

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**SAINT MARY'S HOSPITAL FOR CHILDREN**

**and**

**Case No. 29-CA-093232**

**1199SEIU UNITED HEALTHCARE WORKERS EAST**

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**GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel excepts to portions of Administrative Law Judge Susan A. Flynn's December 26, 2013 Decision in the above-captioned case.

In her Decision, the ALJ correctly found that Saint Mary's Hospital for Children ("Respondent") violated Section 8(a)(1) and (5) of the Act by laying off bargaining unit employee Lisa Leonard and transferring bargaining unit work out of the unit. (ALJD p. 8, line 8-10). The General Counsel urges the Board to adopt these findings as they are fully supported by the record evidence. Additionally, the General Counsel urges the Board to adopt the facts set forth by the ALJ, as those facts are fully supported by the evidence adduced at the hearing.

**STATEMENT OF EXCEPTIONS**

The General Counsel hereby takes limited exception to the Administrative Law Judge's omissions concerning the allegation that Respondent violated 8(a)(1) and (5) of the Act by unilaterally eliminating the bargaining unit Assistant position from the bargaining unit. In her

Decision, the ALJ found that Respondent unlawfully abolished the bargaining unit position. (ALJD p. 5, line 35-37). However, she failed to engage in the legal analysis supporting this conclusion, failed to include this finding in her Conclusions of Law and failed to include the necessary remedy to the violation in her Remedy, Order, and Notice to Employees. (ALJD p. 8-10).

Specifically, the General Counsel files the following exceptions to the ALJ's Decision:

1. The ALJ erred by failing to find that Respondent violated 8(a)(1) and (5) when it eliminated the unit position. (ALJD p. 8, line 3).

Unit scope is a permissive subject of bargaining; parties are free to bargain or not to bargain about the scope of the unit. *Shell Oil Co.*, 194 NLRB 988, 995 (1972). Employers cannot alter the scope of a unit without first getting consent from either the union or through a unit clarification petition filed with and processed by the NLRB. *Taos Health Systems, Inc. d/b/a Holy Cross Hospital*, 319 NLRB 1361 (1995). Employers do not have impasse rights regarding permissive subjects of bargaining. This requirement is important for maintaining labor relations stability because the union must know with certainty which employees it represents. *Shell Oil Co.*, 194 NLRB at 995. If employers could change the scope of the unit without the union's consent, employers could systematically reduce the number of positions in the unit over the union's protest until the union did not represent any employees.

The ALJ correctly found that Respondent and the Union agreed to the scope of the unit at issue prior to the stipulated to election, that the unit included the Assistant position in the Medical Day Care department, and that the bargaining unit was certified by the Board. (ALJD p. 2, line 39-44 – p. 3, line 1-2). The ALJ also correctly found that Respondent unilaterally eliminated the unit Assistant position occupied by Lisa Leonard within Medical Day Care.

(ALJD p. 5, line 37-39). It is undisputed that Respondent never filed a unit clarification petition with the Board to obtain the Board's permission to change the scope of the unit. The ALJ also correctly found that Respondent did not obtain the Union's consent for the change to the unit, based on the testimony of Union representatives Ramsey and Kramer. (ALJD p. 4, line 16-17; p. 5, 37-39). Because Respondent failed to obtain consent from the Union or a unit clarification determination from the NLRB, Respondent violated 8(a)(5) when it unilaterally altered the scope of the unit by removing the unit position.

Because the ALJ failed to discuss the unilateral elimination of a bargaining unit position as a permissive subject of bargaining and failed to find that Respondent violated 8(a)(1) and (5) of the Act by eliminating the unit Assistant position, the ALJ's Decision was deficient.

2. The ALJ's legal conclusion was incomplete by failing to include that Respondent unilaterally eliminated the Assistant position from the unit. (ALJD p. 8, 8-10).

As discussed above, it is unlawful for Respondent to alter the scope of the bargaining unit without the consent of the Union. The ALJ did find a violation based on the elimination of the bargaining unit position in the Analysis of her decision. (ALJD p. 5, line 35-37). However, the ALJ failed to include this violation in her Conclusions of Law. (ALJD p. 8, line 8-10). Therefore, Respondent's violation of 8(a)(1) and (5) by unilaterally eliminating the Assistant position from the unit should be added to the Conclusions of Law.

3. The ALJ erred by failing to include in her Remedy the requirement that Respondent reinstate the Assistant position to the bargaining unit. (ALJD p. 8).

