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Heartland Human Services *and* American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO. Case 14–CA–118716

May 15, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The General Counsel seeks summary judgment in this case on the ground that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent has violated Section 8(a)(5) and (1) of the Act.

Upon a charge and an amended charge filed by American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO (the Union), on December 10, 2013, and January 16, 2014, respectively, the General Counsel issued the complaint on January 24, 2014, against Heartland Human Services (the Respondent), alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing a drug testing policy for employees who sustain a work-related injury that requires medical treatment, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

The Respondent filed an answer admitting all of the factual allegations in the complaint, denying all of the legal conclusions in the complaint, and asserting an affirmative defense. On February 5, 2014, the General Counsel filed with the Board a Motion for Summary Judgment. On February 6, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, stating, among other things, that it agreed that no genuine issues of material fact exist warranting a hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint alleges, and the Respondent admits, that the Union was certified as the exclusive collective-bargaining representative of the unit employees, that a decertification election was conducted on June 4, 2012, that a revised tally of ballots showed that a majority of valid votes had not been cast for the Union, and that on September 28, 2012, the Board adopted the hearing officer's recommendation in Case 14–RD–063069 that a rerun election be conducted. The complaint further alleges, and the Respondent admits, that on March 18, 2013, the Board issued a Decision and Order in Case 14–CA–087886[1] granting the General Counsel's motion for summary judgment and finding, among other things, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit (*Heartland I*). The United States Court of Appeals for the Seventh Circuit enforced the Board's Order in *Heartland I* on March 14, 2014.[2]

The Respondent admits its continued refusal to recognize and bargain with the Union but contends that its conduct does not violate Section 8(a)(5) and (1) because the Respondent lawfully withdrew recognition from the Union based on a reasonable belief that the Union no longer enjoyed the majority support of its employees. Thus, the Respondent admits that about November 27, 2013, it implemented a drug testing policy for employees who sustain a work-related injury that requires medical treatment without prior notice to the Union and without affording the Union an opportunity to bargain. The Respondent urges the Board to grant summary judgment in favor of the Respondent and dismiss the complaint.[3]

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[1] 359 NLRB No. 76.

[2] *Heartland Human Services v. NLRB*, -- F. 3d – (7th Cir. 2014), 2014 WL 983618. Subsequent to the Board's decision in *Heartland I*, but prior to the court's enforcement of that Order, the Board issued *Heartland Human Services*, 360 NLRB No. 8 (2013) (*Heartland II*), and *Heartland Human Services*, 360 NLRB No. 47 (2014) (*Heartland III*). In those cases the Board again granted the General Counsel's motions for summary judgment, finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the employees' terms and conditions of employment without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct. As in *Heartland I*, the Respondent admitted the complaint allegations in *Heartland II* and *III* but asserted that its conduct was not unlawful because the Union lacked majority status and therefore the Board should enter summary judgment in its favor or at least stay the proceedings pending the court's decision in *Heartland I*. The Board filed an application for enforcement in *Heartland II* (Case No. 13–3706), but moved to hold the case in abeyance, as the parties agreed that the issues in *Heartland II* (unilateral changes) would be decided in *Heartland I*. The court consolidated the Board's application for enforcement and the Respondent's cross-petition in *Heartland II*, and that consolidated appeal was held in abeyance pending the outcome in *Heartland I*. On March 19, 2014, the Board filed an application for enforcement in *Heartland III*. On April 28, 2014, the United States Court of Appeals for the Seventh Circuit entered its Consent Judgment in *Heartland II*, enforcing the Board's Order in full.

[3] In the alternative, the Respondent requests that the Board stay these proceedings until the Seventh Circuit Court of Appeals renders judgment in *Heartland I*. As noted above, that Court enforced the Board's Order in *Heartland I* on March 14, 2014.

We find that there are no issues warranting a hearing because the Respondent has admitted the crucial factual allegations set forth above. In accord with its position in *Heartland I*, *Heartland II*, and *Heartland III*, the Respondent claims that its admitted conduct is not unlawful because of its reasonable belief that the Union does not enjoy the majority support of the employees in the collective-bargaining unit, based exclusively on the Union's loss of the June 4, 2012 representation election and on the Respondent's claim that the Board erred in directing a rerun election in Case 14–RD–063069.

As noted, the Respondent's defense has previously been raised to the Board and the court and found to be without merit. It is rejected here again for the same reasons.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, an Illinois corporation with an office and place of business located at 1200 North 4th Street, Effingham, Illinois, has been engaged in providing residential and outpatient mental health services.

