

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

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

Respondent,

and

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

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

Charging Party.

**REPLY BRIEF BY COUNSEL FOR THE GENERAL COUNSEL
TO RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Reply Brief to Respondent's Answering Brief to the General Counsel's Exceptions to the Decision issued by Administrative Law Judge Jay R. Pollack ("ALJ") in the captioned matter.¹

I. INTRODUCTION

Counsel for the General Counsel files this Reply Brief in support of its Exceptions to the Decision of the ALJ. On October 23, 2013, Counsel for the General Counsel filed three exceptions to the ALJ's Decision and a brief in support of those exceptions. In the supporting brief, Counsel for the General Counsel argues that the ALJ erroneously determined that Respondent made the unilateral change to how nurses could obtain required certification/recertification training in April 2012, prior to the Union's election as bargaining representative. Counsel for the General Counsel further argues that the ALJ failed to find and conclude that Respondent violated Section 8(a)(5) and (1) of the Act by, absent an overall good-faith impasse during negotiations and without prior notice to the Union, implementing the requirement that nurses utilize HeartCode to obtain their required training certifications/recertifications.

¹Citations are as follows: Administrative Law Judge Decision (ALJD at page:line); Transcript (Tr. ___/witness name); Exhibits (GC Exh. ___; or R Exh. ___); Respondent's Answering Brief (R Ans. Brief at ___). Counsel for the General Counsel's Brief in Support of Exceptions (GC Brief in Support at ___).

On November 6, 2013, Respondent filed an Answering Brief to the General Counsel's Exceptions. As set forth below, the arguments raised in Respondent's Answering Brief are not supported by the record evidence. As such, Respondent's arguments are meritless and should be rejected in their entirety.

II. ARGUMENT

A. THE NATURE OF THE UNILATERAL CHANGE

As a preliminary matter, and as set forth in the General Counsel's Brief in Support of Exceptions, the ALJ appears to mistake the nature of the 8(a)(5) unilateral change. The unilateral change in the instant case was not when Respondent offered HeartCode as one training option amongst many prior to the Union's certification. Rather, the actual unilateral change at issue took place on August 2, 2012, when Respondent eliminated all training options and made HeartCode into a training requirement for nurses. (GC Brief in Support at 5.) In mistaking the nature of the unilateral change, the ALJ erroneously determined that Respondent made the unilateral change prior to the Union's election as bargaining representative. (GC Brief in Support at 4-6.)

B. RESPONDENT'S FACTUAL MISREPRESENTATIONS

Respondent's Answering Brief takes advantage of the ALJ's misunderstanding of the nature of the unilateral change by arguing that since HeartCode was offered to nurses as a training option prior to the Union's certification, Respondent had no obligation to bargain. In making this argument, Respondent's Answering Brief makes a flurry of factual misrepresentations that are not supported by the evidentiary record, as set forth below.

1. Respondent's Assertion: "[T]he Hospital's implementation of its 'HeartCode Policy' well pre-dated the Union's certification."

The record evidence clearly shows that Respondent made the decision to make HeartCode a requirement on August 2, 2012, after the Union became certified. There is nothing in the evidentiary record to establish that Respondent made HeartCode a requirement prior to the Union's certification.

a. Respondent's Board of Trustees approved the HeartCode policy on August 2, 2012. (GC Exh. 22.) The HeartCode policy required nurses to use HeartCode to complete trainings necessary for their certifications/recertifications. (GC Exh. 21.)

b. Respondent's Chief Quality Officer Sheriff testified that Hospital policies are effective only after the approval by the Board of Trustees. (Tr. 341-359-360/Sheriff.) Hence, Respondent decided to make HeartCode a requirement on August 2, 2012.

c. A copy of Respondent's meeting minutes titled, "HeartCode Requirement" further stated that the HeartCode policy was approved on August 2, 2012. (GC Exh. 21.)

2. Respondent's Assertion: "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." (R Ans. Brief at 6.)

Respondent makes the above assertion to imply that it made the decision to require HeartCode in early 2012 prior to Union certification, when in fact, the Hospital merely offered HeartCode as a training option at that time. Contrary to Respondent's above assertion, Ms.

Jackson did not testify about what she intended to require in the HeartCode policy, and there is no factual basis to support Respondent's assertion.

