Heartland Human Services *and* American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO. Case 14–CA–096323

October 31, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The Acting General Counsel seeks summary judgment in this case on the ground that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent has violated Section 8(a)(5) and (1) of the Act.

Upon a charge filed by American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO (the Union), the Acting General Counsel issued the complaint on March 21, 2013, against Heartland Human Services (the Respondent), alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by (a) ceasing to give employees raises on their anniversary dates as required by its collective-bargaining agreement with the Union; (b) changing its 401(k) plan and provider; and (c) increasing the premium for family and dependent health insurance benefits, all without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

The Respondent filed an answer and an amended answer, admitting all of the factual allegations in the complaint, denying all of the legal conclusions in the complaint, and asserting an affirmative defense. On June 19, 2013, the Acting General Counsel filed with the Board a Motion for Summary Judgment to which the Respondent filed a response, stating among other things that it agreed that no genuine issues of material fact exist warranting a hearing.

On June 24, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent again filed a response, and the Acting General Counsel filed a brief in reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint alleges, and the Respondent admits, that the Union was certified as the exclusive collective-bargaining representative of the unit employees, that a decertification election was conducted on June 4, 2012, that a revised tally of ballots showed that a majority of valid votes had not been cast for the Union, and that on September 28, 2012, the Board adopted the hearing officer's recommendation in Case 14–RD–063069 that a rerun election be conducted. The complaint further alleges, and the Respondent admits, that on March 18, 2013, the Board issued a Decision and Order in Case 14–CA–087886[1] finding, among other things, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit (*Heartland I*). Upon the Respondent's refusal to comply with the Board's March 18, 2013 Order, the Board has sought enforcement of its Order in the United States Court of Appeals for the Seventh Circuit.[2]

The Respondent admits its continued refusal to recognize and bargain with the Union but contends that its conduct does not violate Section 8(a)(5) and (1) because the Respondent lawfully withdrew recognition from the Union based on the fact that it no longer enjoyed the majority support of its employees. Thus, the Respondent admits that on August 8, 2012, it ceased giving employees raises on their anniversary dates as required by the collective-bargaining agreement; that on September 21, 2012, it changed its 401(k) plan and provider; that on September 22, 2012, it increased the premium for family and dependent health insurance benefits; and that it engaged in all of this conduct without prior notice to the Union and without affording the Union an opportunity to bargain. The Respondent urges the Board to grant summary judgment in favor of the Respondent and dismiss the complaint, or in the alternative, to stay these proceedings until the Seventh Circuit Court of Appeals renders its judgment.

We find that there are no issues warranting a hearing because the Respondent has admitted the crucial factual allegations set forth above. In accord with its position in the pending enforcement proceeding in Case 14–CA–087886, the Respondent claims that its admitted conduct is not unlawful because of its reasonable belief that the Union does not enjoy the majority support of the employees in the collective-bargaining unit, based exclusively on the Union's loss of the June 4, 2012 representation election and the Board's erroneous direction to con-

[1] 359 NLRB No. 76.
[2] Case No. 13-1954.

duct a rerun election in Case 14–RD–063069. For the reasons that follow, we find no merit in this defense.

With respect to the Respondent's contention that it is relieved of its bargaining obligation because the Union does not enjoy majority status and the Board erred in ordering a rerun election in Case 14–RD–063069, this defense was raised before the Board and found to be without merit in *Heartland I,* supra, and it is rejected here for the same reasons.

With respect to the Respondent's request to dismiss the complaint or, in the alternative, to stay these proceedings pending a determination in *Heartland I* by the United States Court of Appeals for the Seventh Circuit, the request is denied. It is well settled that the pendency of collateral litigation does not suspend a respondent's duty to bargain under Section 8(a)(5).[3]

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, an Illinois corporation with an office and place of business located at 1200 North 4th Street, Effingham, Illinois, has been engaged in providing residential and outpatient mental health services.

In conducting its operations during the 12-month period ending February 28, 2013, the Respondent derived gross revenues in excess of $100,000, and purchased and received at its Effingham, Illinois facility goods valued in excess of $20,000 directly from points located outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, is a health care institution within the meaning of Section 2(14) of the Act, and that the Union, American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Jeff Bloemker	Executive Director
Debra Johnson	Human Resources Director
Charles A. Siler	Director of Business Services

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Respondent at its Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

