

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

## Advice Memorandum

DATE: June 4, 2013

TO: Mori Rubin, Regional Director  
Region 31

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

SUBJECT: Southern California Permanente Medical Group  
and Kaiser Foundation Hospitals d/b/a Kaiser  
Permanente  
Cases 31-CA-093746 and 31-CA-093748

530-6050-2575  
530-8054-9000  
530-6067-4011-6200  
530-6067-4022-6200  
530-6067-4044-5000  
775-8731

These cases were submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act by failing to bargain with the Union over its layoff decision and the effects of the layoffs before it unilaterally initiated the applicable reduction in force procedures. We conclude that the Employer violated Section 8(a)(5) by unilaterally initiating the applicable reduction in force procedures because the decision and effects of the layoffs are mandatory subjects of bargaining, and the Union did not waive its right to bargain.

### FACTS

#### Background

The Employer, Southern California Permanente Medical Group and Kaiser Foundation Hospitals d/b/a Kaiser Permanente, is a non-profit public benefit corporation that operates several acute care hospitals in the State of California. The Employer and the Union, United Nurses Associations of California/Union of Health Care Professionals, are parties to a collective-bargaining agreement governing the terms and conditions of employment for two bargaining units. The Health Care Professionals unit consists of over 12,000 employees, primarily Registered Nurses, Physician Assistants, and Registered Nurse Practitioners, at approximately 100 locations throughout Southern California. The Specialty Care Nurses unit includes over 800 RNs in various specialized classifications at approximately 15 Southern California locations. Article XI of the parties' agreement, entitled "Seniority," requires the Employer to provide "reasonable

notice” of any reduction in force and sets forth various procedures for accomplishing such force reductions, as well as recall rights.<sup>1</sup> In addition, the Employer and Union are party to an Employment and Income Security Agreement (EISA) that guarantees employees continued employment for a full year after they receive notice of layoff. Pursuant to this agreement, if the notified employees are unable to transition into a similar job classification by the end of the one-year period, they are laid off.

### The Employer’s Efforts to Address Budgetary Issues

The Union, as a member of the Coalition of Kaiser Permanente Unions comprised of seven unions that represent Kaiser employees, is also party to an agreement with the Employer known as the Labor-Management Partnership Founding Agreement. Pursuant to that agreement, the Employer and Coalition hold regular monthly meetings to discuss a wide variety of workplace issues. On August 13, 2012,<sup>2</sup> at one of those regular monthly meetings, the Employer notified the Coalition unions about a significant projected gap in the Employer’s 2013 budget. The Employer and Coalition agreed to address this issue by utilizing the Interest-Based Problem Solving (IBPS) process detailed in their partnership agreement. That agreement states that “[i]n the absence of consensus” through this process, “mandatory bargaining subjects will be resolved in accordance with contractual and legal rights.”<sup>3</sup>

Utilizing the IBPS process, the Employer and the Coalition unions held eight meetings to address the budgetary issue, between August 23 and October 15. At these meetings, the parties brainstormed a variety of options to cut Employer costs, including: an early incentive retirement program, efforts to reduce employee absenteeism, spending cuts associated with traveler nurses, and using two part-time positions in lieu of one full time-position.

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<sup>1</sup> The contractual management-rights clause states that the parties agree to work together to resolve issues concerning “skill mix or changes in care delivery” and sets up a procedure for resolving disputes when such issues cannot be resolved by agreement.

<sup>2</sup> All dates are in 2012, unless otherwise noted.

<sup>3</sup> See October 1997 Labor-Management Partnership Founding Agreement, <http://www.lmpartnership.org/what-is-partnership/national-agreements/lmp-agreement#decision>, retrieved May 23, 2013.

On October 15, at what would be the last IBPS meeting, an Employer representative gave a presentation on the actual cost savings for the various cost-cutting options that the parties had explored. After the presentation, the Employer's President stated that the cost savings options identified by the parties through the IBPS discussions were not enough to close the budget gap. Thus, the Employer's President announced: "[t]he only way to reduce the budget gap is to do a reduction in force." There is no suggestion that the other IBPS participants concurred in this conclusion.

Indeed, the following exchange transpired immediately after the Employer President's statement:

**Union President:** "Fine, if that's where we're going, we're going to do this in the traditional manner. I did all the realignments during the 90's, so I know how to do this. It's not like I haven't done this before with some of you in this room."

**Employer's Senior VP of HR:** "That's where we're going."

**Employer Representative:** "Yeah, you know how to do it."

**Employer's President:** "Well this is the thing that we have to do, and this is the only thing that works."

**Union Representative:** "[Employer President], you knew about this problem in March, you didn't call us to meet until August. We should have been working on this back in March. Why are you calling us in August?"

