UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHCOAST HOSPITALS GROUP, INC. and 1199 SEIU UNITED HEALTHCARE WORKERS EAST	Case 01-CA-067303

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respectfully Submitted By:

Scott F. Burson
Counsel for the Acting General Counsel
National Labor Relations Board
Region 01
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222

TABLE OF CONTENTS

I. STATEMENT OF THE CASE

Administrative Law Judge Kenneth Chu issued his decision on June 12, 2013. The Judge found that a provision of Respondent's system-wide transfer policy violated Section 8(a)(1) because it discriminated against employees on the basis of a provision in their collective-bargaining agreement and violated Section 8(a)(3) and (1) of the Act by refusing to consider employees Dennis Souza, Noelia Nunes, and as yet unidentified similarly situated employees for transfer to certain positions, and refused to hire Nunes and other as yet unidentified employees based on its unlawful policy. This case presents one principal issue and two subsidiary issues.

The Judge correctly decided the principal issue before him: whether Southcoast Hospital Group, Inc.'s (Respondent or Southcoast) Employment Selection Process Policy (Policy), which subordinates the priority of consideration given to union represented job applicants from Tobey Hospital (Tobey) at the Respondent's non-represented facilities, is unlawful. Having found the Policy unlawful, the Judge correctly decided the two subsidiary questions presented as a consequence of the application of the unlawful policy: first, did the Respondent fail to consider, in violation of Section 8(a)(3) and (1), each Tobey applicant who was excluded from the first round of consideration for openings at the Respondent's other facilities, and second, did Respondent unlawfully refuse to hire Noelia Nunes for the position of OR Assistant 1 (Tr. 111)[1] and unlawfully delay her selection as a Mobility Aide? (Tr. 111; GC 14) The parties agreed to defer to the Compliance stage of this proceeding the identification and litigation of discriminatees beyond the named discriminatees Sousa and Nunez, in order to avoid the extensive

[1] Herein, Tr. refers to transcript page numbers; GC refers to Counsel for the Acting General Counsel's Exhibit numbers; JT refers to Joint Exhibit numbers; and R refers to Respondent Exhibit numbers.

document production and analysis necessary only if Respondent's Policy were found unlawful.

II. STATEMENT OF THE ISSUES

1. Did Respondent violate Section 8(1) and (3) of the Act by maintaining and enforcing an Employment Selection Process Policy that prohibited union represented employees at its Tobey Hospital facility from receiving consideration at its unrepresented hospital facilities until the second round of interviews?

2. Did Respondent violate Section 8(a)(1) and (3) of the Act by refusing to consider Christopher Souza, Noelia Nunes, and similarly situated employees for hire at the Respondent's unrepresented facilities until the second round of interviews?

3. Did Respondent violate Section 8(a)(1) and (3) of the Act by refusing to hire Noelia Nunes for the position of Operator Assistant 1 at its unrepresented St. Luke's facility and delay in hiring Ms. Nunes for a Mobility Aide position at the same facility?

III. STATEMENT OF THE FACTS

The Counsel for the Acting General Counsel adopts the facts as found by the Judge. The Judge properly focused on the effects of Respondent's Policy on employees in a bargaining unit of approximately 215 employees competing for transfers against approximately 4800 unrepresented employees in the Employer's entire system.

Since April 1999, Respondent has maintained an Employment Selection Process Policy (Policy) (GC 2). Respondent first implemented the Policy on April 5, 1999 without notice to the Union of the Policy or the Union's assent. (Tr. 162) There was never an agreement between the parties as to the implementation and maintenance of the Policy. (Tr. 75) In fact, the evidence establishes that the Union did not become aware of the actual terms of the Policy until the events giving rise to this unfair labor practice charge.

The Policy gives preference to current "regular status employees [who are] given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates." (GC 2)[2] The Policy, however, excludes Tobey employees who are represented by the Union from the first area of consideration at the non-represented hospitals and facilities of Respondent, on the basis of its provision that, "[e]mployees in a union whose collective bargaining contract does not provide reciprocal opportunity to employees who are not members of the union will be considered external candidates" for open positions at the Respondent's currently non-union sites. (GC 2) The Union's current collective-bargaining agreement does not provide for reciprocal opportunity to non-represented employees for open positions at Tobey, as the agreement requires the Employer to give preference to unit candidates for openings at Tobey, provided they possess the minimum qualifications for the position. (GC 5, GC 6)

Respondent offered David DeJesus, Jr., Senior Vice-President of Human Resources at Southcoast, to testify about the basis for the Policy. DeJesus testified that, prior to coming to Southcoast, he worked in human resources at a hospital that had union and non-union facilities, and he perceived an inequity in the handling of transfers whereby non-unionized employees were disadvantaged because the applicable collective-bargaining agreements required that internal candidates be preferred. (Tr. 148-149) At Southcoast, when it became clear that the union would not agree to a collective-bargaining agreement with system-wide preference for transfers into Tobey, the Policy was drafted and implemented in 1999. (Tr. 149) No specific testimony was offered with

[2] Notwithstanding this proviso, the testimony is clear that outside candidates are not considered, regardless of their qualifications, if an internal candidate is chosen from the first area of consideration.

respect to complaints of inequity at the Southcast facilities. (Tr. 159) Vague instances were referred to by DeJesus of one registered nurse named Maddy Jezierski represented by a separate union and several other unnamed nurses that worked at Tobey who purportedly complained to him. (Tr. 163, 165-166, Tr. 173) DeJesus could not recall a single instance where an SEIU Tobey employee or where a non-represented employee had complained to him.[3] (Tr. 163-166)