3. Respondent's Assertion: "[T]he 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." (R Ans. Brief at 4.)

"None of the AGC's witnesses at trial testified that they were required to take the HeartCode course at all." (R Ans. Brief at 5.)

Contrary to Respondent's assertion, the record evidence clearly establishes that HeartCode was required and that it was communicated as a requirement to nurses.

a. The agenda for the September 27, 2012 nurse staff med/surg meeting has a topic section titled, "HeartCode Requirement." This section states, "HeartCode [...] is a corporate directive and all staff *will be required* to get their certification/ recertification through this program." (emphasis added) (GC Exh. 21.)

b. A flyer posted at the Hospital states, "Advance Cardiac Life Support – All Med/Surg Staff must have HeartCode ACLS – 2012" (GC Exh. 16.)

c. Nurse Ziemer and Nurse Moon testified that in late August/early September, they saw a flyer (GC Exh. 16) posted which announced that HeartCode would be required. (Tr. 233-235/Ziemer; 299-300.)

d. Nurse Ziemer testified that Troy Desonia, a Hospital supervisor, told nurses that HeartCode was the only way they could obtain their certification. (Tr. 237/Ziemer.)

e. Even Respondent's own witness, Chief Financial Officer Howell, testified in a Board affidavit dated November 5, 2012 that HeartCode was a requirement. In that affidavit, she

testified, “About two months ago, BCH [Respondent] had a policy that required nurses to utilize Heart Code in order to obtain their certification or recertification.” (Tr. 476-477/Howell.)

f. Union Negotiator Matthews testified that in late August 2012, nurses notified him of a rule change in which Respondent required nurses to use HeartCode as the only means of obtaining their certification/recertifications. (Tr. 51-53/Matthews; GC Exh. 9.)

4. Respondent’s Assertion: “[T]he HeartCode course simply replaced live instruction as the onsite means by which nurses could satisfy the certification requirements.” (R Ans. Brief at 5.)

Respondent makes the above assertion to argue that the HeartCode policy allowed nurses to take courses off-site when in reality, Respondent’s original HeartCode policy replaced *all* training courses irrespective of whether they were on or off-site.

a. Respondent Chief Financial Officer Howell testified in a Board Affidavit dated November 5, 2012 that HeartCode was *required*. Specifically, she testified, “About two months ago, BCH [Respondent] had a policy that required nurses to utilize Heart Code in order to obtain their certification or recertification.” (Tr. 476-477/Howell.)

b. Respondent’s HeartCode policy dated August 2, 2012 states, “HeartCode replaces instructor-led classes BLS, ACLS, and PALS for all CHS employees.” (GC Exh. 22.)

c. Proving that Respondent’s HeartCode policy replaced all classes irrespective of whether they were on or off-site is the fact that the Union, during a bargaining session on September 13, 2012, submitted a proposal to allow nurses the option of taking their trainings off-site. (ALJD 3: 46-47.)

d. It was not until November 1, 2012 that Respondent revised the HeartCode policy to allow nurses to take certification/recertification trainings outside of the Hospital. (Tr. 229/Ziemer; Tr. 399/Jackson.) Even then, there is no evidence that this revised HeartCode policy was communicated to nurses.

5. Respondent's Assertion: The AGC's own witness took the certification trainings offsite, proving that HeartCode was never required. (R. Ans. Brief at 6.)

Nurse Moon testified that despite learning that HeartCode was a requirement, she decided to take the training course off-site because she had not heard of nurses being disciplined for failing to take HeartCode. (Tr. 305/Moon.) In fact, Moon took the off-site certification training in January 2013, after Respondent had revised the HeartCode policy in November to no longer make HeartCode a requirement. (Tr. 304/Moon.)

6. Respondent's Assertion: "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." (R Ans. Brief at 3.)

Respondent failed to pay nurses in full for the time spent taking HeartCode but eventually made nurses whole well after Complaint in the instant matter had issued.

a. Under the HeartCode policy, Respondent capped the number of hours for which Nurses could be compensated when taking certification/recertification trainings irrespective of the time spent taking the trainings. (GC Exh. 23; Tr. 403-405/Jackson.)

b. Respondent's Chief Quality Officer Sheriff testified that pursuant to the HeartCode policy, nurses who exceeded the allotted time for completing trainings were not compensated for that additional time. (Tr. 404-408/Sheriff.)

c. The Summary of the Time Detail Reports reveals that after the implementation of the HeartCode policy, Respondent failed to pay four Nurses between 1.8-4.3 hours each for time spent taking trainings. (GC Exh. 24, 25.)

d. It was not until May 31, 2013 that Respondent eventually paid nurses for this previously unpaid time taking HeartCode, well after Complaint had already issued. (GC Exh. 24.)

