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 BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

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 BRIEF IN SUPPORT OF 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, and files its Brief in Support of Exceptions to the September 10, 2013 Decision of Administrative Law Judge Michael A. Rosas**,** submitting that he erred as set forth in both Respondent's Exceptions and as further elucidated herein:

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Court Cases

NLRB Cases

Statutes

I. OVERVIEW[1]

Respondent is an acute care hospital located in rural Salem County, New Jersey (thirty to forty miles south of Philadelphia, PA), where its primary purpose is the provision of medical treatment and care to patients. (R1(c); Tr. 125-126) Licensed for 140 beds, the Hospital employs roughly 450 employees at its facilities, approximately 180 being supervisory and non-supervisory Registered Nurses (herein "RNs")[2]. The unit RNs are under the overall direction and supervision of Chief Nursing Officer (CNO) and Facility Privacy Officer (FPO), Pat Scherle. Non-supervisory RNs receive communications from Scherle through RN supervisors, also referred to as "Directors." (Tr. 125-7) The Hospital operates on a 24/7 basis.

On May 19, 2010, the Union filed a petition to represent the Hospital's non-supervisory RNs. An election was conducted on September 1 and 2, 2010, in which the Union prevailed. Following the Hospital's filing of objections, a three-member-panel of the Board (including former-Member Craig Becker), certified the Union as the RNs' collective bargaining representative on August 3, 2011. The Hospital's subsequent refusal to meet and bargain with the Union, based on its testing of the certification, ultimately ripened into a Board Order, 357 NLRB No. 19 (November 29, 2011), issued by a three-member-panel, once again including former-Member Becker.

On January 30, 2012, the Union filed a series of five unfair labor practice charges alleging various actions to be unlawful unilateral changes. None were coupled with a refusal to

[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.

[2] The Hospital's various departments and facilities include: Emergency Room (ER); Operating Room (OR); Surgical Services; Laboratory; Radiology; Wound Care Center; Therapy; Intensive Care Unit; Telemetry Unit; "Med-Surg" Unit; Pediatrics Unit; Women's Floor including Obstetrics Labor and Delivery; Cardio-Pulmonary Services; Sleep Center; and Educational Department. (Tr. 125-7)

provide information allegation. All five charges were withdrawn. At no time have there been any charges or allegations of conduct independently violative of §8(a)(1) or (3) of the Act.

Since April 2009, and over one year before the Union filed its petition, the Hospital began issuing Employee Handbooks which have contained various policies. These not only include policies concerning the personal appearance of its employees, but have also expressly specified that the Hospital retained discretion to institute future changes. Those same Employee Handbooks have also set forth disciplinary policies applicable to its employees.

In 2009, the Hospital began efforts to implement a local dress and appearance program. In part, the program sought to enable visitors, patients, and other Hospital employees to distinguish and identify the department or skills of the Hospital's clinical personnel by the assigned color of their scrubs. Those initial efforts were terminated in 2010 due to financial constraints. However, in March 2012, Hospital management was in a position to renew its efforts to develop a dress code policy focused on employees' donning scrubs of various assigned colors. The Union had been aware of the contemplated policy since April 2012. The final dress/appearance policy was implemented by September 4, 2012.

The initiative involved the Hospital's measuring, purchasing, and providing three sets of free scrubs to all of its clinical employees based on the color assigned to the employees' departments. Packaged with their assigned-color scrubs was a copy of the September 4, 2012 local hospital policy.[3] This outlined the entire assigned scrub colors program, assigned colors of scrubs for the various Hospital department personnel, and also listed other permissible and impermissible items of apparel, jewelry, piercings, shoes and body art. All the requirements in the 9/4/12 Policy had been contained in all four Employee Handbooks which had previously been issued by the Hospital since April 2009.

[3] This policy will be referred to hereinafter variously as the "9/4/12 Policy" or "GC 9(a)."

Five months following implementation of the 9/4/12 Policy, on February 4, 2013 (and ten months after the Union's initial knowledge of the initiative), the Union filed the initial charge in this matter alleging that the 9/4/12 Policy was an unlawful unilateral change over which the Hospital had failed to notify, consult, or bargain. One week later, on February 11, 2013, the Union submitted an information request to the Hospital seeking information, including that pertaining to non-unit employees. In the same document, the Union stated, "… we order you to cease and desist from implementation of this change." The charge was later amended to allege a refusal to provide information.

The Complaint in this matter issued on March 28, 2013, and was amended both before and at the June 11, 2013 trial. The Hospital filed its initial answer on April 11, 2013, and its First Amended Answer on June 7, 2013. This immediately followed the Chief Administrative Law Judge's denial of the Hospital's motion of June 6, 2013, to postpone the hearing in this matter indefinitely in view of the D.C. Circuit's decision in *Noel Canning v. NLRB,* Case No. 12-1115 (January 25, 2013) and the Third Circuit's decision in *New Vista Rehabilitation,* Case No. 11-3440 (May 16, 2013).[4]

The trial in this matter was heard before ALJ Michael A. Rosas in Philadelphia, PA, on June 11, 2013.

In both the AGC's amended complaint and in presentation of his case in chief, several points became clear. First, the AGC (and Union) claimed that the alleged unlawful unilateral "change" was based upon a comparison of a 2003 Dress Code and Personal Appearance Policy (GC 6), with the allegedly new 9/4/12 Policy. Respondent submits that either the AGC was unaware of the dress and appearance policy in the Employee Handbooks which had been in

[4] These two cases will be referred to herein as "*Noel Canning"* and "*New Vista,*" without further citation.

effect since April 2009 or, if known, either disregarded them or failed to recognize their significance.

Nevertheless, in his Decision of September 10, 2013, ALJ Rosas perpetuated the AGC's factual misunderstandings and analytical errors. Thus, throughout his Decision, the ALJ made findings and conclusions based on a comparison of the 9/4/12 Policy with the 2003 "corporate" policy (GC 6), which had not been in effect since April 2009.

The ALJ further erred by placing emphasis on the supposed difference between the absence of a disciplinary provision in the 2003 dress code policy (GC 6), and the appearance of progressive discipline within the 9/4/12 Policy. However, in reaching this erroneous finding, the ALJ ignored the reality that the 2003 policy had expired upon issuance of the April 2009 Employee Handbook. Since then, the disciplinary policy applicable to the Hospital's employees has been set forth not only in the April 2009 Employee Handbook, but also with the identical language appearing in all three subsequent handbooks issued by the Hospital in June 2009, July 29, 2010 and April 30, 2012. Moreover, "corporate" disciplinary policies in effect at all times since 2002, and at times when Employee Handbooks had not been issued, also provided for discipline for various infractions which include refusal to comply with instructions.

As a result of the ALJ's improper reliance upon an expired 2003 "corporate" dress policy, he consequently failed to examine, evaluate and analyze the extent to which the 9/4/12 Policy departed, if at all, from provisions in the Employee Handbooks which had been issued since April 2009. Had the ALJ undertaken such comparative analysis, as this Brief will show, the resulting findings and conclusion would be that the 9/4/12 Policy posed no appreciable change from the policy set forth in the Employee Handbooks and in effect since April 2009, and one year earlier then the Union's filing of its petition. Additionally, the ALJ failed to convey the crucial fact that three of the four Employee Handbooks (April 2009, June 2009 and July 20,

2010) which contained the same dress/appearance policy, were issued and had been in effect before both the September 1 and 2, 2010 RNs' unit election, as well as the Board's certification of August 3, 2011. Had the proper comparative analysis been undertaken, the ALJ would then have concluded: 1) the 9/4/12 Policy was consistent with the policy set forth in the Employee Handbooks; 2) the Employee Handbook policy preceded the petition, the election and the certification; and 3) the 9/4/12 Policy was not only an extension of those pre-election and pre-certification policies but also an exercise of the discretion retained by the Employer within the Employee Handbook policies before both the September 2010 election and the August 3, 2011 certification.

Accordingly, the Hospital asserts that the Board should reverse the ALJ, and find and conclude that:

1) the 2003 Dress Code Policy relied upon by the AGC and the ALJ had not been in effect since at least April 2009, and therefore provided no basis for comparison with the 9/4/12 Policy;
2) the ALJ erred by failing to find and conclude that policies as to appearance had previously been set forth in Employee Handbooks issued to employees since April 2009, and that those policies were in effect and well known to employees;
3) that the 9/4/12 Policy embodied no substantive changes from the preexisting appearance and disciplinary policies which appeared in identical form in the three prior Employee Handbooks issued in April 2009, June 2009, and July 20, 2010, all of which preceded the Union's petition, the 2010 election, as well as the Board's 2011 certification;

4) that the 9/4/12 Policy does no more than maintain the *status quo* which existed under policies within the 2009 and 2010 Employee Handbooks;

5) assuming, only for argument, that there had been a "change," the ALJ erroneously failed to find and conclude that the asserted change was not sufficiently substantial, material, and/or significant as to rise to the level of a § 8(a)(1) and (5) violation since,

   (a) it was, at most, *di minimus*;

   (b) there has been no appreciable adverse impact on unit employees;

   (c) the 9/4/12 Policy not only protects and fosters the primary purposes of the Hospital, but also reflects the proper and responsible exercise of management prerogatives;

   (d) there is no basis to support the ALJ's findings and conclusions concerning the Union's February 11, 2013 request for information;

   (e) the ALJ erred by rejecting the Employer's contentions that the Board's certification and bargaining orders are invalid on grounds set forth in *Noel Canning* and *New Vista*; and

   (f) the AGC lacked authority to issue and prosecute the subject complaint pursuant to, *inter alia,* the Federal Vacancies Reform Act.

II. ISSUES

1. Whether the 9/4/12 Policy represents a change from the dress and appearance policy which existed prior to the September 1 and 2, 2010 election and the August 3 2011 certification?

2. Whether the appearance policy which is to serve as the basis for comparison with the 9/4/12 Policy, is that contained and set forth, with identical verbiage, in Employee Handbooks first issued to employees in April 2009 and, thereafter, in the Employee Handbooks issued in June 2009, July 29, 2010 and April 30,2012; or the 2003 "corporate" dress code?
3. Whether the alleged September 4, 2012 "change" from the Employee Handbooks' dress and appearance policy was, in labor law terms, "substantial," "material" and "significant?"
4. Whether the Hospital violated § 8(a)(1) and (5) of the Act by implementation of the Hospital-wide dress and appearance policy on September 4, 2012, GC 9(a), which requires unit RNs as well as non-unit employees to wear scrubs of assigned colors, the first three sets of which were provided free to employees by the Hospital, and which Policy limited and permitted certain items of apparel, jewelry, piercings and body art, under circumstances where, prior to implementation of the 9/4/12 Policy:
    a. Unit RNs had previously purchased their own sets of scrubs;
    b. Since 2009 (and prior to the petition, election and certification), the Hospital maintained a dress and appearance policy, known to all employees, which required employees in certain departments to wear uniforms of specified colors, and also permitted and limited various items of apparel, jewelry, piercings, and body art;
    c. The previous appearance policy set forth in the Employee Handbooks since April 2009, were enforceable by progressive discipline;
    d. Since 2009, a dress and appearance policy, well-known to employees, reserved to management the discretion to modify the policy; and
    e. The 9/4/12 Policy incorporated all facets and requirements of policies previously set forth in the 2009, 2010 and 2012 Employee Handbooks.
5. Whether the Hospital's 9/4/12 Policy was a proper and legally cognizable exercise of managerial discretion, not only preserved and retained in the Employee Handbooks, but

also an exercise of its inherent management rights and prerogatives and, therefore, not subject to bargaining obligations?

