United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 2, 2012

TO: Ronald K. Hooks, Regional Director
Region 19, Seattle, Washington

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: St. Charles Health System, Inc. d/b/a
St. Charles Medical Center – Bend
Case 19-CA-069088

530-6067-4001-1700
530-6067-4001-7500
530-6067-4033-9500
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This case was submitted for advice as to whether the employer violated Section 8(a)(5) of the Act by unilaterally increasing employee contributions to a health care plan during initial contract negotiations with a newly certified union. We conclude that the employer did not violate Section 8(a)(5) because it did not alter the lawful status quo. Specifically, the employer did not change its established past practice, in place before the union's election, of allocating set percentages of the cost of health insurance contributions between itself and the employees. Also, the employer did not have substantial discretion regarding the increase in health insurance expenses that caused the dollar amount of employee (and employer) contributions to rise. Accordingly, in agreement with the Region, the complaint allegation regarding the change in the dollar amount of employee health care contributions should be withdrawn and the charge should be dismissed, absent withdrawal.

FACTS

St. Charles Health Care System, d/b/a St. Charles Hospital – Bend ("Employer") has a self-insured health care plan and maintains a longstanding practice of annually reviewing the plan and adjusting, among other things, the overall cost of coverage. Since 2002, the Employer has used an outside consultant, The Partners Group[1] ("TPG"), to determine the yearly health plan budget. The budget produced by TPG is considered "no[n] negotiable" because it is set to cover both fixed and variable plan expenses, the latter stemming from projected employee claims which, under a self-

[1] TPG's primary business function is to develop annual budget rates for self-funded employers. TPG determines the health care plan's annual cost based on industry-standard methods and produces a final health care plan budget.

insured plan, the Employer must pay. Prior to 2010, the Employer's nurses, who are represented by Oregon Nurses Association ("ONA"), had a separate union-only health care plan.

Since at least 2008, the Employer paid 100% of the health care contributions for unrepresented full-time employees and paid 75% of the contributions for unrepresented part-time employees, who contributed the remaining 25%.[2] In 2010, the Employer negotiated a new contract with ONA, which applied the Employer's self-funded plan to the nurses for the first time. The ONA contract set the contribution allocation and required the Employer to pay 95% of the cost of full-time employees' health care coverage and the employees to pay 5%. After negotiating the ONA contract, the Employer decided to apply the same percentage allocation of health care contributions to its unrepresented employees.[3] The Employer made the percentages set forth in the ONA agreement standard for all non-ONA unit employees, effective January 1, 2011.

The Service Employees International Union, Local 49, CTW-CLC ("Union") was certified in February 2011 as the bargaining representative of a unit of the Employer's non-professional employees. Since May 2011, the Union and Employer have met for over 30 bargaining sessions, including sessions during the summer of 2011 when they exchanged proposals on the Employer's health care plan. For the 2012 plan year, the Employer's health care budget was increased per the budget provided by TPG. Due to the overall budget increase, Employer and employee contributions increased in dollar value based on the 95% Employer and 5% employee contribution split. The Employer did not bargain with the Union over the increased dollar contribution amount for the 2012 plan year. The dollar value increase was implemented in January 2012.

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[2] The Employer maintains a schedule of health care contributions required from employees based on the number of hours worked and whether the employee wishes to include a family dependant on their plan. Since at least 2008, the Employer has maintained the same percentage split, but has deducted a higher dollar value from employees' paychecks each year when the budget set by TPG has increased. For the sake of simplicity, this memo will refer only to the individual, full-time employee.

