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Molly C. Dwyer
Clerk of Court

March 25, 2015

No.:	15-70920
NLRB No.:	31-CA-029713
Short Title:	United Nurses Assocs of CA v. NLRB

Dear Petitioner/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

UNITED NURSES ASSOCIATIONS OF CALIFORNIA/
UNION OF HEALTH CARE PROFESSIONALS,
NUHHCE, AFSCME, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD
Cases 31-CA-029713, 31-CA-029714; 31-CA-029715,
31-CA-029716, 31-CA-029717, 31-CA-029738, 31-CA-029745,
31-CA-029749, 31-CA-029768, 31-CA-029769, 31-CA-029786,
31-CA-029936, 31-CA-029965, and 31-CA-029966

PETITION FOR REVIEW

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Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("UNAC/UHCP") hereby petitions this Court for review of the Decision and Order of the National Labor Relations Board in NLRB Case Nos. 31-CA-029713, *et al.*, reported at 362 NLRB No. 32, entered on March 19, 2015. The Board's March 19 Decision and Order is attached hereto.

Dated: March 25, 2015

s/

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CERTIFICATE OF SERVICE

In accordance with Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that one copy of the foregoing **Petition for Review** was served by first-class mail upon the following counsel:

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Dated: March 25, 2015

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Veritas Health Services, Inc. d/b/a Chino Valley Medical Center *and* United Nurses Associations of California/Union of Healthcare Professionals, NUHHCE, AFSCME, AFL–CIO. Cases 31–CA–029713, 31–CA–029714, 31–CA–029715, 31–CA–029716, 31–CA–029717, 31–CA–029738, 31–CA–029745, 31–CA–029749, 31–CA–029768, 31–CA–029769, 31–CA–029786, 31–CA–029936, 31–CA–029965, and 31–CA–029966

March 19, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On April 30, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 111. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate. The Board also filed a motion to dismiss the petition for review pending before the United States Court of Appeals for the District of Columbia and that request was granted.

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.[1] Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the recommended Order as modified and set forth in full below.

Member McFerran finds it unnecessary to pass on the allegation that Charge Nurse Dolly Casas engaged in unlawful surveillance because finding this violation, in addition to other surveillance violations already found, would not affect the remedy.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by issuing subpoenas duces tecum to employees, we reject, for the reasons fully set forth in *Santa Barbara News-Press,* 358 NLRB No. 155 (2012), incorporated by reference in 361 NLRB No. 88 (2014), the Respondent's argument that the Petition Clause of the First Amendment protects its subpoena requests.

While we recognize the possibility that employers may at times have a legitimate, specific need for certain information pertaining to union activity, see generally *Ozark Automotive Distributors, Inc. v. NLRB,* 2015 WL 525134 (D.C. Cir. Feb. 10, 2015), we find that the breadth of the subpoenas at issue here and the nature of the information requested—encompassing communications between employees and the Union, union authorization and membership cards, and all documents relating to the distribution and/or solicitation of union authorization and membership cards—would subject employees' Sec. 7 activities to unwarranted investigation and interrogation. See, e.g., *National Telephone Directory Corp.,* 319 NLRB 420, 421 (1995) (recognizing "the importance of an employee's ability to sign an authorization card with confidence that the card will not be presented to the employer, because it is entirely plausible that employees would be chilled when asked to sign a union card if they knew the employer could see who signed"). Although the Respondent maintains it was willing to allow the documents to be produced to the hearing officer for an in-camera inspection, we find that under these facts, the harm is in the very request itself, which would have a chilling effect on employees' willingness to engage in (or refrain from) protected activities. See, e.g., *Pacific Molasses Co. v. NLRB,* 577 F.2d 1172, 1182 (5th Cir. 1978) ("[I]t is impossible to minimize the seriousness of the threatened [disclosure of authorization cards]. We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the [Act], and, for all intents and purposes, would make meaningless those provisions of the [Act], which guarantee secrecy in union elections.")