According to DeJesus, Respondent's rationale for implementation of the Policy was to "level the playing field" for non-unionized employees who would have been disadvantaged by the union-negotiated hiring preference at Tobey, which purportedly substantially limits the ability of other Southcoast employees to be transferred into an open position at Tobey. (Tr. 154) Per the policy, Respondent sought to resolve this alleged inequity by deferring consideration of transfer applications from Tobey employees, approximately 215 employees, until the second round of interviews for positions at the non-unionized facilities (approximately 4800 employees). (Tr. 151) Although DeJesus was involved in the creation of the Policy, he admitted that he was not personally involved in overseeing the implementation and enforcement of the Policy on a day- to-day basis. (Tr. 149, 169, 174) For instance, DeJesus admitted he was not familiar with Respondent's five-day posting period requirement for open positions within Southcoast. (Tr. 174) Instead, Respondent relied on the testimony of Mary Medeiros to describe the selection and hiring process. (Tr. 177) Medieros, who holds the position of Human Resources Business Partner, has over 19 years of experience working at

[3] In fact, such complaints are unlikely, in view of the fact that the policy was promulgated in 1999, relatively soon after Tobey entered the Southcoast system, and, according to Respondent, codified existing practice.

Southcoast; she is responsible for guiding managers through the employment process and is familiar with the Policy. (Tr. 177-178)

During the proceeding, Mary Medieros described the various steps of the employment selection process and explained how a position is filled under the Policy within the Southcoast system. (Tr. 179) Medieros explained that the selection and hiring process begins when a manger submits an employment requisition, which describes the open position and the number of hours and shift of the position. (Tr. 179) The requisition is then forwarded either to the director or vice-president for approval. (Tr. 179) Once the requisition is approved, it is forwarded to the human resources department for posting. (Tr. 179) The position is then posted for five calendar days on Respondent's website and bulletin board. (Tr. 179-180) Once it is posted on the website, the posting can be viewed and accessed by external applicants. When a position is posted in this manner, it is simultaneously posted internally and externally. (Tr. 180) Medieros also stated that there are different rounds of consideration for each position posted, but how internal and external candidates are defined can depend on which facility is conducting the hiring. (Tr. 181) For an open position at St. Luke's and Charlton, she only considers regularly scheduled employees that are already employed at Southcoast's non-unionized facilities and who apply within the initial five-day posting period in the first round. (Tr. 181) Individuals such as per-diem employees, Tobey employees, and all transfer applicants that apply outside of the five-day posting period – regardless if they work at a unionized or non-unionized site – are considered at the second round. Medieros testified that only in the event that Respondent cannot find a qualified candidate at the first or second round are external candidates then considered in what appears to be a third round of interviews.

(Tr. 182, Tr. 220) Once Respondent determines which applicants belong in the first and second round, it then proceeds to schedule interviews with the applicants. (Tr. 182) Hiring decisions are made by the hiring manager in the respective department. (Tr. 182)

In the spring of 2011, Christopher Souza brought the Policy to the attention of the Union after he unsuccessfully applied for an open building superintendent position at a non-union facility and Respondent notified him by e-mail that he would not be considered until the second round of interviews because he was a Tobey employee and thus, considered an outside candidate. (JT. 1; Tr. 23, Tr. 27) Souza met the basic requirements for the position; in fact, his supervisor, Debbie Harlow, told him he would be excellent for the position. (Tr. 28-29, Tr. 38-39) When Souza questioned Respondent as to why he was not offered an interview despite being qualified for the position, Respondent replied by e-mail per the Policy, 4.06, that it was unable to consider Tobey employees and per diems for first round interviews. (JT. 1) Souza obtained a copy of the Policy on the company's intranet, which is only accessible to Southcoast employees. (Tr. 21, 29).

Like Souza, Noelia Nunes was also a Tobey employee who applied for a position at a Southcoast non-unionized facility. Nunes was a certified nursing assistant at Tobey in a unit position represented by the Union. (Tr. 82-83) She had worked as a CNA for a year-and-a-half before she was hired into her current position as a mobility aide at St. Luke's in March 2012. (Tr. 101; GC 14) Nunes was offered a mobility aide position in January 2012, over two months after the NLRB commenced its investigation into allegations that Respondent's selection and hiring practices were unlawful and discriminatory. (Tr. 101, 140; GC 14)

Beginning in July 2011, Nunes applied for six separate positions at St. Luke's, one of which was posted twice.[4] (Tr. 83) Of the six positions for which Nunes applied, Counsel for the Acting General Counsel contends that Respondent's refusal to hire Nunes for the OR Assistant 1 position and refusal to consider and subsequent delay in hire for the mobility aide position at St. Luke's were unlawful. (Tr. 111; GC. 11, GC. 13)

Nunes applied only for open positions at St. Luke's because the facility is located closer to her home and she wanted a shorter work commute. (Tr. 84, Tr. 87, Tr. 90, Tr. 93, Tr. 96, Tr. 99; GC. 9-14) Nunes learned about all the positions on Respondent's website and applied for each one online. (Tr. 84) Nunes met most of the qualifications for each position. Nunes believed that not meeting every single listed skill and qualification for a position would not disqualify her because she knew of colleagues that Respondent hired even when they had not met all the requisite skills such as medical terminology and EKG, and provided them training following their hire. (Tr. 88-89, 118) Nunes stated that a skill such as medical terminology could be easily acquired through a two to three day long online course. (Tr. 89) Nunes cited to her St. Luke's co-worker, Mary Guillote, as someone Respondent hired without having all the required skills for the position; Nunes stated that Guillote was hired as a nursing assistant at St. Luke's Emergency Department without having the required medical terminology skills and CNA license for the position. (Tr. 116-118) Nunes said that she learned from Guillote that Respondent gave her training in EKG medical terminology after she was hired. (Tr. 116-118)

[4] Respondent posted the position of OR Assistant 1 twice, first on October 17, and second, on December 22, 2011.

