UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

HOSPITAL OF BARSTOW, INC., d/b/a
BARSTOW COMMUNITY HOSPITAL

Respondent,

and Case Nos. 31-CA-090049
31-CA-096140

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING
COMMITTEE (CNA/NNOC), AFL-CIO

Charging Party.

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Juan Carlos González
Counsel for the Acting General Counsel
National Labor Relations Board
Region 31
11500 West Olympic Blvd, Suite 600
Los Angeles, CA 90064

I. INTRODUCTION

Based on charges filed by the California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL-CIO (Union) against Hospital of Barstow, Inc. d/b/a/ Barstow Community Hospital (Respondent), a consolidated complaint issued on April 30, 2013. On May 13, 2013, an Amended Consolidated Complaint issued, and an amendment to that complaint issued on May 15, 2013.[1] The Complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, through Respondent's overall conduct, failing and refusing to bargain with the Union over the parties' first collective-bargaining agreement. In addition, paragraph 12 of the Complaint separately alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally requiring that employees utilize an online training program called HeartCode to obtain mandatory certifications/recertifications.

Administrative Law Judge Jay R. Pollack (ALJ) heard this case in Barstow, California, on June 18-20, 2013 and in San Francisco, California, on June 27, 2013. (ALJD 1:1-2.)[2] On September 9, 2013, the ALJ issued his decision and order. (ALJD 9:32.) The ALJ concluded that Respondent refused to bargain/bargained in bad faith, in violation of Section 8(a)(5) and (1) of the Act. (ALJD 7:49- 8:2.) However, the ALJ did not address the unilateral change allegation contained in paragraph 12 of the Complaint concerning Respondent's requirement that employees obtain certifications/recertifications using the HeartCode program. Further, the ALJ erroneously stated that the Respondent had made changes to how nurses could obtain training for their certifications in April 2012, prior to the Union's certification. (ALJD 3:41-46.)

---

[1] The Amended Consolidated Complaint together with the Amendment to the Amended Consolidated Complaint are hereinafter referred to collectively as "the Complaint".

[2] Citations to the record are as follows: Testimony (Tr. page/witness); Exhibits (GC Exh. # or Resp. Exh. #); and Administrative Law Judge's decision (ALJD page:line).

Based on the entire record in this matter and the arguments presented below, Counsel for the Acting General Counsel respectfully submits that the ALJ erred in failing to find and conclude that Respondent, by making the aforementioned unilateral change, violated Section 8(a)(5) and (1) of the Act.

II. FACTS

Respondent required Nurses to obtain certifications in basic life support (BLS), advanced cardiac life support (ACLS), and pediatric life support (PALS), which must be renewed every two years. (ALJD 3:41-44.) For many years, Respondent had an established policy that allowed Nurses to obtain these certifications/recertifications by completing trainings in either of the two following ways: (1) by taking classes taught by hospital-provided instructors at Respondent's facility, or (2) by taking off-site classes approved by the American Heart Association taught by a third-party provider. (Tr. 50/Matthews; Tr. 227-230/Ziemer; Tr. 301-304/Moon; Tr. 423-425/Alqalqili; Tr. 471-472, 476-477/Howell; GC Exhs. 19, 20.) Under Respondent's past practice, Respondent compensated employees in full for the time spent taking certification and recertification classes taught by live classroom instructors at Respondent's facility. (GC Exh. 18, ¶1; Tr. 230/Ziemer; Tr. 386/Jackson.)

About June 2012[3], Respondent began offering Nurses a third training option for obtaining their certifications/recertifications – an online training program called HeartCode. (Tr. 299-300/Moon.) At that point in time, HeartCode was a training option offered in conjunction with other training options. (Tr. 299-300/Moon.) The Union was certified as the exclusive bargaining representative of Respondent's nurses on June 29. (Tr. 22-23/Matthews; GC Exh. 4.)

On August 2, Respondent's Board of Trustees approved and implemented a "HeartCode policy." This HeartCode Policy *required* Nurses to use HeartCode to complete the trainings

[3] All dates are hereinafter in 2012 unless otherwise noted.

necessary for their certifications/recertifications. (GC Exh. 21, 22, 23; Tr. 229-232; 236-238/Ziemer; Tr. 299-301/Moon; Tr. 423-424/Alqalqili; Tr. 471-472/Howell.) Specifically, Respondent's HeartCode policy states, "HeartCode replaces instructor-led classes BLS, ACLS, and PALS for all CHS employees." (GC Exh. 22.) This HeartCode policy has an effective date of August 2. (GC Exh. 22.) A copy of Respondent's meeting minutes titled "HeartCode Requirement" further clarified this policy. The minutes stated, in part, that "BCH has adopted this new technology [HeartCode] for certification and recertification … all staff *will be required* to get this certification/recertification through this program. The HeartCode policy was approved 8-2-12. Flyers have been posted in all areas explaining the process." (emphasis added) (GC Exh. 21.) Respondent's Chief Quality Officer and Facility Compliance Officer Diana Sheriff testified that Hospital policies are effective only after the approval of the Board of Trustees. (Tr. 341-359-360/Sheriff.)