[3] It is unclear how the formal decision was made to use the same percentages for all employees, but it appears that the percentages were made standard for all employees to allow for administrative simplification given that the ONA nurses were being ushered into the same plan used by all other employees.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) because it did not alter the lawful status quo when it unilaterally increased employee contributions for the 2012 plan year during contract negotiations. Specifically, the Employer did not change its established past practice, in place before the Union's election, of allocating set percentages of the cost of health insurance contributions between itself and the employees. Also, the Employer did not have substantial discretion regarding the increase in health insurance expenses that caused the dollar amount of employee (and Employer) contributions to rise. Accordingly, the Region should withdraw the complaint allegation regarding the change in the dollar amount of employee health care contributions and dismiss that charge allegation, absent withdrawal.

An employer violates Section 8(a)(5) if it unilaterally changes wages, hours, and other terms and conditions of employment without giving the union notice and an opportunity to bargain.[4] In general, an employer may not unilaterally implement changes in terms and conditions of employment during contract negotiations, even if it provided notice and an opportunity to bargain, unless and until the parties have reached an overall impasse on bargaining for the agreement as a whole.[5] However, an employer may lawfully implement a change in employment conditions, even during contract negotiations, if that change continues an established past practice and therefore maintains the lawful status quo.[6]

Where there is a newly certified union, the lawful status quo is comprised of those practices that the employer established prior to the union's election and over which the employer has little to no discretion.[7] First, an employer does not violate the Act if it periodically changes employment conditions under an "established past practice."[8] In *Post-Tribune*, the Board held that the employer did not violate Section

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[4] *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

[5] *Pleasantview Nursing Home*, 335 NLRB 961 (2001), *enforced in pertinent part*, 351 F.3d 747 (6th Cir. 2003); *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enforced sub nom.*, *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[6] *See Stone Container Corp.*, 313 NLRB 336, 336 (1993).

[7] *See Post-Tribune Co.*, 337 NLRB 1279 (2002); *House of the Good Samaritan*, 268 NLRB 236 (1983).

[8] *Post-Tribune*, 337 NLRB at 1280.

8(a)(5) when it unilaterally raised the dollar amount of employees' health insurance contributions because it maintained the same percentage split between employer and employee contributions as it had prior to the union's election.[9] The Board determined that the percent split represented the lawful status quo and that the employer did not alter the status quo even though premiums increased.[10] The "established past practice" defense to a unilateral change allegation can only succeed, however, where the employer lacks substantial discretion concerning the unilateral change.[11] For example, in *House of the Good Samaritan*, the Board affirmed the ALJ's finding that the employer did not violate the Act when it unilaterally increased employees' health care premium contributions based on the amount charged by a third-party health care plan consistent with the employer's policy manual.[12] The policy manual stated the maximum dollar amount the employer would contribute to the health care plan and that any premium amount beyond that amount would be paid by the employees.[13] Significantly, the employer had no real discretion regarding the premium amounts because the health care plan increased its premiums on short notice.[14] In contrast, where the employer has substantial discretion in making a unilateral change, the established-past-practice defense will be rejected.[15]

Moreover, even in the absence of an established practice, if an employer makes a decision to implement a change before becoming obligated to bargain with the union,

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[9] *Id.*

[10] *Id.* at 1281. *Cf. Maple Grove Health Care Center*, 330 NLRB 775, 780 (2000) (unilateral increase in dollar amount of employee health insurance contributions violated Section 8(a)(5) where employer failed to demonstrate that it had maintained status quo ante even though premiums were increased).

[11] *House of the Good Samaritan*, 268 NLRB at 237.

[12] *Id.*

[13] *Id.*

[14] *Id. See also Post-Tribune*, 337 NLRB at 1280 (increase in dollar amount of employee health insurance contributions resulted from increased premiums imposed by third-party health plan).

