

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

INSTITUTO SOCIO ECONÓMICO
COMUNITARIO, INC.,

Respondent,

and

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

Charging Party.

CASES: 24-CA-11762
24-CA-11880

**LEGAL BRIEF IN SUPPORT OF EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

TO THE HONORABLE BOARD:

COMES NOW, Respondent, Instituto Socio Económico Comunitario, Inc., (herein called "INSEC" or the "Company"), through the undersigned counsel respectfully states and prays:

I. STATEMENT OF THE CASE

On March 28, 2011, the Unidad Laboral de Enfermeras(os) y Empleados de la Salud ("ULEES" or the "Union") filed a charge against INSEC alleging that the Company since or about February 10, 2011, failed to provide certain information that had previously been requested. On May 2, 2011, the Company was informed that an investigation was going to be conducted with regard to the allegations made by the Union. While this investigation was pending, the Union filed a second charge against INSEC alleging that since April 2011, INSEC unilaterally and without notice required its unit employees to take forced vacations.

On June 30, 2011, a formal complaint was issued against INSEC with respect to Union's charge regarding the Company's failure to furnish information ("first complaint"). On July 21,

2011, INSEC answered the first complaint denying the allegations made by the Union and it also filed a position statement regarding the second charge made by the Union. As to the alleged forced vacations, INSEC stated that contrary to the allegations made by the Union, the Company was encouraging its employees to take their vacations and was helping them to coordinate them in accordance to the collective bargaining agreement that was in place.

On September 9, 2011, INSEC was informed that the Regional Director had determined to issue a complaint for believing that the Company had engaged in unfair labor practices with respect to the Union's claim that the Company was forcing employees to take vacations. On September 30, 2011, the cases were consolidated and an amended complaint was issued against INSEC. The consolidated amended complaint was answered by INSEC on October 13, 2011. On February 29, 2012, the Board issued a second consolidated complaint ("second complaint") which was duly answered. In both instances INSEC denied the Union's allegations and reiterated that the Company had only tried to encourage its employees to take their vacations and help coordinate them in accordance to the collective bargaining agreement that was in place.

On April 26, 2012, a hearing was held in which the parties were able to reach a non-board settlement agreement with respect to the Union's allegation regarding the Company's alleged failure to provide certain information and giving a memo to an employee. As a result of this, the case was reduced to the Union's claim that the Company was forcing employees to take vacations during periods not requested by the unit employees without any notification to and bargaining with the Union.

During the hearing held by the Board, neither the Union nor the General Counsel proved that INSEC acted in violation of Section 8(a) (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). To that regard, neither the General Counsel nor the Union could prove that unit

employees had requested to work during Holy Week and were forced to take vacations. The General Counsel presented the testimony of Arturo Grant, Union Representative, who testified that allegedly some employees had communicated him, through phone calls or verbal communications; they were compelled to exhaust their accrued vacation time during Holy Week and before September 30, 2011. Besides Mr. Grant's hearsay testimony, there was not one single piece of evidence submitted by the General Counsel or the Union in the hearing that showed that INSEC forced its unit employees to go on vacation during Holy Week. It must be noted that Mr. Grant's testimony was never corroborated by any independent evidence.

As if this were not enough to discredit Mr. Grant's testimony, neither the General Counsel nor the Union presented the testimony of a single unit employee confirming that, in effect, INSEC forced them to take their vacations in dates they had not requested. This leads to only one possible conclusion: that INSEC has never forced its employees to take their vacation leave but it did encourage them to submit their possible vacation dates in order to prepare the vacation schedule of all Company's employees. Furthermore, INSEC's actions with respect to the coordination of the vacations of its employees comports perfectly with the collective bargaining agreement that was in place.

Contrary to the Union and the General Counsel, who relied on the self-serving testimony of Mr. Grant, the Company presented testimonial and documentary evidence which belied Mr. Grant's testimony and clearly showed that INSEC was following its past practice of coordinating its employees' vacations. Moreover, the documents admitted into evidence, particularly the collective bargaining agreement itself, demonstrated that INSEC had asked its employees, as it had done in previous years, when they were going to take their vacations in order to prepare a

vacation plan. Certainly, the mere fact of the Company asking its employees on which dates they want to go on vacation, in no way constitutes an unfair labor practice.