On November 1, Respondent revised the HeartCode policy by no longer requiring that Nurses utilize HeartCode to complete their certification/recertification trainings. (GC Exh. 23; Tr. 229; 237-238/Ziemer.) The revised HeartCode policy allowed Nurses to complete the necessary trainings by taking HeartCode or by taking off-site classes with a third-party provider. However, the revised policy did not allow Nurses to take classes with a live classroom instructor at Respondent's facility, as had been done in the past. (Tr. 229/Ziemer; Tr. 399/Jackson.)

Under the HeartCode policy, Respondent capped the number of hours for which Nurses could be compensated when taking certification/recertification trainings irrespective of the actual time spent taking the trainings. (GC Exh. 23; Tr. 403-405/Jackson.) The policy allowed for Nurses to be reimbursed a maximum of two hours for BLS trainings and six hours for ACLS and PALS trainings. (GC Exh. 23; Tr. 404-405/Jackson.) If Nurses took more time to complete the

certification training through HeartCode than the designated maximum paid hours, Nurses would not be compensated for that additional time. (Tr. 404-405/Jackson.)

The Summary of the Time Detail Reports reveals that after the implementation of the HeartCode policy, Respondent failed to pay four Nurses between 1.8 –4.3 hours each for the time spent taking trainings through HeartCode until May 31, 2013. (GC Exh. 24, 25.) The Employee Earning Statements attached to the Time Detail Reports reveal that after complaint issued in this case, Respondent eventually paid all four Nurses on May 31, 2013 for this previously unpaid time (GC Exh. 24.)

III. LEGAL ARGUMENT

Counsel for the Acting General Counsel submits the following legal argument in support of its exceptions to the ALJ's Decision:

A. Exception No. 1: The ALJ erroneously determined that Respondent made the unilateral change to how nurses could obtain training for their required certifications in basic life support, advanced life support, and pediatric advanced live support in April, prior to the Union's election as bargaining representative (ALJD 3:41-46.)

In the ALJ Decision, the ALJ erroneously determined that Respondent made the unilateral change in April –prior to the Union's election as the bargaining representative. (ALJD 3:41-46.) Contrary to this determination, the record evidence clearly establishes that Respondent made the unlawful unilateral change at issue on August 2 –well after the Union had become the certified collective-bargaining representative of employees.

Here, the ALJ appears to mistake the nature of the unilateral change. The unilateral change in the instant case was not when Respondent purchased the online training program known as HeartCode, nor was it when Respondent offered HeartCode as one training option amongst many in June. In fact, when Respondent initially introduced HeartCode to employees

in June, Nurses could still complete the certification/recertification training using other means outside of HeartCode, as they had done in the past. Rather, the actual unilateral change is the implementation of the "HeartCode policy" which eliminated all training options and instead required Nurses to utilize HeartCode as the only means of obtaining their necessary certifications/recertifications. This unilateral change is clearly set forth in paragraph 12 of the Complaint, which states, in part, that "[a]bout September 2012, Respondent changed how employees in the Unit can obtain the required training certification/recertifications by *requiring* that employees utilize an online training program [....] [R]espondent engaged in the conduct described above in [...] without prior notice to the Union and without first bargaining with the Union to a good faith impasse [...]" [emphasis added] (GC Exh. 1(r).)

The record evidence clearly establishes that Respondent made the decision to approve the HeartCode policy on August 2, well after the Union became the certified collective-bargaining representative of the Nurses. Specifically, Respondent's internal HeartCode policy documents show that the HeartCode policy has an effective date of August 2. Moreover, Respondent made the decision to approve this policy on August 2 as evidenced by the fact that the policy received the final signature by the Board of Trustees that same day. The approval date of August 2 is consistent with Chief Quality Officer and Facility Compliance Officer Sheriff's testimony, who testified that hospital policies become effective once approved by the Board of Trustees. This is further consistent with the fact that the Union first received notice of the unilateral change during the last week of August. (ALJD 3: 41-44.) As of August, the Union had already been certified. (ALJD 2:20-21.) Hence, by this date, Respondent owed a duty to refrain from unilateral implementation of the HeartCode policy absent an overall good faith impasse. Contrary to the

ALJ's recitation of the facts in the Decision, the record evidence clearly shows that the unilateral change took place on August 2, well after Union certification, and not in April.