6. Whether the ALJ's Order, which calls for rescission of a highly-beneficial Hospital-wide dress and appearance policy (requiring, in part, that unit and non-unit employees wear assigned-colored scrubs) would improperly render any subsequent attempt to renew and implement a similar Hospital-wide policy being contingent upon the Union's agreement, or the reaching of a valid impasse between the parties?

7. Whether the 9/4/12 Policy constituted an unlawful unilateral change under circumstances where, after its implementation, RNs would still:

    a) Continue to wear scrubs, as well as scrubs of any style;
    b) Continue being required to purchase new sets of scrubs;
    c) Continue being responsible to launder their scrubs;
    d) Continue being allowed to wear warm-up jackets;
    e) Continue being allowed to wear scrub tops under the colored tops;
    f) Suffer no loss of compensation, pay or hours; and
    g) Experience no change in their duties or responsibilities?

8. Whether the Hospital's refusal to respond to the Union's February 11, 2013 request for information and demand to bargain, under circumstances where the Union's request was submitted ten months following its knowledge of the planned dress code and 5-plus months following the policy's implementation, is violative of the Act; and where the Hospital, by implementing the 9/4/12 Policy, was complying with and abiding by policies in effect prior to the Union's petition, the September 2010 election, and the August 3, 2011 certification?

9. Whether the underlying August 3, 2011 certification, and the Board's November 29, 2011 decision reported at 357 NLRB No. 19, are valid and enforceable inasmuch as both were decided by an unconstitutionally - assembled quorum, including Member Becker, as determined by the U.S. Circuit Court of Appeals for the Third Circuit on May 16, 2013

in *New Vista* and in accord with and the U.S. Supreme Court's 2010 decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct.2635 (2010)

10. Whether the Board's July 31, 2012 decision, reported at 358 NLRB No. 95, (request for bargaining information) and its March 22, 2013 decision reported at 359 NLRB No. 82 (request for, *inter alia*, disciplinary information), are valid and enforceable inasmuch as both Board panels were comprised of unconstitutionally recess - appointed Members Block and Griffin, *per* the D.C. Circuit's January 25, 2013 holding in *Noel Canning*?
11. Whether issuance of the Complaint and prosecution of this matter has been unauthorized, improper and unlawful (and whether the trial should have been postponed indefinitely) due to the AGC's lack of authority to issue and prosecute such matters since: he can only act "on behalf of" a constitutionally configured Board, which does not exist here per *Noel Canning* and *New Vista*; the AGC has not been confirmed by the Senate; his appointment was improper under the Federal Vacancies Reform Act; and his pursuit of the instant matter is *ultra vires*?
12. Whether the complaint in this matter is to be dismissed.

III. CASE HISTORY

The following provides a chronological summary of facts relating to the current dispute.

Date	**Description**
January 1, 2002	The Hospital adopted the "corporate" discipline and discharge policy, B.7. (R 4(a)-(d))
February 1, 2003	The Hospital adopted the "corporate" dress code and personal appearance policy, B.9. (GC 6)
January 2009	Pat Scherle began her tenure as the Hospital's Chief Nursing Officer (CNO) and Facility Privacy Officer (FPO). (Tr.122-3)

January 1, 2009	Effective date of another Hospital-adopted "corporate" discipline and discharge policy, B.7. (R 5(a)-(d))
April 2009	The Hospital issued and distributed a facility-specific Employee Handbook (R 1(a)-(h)) which: ▪ Adopted a new appearance policy with discretion to change retained by the Hospital. (pp. 7-8) ▪ Adopted a new disciplinary and discharge policy with discretion to change retained by the Hospital. (pp.17-18) ▪ Set forth notices to employees (pp. ii and page 1) ▪ Contained a signature page for each employee to acknowledge receipt of the handbook and his/her commitment to read and become familiar with its contents (p. 34)
June 2009	The Hospital issued and distributed another Employee Handbook (GC 11),[5] which included the same language as that which appeared in the April 2009 Handbook as to: notices to employees (pages ii and 1); the personal appearance policy and retained discretion in relation thereto; the discipline and discharge policy and discretion retained in relation thereto; plus the same employee acknowledgement and receipt form.
Mid 2009-Mid 2010	CNO Scherle began developing, and ultimately received approval, for a local hospital-wide dress and appearance policy, which included assigned color scrubs for various departments. However, financial constraints at the latter point in time precluded ordering of scrubs and implementation of the policy. (Tr. 131)
May 19, 2010	The Union filed its petition in Case No. 4-RC-21697.
July 1, 2010	"Corporate" issued a six-page model/template Discipline and Discharge Policy, B.7, for consideration by the Employer. (Jt. 1)
July 29, 2010	The Hospital issued and distributed a new Employee Handbook (R 2(a)-(g); GC 12) which included the identical verbiage as that set forth in the two previous handbooks as to personal appearance, discipline and discharge, retained discretion, the employee acknowledgement and receipt form, and notices to employees.
September 1 & 2, 2010	Region 4 conducted an election among unit RNs; the Union prevailed; objections were filed by the Hospital.
Mid 2010 – Jan. 5, 2013	No activity took place with regard to a color-appropriate scrubs/appearance policy (approximately 18 months).

[5] GC 11 fails to include a cover page, nor does it contain page "ii" which contains an "Important Notice." These pages do appear in R 1(b), R 2(b) and R 3(b).

August 3, 2011	The Board issued its certification of the Union as representative of the Hospital's RNs. (Members Liebman, Becker and Hayes) (GC 2)
August 8, 2011	The Union requested bargaining. (GC 3)
August 15, 2011	The Union requested information for purposes of bargaining. (GC 4)
August 17, 2011	The Hospital responded to the Union that since it was testing the certification, it must necessarily refuse to bargain. (GC 5)
September 14, 2011	The Union filed a charge in Case No. 4-CA-64445, setting up the test of certification. Ultimately, on November 29, 2011, Board Members Becker, Pearce and Hayes issued a bargaining order at 357 NLRB No 19. That matter has been before the United States Circuit Court of Appeals for the District of Columbia Circuit since December 1, 2011. (D.C. Circuit Case Nos. 11-1466 and 12-1009)
October 2011	Linda Tuting began her employment as the Hospital's Human Resources Director (Tr.188).
December 2011	CNO Scherle and HR Director Tuting began discussions as to the development of a local Hospital dress code. (Tr.188)
January 30, 2012	The Union filed five charges, each alleging different unilateral changes. All five charges were withdrawn by August 1, 2012. The Union filed a charge alleging a refusal to bargain and provide information concerning discipline of unit RNs.
Jan.-Mid -March 2013	HR Director Tuting investigated various color-coding scrubs policies and selected a uniform vendor. (Tr.188-9) The initiative gained momentum with a goal of implementing the program by late April 2012. (Tr.160)
April 17, 2012	The vendor for uniforms/scrubs visited the Hospital and began measuring clinical employees for assigned color scrubs. (Tr.189) During this process, the Hospital learned that the scrubs for which employees had been measured were of a style which contained no pockets. (Tr.190) The measuring process was immediately halted since employees who wanted scrubs with pockets needed to be re-measured. (Tr.160-1)
Mid-Late Apr. - Mid June 2012	HR Director Tuting coordinated and oversaw the re-measuring process and periodically placed orders for scrubs. (Tr.189-92)
April 30, 2012	The Hospital issued and distributed to all employees a new Employee Handbook (R 3(a)-(h)) which contained language identical to that which appeared in the April and June 2009, and the July 29, 2010 Employee Handbooks as to dress, appearance and discipline.

May 14, 2012	The Union submitted a request for information concerning the uniform policy which, *inter alia*, sought information as to non-unit employees. (GC 7(a))
Mid-June-Mid Aug. 2012	Scrubs for the measured employees were ordered, and deliveries of scrubs were made sporadically through the latter part of August 2012. (Tr.193, 196)
Aug. 21-Early Sept. 2012	Employees were notified that the scrubs for which they had been measured had arrived, and that they could be picked up at the HR Department. Employees were also informed that those already measured and receiving scrubs were to begin wearing them by September 4, 2012. However, a grace period, to October 4, 2012, was provided for employees who had not been fitted previously. (Tr.195; R 7; GC 8) HR Director Tuting and HR personnel packaged each employee's three sets of color-appropriate scrubs along with a copy of the localized Hospital dress code (GC 9(a)) (Tr.193)
Sept. 4-Oct. 4, 2012	All measured employees (251), including all 120 unit RNs, received and most began wearing their color-appropriate scrubs. No measured and fitted unit or non-unit employees rejected or returned the three sets of Hospital-provided scrubs. (Tr.193-4)
February 4, 2013	The Union filed its charge in the subject case alleging a unilateral change with respect to the 9/4/12 Policy, five months after the Policy's implementation and ten months after its initial knowledge that a dress program was being considered.
February 11, 2013	The Union submitted to the Hospital a request to bargain and for information concerning the September 4, 2012 uniform policy and "orders" the Hospital to cease and desist implementation of the policy that went into effect five months earlier.
March 28, 2013	Complaint issued in the instant matter.
June 11, 2013	Trial of this matter was conducted before ALJ Rosas.
September 10, 2013	ALJ Rosas issued the subject Decision.

IV. THE EMPLOYER'S POLICIES

Determination of which dress and apparel policy is to serve as the basis for comparison with the 9/4/12 Policy (GC 9(a)) is crucial to a correct and proper analysis of this case, and particularly the issue as to whether the 9/4/12 Policy constituted a substantial, significant, or

material change. The AGC and ALJ erroneously determined that the February 1, 2003 Dress Code and Appearance Policy (GC 6) was to be utilized for that comparison. The Employer submits that there can be no question that the policies for this comparison are those set forth, in identical form, in the four Employee Handbooks which were first issued to employees in April 2009. Essential to that determination is an understanding of how the Hospital develops, formulates, and adopts its policies.

A. Three Potential Sources of Employer Policies

The record establishes that the Hospital's policies can be selected and/or composed, and/or tailored on three levels and in various ways. Yet, the ALJ inexplicably concluded that such evidence is "irrelevant to the issues here." (2 ALJD, Fn. 4) It is submitted that this initial error sent the ALJ down a path of further faulty analysis. This, in turn, led to his erroneous reliance on the 2003 dress code policy as the basis for comparison with the 9/4/12 Policy and, ultimately, to the flawed and incorrect conclusion that the 9/4/12 Policy represented an unlawful change.

