

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOSPITAL OF BARSTOW, INC. d/b/a	:
BARSTOW COMMUNITY HOSPITAL	:
	:
and	: Case No. 31-CA-090049
	: Case No. 31-CA-096140
CALIFORNIA NURSES ASSOCIATION /	:
NATIONAL NURSES ORGANIZING	:
COMMITTEE	:

**RESPONDENT’S ANSWERING BRIEF TO COUNSEL FOR THE ACTING GENERAL
COUNSEL’S EXCEPTIONS TO THE DECISION BY ADMINISTRATIVE LAW
JUDGE JAY R. POLLACK**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board (hereafter, the “Board”), Respondent Hospital of Barstow, Inc. d/b/a Barstow Community Hospital (hereafter, “Barstow” or the “Hospital”) hereby files, by and through the Hospital’s Undersigned Counsel, this Answering Brief to the Exceptions filed by Counsel for the Acting General Counsel (hereafter, the “AGC”) to the Decision issued by Administrative Law Judge Jay R. Pollack on September 9, 2013.

BACKGROUND

On September 9, 2013, Administrative Law Judge Jay Pollack (hereafter, the “Judge” or “Judge Pollack”) issued a Decision in which he found that Barstow violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereafter, the “Act”), by (1) allegedly refusing to offer proposals or counter proposals until the Union offered a full contract proposal and (2) declaring impasse at the 9th collective bargaining session and refusing to continue negotiations unless the Union agreed to discontinue their usage of Assignment Despite Objection

forms. The Judge also found that deferral to arbitration would be inappropriate in this case. (ALJD 7:48-8:7.) In response to the Decision, Barstow filed timely Exceptions with the Board, whereby the Hospital has asserted, *inter alia*, that the Judge's findings and conclusion that the Hospital violated Sections 8(a)(5) and (1) of the Act are unsupported by the record and / or controlling law.

In response to the Decision, the AGC filed three Exceptions with the Board. The Hospital opposes the first two of the AGC's Exceptions.¹ Specifically, the AGC's first Exception asserts that the Judge erred in his finding that "during the last week of August 2012, the Union learned that Respondent had changed its policy on how nurses could obtain training for their required certifications in basic life support, advanced cardiac life support and pediatric advance [sic] life support which must be renewed every 2 years. In fact, Respondent had made these changes in April, prior to the Union's election as bargaining representative." (ALJD 3:41-45.)

The AGC's second Exception asserts that the Judge erred in failing to find and conclude that Respondent violated Section 8(a)(5) and (1) of the Act by, absent an overall good faith impasse during negotiations and without prior notice to the Union, implementing a policy that allegedly required Nurses to utilize HeartCode to obtain their required training certifications and re-certifications.

SUMMARY OF ARGUMENT

The AGC asserts on the first page of his Brief that Judge Pollack "did not address the unilateral change allegation contained in paragraph 12 of the Complaint concerning Respondent's requirement that employees obtain certifications and re-certifications using the

¹ The AGC's third Exception concerns a correction to the address of Region 31 of the NLRB in the Judge's recommended Notice to Employees. Subject to and without waiver of Barstow's position that the Hospital has not violated the Act in any respect, and therefore, the Board should not require the Hospital to post any Notice, Barstow has no objection to this Exception.

HeartCode program. But the Judge did address the allegation. He stated clearly and correctly that the Respondent had made changes to how nurses could obtain training for their certifications prior to the Union's certification. (ALJD 3:41-46).

Credible evidence of Record shows that in January 2012, the Hospital began preparations to replace its live, in-house instruction for nurse certifications in life support with a computerized system for offering such instructions called HeartCode. Staff was notified of this change beginning in April 2012, and the first nurse to complete HeartCode training did so on June 11, 2012. The Union was certified on June 29, 2012.

The AGC argues in his Brief that a unilateral change requiring bargaining occurred in August, 2012. He relies for this premise on the August date of formal adoption of the written policy concerning HeartCode, and incorrectly represents that the policy requires HeartCode to the exclusion of any other means of certification training. However, the Judge was correct in relying on the overwhelming evidence of Record referenced below for concluding that the program was adopted, announced, and in place well before the Union's certification. The AGC's reliance on the fact that the ministerial adoption of the formal written policy occurred after the Hospital had implemented HeartCode is misplaced. Instead, the Judge correctly concluded that the *status quo* with respect to certification training included HeartCode, and the plain language of the policies formally adopted thereafter did nothing to change that.