The OR Assistant 1 position, which involves assisting patients before surgery, was first posted on October 17, 2011 and later re-posted on December 22, 2011 (Tr. 196-198, Tr. 204; GC 12) Respondent asserted during the Region's investigation that, pursuant to hospital internal policy, the position required re-posting because the original posting was more than 30 days old and the position had not been filled. (GC 16, Position Statement Dated February 6, 2012) Respondent asserted that all first posting applicants would have to re-apply for the second posting in order for their application to be reviewed and considered, and that Nunes did not apply for the second posting. (GC 16, Position Statement Dated February 6, 2012) Respondent did not provide any evidence of said internal policy during the proceeding. To the contrary, Respondent's interview records specifically noted that Nunes, "***has applied for the second posting and application forwarded to manager.***" (GC 12) (emphasis supplied) It is undisputed that Nunes was never contacted for an interview or made an offer of employment for the OR Assistant 1 position.

Nunes applied for the OR Assistant 1 position the same day that it was first posted. There were 40 applicants for the first posting of the position. (GC 12) Nunes testified that she met most of the qualifications of the position, including having a high school degree, one year of related experience in a healthcare environment and prior work experience as a CNA. (Tr. 94) Nunes admitted that she did not have phlebotomy skills or EKG skills but had performed EKGs when she was a CNA at Tobey yet she was not concerned because she knew of colleagues who were provided training for skills they lacked after they were hired. (Tr. 94) Medieros testified that EKG and phlebotomy skills are typical requirements for an OR Assistant 1 position and that Nunes did not have the

required skills (Tr. 197). Respondent's interview records do not, however, indicate that Nunes was unqualified for the position and/or note that she lacked EKG and phlebotomy skills. (GC 12) Instead, during the proceeding, Respondent relied on a computer printout document produced on January 9, 2012, several months after the Region commenced its investigation, which explicitly states in regards to Nunes's application – "DO NOT HIRE – does not have EKG or phleobotmy [sic] skills." (R. 5; Tr. 200)

After the first posting, Respondent made offers to two St. Luke's employees and followed by an offer to an external candidate, all of whom were unable to fill the position. Respondent first offered the position to Sandra Evangelho, a St. Luke's employee, who declined the position on November 23, 2011. (Tr. 217; GC 12 – SHG 0899 – SHG 0901) The next day, Respondent offered the position to another St. Luke's employee, Patrick Mentzer, who was currently employed as an OR Assistant. (Tr. 217; GC 12 –SHG 0935-0938) Mentzer also declined the position. At the time of Menzter's application on October 18, he stated in his application that he was currently enrolled in a community college course for phlebotomy due to finish in February 2012; he did not appear to be certified in phlebotomy at the time of his application or offer. (Tr. 218, Tr. 228; GC 12) Medieros acknowledged that Mentzer's current position which he started in April 2011, was essentially the same as the OR Assistant 1 position that he had applied for. Medieros testified that she was uncertain whether Mentzer met the phlebotomy requirement at the time of his hire for his current position (given that he was currently enrolled in a course for phlebotomy). (Tr. 232)

Respondent finally offered the position to Erika Dulude, who was not a Southcoast employee and was working as a food server at a Red Robin restaurant at the

time of her application. (Tr. 218) Dulude was considered as an external candidate in the third round of consideration. (Tr. 218) Dulude accepted the offer but when she was unable to obtain medical clearance for the position, Respondent rescinded her offer on December 14. (Tr. 220; GC 16 – Position Statement Dated February 6, 2012)

After Dulude's offer was rescinded about 66 days after the first posting, Respondent re-posted the position eight days later on December 22. There were 11 applicants to the second posting according to Respondent's interview records. (GC. 12) Respondent then offered the position to Summer Sylvia, who submitted her application on October 18, 2011. (Tr. 203; GC 12 – SHG 1017-1019) At the time of her application, Sylvia worked as an OR Assistant at Charlton, a non-unionized site. Sylvia did not list EKG or phlebotomy skills in the section of the application that asked her to list and describe her work-related qualifications; in fact, Sylvia left the section blank yet was still interviewed and offered the position. (GC 12 – SHG 1017-1019, Tr. 203)

While Nunes acknowledged in her testimony that she did not complete the same section of the application which asks her to list her work related skills and experience for the OR Assistant 1 position, she was never told by Respondent that her application was incomplete and required further information or that she was not qualified for the position. (Tr. 121, Tr. 139) Respondent interview records also do not note that Nunes's application was incomplete or that she was unqualified for the position. (GC 12) In fact, Nunes did not specifically list her skills and requirements in any of her online applications, including her ultimately successful application for the Mobility Aide position posted on December 9. Nevertheless, Respondent contacted Nunes for an interview and eventually offered her that position. (Tr. 140)

Nunes also applied for an open Mobility Aide position at St. Luke's. There were 13 applicants for the position. (GC 14) Nunes testified that she was contacted by Human Resources for an interview sometime in January 2012 and offered the position later that same month. (T. 101) Respondent clarified during the Region's investigation that it interviewed Nunes on January 17 or 18 and offered her the position on January 30, 2012, more than two months after the Region commenced its investigation. It also considered an external applicant, Doris Knight, for the position. (GC 16 –Position Statement Dated February 6, 2012) Respondent's interview records show that Knight was interviewed before Nunes on January 6, 2012. The same record also showed that Nunes's application had not been reviewed by a manager at the time Knight was already interviewed. However, Nunes was the first applicant offered the position, which she ultimately accepted. (Tr. 101)

IV. LEGAL ANALYSIS

A. THE RESPONDENT'S MAINTENANCE AND ENFORCEMENT OF ITS SELECTION POLICY, WHICH DETERMINES PRIORITY GIVEN TO TRANSFER APPLICANTS BASED ON THE SUBSTANTIVE TERMS OF THE EMPLOYEES' COLLECTIVE-BARGAINING AGREEMENT, IS UNLAWFUL UNDER *GREAT DANE* AND VIOLATES SECTIONS 8(A)(1) AND (3) OF THE ACT.