The evidence presented and set forth in the record reveals that "corporate" policies are submitted to the Hospital by an independent management consulting company which, *inter alia*, provides suggested models or templates to its affiliated hospitals for their consideration.[6] Examples are Jt. 1, and R 6(a)-(f). These policies can be fully adopted by the affiliated Hospital, or may be modified and tailored by the local facility to address local circumstances, operations, issues, and applicable regulations. (Tr. 161-2;169-71) Additionally, CHS-affiliated facilities, such as the Employer, will create their own modified local policies covering the same subject matter as corporate policies. These policies can later appear in the Hospital's later-issued Employee Handbooks.

[6] The nature of the relationship existing between the Hospital and CHS is set forth on page 2 of each Employee Handbooks in the record.

All Hospital employees since April 2009 have received Employee Handbooks containing policies at different and various times. These occasions include:

1) at the completion of their orientation period;

2) at their annual evaluations; and

3) when the Hospital issues new or revised Employee Handbooks.

(Tr. 153, 171) Upon receiving their handbook, each employee signs a "Handbook Receipt and Acknowledgement" form which, *inter alia*, commits the employee to read and follow the policies set forth therein, and further specifies that the Hospital can modify or withdraw provisions at any time with or without notice.

The Employee Handbooks further explain the significance of the policies and the need for employees to comply. (R 1, April 2009; GC 11, June 2009; R 2, July 29, 2010; and R 3, April 30, 2012). For example, page ii of each handbook provides:[7]

> Much of the information on these pages is a **summary of facility policies as well as federal, state and local laws** which change from time to time. Due to the nature of healthcare operations and variations necessary to accommodate individual situations, the guidelines set out in this handbook may not apply to every employee in every situation. **The facility reserves the right to rescind, modify or deviate from** these or other guidelines, **policies, practices or procedures relating to employment matters from time to time** as it considers necessary **in its sole discretion, either in individual or facility-wide situations** with or without notice. (Emphasis added.)

Similarly, page 1 of each Employee Handbook sets forth the following under the heading "Introduction:"

> **The rules, policies and procedures stated in this handbook are guidelines only … and are subject to change at the sole discretion of the facility** as are all other facility policies, **procedures, methods and other programs**. **From time to time, you may receive updated information concerning changes in policy**. If you have any questions regarding anything in this handbook, please consult with your supervisor or the facility's Human Resources Department. (Emphasis added.)

[7] Page ii, inexplicably, does not appear in GC 11.

Lastly, as suggested immediately above, the Hospital may generate "hospital" policies to address specific local issues. (Tr. 179) These policies can be found within the Employee Handbook or appear outside the handbook when a particular subject matter or issue arises between or after issuance of an Employee Handbook. The 9/4/12 Policy provides one example of such a local hospital policy.

B. Demise of the 2003 Policy and Rise of the Employee Handbook Dress and Appearance Policy

The 2003 dress and appearance policy was a "corporate" policy that had been adopted by the Hospital up to the time of issuance of the April 2009 Employee Handbook. That Handbook first set forth, *inter alia*, the dress and appearance and disciplinary policies applicable to all Hospital employees. The three later-issued Employee Handbooks of June 2009, July 27, 2010 and April 30, 2012, contained the identical verbiage as to dress, appearance and discipline. There can be no question of employees' having received and possessing knowledge of the handbook policies since they receive a handbook at least once a year, at their annual evaluation when they also sign a form acknowledging both receipt of each handbook as well as a commitment to read and familiarize themselves with the handbooks' contents. The ALJ's disregard of this evidence resulted in his arriving at the flawed and erroneous conclusion that the 2003 dress code policy had been in effect continuously up to implementation of the 9/4/12 Policy.

Accordingly, since April 2009, the Employee Handbooks, formulated and issued by the Employer, provide all employees with the Hospital's policies. As will be shown, the ALJ's adoption and reliance on the 2003 dress code policy as the basis for comparison with the 9/4/12 Policy is simply not supported by the record.

V. DEVELOPMENT OF THE 9/4/12 DRESS AND APPEARANCE POLICY

A. Basis For and Benefits Of a Color-Coded Uniform Policy

As described by CNO Scherle, times have changed since the late 1960's and '70's as to attire traditionally worn by RNs. No longer is an RN easily recognizable by the white dress, white shoes, white hat and hose traditionally associated with the nursing profession. (Tr.128) Since those times, the traditional white garb has been replaced by RNs' donning of scrubs. Accordingly, older patients (among others), who still may search for RNs in white, can no longer locate, recognize or identify an RN simply by their attire.

CNO Scherle testified that she had introduced dress codes at facilities where she previously managed. These were based on assigning scrubs of varying colors to be worn by employees based on differing skill sets or working within specific departments. From this experience, Scherle found that RNs and other clinical staff who are assigned such varying colors became easily distinguishable and stand out from one another. (Tr. 129) The distinctive colors of RNs and that of scrubs of other clinical staff serve to enhance a hospital's operations, safety and security in a number of ways including:

- Enabling patients, who cannot see or read identification badges, to better recognize, identify, and, if necessary, recall the skill or department of the clinical personnel who enter their rooms, with whom they speak, and who provide their care. This means of recognition and identification can be significant, if not vital, when confronted with an emergency or in the event issues arise as to questionable treatment; intentional or unintentional disclosures of private information; security problems; and myriad other situations and scenarios.

- Enabling visitors to recognize the skill or department with which the employee is associated, which can become necessary and vital in innumerable contexts and situations involving potential issues of patient treatment, theft, security, and emergencies.

- Enabling employees and medical personnel to recognize the skill and/or department of other employees which can become helpful, significant, if not vital, in an endless variety of foreseeable factual contexts.

- Enabling all patients, Hospital personnel and visitors to distinguish clinical staff from business and administrative personnel.

- Enabling Hospital personnel to distinguish between employees, visitors, and persons having no business within the treatment areas.

- Promoting an aura of professionalism, structure and orderliness which, in turn, imbues patients and visitors with increased confidence that they are entering and being served within a facility and by a staff with a high regard for professionalism and quality care.

- Elimination of a hodge-podge of indistinguishable personnel comprised of office, clerical, administrative, clinical, non-clinical and support employees.

- Elimination of an aura of individual and institutional sloppiness by curbing improper apparel and appearance.

(See Tr.129,130,132)

The effectiveness of the Hospital's color-appropriate scrub policy has been complemented by its providing visitors with badges (R 9). These not only identify them as "VISITORS" on one side, but also, on the reverse side, provide a listing of the colors of scrubs assigned to employees in the Hospital's various departments, in conformance with those set forth in the 9/4/12 Policy. (Tr.132-3)

B. Formulation, Development and Implementation of the 9/4/12 Policy as to Dress and Appearance

Within CNO Scherle's first six months at the Hospital, she observed RNs wearing scrubs of numerous and varied colors, and/or working in street clothes, and/or wearing a variety of differing and unprofessional attire. She was also unimpressed by an RN's appearance at a morning staff workshop in yellow sweat pants – a garb which the RN had worn on duty the previous night. (Tr.130) The inability to distinguish among professional and non-professional staff was also magnified by various colored scrubs being worn by business office personnel, housekeepers, and others. (Tr.137)

As a result, CNO Scherle began focusing, from a managerial and institutional perspective, on a hospital-wide dress code. (Tr.131) A draft plan was developed which was

approved by upper management during 2010. However, financial constraints at that time forced postponement in the ordering of scrubs and implementation of the plan. (Tr.131) By late 2011, Scherle was able to revisit the prospects for a Hospital-wide dress code. Between January and March of 2012, Scherle and HR Director Linda Tuting investigated, discussed and developed a dress code with the goal of full implementation, including new sets of assigned-color scrubs for all clinical employees, by late April 2012.

The Hospital's decision to embark upon a one-time acquisition and provision of three sets of assigned colored scrubs for unit and non-unit employees was based on CNO Scherle's prior experience with implementing dress codes at other locations. She also recognized that there would likely be non-unit employees unable to afford purchasing assigned color-coded scrubs if directed to begin wearing them in the immediate future. Accordingly, the Hospital's provision of the initial three sets of the assigned-color scrubs allowed all employees, Hospital-wide, a lengthy transition period, after which all unit and non-unit employees who had been provided the three free sets of scrubs would easily be able to afford replacements. Scherle viewed this as "the right thing to do." (Tr.164-5, 184)

By April 17, 2012, a representative of the selected vendor went to the Hospital to measure clinical employees for color-assigned scrubs. (Tr.159) During this process, however, an employee noticed and commented upon the measured-for scrubs being of a style having no pockets. This ultimately resulted in a substantial re-measuring effort, as well as a delay in ordering of the scrubs. (Tr.160,190-3) By mid-June 2012, most re-measuring and ordering had been completed. By mid-late August 2012, most of the color-coded scrubs had arrived. HR personnel then packaged, for each employee, the three sets of the measured-for assigned color-coded scrubs, along with a badge holder and a copy of the 9/4/12 Policy, GC 9(a). (Tr.193)

During the same time period, employees were notified to pick up their new scrubs at the HR department. They were also notified that the assigned-color scrubs would be required

apparel as of September 4, 2012. A grace period was extended to October 4, 2012, for any employees who had not previously been measured.

251 employees received three sets of scrubs at a cost to the Hospital exceeding $8,000. No eligible RN or non-unit clinical personnel rejected the provided three sets of Hospital-provided scrubs. All scrubs were distributed, and assigned colors worn, by October 4, 2012. (Tr.193-5)

VI. CONTRARY TO THE ALJ, THE 2003 DRESS POLICY WAS NO LONGER IN EFFECT AND, THEREFORE, PROVIDED NO BASIS FOR COMPARISON WITH THE 9/4/12 POLICY

A. The Applicable And Appropriate Policies For Comparison Are Those Within The 2009, 2010 And 2012 Employee Handbooks

The ALJ erroneously concluded that the 2003 Dress Code (GC 6) was in effect up to the time the 9/4/12 Policy was implemented. As suggested earlier, the record simply fails to support his conclusion. The ALJ's faulty analysis began with his inexplicable footnoted finding that the manner in which the Employer's policies are generated "is irrelevant to the issues here." (2 ALJD, Fn.4) In yet another footnoted finding (4 ALJD Fn. 12), the ALJ asserted that nurse McAllister's own testimony regarding the "past policy" (the ALJ's term for the 2003 policy) was not refuted by any Employer witness. Yet, McAllister's own testimony reflects that she consulted and/or referred to the 2003 policy only in the year 2003 at which time she had an issue arise concerning a piercing of her nose. (Tr. 68-70) That testimony, however fails to establish that the same policy was still in effect during the nine years leading up to the 9/4/12 Policy. Rather, McAllister's testimony refers only to an incident occurring, and a policy existing, in 2003. Further, the ALJ simply disregarded her disclosure, on cross-examination, that she had received and signed for and read, the four Employee Handbooks containing the dress and appearance policy which had been in effect since April 2009. (Tr. 94-98)

With such broad and flawed strokes, the ALJ simply dispensed with consideration of the testimony and overwhelming documentary evidence introduced both by the AGC and Respondent as to policies contained in the Employee Handbooks of 2009, 2010 and 2012. The ALJ, at best, accorded the handbooks' introductory lip service. (2 ALJD 26-39) It is submitted that had the ALJ addressed the documentary evidence and testimony as to the manner in which the Hospital formulates its policies, he would have concluded that the 2003 Policy (GC 6), had not been in effect since April 2009, at which time the dress and appearance policy applicable to all Hospital employees was first set forth in the Employee Handbook. (R 1(d)&(e)). The April 2009 Employee Handbook first set forth a new dress and appearance policy applicable to **all Hospital employees.** (R 1(d) & (e)) This replaced, displaced and supplanted the 2003 "corporate" policy. The articulation of the April 2009 policy appeared thereafter, and in identical form, in all three subsequent Employee Handbooks issued to and signed as received by all employees. Those handbooks appear in the record as GC 11 (the June 2009 Employee Handbook); R 2(d) & (e) and GC 12, p. 8 (the July 29, 2010 Employee Handbook); (R 3(d) & (e) (the April 30, 2012 Employee Handbook).

