

**Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County and Health Professionals and Allied Employees (HPAE). Case 04–CA–097635**

April 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND SCHIFFER

This case arises from Respondent's unilateral change to its dress code policy on September 4, 2012, and failure to furnish information requested by the Union on February 11, 2013.<sup>1</sup> For the reasons stated by the judge, and

<sup>1</sup> On September 10, 2013, Administrative Law Judge Michael A. Rosas issued the attached decision. Respondent, Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County, filed exceptions, a supporting brief, a reply brief, and an answering brief to the General Counsel's cross-exceptions. The General Counsel filed an answering brief and cross-exceptions.

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, and conclusions and to adopt the recommended Order as modified and set forth in full below.

We shall modify the judge's recommended Order to conform to the judge's findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

We shall order Respondent to reinstate any unit employees who may have been discharged under the new dress code policy.

We also clarify the Order to require Respondent to make unit employees whole for losses they may have sustained as a result of Respondent's unilateral change to its dress code, including out-of-pocket costs for any new uniform items purchased to comply with the new policy and losses sustained by unit employees who may have been discharged or otherwise disciplined under the new policy. See *Crittendon Hospital*, 342 NLRB 686, 697 (2004); *Laurel Baye Healthcare*, 352 NLRB 179 (2008), vacated and remanded 564 F.3d 469 (D.C. Cir. 2009), cert. denied 130 S.Ct. 3498 (2010), aff'd. 355 NLRB 599 (2010).

For unit employees who may have been separated from employment under the September 4, 2012 dress code policy, backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950). For unit employees who may have been otherwise disciplined under the September 4, 2012 dress code policy, the make whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). For both groups, the remedy shall include interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, we shall order 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.

Finally, we shall substitute a limited bargaining order for the judge's recommended affirmative bargaining order in accordance with *Mimbres Memorial Hospital*, 337 NLRB 998, 998 fn. 2 (2002), aff'd. sub nom. *NLRB v. CHS Community Health Systems, Inc.*, 108 Fed. Appx. 577 (10th Cir. 2004). We observe that Respondent is already subject to an affirmative bargaining order. *Memorial Hospital of Salem County*, 357 NLRB No. 119 (2011) (not reported in Board volumes).

for the additional reasons discussed below, we affirm the judge's finding that the newly implemented dress code policy was a material, substantial, and significant change in unit employees' terms and conditions of employment and therefore that Respondent violated Section 8(a)(5) and (1) of the Act by implementing the change unilaterally. We also affirm the judge's finding that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the requested information to the Union.<sup>2</sup>

I. BACKGROUND

Respondent is an acute care hospital. In August 2011, the Board certified the Union as the exclusive bargaining representative of 120 of Respondent's nurses.<sup>3</sup>

Since at least February 1, 2003, Respondent maintained a dress code policy; since at least January 1, 2002, it maintained a discipline and discharge policy. Respondent also included provisions on personal appearance and discipline in its employee handbooks. Respondent published four editions of its employee handbook from April 2009 to April 2012. Each edition contained identical provisions on personal appearance and discipline.

In April 2012, Respondent approved a revised draft dress code. The new policy assigned color-coded uniforms to each hospital department, provided general dress code rules applicable to all employees, listed non-acceptable items, and included a four-step disciplinary process for employees who failed to abide by the new policy. Respondent planned to provide three<sup>4</sup> free uniforms to each employee to help ease the transition to the new dress code policy, and it began measuring employees for the new uniforms. Patricia Scherle, Respondent's chief nursing officer and facility privacy officer, testified that the purpose of the new policy was to improve the professional image of Respondent's employees. The color-coded uniform system was also designed to help staff, patients, and visitors more easily identify and distinguish employees.

Respondent did not inform the Union about the changes it planned to make to the dress code. The Union be-

<sup>2</sup> The requested information concerned Respondent's then-current and newly imposed dress code policies, lists of employees and units affected by the change, and an explanation of the operations of the new policy. For the reasons stated by the judge, we find that the requested information is presumptively relevant and that Respondent failed to rebut the presumption.

<sup>3</sup> Thereafter, Respondent refused to bargain with and provide requested information to the Union while challenging the Union's certification. *Memorial Hospital of Salem County*, 357 NLRB No. 119 (2011) (not reported in Board volumes); *Memorial Hospital of Salem County*, 358 NLRB 837 (2012).

