

Sunrise Mountainview Hospital, Inc. d/b/a Mountainview Hospital and California Nurses Association/National Nurses Organizing Committee (CNA/NNOC). Case 28–CA–023100

November 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On January 10, 2011, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel and the Union filed answering briefs and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.² We shall also substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Sunrise Mountainview Hospital, Inc. d/b/a Mountainview Hospital, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with California Nurses Association/National Nurses Organizing Committee (CAN/NNOC) (the Union) as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time, regular part-time, and VSP/Per Diem Registered Nurses employed at the Employer's facility at 3100 N. Tenaya Way, Las Vegas, Nevada. VSP/Per Diem Registered Nurses are eligible if they have worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the

¹ We find that the Respondent violated Sec. 8(a)(5) and (1) of the Act when it unilaterally departed from its holiday staffing policy by scheduling four on-call nurses on July 5, 2010 (the observed July 4 holiday), instead of its normal practice of scheduling two on-call nurses with one backup on holidays. Consequently, we find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(5) and (1) by unilaterally departing from its established surgical scheduling policy by permitting physicians to schedule elective surgeries on a holiday. Such a finding would be cumulative and would not affect the remedy. Therefore, we also need not pass on the judge's characterization of "elective" surgery as "surgeries scheduled to take place more than 6 days from the booking date," without regard to the urgency of the medical procedure.

² We shall modify the judge's recommended Order to conform to the violation found and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

eligibility date, i.e., during the periods from Sunday, September 13, 2009 to Saturday, December 12, 2009 or from Sunday, June 14, 2009 to Saturday, September 12, 2009; excluding all other employees, confidential employees, permanent charge nurses, physicians, nurse educators, clinical educators, Emergency Department Educators, nurse coordinators, clinical coordinators, Bariatrics Coordinator, clinical nurse specialists, case managers, utilization review and/or discharge planners, nurse practitioners, Cardiovascular Nurse Practitioner, accounting or auditing RNs, Nurse Auditors, Infection Control Practitioner, Employee Health Coordinator, risk management/performance improvement and/or quality assurance or quality management nurses, Concurrent Review Nurse, Quality Management Coordinators, employees of outside registries and other agencies supplying labor to the Employer, managerial employees, guards and supervisors as defined in the Act.

(b) Making any changes in wages, hours, or other terms and conditions of employment of employees represented by the Union without first bargaining with the Union as their exclusive collective-bargaining representative.

(c) Unilaterally changing the work schedules of employees represented by the Union without first giving notice to and bargaining with the Union.

(d) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described bargaining unit.

(b) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit concerning the scheduling of employees.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit concerning the change of unit employees' work schedules for July 5, 2010.

(d) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on June 15, 2010.

(e) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached no-

tice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.⁴ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 15, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

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 bargain in good faith with California Nurses Association/National Nurses Organizing Committee (CAN/NNOC) (the Union) as the

³ 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."

⁴ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time, regular part-time, and VSP/Per Diem Registered Nurses employed at the Employer's facility at 3100 N. Tenaya Way, Las Vegas, Nevada. VSP/Per Diem Registered Nurses are eligible if they have worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the eligibility date, i.e., during the periods from Sunday, September 13, 2009 to Saturday, December 12, 2009 or from Sunday, June 14, 2009 to Saturday, September 12, 2009; excluding all other employees, confidential employees, permanent charge nurses, physicians, nurse educators, clinical educators, Emergency Department Educators, nurse coordinators, clinical coordinators, Bariatrics Coordinator, clinical nurse specialists, case managers, utilization review and/or discharge planners, nurse practitioners, Cardiovascular Nurse Practitioner, accounting or auditing RNs, Nurse Auditors, Infection Control Practitioner, Employee Health Coordinator, risk management/performance improvement and/or quality assurance or quality management nurses, Concurrent Review Nurse, Quality Management Coordinators, employees of outside registries and other agencies supplying labor to the Employer, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT change your work schedules without first notifying the Union and giving it an opportunity to bargain.

