

**Instituto Socio Economico Comunitario, Inc. and Un-
idad Laboral de Enfermeras(os) y Empleados de
la Salud.** Cases 24-CA-011762 and 24-CA-
011880

December 10, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On August 1, 2012, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

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

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 conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Instituto Socio Economico Comunitario, Inc., Hato Rey, Toa Baja, Comerio, Lomerio, Caguas, Humacao, Ponce, and Mayaguez, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's finding that the Respondent unlawfully required unit employees to take vacation leave, and that the Respondent's actions were not privileged by the parties' expired collective-bargaining agreement, we reject the Respondent's reliance on the contractual provision permitting the Respondent to declare additional holidays. Even assuming that this provision survived the expiration of the parties' agreement, there is no evidence that the Respondent actually declared any additional holidays during the periods at issue, and the provision states that the charging of such holidays to an employee's vacation leave is voluntary.

Aysha K. Villegas Estrado, Esq., for the Acting General Counsel.¹

Carlos E. George, Esq. and *Alberto J. Bayouth-Montes, Esq.*, for the Respondent.²

Harold E. Hopkins, Esq., for the Charging Party.³

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This is a unilateral change case which I heard in San Juan, Puerto Rico, on April 26, 2012. The prosecution of this case followed the issuance of a second consolidated amended complaint and notice of hearing (the complaint) issued by the Regional Director for Region 24 of the Board, acting in the name of the Board's Acting General Counsel, on February 29, 2012. The sole issue is whether since April 2011⁴ the Company unilaterally, and without prior notice to the Union and without affording the Union an opportunity to bargain, required its unit employees to take vacation leave during periods not requested by the employees.⁵ It is alleged the Company's actions violate Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

The Company, in a timely filed answer to the complaint, at trial and in its posttrial brief, denies having violated the Act in any manner alleged in the complaint. The Company contends its actions were simply to encourage its employees to take accumulated vacation time and assist them in coordinating their efforts in accordance with provisions of the collective-bargaining agreement as well as in keeping with past practice.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record,⁶ and based on more detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the National Labor Relations Board (the Board) as the Government.

² I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

³ I shall refer to counsel for the Charging Party as Counsel for the Union and I shall refer to the Charging Party as the Union.

⁴ All dates hereinafter are 2011, unless otherwise indicated.

⁵ The parties entered into a non-Board settlement of the issues related to the Union's request for certain information from the Company and the Company's issuance of a disciplinary warning to unit employee Ronny Paoli. It was agreed, as part of the settlement, that the Government would be allowed to present evidence regarding Paoli's disciplinary warning in support of the vacation leave issue litigated herein.

⁶ I grant the Government's unopposed posttrial Motion to accept the English translations of GC Exhs. 25 and 26.

FINDINGS OF FACT

I. JURISDICTION

The Company is a nonprofit corporation, with offices and places of business in Hato Rey, Toa Baja, Comerio, Lomerio, Caguas, Humacao, Ponce, and Mayaguez, Puerto Rico (the Company's facilities), where it has been, and is, engaged in providing services to low income communities within Puerto Rico. During the 12-month period ending February 29, 2012, a representative period, the Company, in conducting its operations, received funds in excess of \$8 million from the United States Government. During that same 12-month period the Company purchased and received at its facilities goods valued in excess of \$50,000 from other enterprises located within the Puerto Rico, each of which enterprises received these goods directly from points outside Puerto Rico. The parties admit, the evidence establishes, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The parties admit, and I find, that at all times material, the Union has been, and continues to be, a labor organization within the meaning of Section 2(5) of the Act.

III. BARGAINING UNIT

It is admitted the following employees of the Company (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All employment technicians, case management technicians, housing improvement technicians, service application assistants, communal technicians, communal developers, accounting clerks, planning technicians, community service representatives, representatives of external resources, program technicians, program clerks, program assistants, data-entry clerks, warehouse employees, secretaries, receptionists, and janitors employed by the Employer in its different offices located at Ponce, Aguada, Toa Baja, Caguas, Arecibo, Humacao, San German, Carolina, Comerio, Guayama, Mayaguez and Central Offices located in Hato Rey, Puerto Rico.