**Employer's President:** "We have done interest-based. We are doing layoffs."

**Union President:** "Don't give me a list of names of employees who you want to lay off, and I don't want you talking to my members."

The meeting ended following this exchange.

#### The Parties' Subsequent Communications over Potential Layoffs

On October 23, the Employer's Chief Operating Officer sent an internal communication intended only for management, stating in part:

As you are aware, Kaiser Permanente Southern California has undertaken a series of cost-reduction initiatives that ensure we

continue to provide the right care at the right time for our members at an affordable price. . . . Despite numerous actions we have taken to date, it has become clear that we will still need to make further adjustments to respond to these challenges. Unfortunately, this will a [sic] modest downsizing of staff positions . . . these reductions will be announced in two stages with unrepresented employees being informed between October 24 and 26, and represented employees scheduled to be notified within the next few weeks.

On October 25, a Union Representative obtained a copy of this email and brought it to the Union President's attention. The next day, the Union filed an unfair labor practice charge alleging that the Employer violated Section 8(a)(5) by, *inter alia*, unilaterally announcing the layoff of bargaining unit employees without providing the Union with adequate notice or an opportunity to bargain over the Employer's decision or the effects of the reduction in force.

Then, on November 5, the Employer's Senior VP of Human Resources sent an email to the Union President with the subject heading of: "Advanced Notification of Today's Regionwide Message About Workforce Reductions[.]" The email informed the Union President that "[t]he message below will be issued . . . this morning at 11:30 AM to all . . . employees to help reduce anxiety about position eliminations that are expected to be announced in the near future to all . . . represented employees." This message contained a lengthy discussion of the Employer's economic justifications for the reduction in force but stated that "[w]e will sit down with labor representatives from each of the affected bargaining units to discuss the impact of these plans."

On November 9, the Union President sent a lengthy information request to the Employer's Senior VP of Human Resources "in light of Kaiser Permanente's announcement to its managers and supervisors regarding a reduction in force (RIF) of unidentified UNAC/UHP-represented members" in the Health Care Professionals bargaining unit.

Then on November 12, and before responding to the Union's information request, the Employer sent the Union President two separate official notices of layoffs—one for the Health Care Professionals bargaining unit and the other for the Specialty Care Nurses bargaining unit. The letters stated, in relevant part:

[t]he purpose of this correspondence is to provide . . . official notification of position eliminations for employees covered by [the] UNAC-UHCP [bargaining unit] . . . Per our conversation this morning, the Employer is requesting to meet with you tomorrow on November 13 to review the list and confirm names of impacted employees. Please let me know what time you would like to meet at the UNAC offices. . . .

Impacted employees will receive notifications on Friday, November 16, 2012.

The following day, the Union President met with the Employer's Director and its Senior VP of Human Resources. At this meeting, the Union President presented a demand to bargain letter, which stated in relevant part:

UNAC/UHCP hereby demands to bargain over the Employer's announced decision to layoff represented employees, including unidentified UNAC/UHCP bargaining unit members, and the effects of the Employer's decision, including the procedures to be followed in layoffs, the exercise of affiliate facility seniority by employees, the recall rights of employees who are to be laid off, and the effects such layoffs will have on those employees. Please advise me of the Employer's earliest availability to engage in bargaining and to review with UNAC/UHCP the list of UNAC/UHCP bargaining unit members that the Employer has decided to layoff to ensure that seniority has been followed.

A few days later, on November 15, the Union met with the Employer to discuss whether the layoffs would actually save the Employer money in 2013, given that the terms of the EISA required the Employer to continue paying and providing benefits to the employees receiving the layoff notices for an entire year. The Union also requested that the Employer delay issuing the layoff notices to employees until January 1, 2013, and suggested that the parties could bargain about the layoffs at that time. The Employer refused this request. Later that afternoon, the Employer emailed the Union a list of the Health Care Professionals bargaining unit employees who would receive layoff notices on November 16. The email did not identify the Specialty Care Nurses bargaining unit employees whom the Employer planned to layoff.

On November 16, the Employer provided layoff notices to approximately 165 Health Care Professionals bargaining unit employees and five Specialty Care Nurses unit employees. The notices stated that the affected employees were immediately being "placed into the redeployment and transition process per the Employment and Income Security Agreement (EISA)[.]"

On November 19, the Union filed grievances alleging that the Employer's notice of layoffs violated the collective-bargaining agreement by failing to: provide reasonable advance notice of the layoffs and the facilities, units, and employees who would be impacted; follow the applicable seniority provisions in the collective-bargaining agreement; and bargain the effects of the layoffs.