<sup>4</sup> At one point in his decision, the judge incorrectly stated that Respondent provided employees with two free sets of uniforms.

came aware of the planned changes only when unit employees told Sandra Lane, the Union's staff representative, that their unit managers had made announcements about the new dress code and had begun taking measurements for the free uniforms. On May 14, 2012, Lane sent a letter to Respondent demanding bargaining over changes to the dress code policy. The Union did not receive a response.

On September 4, 2012, Respondent instituted the new dress code policy. Employees who had not yet received their three free sets of uniforms were given a grace period until October 4, 2012, to comply with the new policy.

On February 4, 2013, the Union filed a charge against Respondent for unilaterally implementing the new dress code policy.

## II. ANALYSIS

We affirm the judge's finding that Respondent violated Section 8(a)(5) and (1) by unilaterally changing its dress code policy on September 4, 2012. Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, which generally include uniform requirements and workplace attire. See *Crittenton Hospital*, 342 NLRB 686, 690 (2004); *Public Service Co. of New Mexico*, 337 NLRB 193, 199 (2001). To be unlawful, however, there must be evidence that the unilateral change was a "material, substantial, and significant" change to employees' terms and conditions of employment. See *Carey Salt Co.*, 360 NLRB 201, 212 (2014); *Peerless Food Products*, 236 NLRB 161, 161 (1978). Whether a change rises to that level is determined "by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co.*, 284 NLRB 1205, 1205 fn. 1 (1987), *enfd.* 852 F.2d 572 (9th Cir. 1988).

For the reasons stated by the judge, and as further explained below, we find that the new dress code policy differed materially, substantially, and significantly from the April 2012 handbook provisions on personal appearance and discipline.<sup>5</sup> Under the handbook provisions, employees had wide latitude to determine the color and

type of their scrubs. Employees were also permitted to wear hoodies, sweatshirts, and fleece jackets. The new policy required employees to wear color-coded uniforms and permitted only coordinating solid or print warm-up jackets.

These changes had a significant financial impact on unit employees. As the judge found, the new color-coded uniform requirements "render[ed] useless most, if not all, of their personal scrub inventories containing other colors and styles." Notably, Respondent must have recognized this adverse financial impact because it provided three free sets of scrubs to reduce the initial monetary cost to employees of complying with the new policy.<sup>6</sup> But employees would inevitably need to purchase replacement scrubs when the free scrubs no longer fit or wore out. Although Respondent had always required employees to purchase their own scrubs, most employees already owned multiple sets of scrubs before the dress code policy was changed. Most of those scrubs did not comply with the color codes under the new policy; therefore, when the free scrubs wore out, most employees would have had to purchase new ones. Further, we find that the new dress code's ban on hoodies, sweatshirts, and fleece jackets also had a significant financial impact on unit employees. Under the prior dress code, it was common for employees to wear these items. To comply with the new dress code, employees who wanted to stay warm at work would have had to purchase coordinating solid or print warm-up jackets.

For those reasons alone, we would affirm the judge's finding that Respondent made material, substantial, and significant changes to its dress code policy.

But there is another, independent reason to affirm the judge's finding: in addition to imposing changed attire requirements, Respondent's revised dress code imposed a new disciplinary process for dress code violations. In the past, the handbook provision on personal appearance did not specifically refer to discipline, and the handbook provision on discipline did not specifically refer to dress code violations. An employee who violated the dress code was simply sent home and made to change into appropriate attire. If the employee failed to comply, then the employee could have faced discipline under the discipline provision of Respondent's handbook. That provision stated that "[t]he disciplinary action that is appropri-

<sup>5</sup> The judge compared the new dress code with Respondent's 2003 dress code rather than the requirements set forth in its April 2012 handbook. We find that the appropriate comparison is to the 2012 handbook, which contained Respondent's most recent provisions on personal appearance and discipline. The judge's error does not affect our decision, however, because the language in the 2003 policy is nearly identical to the handbook provisions.

We find that the judge properly rejected Respondent's arguments that the new dress code policy was an appropriate exercise of management prerogatives, see *Crittenton Hospital*, above at 690, and that the Board should apply the "core purposes" analysis from *Peerless Publications*, 283 NLRB 334 (1987), to hospital employers, see *Virginia Mason Hospital*, 357 NLRB 564, 567-568 (2011).