In summary, the ALJ's conclusion that the 2003 dress policy was in effect up to the 9/4/12 Policy is simply incorrect. In turn, the ALJ's reliance upon the 2003 policy as the basis for comparison with the 9/4/12 dress policy is not supported and constitutes further error.

The ALJ's disregard for, and misinterpretation of, highly-material facts concerning the dress, appearance, and disciplinary policies governing the Hospital's employees, requires that the Board reverse the ALJ's findings and itself find and conclude that:

1. The 2003 policy had not been in effect since April 2009, at which time the applicable dress and appearance policy was articulated at pages 7-8 of the

Employee Handbook. Further, the same policy has appeared in Employee Handbooks from June 2009, July 29, 2010, and April 30, 2012.

2. The Employee Handbook policy expressly declares:

> The facility **reserves the right to use its discretion to determine what constitutes appropriate dress**. (Emphasis supplied.) .

3. All employees, at least annually, sign a form that they not only received the Employee Handbook, but also that they agree to read the handbook, follow the policies therein, and acknowledge that the Employer has the right to modify or withdraw any handbook provisions.
4. The appearance policy appearing in the 2009 and 2010 Employee Handbooks preceded both the September 1 and 2, 2010 election, as well as issuance of the August 3, 2011 certification.
5. The appearance policies set forth in the Employee Handbooks of 2009, 2010 and 2012 provided the substantive basis for the 9/4/12 Policy.
6. The 2003 policy (GC 6) provides no basis for comparison with the 9/4/12 Policy. Rather, the 2009, 2010 and 2012 handbooks provide the written bases for assessing whether there has been a "change."

B. The Absence Of Disciplinary Language In The 2003 Policy Is Of No Consequence

Inasmuch as the 2003 policy was not in effect after April 2009, the absence of any disciplinary steps in that policy (GC 6), which do appear in the 9/4/12 Policy, is of no consequence. Moreover, even if the 2003 policy had been in effect, the absence of disciplinary steps therein would also be inconsequential. Thus, at times, when the 2003 corporate Dress Code and Personal Appearance Policy had been in effect, the "corporate" discipline and disciplinary polices of January 1, 2002 (R 4(a)-(d)), and January 1, 2009, had also been in effect. Similar to the demise of the 2003 dress code policy, those discipline policies were supplanted by those within the April 2009 Employee Handbook. (See R 5(a)-(d), R 1(f), and GC 11, pp.17-18.)

VII. COMPARISON OF THE SUBSTANTIVE TERMS OF THE 9/4/12 DRESS AND APPEARANCE POLICY WITH THOSE SET FORTH IN THE 2009, 2010 AND 2012 EMPLOYEE HANDBOOKS SHOWS NO APPRECIABLE CHANGE

The ALJ erroneously relied upon the 2003 Dress Policy as the basis for comparison. He therefore failed to engage in any comparison of the Employee Handbook policies with the 9/4/12 Policy. As the following shows, a close and proper comparative analysis of the 9/4/12 Dress and Appearance Policy with that set forth in the 2009, 2010 and 2012 Handbooks reflects no substantive differences regarding permissible and impermissible items of dress and appearance. Thus:

A. Pages 1-3 of The 9/4/12 Policy *vis- a-vis* Employee Handbook Provisions

- **Statements of Policy Purpose**

  Both the Employee Handbook and the 9/4/12 Policy make reference to promotion of professional image and appearance; the expectation that employees are to present themselves in "appropriate attire;" and the need for proper grooming. The only difference is in the words used to convey the same content.

- **"Guidelines"**

  All four Employee Handbooks, as well as the 9/4/12 Policy, refer to the listed contents as "guidelines."

- **Identification**

  All four Employee Handbooks and the 9/4/12 Policy require wearing of visible identification badges.

- **As to Colors of Uniforms**

  The four Employee Handbooks provide for both existing, and future, color-appropriate uniforms. The 9/4/12 Policy likewise embraces this. Thus the four Employee Handbooks state that, "If uniforms are required, they must be of the established color and style specified for the specific work unit." The handbooks further reserve to the Hospital the right to use its discretion to determine that which constitutes appropriate dress or uniforms, "as well as items of clothes… that are prohibited… if they do not promote a professional image."

GC 9(a), the 9/4/12 Policy, further effectuates those pre-existing policies. It clearly conveys that various work units may have specified uniform colors. Further, it sets forth an explicit statement of the Hospital's retained discretion to determine appropriate attire as well as the determination as to whether various apparel does or does not promote a professional image.

As to the issue of the colors of uniforms, the ALJ not only disregarded Employee Handbook provisions as to uniforms, but also made a number of factual and analytical errors in relying upon testimony of two AGC witnesses. These errors, in turn, led the ALJ to unfounded findings and conclusions based upon irrelevant considerations. Among such irrelevancies are his view that "inventories" of scrubs would be rendered useless by the alleged change.

First, the Hospital has at no time required any unit employees to have purchased any more than one set of scrubs – those to be worn on a day of work. The Hospital has never required employees to build up "inventories" of scrubs. Additionally, if any of the other 118 RNs had purchased as few as three sets of scrubs prior to 9/4/12, the Hospital's provision of three sets of paid-for scrubs could hardly be viewed as having their "inventory" rendered useless. Further, the three sets of Hospital-provided free scrubs could exceed the number of sets of scrubs previously paid for by the RNs themselves. Also, there is no evidence to establish that one set of scrubs, i.e., one-third of the sets of scrubs provided to RNs by the Hospital, could not last months or even years. Additionally, the testimony of one AGC witness that she purchased and possessed 200 sets of scrubs, as well as coordinating shoes, socks and accessories, not only establishes that the cost of scrubs is no issue to the Hospital's unit RNs, but also completely fails to establish that RNs have any number of scrubs which even approximate that number. By such deficient analysis, the ALJ ultimately and erroneously morphed a generous and beneficial gesture on the part of the Hospital, i.e., provision of initial three sets of scrubs to all unit and non-unit employees, into what he improperly characterized as an unlawful action detrimental to employees.

Further, the ALJ inaccurately portrayed the Hospital's efforts as having an adverse financial impact upon the RNs. (7 ALJD 22-29). In so doing, the ALJ simply disregarded obvious facts including:

a) that an RN, such as AGC witness Thomas, who could afford 200 sets of various colored scrubs, along with coordinating accessories, socks, and shoes, would endure little, if any, difficulty in affording a set of replacement navy blue scrubs which can cost as little as $13.00 per set. (Tr. 104-105, 117, 194)

b) The Operating Room ("OR") RNs' wearing of provided-for green scrubs presents a clear example of the 9/4/12 Policy's consistency with the appearance policy set forth in the previous Employee Handbooks issued since 2009. Both before and after the 9/4/12 Policy, OR RNs wore green scrubs. The policy in effect since

2009 provided that if uniforms were required, they must be of a color specified by a work unit. Though the ALJ correctly noted that OR RNs were required to wear Hospital-provided scrubs pursuant to State regulations (4 ALJD 1-2; and Fn. 10), the record contains no evidence to establish that the State itself required green scrubs. Green scrubs to be worn by the Hospital OR RNs were obviously required by the Employer. The 9/4/12 Policy's provision that OR/PACU/SPD employees must wear scrubs per departmental policy, is totally consistent with the previous Employee Handbook dress and appearance provisions as to those RNs.

c) RNs had purchased their own scrubs at all times prior to the 9/4/12 Policy.

- **Footwear**

  The Employee Handbooks, as well as the 9/4/12 Policy, address issues of footwear and athletic shoes. The two bullet points in the handbooks' policy address open-toed or backless shoes, while the 9/4/12 Policy provisions on these matters (at page 3, item XIV.) parallel those points as it permits them being worn, with but a few restrictions.

- **Hair**

  The Employee Handbooks, as well as the 9/4/12 Policy, require that hair be secured, so as not to touch patients. (GC 9(a), p. 3)

- **Facial Hair**

  The handbooks as well as the 9/4/12 Policy (GC 9(a)) both require that male facial hair be trimmed and neatly maintained.

- **Nails**

  Though the Employee Handbooks make no specific reference to nails, GC 9(a)'s reference thereto cites the obvious need for nails to conform with "infection control guidelines." These same guidelines would be in effect, even if not specifically mentioned in the Employee Handbook. Additionally, the Employee Handbooks' statement of policy explained that its provisions were "guidelines." Moreover, the tenor of all policies in the Handbook emphasizes both safety and promotion of a professional image.[8]

[8] See *Crittenton Hospital*, 342 NLRB 686 (2004), wherein a change in dress code policy which prohibited RNs from wearing acrylic/artificial nails was held not to be a material, substantial or significant change.

- **Attire for Conferences and Workshops**

  The 9/4/12 Policy's requirement that nursing uniforms and/or business casual should be worn at these events, while disallowing sweats, shorts, tank tops, etc., does no more than define and refine the Hospital's right, set forth in the Employee Handbooks, to determine "appropriate attire" and "inappropriate clothing" at such occasions. Further, mere application of common sense, as well as an RN's obvious need and concern to present a professional appearance in itself predisposes an RN to recognize the inappropriateness of such excluded attire at these functions.

- **Proper Fit, Laundering, and Acceptable Skirt Length**

  The 9/4/12 Policy's provisions as to these areas are specifically referenced in the introductory statements and in the second and third bullet points within the Employee Handbooks' appearance policy.

- **Non-visible Undergarments**

  The statement of impermissibility of visible undergarments in the 9/4/12 Policy is totally consistent with the Employee Handbooks' third bullet point. Again, the use of common sense and one's own concern for professional appearance should itself render such direction unnecessary.

- **Socks and Stockings**

  GC 9(a)'s reference to these required items of apparel are, in a Hospital setting, if not within the realm of common sense, would certainly be implicit in the Employee Handbooks' references to proper attire, and the minimization of hygiene issues and safety hazards.

B. GC 9(a)'s Listing of "Not Acceptable" Items *Vis-A-Vis* Employee Handbook Provisions Likewise Reflects No Appreciable Difference

This comparison again establishes that the alleged "new" 9/4/12 Policy is in reality a continuation of existing policies.