1. In The Absence Of A Substantial And Legitimate Business Justification, Respondent May Not Determine The Priority Of Consideration Of Transfer Applicants For Positions Outside A Bargaining Unit By Reference To The Substantive Terms Of A Collective-Bargaining Agreement

Respondent freely concedes that its Policy operates with respect to bargaining unit employees at Tobey Hospital based on a substantive provision of their collective bargaining agreement (CBA). For transfers within the Tobey Hospital bargaining unit,

Section 8.2 "Vacancies" of the CBA requires the qualified senior applicant within the bargaining unit be preferred over other candidates, including other employees of Southcoast Hospitals. The provision is unremarkable, and states a preference commonly found in such collective bargaining agreements. By predicating the operation of the Policy on the substantive terms of the CBA, Respondent has made a distinction in employment opportunities of Tobey employees based on their Section 7 protected right to be represented by an exclusive representative for the purposes of collective bargaining.

The Board has held that the maintenance and enforcement of a hiring policy that makes distinctions on the basis of Section 7 considerations is subject to scrutiny, even in the absence of evidence of Employer animus. *Legacy Health Systems*, 354 NLRB No. 45 (2009). Even where an employer policy is facially neutral and uniformly applied, the Board will find a violation where the predictable and actual effect is to discriminate against employees for engaging in Section 7 activity. *Lone Star Industries, Inc*., 279 NLRB 550, 552 (1986).

The Supreme Court has found that certain categories of employer conduct may violate Section 8(a)(3) even in the absence of direct evidence of discriminatory intent. *NLRB v. Great Dane Trailers*, 388 U.S. 26. In *Great Dane*, the Court held that no proof of antiunion motivation is necessary to find a violation where an employer's conduct is "inherently destructive of important employee rights." In circumstances, where an employer's conduct has only a "comparatively slight" impact on employee rights, the employer may justify its action by demonstrating evidence of a "legitimate and substantial business justification for the conduct." If the employer can make an adequate showing of business justification, the burden shifts to the General Counsel to demonstrate

affirmative evidence of antiunion animus. *Id*. at 33; see *Roosevelt Memorial Medical Center*, 248 NLRB 1016 (2006). If, on the other hand, the employer fails to demonstrate a legitimate and substantial business justification with respect to actions with "comparatively slight" impact on employees' Section 7 tights, then the inquiry concludes, and there is no need to demonstrate animus. *National Football League*, 309 NLRB 78, 81, n. 15 (1992). The Board has held that employer justification based on presumptions about employee needs or concerns that lack evidentiary support do not rise to the level of a legitimate and substantial business justification under *Great Dane*.[5]

Although many cases applying *Great Dane* involve employer conduct in the context of a bargaining negotiations and/or a strike or lockout, the Board has applied *Great Dane* to find that an employer's discriminatory policy violated Section 8(a)(3). E.g. *Honeywell, Inc.*, 318 NLRB 637 (1995) (finding employer policy which prohibited union-represented employees from bidding on vacancies at other employer locations or subcontracted operations was inherently destructive); *Contractors Labor Pool v. NLRB*, 323 F.3d 1051 (D.C. Cir 2003) (employer policy denying employment to applicants with wages 30 percent higher or lower than those offered by the employer was inherently destructive).

[5] See *Bud Antle*, 327 NLRB 87, 91 (2006) (Board finding that employer did not have a legitimate business justification for further delaying reinstatement of formerly locked out employees for an additional 30-days on the rationale that it needed to give employees time to notify their employers to relocate. Employer admitted it never asked the employees if they needed to give their current employers two weeks' notice, and the need for additional time both to give notice and relocate were uncorroborated employer assumptions). See also *Lone Star Industries, Inc.*, 279 NLRB 550, 553 (1986) (employer's change in policy for assigning work, including overtime, after the strike so as to eliminate the factor of seniority had at least a comparatively slight adverse effect on employee rights, and the employer's only explanation for the change, *i.e.*, that it was more equitable to junior drivers, was merely another way of stating that the employer did not wish to favor senior drivers and was not a legitimate and substantial business justification).

In the leading Board case addressing an employer's policy under a *Great Dane* "comparatively slight" analysis, the Board, in *Legacy Health Systems,* 354 NLRB No. 45 (2009), aff'd 355 NLRB 76 (2010), held that the employer's policy, which prohibited employees from holding dual part-time jobs if one position was in the bargaining unit and the other was not, violated Section 8(a)(3) because it discriminated on the basis of Section 7 considerations - that is, employees' decision to be represented by a union - and had at least a comparatively slight impact on employees' Section 7 rights. Further, the Board also held that the employer there violated Section 8(a)(3) because it refused to consider the three union employees at issue for positions that they applied for outside of the unit. 354 NLRB at slip op. 1. Similar to this case, *Legacy Health Systems* involved an employer hospital system which operated five hospitals and a research facility, some of which had units represented by a union and others that were unrepresented. *Id.* The Board explained that an employee's future part-time employment opportunities – and the supplemental pay and benefits – were limited by whether the employee's existing position was union-represented. This limitation supported a finding that the policy had a "comparatively slight" impact on employees' Section 7 rights to seek and support union representation. 354 NLRB at slip op. 1, fn. 4. The Board rejected the employer's proffered business justification that prohibiting such employment prevented "legal uncertainties" inherent in allowing an employee to work in represented and non-represented positions concurrently, finding the defense unavailing, since the employer did not prohibit employees from holding two part-time jobs represented by different unions. 354 NLRB at slip op. 2. The Board explained that the employer's failure to prohibit employees from holding simultaneously two part-time positions in units represented by

different unions was critical because it undermined the rationale of "legal uncertainties" on which the employer sought to justify its policy. *Id*. The Board noted that by not having established a legitimate and substantial justification for its policy, the employer had effectively penalized employees with reduced employment opportunities for having chosen union representation. *Id*. The Board found it unnecessary to rely on the Administrative Law Judge's "inherently destructive" analysis because the employer did not have a legitimate and substantial business justification for its policy. *Id*.

