

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

QUALITY HEALTH SERVICES OF P.R.,  
INC. d/b/a HOSP. SAN CRISTOBAL

Respondent

v.

UNIDAD LABORAL DE ENFERMERAS  
Y EMPLEADOS DE LA SALUD

Charging Party

CASE NUM. 24-CA-11630

A.L.J. Mr. George Aleman

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE  
DECISION

COMES NOW, the Hospital San Cristobal de Ponce (hereafter to be referred as “the charged party”, “the Hospital”, “Respondent” or “the employer”) through the undersigned attorney and respectfully states and avers.

FIRST EXCEPTION

1- The Administrative Law Judge (ALJ) decision states a page 7, line 48-49 that Respondent’s unilateral decision to end the practice of paying incentive/differential earnings to the employees when considering granting increases to comply with Law 27 of 2005 was a violation of the Act.

## Respondent Position

Respondent and the Unidad Laboral de Enfermeras y Empleados de la Salud (ULEES) had a collective bargaining agreement that expired on February 28, 2010. While the union contract was in force the hospital complied by its terms and conditions and granted certain salary increases bargained with the union by an Stipulation<sup>1</sup> that was signed on July 1, 2005. This Stipulation also included the extension of the collective bargaining agreement until February 28, 2011. While the collective bargaining agreement was in force the Commonwealth of Puerto Rico enacted Law 27 of July 20, 2005<sup>2</sup> (known as Puerto Rico's Salary Increases to Nursing Personnel for the Private Sector). This legislation requested for private hospital employers to raise the nursing staff salaries (registered nurses and licensed practical nurses) to certain levels. Law 27 also provided for the salary increases to be postponed or not extended to those union contracts still in force or effective when this state legislation was enacted. Once the collective bargaining agreements expired any private hospital was required to comply with the provisions of Law 27. That was such a case with Respondent.

Respondent proceeded to comply with the requirements of Law Num. 27 of July 20, 2005 once the collective bargaining agreement expired on **February 28, 2010**. This

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<sup>1</sup> See: GC Exh. 3

<sup>2</sup> See: GC Exh. 6-B

compliance was informed to the employees via an internal memo on March 18<sup>th</sup>, 2010<sup>3</sup>. In order to comply with Law 27 salary increases the hospital considered as **salary**—as allowed by federal and state laws—several pay differentials and economic incentives paid to union employees.

Respondent understood that pay differentials could be included as an employee **regular rate**, specially to pay overtime, since this concept requires to include all remuneration, as it is has been defined by the Fair Labor Standards Act. In order to support its rationale Respondent rely on the United States Supreme Court decision of *Bay Ridge Co. AARON*, 334 U.S. 446 (1948) which established that...“where an employee receives a higher wage or rate because undesirable hours or disagreeable work, such wage represents a shift *differential*, rather than an overtime premium and must enter into the determination of the ‘*regular rate of pay*’”. *Bay Ridge* at pages 468-69. Respondent also relied on the Supreme Court leading case of *Walling, Adm. of the Wage and Hour Division v. Youngerman-Reynolds*, 325 U.S. 419, which stated that “**regular rate** by its very nature **must reflect all payments which the parties have agreed** shall be received regularly during the workweek, exclusive of overtime payments”. For example, lump sum premiums that are paid as an incentive for the rapid performance of work without regard to the number of hours worked also are included in the regular rate. 29 C.F.R. 778.207 (b).

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<sup>3</sup> See: GC Exh. 5-B.

On the other hand, the ALJ decision determined that Respondent by resorting to consider the incentive pay as part of the salary, for the purpose of complying with the increases required by Law 27, resulted in employees having a net loss in their pay or in a *de facto* elimination of the incentive/differential pay by the union employees.

## **ARGUMENTATION**

Respondent argues the unit employees salary were not reduced since they continued to be paid with their base salary and any differentials. There was no reduction in salary. What Respondent did was to consider any payment for differentials, as the **regular rate** to determine the **salary** of the employees as defined by the Fair Labor Standards Act and Puerto Rico labor state laws, in order to comply with Law 27 of 2005 once the collective bargaining agreement expired. In order to comply with this legislation Respondent was not required to bargain with the union the legally mandated salary increases. When either a federal or state law is enacted it is the duty of an employer to comply with the law.

Respondent also avers that it was required by Law 27 of 2005 to pair up the salary of the registered and practical nurses up to the level mandated by said law. In performing the match mandated by law Respondent abide to what federal and state law define as salary. Therefore, according to Respondent the case at bar involves the application of a legal standard or provision (federal or state) which is a question of law. Respondent pay

to union employee of a salary plus several differentials has to be included as regular rate when paying overtime. As such the salary as well as the differentials are considered by federal and state law as salary.

The Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C.A. 207 (e) defines as **regular rate**...“all remuneration for employment paid to, or on behalf of, the employee”. This definition does not include sums paid as gifts, for periods not worked (like vacation, sick leave, etc.); sums paid in recognition of services, or contributions paid to a bone fide retirement, accident or health plan. Therefore, the FLSA does not differentiate salary and differentials for the purposes of law. The Code of Federal Register(CFR, 29 CFR Ch.V (7-1-10 Edition) Section 778.207 (**Non-overtime premiums**) states that “The Act requires the inclusion in the regular rate of such extra premiums as nightshift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour.”

The United States Internal Revenue Code, 26 U.S.C.A. 1, *et seq*, defines as gross income all income whatever source derived, including compensation from services. Adams v. U.S., 585 F. 2d. 1060. Provision 22(a) of the Revenue Act defines “gross income” to include salaries, wages and compensation...of whatever kind and in whatever for paid...whatever the form or mode it was affected. C.I.R. v. Smith, 324 U.S. 177. Compensation for services rendered by employee to employer is taxable income of whatever form it is received. C.I.R. v. Daehler, 281 F. 2d. 823. Any economic or

financial benefit conferred upon employee as compensation must be included in gross income. Silverman v. C.I.R., 253 F. 2d. 849.

The ALJ correctly determined that Law 27 of 2005 did not determined “*how employers were to achieve compliance with its provisions, since Law 27 did nothing more than establish minimum wage requirements for nursing employees in Puerto Rico based on their education level and experience*”. (See: decision at page 6, lines 5-8). Since Law 27 of 2005 does not provides for a definition of salary Respondent resorted to Puerto Rico’s Law 148 of June 30<sup>th</sup>, 1969, 29 P.R.L.A.<sup>4</sup> 501 (Regulation 7904) and Law 180 of July 28<sup>th</sup>, 1998, 29 P.R.L.A. 250b, which established the guideline of what items, payments or benefits are to be considered to define “salary”. These local two laws basically follow the definition established by the I.R.C. and the FLSA. Law 180 of July 27<sup>th</sup>, 1998, 29 PRLA 250b (h) which was enacted to supplement the Fair Labor Standards Act defines *salary* as:

“Includes wages, pay, remuneration and any type of compensation, whether in cash, in kind, services, facilities or any combination thereof; but shall not include anything but money when it is a minimum wage prescribed under the provisions of this chapter, unless otherwise provided or Authorized by the Secretary”.

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<sup>4</sup> PRLA stands for Puerto Rico Laws Annotated

Likewise, Law 379 of May 15<sup>th</sup>, 1948, as amended, 29 PRLA 288 (4) primarily enacted to regulate the weekly and daily working time, see: *Puerto Rico International Airlines v. Silva Recio*, 520 F. 2<sup>nd</sup> 1342 (1<sup>st</sup>. Cir. 1975); defines *wage* to include “salary, day wages, payment and any other form of cash compensation”. Equally Puerto Rico’s Christmas Bonus legislation, Law 148 of June 30<sup>th</sup>, 1969, 29 P.R.L.A.<sup>5</sup> 501, through Regulation Num. 7904 authorized on August 11<sup>th</sup>, 2010 defines salary as: “any class of remuneration that receives a person in payment of rendered services, including, without meaning a limitation, any wage, salary, commission, o payment for vacation or sick leave. It is excluded any amount of money received for disability pay or unemployment insurance”.

The Administrative Law Judge argues that by adding the base pay together with the differentials to consider these items as “salary” to comply with Law 27 salary increases Respondent violated the Act. (See: page5, lines 5-8 of the decision) since said incentives were to be separate and paid on a different basis. Respondent was required by law to consider regular rate any earnings, pay or differentials granted the incentive granted by the collective bargaining agreement could not be considered as a separate matter for one purpose and as a whole for other purposes of the law.

Respondent did not violated the Act by considering the pay differentials and/or incentives as part of the regular rate of the employees in the units. As the evidence

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<sup>5</sup> PRLA stands for Puerto Rico Laws Annotated

showed no wages were reduced. Also no evidence was provided to demonstrate that a given employee had his/her salary reduced since GC Exh. 8-B (table) shows there were even salary increases (in different amounts) in order to comply with the salaries established and required by Law 27. Accordingly, there were no salary reductions and Respondent did not violated the Act when it considered as salary, for the purposes to comply with Law 27, the differentials paid to the union employees.

WHEREAS, it is respectfully requested for this Decision to be vacated.

Proof Service

I hereby certify that a copy of this motion has been filed at the N.L.R.B., Region 24, at La Torre the Plaza, Plaza Las Américas Mall, Suite 1002, at 525 F.D. Roosevelt Ave., San Juan, P.R. A copy was also mailed to Mr. H. Hopkins, to the care of Unidad Laboral at Calle Héctor Salamán Num. 354, Urb. Ext. Roosevelt, Hato Rey, P.R. 00917.

Respectfully submitted this 18<sup>th</sup> day of August, 2011.

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