EXCLUDED: All other employees, administrators, executives, directors and their assistants, executive secretary, confidential employees, guards and supervisors as defined by the Act.

The Union was certified as the exclusive collective-bargaining representative of the unit on August 30, 2002. At all times since August 30, 2002, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit. The parties most recent collective-bargaining agreement was effective by its terms from October 2006 to October 2009. The parties are currently in negotiations for a successor agreement.

IV. THE FACTS

Before moving into the annual vacation leave facts I note Ar-

turo Grant is the Union's representative; Jolanda Vélez is the Company's executive director; Iris Lopez is the Company's human resource director, and Yadira Guilliani is the Company's operations manager.

As reflected in the parties most recent collective-bargaining agreement, unit employees accrue 2 days annual leave each month. There are certain fixed periods when employees must take vacation leave, namely, the last calendar week in December and the first calendar week in January each year. In that 2-week timeframe there are; however, 3 days that do not count as vacation leave even though the unit employees are not working. The 3 days are Christmas Day, New Year's Day, and King's Day. There are six specific holidays all unit employees must take and their absence is counted as vacation leave. The six specific holidays are: the first Monday of January; Martin Luther King's birthday; March 22, Evolution of Slavery Day; the last Monday in May, Memorial Day; October 12, Columbus Day; November 11, Veteran's Day; and November 19, Discovery of Puerto Rico Day. The collective-bargaining agreement states that for "the rest of the accumulated vacation days of the employee, prior to the period of December and January, the employee will request it on any other date, within the following (9) months" The collective-bargaining agreement provides for the accumulation of annual leave for up to a maximum of 2 years by prior written agreement between the employee and the Company. Every 3 months the Company, on request, provides each unit employee a summary of vacation days the employee has accumulated. The collective-bargaining agreement provides the Company can, at its discretion, and as required by its service needs, assign work to any employee on any of the mentioned holidays and can, at its discretion declare, other holidays whether with pay or charged voluntarily to the employee's vacation account.

Union Representative Grant is specifically assigned to assist unit employees at the Company. Grant contacts employees by telephone and visits to the Company's various facilities. Grant testified that beginning in January he received notification, by telephone and in writing, from unit employees they were being told they needed to use their vacation time before Holy Week. Grant specifically recalled complaints and/or concerns from employees Ronny Paoli, Carmen Rivera, Yolando Soto, a Ms. Cancel, and an employee from Camuy, Puerto Rico. As a result of these notifications, Grant wrote Company Attorney George on February 25 suggesting Company Human Resource Director Lopez was violating the vacation provisions of the collective-bargaining agreement by telling employees they had to use excess vacation leave before April. Attorney George responded in writing asserting the Union's contentions were "incorrect" that the Company did not violate the collective-bargaining agreement rather the employees were only being requested to coordinate their vacation times.

Grant testified he and union bargaining committee member Miriam Cancel met on March 8 with Company Attorney George and Human Resource Director Lopez regarding the vacation issue. Grant testified the Union raised the fact the Company was forcing employees "to take vacation time . . . in excess of 7 days . . . before Holy Week." According to Grant, the Company stated its actions were not an imposition and con-

tinued to advance the position it had taken in George's March 1 letter to the Union. Grant told the Company that an assistant in the human resource department was mandating employees take excess leave. The meeting ended without a resolution of the vacation issue.

Union Representative Grant sent Attorney George another letter on March 10 regarding their earlier communications and stated that although the Company continued to take the position it was only helping employees coordinate their vacation time that was in fact not the case. Grant attached to his letter an email sent by Company Human Resource Specialist Thayda Munera to various unit employees, namely Iris Cartas, Gladys Gonzalez, and Yolanda Soto in which she advised the employees they were being notified they still owed the Company their requests for vacation leave. Grant indicated the employees had not requested any such vacation time. Grant asked the Company to comply with the parties' collective-bargaining agreement and requested that Munera cease seeking vacation requests from employees that were not requesting vacation time.

