UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

SALEM HOSPITAL CORPORATION	)	
a/k/a	)	
THE MEMORIAL HOSPITAL	)	
OF SALEM COUNTY	)	
	)	
Respondent	)	
	)	
and	)	**CASE NO. 04-CA-097635**
	)	
	)	
HEALTH PROFESSIONALS AND ALLIED	)	
EMPLOYEES (HPAE)	)	
	)	
Charging Party	)	

RESPONDENT'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW the undersigned Counsel for Respondent and, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, files Exceptions to the September 10, 2013 Decision of Administrative Law Judge Michael A. Rosas[1] submitting that he erred as follows:

[1] References to the Administrative Law Judge will be designated as "ALJ," and references to his Decision will be designated as "ALJD," preceded by the page number and followed by line numbers. Footnotes in the ALJD will be designated as "Fn." The Acting General Counsel will be referred to as "AGC," and Respondent referred to herein variously as "the Hospital" or "Employer." References to the transcript will be designated as "Tr. ___;" Respondent's exhibits as "R, ___;" AGC exhibits as "GC__;" and Joint Exhibit as "Jt.;" followed in each instance by the page or exhibit number.

1. The failure to find and conclude that the September 4, 2012 policy:[2] was totally consistent with pre-existing policies set forth in the Employee Handbooks issued in April and June of 2009, and on July 29, 2010; that any departure therefrom was, at most, *di minimus*; that there was little, if any, adverse impact on unit employees as a result of the 9/4/12 Policy; that the 9/4/12 Policy was an insubstantial, insignificant, and immaterial "change;" and its implementation did not constitute a violation of the Act.
2. Failure to find that the 2003 Dress Code Policy was no longer in effect.
3. Failure to find that the 2003 policy had been supplanted and replaced by the dress code policies set forth in Employee Handbooks which were issued in April 2009, June 2009, July 29, 2010, and April 30, 2012, a receipt for which was signed by all employees who also committed therein to read the handbooks' policies.
4. Failure to recognize that the 2003 dress code policy had not been in effect since April 2009 and, therefore, the 2003 policy provides no basis for comparison with the 9/4/12 Policy at issue. (GC 9(a))
5. Failure to recognize that the applicable and appropriate dress code policy to compare with the 9/4/12 Policy is contained within the 2009, 2010 and 2012 Employee Handbooks, rather than the supplanted dress code policy of 2003.
6. To the ALJ's failure to recognize, find and conclude that both the dress and appearance, and the discipline and discharge policies set forth in the Employee Handbooks issued in 2009, 2010 and 2012, were the operative policies in effect at all material times.

[2] For purposes of brevity herein, the policy set forth in GC 9(a) will be referred to herein as the "9/4/12 Policy" or "GC 9(a)."

7. To the ALJ's conclusion that "the Employer's recitation of how the Hospital's policies, procedures, and manuals are generated elsewhere through its parent company or a management consulting company is irrelevant to the issues here." (2 ALJD Fn. 4)

8. To the ALJ's disregard and/or failure to consider evidence establishing that the policies provided by a management consulting company (referred to as "corporate") to local CHS-affiliated hospital facilities, including the Employer herein, serve only as models or templates which can be, and often are, modified in whole or part by the local facility to address local issues; as well as a further disregard of evidence establishing that adopted or modified policies then appear in the Employee Handbooks which are signed as received by all employees.

9. Failure to find that, in addition to the model policies provided by "corporate" and the local modifications thereto appearing in Employee Handbooks since 2009, the Hospital also develops and implements its own policies such as the 9/4/12 Policy herein, which can eventually be incorporated into subsequently-issued Employee Handbooks.

10. Failure to give controlling weight to local policies set forth in the Employee Handbooks of 2009, 2010 and 2012 concerning dress and appearance and discipline and discharge where those locally-formulated policies differ from the template/models provided by the "corporate" management consulting company.

