

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

**SW GENERAL, INC. d/b/a
SOUTHWEST AMBULANCE**

and

Case 28-CA-094176

**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL I-60, AFL-CIO**

GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

The relevant facts of this case are straightforward. Respondent, after 12 years of regularly issuing eligible employees biannual payments called “longevity pay,” unilaterally ceased issuing longevity pay without providing notice to the Union.

During the hearing, Respondent failed to introduce any compelling evidence to support its contention that the Union waived its right to bargain over longevity pay upon the expiration of its most recent contract. As a result, the Administrative Law Judge correctly held that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally ceasing its payments of longevity pay during December 2012.

Respondent’s exceptions to the Decision (ALJD) of Administrative Law Judge Donna N. Dawson (ALJ) are without merit and are neither supported by the record nor by longstanding Board precedent.¹ Thus, the Board should reject Respondent’s attempts to use

¹ SW General Inc. d/b/a Southwest Ambulance is referred to as “Respondent.” International Association of Fire Fighters Local I-60, AFL-CIO is referred to as “Union.” References to the hearing transcript are designated as (Tr.) with the appropriate page citation. References to the hearing exhibits of the Acting General Counsel and Respondent are referred to as (GC) and (R.) respectively, with the appropriate exhibit number. Exhibits introduced jointly by both the Acting General Counsel and Respondent are referred to as (J.), with the appropriate exhibit number.

this proceeding to postpone the inevitable, and, without delay, adopt the ALJ's findings of fact, conclusions of law, and recommended order.

II. QUESTIONS INVOLVED

1. Whether any alleged defects in the appointment of members of the National Labor Relations Board and/or the appointment of the Acting General Counsel affect the outcome of this case.
2. Whether the parties' intent regarding Respondent's contractual obligation to issue employees longevity pay affects the outcome of this case.
3. Whether Respondent's practice of biannually issuing eligible employees longevity pay for twelve consecutive years is sufficient to establish an ongoing practice.
4. Whether either the Union's conduct and/or the language in the parties' most recent contract establish that the Union clearly and unmistakably waived its right to receive notice and bargain about any changes to longevity pay.
5. Whether the ALJ applied the correct legal standards.

III. PRECEDURAL HISTORY

The ALJ properly found that on or about December 1, 2012, Respondent violated Section 8(a)(1) and (5) of the Act by failing to give notice to the Union and an opportunity to bargain with the Union prior to unilaterally ceasing longevity pay for all eligible unit employees. ALJD at 16.

Despite the uncomplicated nature of this case - with a hearing that lasted less than a day - and the longstanding Board precedent that the ALJ relied on in her decision, Respondent has filed 15 exceptions to the ALJD, and a brief in support of those exceptions. Respondent's numerous exceptions include several differently-worded exceptions premised on its disagreement with the ALJ over whether its practice of issuing employees longevity pay over the course of 12 years qualified as an ongoing practice. Resp't Exceptions at 2. Given Board

precedent, such an argument is without merit. Whether or not longevity pay was an ongoing practice is irrelevant – longevity pay is clearly a form of wages and, therefore, a mandatory subject of bargaining under Section 8(a)(5) of the Act. Furthermore, although it failed to raise such a defense in either its Answer or ALJ Brief, Respondent argues in its exceptions that the Regional Director lacked authority to issue the Complaint in this case. Resp't Exceptions at 3. All 15 of Respondent's exceptions lack merit. It is respectfully submitted that the Board should reject Respondent's exceptions and affirm the ALJ's conclusion that Respondent violated the Act by unilaterally ceasing payments of longevity pay to its employees.

IV. BACKGROUND

Respondent is an emergency medical services provider that contracts with local municipalities and other government entities throughout the State of Arizona. Tr. 19. Since 1992, Respondent has recognized the Union as the exclusive bargaining representative of its employees.² J. 1(c); J. 1(e).