On April 7, Grant again wrote Company Attorney George with a list of unit employee concerns that included employees being forced to take vacation days they had not requested. Grant explained unit employees were required to take vacation time during the first 4 days of Holy Week but that Good Friday, of that week, was a contractually provided and paid holiday. The Company did not respond to Grant's letter.

Company Operations Manager Guilliani testified the Company did not open its facilities during Holy Week (April 18 through April 22) and said employees were charged leave for those days except Good Friday. Company Executive Director Vélez testified all offices were closed during Holy Week because no employee requested to stay and work. Vélez stated, however, there was a vacation plan schedule that showed an excess of accrued vacation leave and that supervisors were notified to work on the excess and schedule it.

Grant testified that prior to April the Company had never compelled unit employees to use or exhaust accrued vacation leave as it did in 2011, nor had there been a practice of forcing employees to take vacation leave prior to April 2011.

Union Representative Grant testified that after April unit employees were told they needed to liquidate their total vacation leave time before the end of September. Grant learned of this in August from employees both verbally and in writing. Grant testified that prior to August employees had never before been compelled to exhaust accrued vacation leave.

On August 2, Grant wrote Company Human Resource Director Lopez reminding her that although she and Attorney George's insistence on July 26 that employees were only asked about their vacation leave time and helped in coordinating it that Company Operations Manager Guilliani that day (August 2) had given concrete instructions that unit employees had to exhaust their vacation leave and that the Company was forcing employees to immediately go on vacation leave at times the employees had not requested. Grant requested that the leave employees had been forced to take be restored.

On August 9, Company Human Resource Director Lopez emailed Human Resource Assistant Sanchez, regarding some

19 specifically listed employees, instructing Sanchez to "program existing [vacation leave] differentials" and ascertain from supervision if the vacation balances listed for the 19 employees had been scheduled and to find out the status of employees that still had vacation leave balances. In the email Lopez noted employee Rafael Torres had 22 days of vacation leave, as of that date, for which he had requested leave only for 14 of the days. Lopez directed the remaining 8 days be scheduled for Torres as soon as he returned from leave on August 12. Lopez noted employee Yolanda Soto had one additional vacation leave day and indicated that her current vacation was being extended until 9 a.m. August 18. Lopez noted employee Wanda Toro's vacation, she had 5.73 vacation days to use, was being extended until August 22, and that she was to report for work on that day for 2-1/2 hours then the remainder of the day would be charged to her as vacation leave. Lopez indicated in the email Toro had already been notified of the changes.

As early as June 2011, Company Operations Manager Guilliani, in an email to Lopez and others, instructed that vacation leave should be contemplated on or before September 30, and added that "the vacation plan was incomplete [that] there are employees missing to comply." Guilliani testified she did not give specific instructions that employees had to take vacation leave prior to September 30. She explained that requests for vacation leave did not come directly to her, but, rather went to the employees' immediate supervisors. She testified she was not involved with informing employees of the Company's policies regarding vacation leave.

Employee Ronny Paoli requested, was granted, and took vacation time throughout 2011. Paoli specifically requested vacation leave for July 18-22 and returned for work on July 26. Paoli was requested by his supervisor, Zuma Rivera, to go back on vacation on August 1 for the balance of his vacation leave without "fractioning" it. Paoli refused Rivera's request and on August 4, Company Human Resource Manager Lopez issued Paoli a written disciplinary action for his refusal. Lopez wrote, "I am notifying you that if you persist in this behavior the Institute [Company] will terminate your work relationship with us effective immediately." Lopez acknowledged she signed Paoli's discipline on August 4 and acknowledged Paoli was disciplined because he refused to take vacation in August as ordered by his supervisor, Rivera.

The Company contends its supervisors and agents communications with its employees were simply to encourage employees to take their accumulated vacation leave and help them coordinate their vacation time in accordance with provisions of the parties collective-bargaining agreement and past practice.