On December 6, the Union met with the Employer to discuss how the EISA would be applied to the recently-initiated reduction in force. As a result of this meeting, the Employer agreed to grant preferential rehiring/recall rights to the affected employees. This agreement was memorialized in a December 7 letter from the Employer's Senior VP of Human Resources to the Union President. Despite this agreement, the Union indicated that it would continue to pursue its grievance.

At this time, no bargaining unit employees are scheduled to be laid off until November 16, 2013. Nevertheless, approximately 20 of the unit employees who received layoff notices have had to change departments, hours, shifts, and/or work locations.

### ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by initiating layoffs without first fulfilling its obligations to bargain over its decision and the effects of the planned layoffs.

Initially, we note that it is well established that layoffs are a mandatory subject of bargaining.<sup>4</sup> Thus, an employer is obligated to provide notice and an opportunity to bargain over a decision to lay employees off and the effects of that decision.<sup>5</sup> Upon receiving notice of an employer's planned change involving a mandatory subject of bargaining, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining rights.<sup>6</sup>

We conclude first, in agreement with the Region, that the Employer provided a definitive enough statement that it was planning to initiate layoffs when its

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<sup>4</sup> *Rose Fence, Inc.*, 359 NLRB No. 6, slip op. at 1, n.1, 5 (2012); *Lapeer Foundry & Machine*, 289 NLRB 952, 954 (1998).

<sup>5</sup> *Rose Fence*, 359 NLRB No. 6, slip op. at 5-6, 8; *Lapeer*, 289 NLRB at 954.

<sup>6</sup> See *KGTV*, 355 NLRB 1283, 1285 (2010) (union waived its right to bargain over the employer's decision to lay off employees by requesting to bargain only over the effects of the decision and failing to request bargaining over the decision itself, where the employer's decision was not a *fait accompli*); *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001) (union waived its right to bargain over a plant closure and transfer of bargaining unit work when the union failed to demand to bargain for four months after receiving notice of the changes from the employer).

President declared that “[w]e are doing layoffs” at the October 15 IBPS meeting as to constitute notice of its decision.<sup>7</sup>

We further conclude that the Union did not waive its right to bargain over the Employer’s decision to initiate layoffs and the effects of that decision. Indeed, the Union immediately voiced a desire to bargain over the decision. Specifically, at the October 15 IBPS meeting after the Employer’s President stated that the only way to remedy the budget gap was to implement a reduction in force, the Union President immediately responded by stating that “if that’s where [the parties are] going, we’re going to do this in the traditional manner. I [negotiated] all the realignments during the 90’s, so I know how to do this. It’s not like I haven’t done this before with some of you in this room.” The Union President’s reference to the “traditional manner” was a reference to collective bargaining, as distinguished from the interest-based problem-solving meetings that the parties had been engaged in. In addition, the Union President made clear that the Union did not want the Employer to unilaterally determine the identity of employees to be laid off when he stated that he didn’t want to be presented with a list of names and he didn’t want the Employer to deal directly with the employees.

The Union’s responses to each subsequent communication from the Employer confirmed that it was asserting its right to bargain over the decision and its effects. Thus, on October 26, the day after the Union obtained a copy of an Employer email intended only for management employees which discussed the planned layoffs, the Union filed an unfair labor practice alleging that the Employer violated Section 8(a)(5) when it unilaterally announced layoffs without providing the Union with an opportunity to bargain over its layoff decision or the effects of the planned layoffs. And only days after the Employer sent the Union a May 5 email providing “Advanced Notice of . . . Workforce Reductions[,]” the Union requested that the Employer provide information in light of the fact that the layoffs would impact unidentified bargaining unit members. Then, the day after the Employer provided the Union with official notice of planned layoffs, the Union hand delivered to the Employer a letter formally demanding to bargain over the decision to lay off represented employees and the effects of that decision.

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<sup>7</sup> Compare *Pan American Grain Co.*, 343 NLRB 318, 318 (2004) (employer’s general statement of intent to lay off employees in the future held not specific enough to provide union with reasonable opportunity to bargain); *remanded on other grounds*, 448 F.3d 465 (1st Cir. 2005); *Oklahoma Fixture Co.*, 314 NLRB 958, 960-61 (1994) (employer’s “inchoate and imprecise” statement about future plans was insufficient notice to trigger union’s duty to request bargaining), *enforcement denied on other grounds*, 79 F.3d 1030 (10th Cir. 1996).

