

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VIRGINIA MASON HOSPITAL, (a  
division of VIRGINIA MASON  
HOSPITAL CENTER)

and

WASHINGTON STATE NURSES  
ASSOCIATION

Case No. 19-CA-30154

**MEMORANDUM IN SUPPORT OF WSNA'S EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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## **STATEMENT OF THE CASE**

In *Virginia Mason Hospital (A Division of Virginia Mason Hospital Center)*, 357 NLRB No. 53 (2011) the Board reversed the Administrative Law Judge's finding that Virginia Mason was privileged to implement its flu-prevention policy mandating immunization or the wearing of a face mask at work on the basis that the decision was exempted from mandatory bargaining under *Peerless Plywood*, 283 NLRB 334 (1987), and remanded the case to address other issues that had been presented, but not addressed because of the overarching *Peerless* determination. Those issues included the Hospital's contention that the Union had waived bargaining when it agreed to the management rights clause in the collective bargaining agreement. 357 NLRB No. 53 at p.2.

Administrative Law Judge Meyerson issued his decision on remand November 25, 2011. He again recommended dismissal of the case on the grounds that the Union had waived its right to bargain about the mandatory face mask policy that the Hospital had implemented when it agreed to the management rights clause in the collective bargaining agreement. ALJ Decision, Page 7, lines 33-42. This Brief is submitted in support of Exceptions timely filed in accordance with the Board's Order granting an extension to January 6, 2012 for filing.

## **STATEMENT OF FACTS**

The facts are succinctly stated by the Board in its 2011 decision. The Respondent is an acute care hospital in Seattle, Washington. It employs approximately 5000 employees. Of these, roughly 600 are registered nurses represented by the Union. At all relevant times, the Respondent and the Union were parties to a collective-bargaining agreement effective November 16, 2004, through November 15, 2007.

In September 2004, the Hospital announced that it was amending its “Fitness for Duty” policy to require its entire work force to be immunized against the flu. The Union grieved this change on behalf of the registered nurses, and the grievance went to arbitration. On August 8, 2005, an arbitrator issued an award in favor of the Union<sup>1</sup>. In conformity with this award, the Hospital has not required the nurses to be immunized.

In October and November 2005, at monthly meetings of a joint labor-management advisory committee, the Hospital informed the Union that it was considering requiring non-immunized nurses either to wear a protective facemask or to take antiviral medication. At one of these meetings, management produced a form entitled “Declination of Annual Influenza Immunization 2005-06.” The form stated that registered nurses who decline flu immunization must agree, no later than January 1, 2006, either to take a specified antiviral drug or to wear a protective mask “at all times while at work, including patient and public areas of the hospital.”

On December 5, Barbara Frye, the Union’s director of labor relations, objected to the declination form and to requiring the registered nurses to sign it as a condition of employment. Frye accused the Hospital of, among other things, not providing “a reasonable amount of time to bargain about the new working conditions you seek to unilaterally impose in your plan.” Frye also requested several categories of information.

On December 9, Charleen Tachibana, the Hospital’s senior vice president and chief nursing officer, informed Frye that the Hospital had not distributed the declination

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<sup>1</sup> Washington State Nurses Assn. v. Virginia Mason Hospital, FMCS 05-53154 (Aug. 8, 2005) (Escamilla, Arb.). The arbitrator's decision was upheld by both the Federal district court and the Ninth Circuit. See Virginia Mason Hospital v. Washington State Nurses Assn., No. CO5- 1434MJP, 2006 WL 27203 (W.D. Wash. 2006), affd. 511 F.3d 908 (9th Cir. 2007).

form to managers or staff and that it had never considered requiring nurses to sign the form as a condition of continued employment. On December 29, John Waldman, the Hospital's director of labor relations, confirmed Tachibana's letter and added that the Hospital would not require the nurses to comply with the terms of the declination letter as a condition of employment.