The facts in this case are similar to those of *Legacy Health System* and largely undisputed by the parties. Respondent does not dispute the maintenance and enforcement of the Policy. As in *Legacy Health System*, the Policy discriminates against Tobey employees who have chosen Union representation in favor of unrepresented employees and has a comparatively slight[6] impact on employees' Section 7 rights because it hinders and adversely affects the career opportunities of represented employees based on a term in their collective-bargaining agreement.[7] The record demonstrates that Souza was denied initial consideration for the open Building Superintendent position because of the terms of his Unit's collective-bargaining agreement despite being qualified for the position. Indeed, Souza received an e-mail from human resources expressly stating that he would not be considered until second round interviews because he was a Tobey

[6] "Comparatively slight" is actually a term of art in labor law for the entire range of possible impact on employees' Section 7 rights less than "inherently destructive." It does not imply insignificance or triviality.
[7] Counsel for the Acting General Counsel does not contend that the Policy was inherently destructive of employee rights because, in inherently destructive cases, the conduct involved had an absolute and immediate discriminatory impact on all union represented employees. The Policy did not completely preclude the hire of Tobey employees into non-unit positions as demonstrated by the January 2012 hire of Noelia Nunes into a Mobility Aide position at St. Luke's. Furthermore, Respondent's Exhibits 6 to 7 also demonstrate several instances where Respondent acting under its Policy had hired Tobey employees into various positions at its unrepresented facilities although the Exhibits do at times identify the place of employment of the transfer applicants, that is, whether they were Tobey employees or employees of a non-unionized facility.

employee in an SEIU position. He was never told he was not qualified for the position or that his application was incomplete. Moreover, Nunes was similarly denied initial consideration for the OR Assistant I and Mobility Aide positions because she was represented by the Union despite having being qualified for these positions.

Also analogous to *Legacy Health Systems* is the Policy's adverse and disparate impact on employees who are represented by the Union. Here, the Policy adversely impacted represented Tobey employees far greater than the impact of the collective-bargaining agreement's hiring preference for unit positions on Southcoast's unrepresented employees. As the record demonstrates, the internal preference granted to eligible unrepresented employees extends far beyond first consideration granted for positions at an employee's current site of employment; the preference applies to all the non-represented facilities, thereby significantly expanding career opportunities for unrepresented employees. Tobey employees under the collective-bargaining agreement only receive internal preference at the Tobey facility for unit positions. The collective-bargaining unit at issue here gives unit employees preference for approximately 215 unit positions at Tobey in a facility with a total workforce of 550 employees total; Respondent's policy grants non-Tobey employees preference for approximately 4,800 positions at Charlton, St. Luke's and their ancillary facilities. Tobey's union represented workforce represents only a small fraction of Southcoast's total unrepresented workforce. The disadvantage suffered by non-union employees applying for transfer into the Tobey

Unit's 215 positions is dwarfed by the disadvantage suffered by Unit employees at Tobey seeking a transfer elsewhere in Respondent's organization.[8]

Respondent has failed to provide a substantial business justification for the discriminatory impact of the Policy sufficient to satisfy its burden under *Great Dane*. DeJesus claimed that the purpose of the Policy was "to level the playing field" for nonunionized employees who would have been disadvantaged by the union-negotiated hiring preference at Tobey, which he stated would limit non-Unit employees' ability to be hired into an open position at Tobey. As just demonstrated, however, in terms of opportunity, the Policy fails utterly to level the playing field because of the radical difference in the number of employment opportunities within the Unit compared to those in the rest of the Southcoast system. DeJesus's testimony does not explain or justify why internal preference for unrepresented employees was not limited to the applicants' current site of employment, a provision more nearly analogous to the single facility preference granted to Tobey employees.[9] Rather than "leveling the playing field," Respondent's Policy confers a tremendous advantage to nonunit employees seeking transfers within the Southcoast system. By extending the breadth of internal preference to unrepresented employees to every single unrepresented facility within Southcoast's system, Respondent tips the scales to the decisive advantage of unrepresented employees.

The disproportionate nature of Respondent's policy would, in itself, be sufficient to invalidate the Policy, but it fails for the further reason that it lacks a substantial basis. DeJesus's testified that he implemented the Policy at Southcoast based on his own prior

[8] Respondent contends the Policy, contrary to its terms, is not applied to transfers for positions which do not exist within the Unit at Tobey. Even if true, the fact remains that both other Southcoast Hospitals are significantly larger than Tobey.