B. <u>Exception No. 2</u>: The ALJ erroneously failed to find and conclude that Respondent violated Section 8(a)(5) and (1) of the Act by, absent an overall good-faith impasse during negotiations and without prior notice to the Union, implementing a policy that required Nurses to utilize HeartCode to obtain their required training certifications/recertifications.

Counsel for the Acting General takes exception to the ALJ's failure to rule on the issue of whether Respondent violated Section 8(a)(5) and (1) of the Act through the unilateral implementation of a policy that required Nurses to utilize HeartCode to obtain the required certifications/recertifications. Respondent violated Section 8(a)(5) and (1) of the Act by, absent an overall good-faith impasse during negotiations and without prior notice to the Union, implementing a policy that required Nurses to utilize HeartCode to obtain their required training certifications and recertifications.

Section 8(a)(5), as augmented by Section 8(d) (29 U.S.C. § 158(d)), requires an employer to bargain over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(a)(5). Accordingly, an employer violates Section 8(a)(5) "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). *Accord NLRB v. Katz*, 369 U.S. 736, 743-48 (1962); *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1129 (9th Cir. 1986).

Respondent required Nurses to obtain certifications in basic life support, advanced cardiac life support, and pediatric life support, which must be renewed every two years. (ALJD 3:41-44.) It is well-established that changes in such job requirements and

qualifications are mandatory subjects of bargaining. *Cardi Corp.*, 353 NLRB 966, 970 (2009) (citing *Public Serv. Co. of Okla. (PSO)*, 334 NLRB 487 (2001).

Where parties are engaged in negotiations for a collective-bargaining agreement, the prohibition against unilateral changes continues "unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enters.*, 302 NLRB 373, 374 (1991), *enforced sub. nom*, *Master Window Cleaning, Inc. v. NLRB,* 15 F.3d 1087 (9th Cir. 1994) *Accord NLRB v. Katz*, 369 U.S. at 742-47 (an employer violates the Act by undertaking unilateral actions when the parties are in the midst of bargaining for an initial contract). Thus, when a union, such as the Union here, is newly certified, the employer must maintain the existing terms and conditions of employment while the parties bargain. The duty to maintain existing terms and conditions of employment imposes an obligation upon an employer not only to maintain that which has already been given to employees, but also to "implement benefits which have become conditions of employment by virtue of prior commitment or practice." *Alpha Cellulose Corp.,* 265 NLRB 177, 178 fn 1(1982) *enfd. mem.* 718 F.2d 1088 (4th Cir. 1983); *More Truck Lines*, 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003); *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003).

Contrary to these fundamental principles, the record evidence demonstrates that Respondent unilaterally implemented a policy requiring that Nurses use the HeartCode program. In the past, Respondent had an established policy whereby it offered Nurses the option of completing the certification and recertification trainings by attending on-site classes taught by hospital-provided instructors or by taking classes off-site through a third-party. Nurses who chose the former (on-site) option were compensated in full for the time spent

taking these trainings. However, as of August 2, Respondent eliminated all options for taking these trainings and instead imposed a requirement that Nurses utilize HeartCode.

Respondent failed to inform the Union of the implementation of the HeartCode policy prior to the August 2 decision date. The Union first received notice of this change during the last week of August. (ALJD 3:41-44.) Furthermore, Respondent refused to bargain with the Union over this unilateral change even after Union Representative Matthews requested to bargain via the August 31 email to Respondent Attorney Carmody and Union Representative Matthews's in-person request to bargain during the September 13 bargaining session. (ALJD 3:47-52.)