As set forth above, and contrary to Respondent's numerous factual misrepresentations, the evidence clearly shows that the HeartCode policy was adopted by Respondent on August 2, 2012, well after the Union had become certified, and this policy required nurses to utilize HeartCode as the only means by which to complete required certification/recertification trainings.

C. RESPONDENT EXAGGERATES THE FINDINGS IN THE ALJ DECISION

Respondent, in its Answering Brief, repeatedly mischaracterizes and exaggerates the findings of the ALJ Decision concerning HeartCode when in reality, the ALJ failed to make a ruling on the 8(a)(5) unilateral change allegation. Respondent states the following in its Answering Brief:

- (1) "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."

(R Ans. Brief at 4.)

- (2) “[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.” (R Ans. Brief at 4.)
- (3) “[T]he 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.” (R Ans. Brief at 7.)

Through the above assertions, Respondent attempts to make it appear as though the ALJ fully considered the merits of the 8(a)(5) unilateral change allegation regarding HeartCode. However, the Decision clearly shows that the ALJ failed to rule on this allegation. In fact, the Decision omits almost any mention of HeartCode in the factual findings section and entirely fails to address this allegation in the ALJ’s analysis and conclusions.

Moreover, through Respondent’s statement that the ALJ “properly relied on the credible evidence of record” to argue that the unilateral change took place prior to Union certification mischaracterizes the Decision. The Decision is silent as to what evidence the ALJ relied upon to make its factual finding regarding implementation of the HeartCode policy. Without knowing what evidence the ALJ specifically relied upon, one cannot (or should not) argue that reliance upon such unstated evidence was proper. Similarly, Respondent’s statement that the ALJ “was well within the bounds of his authority to credit the testimony” concerning HeartCode mischaracterizes the Decision. In actuality, the Decision does not contain any witness credibility determinations concerning testimony about HeartCode.

In the above manner, Respondent exaggerates and mischaracterizes the findings contained in the ALJ's Decision when in fact, the ALJ failed to rule on the 8(a)(5) unilateral change allegation concerning HeartCode. The ALJ's failure to make a ruling on this allegation forms the basis of the General Counsel's Exception No. 2.

D. RESPONDENT'S LEGAL ARGUMENT LACKS MERIT AND SHOULD REJECTED

Respondent, in its Answering Brief, mischaracterizes the HeartCode policy as a mere "change in instruction method," and states that such a change is a more dependable method of enforcing an existing policy for which there is no obligation to bargain pursuant to *Rust Craft Broadcasting of New York, Inc.* 225 NLRB 327 (1976). (R Ans. Brief at 9-11.) Unlike in *Rust Craft Broadcasting*, the change in the instant case is not merely procedural; it is substantive in that it involves clear changes to nurses' pay. The HeartCode policy limited the amount of paid time for trainings when in the past, employees were paid for the full time spent taking certification/recertification trainings. As set forth in the General Counsel's Brief in Support of Exceptions, the Board has held that such changes to employees' benefits are material, substantial, and significant. (GC Brief in Support, at 8.) It was not until well after Complaint issued that Respondent fully paid employees for time they were owed. Clearly, Respondent's act of paying nurses after Complaint had issued, and just two weeks prior to the unfair labor practice hearing, is an attempt by Respondent to avoid its obligations under the Act. In sum, Respondent's legal arguments lack merit and should be rejected.

IV. CONCLUSION

Based on all the forgoing, the assertions and arguments raised by Respondent are not supported by the record evidence and should be rejected in their entirety. Accordingly, Counsel for the General Counsel requests that the General Counsel's Exceptions to the ALJ's Decision be granted.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **REPLY BRIEF BY COUNSEL FOR THE GENERAL COUNSEL TO RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 20th day of November, 2013:

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