From June 2001 through June 2012, Respondent issued qualifying employees biannual payments called "longevity pay." J. 8. In order to qualify for longevity pay, employees must have worked a certain number of continuous years of service to Respondent. See J. 1-4. At the time the Union and Respondent initially negotiated the terms of longevity pay in 2001, Respondent and the Union had in place salary caps for many employees who had more than ten years of service. J. 1 at 50-52. Thus, the purpose of longevity pay was to provide a pay increase for long-serving employees without adjusting those employees' already-negotiated regular rates of pay. Tr. 109-111.

² Respondent has recognized the Union as the representative of the following employees: All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act. J. 4.

Due to the impending expiration of the parties' 2009 contract, in March 2012, the Union and Respondent began negotiations over a new collective-bargaining agreement. GC 2. During the course of those negotiations, the parties arrived at a tentative agreement that the terms of longevity pay would remain the same in the new contract. Tr. 55-56; 95-97. After several temporary extensions, the 2009 contract expired on September 8, 2012. J. 4 at 6; J. 5-6.

On September 11, 2012, Roy Ryals, Respondent's Chief Operating Officer, sent an e-mail to Respondent's managers stating the following:

By now you have all heard that the contract with Local I-60 has expired and the company did not extend the contract. This is true. . . Now what does this all mean to you and how you manage your direct reports? The answer is, pretty much nothing. Wages benefits and working conditions remain unchanged In other words, it is business as usual GC. 2.

Despite Ryals' e-mail, employees' wages would change come December. On December 3, 2012, Union President Adam Lizardi e-mailed Respondent's payroll manager Cassandra Collins to ask when Respondent planned to issue its employees longevity pay. GC 4. Although Collins initially responded that employees would receive longevity pay in their second paycheck, Collins eventually recanted and told Lizardi that Respondent no longer planned to issue employees longevity pay. *Id.*

During a meeting held later that month, Union Treasurer Kevin Burkhart asked Roy Ryals "to do the right thing" by issuing employees longevity pay. Tr. 57. Roy Ryals denied that request. Since June 2012, Respondent has failed to make any new longevity payments to its employees.

V. ARGUMENT

A. Any alleged defects in the appointment of members of the National Labor Relations Board and/or the appointment of the Acting General Counsel have no effect on the outcome of this case.

1. The ALJ's reliance on *Finley Hospital* is in accordance with Board precedent.

Respondent correctly points out that in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), the D.C. Circuit Court held that former Members Griffin and Block, then-current Board members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. Respondent also correctly points out that in the ALJD, the ALJ relied, in part, on *Finley Hospital*, 359 NLRB No. 9 (2012), which was decided by the President's January 2012 appointees to the Board. However, the Supreme Court has granted the Board's petition for certiorari of *Noel Canning*. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts. Compare *Noel Canning v. NLRB*, 705 F.3d 490, 505-506 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Indeed, in *Belgrove* the Board concluded that the "question [of the validity of the recess appointments] remains in litigation" and that, until that question is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act." 359 NLRB No. 77, slip op. 1, fn.1

Thus, the ALJ's reliance on *Finley Hospital* is in accordance with the Board's judgment on these matters and the Board should affirm the ALJD. In any event, the fact remains that *Finley Hospital* was correctly decided and, to the extent necessary, the Board in this case should restate and reaffirm the holdings and principles of that case.

2. The Regional Director had authority to issue a complaint in this case because the Acting General Counsel was properly appointed under the FVRA.

Should the Board deem it necessary to address the merits of Respondent's argument, however, the Board should hold that the Complaint in this case was properly issued because the Acting General Counsel was properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, et seq. ("FVRA").