<sup>6</sup> Respondent's attempt to mitigate the financial impact of the new dress code does not make its changes lawful. Indeed, the Board has found that an employer's provision of free uniforms, without bargaining with the union, still violates Sec. 8(a)(5) and (1). *Middleboro Fire Apparatus, Inc.*, 234 NLRB 888, 894 (1978), *enfd.* 590 F.2d 4 (1st Cir. 1978). We find no such violation here, because none is alleged. Our broader point, rather, is that an employer cannot evade its statutory duty to bargain by making (arguably) offsetting unilateral changes.

ate for any particular act or misconduct depends on many factors . . . . The disciplinary action rests in the sole discretion of the facility.” Chief Nursing Officer Scherle testified, however, that she did not know of any employees who were disciplined for violating the old dress code (perhaps because the old code was comparatively liberal as to the sorts of apparel permitted).

By contrast, the new dress code contained a specific disciplinary process for dress code violations. Under the new dress code, there was no discretion in determining discipline and no factors other than the employees’ non-compliance with the dress code were considered (other than prior dress code violations). As the judge noted, “the policy stated that employees ‘will be sent home if they arrive for their scheduled shift not dressed as per policy’ and faced progressive discipline for violating it.”<sup>7</sup> Not only did the new policy impose more stringent discipline, it also contained more restrictions than the past dress code, thus making it more easily violated. Employees therefore faced a heightened prospect of discipline under the new dress code. The addition of this disciplinary process alone is sufficient to establish that the new dress code differed materially, substantially, and significantly from the past dress code. See *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001), modified 337 NLRB 1025 (2002) (finding that the threat of discipline for violations of the new policy demonstrated that the change was significant).<sup>8</sup>

Finally, we find no merit in Respondent’s argument that the timing of the Union’s charge undercuts the significance of the changes to the dress code. Observing that the Union did not file its charge until 9 months after it learned of the planned dress code changes, and 5 months after the changes were implemented, Respondent contends that the Union’s “dilatory tactics” compel a finding that the changes were not material, substantial, or significant. Here, of course, it is undisputed that the Union’s charge was timely under Section 10(b) of the Act. Even accepting, for the sake of argument, the dubious proposition that the timing of a charge could be probative of the materiality of an underlying unilateral change, the Union’s timing here provides no support for the Respondent’s position. When the Union learned of the prospective changes to the dress code, it promptly requested bargaining, thus indicating (contrary to Respondent’s

argument) that it did consider the changes to be significant.<sup>9</sup> That the Union did not file a charge with the Board at that same time is irrelevant, as no unilateral change had yet taken place. And although the Respondent implemented the changes in September, most of the unit employees would not have incurred the costs resulting from the changes until sometime later, when the hospital-supplied scrubs had worn out and had to be replaced. In those circumstances, we find nothing “dilatory” in the Union’s response to the new dress code, and we reject any notion that the Union’s “delay” in filing its indisputably timely charge establishes that Respondent’s unilateral changes were not material, substantial, or significant.

For all the foregoing reasons, we affirm the judge’s finding that Respondent violated Section 8(a)(5) and (1) by unilaterally changing its dress code policy on September 4, 2012.

#### ORDER

The National Labor Relations Board orders that the Respondent, Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County, Salem County, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying Health Professionals and Allied Employees (the Union) and giving it an opportunity to bargain.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(c) 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 following bargaining unit:

<sup>7</sup> For a first offense, an employee would receive a verbal warning; for a second offense, a written warning; for a third offense, a final written warning; and for a fourth offense, termination.

<sup>8</sup> Even if Respondent had not added this new disciplinary process to the dress code, any discipline under the new dress code would itself be unlawful. *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618–619 (2007).

<sup>9</sup> The Union was under no obligation to reiterate its bargaining request when the Respondent later presented the new dress code as a fait accompli. See *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003) (finding that “[a] union is ‘not required to go through the motions of requesting bargaining’ . . . if it is clear that an employer has made its decision and will not negotiate”) (citing *Gratiot Community Hospital*, 312 NLRB 1075, 1080 (1993), enfd. in relevant part 51 F.3d 1255, 1259–1260 (6th Cir. 1995)).

All full-time and regular part-time, and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, excluding all other employees, managers, guards, and supervisors as defined in the Act.

(b) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on September 4, 2012.

(c) Make unit employees whole for any losses incurred by them due to Respondent's unilateral changes to the dress code on September 4, 2012.