That same day, Rose Methven, a nurse manager and admitted statutory supervisor, emailed a number of registered nurses, informing them that starting January 1, 2006, and through the end of the flu season in March, all non-immunized staff working in patient care areas would have to wear masks. On December 30, David Campbell, the Union's attorney, protested Methven's directive as an "unlawful change in working conditions" and "inconsistent" with the Hospital's prior assurances.

On January 1, 2006, the Hospital implemented a flu-prevention policy requiring non-immunized registered nurses to wear a facemask or take antiviral medication. A registered nurse in the critical care department testified that beginning January 1, she was required to wear a facemask at all times except when she was in the rest room, break room, or cafeteria. On January 3, Debra Madsen, the Hospital's attorney, acknowledged that the Tachibana-Frye correspondence and the Methven email had created confusion, but defended the new flu-prevention policy as within the Hospital's right to set a "standard of practice" under the managerial-rights provision of the collective-bargaining agreement. Madsen also stated that the Hospital would handle any noncompliance with the policy through its "standard processes, which may include progressive discipline."

On remand the Administrative Law Judge relied on the management rights clause of the collective bargaining agreement which read, GCX 22, Art. 18:

The Association further recognizes the right of the Hospital to operate and manage the Hospital including but not limited to the right to require standards of performance and to maintain order and efficiency; to direct nurses and to determine job assignments and working schedules; to determine the materials and equipment to be used; to implement improved operational methods and procedures; to determine staffing requirements; to determine the kind and location of facilities; to determine whether the whole or any part of the operation shall continue to operate; to select and hire nurses; to promote and transfer nurses; to discipline, demote or discharge nurses for just cause, provided however the Hospital reserves the right to discharge any nurse deemed to be incompetent based upon reasonably related established job criteria; to lay off nurses for lack of work; to recall nurses; to require reasonable overtime work of nurses; and to promulgate rules, regulations and personnel policies, provided that such rights shall not be exercised so as to violate any of the specific provisions of this Agreement. ... All matters not covered by the language of this Agreement shall be administered by the Hospital on a unilateral basis in accordance with such policies and procedures as it from time to time shall determine.”

#### **ADMINISTRATIVE LAW JUDGE DECISION**

The Administrative Law Judge, noting that “the record shows no genuine effort on the part of the [Hospital] to negotiate over this matter with the Union,” ALJ Dec. at page 3, addressed and rejected all the defenses raised by the Hospital except the defense that the Union had waived bargaining by its agreement to the management rights clause of the contract. The ALJ determined that “it seems clear and unmistakable that language in the management-rights clause, which gives the Hospital the authority ‘to determine the materials and equipment to be used [and] to implement improved operational methods and procedures,’ would include requiring nurses who have not been immunized against the flu and who have declined to take antiviral medication to wear a facemask when in contact with patients, fellow employees, and visitors to the Hospital.” (p. 6, lines 20-25)

The ALJ determined that the Hospital’s mandatory masking policy is “simply an extension of the infection control guidelines already in effect, which is clearly permitted

under the language of the management-rights clause.” (p. 6, lines 25-27). The ALJ rejected the Hospital’s argument that the contractual “zipper clause” when combined with the management rights clause strengthened the argument that the Union had waived bargaining. (p. 7, lines 2-31).

### **QUESTIONS PRESENTED**

1 Did the ALJ err when he ruled that the Nurses clearly and unmistakably waived bargaining about the “immunization or mask” policy when they agreed to a management rights clause that gave the Hospital the authority “to determine the materials and equipment to be used [and] to implement improved operational methods and procedures? Exceptions 1, 2, 4, 5, 7, 8.

2. Did the ALJ err when he ruled that the Hospital’s mandatory masking policy is “simply an extension of the infection control guidelines already in effect, which is clearly permitted under the language of the management-rights clause.”? Exception 2.

3. Did the ALJ err when he relied on testimony that the Nurses had not challenged other less intrusive aspects of the infection control guidelines in the past? Exception 3.