In support of its argument, Respondent cites the recent Section 10(j) dismissal order in *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013). With minimal analysis, *Kitsap* concluded that the AGC's designation violated the FVRA because the AGC never served as a first assistant to the departing officer. But the limitation regarding prior service as a first assistant applies only to designations made pursuant to § 3345(a)(1) of the FVRA. The AGC is serving under a designation made pursuant to § 3345(a)(3). Accordingly, the limitations applied by the *Kitsap* court do not apply to the AGC. *See* Cong. Rec., 105th Cong., 2nd sess. (Oct. 21, 1998) at p. 27496 ("Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)."). *See also Belgrove Post Acute Care Ctr.*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013) (finding that the AGC was properly appointed under the FVRA). Moreover, as AGC Solomon was properly appointed

under the FVRA, his delegation of authority to Regional Director Overstreet to issue and process complaints is valid. Therefore, the Board should reject Respondent's contention that the complaint is invalid.

B. The parties' intent regarding Respondent's contractual obligation to issue employees longevity pay is immaterial to the outcome of this case.

Had the Union and Respondent bargained to lawful impasse about longevity pay, then it might be material at an arbitration proceeding, for purposes of determining Respondent's contractual liability, whether either one or both of the parties, when drafting the terms of longevity pay, intended that Respondent's contractual obligation to issue longevity pay ceased upon the contract's expiration.

This is not an arbitration proceeding. The Complaint does not allege that Respondent violated the terms of its contract. The Complaint alleges that Respondent failed to bargain in good faith with the Union by not maintaining the status quo during negotiations. Thus, the Board should reject Respondent's attempts to transform this unfair labor practice proceeding into an arbitration concerning contractual intent and reject Respondent's Exceptions 3, 4, and 5.

The Board has repeatedly held that the purpose of an unfair labor practice proceeding is to determine Respondent's statutory obligations under the Act, not its contractual obligations under a collective-bargaining agreement. In *Litton Financial Printing Division v. NLRB*, 484 U.S. 539 (1988), the Supreme Court upheld that distinction when it stated that under Section 8(a)(5), "most terms and conditions of employment are not subject to unilateral change They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." *Id.* at 206. The Court further held that the difference between a statutory obligation and a contractual obligation is "elemental." *Id.* The

Board has further clarified that an Employer's obligation to maintain the status quo until it bargains to legal impasse with a union is only relieved when "bargaining partners . . . unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term" *Provena St. Joseph Medical Center*, 350 NLRB at 811 (2007); see also *Metropolitan Edison Co. v NLRB*, 460 U.S. 693, 708 (1983). Typically, a union does not waive its right to bargain over a mandatory subject of bargaining unless the union entered into a contractual agreement that clearly and specifically waives that right. See *Finley Hospital*, 359 NLRB No. 9 at 3 (2012) (one-year collective-bargaining agreement clarifying that a one-time wage increase would only apply "during the terms of [an] Agreement" did not clearly and unmistakably waive Union's right to bargain over a subsequent wage increase); *Provena St. Joseph Medical Center*, 350 NLRB 808, 815 (2007) (holding that in "absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining" an employer violates Section 8(a)(5) by unilaterally changing a condition of employment); *General Tire & Rubber Co.*, 274 NLRB 591, 592-93 (1985), *enfd.* 795 F.2d 585 (6th Cir. 1986) (Board found the contract did not address employer's statutory obligation to pay benefits after contract expired and therefore did not constitute a waiver of union's rights).

1. The ALJ did not abuse her discretion when excluding evidence of Respondent's intent when drafting the contractual terms of longevity pay 12 years ago.

Respondent's Exception 3 lacks merit because the ALJ properly excluded from the record Ryals' alleged intent when drafting the language of the 2001 collective-bargaining agreement. Such intent has no relevance to whether the Union waived its right to bargain over longevity pay because the terms of longevity pay were most recently updated in the parties'

2009 collective-bargaining agreement – not an agreement that is now over 12 years old. Furthermore, despite the Acting General Counsel’s objections, the ALJ admitted into the record evidence of Ryals’ intent when drafting the language in the 2009 contract. Tr. 167. The ALJ even included a discussion of that intent in her decision. ALJD at 9. Despite the ALJ’s consideration of that intent, however, the ALJ still correctly concluded that Respondent violated Section 8(a)(5) because the Board has never held that a single party’s intent, standing alone, is sufficient to establish that a union has clearly and unmistakably waived its right to bargain over a mandatory subject of bargaining. Thus, the ALJ did not abuse her discretion when excluding Ryals’ intent when drafting portions of the 2001 contract.