(d) Rescind any disciplinary action taken against unit employees for violating the September 4, 2012 dress code.

(e) Within 14 days from the date of this Order, offer any unit employees who may have been discharged for violating the September 4, 2012 dress code full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make unit employees whole for any loss of earnings and other benefits they may have suffered as a result of their discharge or other disciplinary action under the September 4, 2012 dress code, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Compensate any unit employees who may have been discharged or otherwise disciplined under the September 4, 2012 dress code for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(h) Within 14 days from the date of this Order, remove from its files any reference to any discharges or other disciplinary action that may have been imposed under the September 4, 2012 dress code, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges or other disciplinary action will not be used against them in any way.

(i) Furnish to the Union in a timely manner the information requested by the Union on February 11, 2013.

(j) 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 amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Salem, New Jersey facility copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the 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. 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 September 4, 2012.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 4 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.

<sup>10</sup> 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."

WE WILL NOT change your terms and conditions of employment without first notifying Health Professionals and Allied Employees (the Union) and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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 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 our employees in the following bargaining unit:

All full-time and regular part-time, and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, excluding all other employees, managers, guards, and supervisors as defined in the Act.

WE WILL rescind the changes in the dress code for our unit employees that were unilaterally implemented on September 4, 2012.

WE WILL make unit employees whole for any losses they may have incurred due to our unilateral changes to the dress code on September 4, 2012.

WE WILL rescind any disciplinary action taken against unit employees for violating the September 4, 2012 dress code.

WE WILL, within 14 days from the date of the Board's Order, offer any unit employees who may have been discharged for violating the September 4, 2012 dress code full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make unit employees whole for any loss of earnings and other benefits resulting from their cessation of employment or other disciplinary action under the September 4, 2012 dress code, less any net interim earnings, plus interest.

WE WILL compensate any unit employees who may have been discharged or otherwise disciplined under the September 4, 2012 dress code for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to any discharges or other disciplinary action that may have been imposed under the September 4, 2012 dress code, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges or other disciplinary action will not be used against them in any way.

WE WILL furnish to the Union in a timely manner the information requested by the Union on February 11, 2013.

SALEM HOSPITAL CORPORATION A/K/A THE  
MEMORIAL HOSPITAL OF SALEM COUNTY

The Board's decision can be found at [www.nlr.gov/case/04-CA-097635](http://www.nlr.gov/case/04-CA-097635) 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.



*David Faye, Esq.*, for the General Counsel.

*John Jay Matchulat, Esq.*, of Brentwood, Tennessee, for the Respondent.

*Lisa Leshinski, Esq.*, of Haddon Heights, New Jersey, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on June 11, 2013. The Health Professionals and Allied Employees (HPAE) (the Union) filed the charge on February 4, 2013,<sup>1</sup> and the amended charge on May 31. The Acting General Counsel issued the complaint on March 28 and the amended complaint on April 4. The amended complaint alleges that Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County (the Employer) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)<sup>2</sup> by (1) failing and refusing to bargain with the Union over a change to the dress policy and (2) failing and refusing to furnish the Union with requested information which was necessary and relevant to the performance of its

<sup>1</sup> All dates are 2013, unless otherwise indicated.

<sup>2</sup> 29 U.S.C. § 151-169.

duties as the exclusive collective-bargaining representative of certain employees. The Employer denies the allegations and contends that the change in the dress policy was de minimis and does not rise to the level of unfair labor practice, and that there was no basis to respond to the Union's information request.

On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Employer, and the Charging Party, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Employer, a New Jersey corporation, is engaged in the operation of an acute care hospital (the Hospital) at its facility in Salem, New Jersey, where it annually receives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of New Jersey. The Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Hospital's Operations, Policies, and Procedures*

Richard Grogan serves as the Employer's interim chief executive officer (CEO). Patricia Scherle, a registered nurse, is the Hospital's chief nursing officer and facility privacy officer. Her directives are implemented by nursing supervisors. Linda Tuting has served as the Employer's director of human resources since October 2011.

