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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILKES-BARRE HOSPITAL COMPANY, LLC
D/B/A WILKES-BARRE GENERAL HOSPITAL

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

Respondent

Docket No.

15-1318

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, and Rule 15 of the Circuit Rules of the United states Court of Appeals for the District of Columbia Circuit, Wilkes Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order issued by the National Labor Relations Board on July 14, 2015, and reported at Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital , 362 NLRB No. 148. A copy of the Decision and Order is attached hereto.

Dated: September 9, 2015

Respectfully submitted,

Carmen M. DiRienzo, Esq.
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(917) 217-4691
Carmen.DiRienzo@Hotmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served via email and U.S. Mail on the persons listed below on this 9th day of September, 2015:

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National Labor Relations Board
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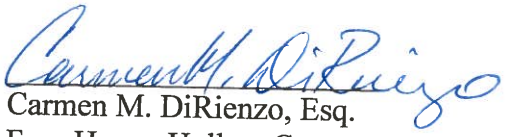

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other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

Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital *and* Pennsylvania Association of Staff Nurses and Allied Professionals, AFL–CIO. Case 04–CA–123748

July 14, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On November 17, 2014, Administrative Law Judge Susan A. Flynn issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions. The Respondent filed a reply brief to the Charging Party's brief in opposition.

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,[1] findings, and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital, Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs.

"(d) Compensate affected employees 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."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 14, 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

[1] We affirm the judge's denial of the Respondent's motion to dismiss. See *Pallet Cos.*, 361 NLRB No. 33, slip op. at 1–2 (2014).

[2] For the reasons stated by the judge, we affirm the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by ceasing to pay longevity-based wage increases after the collective-bargaining agreement expired, without providing the Union prior notice and an opportunity to bargain. In affirming the judge, we do not rely on the judge's statement that because "the provisions in the two contracts are different . . . the situations are not comparable."

In addition to the rationale set forth by the judge, Members Hirozawa and McFerran find that *Finley Hospital*, 362 NLRB No. 102 (2015), supports the judge's conclusion. In *Finley*, the Board found that an employer violated Sec. 8(a)(5) and (1) by unilaterally discontinuing, upon the expiration of the parties' collective-bargaining agreement, the annual 3-percent pay raises provided for in the agreement. Further, Members Hirozawa and McFerran agree with the judge that the Respondent had a statutory obligation to continue to pay the longevity increases after the expiration of the parties' collective-bargaining agreement, and they find it unnecessary to pass on the judge's finding that the Respondent did not have a contractual obligation to pay longevity-based wage increases in January 2014.

Member Johnson concurs in finding a violation based on the specific facts presented in the instant case. Here, adherence to the longevity scale *is* adherence to the status quo. The January 2013 wage rates for each of the seven levels of seniority (the "January 2013" vertical columns) were set upon expiration of the contract. (See GC Exh. 2) By refusing, in January 2014, to pay eligible nurses who had moved into the higher level the corresponding longevity-based wage rate, the Respondent effectively created a two-tier wage system. For example, a nurse who had 3 years of experience when the contract expired would be paid $27.00, but a nurse who reached 3 years of experience after the contract expired would be paid only $26.10. As the judge rightly observed, this wage "freeze" was a *change* in employees' terms and conditions of employment because employees continued to gain seniority but were not given the wages that would have otherwise obtained. He notes that, in *Finley Hospital*, 362 NLRB No. 102 (2015), base wage rates were likewise set at contract expiration, and those rates (like the vertical column rates here) were, in his dissenting view, the status quo that should have been maintained postcontract expiration. Instead, the *Finley* majority transformed a term-limited contractual obligation into a statutory obligation to continue making annual 3-percent wage increases.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and we shall substitute a new notice to conform to the Order as modified.

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 unilaterally discontinue paying increases to your base hourly wage rate based on experience level as described by article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement.