[9] Even such a limitation to a single facility would pose issues of equity, given the vast disparity in size between Tobey and Respondent's other facilities.

experience working at another hospital system with represented and unrepresented facilities and his personal opinion that it was inequitable to give internal preference to union candidates at all facilities, but limit such preference to unit members at union represented facilities. This testimony constitutes an admission that the Policy was implemented at Southcoast in the absence of any evidence of actual concern by any employee of the Southcoast system. When DeJesus was questioned about whether he had received specific complaints from employees about perceived inequity at the Southcoast facilities, DeJesus's testimony was, at best, vague and speculative. DeJesus pointed to one instance of a Tobey nurse who had complained, but offered no specific details or any documentary evidence in support of his testimony. DeJesus also admitted that he could not recall a single instance where an an unrepresented employee had complained about an inability to compete for unit positions at Tobey. Simply put, Respondent failed to provide sufficient evidence to establish that unrepresented employees for the positions at issue in this case actually felt aggrieved by the contractual preference granted to Tobey employees at their facility, or that such sentiment was so disruptive to the Employer's operations that the Policy was required to address the issue. Rather, Respondent's justification is based on a manager's unsupported presumptions about employee concerns which appear not to exist in the Southcoast system. As a basis for choosing to distinguish between employees based on their Section 7 activity, this is simply insufficient under *Great Dane*. In *Legacy Health Systems*, the Board did not question the bona fides of the Employer's assertion that it feared "legal complications" in permitting part time employees to work separate jobs within and outside a bargaining unit, and the Counsel for the Acting General Counsel does not do so in this case. Nevertheless, Respondent's

concern for equity was simply not grounded sufficiently in hard fact to justify the Employer's Policy. The Judge was correct in drawing this conclusion. Since Respondent failed to offer a legitimate and substantial business justification for its policy, there is no need for Counsel for the Acting General Counsel to produce direct evidence of antiunion animus.

In contemporaneously filed Cross-Exception, Counsel for the Acting General Counsel argues that the ALJ's apparent reliance on *FES* for the analytical framework for resolving the refusal to consider and refusal to hire allegations arising from Respondent's application of its Policy is unwarranted.

FES requires that Counsel for the Acting General Counsel, as part of its prima facie case, establish that discriminatory animus motivated allegedly unlawful refusals to consider or hire. Respondent argues that the complaint should be dismissed with respect to the refusal to consider and refusal to hire allegations concerning Souza and Nunes because there is no particularized showing of animus with respect to either employee.

Respondent's argument fails because this case is governed by *Legacy Health*. No particularized showing of animus is required where the alleged violation follows automatically from the application of an employment policy which has been shown to be unlawful under the *Great Dane* analysis. By invoking *FES*, Respondent attempts to import a requirement for the Acting General Counsel affirmatively to demonstrate animus with respect to the individual employment actions challenged by the Complaint. In the circumstances of this case, particularized proof of animus is unnecessary where the refusals to consider and hire arise automatically from the application of an unlawful Policy.

2. The Judge Properly Rejected Asserted Equitable Defenses To The Complaint.

Respondent argues that the Union is equitably estopped from any challenge to the Policy, relying on *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005). If accepted, Respondent's estoppel argument would permit a radical intrusion on the Section 7 rights of represented employees. Respondent is claiming that unless the Union agrees to a policy satisfactory to it for transfers of out-of-unit employees into the Tobey bargaining unit, Respondent is *permanently* privileged to maintain its Policy.

Because Respondent fails utterly to make out a Union waiver with respect to the Policy, discussed in greater detail below, Respondent constructs an estoppel argument based on the long period it has maintained its policy, speculation about what Union representatives must have known about the policy, and inferences that reported employee complaints about previous transfers indicate the Union was, or should have been aware of, the Policy, yet failed until now to challenge it. Respondent points to no prejudice it suffers by a challenge to the Policy at this time.

The Policy is – after all – *not* a term and condition of employment of Unit employees. It governs transfer rights for Southcoast system employee applicants to positions *outside* the Unit. Respondent acknowledges that the parties never entered into any express agreement over the Policy. Instead, in support of its equitable estoppel argument, Respondent relies on a contract proposal that it presented and discussed with the Union during the 1997-1998 negotiations for a successor collective-bargaining agreement. (Tr. 155-157; R. 1, footnote 2) In the proposal, Respondent offered language that it asserted would treat all transfer applicants throughout its system the same. The Union rejected the proposal. (R. 1) Respondent contends that, by negative implication,

the Union's rejection of this proposal constituted its tacit acquiescence to Respondent's status quo practice of deferring consideration of Tobey transfer applicants for nonunit positions to a second round of consideration. The record establishes, and the Judge found (ALJD at p. 3, ll. 7-9) that the Policy itself was not drafted until 1999 (that is, after the rejection of the 1997-98 proposal). Respondent contends that following the Union's rejection of the proposal, the Union did not offer any proposals seeking to obtain first-round consideration for Unit employees applying for positions outside the Unit, and that this failure to bargain and obtain agreement to a different practice, extended over more than ten years, constituted acquiescence in Respondent's policy, thereby estopping the Union from challenging the Policy.

Respondent's estoppel argument overlooks the absence of evidence that prior to Souza's report to Lemieux, the Union had any knowledge of the express terms of the Policy or indeed of any systematic approach by Respondent to subordinating the consideration of Tobey employees for transfers elsewhere in the Southcoast system. Respondent attempts to blunt this deficiency by asserting that the Union must have known of the policy, given the long period it has been in effect, and the evidence over time of employee complaints to the Union regarding transfer applications from Tobey to other units in the Southcoast system. The Judge, however, reasonably found, based on this record, that vague reports of employee discontent fell far short of establishing Union knowledge of and acquiescence to the Policy. Finally, even conceding arguendo that some form of equitable estoppel based on Union conduct is appropriate, Respondent has articulated no reason why a prospective cease and desist order protecting the rights of future transfer applicants should not issue. Respondent can show no detrimental reliance

on the Union's past conduct with respect future application of the policy, and insofar as the policy applies to nonunit employees and nonunit positions, it is not a mandatory subject of bargaining that the Union can insist on addressing in collective bargaining.