11. Failure to find and conclude that the "corporate" discipline and discharge policy of January 1, 2002, was revised by the Employer, a local facility, in its Employee Handbook of April 2009 (R 1(f) & (g)) and repeated identically thereafter in the

Employee Handbooks of June 2009, July 29, 2010 and April 30, 2012. (GC 11, pp. 18-19). (3 ALJD 11-22)

12. Erroneously referring to the February 1, 2003 policy throughout his Decision as "the past dress policy" and thereafter erroneously concluding that said policy was in effect at all material times and then improperly utilizing that policy as the basis for comparison with the 9/4/12 Policy when, in fact:

    a) the evidence establishes that the 2003 dress code policy had not been effect since April 2009, when it was supplanted by provisions within the April 2009 Handbook (R 1(d) & (e));

    b) the language of the April 2009 policy was maintained intact and unchanged thereafter in Employee Handbooks issued in June 2009 (GC 11 p.8); and on July 29, 2010 (GC 12, p.8; R 2(d); and again on April 30, 2012 (R 3 (d) & (e));

    c) all Employee Handbooks issued since April 2009 have clearly stated, *inter alia*, "The facility reserves the right to use its discretion to determine what constitutes appropriate dress. The employee's supervisor will determine the appropriate dress or uniform for positions as well as items of clothing or shoes that are prohibited if they present a safety hazard or if they do not promote a professional image."[3] (R 1(e)) (3 ALJD 23-35; 4 ALJD 6-9; Fn.11-12; and 7 ALJD 15-29)

13. The failure to find and conclude that the dress policy in effect and within Employee Handbooks since 2009 clearly informed all employees that the Employer retained

[3] It is to be noted that communications to unit RNs by 13 RN Department Supervisors originate from directives given to those supervisors by CNO Pat Scherle. (Tr. 127; 2 ALJD 23)

discretion to determine that which constitutes inappropriate and appropriate dress and, therefore, any supposed "latitude" or loss of employee discretion is irrelevant as it is subordinate to the discretion retained by the Employer. (R 1(d) & (e); GC 11, p. 8; GC 12, p. 8; R 3(d) & (e)) (7 ALJD 12-20)

14. Failure to analyze the question of "change" in the dress code through examination, comparison and analysis of the 9/4/12 Policy with the provisions of the policy appearing in the Employee Handbooks of 2009, 2010 and 2012.

15. Failure to find and conclude that the Employee Handbooks of 2009, 2010 and 2012 contain the applicable, effective, and relevant provisions concerning discipline and discharge and that since 2002, violations of policy have been subject to discipline. (R 1(f) & (g); GC 11, pp.18-19; R 2(e) & (f); GC 12, pp. 17-18; and R 3(f) & (g))

16. Failure to find and conclude that as the dress code and personal appearance policy of 2003 was no longer in effect, the absence of disciplinary language within the 2003 policy is, therefore, of no consequence in evaluating the 9/4/12 Policy.

17. To the erroneous finding that AGC witness McAllister's assertion (at 4 ALJD 6-19, and Fn.12) that the "past policy" (2003) was in effect and that this testimony was not refuted when, in fact:

    a) overwhelming and extensive documentary evidence presented and introduced into the record both by the AGC and Respondent, establish that pursuant to, *inter alia*, provisions in the Employee Handbooks of 2009, 2010 and 2012, discipline could be imposed for violations of the dress code policy. (R 1(d), (e), (f) & (g); and GC 11, pp. 8, 18-19; GC 12, pp. 1, 8, and 17-18; and R 3(d),(e),(f) & (g);

b) the testimony of Pat Scherle, who has occupied the CNO position since 2009, reflects that application of policies within all four Employee Handbooks since April 2009, could result in discipline. (Tr. 123,138);

c) McAllister's testimony failed to establish that the 2003 dress policy was in effect as of 2012, since her testimony disclosed that she only referred to and consulted the 2003 policy in the year 2003, when she had an appearance issue arise concerning a piercing in her nose. Accordingly, at that time, the 2003 policy (GC 6) would have applied. Yet, McAllister provided no evidence that the 2003 policy applied to any incident occurring after 2003. Further, since McAllister admitted having received all Employee Handbooks and that she read the dress and appearance policies therein since issuance of the April 2009 Employee Handbook, the ALJ's reliance upon her testimony to conclude that the 2003 policy was in effect immediately prior to the 9/4/12 Policy was critical error. (Tr. 94-95)