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

WE WILL, before implementing any changes in your wages, hours, or other terms or conditions of employment, notify and, on request, bargain collectively with the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP), AFL–CIO (the Union), as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time graduate and registered nurses employed by Wilkes-Barre Hospital Company, LLC, 575 North River Street, Wilkes-Barre, including certified registered nurse anesthetist, nurse epidemiologist, clinical educator, continuing care nurse (discharge planner), tumor registry nurse, patient advocate, RN tech scanner (cardiology), RN special procedures, instructor, cardiology/ultrasound RN, lead instructor (Hospital Services division), cardiology RN, neurophysiology RN, radiation oncology RN, respiratory RN, radiology, special procedures, cath. lab nurse, RN unit secretary, IV therapy nurse, staff RN, coordinator QI, coordinator UM, clinical care coordinators, relief charge nurse, employee health nurse, occupational health nurse/case manager, family enhancement facilitator, family outreach facilitator, health awareness facilitator, diabetes center nurse educator, physical therapy RN, cardiac rehabilitation nurse, Mother-to-be program RN, pain management RN, ambulatory/outpatient diagnostic RN, women's health specialist, health enhancement associate, lead instructor (health enhancement), coordinator clinical support (family outreach), O.R. nurse, and service coordinator I, case managers, Wilkes-Barre Academic Medicine, LLC registered nurses, and childbirth facilitator.

WE WILL resume paying increases to the base hourly wage rates based on experience level to eligible employees as described in article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make eligible employees whole, with interest, for any losses sustained as a result of the unlawful cessation of giving pay raises based on experience level as of January 27, 2014.

WE WILL compensate affected employees 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 backpay awards to the appropriate calendar quarters for each employee.

WILKES-BARRE HOSPITAL COMPANY, LLC
D/B/A WILKES-BARRE GENERAL HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-123748 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Henry R. Protas, Esq., for the General Counsel.
Carmen M. DiRienzo, Esq., for the Respondent.
Jonathan Walters, Esq. (Markowitz & Richman), for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on July 14–16, 2014. The Union filed the first charge (Case 04–CA–111130) on August 13, 2013, and the General Counsel issued the complaint on November 22, 2013. The second charge (Case 04–CA–121027) was filed on January 17, 2014, and was amended on March 28, 2014. The third charge (Case 04–CA–123748) was filed on March 5, 2014. The General Counsel issued a consolidated complaint on April 23, 2014. The Respondent filed answers denying all material allegations.

On September 8, 2014, subsequent to the hearing, the Union requested that I remand certain allegations of the consolidated

complaint to the Regional Director for consideration of its request to withdraw those allegations, which I did on September 10, 2014. On September 23, 2014, the Regional Director issued an Order approving full and partial withdrawal request and dismissing consolidated complaint in part. As a result, all allegations in Cases 04–CA–111130 and 04–CA–121027 were withdrawn as well as portions of Case 04–CA–123748. The portion of Case 04–CA–123748 remaining before me alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it failed to pay longevity-based wage increases after the contract expired.

After the trial, the parties filed briefs, which I have read and considered. Based on the entire record in this case,[1] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Wilkes-Barre Hospital Co., LLC, operates an acute care hospital in Wilkes-Barre, Pennsylvania. In 2013, the Respondent received gross revenues in excess of $250,000 and purchased and received goods in excess of $5000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, and the Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

BACKGROUND

Wilkes-Barre General Hospital is an acute care medical facility in Wilkes-Barre. Since May 12, 2009, it has been owned by Community Health Systems. (R. Exh. 8.) The Hospital's registered nurses (RNs), both full-time and part-time graduate and registered nurses, are unionized and are represented by the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP). The most recent collective-bargaining agreement was effective April 30, 2011, and expired April 30, 2013. (GC Exh. 2.) The parties began negotiations for a successor agreement in February 2013. No agreement had been reached at the relevant time period.