Notwithstanding the Company proved that it did not force its employees to take vacations and the fact that Mr. Grant's testimony constituted uncorroborated hearsay, the ALJ concluded the opposite. In the instant case, the record as a whole unmistakably showed that INSEC encouraged its employees to take vacation time they had accumulated during the year and helped them to coordinate the same pursuant to the collective bargaining agreement and the past practice that has always been followed by the Company. INSEC did not implement any change with regard to the vacation leave nor did it impose new conditions of employment.

The ALJ's decision is devoid of substantial evidence that would show that the Company compelled its employees to take unwanted vacations. As such, INSEC requests the Board to admit the exceptions presented today and overturn the ALJ's decision.

II. QUESTIONS OF FACT AND LAW

1- The ALJ's determination that INSEC had violated Section 8(a) (5) of the Act upon forcing its unit employees to take vacations during periods not requested by them is not supported by substantial evidence. (See Exception A).

2- The ALJ's determination to solely rely on the testimony provided by Mr. Grant, Union Representative -which was founded on uncorroborated hearsay testimony- and disregard the testimony given by the Company's witnesses is not supported by substantial evidence. (See Exception B).

III. LEGAL ARGUMENT IN SUPPORT OF EXCEPTIONS

Exception A: The ALJ erred in ruling that INSEC forced its unit employees to take vacations during periods not requested by them in violation of Section 8(a) (5) of the Act.

The ALJ found that the Company violated the Act by forcing its unit employees to take vacations in dates not previously requested by them. (See Decision, P. 8). In so concluding, the ALJ relied exclusively on the hearsay testimony of Union Representative, Mr. Grant, and ignored without reason the testimony of INSEC' witnesses as well as the provisions of the collective bargaining agreement and the past practice followed by the Company.

As stated by the ALJ in its decision and by Mr. Grant during his testimony, the collective bargaining agreement states that any accrued vacation time a unit employee has prior to the period of December and January has to be requested by the unit employee at any other date within the next nine (9) months-on or before September. (See Decision, P. 3). As asserted by ALJ during the hearing, this is a designated time that all parties take annual leave and are away from work regardless of how many days that is. (See Hearing Transcript, P. 30, L. 24-25, P. 31, L. 1-9, P. 85, L. 20-25, P. 86, P. 87 and P. 88, L. 1-2, and General Counsel's Exhibit 13 (a) and 13 (b)). The collective bargaining agreement also provides that all parties have to take annual leave between December and January. (See Hearing Transcript, P. 30, L. 24-25, P. 31, L. 1-9, P. 85, L. 20-25, P. 86, P. 87 and P. 88, L. 1-2, and General Counsel's Exhibit 13 (a) and 13 (b)). Thus, pursuant to the collective bargaining agreement is an uncontroverted fact that unit employees have to notify the Company on or before September when they are going to take their vacation time. If the employees failed to do so, the mere fact that the Company asks them to provide their vacation dates does not constitute an unfair labor practice.

As agreed in the collective bargaining agreement, unit employees have to take their vacations according to the program established by INSEC in such a manner that the institutions normal functions are not interrupted. (See Hearing Transcript, P. 53, L. 15-21 and General Counsel's Exhibit 13 (a) and 13 (b)). Furthermore, the collective bargaining agreement allows

INSEC to, at its own discretion, declare holidays whether with pay or charged to the employees vacation account. (See Hearing Transcript, P. 31, L. 10-25, P. 32, L. 1-17, P. 88, L. 23-25 and P. 89, L. 1-12, and Respondent's Exhibit 1 (a) and 1 (b)).

Despite the fact that the collective bargaining agreement clearly establishes that unit employees have to submit their vacations date prior to September of each year and that Company can, at its own discretion, declare Holidays charged to vacations, the ALJ erroneously concluded that INSEC was forcing its employees to take vacations during periods not requested. (See Decision, P. 8). Upon reaching said conclusion, the ALJ completely ignored the dispositions concerning vacations contained in the collective bargaining agreement and gave improper consideration to an e-mail sent by Iris López, INSEC's Human Resource Director, to her assistant Claudette Sánchez instructing her to update employees' vacation plan according to vacations' leave differentials. (See General Counsel Exhibit 26). In said e-mail, Mrs. López listed eighteen employees, both unit and non unit employees, who had to schedule the remainder of their vacation time. A reading of the e-mail clearly shows that Mrs. López did not give instructions to force employees to take vacations during Holy Week. (Id.). On the contrary, Ms. López only asked Ms. Sánchez to schedule with the employees the remainder of their vacation time. (Id.). Thus, opposite to the ALJ's finding Mr. López's request is solely grounded on the collective bargaining agreement which expressly requires unit employees to submit their vacations dates on or before September of each year.