All hospital employees receive an employee handbook, which is updated periodically.<sup>4</sup> Since 2009, the employee handbook has contained policies relating to personal appearance and discipline. The employee handbook also explains the significance of the policies and the need for compliance. The April 2009, July 29, 2010, and April 30, 2012 versions all state, at page ii:

Much of the information on these pages is a summary of facility policies as well as federal, state and local laws which change from time to time. Due to the nature of healthcare operations and variations necessary to accommodate individual situations, the guidelines set out in this handbook may not apply to every employee in every situation. The facility reserves the right to rescind, modify or deviate from these or other guidelines, policies, practices or procedures relating to employment matters from time to time as it considers necessary in its sole discretion, either in individual or

facility-wide situations with or without notice.<sup>5</sup>

Similarly, page 1 of each employee handbook advises employees that its provisions are subject to revision periodically:

The rules, policies and procedures stated in this handbook are guidelines only . . . and are subject to change at the sole discretion of the facility as are all other facility policies, procedures, methods and other programs. From time to time, you may receive updated information concerning changes in policy. If you have any questions regarding anything in this handbook, please consult with your supervisor or the facility's Human Resources Department.

A "Discipline and Discharge Policy" has been in place since January 1, 2002.<sup>6</sup> That policy was revised on January 1, 2009.<sup>7</sup> On July 1, 2010, the Employer's parent company issued a six-page model Discipline and Discharge Policy B.7.<sup>8</sup> The Employer's most recent and current policy on "Discipline and Termination of Employment," effective since July 1, 2011, addresses dress code infractions, if any. The policy states, *inter alia*, "Discipline is not required to follow a rigid process but is fact specific." and, further, "The disciplinary action that is administered for any particular act or misconduct rests in the sole discretion of the Facility." It sets forth the following disciplinary options: counseling; first written warning; second/final written warning; third written warning; investigative suspension; disciplinary suspension; termination of employment. The disciplinary policy in the employee handbook, as revised on April 30, 2012, contains similar language to the July 1, 2011 disciplinary policy, but adds two additional types of disciplinary—probation and demotion.

At issue is the Employer's dress policy for nursing staff. The initial Dress Code and Personal Appearance Policy was adopted on February 1, 2003 (the past dress policy). It was relatively flexible in scope, requiring employees to dress professionally and appropriately, but leaving stricter requirements to each Hospital department. It stated, in pertinent part:

Each department should develop and maintain written guidelines that identify the appropriate dress or uniform for each position as well as items of clothing or shoes that are prohibited if they present a safety hazard . . . or that do not promote a professional image." Further, it stated that "each department may formulate whatever dress codes are necessary to maintain a professional and safe working environment." . . . If uniforms are required, they must be of the established color and style specified for the specific work unit."<sup>9</sup>

Except for surgery department nurses, who were provided green scrubs by the Hospital, nurses provided their own uni-

<sup>3</sup> The Acting General Counsel's unopposed motion to correct the transcript, dated July 30, 2013, is granted and received in evidence as GC Exh. 13.

<sup>4</sup> There is no issue that every employee is provided with an employee handbook. However, the Employer's recitation of how the Hospital's policies, procedures, and manuals are generated elsewhere through its parent company or a management consulting company is irrelevant to the issues here. (R. Exhs. 6(a)-(f); Tr. 161-162; 169-171, 179.)

<sup>5</sup> R. Exhs. 1-3.

<sup>6</sup> R. Exhs. 4(a)-(d).

<sup>7</sup> R. Exhs. 5(a)-(d).

<sup>8</sup> Jt. Exh. 1.

<sup>9</sup> GC Exh. 6.

forms.<sup>10</sup> As a result, there was a variety of scrub colors and styles worn within the Hospital. Moreover, nurses frequently wore a variety of jackets, fleeces, and sweatshirts, including hoodies and sweatpants.<sup>11</sup>

The past dress policy did not specifically refer to disciplinary measures for dress code violations, although a nurse who came to work inappropriately dressed could have been directed to change into more appropriate attire. If a nurse failed or refused to comply with such a directive, the Employer could have applied its progressive disciplinary policy.<sup>12</sup>

#### B. The Parties' Collective-Bargaining Relationship

Pursuant to a representation election held on September 1–2, 2010, and a subsequent Decision and Direction of Election, in a bargaining unit consisting of all full-time, regular part-time, and per diem registered nurses, including staff nurses, case managers, and charge nurses, employed by the Employer at the Hospital, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

On August 3, 2011, the Board certified the Union as the exclusive collective-bargaining representative of approximately 120 hospital employees (the unit) within the meaning of Section 9(b) of the Act:

All full-time and regular part-time, and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, excluding all other employees, managers, guards and supervisors as defined in the Act.<sup>13</sup>