WAGE INCREASES

Under the terms of the collective-bargaining agreement, nurses were paid a minimum base hourly rate commensurate with their years of experience. That experience was grouped as follows: 0–2 years, 3–4 years, 5–9 years, 10–14 years, 15–19 years, 20–24 years, and 25+ years. (GC Exh. 2.)

The collective-bargaining agreement provided for two different types of wage increases, across-the-board annual raises and periodic longevity-based wage increases. There were three annual across-the-board pay rate increases, the first upon contract ratification in May 2011, another in January 2012, and the third in January 2013, the January raises being effective the first full pay period following January 27, 2012, and 2013. In addition, as a nurse advanced from one experience level to the next, his/her hourly pay rate increased accordingly. Those raises were paid January 27 of the year following the work anniversary. Article 25, sections 1, 2, and 3 pertain to the across-the-board raises, while sections 4 and 5 pertain to the longevity-based wage increases. The specific contract provisions are set forth below.

> **Section 1**—Effective upon the first full payroll period following the date of ratification, regular full-time and regular part-time registered nurses who have completed their probationary period shall be paid no less than the minimum base hourly rates set forth on Appendix A, specifically May 2011. Consequently, those who are paid less than the minimum base hourly rates set forth in Appendix A, specifically May 2011 shall be raised to those rates. Those who are already receiving higher base hourly rates than those specified in Appendix A shall retain those higher rates, but shall receive an increase only in accordance with Section 2 below.
>
> **Section 2**—Effective the first full pay period after January 27, 2012, minimum base hourly rates shall be paid as set forth in Appendix A, specifically January 2012. Those who are paid less than the minimum for their service level shall be raised to the new minimum base hourly rate. Those whose base hourly rates already equal or exceed the minimum rates in Appendix A; specifically January 2012 shall receive a 2.75% increase in their then-existing base hourly rate if the most recent annual performance evaluation indicates the individual meets standards. Where an employee's increase to the wage scale is less than the percentage increase of his/her then-existing base hourly rate specified above, he/she shall be entitled to the percentage increase specified above if the most recent annual performance evaluation indicates the individual meets standards.
>
> **Section 3**—Effective the first full pay period after January 27, 2013, minimum base hourly rates shall be paid as set forth in Appendix A, specifically January 2013. Those who are paid less than the minimum for their service level shall be raised to the new minimum base hourly rate. Those whose base hourly rates already equal or exceed the minimum rates in Appendix A; specifically January 2013 shall receive a 2.00% increase in their then-existing base hourly rate if the most recent annual performance evaluation indicates the individual meets standards. Where an employee's increase to the wage scale is less than the percentage increase of his/her then-existing base hourly rate specified above, he/she shall be entitled to the percentage increase specified above if the most recent annual performance evaluation indicates the individual meets standards.
>
> **Section 4**—Wage minimums shall be based upon the employee's length of continuous service as a registered nurse in any registered nurse position(s) within Wyoming

[1] There are two obvious typographical errors that should be corrected. P. 14, L. 2, should read "Protas" rather than "Gratius," and p. 311, L.15, "step" rather than "staff."

Valley Health Care System[2] or its predecessors. Those who have been granted credit for prior registered nurse experience at other institutions shall retain such length of service for wage determination purposes only. New hires may be given credit for prior registered nurse experience.

Section 5—For the purpose of computing compensation under this Article, the "base hourly rates" of salaried employees shall be their base bi-weekly salary divided by (80) eighty hours. Unless the effective date of an increase falls on the first day of the payroll period the increase shall actually become payable on the first day of the next payroll period. Scale increases according to longevity shall become due only upon January 27th of the year following the employee's anniversary date.

(GC Exh. 2.)

The chart at Appendix A shows the hourly pay rates for the defined experience categories, for acute care and health services nurses. The chart specifies the hourly pay rates for May 2011, January 2012, and January 2013, for nurses at each of the seven different levels of seniority. Reading across, the chart shows the three annual across-the-board raises; reading down, the chart shows the longevity-based wage increases. Appendix A is reproduced below.