18. Failure to find that the Employer's documentary evidence and testimony of the Hospital's Chief Nursing Officer to the effectiveness of the 2009, 2010 and 2012 Employee Handbook policies is unquestionably more probative of the status, formulation and effectiveness of those policies than the characterization of (1) a single employee (who admitted receiving all handbooks since 2009) based solely on her having viewed the 2003 policy only in 2003 when she had an issue arise concerning her pierced nose; and (2) the testimony of a Union representative who

has never worked at the Hospital and had little, if any, knowledge of any dress policy other than that of 2003 which was provided by her. (Tr. 31,35-8, 58-9).

19. Failure to find and conclude that the 9/4/12 Policy provided for no more stringent enforcement provisions than that which had been in effect since April 2009.

20. Failure to:

a) recognize and distinguish between "corporate" policies as to discipline which are provided to local affiliates, such as the Employer herein, as models or templates, and the controlling and effective local policies of the Employer which are based on its local conditions and thereby result in modifications to the corporate models;

b) recognize and find that apart from the corporate models, the local controlling and effective disciplinary policy of the Employer as to disciplinary issues first appeared in the April 2009 Employee Handbook (R 1(f) & (g)) and appeared in identical form thereafter in the June 2009 Employee Handbook (GC 11, pp. 18-19), the July 29, 2010 Employee Handbook (R 2(d) and (f) and GC 12, pp. 17-18), and the April 30, 2012 Employee Handbook (R 3(f) & (g));

c) find that there is no difference in the verbiage of the disciplinary policies contained in the Employee Handbooks of April 2009, June 2009, July 29, 2010 and April 30, 2012;

d) find that all Employee Handbooks referred to the disciplinary actions of promotion and demotion. (2 ALJD Fn.4)

21. The ALJ's failure to find that the April 30, 2012 Employee Handbook disciplinary policy is the Employer's most recently issued and current disciplinary policy. (3 ALJD 11-22).

22. Failure to find and conclude that the longstanding requirement that Surgical Department ("OR") RNs wear green scrubs, provides a compelling example that unit RNs were assigned department-specific color scrubs prior to the alleged change of September 4, 2012, and had also been required under the policy within Employee Handbooks since April 2009 ("If uniforms are required, they must be of the established color … specified for the specific work unit.") and also within and under the 9/4/12 Policy. Accordingly, the 9/4/12 Policy constituted no change as to the right of management to determine the color of scrubs. (4 ALJD 1-4 and Fns.10-11)

23. Failure to find and conclude that there is no evidence that the State required green-colored scrubs. (4 ALJD 1-4, and Fns. 10 and 11)

24. Failure to find that there is no record evidence, despite the ALJ's multiple transcript references, that the State dictated the green-colored scrubs worn by the surgical RNs; and that the record shows only that the State required that the Employer provide those RNs with hospital-supplied clean laundered scrubs, without reference to any color. Accordingly, it must be found and concluded that the Hospital required the green-color scrubs long before the 9/4/12 Policy. (4 ALJD Fn. 10)

25. The ALJ's implication that the verbiage in the discipline and discharge policy (that discipline is not required to follow a rigid process but is fact specific, and that disciplinary action for any particular act of misconduct rests in the sole discretion of

the facility), precluded the Employer from setting forth progressive disciplinary steps in the 9/4/12 Dress Policy. (3 ALJD 12-20, 6 ALJD 1-3, and 7 ALJD 8-20)

26. Failure to find that the Employer had previously retained discretion to institute a disciplinary system for uniform infractions prior to the 9/4/12 Policy. (3 ALJD 12-30)

27. To the characterization that RNs "frequently" wore a "variety" of jackets, fleeces, and sweatshirts, including hoodies and sweatpants. (4 ALJD 2-4)

28. Reliance upon the 2003 ("past dress policy") to assert that the 2003 Policy did not specifically refer to discipline when, in fact:

    a) the 2003 policy was no longer operative, having been displaced as of April 2009; and

    b) even assuming, only hypothetically, that the 2003 dress code policy had been in effect, a corporate disciplinary policy had been in effect since 2002 which provided for discipline for appearance policy violations. Accordingly, the appearance of progressive discipline in the 9/4/12 Policy would not constitute a substantive or substantial change. (R 4(a)-(d)) (4 ALJD 6-9)