Significantly, both prior to and following inception of HeartCode training, nurses were allowed to receive offsite training with live instructors for the certifications at American Heart Association approved facilities. Both prior to and following inception of HeartCode, nurses were paid for all of the time spent in instruction offered by the Hospital, but were not paid for time spent in instruction offered offsite.

The AGC asserts incorrectly that a change in job requirement occurred, but this is not true. Both before and after the adoption of the computerized system, the job requirement remained the same: that is, that nurses needed to be certified in basic life support, advanced cardiac life support, and pediatric life support and re-certified in each of those areas every two years. The computerization of the onsite training had no impact whatsoever on which certifications were required, when the certifications were required, whether nurses could take live instruction from courses offered outside the Hospital in lieu of HeartCode, or whether nurses would be paid for the time spent in instruction.

Thus, Judge Pollack was correct in finding that the Hospital implemented its HeartCode policy well prior to the Union's certification and no violation of the Act resulted from it. This finding should be upheld by the Board.

ARGUMENT

I. Judge Pollack Properly Relied On The Credible Evidence of Record in Determining That the Hospital's Implementation of Its "HeartCode" Policy Well Pre-Dated the Union's Certification

The AGC argues that the HeartCode policy eliminated all training options and instead required nurses to utilize HeartCode as the only means of obtaining their necessary certifications/re-certifications in August, 2012. (AGC Brief P. 5). But the weight of the evidence clearly credited by Judge Pollack proves that the Hospital changed its onsite training offering to HeartCode in April, 2012, well before the Union's certification on June 29, 2012. Moreover, the AGC offers no proof that nurses were ever required, in practice, to use HeartCode as the only means by which to satisfy their certification requirements, or that there was any change in payment method. (Tr. 385, 390, 396-399, 420-421, 469.)

Significantly, none of the AGC's witnesses at trial testified that they were required to take the HeartCode course at all. Ms. Mary Moon, a member of the Union's bargaining committee, testified that she had taken a live, offsite certification course and it was accepted by the Hospital in satisfaction of her re-certification requirement. (Tr. 304)

Contrary to the AGC's assertion, neither of the two written HeartCode policies presented at trial states that the HeartCode course was required to the exclusion of any other course. (GC Exhibits 22 and 23.) Instead, the HeartCode course simply replaced live instruction as the onsite means by which nurses could satisfy their certification requirements. Moreover, both before and after the inception of HeartCode, nurses who took the onsite instruction were paid for their time in doing so. Both before and after the inception of HeartCode, nurses who opted to take other American Heart Association approved courses offsite were not compensated for their time spent in instruction. Finally, both before and after the inception of HeartCode, certifications acquired at offsite American Heart Association approved facilities were acceptable to the Hospital as proof of the certifications required. Thus, contrary to the AGC's claims, neither pay nor the employees' options changed. (Tr. 384-386.)

Ms. Terri Jackson, Registered Nurse and Director of Staff Education at the Hospital, testified that each clinical employee requires certain certifications every two years. (Tr. 384.) She was first notified that HeartCode would be adopted as the Hospital's internal method of instruction in January 2012. She and the other staff educator were trained on the system in March 2012. She demonstrated the system for Hospital leadership in April 2012, issued the "Fact Sheet" about the system in April 2012, and the first nurse to complete certification on the system did so on June 11, 2012, nearly three weeks before the Union's certification. (Tr. 390-398.)

Ms. Jackson testified that, although neither the "Fact Sheet" nor the written policy required employees to take HeartCode to the exclusion of other courses, early on, she intended to require it. But it was never communicated to staff as an absolute requirement. Upon meeting with the leadership team at some point prior to August 2012, it was agreed that employees could continue to take live instruction offsite, and also agreed that employees would be paid for actual time spent in HeartCode instruction, even if time spent exceeded the guideline times set forth in the policy. (T. 404-408.)