The HeartCode policy materially, substantially, and significantly impacted Nurses' terms and conditions of employment. To be found unlawful, unilaterally imposed changes must be "material, substantial, and … significant" and must have a "real impact" upon or be a "significant detriment to" the employees or their working conditions. *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992). The Board has held that a material, substantial, and significant change in regular benefits to employees are a mandatory subject of bargaining. See, e.g., *In Re Pac. Micronesia Corp.*, 337 NLRB 469, 480 (2002) (the Board held that a $10 box of laundry detergent given to employees on a monthly basis constituted a mandatory subject of bargaining); *Beverly Enterprises*, 310 NLRB 222 (1993), *enfd. in pertinent part* 17 F.3d 580 (2d Cir. 1994) (employer unlawfully eliminated providing free coffee to employees in violation of Section 8(a)(5)). Moreover, the Board has routinely held that employers violate Section 8(a)(5) of the Act by making unilateral changes in rules that limit employees' ability to perform previously allowed activities on paid working time. See, e.g., *In Re Verizon New York, Inc.*, 339 NLRB 30, 31 (2003) (unilateral change where employer ended practice of allowing employees to participate

in company-sponsored blood drives on paid working time); *Children's Hosp. of San Francisco*, 312 NLRB 920, 930 (1993) (unilateral change where employer limited jury duty paid time off).

Respondent's past practice had been to compensate Nurses in full for time spent taking certification and recertification trainings taught by live classroom instructors at Respondent's facility. Through the implementation of the HeartCode policy, Respondent eliminated this classroom (and reimbursement) option and instead limited the amount of paid time in which Nurses could take certification trainings, in deviation from the past practice. This limitation on the amount of paid time is clearly evidenced by the following: (1) Respondent's revised HeartCode policy that placed caps on paid time; (2) Chief Quality Officer and Facility Compliance Officer Jackson, whose testimony acknowledged these limitations on paid time; and (3) Respondent's failure to initially pay four Nurses in full for time spent taking these training through HeartCode. By not being compensated in full for the time spent taking these trainings, Nurses lost a regular benefit of employment that they previously enjoyed. The loss of this benefit is arguably greater in monetary terms than a $10 monthly box of laundry detergent or free coffee. In this manner, the benefit conferred to employees, which Respondent eliminated through the implementation of the HeartCode policy, is a material, substantial, and significant change to Nurses' terms and conditions of employment.

In response to the possible argument that the HeartCode policy did not materially, substantially, or significantly affect Nurses' terms and conditions of employment on the basis that it eventually paid the Nurses for the time owed, this argument should be rejected. It was not until May 31, 2013 –nearly ten months after the HeartCode policy was first implemented, that Respondent paid these four Nurses for the remaining balance of time owed. Clearly, Respondent's act of paying Nurses nearly ten months after the HeartCode policy was initially

implemented, and just two weeks prior to the unfair labor practice hearing, is an attempt by Respondent to avoid its obligations under the Act.

In sum, Respondent's failure to provide the Union with notice or an opportunity to bargain, and subsequent failure to bargain over the HeartCode policy violates Section 8(a)(5) of the Act. Accordingly, the ALJ erred in failing to make the above findings and conclusions.

III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that its exceptions to the ALJ's Decision be granted. Counsel for the Acting General Counsel submits that the record and the applicable case law support the overall conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by, absent an overall good-faith impasse during negotiations and without prior notice to the Union, implementing a policy that required Nurses to utilize HeartCode to obtain their required training certifications/recertifications.

Dated at Los Angeles, California this 23rd day of October, 2013.

J. Carlos González
Counsel for the Acting General Counsel
National Labor Relations Board, Region 31
11500 West Olympic Blvd, Suite 600
Los Angeles, CA 90064
(310) 235-7168

Re: Hospital of Barstow, Inc. d/b/a
Bartow Community Hospital
Cases: 31-CA-090049 and 31-CA-096140

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 23rd day of October, 2013:

SERVED VIA E-FILING

Gary W. Shinners, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
www.nlrb.gov

SERVED VIA E-MAIL

BRYAN T. CARMODY, ESQ.
134 EVERGREEN LN
GLASTONBURY, CT 06033-3706
bryancarmody@bellsouth.net

DON T. CARMODY, ESQ.
PO BOX 3310
BRENTWOOD, TN 37024-3310
doncarmody@bellsouth.net

CARMEN M DIRIENZO
LEGAL REPRESENTATIVE
4 HONEY HOLLOW RD
KATONAH, NY 10536-3607
carmen.dirienzo@hotmail.com

M. JANE LAWHON, ESQ.
CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC)
LEGAL DEPARTMENT
2000 FRANKLIN ST
OAKLAND, CA 94612-2908
jlawhon@nationalnursesunited.org

NICOLE DARO, ESQ.
CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORAGANIZING COMMITTEE (CNA/NNOC)
LEGAL DEPARTMENT
2000 FRANKLIN ST
OAKLAND, CA 94612-2908
ndaro@calnurses.org

Aide Carretero

Aide Carretero, Secretary to the Regional Attorney
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064-1825