29. Failure to consider and address the reality that the color-coded scrub policy implemented on September 4, 2012 was, and is, intended to apply to all personnel Hospital-wide including, among others, non-unit clinical and non-clinical employees, as well as business and administrative personnel; that RNs are but one of many departments and employee groups covered by the 9/4/12 Policy. (GC 9(a)); and, for

the program to be of benefit to patients, visitors, and other employees, both non-unit employees and unit RNs must necessarily wear assigned-color scrubs.

(5 ALJD 9-14)

30. Failure to acknowledge that considerations of patient safety, security and hygiene were additional bases for implementing the 9/4/12/ Policy. (GC 9(a); Tr. 129-130, 132) (5 ALJD 9-14)

31. Rendering an unnecessary and unsupported finding, based on testimony of one witness, that the 2003 policy was in effect, when testimony and overwhelming documentary evidence, i.e., four Employee Handbooks introduced both by the AGC and the Employer, set forth the contents of a the color-coded scrub policy between April 2009 and September 3, 2012. (GC 9(a)) (5 ALJD 20-21, Fn. 22)

32. To the irrelevant consideration of the "many different colored scrubs that they [RNs] used over the years," and failure to find and conclude that prior to September 4, 2012, and since April 2009, the Employer had retained the discretion to require RNs to purchase and wear assigned colored scrubs, at their own expense. (5 ALJD Fn. 23)

33. To the irrelevant, unsupported and unsupportable finding and conclusion that the Employer's 9/4/12 Policy rendered "useless most, if not all, of their personal scrub inventories containing other colors and styles." (5 ALJD 22-23)

34. To the irrelevant findings that one RN disliked the fit and comfort of the Hospital-provided three sets of scrubs, and that another RN had difficulty obtaining the proper fit plus the failure to find and conclude that the Employer had the discretion, retained in Employee Handbooks since April 2009 (and well prior to the Union's petition), to

have required RNs to purchase their own "comfortable" and proper fitting navy blue scrubs. (6 ALJD Fn. 27)

35. Failure to find that witness McAllister, who complained of fit and comfort, admitted that she elected not to be measured or fitted for the Hospital-provided scrubs. (Tr. 75, 92-3)

36. Failure to consider evidence that RNs' purchase of "replacement" scrubs constituted no change from requirements that existed prior to the 9/4/12 Policy and, further, that witness Thomas' admission that she purchased and possesses 200 sets of scrubs, along with coordinating shoes, socks and related accessories, in itself establishes that the cost of scrubs to a unit RN is not a financial burden. (Tr. 104) (5 ALJD 22-23)

37. Failure to find and conclude that the degree of non-financial and financial impact of the 9/4/12 Policy on RNs, if non-existent, is, at most, incidental and not significant.

38. To the finding that the 9/4/12 Policy limited warm-up jackets to those "matching" the navy blue scrubs and precluded the use of certain apparel including hoodies, fleece jackets, jewelry, piercings, shoes and body art, when:

    a) the evidence establishes that warm-up jackets of a coordinating solid or print were permitted under GC 9(a); and

    b) matters of piercings, shoes, body art and inappropriate apparel had already been restricted and limited by policies contained in the four previous Employee Handbooks which were issued between 2009 and 2012. (R 1(d) & (e); GC 11, p. 8; R 2(d); and GC 12, p. 8; and R 3(d) & (e)) (5 ALJD 27-29; and Fn. 24)

39. To the finding that one employee, claiming to have been "uncomfortable" due to inability to wear sweatshirts or hoodies over her scrubs during winter, and to the unsubstantiated finding that cold working conditions existed within the entire Hospital during the winter months, where:

    a) there was no evidence presented to establish that the Hospital or any part thereof is cold in the winter, with the possible exception of the Emergency Department; and

    b) the AGC's sole witness concerning this matter admitted on direct examination, "I am cold a lot anyway. So I'm just cold," (Tr. 84) establishing that she was not only unique, but also that her asserted sensitivity to lower temperatures would not be affected by the 9/4/12 Policy which allows the wearing of warm-up jackets as well as the allowance of solid color scrub tops to be worn under the navy blue scrub top. (5 ALJD 29-31; Fn. 25)