During the term of this Agreement, the initial wage scale and subsequent applicable increases to same for bargaining unit RN's shall be in accordance with the following:

[2] Wyoming Valley Health Care System was the predecessor owner of Wilkes-Barre General Hospital. (Tr. 47, 48.)

	Acute Care				Health Services		
	May 2011	Jan 2012	Jan 2013		May 2011	Jan 2012	Jan 2013
0–2	$24.90	$25.58	$26.10		$19.54	$20.08	$20.48
3–4	$25.76	$26.47	$27.00		$20.10	$20.65	$21.07
5–9	$26.55	$27.28	$27.83		$21.04	$21.62	$22.05
10–14	$27.87	$28.64	$29.21		$22.14	$22.75	$23.20
15–19	$28.74	$29.53	$30.12		$22.68	$23.30	$23.77
20–24	$29.17	$29.97	$30.57		$23.20	$23.84	$24.31
25+	$30.11	$30.94	$31.56		$23.84	$24.50	$24.99

(GC Exh. 2.)

Thus, nurses who moved from one experience level to the next received an increase in hourly pay the following January 27. All nurses received a pay increase the first full pay period after January 27, 2012, and 2013. However, no one received a raise in January 2014. (Tr. 43, 140, 272.) There is no allegation regarding across-the-board raises in 2014. It is, however, alleged that eligible nurses—those who advanced to the next higher experience level in 2013— should have received pay raises in January 2014 as set forth in the chart at appendix A.

III. LEGAL STANDARDS AND ANALYSIS

A. Did the Region 4 Regional Director have the Authority to Issue the Complaint?

The Respondent moved to dismiss the complaint, contending that Regional Director Walsh had no authority to issue the complaint in this matter. The Respondent asserts that, because the January 2012 recess appointments of National Labor Relations Board Members were determined to be invalid and the Board thus had no quorum until August 2013, any actions taken by the Board in the interim are invalid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). It follows, according to the Respondent, that, as Walsh was appointed by the Board in January 2013, when it had no quorum, his appointment was invalid and his issuance of the complaint was ultra vires.

However, the power to appoint Regional Directors during this period was delegated to the General Counsel. The Board had issued an Order contingently delegating authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge that was effective November 22, 2011. Notice of this order was posted in the Federal Register. The order reads as follows, in pertinent part.

> The National Labor Relations Board anticipates that in the near future it may, for a temporary period, have fewer than three Members of its full complement of five Members. The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public to the greatest extent possible, the Board has decided to temporarily delegate certain authority to the Chairman, the General Counsel, and to the Chief Administrative Law Judge as described below, subject to the right of any sitting Board Member to request full-Board consideration of any particular decision. These delegations shall be effective during any time at which the Board has fewer than three Members and are made under the authority granted to the Board under sections 3, 4, 6, and 10 of the National Labor Relations Act.
>
> Accordingly, the Board delegates to the General Counsel authority over the appointment, transfer, demotion, or discharge of any Regional Director or of any Officer-in-Charge of a Subregional Office, and over the establishment, transfer or elimination of any Regional or Subregional Office, subject to the right of any sitting Board Member to request full-Board consideration of any particular decision. In the absence of a request by any sitting Board Member for full-Board consideration of a particular decision(s), the decision(s) of the General Counsel will become final 30 days after the then-sitting Board Members are notified thereof.
>
> . . . .
>
> These delegations shall become and remain effective during any time at which the Board has fewer than three Members, unless and until revoked by the Board.

(76 Fed. Reg. 73719 (November 29, 2011.)

Additionally, on July 18, 2014, the Board minutes reflect that "in an abundance of caution, with a full complement of five Board members" the Board confirmed, adopted, and ratified all administrative, personnel, and procurement matters approved by the Board or taken by or on behalf of the Board between January 4, 2012, and August 5, 2013. "In a further abundance of caution, and in an effort to bring an end to ongoing litigation regarding the actions of the Board and its personnel between January 4, 2012, and August 5, 2013," the Board expressly authorized Walsh's selection as Region 4 Regional Director.