On February 1, 2006, the Union was certified as the exclusive collective-bargaining representative of the unit. The most recent collective-bargaining agreement covering the unit was effective from August 21, 2009, through August 20, 2011. At all material times since February 1, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On June 4, 2012, pursuant to a petition filed in Case 14–RD–063069, an election was conducted in the unit. The tally of ballots disclosed that 19 ballots were cast for the Union, 18 votes were cast against the Union, and there was 1 challenged ballot, which was sufficient to affect the results of the election. On June 11, 2012, the Union filed objections to the election. On June 28, 2012, a hearing on the challenged ballot and the objections was held. On July 18, 2012, the hearing officer issued a report recommending that the challenged ballot be opened and counted. If the revised tally of ballots disclosed that a majority of valid votes had not been cast for the Union, the hearing officer recommended that a rerun election be conducted, having further recommended that three objections be sustained. On August 9, 2012, the Respondent filed exceptions to the hearing officer's report. On September 28, 2012, the Board adopted the hearing officer's report, findings, and recommendations. On October 12, 2012, the challenged ballot was opened and counted. The revised tally of ballots disclosed that a majority of valid votes had not been cast for the Union. Accordingly, a rerun election will be conducted at an appropriate date, time, and place to be determined by the Regional Director.

On March 18, 2013, the Board issued a Decision and Order in Case 14–CA–087886, finding, among other things, that the Respondent violated Section 8(a)(5) and

[3] See *Maywood Do-Nut Co.,* 256 NLRB 507, 508 (1981) (citing *Keller Aluminum Chairs Southern, Inc.,* 173 NLRB 947, 952 fn. 14 (1968)); see also *Great Dane Trailers, Inc.*, 191 NLRB 6 (1971); *Porta Kamp Mfg. Co.,* 189 NLRB 899 (1971); and Sec. 10(g) of the Act, which provides: "The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

(1) by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit.

After the hearing officer's report issued, the Respondent engaged in the following conduct at issue here:

1. About August 8, 2012, the Respondent ceased giving employees raises on their anniversary dates as required by the wage and step schedule set forth in appendix A of the collective-bargaining agreement described above.

2. About September 21, 2012, the Respondent changed its 401(k) plan and provider.

3. About September 22, 2012, the Respondent increased the premium for family and dependent health insurance benefits.

4. The subjects set forth above in paragraphs 1, 2, and 3 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

5. The Respondent engaged in the conduct described above in paragraphs 1, 2, and 3 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSION OF LAW

By the conduct described above in paragraphs 1, 2, and 3 the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found the Respondent violated Section 8(a)(5) by, since about August 8, 2012, ceasing to give employees raises on their anniversary dates as required by the wage and step schedule set forth in appendix A of the collective-bargaining agreement; since about September 21, 2012, changing its 401(k) plan and provider; and since about September 22, 2012, increasing the premium for family and dependent health insurance benefits, we shall order the Respondent to rescind these unilateral changes and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations. We shall also order the Respondent to make the unit employees whole for any losses attributable to the Respondent's unlawful conduct, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971); and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, we shall order the Respondent to reimburse the unit employees in an amount equal to the differences in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had the Respondent not violated Section 8(a)(5) as concluded above. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Heartland Human Services, Effingham, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit by unilaterally ceasing to give employees raises on their anniversary dates as required by the wage and step schedule set forth in appendix A of the collective-bargaining agreement; by unilaterally changing the employees' 401(k) plan and provider; and by unilaterally increasing premiums for family and dependent health insurance benefits, all without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct. The unit is:

> All full-time and regular part-time employees employed by Respondent at its Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

[4] The Acting General Counsel has requested a notice-reading remedy. We agree that this special remedy is appropriate to dispel the effects of the Respondent's serious and persistent unfair labor practices, especially in light of the Respondent's repetition of the same type of misconduct previously found unlawful and previously found to warrant such a remedy. See *Heartland Human Services*, 359 NLRB No. 76, supra. Therefore, we will require that the Respondent's executive director or, at the Respondent's option, a Board agent in the executive director's presence, read the remedial notice to the Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes in terms and conditions of employment and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(b) Make the unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes in wages, benefits, and other terms and conditions of employment in the manner set forth in the remedy section of this decision.

(c) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the unit employees' backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days after service by the Region, post at its facility in Effingham, Illinois, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since about August 8, 2012.

(e) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's executive director or, at the Respondent's option, by a Board agent in the executive director's presence.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2013

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the following appropriate unit by unilaterally ceasing to give employees raises on their anniversary dates as required by the wage and step schedule set forth in appendix A of the collective-bargaining agreement; by unilaterally changing the employees' 401(k) plan and provider; and by unilaterally increasing premiums for family and dependent health insurance benefits without prior notice to the Union, and without affording the

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union an opportunity to bargain with us with respect to this conduct and the effects of this conduct. The unit is:

> All full-time and regular part-time employees employed by us at our Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unilateral changes we made to the terms and conditions of employment for our unit employees and restore the status quo ante until such time as we reach an agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes in wages, benefits, and other terms and conditions of employment, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

HEARTLAND HUMAN SERVICES