1. "Hoodies, Sweatshirts and Fleece Jackets"

The ALJ concluded, erroneously, that the 9/4/12 Policy's disallowance of hoodies and fleece jackets as unacceptable attire constituted a change from existing requirements. His conclusion is unsupported. Initially, the appearance policy set forth in all Employee Handbooks since April 2009 have provided, within the personal appearance policy itself, the following: "T-shirts, jogging outfits … or inappropriate clothing may not be worn when on duty," (third bullet point); that "employees are to be "neat, clean and

appropriately attired" (introductory statement); and that the Hospital "reserves the right to determine what constitutes appropriate dress" (final paragraph) (R 1(d)(e); GC 11; R 2(d); GC 12; and R 3(d)(e))

Additionally, the testimony of McAllister as well as witness Thomas reflects that the wearing of hoodies and fleece jackets can look unprofessional and detract from a professional appearance. (Tr. 90-1, 118)

Third, as the alleged change of the 9/4/12 Policy permitted warm-up jackets of coordinating solid or print as well as allowance of RNs to wear solid colored tops under their scrub tops, the alleged change alleviated any issues concerning temperature. Further, there is no evidence, contrary to the ALJ's findings, that the entire Hospital itself was cold. If anything, the testimony of McAllister dealt solely with the Emergency Department. Finally, the ALJ, in alluding to McAllister's having experienced "discomfort" from the cold due to the change, disregarded her additional testimony that "I am cold a lot anyway. So I'm just cold," thereby disclosing that her sensitivity to temperature change was unique. (Tr. 84, Ll. 10-13)

2. "Skorts, Culottes, Spandex"

These items fall within the Employee Handbooks' personal appearance policy's third bullet point, as well as its introductory statement, plus its concluding statement. Further, this would be covered in the Employee Handbook's Introduction.

3. Sleeveless Tops

The disallowance of this attire in clinical areas would have been precluded by the third bullet point within the Employee Handbooks' personal appearance policy, as well as its introductory statement, its concluding paragraph, and would also be encompassed within the Handbooks' Introduction.

4. "Textured Stockings"

The disallowance of this item would have been precluded within the Employee Handbooks' Introduction, the personal appearance policies, introductory statement, its third bullet point, and its concluding paragraph.

5. "Midriff or Low-cut Tops"

This attire would likewise have been prohibited under provisions in the Employee Handbooks' Introduction and within the personal appearance policy's introductory statement, its third bullet point, and its concluding paragraph.

6. **"Sweatpants or Printed T-shirts"**

   This attire would likewise have been prohibited under provisions in the handbooks' Introduction, the personal appearance policy's introductory statement, its third bullet point, and its concluding paragraph.

7. **"Denim or Camouflage"**

   This attire would likewise have been prohibited under provisions within the handbooks' Introduction, the personal appearance policy's introductory statement, its third bullet point, and its concluding paragraph.

8. **"Open-Toed Shoes in Clinical Areas"**

   Disallowance of these items falls within provisions of the Employee Handbooks' Introduction, the personal appearance policy's eighth bullet point, its introductory statement, and its concluding paragraph.

9. **"Fad Hair Colors"**

   Disallowance of these would likewise have been prohibited under provisions in the handbooks' Introduction, the personal appearance policy's introductory statement, its fourth bullet point, and its concluding paragraph.

10. **Large Hoop or Dangle Earrings and No More Than Three Sets of Earrings**

    These items would have been prohibited under provisions within the handbooks' Introduction, the personal appearance policy's introductory statement, its sixth bullet point, and its concluding paragraph.

11. **Visible Facial Piercings and Excessive Jewelry**

    These items would have been prohibited under provisions within the handbooks' Introduction, the personal appearance policy's introductory statement, its sixth and seventh bullet points, and concluding paragraph.

12. **"Tattoos"**

    The disallowance of visible tattoos would likewise have been prohibited under provisions within the handbooks' Introduction, the personal appearance policy's introductory statement, its ninth bullet point, and concluding paragraph.

13. **Artificial Nails of Any Type in Clinical Areas**

    See Brief above at page 24 as to "Nails."

14. Nail Length Greater Than ½ inch over tip of Finger in Clinical Areas

See Brief above at page 24 as to "Nails."

15. Crocs or Clogs With Holes on Top

These items would have been prohibited under provisions within the handbooks' Introduction, the personal appearance policy's introductory statement, its eighth bullet point, and concluding paragraph.

Accordingly, it is submitted that the Board should reverse the ALJ, and find and conclude that the 9/4/12 Policy encompasses no appreciable and/or substantive change from existing appearance policies set forth in the 2009, 2010 and 2012 Employee Handbooks. While the structure, format and wording of GC 9(a) differ from that set forth and articulated in the handbooks, the substantive content of all are parallel and consistent.

VIII. COMPARISON OF THE DISCIPLINARY STEPS CONTAINED IN THE 9/4/12 POLICY *vis-a-vis* THE 2009, 2010 AND 2012 HANDBOOKS REFLECTS NO CHANGE

The 2003 dress code policy contained no specific disciplinary steps, unlike the appearance of progressive discipline in the 9/4/12 Policy (4 ALJD 6-7, 6 ALJD 2-4, 7 ALJD 15-20,26-29). This finding, in turn, appears to have contributed to the ALJ's conclusion that the 9/4/12 Policy constituted an unlawful unilateral change. In so doing, it appears that the ALJ simply ignored evidence that the 2003 policy had not been in effect after April 2009. Accordingly, to ascertain whether the brief reference to progressive discipline in GC 9(a), constitutes a "change" from prior disciplinary policies, reference must again be made to the disciplinary policies set forth in the Employee Handbooks. The disciplinary policy to serve as the basis for comparison first appeared in the April 2009 Employee Handbook. (R 1(f) and (g); GC 11, pp. 18-19). It thereafter remained in the exact same verbiage within the June 2009, July 29, 2010, and April 30, 2012 Employee Handbooks. (GC 12, pp. 18-19; R 2(e) and (f); GC 12, pp. 17-19; and R 3(f) and (g))

Under the heading "Disciplinary Actions," the handbooks' policy begins by stating that the appropriateness of disciplinary action depends upon many factors and rests in the sole discretion of the Hospital. Further, "Disciplinary action… may include but is not limited to informal counseling, counseling and/or written warnings, investigative or disciplinary suspension, probation, demotion and termination." Appearing under the heading "Conduct That May Result in Disciplinary Action," are two listings of various types of conduct which are set forth as a "guideline." Listed first is a series of eleven behaviors that would result in immediate termination. That is followed by a lengthy listing of twenty-one behaviors that could result in disciplinary action up to and including termination. Included thereunder are "unsatisfactory work performance," and "insubordination or refusal to comply with instructions or failure to perform assigned tasks."

As admitted by AGC witness McAllister, showing up for work out of uniform would result in disciplinary action well before GC 9(a) was developed. (Tr.96) As stated by CNO Scherle, if an RN came to work out of uniform on her watch, the RN would first be spoken to, followed by further discipline in the event of the RN's continued non-compliance. (Tr.138)

GC 9(a), the 9/4/12 Policy, maintains, verbalizes and memorializes the availability of discipline for non-compliance with the Hospital's policies, including the dress and appearance policy. The stated process in GC 9(a) further reflects management's long-standing discretion to implement various modes of discipline for uniform violations – consistent and consonant with the disciplinary policies in effect since issuance of the April 2009 Employee Handbook. GC 9(a) changes nothing by its inclusion of available progressive discipline.[9]

[9] While the July 1, 2011 corporate model was in effect albeit at other CHS-affiliated hospitals, the Employee Handbook policies were in effect at the Employer, the local facility. As the ALJ noted, verbiage of both are very similar. It is noted that the verbiage of the April 30, 2012 Employee Handbook policy has remained the same since the April 2009 Employee Handbook. In any event, the evidence is undisputed that discipline had been available for

IX. APPLICATION OF PRECEDENT TO THE CIRCUMSTANCES HEREIN ESTABLISHES THAT THE ALJ ERRED IN FINDING AND CONCLUDING AN UNLAWFUL UNILATERAL CHANGE

The burden is on the AGC to establish that the alleged unlawful change is substantial, material and significant. *Sprint Communications*, 343 NLRB 987 (2004) The ALJ erroneously concluded that the AGC met that burden. For reasons as set forth below, it is submitted that the Board must reverse the ALJ's findings and conclusion of an unlawful unilateral change.

Initially, as Hospital Counsel noted at the outset of the trial, laypersons' use of the terms "change" and "new" differs dramatically from the meaning and usage of those terms in connection with allegations of unlawful "new" and/or "unilateral changes" under the Act. As shown in the presentation of evidence in this matter, laypersons' verbal and written usage of "new" and "change" with respect to policies does not establish that those changes are unlawful in labor law terms. Thus, unlawful unilateral changes must: 1) be "substantial," "material," and "significant;" 2) adversely affect unit employees; and 3) be inconsistent with prior policy or practice. Conversely, lawful changes which are deemed "insubstantial," "insignificant," "immaterial," trivial or *di minimus*, and are consistent with past policies, and result in minimal adverse impact on unit employees, are deemed lawful. As the ALJ did correctly state, "A minor change, stemming from a prior policy, and not shown to adversely affect the employees, will not constitute an unfair labor practice." (7 ALJD 8-9) It is submitted that Board precedent, properly applied to this matter, establishes the absence of a "change" in labor law terms. At most, the alleged modification would not rise to the level of a § 8(a)(1) and (5) violation as it was not substantial, material, or significant. Rather, the modification was *di minimus*, and consistent with prior policy, and had little, if any, adverse effect upon unit employees.

---

violations of the uniform policy before September 4, 2012, and that the Hospital possesses the sole discretion to determine the disciplinary options, which is likewise evidenced in the 9/4/12 Policy.

A. There Has Been No Change In Policy And, Therefore, No Violation Of The Act

The ALJ based his findings and conclusions on the premise that the 9/4/12 Policy, (GC 9(a)), differed from that set forth in the 2003 corporate policy (GC 6). As explained above, the evidence establishes that 1) prior to the Union's filing of the May 19, 2010 petition, and 2) prior to the September 1 and 2, 2010 election and, 3) prior to the August 3, 2011 certification, the relevant policies for comparison were those encompassed in the Employee Handbooks issued in April and June 2009, and continued intact thereafter in the June 2009, the July 29, 2010 and the April 30, 2012 Employee Handbooks. Further, as discussed in depth within Parts VII and VIII of this Brief, close examination and comparison of the 9/4/12 Policy's personal appearance and disciplinary provisions with those set forth in the Employee Handbooks, lead to but one conclusion: except for format, structure and verbiage, there has been no substantive or conceptual change.

The law as to unlawful unilateral changes has been well-established since 1962's U.S. Supreme Court decision, *Labor Board v. Katz*, 369 US 736. The application of *Katz* is initially contingent on the existence of union activity and/or a legally-recognized or certified bargaining representative. In the case *sub judice*, the personal appearance policy set forth in the Employee Handbook which issued in April 2009 obviously predated the petition, the election, and the certification herein. The subsequently-issued three Employee Handbooks set forth the exact same dress and personal appearance policy. Accordingly, that policy continued in effect until implementation of the Hospital's local 9/4/12 Policy. The disciplinary provisions within the 9/4/12 Policy likewise include the disciplinary provisions set forth within the past and present Employee Handbooks. Moreover, these provisions specifically provide for management's discretion to determine the type of discipline appropriate for various violations.