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, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as your exclusive collective-bargaining representative.

WE WILL on request, bargain with the Union as your exclusive collective-bargaining representative concerning your work schedules.

WE WILL, on request, bargain with the Union as your exclusive collective-bargaining representative concerning the change of the work schedules of unit employees for July 5, 2010.

WE WILL rescind the change in the terms and conditions of employment for our unit employees that was unilaterally implemented on June 15, 2010.

SUNRISE MOUNTAINVIEW HOSPITAL, INC. D/B/A
MOUNTAINVIEW HOSPITAL

William F. LeMaster, Esq., for the General Counsel.
Paul R. Beshears, Esq. (Ford & Harrison, LLP), of Atlanta, Georgia, for the Respondent.
Holly Miller, Esq. (California Nurses Association), of Oakland, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by California Nurses Association/National Nurses Organizing Committee (CNA/NNOC) (the Union), the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) on September 24, 2010.¹ The complaint alleges that Sunrise MountainView Hospital, Inc. d/b/a MountainView Hospital (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). This matter was tried in Las Vegas, Nevada, on November 2.

II. ISSUE

Did the Respondent violate Section 8(a)(5) and (1) of the Act by unilaterally changing its practice and policy of surgical scheduling without affording the Union an opportunity to bargain about the changes?

III. JURISDICTION

At all material times the Respondent, a Nevada corporation, with an office and place of business in Las Vegas, Nevada (the facility), has been engaged in the operation of an acute-care hospital providing inpatient and outpatient medical care. During the 12-month period ending July 14, the Respondent, in conducting its business operations derived gross revenues in excess of \$250,000 and purchased and received at the facility goods valued in excess of \$5000 directly from points outside the State of Nevada. I find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and has been a health care institution within the meaning of Section 2(14) of the Act. I find that the Union was a labor organization within the meaning of Section 2(5) of the Act.

IV. STATEMENT OF FACTS

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings. Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

A. Collective-Bargaining Background

On January 13 and 14, a representation election was conducted among the classifications of employees set forth below (the unit), a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. On

¹ All dates herein are 2010, unless otherwise specified.

January 22, the Union was certified as the unit's exclusive collective-bargaining representative. The unit comprised approximately 420 registered nurses (RNs). At all times since January 14, based on Section 9(a) of the Act, the Union has been the following employees' exclusive collective-bargaining representative: All full-time, regular part-time, and VSP/Per Diem Registered Nurses employed at the Employer's facility at 3100 N. Tenaya Way, Las Vegas, Nevada.

Following certification, the Respondent and the Union entered into negotiations over the terms of a collective-bargaining agreement to cover unit employees; negotiations were ongoing at the time of the hearing.

B. The Respondent's Relevant Policies and 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:

JD Melchoide—Chief Operating Officer
 Bob Nettles—Director of Human Resources
 John Paul Draves—Director of Surgical Services

Approximately 26 registered nurses (RNs) work within the pre and post care unit (PPCU) and the surgical services department (the surgical department). The RNs prepare patients for surgery and handle recovering patients in preparation for postsurgery discharge. Since April 20, 2006, the Respondent has maintained written surgical scheduling guidelines for surgical department RNs, which set forth the following policies:

A. Definitions:

1. Elective Surgery: scheduled to be performed at a date in the future mutually agreed upon by patient, physician & hospital.²
2. Urgent Surgery: surgical intervention should take place within a designated time frame (i.e.: within 8 hrs. or within 6 days).
3. Emergency Surgery (Bump):³ a critical or life-threatening condition, which requires surgical intervention as soon as preparations can be made (immediate response).