By letter to Grogan, dated August 8, 2011, the Union requested that the Employer enter into collective bargaining.<sup>14</sup> In another letter to Grogan, dated August 15, 2011, the Union requested certain information in anticipation of bargaining, including a copy of the Employer's policy and procedure manuals, by September 30, 2011. The Union also provided possible bargaining dates in November and December 2011.<sup>15</sup> By letter, dated August 17, 2011, Grogan rejected the request to meet and bargain on the ground that the Employer was testing certification.<sup>16</sup>

Recognition and bargaining issues persisted, however, and on November 29, 2011, the Board issued an Order finding that the Employer refused to meet and bargain with the Union in violation of Section 8(a)(5) and (1).<sup>17</sup> On July 31, 2012, the Employer's failure and refusal to provide information requested by the Union was also found to be a violation of Section

<sup>10</sup> Operating room nurses were required to wear specific scrubs to meet State nursing regulations. (Tr. 38–39, 70, 72–73, 93–94, 101, 104, 135–136, 164, 165.)

<sup>11</sup> There is no dispute as to the diversity of colors and styles of scrubs used by nurses under the past dress policy. (GC Exhs. 6, 9; Tr. 35, 41, 70, 79–80, 85–86, 130, 135, 136–137, 163, 172–173, 181, 184.)

<sup>12</sup> Nurse Tracy McAllister's testimony regarding past policy was not refuted by Scherle nor any other employer witness. (Tr. 46, 68–70, 96, 137–138.)

<sup>13</sup> GC Exh. 2.

<sup>14</sup> GC Exh. 3.

<sup>15</sup> GC Exh. 4.

<sup>16</sup> GC Exh. 5.

<sup>17</sup> 357 NLRB 68.

8(a)(5) and (1) of the Act.<sup>18</sup>

#### C. The Hospital's Dress Code Change

In March 2012, Sherle renewed the Hospital's initiative to improve the dress and appearance of its nurses. Her objectives were to implement a dress policy curtailing sloppy appearances, promote a greater sense of professionalism among nurses, and enabling patients, visitors, patients, and other hospital employees to easily identify the departmental affiliation of nurses based on the color of their scrubs. In addition, visitors were to be provided with visitors badges containing an index of the colors of scrubs worn by clinical staff.<sup>19</sup>

In early April 2012, the Hospital's unit managers began informing nurses at meetings that there would be a new dress policy. On April 17, the Employer began measuring nurses for new scrubs.<sup>20</sup> On August 21, the Employer posted a notice instructing nurses to pick up their solid navy blue scrubs in the human resources department and begin using them on September 4.<sup>21</sup> Exceptions were listed for operating, delivery, and cardiac rehabilitation room nurses, who were required to wear colors and patterns specific to their departments.<sup>22</sup> Each nurse was provided with three free uniforms in the required color, thus rendering useless most, if not all, of their personal scrub inventories containing other colors and styles. The cost of any additional or replacement scrubs was to be borne by the nurses.<sup>23</sup>

Included with the scrubs were copies of the new dress policy listing the scrub colors for the various departments. The policy also limited warmup jackets to those matching the navy blue scrubs and precluded the use of certain apparel, including hoodies and fleece jackets, jewelry, piercings, shoes, and body art.<sup>24</sup> The change has resulted in discomfort from the cold to at least one employee due to her inability to wear sweatshirts or hoodies over her scrubs during the winter.<sup>25</sup>

With respect to compliance, the policy stated that employees "will be sent home if they arrive for their scheduled shift not dressed as per policy" and faced progressive discipline for violating it.<sup>26</sup> Nurses were given a 30-day grace period to com-

<sup>18</sup> *Memorial Hospital of Salem County*, 358 NLRB 837, 840 (2012).

<sup>19</sup> Neither Scherle's expertise in nursing administration nor the merits of her initiative were challenged. (Tr. 128–131, 132–133, 137, 164–165, 184; R. Exh. 9.)

<sup>20</sup> There is no indication that the Union was involved in providing feedback to the Employer about the new scrubs during this timeframe. (Tr. 159–160, 190–193.)

<sup>21</sup> GC Exh. 8.

<sup>22</sup> This finding is based on the credible testimony of nurses Thomas and McAllister. (Tr. 41, 44–45, 57–58, 70–71, 76, 79–81, 92, 100, 103, 110–111, 113, 116, 136–137, 160, 163–164, 172–174, 181, 189–190; GC Exh. 9.)