In essence, the 9/4/12 Policy is a continuation of prior handbook policies. Rather than constituting a "change," GC 9(a) is a "mere continuation of the *status quo*." (*Katz*, at 746)[10]

B. Board Principles as to the Meaning of "Change"

1. General Legal Principles

Assuming, *arguendo*, that the 9/4/12 policy were deemed a "change," Board principles provide guidance as to what is and what is not an unlawful unilateral change. The Court in *Katz* further noted that it "did … not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action." (*Katz, supra*, at 748, Fn.16) The Board, as noted by the Court, has held that not every unilateral departure from a previous policy or practice constitutes a violation of the Act. *Peerless Food Products, Inc.*, 236 NLRB 161 (1978). The various circumstances and analyses to assess lawful and justifiable unilateral action were succinctly delineated by ALJ Samuel M. Singer, and adopted by the Board, in oft-cited, *U.S. Postal Service*, 203 NLRB 219 916 (1973), at 919:[11]

> However, the Board and Courts have also held that not all direct dealings and unilateral actions are unlawful. Such conduct may be immunized where it appears, for example, that the employer's conduct falls **within the realm of management prerogatives; or** the employer's **action constitutes a continuation of past operational policies or practices so that it constitutes "a mere continuation of the *status quo*"** (*N.L.R.B. v. Katz, supra*, at 746); or the conduct requires prompt attention because of business necessity; **or the changes involved are trivial, of a *di minimus* nature or have only a slight or insubstantial impact**; or the employer has contractually preserved the right to take unilateral action through an effective "management prerogative" clause. (Citations have been omitted from the original. Emphasis has been supplied.)

---

[10] See also, *Trading Port* , 224 NLRB 980 (1976) (Introduction of time clock to more accurately measure employees' productivity against previous standards of production did not require bargaining as there was no significant change in the *status quo*.) See also, *Courier Journal*, 342 NLRB 1073, 1094 and 342 NLRB 1148 (passing onto employees the cost of insurance premiums was held to be an established past practice). *Westinghouse Electric Corp*. (*Mansfield Plant*), 150 NLRB 1574 (1965) (subcontracting work out of the bargaining unit as part of a recurrent past practice, and having no adverse impact on unit employees' jobs did not violate the Act.)

[11] See also, *Soule Glass and Glazing Co.,* 652 F.2d 1055, par.79 (1981)

Several of these conditions and circumstances apply to the subject case and serve to immunize the Employer's conduct in issuing the 9/4/12 Policy. .

2. Extent of Departure from Previous Policy or Practice

The discussion immediately above as to the 9/4/12 Policy's constituting no change, is likewise applicable to minor changes. Should the change not fundamentally modify the *status quo,* it will likely not be found violative under the *Katz* rationale.

Where a modification is deemed a "change," the degree of modification required by the Board to determine its legality is measured by the extent to which it departs from the existing terms and conditions of the employees. *Southern California Edison Co.*, 284 NLRB 1205, Fn.1 (1987) Board precedent also provides guidance as to the degree of departure required to determine whether the modification is "substantial, significant, or material." Thus, in *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), the employer's introduction of a time clock to more dependably monitor and enforce an "in-and-out" policy, was found to fall short of "such a **radical change,**" since the in-and-out rule itself remained intact. In *Cooper-Jarrett, Inc.*, 237 NLRB 327 (1978), the Board, relying on *Rust Craft,* concluded that a change in the formula by which productivity was measured, was not substantial, significant, or material since the productivity rule itself had not changed. Similarly, in *UNC Nuclear Industries*, 268 NLRB (1984), the Board, adopting the ALJ, held that unilateral implementation of an oral test as part of an established training program was not a bargainable change. Relying on *Rust Craft,* the ALJ found the change to depart from the established program **"in only an insignificant way."** 268 NLRB 1848 (1984)

3. Trivial and/or *Di Minimus* Changes

The Board also considers the degree to which a modification could be viewed as going beyond a trivial or *di minimus* modification.

In *Peerless Food Products, supra*, the Board concluded that a change restricting a union representative's access to the production floor to discuss non-contractual matters fell far short of the "significant, substantial and material" standard. In his concurring opinion, Member Penello cautioned the General Counsel from pursuing trivial matters and processing violations of a "minor" or "isolated character." Id. at 162. Similarly, in *Sprint Communications*, 343 NLRB 987 (2004), the employer's having a representative participate in a third step grievance meeting by teleconference rather than by his usual physical presence, was held not violative. In *LaMousse, Inc.*, 259 NLRB 37 (1981), an expansion of break times from ten minutes to fifteen minutes was found by the Board not to be of a sufficiently substantial nature or significance as to constitute an unlawful change. In the same vein, an alleged unilateral wage reduction, based solely on a time-keeping error, which affected only a few employees, and involving only an insubstantial amount of money, was found not to be substantial, material or significant. *Alexander Linn Hospital Association and Hospital*, 289 NLRB 103 (1988).

4. Nature and Degree of Adverse Impact on Employees: Non-Financial

The Board also evaluates alleged unlawful changes in terms of the presence, absence and/or extent of adverse impact upon employees. Board precedent further demonstrates that a change which results in some incidental or minor adverse impact on employees, will not violate the Act.

In *Berkshire Nursing Home*, 345 NLRB 220 (2005), a directive that employees use a different parking lot, resulting in their being required to walk an additional two to four minutes to reach the employer's entrance, was held to be no more than a **"relatively minor inconvenience to employees,"** and "was not substantial, significant or material," nor was it a "statutorily cognizable change." (Emphasis supplied.)

Similarly, in *Newcor Bay City Div. of Newcor*, 351 NLRB 1034 (2007), a new directive that a non-unit employee make a fifteen minute mail run, which had formerly been performed by a unit employee, was held not to violate the Act. The Board's conclusion was based on the unit employee's having suffered no loss of hours or pay. See also, *Westinghouse Electric Co., (Mansfield Plant)* 150 NLRB 1574 (1965), where the established and recurrent subcontracting of unit work was found to have no impact on unit employees.

5. Nature and Degree of Adverse Impact on Employees: Financial

The Board is less likely to find a change to be substantial, significant and material when it places minimal financial burdens on unit employees.

Thus, the Board found a union/employer's unilateral rescission of employees' credit card privileges to be violative. The change resulted in employees being forced to use their own money, and having to wait at least one week, thereafter, for reimbursement. *Louisiana Council No. 17*, 250 NLRB 880 (1980) The Board has also evaluated an alleged unlawful unilateral change where events involving non-unit employees affected those in the bargaining unit. In *Torrington Co., Inc.*, 305 NLRB 938 (1991), the employer eliminated internal coordination of medical benefits between spouses who were both employed by the same company. The Board concluded that while this change had an **"incidental, adverse impact"** on unit employees' overall financial concerns, the change did not affect the terms and conditions of unit employees and, therefore, was not bargainable. Id. at 940. (Emphasis supplied.)

In *Laurel Baye Healthcare*, 352 NRLB 179 (2008), the employer therein imposed a number of unilateral changes. Among them was a new dress code which added a number of appearance restrictions as well as requiring that unit employees purchase their own white shoes **and** white scrubs. The decision presents no evidence that those employees were required to purchase a specific uniform prior to the change. All changes were found to be violative.

In *Crittenton Hospital*, 342 NLRB 686 (2004), two of three Board members found that a change to RNs' uniform policy (a policy which was totally separate from that covering other

Hospital employees), which required RNs to purchase new scrubs "at not an insignificant cost" was found violative. There is no indication in *Crittenton* that RNs were required to purchase work apparel prior to the change.

6. Whether the Modification Involves More Stringent Enforcement of Formerly Lax Policies

In *United Rentals*, 350 NLRB 955 (2007), the Board's finding of a violation was analytically premised upon the employer's more stringent enforcement of a uniform policy. Prior to the change, the employer merely required a "proper appearance" or to "wear a uniform in a prescribed manner" (which included the ability to wear jeans and sweatshirts). The change resulted in a more stringent dress code where employees could be reprimanded for not wearing button-down shirts and khakis.

7. Whether the "Change" Was a Proper Exercise of Management Prerogatives

The Board has also evaluated an alleged change in terms of whether it results from the proper exercise of management prerogatives.[12] Contrary to the ALJ's conclusion (7 ALJD 38-42), where such prerogatives are found, the matter is deemed exempt from notice, consultation, and bargaining with a union. Thus, in *Irvington Motors, Inc.*, 147 NLRB 565 (1964), a requirement that salesmen make five telephone calls per day was considered to be within the realm of a "normal management function" and not subject to bargaining. In *Rust Craft*, *supra*,

---

[12] The Hospital also submits that application of the "core purpose" rationale is applicable to this healthcare employer. In *Peerless Publications*, 283 NLRB 334 (1987), the Board recognized that an employer may overcome the presumption that a matter which affects the terms and conditions of employment is a mandatory subject of bargaining, by establishing that the subject matter goes to "protection of the core purposes of the enterprise." If so, the rule must, on its face, 1) be narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and 2) appropriately limited in its applicability to accomplish the necessarily limited objectives.

While the ALJ here correctly noted that the Board in *Virginia Mason Hospital*, 358 NLRB No. 64 (2012) limited the *Peerless Publications* holding to the newspaper industry, Respondent submits that the case was wrongly decided and should be overruled. Simple common sense dictates that the principal or "core" purpose of healthcare institutions is the treatment and care of patients. It is further submitted that the rationale in the dissent of then-Member Hayes in *Virginia Mason Hospital* is applicable to the instant matter. The 9/4/12 Policy goes to protecting the core purposes of the Hospital. Additionally, as the 9/4/12 Policy meets both the *Peerless Publications* standards, it overcomes any presumption that it is a mandatory subject of bargaining.

the introduction of time clocks "was but a part of the day-to-day managerial control which it was free to exercise."

Little Rock Downtowner, 148 NLRB 717 (1964), involved a rule requiring maids to wash windows daily. The ALJ found that the rule had been abandoned and that its renewal "constituted a new and independent action" which required notice and bargaining. However, the Board, reversed the ALJ on that point, stating:

> This type of work order does not exceed the compass of the job duties the affected employees were hired to perform and falls within the normal area of detailed day-to-day operating decisions relating to the manner in which work is to be performed. In our view, it is not of such a character as to require under good-faith bargaining standards, prior notice to and consultation with the union. (Citing *Irvington Motors, Inc*.)

Likewise, in *Alexander Linn Hospital, supra,* correction of a payroll error, rather than constituting a unilateral change in wage rates, was held by the Board to be an administrative matter which was within the realm of management prerogative.

C. Under Board Precedent, Implementation of the 9/4/12 Policy Would not Violate the Act

Applying the above legal principles to the relevant and pertinent facts in the subject case, there can be no question that the alleged change herein is immunized from bargaining obligations. The following evaluates the implications of the precedent set forth above with the facts posed herein.