B. Operational Process:

1. Elective surgery will be performed daily Monday–Friday from 700 to 2300 and Saturday from 0700 to 1500. Sunday & Holidays, there will be no elective surgery.⁴ Surgical & Anesthesia staff will be available for urgent & emergency cases only. Administration in conjunction with the Surgical

² This definition of elective surgery considered only the scheduling time frame. An attending physician had sole discretion to determine under what time constraints a surgery was to be performed. The Respondent did not ask a physician to declare whether a surgery was emergency, urgent, or elective when scheduling.

³ "Bump" refers to the understanding that a critical or life-threatening condition requiring surgery would take precedence over or "bump" a less critical surgery.

⁴ The Respondent's practice was to permit emergency and urgent surgeries, as defined above, to be scheduled for Sundays and holidays.

Services Director will evaluate any exceptions to this guideline.

During material times, the Respondent maintained a written Policy/Procedure Statement HR10 dated May 9, 1999 (last revised August 8, 2007), that established New Year's Day, Memorial Day, 4th of July, Labor Day, Thanksgiving, and Christmas as recognized holidays.

When New Year's Day, the 4th of July, or Christmas fell on a Saturday or Sunday, Respondent observed the respective holiday on the weekday closest to the calendar holiday and called the designated day "the observed holiday." In 2010, the 4th of July fell on a Sunday. The Respondent's observed holiday was Monday, July 5.

Prior to June 15, the Respondent had followed the practice of not scheduling elective surgeries on Sundays and holidays, limiting surgical services to emergency and urgent surgeries.⁵ For Sundays and holidays, the Respondent's practice was to schedule two surgical RNs to be available on an on-call basis for emergency surgeries.⁶

C. *The Alleged Unilateral Change*

On April 19, John Paul Draves (Draves), employed as of December 2009, emailed JD Melchoide (Melchoide), chief operating officer as follows:

Here is the 2010 Calendar. What is our status when a holiday falls on a weekend? Do we recognize the holiday Friday/Monday. I have worked where if the holiday falls on a weekend we are open both Friday and Monday, what has been the status quo here? Are we looking to change anything? Let me know but as for the calendar I made, we [will not be] closed if the holiday falls on the weekend.

Melchoide responded, in pertinent part:

I guess we need to discuss some of these since July 4th, Christmas, and New Year's Day all fall on a weekend day . . . my preference is to have at least 1 elective room. If nobody schedules, then put people on call. [July 5th] will probably be a lighter day . . . but we need elective capability. . . . Prepare yourself now because the staff may not be too happy.

Sometime thereafter, Melchoide and Draves discussed whether surgeries should be scheduled on the observed holiday of Monday, July 5. Melchoide's expectation was that the Respondent should be receptive to physician's surgical needs, including elective cases. Feeling that physicians would be interested in having the Respondent's surgical services availa-

⁵ Elective surgeries might occur on a holiday if, while a surgical team was already in place for an emergency surgery, a surgeon received permission to perform an elective surgery.

⁶ The Respondent devised the holiday on-call list in advance to permit surgical RNs to choose on-call status for designated holidays. The Respondent asserts that in 2009, when the 4th of July holiday fell on Saturday and was observed on Friday, July 3, the surgical department accepted all cases. Although JD Melchoide testified that he discussed accepting all July 3, 2009 surgical cases with Draves' predecessor, there is no evidence the Respondent actually deviated from its written scheduling policy on July 3, 2009, and no evidence extra RNs were scheduled to work that day.

ble on July 5, Melchoide and Draves decided to schedule elective surgeries, as defined in the surgical scheduling guidelines, for the observed holiday of Monday, July 5.