40. Failure to find and conclude that the progressive discipline set forth in the 9/4/12 Policy was fully consonant with that set forth in seven previous documents concerning discipline which issued between January 1, 2009 and April 30, 2012. (R 5(a)-(d); R 1(f); GC 11, pp. 18-19; Jt. 1; R 2(e)-(f); GC 12, pp. 17-18; R 6(a)-(f); and R 3(f)-(g)) (6 ALJD 2-4)

41. To the finding that three sets of new scrubs were issued to approximately 250 RNs where the record discloses that all 120 unit RNs accepted three sets of Hospital-provided scrubs; and to the ALJ's failure to find, as set forth in the record, that 251

employees including all unit RNs plus non-unit clinical and other employees received three sets of scrubs. (Tr. 193-194) (6 ALJD 5)

42. The failure to acknowledge that the two employee witnesses presented by the AGC and Union:

    a) accepted the three sets of Hospital-provided scrubs;

    b) provided no evidence that they rejected, returned, or complained to management about the three sets of Hospital-provided scrubs;

    c) witness Thomas, who is 5'11" tall, acknowledged the Hospital did all it could to fit her with three sets of free proper-fitting scrubs; and

    d) the testimony of AGC witness McAllister, that color-coded scrubs do not enhance a professional image reflects that the color of scrubs was not a consideration since scrubs of any color would not be acceptable to her, and that the color was simply an unimportant and irrelevant consideration. (6 ALJD 5-6; Fn. 27; Tr. 89-90)

43. Failure to specify the Employer's additional contentions including, *inter alia*:

    a) that the 2003 Dress Code Policy was not in effect and provides no basis for comparison with the 9/4/12 Policy as to whether there was a change (GC 9(a)); and

    b) that comparison of the substantive terms of the 9/4/12 Policy with those set forth in the 2009, 2010 and 2012 Employee Handbooks establishes that there was no substantial, significant or material change. (6 ALJD 33-37)

44. To the finding and conclusion that, "… the Employer's past and new dress policies differ significantly." (7 ALJD 12-13)

45. To the finding and conclusion that the 9/4/12 Policy differed significantly from the "past policy" (of 2003) inasmuch as the ALJ erroneously relied on the 2003 dress code policy (which had not been in effect since 2009) as the basis for comparison with the 9/4/12 Policy. (7 ALJD 12-29)

46. Failure to analyze the 9/4/12 Policy in comparison to dress and appearance policy provisions contained in the 2009 and 2010 Employee Handbooks, both of which were in existence and in effect prior to the September 2010 election and the August 3, 2011 certification. (7 ALJD 12-20)

47. To the ALJ's erroneous reliance upon the 2003 policy as a basis for comparison with the 9/4/12 Policy, under circumstances where the 2003 policy was not in effect and, therefore, his findings as to employees' "latitude" being restricted and employee discretion being eliminated, are totally unfounded. (7 ALJD 12-29)

48. Failure to undertake a comparison of the substantive terms of the 9/4/12 Policy (GC 9(a)) with those set forth in the 2009, 2010 and 2012 Employee Handbooks, which, if performed, would reveal no appreciable change and, at most, would show only a *di minimus* modification.