Considering the totality of the Union's actions before the Employer unilaterally implemented the reduction in force procedures on November 16, we conclude that the Union made an adequate and timely request to engage in traditional bargaining over the employer's decision to impose layoffs and the effects of that decision and did not waive its right to bargain by inaction.<sup>8</sup>

We also conclude that the collective-bargaining agreement did not privilege the Employer's decision to institute a reduction in force. A union may contractually relinquish a statutory right provided the relinquishment is expressed in clear and unmistakable terms.<sup>9</sup> Such a waiver of the right to bargain over a mandatory subject, however, will be found only if there is clear and unequivocal contractual language or bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union intentionally yielded its right to bargain.<sup>10</sup> Applying these principles here, we conclude that there was no contractual waiver of the right to bargain about layoffs, notwithstanding the parties' agreement to the one-year EISA guarantee; i.e., there is nothing in the management-rights clause, or elsewhere in the collective-bargaining agreement, that can be read as a waiver by the Union of its right to bargain over either the decision to conduct layoffs, or over other effects of any layoffs, and the Employer has not asserted otherwise.<sup>11</sup>

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<sup>8</sup> See *Oak Rubber Co.*, 277 NLRB 1322, 1323 (1985) (union's offer to "try to work out any problems" associated with the employer's decision to relocate was a request for bargaining and properly alerted the employer that it did not acquiesce in the employer's decision even though the union's formal demand to bargain wasn't served until two and a half months later; request for information made about the same time as request to "try and work out any problems" further indicated a timely bargaining request), *enforcement denied mem. on other grounds* 816 F.2d 681 (6th Cir. 1987). See also *Armour & Co.*, 280 NLRB 824, 828 (1986) (although union never used the word "bargain," the "sequence of events should have left little doubt in the mind of a reasonable person" that the union was interested in bargaining).

<sup>9</sup> *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-15 (2007).

<sup>10</sup> *Provena*, 350 NLRB at 815; *Trojan Yacht*, 319 NLRB 741, 742 (1995).

<sup>11</sup> See, e.g., *KGTV*, 355 NLRB at 1285 (even assuming the employer complied with the expired contract's provisions governing effects of layoffs, to the extent that there were issues not addressed by those provisions, such as the effects on remaining unit employees' workloads, those remain subject to bargaining).

We note also that the IBPS process did not constitute bargaining over the Employer's decision to implement layoffs. Indeed, the founding documents establishing the collaborative framework between the Employer and the Coalition specifically indicate that when IBPS discussions do not result in a consensus, mandatory subjects of bargaining (such as layoffs) "will be resolved in accordance with contractual and legal rights."

And, the parties' December 7 agreement about a variety of effects does not satisfy the Employer's obligation to engage in effects bargaining because the Employer's unilateral implementation of its decision tainted the parties' post-implementation bargaining.<sup>12</sup>

Finally, although there is a pending grievance alleging that the Employer violated the collective-bargaining agreement by failing to provide appropriate notice, by not following contractual seniority provisions, and by failing to bargain the effects of the layoffs, deferral to the parties' grievance resolution process is inappropriate. Since there is no claim that the contract's terms authorized the decision to lay off employees, deferral of the allegation that the Employer unlawfully failed to bargain over the decision itself is inappropriate.<sup>13</sup> Deferral of the refusal to bargain about effects allegation is therefore also inappropriate because it is inextricably intertwined with a nondeferrable allegation.<sup>14</sup>

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<sup>12</sup> See *Times Union*, 356 NLRB No. 169, slip op. at 1, n.2 (2011) (Board agreed with ALJ that the employer's "unilateral application of its criteria for selecting employees for permanent layoff and its unilateral placement of the selected employees on paid leave presented the Union with a fait accompli, tainting the parties' subsequent bargaining over the layoffs").

<sup>13</sup> See *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616-17 (1973) (deferral of unilateral change charge is inappropriate where resolution of the dispute does not turn on the interpretation of specific contractual provisions and the employer is not claiming contractual privilege), *affirmed on reconsideration*, 207 NLRB 1063 (1973), *enforced mem.* 505 F.2d 1302 (5<sup>th</sup> Cir. 1974), *cert. denied*, 423 U.S. 826 (1975). Cf. *Inland Container Corp.*, 298 NLRB 715, 716 (1990) (deferring to arbitration a charge alleging unlawful unilateral establishment of a controlled substance policy even though no specific contract provisions were in dispute, where contract incorporated company rules and rules provided that disputes regarding their establishment or application were subject to the grievance procedure).

<sup>14</sup> See, e.g., *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168 (1972) (deferral to grievance-arbitration procedure inappropriate where deferrable issue inextricably related to non-deferrable issue), *enforced*, 502 F.2d 1159 (1st Cir.

Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement.

/s/  
B.J.K.

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*cert. denied* 416 U.S. 904 (1974); *American Commercial Lines*, 291 NLRB 1066, 1069 (1988) (same).