Significantly, with respect to the AGC's claim that implementation of the policy affected nurses' pay, Ms. Nedal Alqualquili, Nurse Director of Medical Surgical, and Ms. Carrie Howell, Chief Financial Officer, testified without contravention that, despite the fact that the original HeartCode Policy established guidelines for the number of hours employees should be paid for each online course, in circumstances where nurses took longer than the guideline time periods, they were paid for actual time spent in instruction, and in circumstances where nurses took less than the guideline time periods, they were still paid the guideline amounts. (Tr. 423-428; T. 471-476.)

With respect to the question of whether nurses were allowed to take certifications offsite after the inception of HeartCode, what better proof is needed than the fact that the AGC's own witness took certification offsite? (T. 304.) Moreover, despite the AGC's characterization to the contrary in his Brief, the policies entered in evidence by the AGC nowhere state that offsite instruction would not be allowed. (GC Exhibits 22 and 23.) As explained cogently by Ms. Howell, the August 2 HeartCode-E-learning policy replaces classes previously led by instructors, but does not state that the HeartCode classes are required to the exclusion of other, external classes. (T. 472.) The modification of the August 2, 2012 policy in October 2012 (GC 23)

clarifies that HeartCode was not required, but preferred, clarifies the method of payment, and reiterates that certifications taken off campus would not be paid, as was the case prior to the Hospital's adoption of HeartCode. (T. 474.)

Finally, in addition to the testimony of Ms. Alqualquili ó who supervises the vast majority of the Hospital's nurses ó that every one of her nurses was paid for every minute they reported in HeartCode training, Ms. Howell, who is responsible for payroll, testified that no nurse at Barstow was paid for less than the entirety of the time spent in instruction offered by the Hospital². (T. 459-467; T. 474.)

Thus, the AGC's argument that a change occurred on August 2, 2012 is simply not supported by the Record. Although the date of the policy reflects its formal adoption, the Judge was well within the bounds of his authority to credit the testimony establishing that no change in terms or conditions of employment occurred following the Union's certification. In this regard, in the oft cited case of *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enforced*, 188 F.2d 362 (C.A. 3, 1951), the Board noted that "it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence, we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." This precept that the Board will not overrule the credibility determinations of administrative law judges, regardless of whether they are specifically based on demeanor, has since been widely cited by the Board. See, *Atl. Scaffolding Co.*, 356 NLRB No. 113 (Mar. 18, 2011); *In Re Fantasia Fresh Juice Co.*, 339

² In his Brief, the AGC references the fact that four nurses were paid for fewer hours of online training than they actually spent in training. This inadvertent error ó totaling a range of 1.8-4.3 hours - was corrected by the Hospital upon discovery and does not constitute the basis for finding a violation of the Act.

NLRB 928, 931 (2003); *Truck Drivers, Oil Drivers, Filling Station & Platform Workers' Union*, 314 NLRB 95, 96 (1994). Consequently, Judge Pollack's findings with respect to the change in policy should be upheld by the Board.

II. Judge Pollack Correctly Determined that the Hospital Did Not Violate The Act In Implementing Its HeartCode Policy.

The AGC's argument that a violation of the Act occurred in connection with the Hospital's implementation of HeartCode is fundamentally flawed, in that it relies upon three incorrect and unsubstantiated premises: (1) that HeartCode was implemented in August, 2012 instead of April, 2012; (2) that HeartCode training was required to the exclusion of other means of certification training; and (3) that nurses were paid differently for time spent in HeartCode training than for time spent in live instruction. As presented in Point I above, none of these premises is supported by the Record.

What the Record does support is that in April, 2012, prior to the Union's certification on June 29, 2012, the onsite Hospital instruction for required certifications was changed from live instruction to HeartCode, a computerized system which included live instructors only as part of the final portion of the training. The staff was notified of this change in April. The AGC claims that the Union did not learn of the change until August, and attempts to bootstrap this point to demonstrate that the change occurred in August. But the Union did not represent the nurses in April when staff learned of the new training method, and collective bargaining did not begin until July 16, 2012. (ALJD 3:7.) Thus, the fact that the Union may not have learned of the HeartCode training until months after it happened is neither surprising nor relevant.

Not every unilateral departure from a previous policy or practice constitutes a violation of

the Act. *Peerless Food Products, Inc.*, 236 NLRB 161 (1978).³ The various circumstances and analyses for 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 916, 919:

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 *de minimis* 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. (Internal citations omitted.)