The above discussion demonstrates that *Manitowoc Ice*, 344 NLRB 1222 (2005), relied on by Respondent, is distinguishable. Over a period of years, the employer in *Manitowoc* had unilaterally implemented and subsequently made changes to a profit sharing plan applicable to unit employees. The employer never gave notice of these proposed changes to the union or bargained, and the union never complained or filed charges with respect to the employer actions. In bargaining for a new contract in 2001, the union proposed that the employer guarantee the current profit sharing plan for the term of the new agreement. The employer declined, asserting that it always had the right to make unilateral changes in the profit sharing plan, and it intended to maintain that right. Although the union reasserted its proposal a number of times, the employer maintained its response, and the union made no protest of the employer's position, nor did it file an unfair labor practice charge. Instead the union signed a collective bargaining agreement that, as in previous contracts, made no mention of the profit sharing plan. Following execution of the contract, the employer made a change in the plan that was challenged in an unfair labor practice charge.

The Judge there found that the union had fully discussed and consciously explored the profit sharing plan issue in bargaining and consciously yielded its right to bargain changes. The Board declined to follow the Judge's analysis, finding instead that the union's conduct led the employer to reasonably believe that it could deal unilaterally with the profit sharing plan. In reaching its decision, the Board referred to *Speidel Corp.*,

120 NLRB 733 (1961); *NLRB v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954); and *Tucker Steel Corp.*, 134 NLRB 323 (1961). In all of these cases, the unions made proposals during bargaining to limit an employer's right to unilaterally enforce changes in unit terms and conditions of employment, the employers refused to agree, an agreement was signed, and the unions subsequently challenged the unilateral practice by unfair labor practice charge. Summarizing its rationale in all these cases, the *Manitowoc Ice* Board concluded:

> On these facts, we find that there was a "clear understanding" that the profit-sharing plan would remain a management prerogative, and that the Union, by its conduct set forth above, "bargained away" its interest in the plan. See *Tucker Steel Corp.*, 134 NLRB at 333; *Speidel Corp.*, 120 NLRB at 741. By challenging the Respondent's unilateral changes to the plan, after abandoning its effort in collective-bargaining to make the plan a contractual benefit, the Union is, in effect, attempting to deprive the Respondent of the benefit of its bargain. Accordingly, because the Respondent has done "no more and no less for its union employees than its collective-bargaining agreement with them called for," we decline to find that its conduct constituted an unfair labor practice. See *NLRB v. Nash-Finch Co.*, 211 F.2d at 627.
>
> *Manitowoc Ice*, 344 NLRB at 1224 [footnotes omitted]

Contrary to the circumstances in the foregoing cases, the Policy in this case was not a mandatory subject of bargaining concerning terms and conditions of employment of employees in the bargaining unit and the Union had made no effort in collective-bargaining to alter the policy and come up empty-handed. Unlike the cases cited above, there is no evidence that the Union had any clear idea of the terms of the policy or how it operated until Souza brought the terms of the Policy to its attention. These distinctions

are important, because in the cases where the Board has found estoppel, it has concluded that to do otherwise would deprive an employer of the benefit of the bargain it had reasonably thought it had reached. The negative inference drawn from its failed transfer proposal in bargaining more than ten years ago is too flimsy a construction to support a reasonable expectation on the part of the Employer that it has a contract right to maintain its Policy.

It is unsurprising that Respondent challenges the Judge's application of waiver analysis to its policy, because the record fails to establish a knowing and intentional decision of the Union to forego a challenge to the Policy. The Judge properly analyzed Respondent's equitable argument by the Board's waiver standard. Employees in the Unit have a right to be free from unlawful discrimination, and the Board should not lightly infer that a union, through inaction, has permanently compromised that right of individual employees. Under long-standing Board policy, a waiver of a statutory right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), aff'd in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) Respondent presented no evidence that the Union expressly and unequivocally agreed to waive its right to bargain over the issue of preference for Tobey employees at nonunion facilities; neither is there any evidence that the Union had knowledge of the Policy or its terms. In the absensce of clear evidence that the Union was apprised of Respondent's policy and consented to it, a waiver argument must fail.

B. BETWEEN JULY 2011 AND DECEMBER 2012, RESPONDENT, ACTING PURSUANT TO THE POLICY, UNLAWFULLY FAILED TO CONSIDER FOR HIRE SOUZA, NUNES, AND SIMILARLY SITUATED TOBEY EMPLOYEES WHO APPLIED FOR POSITIONS AT SOUTHCOAST'S UNREPRESENTED FACILITIES.

With respect to Souza and Nunes, it is undisputed that they both applied for positions at Southcoast's unrepresented facilities. The Judge's finding that they were not considered for certain positions is well supported in the record.

The evidence established that Respondent's Policy was routinely enforced to the detriment of Tobey employees like Souza and Nunes. Thus, the record supports a finding that, with respect to Souza, Nunes, and similarly situated employees, Respondent unlawfully refused to consider them for positions at its unrepresented facilities.

C. RESPONDENT, ACTING PURSUANT TO THE POLICY, VIOLATED 8(A)(3) AND (1) OF THE ACT BY REFUSING TO HIRE NOELIA NUNES FOR THE POSITION OF OR ASSISTANT 1 AT ITS UNREPRESENTED ST. LUKE'S FACILITY, AND DELAYED IN HIRING MS. NUNES FOR A MOBILITY AIDE POSITION AT THE SAME FACILITY BECAUSE OF HER AFFILIATION WITH THE UNION.

Because of her employment in a union-represented position, Nunes was rejected for the position of Operating Room Assistant 1, which she was qualified to perform. Nunes met the basic requirements of the position: she had a high school degree, had one year work experience in a healthcare environment, and had prior work experience as a CNA. Respondent's explanation for refusing to consider and rejecting Nunes's application was conflicting and unreliable. Medieros testified that Nunes lacked the requisite EKG and phlebotomy skills for the position, which she characterized as a typical requirement for the position. However, the record evidence establishes that Patrick Mentzer, who was a St. Luke's employee and the second applicant offered the

position after the first posting, did not appear to be certified in phlebotomy and was enrolled in a community college course for phlebotomy due to be completed several months after he applied for the first posting. Respondent's offer of employment to Mentzer undercuts its assertion that phlebotomy skills were an indispensable requirement of the OR Assistant 1 position. When questioned if Mentzer even possessed the requisite phlebotomy skills for his current OR Assistant position, which is essentially the same as the position he applied for, Medieros stated that she wasn't certain.