4. Did the ALJ err in ruling that because a facemask “is obviously equipment under the Hospital’s Infection Control Policy” the management rights clause authorizes the Hospital to unilaterally create rules related to face masks and enforce them with discipline? Exception 4.

5. Did the ALJ err in ruling that the arbitrator had determined in the pre-existing mandatory immunization arbitration that there had been negotiations between the parties over the issue. Exception 6.

## ARGUMENT

### **I. THE NURSES NEVER WAIVED THEIR RIGHT TO BARGAIN ABOUT THE NEW “IMMUNIZATION OR MASK” POLICY IN CONTRACT NEGOTIATIONS.**

The Board in *Provena St. Joseph Medical Center (Illinois Nurses Association)*, 350 NLRB 808 (2007), reaffirmed its adherence “to one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees’ terms and conditions of employment during the life of a collective bargaining agreement. The clear and unmistakable waiver standard is firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining. It has been applied consistently by the Board for more than 50 years, and it has been approved by the Supreme Court. *NLRB v. C&C Plywood*, 385 U.S. 421 (1967)” 350 NLRB 808, 810-811. The Board observed that, “The clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” (emphasis added) 350 NLRB at 811. In *Provena* the Board considered contentions that the hospital had breached its duty to bargain by unilaterally implementing a staff incentive policy (premium pay for extra shifts) and separately by unilaterally implementing a revised attendance and tardiness policy addressing disciplinary processes related to attendance and tardiness. The hospital relied on provisions in an extensive management rights clause to justify its actions. Those provisions reserved to the employer “the traditional rights ... to operate and manage its business and to direct its employees, ....to change or eliminate existing

methods, materials, equipment, facilities and reporting practices and procedures and/or to introduce new or improved ones ... to suspend, discipline and discharge employees ... to make and enforce the rules of conduct, standards, and regulations governing the conduct of employees ... to establish and administer policies and procedures related to research, education, training, operations, services and maintenance ... the right to determine or change the methods and means by which its operations are to be carried on, and ... to take any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care.” 350 NLRB at 810.

The Board rejected the defense as to the staff incentive policy, agreeing with the Administrative Law Judge that the broad terms of the management rights clause were insufficiently specific to authorize the staff incentive plan and the lack of evidence that that the union had explicitly waived it, even though the union had not objected to similar plans in the past. 350 NLRB at 815.<sup>2</sup>

Similarly, Virginia Mason relies on its management rights clause in its collective bargaining agreement to justify its unilateral implementation of its masking policy. Virginia Mason relied on the “standard of practice” portion of the management rights clause, GCX 22, Art. 18:

The Association further recognizes the right of the Hospital to operate and manage the Hospital including but not limited to the right to require standards of performance and to maintain order and efficiency; to direct nurses and to determine job assignments and working schedules; to determine the materials and equipment to be used; to implement improved operational methods and procedures; to determine staffing requirements; to determine the kind and location of facilities; to determine whether the whole or any part of the operation shall continue to operate; to select and hire nurses; to promote and transfer nurses; to discipline, demote or

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<sup>2</sup> The Board also found that the union, by agreeing to provisions in the management rights clause related to changing reporting practices, establishing rules of conduct and imposing discipline had “explicitly” waived objections to the establishment of the revised attendance and tardiness policy. 350 NLRB at 815-816

discharge nurses for just cause, provided however the Hospital reserves the right to discharge any nurse deemed to be incompetent based upon reasonably related established job criteria; to lay off nurses for lack of work; to recall nurses; to require reasonable overtime work of nurses; and to promulgate rules, regulations and personnel policies, provided that such rights shall not be exercised so as to violate any of the specific provisions of this Agreement. ... All matters not covered by the language of this Agreement shall be administered by the Hospital on a unilateral basis in accordance with such policies and procedures as it from time to time shall determine.”