49. Failure to find and conclude, based upon a comparison of the 9/4/12 Policy with the Dress Code Policy set forth in Employee Handbooks issued in 2009, 2010 and 2012, that the 9/4/12 Policy posed no material, substantial or significant change from that which existed in the Employee Handbooks. (7 ALJD 12-20)

50. To the reference that each RN received "two" pair of navy blue scrubs where the record reflects that Hospital employees numbering 251, clinical and non-clinical, unit and non-unit, were issued three sets of scrubs of the color assigned to their respective departments. (7 ALJD 22-29)

51. Finding that, despite the Employer's provision of three free sets of colored scrubs, there was an adverse financial impact on unit RNs, where the record demonstrates:

    a) RNs (except for those in the surgical area) were required to purchase their own scrubs before and after the alleged unlawful change. (7 ALJD 22-29)

    b) RNs, such as AGC witness Thomas, purchased and possesses 200 sets of colored scrubs, along with coordinating shoes, socks and accessories, would obviously experience little, if any, financial burden in purchasing blue scrubs, which cost as little as $13.00 per set, at such time as the Hospital-provided scrubs needed replacement. (Tr. 194) (7 ALJD 22-29)

52. To the ALJ's irrelevant, unsupported and unsupportable finding and conclusion, that under the 9/4/12 Policy, most RNs' scrubs could not be worn and were "rendered inappropriate for use," and his reliance upon such finding and conclusion in evaluating the impact of the alleged change. (7 ALJD 22-29)

53. Failure to find that the financial impact of the 9/4/12 Policy on RNs was, at most, miniscule. (7 ALJD 22-29)

54. Failure to recognize that the following factors provide further support for the conclusion that the 9/4/12 Policy does not constitute a material, substantial, or significant "change:"

    a) the absence of record evidence from AGC witnesses that the RNs conveyed any complaint directly to management as to the color of the Hospital-provided scrubs;

    b) all RNs accepted the three sets of navy blue Hospital-provided scrubs;

    c) no unit RN rejected or returned the Hospital-provided scrubs despite the scrubs not even being used. (Tr. 92-3).

    d) The evidence establishes that the 9/4/12 Policy itself was insignificant, insubstantial, and immaterial to both the Union and its constituent RNs as evidenced by:

        1) the Union's failure to immediately protest or challenge the implementation of the 9/4/12 Policy through the filing of a charge, and/or to request §10(j) injunctive relief;

        2) the Union's failure/refusal to pursue the issue until ten months after its first knowledge of the alleged new policy; and

        3) the Union's failure/refusal to pursue the issue until five months after the policy had been fully implemented.

55. Failure to acknowledge that:

    a) U.S. Supreme Court precedent, the record evidence, and the application of common sense establish that a hospital's sole and core

purpose is the care and treatment of its patients and that any interference with that purpose cannot be tolerated;

b) the rationale of dissenting then-Member Hayes in *Virginia Mason Hospital*, 357 NLRB No. 5 (2011), applied to the facts herein, would establish that the Hospital met the core purpose requirements of *Peerless Publications*, 283 NLRB 334 (1987), and the 9/4/12 Policy would not be subject to bargaining. (7 ALJD 31-41)

56. Failure to recognize, find and conclude that:

a) certain changes involving mandatory subjects of bargaining do not rise to the level of a Section 8(a)(5) violation;

b) the dress and appearance policies in the Employee Handbooks since April 2009, which retained and preserved the Employer's discretion to change and determine that which constitutes appropriate dress, had been in existence long before the Union's May 2010 petition, the September 2010 RN unit election, and the Board's August 3, 2011 certification;

c) the 9/4/12 Policy was not only the exercise of discretion retained by management within the dress and appearance and disciplinary policies set forth within the Employee Handbooks in existence since April 2009, but also, in terms of content, was no more than an insignificant modification of the policies set forth in the Employee Handbooks;

d) Board precedent provides that where an alleged change has been the proper exercise of management prerogative, that matter is deemed immunized from notice, consultation and bargaining with a union;

e) That formulation and implementation of the 9/4/13 Dress Code Policy was the proper exercise of its management rights and prerogatives;

f) management possesses the inherent right, responsibility, and prerogative to take all actions to advance the objectives and interests of its patients, the institution, and the community which it serves;

g) the ALJ's rejection and failure to accept the concept that healthcare institutions such as the Hospital herein, must necessarily possess and exercise an array of inherent management rights and prerogatives, and the ALJ's rejection of that concept, is neither in accord with Board precedent nor in the best interest of the Hospital's patients, the community which it serves, or its unit and non-unit employees.

h) the ALJ's failure to recognize that the Board is in no position to determine, define, describe, minimize, restrict, or even amplify that which constitutes the rights, prerogatives and flexibilities which management must possess to operate a healthcare institutions, and that such demands on management include:

    i) taking all actions to provide the highest quality patient care and treatment;

    ii) continuously achieving compliance with an unending array of state and federal statutory and regulatory schemes and requirements;

iii) insuring minimal exposure to legal liabilities based on numerous statutes, common law theories, and administrative rules and regulations which can be advanced by sources in the private and public sector;

iv) provision of high levels of security to patients, employees, visitors, as well as the institution itself; and

v) responsibility to meet all budgetary and financial objectives and obligations.