A second e-mail admitted into evidence further shows that the vacation plan was incomplete since some employees, both unit and non unit employees, had not submitted their vacations dates. This is the reason why the Company was asking unit employees to submit their vacation time. (See General Counsel Exhibit 25). To this respect, the ALJ concluded that

Yadira Guilliani, INSEC's Operations Manager, testified she did not give specific instructions that employees had to take vacation leave prior to September 30.

As to the testimony given by Jolanda Vélez, Executive Director of the Company, the ALJ stated the following:

Vélez explained the Company 'regularly closed [its] operations' during Holy Week each year. **Vélez testified 'we allow employees to charge these days to their vacation leave. If this is not the case, we try to establish an office for those employees who did not wish to have their vacation leave on those days to work.'** Vélez testified the Company had followed this practice 'since forever'; however, she acknowledged that during Holy Week 2011 the Company closed all its facilities. **She explained that all offices were closed because "no employee requested staying and working."** Vélez testified she never gave any instructions with regard to taking vacation leave that were different from what was established by the parties collective bargaining agreement.

(See Decision, P. 8). (Emphasis added).

In spite of the overwhelming testimony and evidence presented by INSEC showing that it has never forced its unit employees to take unwanted vacations, the ALJ disregarded-without explanation-the evidence presented by INSEC, including the collective bargaining agreement itself, and decided to give full credit to Mr. Grant's uncorroborated hearsay testimony. The ALJ concluded the following:

It is also clear the Company did not follow its past practice, in effect "since forever," of keeping one office open for employees desiring to work during Holy Week. The Company unilaterally closed all its facilities during Holy Week. The parties' collective bargaining agreement does not make provision for the Company to entirely suspend its operations during Holy Week. The Company's contention it did not keep any facility open during Holy Week 2011 because all employees scheduled vacation leave for that time is refuted by the fact employees were compelled to schedule vacation leave for that time.

(See Decision, P. 7 and 8). (Emphasis in the original).

As it can be seen, ALJ's finding is not supported by relevant evidence that a reasonable mind might accept as adequate to support such a conclusion. There is no ground for concluding

that INSEC closed all its facilities because employees were compelled to schedule their vacations for Holy Week. As previously stated, neither the General Counsel nor the Union proved that unit employees requested to work during Holy Week and were forced to take vacations. As a matter of fact, the evidence showed that INSEC closed all its facilities because no employee requested to work during Holy Week. As to the ALJ's ruling that the collective bargaining agreement does not make provision for the Company to entirely suspend its operations during Holy Week, the same is inconsistent with its finding that according to the collective bargaining agreement INSEC can, at its own discretion, declare holidays whether with pay or charged to the employees vacation account. (See Decision, P. 4 and 7). In other words, the Company had a right suspended its operations during Holy Week not only because of the powers granted by the collective bargaining agreement itself, but also because no unit employees requested to work instead of going on vacations during said time period. Furthermore, the evidence submitted by the Company unmistakably showed that some unit employees had not submitted their vacation dates and INSEC requested the same to complete the employees' vacation plan. Thus, it is unequivocally clear that INSEC did not give any instructions with regards to the taking of vacations contrary to the dispositions of the collective bargaining agreement and the practice followed by the Company.

In Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), the Supreme Court of the United States held that a decision of the National Labor Relations Board may be set aside by a reviewing court if unsupported by substantial evidence based upon the record as a whole. Likewise, "[w]hen the [Board's] findings are based on the ALJ's assessment of the credibility of witnesses, they will not be overturned unless they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony." Kinney Drugs, Inc. v.