In implementation of Melchoide and Draves' decision to schedule elective cases on July 5, the Respondent, without prior notification to or discussion with the Union, scheduled 12 surgical procedures for July 5, 4 of which were booked more than 6 days before the procedure date and therefore fell within the elective surgery definition. To provide adequate staff for the July 5 surgeries, the Respondent placed at least two additional surgical RNs on the July 5 observed-holiday on-call list (the revised on-call schedule) and posted the revised schedule.⁷

Upon learning of the revised on-call schedule, RN Karen Clendenin (Clendenin), a registered nurse employed by the Respondent and a member of the Union's bargaining committee, spoke to Draves. Clendenin told Draves she had noticed that elective surgeries had been scheduled for July 5. She objected to the scheduling of elective surgeries on an observed holiday and to the revised on-call schedule, asserting that the Respondent needed to negotiate with the Union about any change in past practice.

Thereafter, after consultation with Union Representative Lisa Morowitz (Morowitz), Clendenin wrote a letter to Draves on the Union's letterhead, which 12 surgical RNs signed, and on June 19 placed it in Draves' personnel mailbox; the letter read, in pertinent part:

Regarding the matter of proposed changes in the work schedules of all the RN's in PPCU. We the undersigned RN's respectfully remind you that no Unilateral Changes may be made in staffing, work schedules or hours of operation in any department of MountainView Hospital. . . . We remind you again that PPCU will continue to operate under the same conditions we have operated under since the opening of this unit. . . . We have always been a five business day a week department with weekends and holidays as on-call days only. . . . As this is the current and past practice regarding PPCU, we expect this to remain unchallenged.

You were informed on June 15, 2010 of our past practice of being closed on holidays. . . . You decided against past practice, to keep PPCU open despite the fact that the PPCU schedule was already posted with two on-call nurses only for that holiday. This . . . violates the past practice of this department. . . .

Draves did not respond to the June 19 letter.

Thereafter Morowitz and Bob Nettles (Nettles), the Respondent's director of human resources, exchanged the following emails:

June 22 email, in pertinent part, Morowitz to Nettles:
Bob—it has just come to our attention that MountainView has notified nurses in Pre-Op that it will be open on Monday, July 5 for business and they will be expected to work. This is a deviation from past practice and this change requires negotiation. . . . Please get back to me asap regarding dates when we

⁷ Draves told RN Karen Clendenin that she would be the sixth RN on call for that day.

can bargain.

June 25 email, in pertinent part, Nettles to Morowitz:

Lisa . . . As you know, MountainView is a 24/7 operation, and we must plan for the provision of care and services based on that reality. We will staff PPCU on July 5 with on-call staff, just as we typically do on days that immediately precede or immediately follow a holiday occurring on a Saturday or Sunday. Contrary to what you may have been told, staffing for the PPCU on July 5 will be based on anticipated volume and patient care needs. This is consistent with our past practice and not a violation of status quo. In order to meet our staffing needs, we will solicit volunteers; if we do not have enough volunteers, then employees will be assigned in reverse order of seniority . . . to be on call that day.⁸

June 26 email, in pertinent part, Renee Ruiz (Ruiz), union organizer, to Nettles:

Bob—You advised . . . yesterday that PPCU would be staffed on July 5 as per the status quo with on-call staff. Subsequent to your response, the PPCU manager posted a schedule and change in operation for July 5 which is in direct contradiction to your response. . . . The RNs on that unit have already expressed that they are not prepared to comply with these abrupt and unilateral changes and neither are we. I will be at your office at 9:00 am Monday, June 28 so we can reach resolution on this matter. . . .⁹

June 29 email, in pertinent part, Morowitz to Michael Bishop, attorney:

Mike—. . . I have not [heard] back from anyone at MountainView regarding this issue which we have been discussing for the last 11 days. Both you and Nettles advised that the status quo would not be changed and assured us we did not need to negotiate in good faith over unilateral changes. Unfortunately, the nurses are still being told they must work on Monday as a regular work day and the regular Monday schedule is still up. We consider this a violation of [the EPA and LRA].¹⁰

V. DISCUSSION

An employer violates Section 8(a)(5) and (1) of the Act if it makes material unilateral changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining, “for . . . a circumvention of the duty to negotiate . . . frustrates the objectives of § 8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 606 (2006).