[15] *See Eugene Iovine*, 328 NLRB 294, 294 (1999) (violation found where employer discretion to reduce employee hours seemed unlimited), *enforced*, 1 Fed.Appx 8 (2d Cir. 2001); *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1314 (11th Cir. 1999) (violation found where employer changed health care contributions on "pure whim"), *enforcing* 323 NLRB 1263 (1997).

it "does not violate the Act by its later implementation of that change."[16] For example, in *Mail Contractors*, the Board adopted the ALJ's finding that the employer did not violate Section 8(a)(5) by unilaterally terminating its old health care plan, because the decision to change plans occurred before the union's election and therefore represented the lawful status quo.[17] The ALJ relied on the minutes of the employer's board of directors and the testimony of the employer's general counsel to find that the pre-election decision to terminate the old plan was final and specific, rather than a general decision to alter health insurance benefits.[18]

Here, the Employer did not violate the Act when it unilaterally increased the dollar amount of the employees' health care contributions because it did not change its "established past practice" regarding those contributions. Thus, like in *Post-Tribune*, the Employer did not change the health care contribution percentages allocated between it and the employees, which were in place before the Union's election.[19] Also, the Employer continued its longstanding practice of annually reviewing its health care plan and adjusting, among other things, the overall cost of coverage. Moreover, the Employer exercised minimal discretion in determining its annual health insurance costs, the factor that ultimately caused higher employee (and Employer) health care contributions.[20] The Employer lacked discretion because TPG determines the plan's annual cost based on industry-standard methods and produces a final health care plan budget that is considered "not negotiable." Finally, the fact that the parties are currently negotiating a collective-bargaining agreement, including bargaining over health care, does not require a different result.[21]

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[16] *Mail Contractors of America, Inc.*, 346 NLRB 164, 175 (2005) (citing *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992) and *SGS Control Services*, 334 NLRB 858 (2001)).

[17] 346 NLRB at 175.

[18] *Id.* Although the employer had not formally determined the specifics of the new plan prior to the union's election, such that the union had the right to insist on bargaining over that issue, the Board found that the "economic exigency" exception of *RBE Electronics of S. D., Inc.*, 320 NLRB 80, 82 (1995), justified the employer's unilateral implementation of the new plan. 346 NLRB at 164 n.1.

[19] *Post-Tribune Co.*, 337 NLRB at 1280.

[20] *Id.*; *House of the Good Samaritan*, 268 NLRB at 237.

[21] *See Stone Container Corp.*, 313 NLRB at 336.

The Union argues that the Employer did not have an "established past practice" because it had only implemented the current percentage split of Employer and employee contributions one time (January 2011) before the Union was elected. We recognize that the employer in *Post-Tribune* had maintained the same percentage split of employer and employee contributions for 2-3 years before the union's election. However, when assessing whether an employer has an "established past practice" in order to determine the lawful status quo, the amount of time the practice has been in effect is not necessarily determinative. The key factors are whether the practice at issue was lawfully in effect prior to the alleged unilateral change and the degree of employer discretion applicable to the practice. For example, the Board found an established past practice in *House of the Good Samaritan* based upon the employer policy manual in effect at the time the union was elected, without any discussion of how long that policy manual had been in place.[22]

But even without demonstrating that the Employer acted consistent with an "established past practice," it did not unlawfully change the status quo. Thus, as in *Mail Contractors*, the Employer decided to extend the percentage allocation of Employer and employee health care contributions set forth in the ONA agreement to all its employees, including those currently represented by the Union, prior to the Union's election.[23] Not only did the Employer make the decision before the Union's election, it actually implemented it before the Union's election.

Accordingly, the Employer did not violate Section 8(a)(5) by unilaterally increasing the dollar amount of employee contributions for health care coverage.

/s/
B.J.K.

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[22] The Union also relies on *Dayton Newspapers, Inc. d/b/a Cox Ohio Publishing*, Cases 9-CA-40093, et al., Advice Memorandum dated February 22, 2005, where we found that an employer violated Section 8(a)(5) by unilaterally implementing changes in its health benefits program as to a newly-certified union. Unlike here, however, the employer in *Dayton Newspapers* exercised substantial discretion in applying the past practice.

[23] *See Mail Contractors of America, Inc.*, 346 NLRB at 175.