2. The ALJ did not abuse her discretion when she made the factual determination that the parties did not discuss what would happen to longevity pay upon the most recent contract’s expiration.

The ALJ did not abuse her discretion by concluding that, during negotiations over the terms of the 2009 contract, the parties did not talk about what would happen to longevity pay if the contract were to expire. There is no evidence in the record showing that the parties talked about this subject, and it would be Respondent’s burden to show that the Union at some point clearly and unmistakably waived its right to bargain over longevity pay. Indeed, both Lizardi and Ryals, who testified that they were very involved in the negotiation of the 2009 contract, testified that they did not recall representatives of either the Union or Respondent engaging in any conversations about what would happen to longevity pay upon the contract’s expiration. Tr. 109-110, 170.

Thus, the Board should reject Respondent's attempt to turn this unfair labor practice proceeding into an arbitration concerning the parties' contractual intent by denying Respondent's evidentiary exceptions and affirming the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by ceasing its payments of longevity pay to employees.

C. Respondent's practice of issuing eligible employees longevity pay during the course of 12 consecutive years created an ongoing practice that qualified as a mandatory subject of bargaining.

In her decision, the ALJ correctly held that the "longevity payments in the instant case were not 'stand-alone' or 'separate' events." ALJD 14, and that they were instead "consistent payments issued biannually . . . between Respondent and the Union from 2001 through 2012." *Id.* There is no dispute that from June 2001 through June 2012, Respondent had a policy of issuing eligible employees longevity pay during June and December of each year. J. 8.

Respondent's argument that longevity pay was not an ongoing practice and, as a result, ceasing payments of longevity pay was not a change to employees' wages clearly lacks merit. First, there is no question that longevity pay qualifies as wages for purposes of Section 8(a)(5) of the Act. *Pine Brook Care Center, Inc.* 322 NLRB 741, 744 (1996). Second, the ALJ's conclusion that Respondent's biannual payment of longevity pay was an ongoing practice is in accordance with Board precedent. In *Finley Hospital*, the Board held that an employer's agreement to increase wages in a single, one-year collective-bargaining agreement established a duty for the employer under Section 8(a)(5) to provide notice and bargain with the union over a subsequent wage increase after the contract's expiration. *Finley Hospital*, 359 NLRB No. 9 at (2012). Even the dissent in *Finley Hospital* would conclude that Respondent has violated the Act by ceasing longevity pay. Specifically, in his dissent,

Member Brian Hayes concluded that, after the expiration of a contract, an employer has an obligation to continue issuing its employees “wages and/or benefits *at the same level* as on the final day of a contract’s term.” *Id.* at 11-12. In this case, regardless of whether longevity pay was an ongoing practice, in order for Respondent to maintain the status quo, Respondent must issue its employees the same amount of wages upon the contract’s expiration. Thus, Respondent’s unilateral decision to cease issuing certain employees longevity pay disrupted the status quo by decreasing those employees’ annual wages.

In conclusion, Respondent’s argument that its 12-year practice of issuing employees longevity pay was not an ongoing policy lacks merit and the Board should affirm the ALJD’s conclusion that Respondent’s cessation of longevity pay violated Section 8(a)(1) and (5) of the Act.

D. Neither the Union’s conduct nor the language in the parties’ most recent contract establishes that the Union clearly and unmistakably waived its right to receive notice and bargain about changes to longevity pay.

1. The 2009 contract fails to establish that the Union clearly and unmistakably waived its right to receive notice and bargain about changes to longevity pay.

The Board has typically held that in “absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining” an employer violates Section 8(a)(5) by unilaterally changing a mandatory subject of bargaining. *Provena St. Joseph Medical Center*, 350 NLRB 808, 815 (2007).

