of them is amply supported by record evidence – particularly Mountainview’s own past practice.

As has been stated above, Mountainview has proffered no evidence that in the past it has scheduled elective surgeries on a holiday and staffed the PPCU with more than 2 on-call RNs to cover those surgeries. To the contrary, the record evidence clearly demonstrates that Mountainview has *not* scheduled elective surgeries on holidays, rather it has accepted only urgent or emergent cases and staffed those cases with 2 on-call RNs. As described above and testified to by RN Karen Clendenin, Mountainview's past practice demonstrates that it follows its own written policy. And Mountainview's written policy requires no better explanation than that provided by Mountainview's own past practice. The Hospital's after-the-fact attempts to contort the language of that policy to be read to mean anything other than what it obviously states on its face – elective surgeries, i.e. surgeries booked more than six days in advance, are not to be scheduled on holidays – are void of any factual or legal support.

Lastly, Mountainview's argument that its surgical scheduling guidelines allowed for Mountainview to make exceptions is wholly without merit. In the context of first contract negotiations (which the parties were engaged in at the time of the unilateral change and in which they are presently engaged) this is precisely the kind of managerial discretion over which the Act requires an employer to bargain. *NLRB v. Katz*, 369 U.S. 736, 746 (1962); *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992).

IV. CONCLUSION

The Union respectfully submits that the record in this case as well as the Board law relied upon by the ALJ amply support the finding that Mountainview blatantly violated Sections 8(a)(5) and (1) of the Act when it (1) unilaterally changed RN staffing in the PPCU on a holiday in order to accommodate elective surgeries it solicited and scheduled; (2) failed to notify the Union of the change and afford the Union an opportunity to bargain over it; and (3) flatly refused the Union's direct and repeated requests to bargain over the change. Mountainview has failed to

adduce any evidence from the record or applicable Board precedent to support its exceptions.
For these reasons, the Board must affirm the ALJ's finding in its entirety.

Dated: February 22, 2011

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING
COMMITTEE LEGAL DEPARTMENT

_____/s/_____
Holly L. Miller
Legal Counsel

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Suite 300, Oakland, California 94612.

On the date below, I caused to be served a true copy of the following document:

UNION’S ANSWERING BRIEF

via electronic mail service as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: February 22, 2010

_____/s/
Rob Craven