<sup>23</sup> McAllister and Thomas provided credible and unrefuted testimony regarding the many different colored scrubs that they purchased and used over the years. (Tr. 71–79, 83–84, 92–93, 96, 103–109, 110, 117, 164–165, 169, 193.)

<sup>24</sup> GC Exhs. 7–9(a); R. Exh. 7.

<sup>25</sup> The Employer did not contest McAllister's assertion as to the cold working conditions in the Hospital during the winter months. (Tr. 46, 81–84, 112.)

<sup>26</sup> GC Exhs. 9, 9(a).

ply with the new dress policy. Between September 4 and October 4, 2012, the Employer provided new scrubs to approximately 250 nurses. Some employees, however, elected to purchase their own solid navy blue scrubs and did not use those provided by the Employer.<sup>27</sup>

#### D. Request to Bargain and Information Request

In a letter dated May 14, 2012, to Grogan, Lane wrote that the Union demanded bargaining over unilateral changes it heard that Employer intended to make to its dress policy. In addition, Lane requested that specific information about the new dress policy be provided by May 21, 2012. The Employer did not respond to the request.<sup>28</sup>

By letter, dated February 11, 2013, the Union requested bargaining with the Employer over the changes to the past dress policy and requested the following information by February 18, 2013: current policies relevant to the Hospital dress policy; new policies and/or changes to policies relevant to uniforms/dress code; list of units affected by these changes; list of all bargaining unit members that will be affected by the changes; and an explanation as to whether the Employer would provide new uniforms or employees be expected to purchase them, how employees would be reimbursed for purchasing new uniforms, applicable disciplinary action if employees did not comply with the policy, and any grace period for compliance. The Employer neither responded nor provided the Union with any of the requested information.<sup>29</sup>

#### Legal Analysis

##### A. Unilateral Change in Dress Code Policy

The Acting General Counsel alleges that the Employer violated Section 8(a)(5) and (1) of the Act by unilateral changing its dress code policy on or about September 4, 2012, without giving the Union notice and an opportunity to bargain. The Employer denies it was obligated to bargain with the Union over the change, and argues the change was de minimis, not “material, substantial, and significant,” thus, does not rise to an 8(a)(5) and (1) violation. The Employer further contends that the change is protected because it goes to the core purpose of the Hospital and was a proper exercise of management prerogative.

An employer has a statutory duty to bargain in good faith with union representatives about wages, hours, and other conditions of employment, commonly referred to as “mandatory” subjects of bargaining. *Crittenton Hospital*, 342 NLRB 686, 691 (2004), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Workplace apparel is a mandatory subject of bargaining. *Id.* at 690. However, not all unilateral changes in bargaining unit employees’ terms and conditions of employment are found to be unfair labor practices. *Crittenton*, 342 NLRB at 687. A change must be a “material, substantial, and significant” to constitute an unfair labor practice. *Id.*

A minor change, stemming from a prior policy, and not

shown to adversely affect the employees, will not constitute an unfair labor practice. *Id.* In *Crittenton*, the Board found that a hospital’s previous policy, which “strongly discouraged artificial nails,” and its new policy, which outright prohibited artificial nails, were not so materially different to constitute an 8(a)(5) and (1) violation. *Id.* In the instant case, however, the Employer’s past and new dress policies differed significantly.

The Employer’s past dress policy stated that each department would have a dress policy that nurses were expected to follow, and required all employees to be properly groomed and appropriately dressed. The policy also provided employees with wide latitude as to the type and colors of scrubs worn. The new dress policy, however, eliminated that discretion. It requires nurses to wear an all navy blue uniform, permitting only navy blue scrubs and matching warmup jackets if so desired.

Although the Employer provided each nurse hired with two pairs of navy blue scrubs in order to comply with the change in policy, it did not ameliorate the adverse financial impact on nurses, at least some of whom accumulated inventories of dozens to hundreds of scrubs for use at work. Many, if not most, of their scrubs could not be worn under the new dress policy and were rendered inappropriate for use. Because the change in the new dress policy departed significantly from the existing terms and conditions of employment under the past dress policy, the change is material. *Crittenton*, *supra* at 687 (change measured by the extent it departs from the existing terms and conditions affecting employees).