In *Finley Hospital*, the Board rejected the employer’s argument that language limiting the terms of a one-year wage increase to “during the terms of [an] Agreement” established that the Union had waived its right to bargain over a subsequent wage increase upon the contract’s expiration. *Finley Hospital*, 359 NLRB No. 9 (2012). In this case, the parties’ 2009

contract stated that longevity pay should be issued to employees “[e]very December 1st and June 1st of each year of this Agreement. . . .” J. 4. The relevant contractual language in this case is almost indistinguishable from the language addressed by the Board in *Finley Hospital*. Based on this recent precedent, it is clear that the ALJ correctly held that the 2009 contract failed to establish that the Union waived its right to bargain over longevity pay. Thus, the Board should reject Respondent’s arguments and affirm this portion of the ALJD.

2. The Union’s conduct fails to establish that it clearly and unmistakably waived its right to receive notice and bargain about changes to longevity pay.

The Board has generally held that in order to hold that a union waived its right to maintaining the status quo upon a contract’s expiration, there must usually be evidence that the parties’ expired contract “specifically express[es] [the parties’] mutual intention to permit unilateral employer action” *Finley Hospital*, 359 NLRB No. 9 at (2012), citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). The Board has stated that in order to successfully establish that a union has waived its Section 8(a)(5) rights through inaction, an employer must show that the union had clear advance notice of the employer’s intent to institute a change and that, despite that notice, the union failed to dispute the change in any meaningful way. *Rappazo Elec. Co.*, 281 NLRB 471, 482 (1986); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981). The Union’s actions from its first becoming aware of Respondent’s unilateral change establish that the Union objected to such a change from the outset to the present day.

This case is strictly about whether Respondent violated Section 8(a)(1) and (5) of the Act by ceasing its payments of longevity pay to employees. Thus, whether or not the Union filed a grievance about another alleged unilateral change -- here, Respondent's failure to increase annual wages -- is immaterial.

Indeed, in this case, the most relevant conduct is not that of the Union, but that of Respondent. There is no question that Respondent failed to give prior notice to the Union about its decision to cease issuing its employees longevity pay. Thus, Respondent's conduct establishes a *fait accompli*, and there is no need for the Board to address the Union's action or inaction in response to Respondent's unilateral cessation of longevity pay.

Accordingly, the ALJ correctly concluded that neither the Union's conduct nor the plain language of the parties' most recent contract established that the Union clearly and unmistakably waived its right to bargain over changes to longevity pay.

E. The ALJ applied the correct legal standard.

As recently as September 2012, the Board upheld its longstanding doctrine that in order for a union to waive its statutory right to the status quo upon a contract's expiration, there must be evidence that the union entered a clear and unmistakable waiver of that right. *Finley Hospital*, 359 NLRB No. 9 (2012).

Respondent correctly points out that, in some limited circumstances, the D.C. Circuit Court has held that a different legal framework is more appropriate. But, as discussed by the ALJD, the Board has not applied that framework and the D.C. Circuit cases cited by Respondent are distinguishable because they involved analyzing language within contracts that were still in effect at the time that the employers' alleged unilateral changes took place.

There is no dispute that in this case Respondent's decision to cease issuing longevity pay occurred in December 2012 - after the expiration of the parties' most recent contract.

Accordingly, the ALJ did not err when she applied the "clear and unmistakable waiver" test to this case, and the Board should affirm the ALJ's holding that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally ceasing its payments of longevity pay to its employees.

VI. CONCLUSION

Based on the foregoing and the entire record, the Acting General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act as set forth in the ALJD and that Respondent's exceptions should be rejected. It is respectfully submitted that the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order, and order whatever other additional relief it deems just and necessary to remedy Respondent's violations of the Act.

Dated at Phoenix, Arizona, this 19th day of September 2013.

Respectfully submitted,

/s/ Daniel B. Rojas

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in SW GENERAL, INC. d/b/a SOUTHWEST AMBULANCE, Case 28-CA-094176 was served by E-Gov, E-Filing, and E-Mail on this 19th day of September 2013, on the following:

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