The management rights clause does not address influenza policies, influenza masking policies or even infection control policies. Absent such specificity the clause cannot operate to shield the hospital from its duty to bargain about changed working conditions. *Provena St. Joseph Medical Center (Illinois Nurses Association)*, 350 NLRB 808 (2007); *Windstream Communications*, 352 NLRB 44, (2008), reaffirmed, 355 NLRB No. 74 (2010). As the Board noted in *Windstream*, 355 NLRB at 52:

With respect to waiver, the Board and the courts have long held that waivers of statutory rights are not to be lightly inferred, but instead must be “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *C&P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982); *Georgia Power Co.*, 325 NLRB 420 (1998). To establish a waiver by contract, the language must be specific and related to the particular subject or it must be shown that the issue was fully discussed and that the union consciously yielded its interest in the matter, *Georgia Power Co.*, supra. See also *Allison Corp.*, 330 NLRB 1363, 1365 (2000). The Board has held that generally worded management rights clauses or zipper clauses will not be construed as waivers of statutory bargaining rights. *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992); *Johnson-Bateman Co.*, 295 NLRB 180, 184-188 (1989).

Careful analysis of *Provena* demonstrates the degree of specificity necessary to constitute a “clear and unmistakable” waiver of bargaining rights. In *Provena* the Board held that the provisions did not constitute a clear and unmistakable waiver of the unions right to bargain over the implementation of an incentive pay policy providing increased pay for nurses willing to take extra holiday shifts holding that “there is no express

substantive provision in the contract regarding incentive pay.” 350 NLRB 15. The Board explicitly rejected the assertion that a contract clause permitting “extraordinary pay” for extra hours authorized the incentive pay program. 350 NLRB 808, 815 n.34. The Board also rejected the argument that the contract provision authorizing the employer to take “any and all actions [the Respondent] determines appropriate ... to maintain efficiency and appropriate patient care” constituted a waiver, 350 NLRB 808, 815 n.34, citing *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999), *enfd.* in relevant part, 233 F.3d 831 (4<sup>th</sup> Cir. 2000).

The Virginia Mason policies are no more specific to justify the immunize or mask policy than the *Provena* policies were to justify its incentive pay policy. The ALJ relied on the general provision authorizing the Hospital to “direct the nurses,” to “determine the materials and equipment to be used” and to “implement improved operational methods and procedures.” ALJ decision at 6. All of these provisions are general. None of them refer to infection control policies, much less immunization policies. Absent such specificity they manifestly cannot constitute a clear and unmistakable waiver of the right to bargain that is required under the Act.

We acknowledge that the Board in *Provena* also held that a combination of contract provisions authorized the Employer to implement a disciplinary policy on attendance and tardiness. 350 NLRB No. 64 at p.8. There the Board relied on provisions authorizing the employer to “change reporting practices and procedures and/or introduce new or improved ones,” “to make and enforce rules of conduct,” and “to suspend, discipline, and discharge employees.” The Board noted that “a policy prescribing attendance requirements and the consequences for failing to adhere to those

requirements” falls squarely within the contract clauses. 350 NLRB 808, 815-816. Virginia Mason can point to no comparable authority authorizing it to impose the immunization or mask policy.

**II. THAT THE WASHINGTON STATE NURSES ASSOCIATION DID NOT PREVIOUSLY CHALLENGE FAR LESS DISRUPTIVE INFECTION CONTROL MEASURES DOES NOT CONSTITUTE A WAIVER OF ITS RIGHT TO BARGAIN ABOUT THE “IMMUNIZE OR MASK” POLICY**

The Administrative Law Judge relied extensively on the undisputed fact that the Nurses had not objected to previous infection control policies promulgated by the Hospital. ALJ Decision at 6. Those policies addressed far less disruptive (and more medically relevant) measures than are reflected in the immunization or mask policy – requiring surgical masks when evaluating patients with respiratory symptoms or when there is a danger of sprayed secretions. The lack of objection to those policies cannot be translated into waiver of all policies dealing with infection control. The Board explicitly rejected the same argument in *Provena*, 350 NLRB 808, 815 n.35:

“It is well established that ‘union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to the those in which the union may have acquiesced in the past.’” *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. den. 217 F.3d 869 (D.C. Cir. 2000).