The Respondent attached two notices to its motion, both pertaining to delegation of authority by the Board. The first, dated October 9, 2002, granted the General Counsel "full and final authority on behalf of the Agency over the selection, retention, transfer, promotion, demotion, discipline, discharge, and in all other respects, of all personnel engaged in the field, except that personnel action with respect to Regional Directors and Officers-in-Charge of Subregional offices will be conducted as hereinafter provided. . . . The appointment, transfer, demotion, or discharge of any Regional Director or of any Officer-in-Charge of a Subregional office shall be made by the General Counsel only upon the approval of the Board." That memorandum was

modified by an Amendment dated August 1, 2012. It reiterated that "The appointment, transfer, demotion, or discharge of any Regional Director or of any Officer-in-Charge of a Subregional office shall be made by the General Counsel only upon the approval of the Board." Both of those notices address the routine conduct of business, not the extraordinary situation addressed in the November 2011 notice, that was in effect when Walsh was selected.

Walsh was selected by the General Counsel and, in approving the selection without dissent, no Board Member requested full-Board consideration of the decision. The General Counsel exercised the authority delegated to him and there was no invalid action by the Board.

Therefore, the Motion to Dismiss is denied.

B. Did the Respondent Meet Its Obligation to Maintain the Status Quo when it Failed to Pay Longevity-Based Wage Increases in January 2014, after the Collective-Bargaining Agreement Expired?

I must first determine whether the Respondent had either a contractual or a statutory obligation to pay longevity-based wage increases in January 2014, after the contract had expired.

Where the contractual right survives, the employer is required to honor its agreement; it must maintain the contractual term unless and until the union consents to a change. Although a contractual obligation may extend past the expiration of the contract, I find that is not the situation here. See *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991). The contract was effective for the period April 30, 2011, through April 30, 2013. Article 25, sections 1, 2, and 3 specifically state the dates of the across-the-board raises: May 2011, January 2012, and January 2013. Article 25, sections 4 and 5, and appendix A pertain to longevity raises. Appendix A begins "During the term of this Agreement, the initial wage scale and subsequent applicable increases to same for bargaining unit RN's shall be in accordance with the following." This addresses what should occur regarding longevity raises during the term of the contract but does not address what should occur upon its expiration. Article 25, section 5, states "Scale increases according to longevity shall become due only upon January 27th of the year following the employee's anniversary date." The provision likewise does not state that it is limited to 2012 and 2013. However, while these two provisions are silent as to what should occur upon expiration of the contract, the contract contains no language that would extend the provisions of article 25 or appendix A past the contract expiration date. Thus, I find that there was no contractual obligation to pay longevity-based wage increases in January 2014, after the contract expired.

I now turn to the question whether there was a statutory obligation to pay longevity-based wage increases in January 2014. It is well established that an employer violates Section 8(a)(5) and (1) of the Act if it changes the wages,[3] hours, or terms and conditions of employment of represented employees without providing the Union prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). This obligation extends to situations where a collective-bargaining agreement has expired and negotiations on a new contract are ongoing. See, e.g., *Laborers Health & Welfare Trust Fund for North California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988); *Litton Financial Printing Div. v. NLRB*, supra at 198; E. I. *DuPont de Nemours, Louisville Works*, 355 NLRB 1096 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012); *Register-Guard*, 339 NLRB 353, 354 (2003). In such situations, the employer is obligated to maintain the status quo as to mandatory subjects of bargaining unless the parties have bargained to impasse. *Katz*, supra; *Litton*, supra at 198; *AlliedSignal Aerospace*, 330 NLRB 1216, 1216–1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001); *General Tire & Rubber Co.*, 274 NLRB 591, 592–593 (1985), enfd. 795 F.2d 585 (6th Cir. 1986). It is undisputed that the parties had not bargained to impasse in the negotiations over this provision in the new contract.