N.L.R.B., 74 F. 3d 1419, 1427 (2nd Cir. 1996); Beverly Enterprises, Inc. v. N.L.R.B., 139 F. 3d 135, 142 (2nd Cir. 1998). Also, the Board can ignore the ALJ's factual determinations, based on credibility, "unless the clear preponderance of all relevant evidence convinces [the Board] that the resolutions are incorrect." Wright Line and Lamoreux, 251 N.L.R.B. 1083, n. 1 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981).

When, as here, the ALJ's conclusion relies solely on the credited testimony of Mr. Grant, even when it is contradicted by documentary evidence, the Board need not heed to it, even if the ALJ states that its conclusion is based on credibility determinations. See Sutton Realty Co. and Local 32B-32J, Service Employees International Union, 336 N.L.R.B. 405, 406-407 (2001) ("testimony was inconsistent with the record evidence, although the judge mistakenly concluded that this was immaterial"; "[t]he judge accepted this notion and specifically found that [the witness was truthful], despite acknowledging that his testimony was repeatedly inaccurate"). In Sutton, the Board rejected the ALJ's credibility determinations. Although it acknowledged that credibility determinations are overturned only in rare occasions, and that case was one of them. Sutton, 336 N.L.R.B. 405, n. 2. The Board specifically noted that the witness "had no failure of memory[; he] testified confidently about how and when he was hired by Sutton, about when he hired additional employees, and about his efforts to reach the union represented workers who were not hired." Sutton, 336 N.L.R.B. at 407. The Board concluded that the ALJ should have rejected his testimony because "Sutton's own records completely contradict [the witness's] account." Id.

The same is true here. The three witnesses that testified on behalf of INSEC-Ms. López, Ms. Guilliani and Ms. Vélez-declared that since before the year 2011, INSEC usually closes its operations during Holy Week and gives its employees several days off as holidays. (See Hearing

Transcript, P. 55, L. 19-24, P. 60, L. 20-25, P. 61, L. 1-25 and P. 89, L. 1-25). Nonetheless, if there are employees who do not go on vacation during that time, the Company leaves one of its offices open so that the unit employees can go to work. (Id.). During the week of April 18 through April 22, 2011, INSEC did not open its facilities because none of the unit employees requested to work during Holy Week. (See Hearing Transcript, P. 71, L. 5-10, P. 92, L. 12-25 and P. 93, L. 1-3). The testimony of all three witnesses was reinforced by documentary evidence which proved that the vacation plan was incomplete and that is why the Company was requesting to its unit employees to submit their vacation dates.

In addition, Ms. Vélez's testimony and the exhibits submitted support that in that same year, INSEC coordinated and encouraged its employees to take vacations before September 30, because the Company had until said time to exhaust the federal funds that were assigned to it. (See Hearing Transcript, P. 73, L. 4-18, P. 85, L. 8-19 and P. 90, L. 1-5). Thus, it can reasonably be concluded that the Company did not give any instructions with regard to holidays or the taking of vacations that was contrary to the dispositions concerning vacations and holidays contained in the collective bargaining agreement and the practices followed by INSEC. (Id.); (See also Hearing Transcript, P. 36, L. 25, P. 37, L. 1-4, P. 73, L. 4-18, P. 85, L. 8-25, P. 86, L. 1-25, P. 87, L. 13-25, P. 88, L. 1-2 and P. 90, L. 1-5).

In light of the documentary and testimonial evidence, the ALJ should have concluded that none of unit employees had requested to work during Holy Week and this is the reason why INSEC closed all its facilities during said week. Also, the evidence in the present case only showed that INSEC was organizing the vacation plan of all its employees and that is why it requested to unit employees to submit their vacations dates. These are the only conclusions

supported by the record and consonant with the applicable law. As such, the Board should reject the ALJ's finding to the contrary.

Exception B: The ALJ erred in discrediting INSEC's witnesses' testimony by relying solely on the testimony given by the Union Representative which constituted uncorroborated hearsay

Despite the ample documentary and testimonial evidence presented by INSEC showing that no unit employee requested to work during Holy Week, the ALJ decided to give credit to Mr. Grant's hearsay testimony. (See, Decision, P. 6, 7 and 8). Yet, aside from Mr. Grant's testimony the ALJ did not give any reasonable explanation as to why the testimony of all other witnesses was discredited. (Id.). The ALJ's credibility finding is unreasonable and not supported by the preponderance of the evidence.