Member Johnson did not participate in *Santa Barbara* and expresses no view as to whether that case was correctly decided. Contrary to his colleagues, he finds that the Respondent did not violate Sec. 8(a)(1) by serving the subpoenas on employees, and finds it unnecessary to pass on the Respondent's Petition Clause argument. Member Johnson notes that the subpoenas did not have an illegal objective and that they sought relevant information pertaining to the Respondent's contention that the Union utilized charge and relief charge nurses in its organizing effort. Moreover, the subpoenas had very clear and specific instructions that certain requests were applicable only to charge nurses. Finally, the Respondent offered that responsive documents could be produced to the hearing officer for an in-camera inspection to determine which documents would be provided to it, so as to address any Sec. 7 employee confidentiality interests potentially implicated by its requests. Cf. *Wright Electric, Inc.,* 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000) (in finding that employer violated Sec. 8(a)(1) by seeking discovery of employee authorization cards, the Board noted that the employer recognized that its suggestion of an in-camera inspection, where authorization cards would first be inspected by a judge, was a less intrusive way of obtaining information).

In finding that Ronald Magsino's discharge was unlawful, the Board notes that the judge misstated that Cheryl Gilliatt, rather than Linda

[1] In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the attendance policy and by more strictly enforcing the new policy without bargaining with the Union, we do not rely on the judge's citation to *Alcoa, Inc.,* 352 NLRB 1222 (2008). Instead we rely on *Dorsey Trailers, Inc.,* 327 NLRB 835, 853 fn. 26 (1999) (attendance policy is mandatory bargaining subject), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000), and *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1016 (1982) (employer violated Sec. 8(a)(5) and (1) by disciplining employees under unilaterally implemented attendance policy), enfd. 722 F.2d 1120 (3d Cir. 1983).

ings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 111, which is incorporated herein by reference.[2] The Order is set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Veritas Health Services, Inc. d/b/a Chino Valley Medical Center, Chino Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to close the facility and terminate employees if they selected a union.

(b) Threatening employees with loss of benefits if they selected the United Nurses Associations of California/Union of Healthcare Professionals, NUHHCE, AFSCME, AFL–CIO (the Union) as their collective-bargaining representative.

(c) Coercively interrogating employees about their union activities.

(d) Impliedly threatening employees with layoffs if they supported a union.

(e) Telling employees that they might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union.

(f) Giving employees the impression that their union activities are under surveillance.

(g) Threatening to discipline employees because they engaged in union activities.

(h) Informing employees that they could no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them.

(i) Telling employees that the family atmosphere at Chino Valley is over and that henceforth Chino Valley would begin strictly enforcing its policies and procedures, including tardiness, because the employees voted for the Union.

(j) Broadly prohibiting employees from speaking to the media, including about the Union or about terms and conditions of employment.

(k) Serving subpoenas on employees and unions that request information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding.

(l) Unilaterally changing wages, hours, and other terms and conditions of employment of employees without first giving the Union notice and an opportunity to bargain about such changes.

(m) More strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule because employees supported the Union.

(n) More strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule without first giving the Union an opportunity to bargain concerning the change.

(o) Disciplining employees who fail to attend mandatory meetings.

(p) Discharging or otherwise discriminating against any employee for supporting the Union or any other union.

(q) Beginning to discipline employees who fail to attend mandatory meetings without first giving the Union an opportunity to bargain concerning the change.

(r) Terminating the practice of paying part-time employees for the time spent attending classes needed to maintain the certifications necessary to perform their work at Chino Valley without first allowing the Union an opportunity to bargain concerning that change.

(s) Failing to provide the Union with requested information that is presumptively relevant to the Union's performance of its representational duties.

(t) In any other 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, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

Ruggio, told Magsino that it was a violation to copy a redacted version of a medical record That inadvertent error does not affect our disposition of any issue in this case

Member Johnson concurs with his colleagues that Magsino's discharge was unlawful However, unlike his colleagues, Member Johnson finds that the Respondent *did* have a good-faith belief that Magsino committed several violations of its HIPAA-related policies, and that it was justified in disciplining him Nonetheless, Member Johnson agrees with the judge's alternative finding that the Respondent failed to establish that the asserted HIPPA violations would have warranted Magsino's *discharge* under its enforcement and discipline policy for HIPAA-related violations Member Johnson relies, however, *only* on the fact that the Respondent's discharge of Magsino was inconsistent with its own investigation and recommendations as described in its "Potential Privacy Breach Reporting Form" There, the Respondent indicated that it would retrain, reeducate, and issue written warnings to *both* Magsino and Ysenia DeSantiago, and made no recommendations seeking Magsino's discharge. Accordingly, Member Johnson finds that the Respondent did not meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F 2d 899 (1st Cir 1981), to establish that it would have discharged Magsino notwithstanding his union activity

[2] We shall substitute a new notice to conform to *Durham School Services*, 360 NLRB No 85 (2014) We shall also modify the judge's recommended Order to conform with our recent decision in *Don Chavas LLC d/b/a Tortilla Don Chavas*, 361 NLRB No 10 (2014)

All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

(b) Rescind the discipline imposed pursuant to stricter enforcement of the tardiness rule and restore the practice that existed prior thereto.