Company Executive Director Vélez testified that while the Company establishes vacation plans "[w]e give our employees the opportunity for them to schedule their vacation time." Vélez noted employees must schedule vacation leave yearly before September but after December and January, and added that circumstances "may come up requiring work, depending on the service needs." Vélez testified that all actions taken by the Company related to vacation leave were taken within the provisions of the parties collective-bargaining agreement. Vélez explained the Company "regularly closed [its] operations" dur-

ing Holy Week each year. She testified, “[W]e allow employees to charge these days to their vacation leave. If this is not the case, we try to establish an office for those employees who did not wish to have their vacation leave on those days to work.” Vélez testified the Company had followed this practice “[s]ince forever”; however, she acknowledged that during Holy Week 2011 the Company closed all its facilities. She explained that all offices were closed because “no employee requested staying and working.” Vélez testified she never gave any instructions with regard to taking vacation leave that were different from what was established by the parties collective-bargaining agreement. She acknowledged the collective-bargaining agreement provided for employees to carry vacation leave over from 1 year to the next.

V. CREDIBILITY DETERMINATIONS

I credit Union Representative Grant’s testimony that starting in January he began receiving telephone and written concerns from unit employees that they were being told to use accrued vacation leave before Holy Week in April. Grant impressed me as a thoughtful witness and the actions he took were consistent with what he testified happened. In that regard, he specifically named various employees who had raised concerns. It is undisputed, that as a result of the concerns, Grant wrote Company Attorney George suggesting Human Resource Director Lopez was violating the parties collective-bargaining agreement by telling employees to use their excess vacation leave before April. While the Company denies it violated the collective-bargaining agreement contending it was only assisting employees to coordinate their vacation leave, Grant credibly testified he continued to pursue the matter with management. I credit Grant’s testimony that at a March 8 meeting with management he raised the point that an assistant in the human resource department was mandating that unit employees use any excess vacation leave prior to Holy Week. It is undisputed Union Representative Grant, in writing, on March 10, advised Company Attorney George that Human Resource Specialist Munera had notified at least three named employees they still owed the Company vacation leave requests for times they had not requested. It is undisputed Grant wrote Company Attorney George on April 7 about employees being, according to Grant, forced to take vacation leave for times the employees had not requested. It is likewise undisputed the Company closed all its facilities during Holy Week (April 18–22) 2011. I specifically credit Grant’s testimony that prior to April 2011 the Company had never compelled unit employees to use or exhaust accrued or excess vacation leave prior to Holy Week. The Company did not present any compelling evidence otherwise.

Grant credibly testified that after April unit employees began telling him they were being told to liquidate their vacation leave before the end of September. Grant credibly testified that prior to August employees had never been compelled to exhaust accrued vacation leave in that manner. Grant continued to complain to management and even requested management restore vacation leave the employees were forced to take.

Section 8(a)(5) and (d) of the Act requires an employer to bargain in good faith with the collective-bargaining representative of unit employees with respect to wages, hours, and other

terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). It is well established an employer violates Section 8(a)(5) 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. *NLRB v. Katz*, 369 U.S. 736 (1962). Simply stated, the Government can establish a prima facie violation of Section 8(a)(5) of the Act if it shows an employer unilaterally made a material and substantial change in a term of employment without negotiating with the union. The burden is on the employer to show, or demonstrate, the unilateral change was somehow permissible such as, for example, being consistent with an established past practice. *Fresno Bee*, 339 NLRB 1214 (2003). The Board has held that vacation scheduling and the procedures related thereto constitute substantial and material mandatory subjects of bargaining and any unilaterally imposed changes violate Section 8(a)(5) of the Act. *United Cerebral Palsy of New York City*, 347 NLRB 603, 606–607 (2006), citing *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enfd. mem. in relevant part 106 F.3d 413 (10th Cir. 1997).