The ALJ’s reliance on WSNA acquiescence in the past to demonstrably reasonable infection control measures to infer a waiver of bargaining about a immunization or mask policy that is applicable throughout the hospital and impinges on working conditions throughout each nurse’s shift is the very antithesis of a clear and unmistakable waiver and should be rejected.

### **III. WSNA DID NOT CLEARLY AND UNMISTAKABLY WAIVE ITS RIGHT TO BARGAIN IN PREVIOUS COLLECTIVE BARGAINING WITH THE HOSPITAL**

The Nurses objected to the initial immunization policy and pushed the objection to a successful arbitration decision that was sustained on appeal. See, GXC 23, *Virginia Mason Hospital v. Washington State Nurses Assn.*, No. CO5- 1434MJP, 2006 WL 27203 (W.D. Wash. 2006), *affd.* 511 F.3d 908 (9th Cir. 2007). The Arbitrator explicitly addressed the Hospital's contention that the Union had waived its right to bargain about the policy. He noted the Union grieved the immunization mandate while the parties were in negotiations for a new agreement; thus, immunizations were a subject matter that the parties discussed and failed to reach agreement upon during negotiations for a new contract. GXC 23, at 21. Arbitrator Escamilla further reasoned that "[i]t is absolutely clear that neither party believed that their dispute over the flu immunization policy disappeared by entering into a new contract or that the Association waived its right to bargain over this matter." *Id.* at 21-22.

Within two months of the arbitration decision the Hospital responded by unilaterally implementing its immunization/masking policy. Just as there was no indication that the Nurses had waived their right to contest the implementation of its influenza immunization policy, *see* GXC 23, there is no indication that the Nurses waived their right to bargain about the masking policy. There was in fact no bargaining between the arbitration decision and the implementation of the immunization/mask policy, and indeed only contradictory information provided to the Union before the policy was implemented. GSX 7, 8, 10, 11. Virginia Mason does not contend it gained approval for the masking policy in direct negotiations with the Nurses because there were none. The

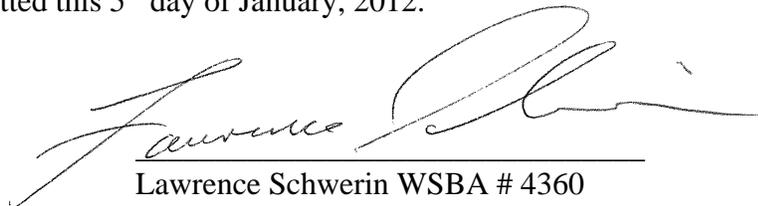
ALJ's suggestion on page 7 that Arbitrator Escamilla found that there had been bargaining over the initial immunization policy is directly contrary to the arbitration award. GXC 23.

### CONCLUSION

Administrative Law Judge Meyerson erred in concluding that WSNA had waived its right to bargain about the immunization/mask policy when it agreed to the general management rights clause in the contract. There was no clear and unmistakable waiver that is required. The Administrative Law Judge also erred in concluding that the immunization/mask policy was "simply an extension" of the infection control policies that were authorized by the management rights clause and that the nurses' acquiescence in them justified a conclusion that they had waived their right to bargain about the policy. Finally there is no evidence that the Nurses waived their right to bargain in collective bargaining negotiations over the initial immunization policy or the amended immunization/mask policy in direct negotiations.

The Board should reject the ALJ recommendation and issue an appropriate order directing the Employer, upon request, to rescind its immunization/mask policy and bargain with WSNA before implementing changes in wages, hours, or working conditions.

Respectfully submitted this 5<sup>th</sup> day of January, 2012.



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