It is also undisputed that the Respondent did not give the Union prior notice of its intention not to pay longevity-based wage increases in January 2014. The Respondent asserts that it had no obligation to give such notice, since it was under no obligation to pay longevity-based wage increases after the contract expired. The collective-bargaining agreement chart at appendix A states that "During the term of this Agreement, the initial wage scale and subsequent applicable increases to same for bargaining unit RN's shall be in accordance with the following . . . ." The Respondent contends that this language limits any raises to the term of the contract. I disagree. The language states what was to happen during the contract term, and limits the annual across-the-board raises to those specifically provided for in that article. It also limits the Respondent's contractual obligation regarding longevity-based wage increases. But the contract says nothing about nurses receiving longevity-based wage increases after the contract expired. Absent language specifically limiting the applicability of the provision for wage rate increases based on experience level to the term of the contract, that provision continues in effect. Nor does the contract contain language constituting a clear and unmistakable waiver of the Union's statutory rights.[4] See *General Tire & Rubber Co.*, 274 NLRB 591 (1985), enfd. 795 F.2d 585 (6th Cir. 1986) (termination clause did not constitute clear and unmistakable waiver); *Cauthorne Trucking*, 256 NLRB 721 (1981), enf. granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982) (waiver found where pension agreement provided that, upon expiration of a collective-bargaining agreement, the company's obligation to make pension payments would terminate). Therefore, while there is no continuing contractual obligation, there is a continuing statutory obligation to maintain the status quo.

The Respondent does not dispute that it was required to maintain the status quo after expiration of the contract in April 2013. The dispute in this case revolves around what status quo

[3] The nurses' wages are at issue in this case. I would note that the Board has held that longevity pay is a mandatory subject of bargaining. *Pine Brook Care Center*, 322 NLRB 740, 748 (1996); *Southwest Ambulance*, 360 NLRB No. 109, slip op. at 8 (2014). It is unclear whether the longevity pay in *Pine Brook* involved bonuses, as in *Southwest Ambulance*, or whether it involved increases to the employees' hourly wage rates as in the instant case.

[4] I note that the Respondent did not assert that the Union waived its statutory right to maintenance of the status quo as to the contract provision at issue.

means in this particular situation. The General Counsel asserts that in order to maintain the status quo, the Respondent was obligated to continue paying longevity-based hourly wage rate increases as set forth in the contract, at the amounts set forth in the appendix A chart (those dollar amounts being frozen). The Respondent contends that maintaining the status quo means that each nurse's pay would remain frozen at the level it was when the contract expired.

The Respondent asserts that the contract terms must be integrated, that appendix A and sections 4 and 5 of article 25 cannot be read independently of the other sections in article 25. The Respondent further contends that the General Counsel argues for a "dynamic status quo," seeking to impose pay scale increases that had never been negotiated. I reject those arguments. Sections 1, 2, and 3 of article 25 relate to annual across-the-board raises, that are not at issue in this case. Sections 4 and 5 and the chart at appendix A set forth the nurses' rights as to longevity-based wage rate increases. There is no need to interpret the contract, contort the contract, nor speculate as to the wage rate increase due a particular nurse, as the Respondent claims. It is quite simple to apply the longevity-based scale at appendix A. And if a nurse reached the maximum hourly wage rate on the chart when s/he advanced to the next higher experience level, then s/he would receive no further raises until a new contract is reached. The General Counsel does not suggest that the pay rates on the chart be changed or increased, but only contends that some nurses should have moved up the scale and received wage rate increases per the chart when they advanced to the next higher experience level, that the Respondent should have applied the terms that already existed in the contract and granted hourly wage rate increases as specified in appendix A. It is the Respondent's position that attempts to subvert the employees' rights under contract, by insisting that across-the-board raises go hand-in-hand with longevity-based wage rate increases, when they are distinct rights. Bargaining unit employees had the right to wage rate increases when they advanced to the next experience level, as set out in sections 4 and 5. Those increases based on experience were due on January 27 of the year following the milestone work anniversary. It was not impossible, nor even difficult or confusing, to apply the longevity scale increases just because there were no concomitant across-the-board raises. The Respondent relies on *American Mirror*, 269 NLRB 1091 (1984), but it has no bearing on the instant case. In *American Mirror*, there had been no contract, there had been no set annual raises, and it was found there was no contract status quo to maintain. In the instant case, the General Counsel does not seek to impose a requirement that the Respondent continue to pay annual across-the-board raises. Nor is this case similar to *Anaconda Ericcson Inc.*, 261 NLRB 831 (1982), also cited by the Respondent. The instant case involves no discretionary increases but hourly wage rate increases that had been negotiated and were in the contract.