⁸ As it turned out, the Respondent did not initially have volunteers for July 5; the Respondent scheduled four additional on-call RNs in reverse-seniority order to provide staff for the procedures scheduled for July 5.

⁹ Morowitz also contacted Michael Bishop, the Respondent’s attorney, about the situation.

¹⁰ The next day, the parties raised the issue before a mediator. While the Union was satisfied with the mediator’s resolution of the matter, the Respondent did not agree it was bound by the dispute resolution. When the Respondent refused to implement the mediator’s resolution, the Union filed an unfair labor practice charge with the Board on July 14.

The General Counsel argues that, contrary to established policy and without notice to or bargaining with the Union, the Respondent scheduled elective surgeries for July 5, which resulted in changes to customary RN staffing, a mandatory subject of bargaining.

The Respondent contends that the issues of scheduling elective surgeries and, concomitantly, scheduling a sufficient complement of nurses to staff them are not mandatory subjects of bargaining. Citing *Peerless Publications*, 283 NLRB 334 (1987), the Respondent argues that its change in scheduling policy was a core entrepreneurial decision designed to protect the viability of its surgery services and that it met the “narrowly tailored” and “appropriately limited” factors enunciated by *Peerless*. The Board has declined to apply the *Peerless* rationale broadly. *King Soopers, Inc.*, 340 NLRB 628, 629–630 (2003). Employee work schedules, even in a surgery department, are vital aspects of working conditions and are mandatory subjects of bargaining.¹¹ Even assuming the Respondent did not have to bargain about its surgery-scheduling policy, it had an “obligation to engage in effects bargaining over a managerial decision that has an impact on terms and conditions of employment.” *Id.*

The Respondent also argues that it had no obligation to bargain with the Union over scheduling surgery procedures for July 5, because it followed its established past practice. In making this assertion, the Respondent presumably refers to Melchiodi’s testimony that in 2009 he discussed accepting all July 3, 2009 (the observed holiday) surgical cases with Draves’ predecessor. There is no evidence the Respondent actually deviated from its written surgery-scheduling policy on July 3, 2009, or that it scheduled extra RNs to work that day; mere managerial discussion of a possible policy change cannot create an established past practice.

Finally, the Respondent urges that its policy should not be read to reflect a wooden categorization of surgeries as elective, urgent, or emergency, which designations are solely within the province of the surgeon and not in the Respondent’s discretion. Rather, the Respondent contends, the policy was intended to prioritize surgical resources, a purpose which, the Respondent apparently argues, frees it from adherence to the policy. The Respondent’s motivation in devising the policy is immaterial. The Respondent maintained a policy whereby surgeries were separated into specific, objective categories dependent on scheduling timeframes without regard to the urgency of the medical procedure contemplated. The policy provided that surgeries scheduled to take place more than 6 days from the booking date would be designated as “elective” and would not be performed on Sundays and holidays. Since the change in the policy impacted RN work schedules, the Respondent was obligated to notify and bargain with the Union before implementing

¹¹ See *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *Bloomfield Health Care Center*, 352 NLRB 252, 256 (2008).

any changes.¹² The Respondent's failure to do so violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The collective-bargaining unit described herein is an appropriate unit of employees for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

4. The Union has been at all times since January 14, 2010, and is, the exclusive bargaining representative of the employees in the above-described unit for the purposes of collective bar-

¹² The fact that ultimately a sufficient number of nurses volunteered to work on July 5, obviating a need to assign additional nurses to work that day does not alter the Respondent's obligation to bargain over the change.

gaining within the meaning of Section 9(a) of the Act.

5. Since June 15, 2010, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning terms and conditions of employment of employees in the above-described unit by unilaterally changing its policy with regard to scheduling employees in the pre and post care unit and the surgical services department on an observed holiday, July 5, 2010.

6. The unfair labor practice set forth above affects commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action, as set forth below, designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]