Accordingly the ALJ's failure to accept the concept that healthcare institutions must possess and exercise management rights and prerogatives is, at a minimum, presumptuous, improper, and reflects a disregard of the overriding objectives and obligations of healthcare institutions.

i) the issue here is not whether color-coded uniform requirements are a mandatory subject of bargaining but, rather whether the alleged change is sufficiently substantial, significant, or material as to rise to the level of a violation. (7 ALJD 37-41)

57. Rejection of the Employer's contentions as to the unconstitutional recess appointments of former Members Becker, Griffin and Block (all of whom participated in one or more previous cases involving the Employer, including the initial certifications) under *Noel Canning* and *New Vista*; and the Employer's contention that the AGC lacked authority to issue and prosecute complaints, which

position has subsequently been adopted in *Hooks v. Kitsap Tenant Support Services*, Case No. CV-13-5470 (W.D. Wash. August 13, 2013). (8 ALJD 1-12)

58. Failure to find and conclude that:

    a) the certification in this case is unenforceable since the Board lacked a constitutionally empaneled quorum;

    b) the Board's decisions in 358 NLRB No. 95 (2012) and 359 NLRB No. 83 (2013) are invalid and unenforceable as *per Noel Canning and New Vista*; and

    c) the AGC lacked authority to prosecute this matter.

59. To the ALJ's conclusion that the change in the dress code policy was material, substantial and significant, and that the Employer's failure to bargain over the matter violated Section 8(a)(1) and (5) of the Act. (8 ALJD 14-17)

60. Failure to find and conclude that the 9/4/12 Policy was totally consistent with pre-existing policies in the Employee Handbooks of 2009, 2010 and 2012; that any departure therefrom was minimal, insubstantial, insignificant and not material; and there was little, if any, adverse effect on unit employees as a result of the 9/4/12 Policy; and that its implementation does not constitute an unfair labor practice.

61. The failure to find and conclude that there has been no change in policy and, therefore, no violation of the Act.

62. Failure to find and conclude that even if the 9/4/12 Policy could be deemed a "change," there would still be no violation of the Act.

63. To the finding and conclusion that the information requested is presumptively relevant and that the Employer was required to provide it. (8 ALJD 30-33, 35-40; Fn. 32)

64. Failure to find and conclude that the Union's request for information and to bargain is without merit in the circumstances posed in the case *sub judice*.

65. The failure to recognize, find and conclude that the Employer's contentions as to the Union's five-month delay in filing the charge were focused not on §10(b) considerations but, rather, is focused on the fact that the Union's delay in contesting the alleged change through filing a charge and/or a request for §10(j) injunctive relief, evinces and compels the conclusion that the alleged improper new dress policy was not a substantial, significant or material change to the Union or its constituents. (8 ALJD Fn. 32)

66. To the finding and conclusion that the Employer violated Section 8(a)(5) of the Act by failing to respond to the Union's information request. (9 ALJD 1-2)

67. To the ALJ's conclusions of law. (9 ALJD 4-15)

68. To the ALJ's recommended remedy and order in its entirety. (9 ALJD 19-40 and 10 ALJD 1-41)

69. To the proposed Notice to Employees (set forth in the Appendix) in its entirety.

70. To the ALJ's failure to dismiss the Complaint in its entirety.

71. To the ALJ's Decision which elevates the interests of the Union and the unit RNs, whose highest duty is to patients, to a level of significance beyond that of the Hospital's patients.