I find that the collective-bargaining agreement established a practice that nurses would receive hourly wage rate increases the year after they reached one of the milestone work anniversaries, moving up the steps in the chart. The nurses thus had an expectation of receiving a raise when they advanced in experience level. I find, therefore, that to freeze wages for all nurses, as the Respondent did, was a change in the employees' terms and conditions and in their wages. To be clear, the pay rates in the chart remained stagnant, as set forth in appendix A. Those dollar amounts did not increase in January 2014 via an across-the-board raise. But there is no reason the nurses could not move up the pay scale when they reached the next higher experience level, so they would all be at the same relative pay levels. The Respondent's action resulted in nurses who advanced to the next experience level in 2013 being paid less than other nurses already at that same experience level. It would also result in those nurses being paid at a lower rate than new hires with the same level of experience.

The Respondent also argues that the parties had a past practice of the Respondent failing to continue to pay longevity-based wage increases after expiration of a contract. I reject that argument. The Respondent urges that I compare its conduct in January 2014 with its conduct after the 2005–2009 collective-bargaining agreement expired when it likewise failed to pay longevity wage increases, citing *Courier-Journal*, 342 NLRB 1093, 1094 (2004). However, that case is inapposite. The situations are not remotely similar. In the instant case, there is no longstanding practice of, or any history of, unilateral changes by the Respondent going unchallenged by the Union. On the contrary, the Union did file a charge when the Respondent failed to pay longevity-based raises following expiration of the prior contract. That charge was dismissed by the Region; the Union did not acquiesce in the unilateral change. Moreover, the provisions in the two contracts are different (R. Exh. 8; GC Exh. 2), so aside from the fact that the Region's administrative action in 2010 is of no precedential value, the situations are not comparable, and the Region's action in that case is irrelevant. *Ball Corp.*, 322 NLRB 948, 951 (1997).

In sum, I find that although the Respondent had no contractual obligation to pay longevity-based wage rate increases in January 2014, it did have a statutory obligation to pay longevity-based wage increases. The contract contained no language stating what should occur regarding longevity-based raises when the contract expired; the Union did not waive its statutory right to continue that contract provision in effect; maintaining the status quo required the Respondent to grant longevity-based wage increases as of January 2014 for nurses who advanced into the next higher experience level in 2013; the Respondent did not pay longevity-based wage increases in January 2014 to nurses who had advanced to the next higher experience level in 2013; the Respondent did not give the Union notice of its decision not to give such raises in January 2014 and did not give the Union the opportunity to negotiate over that decision; and the parties had not bargained to impasse over that provision in the new contract.

My finding does not grant all nurses annual wage increases; it would indeed be purely speculative to determine whether the parties would have agreed to further annual across-the-board annual pay increases or what amount they might be. While the parties were engaged in contract negotiations at the relevant time period, and in fact had discussed proposals as to this article, they had not reached an agreement. Rather, my finding grants an increase in base hourly wage rates to those nurses who advanced from one defined experience level to the next since 2012, as set forth in the chart. A hypothetical acute care nurse who had 4years experience in 2012 would have been paid

$27 per hour as of the first full pay period after January 27, 2013. Although s/he subsequently moved into the 5–9 year experience level in 2013, s/he did not receive a pay increase in January 2014. Yet, according to the chart at appendix A, in 2013 an acute care nurse at the 5–9 year experience level was paid $27.83. I find that maintaining the status quo in this case entails paying nurses increased hourly wage rates in the year following a milestone anniversary that moved them into the next higher experience level, in accordance with Appendix A.