In addition to failing to include a discussion of Respondent's unlawful unilateral elimination of the unit Assistant position, the ALJ also failed to include the Remedy for the unilateral removal of the position from the bargaining unit. The Remedy is that the position must

be restored to the bargaining unit. See *Taos Health Systems, Inc. d/b/a Holy Cross Hospital*, 319 NLRB 1361 (1995) (remedy requiring Respondent to restore the unilaterally eliminated positions to the bargaining unit). Therefore, the requirement that Respondent reinstate the Assistant position to the bargaining unit should be included in the Remedy.

4. The ALJ erred by failing to include in her Remedy the requirement that Respondent restore the bargaining unit work back to the bargaining unit. (ALJD p. 8).

The ALJ correctly found that Respondent transferred the bargaining unit work from the unit Assistant position to the new, non-bargaining unit Assistant position. (ALJD p. 8, line 1-3). The remedy for an unlawful transfer of work out of the bargaining unit is for the work to be restored to the unit. See *Dixie Electric Membership Corp.*, 358 NLRB No. 120 (2012) (remedy requiring Respondent to rescind the removal of the unilaterally eliminated position and the “consequent transfer of the work performed by these positions outside of the unit.”). The ALJ failed to include this requirement in her Remedy. Therefore, the requirement that Respondent restore the bargaining unit work to the bargaining unit must be included in the Remedy.

5. The ALJ erred by failing to include in her Order the requirement that Respondent cease and desist from unilaterally altering the bargaining unit by eliminating bargaining unit positions. (ALJD p. 9).

As discussed in Exceptions 1-3, the ALJ failed to fully analyze and discuss 8(a)(5) and (1) violation of unilaterally eliminating a unit position. When a violation of the Act has been found, the ALJ must order Respondent to stop engaging in the unlawful behavior. In this case, that unlawful action was unilaterally altering the bargaining unit when Respondent eliminated the Assistant position. See *Dixie Electric Membership Corp.*, 358 NLRB No. 120 (2012) (Ordering Respondent to “Cease and desist from (a) Eliminating CSO and SO positions from the

bargaining unit represented by the Union, without its consent.”) Therefore, the Order must require Respondent to cease and desist from unilaterally altering the bargaining unit by eliminating a bargaining unit position.

6. The ALJ erred by failing to include in her Order the requirement that Respondent take the affirmative action of reinstating the bargaining unit Assistant position to the bargaining unit. (ALJD p. 9).

As discussed above, an ALJ must Order Respondent to take certain actions to remedy unfair labor practices. The appropriate remedy for an unlawful unilateral elimination of a bargaining unit position is for that position to be reinstated to the unit. See Exception 3, *supra*; *Wackenhut Corp.*, 345 NLRB 850 (2005) (ordering that the eliminated position be restored to the bargaining unit as it existed prior to the unilateral change). Accordingly, the requirement that Respondent reinstate the bargaining unit Assistant position should be included in the Order.

7. The ALJ erred in her Order by allowing Respondent to reinstate Lisa Leonard to a substantially equivalent bargaining unit position instead of requiring Respondent to reinstate Leonard to her previously held bargaining unit position. (ALJD p. 9, line 21-24).

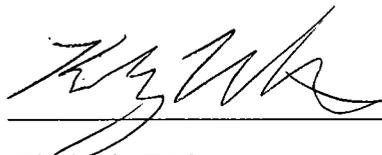
Since Respondent must reinstate Leonard’s previous bargaining unit Assistant position to the unit (see Exception 6) in order to restore the status quo, Respondent must reinstate Leonard to her former position - the Assistant position - and not to a “substantially equivalent” position. See *Wackenhut Corp.*, 345 NLRB at 855, ordering the employer to offer the CAS and SAS operators reinstatement to their former positions. Therefore, the Order should state that Respondent is required to reinstate Lisa Leonard to her previously held bargaining unit Assistant position.

8. The ALJ erred in her Order by omitting the requirement that Respondent remove from its files any reference to the unlawful termination of Lisa Leonard. (ALJD p. 9).

The ALJ correctly included in her Notice to Employees the requirement that Respondent remove any reference in its files to the unlawful termination of Lisa Leonard, notify her in writing that it was done, and not use her termination against her in any way. However, the ALJ failed to include the requirement in her Order. Therefore, the Order should be corrected to state that Respondent is required to take the affirmative action of removing any reference in its files to the unlawful termination of Lisa Leonard, notifying her in writing that it has been done, and not using it against her in any way.

DATED AT Brooklyn, New York, this 3rd day of February, 2014.

Respectfully submitted,



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Kimberly Walters  
Counsel for the General Counsel  
National Labor Relations Board, Region 29  
2 MetroTech Center, 5<sup>th</sup> Floor  
Brooklyn, New York 11201