1. Any Departure from the Employee Handbook Policies Could, at Most, Be Viewed as *Di Minimus*

In accord with the precedent set forth above, it is submitted that even if the 9/4/12 Policy were to be viewed as a "change," it could hardly be deemed substantial, significant, or material, as it is not a departure from prior policy. Contrary to the ALJ's conclusions, the 2003 policy was no longer in effect as of April 2009. All four Employee Handbooks issued between April 2009

up to the time of the alleged change, recognized the existence and future need for appropriate attire as well as colored scrubs. The OR RNs had been wearing assigned green scrubs for years prior to this dispute. RNs in pediatrics and cardiopulmonary had been wearing color-appropriate scrubs prior to the alleged September 4, 2012 change.

All four Employee Handbooks preserved the Hospital's right to modify the appearance policy. These Employee Handbooks contain all appearance and disciplinary provisions which ultimately found their way into GC 9(a). The factual comparisons examined earlier in this Brief establish that the 9/4/12 Policy, despite different structure and verbiage, contains and adopts all appearance and disciplinary requirements encompassed within the Employee Handbooks. The conceptual and substantive provisions of the 9/4/12 Policy could, at the very most, be deemed a *di minimus* departure from that set forth in the previously established policy.

2. There Has Been No Adverse Financial Impact on Unit Employees

The subject case presents no financial considerations which are present in Board precedent where findings of unlawful changes have been made. Thus, unlike the facts in *Laurel Baye Healthcare*, 352 NLRB 179 (2008), where the employees were, apparently for the first time, required to purchase both white shoes and white scrubs, here the Hospital's unit RNs had been required to purchase their own scrubs before and after implementation of the 9/4/12 Policy. Further, the record here is clear that scrubs can be purchased for as little as $13.00 per set. The evidence further establishes that Hospital RNs could afford to purchase up to 200 sets of scrubs, along with coordinating shoes, socks and accessories. (Tr 104-5;117) Additionally, the Hospital's unit RNs are not in the same position as those at *Crittenton Hospital* who were confronted with a dress policy for RNs, separate and apart from that of other employees, which required RNs, apparently for the first time, to purchase scrubs "at not an insignificant cost." 342 NLRB 686 (2004) It is noted that in *Crittenton*, there is no indication that prior to the change,

RNs were required to purchase their own work apparel, unlike here where it is undisputed that RNs have purchased their own scrubs both prior to and after the 9/4/12 Policy was implemented.

Moreover, the following must be considered:

- The Hospital provided the three sets of color-coded scrubs to provide a period of transition period for all clinical employees, to help absorb any immediate monetary outlay, for both unit and non-unit employees. Further, the RNs have paid for their own scrubs before the alleged change and will continue to pay for their own scrubs when and if the Hospital-provided three sets of navy blue scrubs wear out or are otherwise discarded and/or not used.
- Some RNs, prior to the 9/4/12 Policy had, among their collection of scrubs, full sets of navy blue scrubs or components thereof. (Tr. 73, 104-5)
- As noted above, the testimony of AGC witnesses reflects that RNs had previously been capable of purchasing "inventories" of up to 200 sets of scrubs along with coordinating shoes, socks and accessories. Coupled with the fact that a set of scrubs can cost as little as $13.00 per set, the evidence establishes that the cost of blue replacement scrubs would pose no new financial detriment to the Employer's unit RNs. (Tr. 104-105, 117)
- Under the verbiage of the policy in existence not only immediately before September 2012, but since April 2009, the Hospital could have required all employees to purchase scrubs of assigned colors.
- The 9/4/12 Policy has had no effect on unit RNs' compensation.

3. There Has Been No Other Adverse Impact on Unit RNs

The AGC presented two RNs - out of a unit cadre of 120 - as witnesses. Both testified to a perceived loss of individuality and creativity claimed to have been brought about by the required navy blue scrubs. It is submitted that those concerns are not only irrelevant, but must be subordinated to the higher needs of patients, the community, visitors and the Hospital. Such concerns should not and must not predominate. Not unlike the police officer who walks a beat dressed in a distinctive dark blue uniform and wearing a badge, those in need must be able to identify those among us who have the means to provide help.

A comparison of non-financial factors involving scrubs and apparel reveal that both before and after the 9/4/12 Policy:

- Unit RNs must continue to wear scrubs. (Tr.86)
- Unit RNs remain responsible for laundering their own scrubs.[13]
- Unit RNs continue to don and doff their scrubs at their homes. (Tr.89,115)
- Unit RNs continue to choose any style of scrubs they desired. (Tr.86)
- RNs in the cardio-pulmonary area continue to wear pre-9/4/12 Policy sapphire-colored scrubs. (Tr.163-4)
- Unit RNs continue being subject to discipline for being out of uniform. (Tr.96; GC 9(a); R 1; R 2; R 3; GC 11 and GC 12)
- No unit RNs have been disciplined for uniform violations before or after the 9/4/12 Policy. (Tr.184)
- Scrubs have had no adverse effect on unit RNs' performance of their duties and responsibilities. (Tr.166)

The two AGC witnesses who bemoaned the restriction on the wearing of hoodies and fleece jackets both admitted that these items can be worn in an unattractive manner and can present an unprofessional appearance. Witness McAllister's concerns over staying warm in the Emergency Department simply disregarded the 9/4/12 Policy's permitting the wearing of coordinating solid or printed warm-up jackets and that solid-colored scrubs could be worn underneath the navy blue scrub top. Accordingly, the 9/4/12 Policy incurred no adverse effects of a non-financial nature.

4. The 9/4/12 Policy is No More Stringent Than Those That Preceded It

All four Employee Handbooks issued by the Hospital from April 2009 to April 30, 2012, contain appearance and disciplinary policies, which closely track corporate models. The 9/4/12 Policy merely incorporates the disciplinary measures for appearance violations into one local

[13] The OR RNs have worn green scrubs before and after the 9/4/12 Policy. Unlike other RNs, they don and doff their scrubs daily at the Hospital. The Hospital must issue clean scrubs to them daily since it is required by New Jersey regulations and infection control standards. (Tr.136)

hospital appearance policy. As brought out on cross examination of AGC witness McAllister, employees were aware that they could be subject to discipline for uniform violations well before September 4, 2012. GC 9(a) memorializes the nature of discipline, consistent with that contained in the Employee Handbooks, while also exercising the discretion to do so which had been retained in the Employee Handbooks. Moreover, the record contains no evidence that discipline has ever been issued for uniform-related reasons before or since September 4, 2012.

5. The 9/4/12 Policy Reflects the Proper Exercise of Management Prerogatives and Promotes the Care and Treatment of the Hospital's Patients

Member Hayes, in his dissent in *Virginia Mason Hospital I.*, 357 NLRB No. 53 (2012), astutely observed:

> A hospital's singular purpose of providing essential, often critical, care and treatment to the community has been recognized by the Supreme Court and the Board. "Hospitals carry on a public function of the utmost seriousness and importance." *Beth Israel Hospital v. NLRB*, 437 US 483, 511-512 (1978). "The central 'business' of a Hospital is not a business in the sense that the term is generally used in industrial context. The hospital's only purpose is the care and treatment of its patients… I would not elevate the interests of unions or employees, whose highest duty is to patients, to a higher plane than that of the patients." *NLRB v. Baptist Hospital, Inc.*, 442 US 773, 791-793 (1979) (Chief Justice Burger concurring). See also *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976) recognizing "the primary function of a hospital is patient care."

While it should go without saying, it nonetheless must be said in this case. Identification of, and distinguishing between, clinical personnel, by the color of their scrubs, facilitates the treatment and care of the Hospital's patients. One can envision endless scenarios and episodes where identification of various clinical employees by patients, visitors, and other employees would serve to enhance patient treatment and/or provide security within a hospital's walls, and thereby facilitate the Hospital's operations and achievement of its purpose for existence. The

9/4/12 Policy could in no way be viewed as inconsistent with achievement of the protection of the Hospital's primary purpose. Moreover, the simple application of common sense dictates that professional appearance - institutionally and individually - brought about and aided by a system of assigned color scrubs, serves other beneficial purposes. These include, *inter alia*, imparting confidence to arriving patients and visitors from a rural community that they are entering a facility where professionalism, organization, structure, hygiene, discipline and high-quality care await.

The Hospital has implemented a policy which essentially boils down to a mere change in the color of scrubs. Management's authority to assign the scrub colors has been permitted and consistent with Employee Handbook policies since April 2009. Yet, this minor, if any, modification imparts innumerable benefits and advantages to all persons within and outside the facility and can only be viewed as enhancing and advancing the Hospital's overriding purpose: treatment and care of patients within the Salem County community. As such, the policy must be deemed both a responsibility and prerogative of the Hospital's management. Under the circumstances here, if this simple enhancement would be denied to a hospital's management, what, if anything, could any hospital's management do to implement, on a hospital-wide basis, to enhance the ability both patients and visitors to identify and distinguish between employees, caregivers and others?

No one can question that the Board over the years has demonstrated expertise to determine labor relations issues in the healthcare industry including, *inter alia*, representation issues such as unit scope and composition, administration plus enforcement of Section 8(g), and the protection and enforcement of healthcare industry employees' Section 7 rights in their relationships with healthcare employers and the unions representing employees in the healthcare field *via* Sections 8(a) and (b) of the Act. Nevertheless, it is submitted that the Board has minimal, if any, expertise in recognizing and understanding the entire panoply of issues and

demands put upon the management of healthcare institutions. These include, *inter alia*, the following:

- Ongoing responsibility for provision of the highest level of care in treatment of patients and the essential need to take all measures to enhance that primary purpose;
- Continuous achievement of compliance with an unending array of Federal and State statutes, regulations, encompassing every phase of the institution's operations;
- Perpetual necessity to take all measures to avoid exposure from untold types and theories of legal actions based upon Federal and state statutes and regulations, brought by sources in the public and private sectors, as well as the need to take all necessary steps, within the present highly-litigious environment, to avert common law tort and negligence actions which can, individually and collectively, threaten the continued existence of the healthcare institution itself; and
- The continuous need to manage the institution in such a manner as to meet all budgetary and financial objectives and obligations.

Accordingly, it is submitted that the ALJ, like the Board, is not in a position to define, describe, minimize, limit, restrict, or even amplify that which constitutes the rights of management and management prerogatives in the healthcare environment, and to do so would be presumptuous. Yet, the ALJ here has simply refused to embrace the concept that a Hospital must possess and exert its inherent management rights and prerogatives to best serve the patients and its community. Here, not only has the ALJ simply denied the existence of a Hospital's management rights and prerogatives, but has also failed to examine or even consider that those rights, in this particular case, have been memorialized within the handbooks prior to the advent of any union activity.

It is further submitted, that in this matter, the failure to recognize the Hospital's inherent management rights, as well as the rights recorded and reserved in the Employee Handbooks, elevates the interests of the Union and unit RNs, whose highest duty is to patients, to a higher plane than that of the patients whom they have pledged to serve.