The Employer further argues the unilateral change in the new dress policy is not a violation of the Act because the change reflects the “protection of the core purposes of the enterprise,” *Peerless Publications*, 283 NLRB 334, 335 (1987) (change in policy central to employer’s core purpose, narrowly tailored to achieve that purpose, and appropriately limited to the affected employees, is not a violation of the Act). However, the Board recently refused to apply the *Peerless Publications* test to a hospital employer. *Virginia Mason Hospital*, 357 NLRB 564, fn. 7 (2011).<sup>30</sup> Moreover, the Employer’s assertion that its decision to implement a system of assigned colored scrubs fell within management’s discretion ignores the fact that uniform requirements and workplace appearance are mandatory subjects of bargaining. Thus, the assertion that a change in dress policy merely reflects an appropriate exercise of management prerogatives simply contravenes established Board law. *Crittenton Hospital*, 342 NLRB at 690.

Finally, the Employer’s arguments based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2012), and *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), that decisions issued by the Board are invalid and unenforceable, and that the Acting General Counsel has no authority to prosecute, are unavailing. First, Board judges are bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary deci-

<sup>27</sup> McAllister and Thomas provided credible testimony as to their dislike for the Hospital-issued scrubs or difficulties getting the proper fit. (Tr. 75, 92, 97–98, 116–117, 167, 193–194.)

<sup>28</sup> GC Exh. 7(a); Tr. 61–62.

<sup>29</sup> GC Exh. 10(a); Tr. 48–49.

<sup>30</sup> Contrary to the Employer’s argument that the Board’s supplemental decision to *Virginia Mason Hospital*, 358 NLRB 531 (2012), effectively permitted the core purpose analysis to apply to the health care industry, the Board clearly stated it would not apply the *Peerless Publications* analysis to the hospital industry.

sions by courts of appeals. See, e.g., *GAS Regulated Security Solutions*, 359 NLRB 947, 947 fn. 1 (2013); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981), and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). Second, and more importantly, as a result of a recent burst of bipartisan cooperation in the United States Senate, the Board is now stacked with a full house.<sup>31</sup>

Under the circumstances, the workplace uniform requirements are a mandatory subject of bargaining, and the Employer's change in the dress policy was material, substantial and significant. Accordingly, the Employer's failure to bargain and its unilateral change in the new dress policy violated Section 8(a)(5) and (1) of the Act.

#### B. Information Request

The Acting General Counsel also alleges that the Employer violated Section 8(a)(5) and (1) by failing to provide information concerning the new dress policy requested in the Union's information requests since on or about February 11, 2013. The Employer denies that it violated the Act and, in any event, insists there was no basis for it to respond to the Union's request.

It is well established that employers have a duty to furnish relevant information to a union representative during contract negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). If a union seeks information regarding the terms and conditions of employment, the information requested is presumptively relevant to the union's proper performance of its duties. *Honda of Hayward*, 314 NLRB 443, 449 (1994). Information concerning an employer's policies and procedures with respect to workplace appearance and attire is directly related to a unit employee's terms and conditions of employment; this information is presumptively relevant. *Id.* at 444, 448, 450, 455.

The union is entitled to receipt of the requested information

<sup>31</sup> See August 13, 2013 National Labor Relations Board Press Release at <http://www.nlr.gov/news-outreach/news-releases/national-labor-relations-board-has-five-senate-confirmed-members>.

unless the employer presents sufficient evidence to rebut the presumption of relevance. *Id.* at 449. However, the Employer failed to present such evidence.<sup>32</sup> Therefore, because the information requested pertained to unit employees' terms and conditions of employment, the Employer was statutorily obligated to respond in good faith and as promptly as possible. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F.3d 233 (4th Cir. 2005). Accordingly, the Employer violated Section 8(a)(5) and (1) of the Act by failing to respond to the Union's information request since February 11, 2013.

#### CONCLUSIONS OF LAW

1. The Employer failed and refused to bargain with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act by: (1) changing the dress policy for bargaining unit employees on September 4, 2012, without first giving the Union an opportunity to bargain; and (2) failing or refusing to provide the Union with information requested on February 11, 2013.

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

3. By engaging in the above-referenced unlawful conduct, the Employer has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

<sup>32</sup> Contrary to the Employer's assertion, the subject matter of the requested information was bargainable. Moreover, the fact that the Union waited 5 months to request information after the implementation of the dress code is inconsequential, since the Union has 6 months to file a charge.