72. The failure to address the legal issue posed that unless control of the dress and appearance of Hospital employees is deemed a management prerogative, a Hospital-wide color-coded uniform program, which is directed to the treatment, care, safety and security of patients, could not be implemented. Thus, were the issue to be subject to bargaining, a Hospital-wide dress and appearance policy, based on color-coded scrubs, could not be implemented unless and until an agreement, or a valid impasse, were reached with the RN unit as to the color of their scrubs. Accordingly, colored scrubs for employees in the many non-unit departments would be held hostage to the RN unit's negotiations. Any union intransigence and/or unwillingness to concede, would preclude implementation of any Hospital-wide dress and appearance policy based on colors of scrubs. Further, if agreement were reached with the Union as to the color of scrubs, unit RNs would be given a preference unavailable to non-unit employees.

73. Failure to recognize that his Order, which is directed only to unit RNs, would require rescission of the entire fully-implemented Hospital-wide scrub color-coding program, since the unit RNs comprise a substantial part of the clinical employee complement, and that the entire program, including that which covers non-unit employees, could not be implemented unless and until agreement or valid impasse were reached with the Union. As the Employer is a healthcare institution, whose primary concerns and objectives are the care and treatment of its patients, such a result affecting the Hospital's patients, its employees, its visitors and its community - is reprehensible and must not be tolerated or countenanced by the Board.

74. Failure to recognize, find and conclude that subjecting the color of uniform issue to negotiations with the Union would preclude implementation of a Hospital-wide color-coding policy inasmuch as:

    a) The color of scrubs for all non-unit employees could not be determined unless and until the unit RNs, through negotiations with the Employer, would arrive at agreement or valid impasse reached as to the color of scrubs; and

    b) Partial implementation of the program (i.e., without unit RNs) would foreseeably be ineffective for patients, visitors and staff, since RNs would not be distinguishable from non-unit staff.

75. The reference to Richard Grogan as the "Interim CEO" whereas the record establishes that Mr. Grogan has occupied the position on a permanent basis since January 2012. (2 AJLD 21; Tr. 8-9)

Dated this _____, 2013.

Respectfully submitted,

/s/ _____
John Jay Matchulat, Esq.
Counsel for Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

SALEM HOSPITAL CORPORATION	)	
a/k/a	)	
THE MEMORIAL HOSPITAL	)	
OF SALEM COUNTY	)	
	)	
Respondent	)	
	)	
and	)	**CASE NO. 04-CA-097635**
	)	
	)	
HEALTH PROFESSIONALS AND ALLIED	)	
EMPLOYEES (HPAE)	)	
	)	
Charging Party	)	

CERTIFICATE OF SERVICE OF
RESPONDENT'S EXCEPTIONS TO DECISION OF THE
ADMINISTRATIVE LAW JUDGE

The Undersigned, John Jay Matchulat, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, that the "Respondent's Exceptions to Decision of the Administrative Law Judge" was e-filed on Thursday, October 31, 2013, through the website of the National Labor Relations Board (www.nlrb.gov).

The Undersigned does hereby further certify that, on October 31, 2013, a copy of "Respondent's Exceptions to Decision of the Administrative Law Judge" was served upon the Charging Party by e-mail, as follows:

David Faye, Attorney
National Labor Relations Board, Region 4
615 Chestnut Street
7th Floor
Philadelphia, Pennsylvania 19106-4404
david.faye@nlrb.gov

Sandra J. Lane, Staff Representative
Health Professionals and Allied Employees,
American Federation of Teachers/AFL-CIO
208 White Horse Pike
Haddon Heights, New Jersey 08035-1727
SLane@hpae.org

Lisa Leshinski, Esq.
Attorney for the Charging Party
Health Professionals and Allied Employees,
American Federation of Teachers/AFL-CIO
208 White Horse Pike
Haddon Heights, New Jersey 08035-1727
lleshinski@hpae.org

Dated: Brentwood, Tennessee
October 31, 2013

Respectfully submitted,

By: /s/ _____
John Jay Matchulat, Esq.
Counsel for Salem Hospital
Corporation a/k/a The Memorial
Hospital of Salem County
904 Woodburn Drive
Brentwood, TN 37027
(615) 482-0913
jmatchulat@gmail.com