Mr. Grant's testimony during the hearing merely stated that "after April unit employees began telling him they were being told to liquidate their vacation leave before the end of September. [...] prior to August employees had never been compelled to exhaust accrued vacation leave in that manner." (See Decision, P. 7). There is no certainty whatsoever as to what the unit employees said to Mr. Grant and when they told him. Mr. Grant barely remembered the names of the alleged employees that told him that they were forced to take vacations during Holy Week. (See Hearing Transcript, P. 54, L. 4-25). Mr. Grant could only remember the name of an employee who apparently had given him a written document expressing concerns regarding the vacation leave. (Id.). However, said document was not submitted into evidence. It must be noted that Mr. Grant's hearsay testimony as to employees' complaints about forced vacations was never corroborated by independent evidence.

Neither the General Counsel nor the Union presented testimonial or documentary evidence proving that, in effect, unit employees were forced to take vacation leave after they had requested to work during Holy Week. The General Counsel had the burden to make its case and

present substantial evidence to support its allegations of forced vacations. However, the General Counsel crossed her arms and did not present the testimony of a single unit employee confirming that he or she, in fact, had requested to work during Holy Week and later was forced to take vacations. There is no doubt that the General Counsel had the power to subpoena employees but instead elected not to do so.

Thus, the uncorroborated hearsay testimony of Mr. Grant of what the unit employees may have said, standing alone, does not constitute substantial evidence to support the conclusion reached by the ALJ. See N.L.R.B. v. Imparato Stevedoring Corp., 250 F. 2d 297, 302-303 (1957) (“Mere uncorroborated hearsay or rumor does not constitute substantial evidence; the ALJ’s findings, “to be valid, cannot be based upon hearsay, nor upon hearsay uncorroborated by a mere scintilla” of evidence); see also Jacobowitz v. United States, 424 F. 2d 555, 562 (C.C.I. 1970) (“substantial evidence includes more than uncorroborated hearsay and more than a mere scintilla; the findings to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla.”); Edison v. N.L.R.B., 305 U.S. 197, 230 (1938) (“[the] assurance of a desirable flexibility in administrative procedure does not go as far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.”).

Mr. Grant’s testimony should not be believed since it relied on uncorroborated hearsay and the ALJ’s credibility decision in favor of the Union should be overturned. The most that could possibly be credited is that only one unit employee had expressed in writing some concern regarding the vacation leave. However, said letter was not admitted into evidence and does not constitute substantial evidence to support a finding of unfair labor practice. Given that the bulk of Mr. Grant’s testimony is based on uncorroborated hearsay, the underlying premises of the

charge filed against the Union was not proven. Therefore, there is no ground to conclude that INSEC forced its employees to take unwanted vacations during Holy Week or prior to September 30, 2011. Thus, ALJ's Decision must be overturned.

For the reasons set forth above, the Board should reject the ALJ's Decision, and dismiss the charges filed by the Union against INSEC.

IV. CONCLUSION

For the reasons stated above, we respectfully request the Board to admit the aforementioned exceptions, reject the ALJ's Decision, and conclude that:

1- INSEC did not violate the Act upon closing its facilities during Holy Week and coordinating unit employees' vacations as stated in the collective bargaining agreement.

2- Neither the General Counsel nor the Union proved that unit employees had requested to work during Holy Week and were forced to take vacation leave during said time or prior to September 30, 2011.

3- The ALJ's Decision must be set aside since it was based on uncorroborated hearsay testimony.

RESPECTFULLY SUBMITTED.

By E-filing, in Washington, D.C. this 14th day of September 2012.

CERIFICATE OF SERVICE: We hereby certify that on this same date a true and exact copy of this document has been served in conformance with the requirements of the Board's Rules and Regulations to: Ayesha K. Villegas-Estrada, at ayesha.villegas-estrada@nrb.gov; Harold E. Hopkins, at snikpohh@yahoo.com; Unidad Laboral de Enfermeras(os) y Empleados de la Salud, at contacto@unidadlaboral.com; the Region 24 of the National Labor Relations Board and the Division of Judges using the E-Filing system.

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