X. THE ALJ FAILED TO CONSIDER FACTS WHICH BELIE ANY CONTENTION THAT THE 9/4/12 POLICY IS A SUBSTANTIAL, SIGNIFICANT, OR MATERIAL CHANGE, AND FURTHER FAILED TO RECOGNIZE AND CONFRONT ISSUES INVOLVING THE POLICY'S HOSPITAL-WIDE COVERAGE OF BOTH UNIT AND NON-UNIT EMPLOYEES, PATIENTS, AND VISITORS

If any entity has been exposed to adverse impact in this matter, it is the Hospital. The ALJ simply failed to consider the impact of his findings, conclusions and Order on the Hospital, its patients, visitors, as well as non-unit employees.

A. Impact of the ALJ's Faulty Analysis, Findings, Conclusions and Order

Were the ALJ's flawed conclusions and Order to be adopted, the entire Hospital-wide program, covering both unit and non-unit employees, which was designed and implemented to benefit patients, staff, visitors and community, would be held hostage to the Union's vicissitudes and potential intransigence as to the color of RNs' scrubs. As the RNs comprise a substantial portion of the cadre of employees involved with clinical functions, the entire Hospital-wide program, which encompasses non-unit employees, could not be reinstituted unless and until agreement or a valid impasse would be reached in negotiations. Under these circumstances, implementation of the entire scrubs color coding program would be blocked. Further, even if an agreement or valid impasse were reached, the unit RNs would have been given preference over non-unit employees in the selection of their uniform colors. Also, if it a valid impasse were to be reached, the entire program would be frozen as the program is incapable of partial implementation. Thus, without unit RNs' involvement or inclusion, the program would foreseeably be ineffective since patients, visitors, and staff, would be confronted with a hodge-podge of scrubs of varying colors being worn by RNs. This would obviously defeat the purpose of the initiative.

Thus, the ALJ's failure to properly analyze the 9/4/12 Policy in relation to the pre-existing Employee Handbook policies has resulted in erroneous, flawed and unsupported

conclusions. Further, his resulting Order would have deleterious and detrimental effects on all those associated with the Hospital including patients, visitors, non-unit employees and the community.

B. The Union's Dilatory Tactics Belie The Significance of the Alleged Change

Such result is particularly offensive and onerous under the circumstances here. These include the charge being lodged nine months after the Union had notice of the 9/4/12 initiative, and five months after the Hospital had expended over $8,000 to purchase three sets of scrubs for 251 unit and non-unit employees, and the Hospital-wide program had been fully implemented. If the alleged change was so significant, material and substantial, common sense dictates that the Union, as the RNs' supposed champion, would have filed a charge immediately upon notice of the alleged change. Further, if this had been such a radical change, would not the Union have sought, and the Region pursued, §10(j) injunctive relief? This obvious complacency by the Union in pursuing any prompt relief, in itself and by application of common sense, constitutes undisputed evidence that the 9/4/12 Policy was not viewed as significant, material or substantial by the Union or its RN constituents. The ALJ simply, and erroneously, fell back on §10(b) to avoid confronting the reality that the Union's delay evinces, establishes, and then compels the conclusion that the 9/4/12 Policy was not substantial, significant or material.

XI. THE ALLEGED REFUSAL TO PROVIDE REQUESTED INFORMATION AND BARGAIN OVER THIS MATTER IS WITHOUT MERIT

As discussed previously, the 9/4/12 Policy is not a matter subject to bargaining obligations for a number of reasons. Further, the presumption of "bargainability" has been overcome since the policy is an appropriate exercise of management prerogatives and discretion - discretion which was also specifically retained in all four Employee Handbooks issued since April 2009.

Under these circumstances, the information requested by the Union seeks items concerning a matter which, in the first instance, is not bargainable. If the underlying subject matter is not bargainable, it must follow that the request for information relating thereto must likewise be deemed immune from production. Moreover, on its face, the request seeks information concerning non-unit employees as it seeks policies which encompass and affect them, absent any showing of relevance. (See GC 7(a), items 1 through 4.)

Further, the request for information must be viewed for what it really is. Being submitted ten months after the Union's awareness of the contemplated modification to the scrub policy, and five months following the 9/4/12 Policy's implementation, the Union "orders" the Hospital to cease and desist from implementing the policy. While the Union unquestionably has the right to file a charge within six months of the policy's implementation under § 10(b), there is more here than meets the eye. Part and partial of the Union's complacency is a conspicuous manipulation of Board processes. Previously, the Union filed five charges asserting unilateral changes only to withdraw all five, absent settlement. None of those five withdrawn charges, however, was tied to an information request. Thus, it takes little intellect or imagination to recognize that the Union and AGC have sought to breathe life into a weak and baseless johnny-come-lately attack on a non-bargainable policy, by tying it to a request for information where the standard of relevance is extremely broad.

The Union and AGC have, in effect, attempted to pull this case into the halo effect of the two prior information request-related Board Orders. Those decisions derived solely from the Hospital's legitimate right to test certification. Yet, the present case involves **a discrete matter**, entirely separate and apart from the broader issues involved in the two prior Board Orders. Even were the parties here to have been engaged in a long-term bargaining relationship, it is submitted that implementation of this policy, in the circumstances of its being totally consistent

with pre-election and pre-certification policy, would not rise to the level of a violation. The policy is not a "change," or even a *di minimus* change. It is an exercise of long retained management discretion being utilized to enhance treatment and care of patients consistent with past policy. Accordingly, under the circumstances here, the policy must be viewed as a non-bargainable matter. The post-charge request for information is without merit.

XII. DECISIONS OF THE U.S. CIRCUIT COURTS OF APPEAL COMPEL DISMISSAL OF THIS COMPLAINT

It is submitted that the ALJ erred in summarily dismissing the Hospital's arguments, based on *Noel Canning* and *New Vista Nursing and Rehabilitation*, that the previous Board decisions affecting the Hospital are invalid and unenforceable, and that the AGC had no authority to prosecute this matter.

Then-Members Block and Griffin participated on a three-member panel which concluded that the Hospital engaged in violations in Case Nos. 358 NLRB No. 95 (2012) and 359 NLRB No. 83 (2013). The Circuit Court of Appeals for the District of Columbia Circuit has ruled in *Noel Canning* that President Obama's recess appointments of both Block and Griffin were unconstitutional, as they were not appointed during the "recess" of the Senate. The Hospital respectfully requests that the Board defer to the Court's holding and rationale, despite the United States Supreme Court having granted *certiorari* in *Noel Canning* on June 20, 2013.

Also, former-Member Becker was a participant on the three-member panel which not only issued the August 3, 2011 underlying certification in this matter, but was also on the panel in the subsequent test of certification case reported at 357 NLRB No. 19 (November 29, 2011). The U.S Circuit Court of Appeals for the Third Circuit, in *New Vista Nursing and Rehabilitation*, adopting much of the D.C. Circuit's reasoning in *Noel Canning*, has ruled that former-Member Becker's appointment was invalid; and further finding that the Board's actions could be

invalidated due to the appointment. The Hospital adopts and asserts the reasoning of the holding of the Third Circuit.

The Hospital respectfully submits that the ALJ's findings and conclusions which simply skirt *Noel Canning* and *New Vista,* are erroneous. The ALJ is hardly granted latitude to recommend that the Board defer to the Courts. It is submitted that the Board must do so, rather than ignoring the Circuit Courts' decisions and proceeding as if those decisions have no effect on cases before it. Accordingly, the Respondent Hospital asserts that the above-cited cases involving former Members Becker, Block and Griffin are invalid and unenforceable.

The Hospital further submits that the ALJ erred by dismissing its contentions that as the AGC was not properly appointed to his position, he lacked authority to issue and prosecute the instant complaint involving the Hospital. In part, Respondent's assertions are based on *Noel Canning* and *New Vista* which have resulted in findings that the appointments of former Members Block, Griffin and Becker were invalid. Accordingly, absent a constitutionally-appointed quorum, the authority of the AGC to prosecute these matters is likewise invalid.

Despite the Circuit Courts' rulings, the AGC has defied their rulings by continuing to issue and prosecute complaints. The AGC is not a presidential appointee and the Senate likewise has refused to confirm his nomination. While he is to act "on behalf of the Board," the prior Board was not constitutionally configured in the opinions of the U.S. Circuit Courts of Appeal for the D.C., Third, and, more recently, the Fourth Circuit.[14] Accordingly, his actions are not authorized. Additionally, his occupying the AGC position is in violation of the Federal Vacancies Reform Act., 5 USC § 3345(a). This view has recently been articulated by U.S. District Court Judge Benjamin H. Settle of the Western District of Washington in *Hooks v. Kitsap Tenant Support Services, Inc.,* Case No. CV-13-5470 (W.D. Washington, August 13,

[14] See *NLRB v. Enterprise Leasing Company Southeast, LLC,* Case No. 12-1514 (4th Cir., July 17, 2013)

2013). The AGC's actions, on behalf of the unconstitutionally-configured Board is, at a minimum, *ultra vires*.

Under these circumstances, the ALJ's observation that the Board "is now stacked with a full house," fails to diminish the issues which continue being litigated involving and affecting the Employer and others before the United States Supreme Court and the United States Circuit Courts of Appeal. There are very real prospects that all of the Hospital's matters, which have been prosecuted by the AGC, and previously decided by former Members Becker, Block and Griffin, have been and are unauthorized, invalid, *ultra vires*, and unenforceable.

CONCLUSION

The Policy is a discrete matter - separate and apart from the previous Board Orders. It poses a distinct issue which the Board should consider as precisely that. It is an issue which stands apart from previous issues which have been and are being litigated. The Hospital's implementation of its Dress Code and Appearance Policy on September 4, 2012, posed no change and was consistent with existing policy. Even if it were deemed to be a "change," Board precedent holds that the policy would not rise to the level of a Section 8(a)(1) and (5) violation as, at most, it was a *di minimus* departure from prior policies, was not substantial, significant or material, had no appreciable impact on unit RNs, and was a proper exercise of a management prerogative. As the policy further enhances the primary and core purposes of the Hospital, any presumption that the change would be subject to bargaining has been removed. The request for information, even though a product of the manipulation of the Board's processes, is inconsequential inasmuch as the policy itself is not a bargainable subject under these circumstances. Moreover, the prosecution of this matter is *ultra vires* as the Board had been unconstitutionally configured and the AGC lacked authority to prosecute this Complaint.

For the reasons set forth herein, it is urged that the Board reverse the ALJ and dismiss the Complaint in this matter.

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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE MICHAEL ROSAS

SALEM HOSPITAL CORPORATION	)	
a/k/a	)	
THE MEMORIAL HOSPITAL	)	
OF SALEM COUNTY	)	
	)	
Respondent	)	**CASE NO. 4-CA-097635**
	)	
	)	
HEALTH PROFESSIONALS AND ALLIED	)	
EMPLOYEES, AMERICAN FEDERATION	)	
OF TEACHERS/AFL-CIO	)	
	)	
Charging Party	)	

CERTIFICATE OF SERVICE OF
RESPONDENT'S BRIEF IN SUPPORT OF 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 Brief in Support of 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, 2012, a copy of "Respondent's Brief in Support of 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