In conducting its operations during the 12-month period ending December 31, 2013, the Respondent derived gross revenues in excess of $100,000, and purchased and received at its Effingham, Illinois facility goods valued in excess of $20,000 directly from points located outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, is a health care institution within the meaning of Section 2(14) of the Act, and that the Union, American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Jeff Bloemker	Executive Director
Debra Johnson	Human Resources Director

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Respondent at its Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

On February 1, 2006, the Union was certified as the exclusive collective-bargaining representative of the unit. The most recent collective-bargaining agreement covering the unit was effective from August 21, 2009, through August 20, 2011. At all material times since February 1, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On June 4, 2012, pursuant to a petition filed in Case 14–RD–063069, an election was conducted in the unit. The tally of ballots disclosed that 19 ballots were cast for the Union, 18 votes were cast against the Union, and there was 1 challenged ballot, which was sufficient to affect the results of the election. On June 11, 2012, the Union filed objections to the election. On June 28, 2012, a hearing on the challenged ballot and the objections was held. On July 18, 2012, the hearing officer issued a report recommending that the challenged ballot be opened and counted. If the revised tally of ballots disclosed that a majority of valid votes had not been cast for the Union, the hearing officer recommended that a rerun election be conducted, having further recommended that three objections be sustained. On August 9, 2012, the Respondent filed exceptions to the hearing officer's report. On September 28, 2012, the Board adopted the hearing officer's report, findings, and recommendations. On October 12, 2012, the challenged ballot was opened and counted. The revised tally of ballots disclosed that a majority of valid votes had not been cast for the Union. Accordingly, a rerun election will be conducted at an appropriate date, time, and place to be determined by the Regional Director.

On March 18, 2013, the Board issued a Decision and Order in Case 14–CA–087886, finding, among other things, that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit.

Subsequently, the Respondent engaged in the following conduct at issue here.

About November 27, 2013, the Respondent implemented a drug testing policy for employees who sustain a work-related injury that requires medical treatment.

The subject set forth above relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining. The Respondent engaged in this conduct with-

out prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSION OF LAW

By implementing a drug testing policy for employees who sustain a work-related injury that requires medical treatment without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[4] Specifically, having found the Respondent violated Section 8(a)(5) and (1) by, on about November 27, 2013, implementing a drug testing policy for employees who sustain a work-related injury that requires medical treatment, we shall order the Respondent to rescind this unilateral change and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

We shall also order the Respondent to offer any unit employees who were discharged pursuant to the policy full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, we shall order the Respondent to make any unit employees who were disciplined pursuant to the policy whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. To the extent that discipline did not result in employees being separated from employment, any make-whole remedy shall be in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). However, the Respondent is entitled to show, at compliance, that it would have disciplined those employees even in the absence of the unilateral implementation of the drug testing policy, avoiding as to those employees any backpay and reinstatement obligation.[5]

The Respondent shall also be required to expunge from its files and records any and all references to the unlawful discipline, and to notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way. Although the Respondent is required to remove any record of its discipline of an employee under a changed new policy, should the Respondent establish at compliance that it would have disciplined the employee even in the absence of the unilateral implementation of the drug testing policy, it may maintain a record of the employee's discipline. See *Uniserv*, supra, 351 NLRB at 1361 fn. 1.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Heartland Human Services, Effingham, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit by unilaterally implementing a drug testing policy

[4] The General Counsel has requested a notice reading remedy. We agree that this special remedy is appropriate to dispel the effects of the Respondent's serious and persistent unfair labor practices, especially in light of the Respondent's repetition of the same type of misconduct previously found unlawful and previously found to warrant such a remedy. See *Heartland Human Services*, 359 NLRB No. 76, supra; *Heartland Human Services*, 360 NLRB No. 8, supra, *Heartland Human Services*, 360 NLRB No. 47, supra. Therefore, we will require that the Respondent's executive director or, at the Respondent's option, a Board agent in the executive director's presence, read the remedial notice to the Respondent's employees.

[5] *Uniserv*, 351 NLRB 1361 fn. 1 (2007); *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248 fn. 3 (2006), enfd. 490 F.3d 374 (5th Cir. 2007).

[6] Because, as stated above, the Respondent will have the opportunity at compliance to show that it would have discharged or disciplined employees even absent the unilateral implementation of the drug testing policy, the Order and notice shall not include the requirement that the expunction or reinstatement offers be completed "within 14 days of the date of the Board's Order." *Allied Aviation Fuel*, supra, 347 NLRB 248 fn. 3.

for employees who sustain a work-related injury that requires medical treatment. The unit is:

> All full-time and regular part-time employees employed by Respondent at its Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral implementation of a drug testing policy for employees who sustain a work-related injury that requires medical treatment and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(b) Offer any unit employees who were discharged pursuant to the drug testing policy full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make any unit employees who were disciplined pursuant to the drug testing policy whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline, in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to any unlawful discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

(e) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the unit employees' backpay awards to the appropriate calendar quarters for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Effingham, Illinois, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since about November 27, 2013.

(h) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's executive director or, at the Respondent's option, by a Board agent in the executive director's presence.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 15, 2014

Mark Gaston Pearce,	Chairman
Philip Miscimarra,	Member
Kent Y. Hirozawa,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL–CIO, the Union, as the exclusive collective-bargaining representative of the employees in the following appropriate unit by unilaterally implementing a drug testing policy for employees who sustain a work-related injury that requires medical treatment. The unit is:

All full-time and regular part-time employees employed by us at our Effingham, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the drug testing policy for employees who sustain a work-related injury that requires medical treatment that we unilaterally implemented about November 27, 2013, and restore the status quo ante until such time as we reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations with the Union.

WE WILL offer any unit employees who were discharged pursuant to the drug testing policy full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any unit employees who were disciplined pursuant to the drug testing policy whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline, with interest.

WE WILL remove from our files any reference to any unlawful discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

HEARTLAND HUMAN SERVICES

The Board's decision can be found at www.nlrb.gov/case/14-CA-118716 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.