Guided by the principles set forth above, I find the Company, unilaterally and without notice to and without affording the Union an opportunity to bargain, imposed mandatory employee use of accrued vacation leave before and during Holy Week, April 18–22. It is clear no notice was given to the Union. Union Representative Grant only learned of the change through unit employees and not from the Company. It is also clear the Company did not follow its past practice, in effect “since forever,” of keeping one office open for employees desiring to work during Holy Week. The Company unilaterally closed *all* its facilities during Holy Week 2011. The parties collective-bargaining agreement does not make provision for the Company to entirely suspend its operations during Holy Week. The Company’s contention it did not keep any facility open during Holy Week 2011 because all employees scheduled vacation leave for that time is refuted by the fact employees were compelled to schedule vacation leave for that time. I find the unilateral requirement that employees exhaust accrued vacation leave before Holy Week 2011 was a material and substantial change affecting a condition of employment and the Company’s implementing this change without notifying and bargaining with the Union violated Section 8(a)(5) and (1) of the Act. I find the Company failed to establish, or demonstrate, the unilateral change was in some way privileged by the parties collective-bargaining agreement or past practice.

After April, the Company compelled unit employees to use, until exhausted, accrued vacation leave by September 30. The Company had not, prior to 2011, done so. The Union learned of the Company’s actions from unit employees and not by notification from the Company. As early as June 22, Company Operations Manager Guilliani, in an email addressed to among others, Company Human Resource Director Lopez instructed that vacation leave “should be contemplated on or before September 30, 2011.” In the same email Guilliani noted: “Vacation Plan is incomplete there are employees missing to comply.” The Company’s actions, taken as a whole, refute its contention its communications, regarding the taking of accrued vacation leave, were merely to assist its employees schedule

vacation leave rather than compel them to take vacation leave at any specific time. That the Company compelled its employees to take vacation leave before September 30, and at times not requested, is further demonstrated by Human Resource Director Lopez' August 9 email to Human Resource Assistant Sanchez. In that email Lopez directed that employee Torres take the remaining 8 of his 22 days of vacation leave as soon as he returned on August 12 from 14 days of leave he had in fact requested. Lopez directed employee Soto's requested vacation leave be extended to include a day she had remaining but had not requested. Lopez also extended employee Toro's requested leave to include 5 plus days vacation leave not requested. Employee Ronny Paoli, who had requested and taken leave throughout the year, was directed by his supervisor to take vacation leave on August 1, after he returned from requested leave, so he could use the balance of his accumulated vacation leave without fractioning it. When Paoli refused to return to vacation status he was, on August 4, given a disciplinary warning for refusing to do so. He was further notified that if he persisted in refusing to take the balance of his vacation leave he would be terminated. It is clear the Company, contrary to past practice, compelled employees to exhaust their vacation leave before September 30. This unilateral action of the Company had a substantial and significant impact on working conditions for the unit employees and the Company's actions violate Section 8(a)(5) and (1) of the Act. The Company failed to demonstrate this unilateral change was in any way privileged. Finally, I note the Company's action deprived unit employees the opportunity to carry unused vacation leave into the next year as provided for in the parties collective bargaining agreement.

CONCLUSION OF LAW

By, since on or about April 2011, unilaterally and without prior notice to or bargaining with the Union regarding unit employees being required to take vacation leave during periods not requested the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Company engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend the Company be ordered to reinstate all vacation leave unit employees were compelled to take at times they had not specifically requested. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act, and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Company, Instituto Socio Economico Comunitario, Inc., Hato Rey, Toa Baja, Comerio, Lomerio, Caguas, Humacao, Ponce, and Mayaguez, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally requiring unit employees to take vacation leave during periods not requested, without giving prior notice to the Union and without affording the Union an opportunity to bargain with respect thereto.

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

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

(a) Reinstate all vacation leave unit employees who were compelled to take time they had not specifically requested.

(b) Within 14 days after service by the Region, post at its Hato Rey, Toa Baja, Comerio, Lomerio, Caguas, Humacao, Ponce, and Mayaguez, Puerto Rico facilities, copies of the notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted by the Company 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 email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not alerted, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facilities involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since April 2011.

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

Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of the 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 and order of the National Labor Relations Board."

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 unilaterally require our bargaining unit employees to take vacation leave during periods not requested, without giving prior notice to the Union and without affording

the Union an opportunity to bargain with respect thereto.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate all vacation leave unit employees were was compelled to take which they had not specifically requested.

INSTITUTO SOCIO ECONOMICO COMUNITARIO, INC.