(c) Rescind the discipline imposed on employees who failed to attend mandatory meetings.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of employees, and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(f) Restore the practice of paying part-time employees for the time spent attending classes needed to maintain the certifications necessary to perform their work at Chino Valley, and make whole, with interest compounded daily, those employees for any losses resulting from the unlawful termination of this practice.

(g) Furnish to the Union in a timely manner the following information requested by the Union on April 9, 2010: lists of employees, including details as to full or part-time status, hourly wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers; employee handbooks; company policies and procedures; job descriptions; benefit plans; costs of benefits; and disciplinary notices.

(h) Within 14 days from the date of this Order, offer Ronald Magsino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(i) Make Ronald Magsino whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(j) Compensate Ronald Magsino for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(k) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Ronald Magsino, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(l) 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.

(m) Within 14 days after service by the Region, post at its facility in Chino, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 31, 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. In addition, within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all per diem employees and former employees employed by the Respondent at any time since March 8, 2010. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 8, 2010.

(n) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by a responsible management official or by a Board agent in the presence of a responsible management official.

(o) Within 21 days after service by the Region, file with the Regional Director of Region 31 a sworn certification of a responsible official on a form provided by 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."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 19, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to close the facility and terminate employees if they select a union.

WE WILL NOT threaten employees with loss of benefits if they select the United Nurses Associations of California/Union of Healthcare Professionals, NUHHCE, AFSCME, AFL–CIO (the Union) as their collective-bargaining representative.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT impliedly threaten employees with layoffs if they support a union.

WE WILL NOT tell employees they might lose the family atmosphere and flexibility of scheduling at Chino Valley if they select the Union.

WE WILL NOT give employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to discipline employees because they engaged in union activities.

WE WILL NOT inform employees that they can no longer take vacations longer than 2 weeks because the employees selected the Union to represent them.

WE WILL NOT tell employees that the family atmosphere at Chino Valley is over and that from now on Chino Valley will begin strictly enforcing its policies and procedures, including tardiness, because the employees voted for the Union.

WE WILL NOT broadly prohibit employees from speaking to the media, including about the Union or about terms and conditions of employment.

WE WILL NOT serve subpoenas on employees and unions that request information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of employees without first giving the Union notice and an opportunity to bargain about such changes.

WE WILL NOT more strictly enforce a tardiness rule and discipline employees pursuant to that more strictly enforced rule because employees supported the Union.

WE WILL NOT more strictly enforce a tardiness rule and discipline employees pursuant to that more strictly enforced rule without first giving the Union an opportunity to bargain concerning the change.

WE WILL NOT discipline employees who fail to attend mandatory meetings.

WE WILL NOT discharge or otherwise discriminate against employees for supporting the Union or any other union.

WE WILL NOT begin disciplining employees for failing to attend mandatory meetings without first giving the Union an opportunity to bargain concerning the change.

WE WILL NOT terminate the practice of paying part-time employees for the time spent attending classes needed to maintain the certifications necessary to perform their work at Chino Valley without first allowing the Union an opportunity to bargain concerning that change.

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 other 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, no-

tify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time, regular part-time and regular per diem registered nurses employed by us at our 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

WE WILL rescind the discipline we imposed as a result of our stricter enforcement of the tardiness rule and restore our prior practice.

WE WILL rescind the discipline we imposed on employees who failed to attend mandatory meetings.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of employees, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Ronald Magsino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Magsino whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Ronald Magsino, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL restore the practice of paying part-time employees for the time spent attending classes needed to maintain the certifications necessary to perform their work at Chino Valley, and WE WILL make whole those employees for any losses resulting from the unlawful termination of that practice, with interest compounded daily.

WE WILL furnish to the Union in a timely manner the relevant information requested by the Union on April 9, 2010.

VERITAS HEALTH SERVICES, INC. D/B/A CHINO VALLEY MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/31-CA-029713 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.