Moreover, Respondent's interview records do not indicate that Nunes was unqualified for the position. Respondent asserted that Nunes in her application failed to list her work-related skills and experience for the position, yet Respondent's interview records do not indicate that her application was incomplete nor was she ever informed that her application was incomplete. What is more, the successful candidate for the position, Summer Sylvia, a Charlton employee at the time of her application, also did not complete the same work-related skills and experience section of her application, yet Sylvia was still offered the position after it was re-posted on December 22. Thus, Respondent's assertion that Nunes's failure to complete the skills section of her application had somehow impacted Respondent's decision to review and consider her application is unavailing and supports an inference that the true reason for Respondent's refusal to hire Nunes was an overbroad application of the Policy to her. Lastly, Respondent claimed that Nunes was ineligible for the position because she had not applied to the second posting, pursuant to internal policy which required re-posting of the position and first-round applicants to reapply in order to be considered. In addition to not providing documentary evidence of such a policy, Respondent's interview records note

that Nunes had indeed applied for the second posting and that her application had been forwarded to the hiring manager.

It may be that a number of the internal candidates for the position were more qualified than Nunes, and offers to them were justified in preference to her. However, Nunes should in any event have been awarded the position during the first posting, in preference to the offer to the third candidate, Erika Dulude, an external candidate who was employed as a food server at the time of her application; as an external candidate, pursuant to Respondent's policy, Dulude's application should not have been reached prior to Nunes. Moreover, after Dulude's offer was withdrawn for medical reasons, Nunes should have been offered the position as the last remaining qualified candidate in the selection process in the first posting. Instead Respondent, without reasonable justification, reposted the position and offered the position to an unrepresented Southcoast employee. Tellingly, Respondent gives no consistent account of its action with respect to Nunes, claiming a policy requiring reposting after 60 days, while presenting no evidence of such a policy, and asserting that Nunes failed to apply for the second posting notwithstanding internal documents showing that Nunes's application had been forwarded for consideration in the second posting.

Lastly, Respondent delayed in hiring Nunes for the Mobility Aide position posted in December 2011. Respondent asserted that it considered and interviewed Nunes on January 17 or 18 and offered her the position on January 30, 2012, just a few months after the Region had commenced its investigation into Respondent's alleged unfair hiring practices. However, Respondent's interview records, provided during the investigation of this charge, show that Respondent considered and interviewed an external applicant,

Doris Knight, for the same position *before* Nunes on January 6. The same record also showed that Nunes' application had not been reviewed by a manager at the time. The evidence supports the inference that Respondent considered Nunes's application only because of the Region's inquiry into its hiring practices and the status of Nunes's application.

The evidence permits a fair inference that in actual practice, Respondent's policy, far from serving to "level the playing field," erected a significant barrier to Tobey employees seeking transfer into the rest of the Southcoast system. A suggestion of this exclusionary mind-set can be seen in Respondent's marginal notes on Nunes's application for the second Mobility Aide position, where Respondent's agent suggests an affirmative desire to exclude a Tobey employee because of her inclusion in a represented unit. (GC 15, SHG 0175)

Medieros testified that Respondent, as a matter of practice and policy, only looks to external candidates at the third round if there are no qualified applicants in the first or second round. The delay in extending the offer to Nunes by giving preference to Doris Knight is clearly inconsistent with this policy. Inexplicably, Respondent's interview records show that it had not reviewed the application of Nunes, a second round candidate, at the time it considered and interviewed Knight, a third round applicant. Yet, soon after the Region's inquiry, Nunes was offered the position of Mobility Aide. Had Nunes's application been reviewed at the correct earlier stage, Respondent would have found Nunes qualified and offered her the position prior to its interview of Knight on January 6, 2012. Therefore, the evidence with respect to Nunes demonstrates that she was qualified for the position of OR Assistant 1 and that should have been hired, and that Respondent

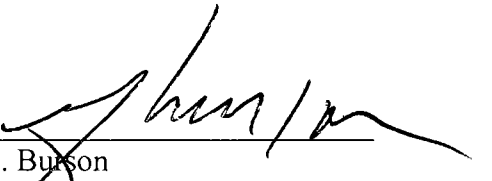
unlawfully refused to hire her because of her Union affiliation. Finally, the record evidence also establishes that Respondent unlawfully delayed in hiring Nunes by considering her at same time as a third round applicant, without justification in violation of Section 8(a)(1) and (3) of the Act. The Judge is entirely correct as to this, and his order to extend a remedy to Tobey employees, to be identified in the compliance stage, who were similarly denied transfers by operation of the Policy, is fully warranted.[10]

V. CONCLUSION

The Judge correctly found that Respondent, by the maintenance and enforcement of the Policy, the refusal to consider union-represented employees for transfer in the first round, and the delay in offering Noelia Nunes one position and the failure to offer her another, has violated Section 8(a)(1) and (3) of the Act and that an appropriate remedial order should issue against Respondent. The Judge's recommended remedy adequately remedies the violations found, and properly includes as yet unidentified employees who were similarly denied transfer by operation of the Policy.

Dated: August 9, 2013

Respectfully submitted,



Scott F. Burson
Counsel for the Acting General Counsel
National Labor Relations Board
Region 01
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

[10] The Judge's reliance on FES is discussed separately in the Acting General Counsel's Brief in Support of Cross Exceptions.

TABLE OF CASES