The AGC quotes the Act and well settled case law for the premise that an employer violates Section 8(a)(5) "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S.190, 198 (1991), Accord *NLRB v. Katz*, 369 U.S. 736,743-48 (1962). But the condition of employment here has not changed; it is that, every two years, nurses must renew their certifications in basic life support, advanced cardiac life support, and pediatric life support. (ALJD 3:41-44). Thus, the case law cited by the AGC for the premise that changes in job requirements or qualifications may not be unilaterally implemented is inapposite. The job requirements or qualifications for nurses at Barstow remain unchanged.

The implementation of HeartCode is not a change in the *status quo*, in that the same certifications are required on the same time schedule for the same positions. The instruction of the case law cited herein supports the fact that, even if the adoption of HeartCode had occurred

³Even the Court in *Katz*, 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).

after the Union's certification, computerization of portions of required certification training does not fundamentally modify the *status quo*, and would not be found to violate the Act.

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 provides guidance as to the degree of departure required to determine if 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 not to amount to "such a radical change" since the in-and-out rule itself remained intact. In *Cooper-Jarrett, Inc.*, 237 NLRB 840 (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 was not changed. Similarly, in *UNC Nuclear Industries*, 268 NLRB 841 (1984), the Board, adopting the ALJ, held that unilateral implementation of an oral test as part of an established training program was not a change that required bargaining. Relying on *Rust Craft*, the Administrative Law Judge had found the change to depart from the established program "in only an insignificant way." 268 NLRB 1848 (1984).

The AGC argues that the HeartCode policy materially, substantially, and significantly impacted nurses' terms and conditions of employment and quotes from *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992) for the premise that, to be found unlawful, unilaterally imposed changes must be "material, substantial, and 'significant'" and must have a "real impact" upon or be a "significant detriment to" the employees or their working conditions. But no such changes occurred at Barstow. As discussed above, the inception of HeartCode preceded the Union's

certification by two months. But even if it had not, a change in instruction method does not constitute a unilateral change over which the Union has a right to bargain, especially when such change had no impact on the employees' pay, or upon the manner in which instruction could be obtained and compensated outside of the course offered inside the Hospital.

The AGC insists on a version of events that not only defies the Judge's credibility determinations, but is simply not supported by the Record in alleging that nurses were (1) denied the opportunity to take offsite certification classes; and (2) were paid differently for onsite training following the Hospital's adoption of HeartCode. The testimony of the AGC's own witnesses — members of the Union's bargaining committee — does not even support the AGC's representations concerning these points; nor does his interpretation of the written policies submitted as evidence at trial. Perhaps the biggest illustration of the lack of genuine support for the AGC's Exception is his reliance on an inadvertent error in a few hours of pay to four individual nurses for the premise that the HeartCode policy materially, substantially, or significantly affected nurses' terms and conditions of employment. Especially in light of the fact that dozens of nurses were paid for actual time spent in onsite computerized training, and the inadvertent error in pay to the four nurses was corrected after it was discovered, the AGC's argument in this last respect must fail.

The Record is replete with evidence supporting the accuracy of Judge Pollack's finding that the Hospital's change in policy with respect to methods of training for required nurse certifications occurred in April, 2012. Therefore, Judge Pollack's conclusion that the policy change did not constitute a violation of the Act is correct.

CONCLUSION

The AGC has offered no basis upon which the Board should overturn Judge Pollack's credibility-based finding that HeartCode was implemented as the Hospital's onsite form of certification instruction in April, 2012, or his determination that no violation of the Act occurred as a result of the HeartCode implementation. Consequently, the AGC's Exceptions should be denied.

Dated: Katonah, New York
November 6, 2013

Respectfully Submitted,

/s/ _____

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NATIONAL LABOR RELATIONS BOARD

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BARSTOW COMMUNITY HOSPITAL

Case Nos: 31-CA-090211
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and

CALIFORNIA NURSES ASSOCIATION /
NATIONAL NURSES ORGANIZING
COMMITTEE

CERTIFICATE OF SERVICE

The Undersigned, Carmen M. DiRienzo, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent's Answering Brief to Counsel for the Acting General Counsel's Exceptions to the Decision Issued by Administrative Law Judge Jay R. Pollack was served on Wednesday, November 6, 2013 upon the following:

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Dated: Katonah, NY
November 6, 2013

Respectfully submitted,

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