Two examples of nurses who advanced into higher experience levels since 2012 but did not receive wage rate increases in January 2014 were provided at the hearing. One acute care nurse was in the 15–19 year category during the term of the collective-bargaining agreement. His 20th anniversary was May 1, 2013. Under the terms of the expired contract, he would then have moved into the 20–24 year category, and would have received an hourly wage rate increase the first full pay period after January 27, 2014, from $30.12 to $30.57. (Tr. 144, 146–147; GC Exhs. 25, 26.) Another acute care nurse reached her 15-year anniversary on November 1, 2013. Under the terms of the expired agreement, she would have moved to the 15–19 year experience level and received an hourly wage rate increase the first full pay period after January 27, 2014, from $29.21 to $30.12 per hour. (Tr. 145, 146; GC Exhs. 25, 27.) Neither has received those hourly wage increases commensurate with their new experience levels.

I find that the contract provision at issue relates to the unit employees' wages and that those wages are based on their experience level (longevity). It is, therefore, a mandatory subject of bargaining.

I find that the Respondent had established a term or condition of setting and increasing nurses' hourly wage rates based on their experience level.

I find that although there was no contractual basis to continue to apply that contract provision, there was a statutory obligation to do so, as the Union did not waive its statutory right to bargain regarding that provision and the parties had not bargained to impasse in negotiations over that provision.

I find that the Respondent's failure to pay hourly wage rate increases in January 2014, per the chart in appendix A of the collective-bargaining agreement, to those nurses who had advanced from one experience level to the next in 2013, constituted a failure to maintain the status quo.

I find that the Respondent's failure to give the Union prior notice and the opportunity to bargain over that decision constituted a unilateral change.

Therefore, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

Conclusions of Law

1. Wilkes-Barre Hospital Co., LLC, d/b/a Wilkes-Barre General Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP), AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By ceasing to pay increases to unit employees' base hourly wage rates based on experience level, as of January 27, 2014, without providing the Union prior notice and an opportunity to bargain, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent 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.

I will order the Respondent to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms or conditions of employment.

I will order the Respondent to resume paying increases to unit employees' base hourly wage rates based on experience level as described in article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement.

I will further order the Respondent to make employees whole for any losses sustained as a result of the unlawful unilateral change. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Wilkes-Barre Hospital Co., LLC, d/b/a Wilkes-Barre General Hospital, Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally discontinuing paying increases to the unit employees' base hourly wage rates based on experience levels as described in article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement.

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

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

(a) Before implementing any changes in wages, hours, or other terms or conditions of employment, notify and, on request, bargain collectively and in good faith with the Pennsyl-

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

vania Association of Staff Nurses and Allied Professionals (PASNAP), AFL–CIO (the Union) as the exclusive bargaining representative of its employees in the following unit:

> All full-time and regular part-time graduate and registered nurses employed by Wilkes-Barre Hospital Company, LLC, 575 North River Street, Wilkes-Barre, including certified registered nurse anesthetist, nurse epidemiologist, clinical educator, continuing care nurse (discharge planner), tumor registry nurse, patient advocate, RN tech scanner (cardiology), RN special procedures, instructor, cardiology/ultrasound RN, lead instructor (Hospital Services division), cardiology RN, neurophysiology RN, radiation oncology RN, respiratory RN, radiology special procedures, cath. lab nurse, RN unit secretary, IV therapy nurse, staff RN, coordinator QI, coordinator UM, clinical care coordinators, relief charge nurse, employee health nurse, occupational health nurse/case manager, family enhancement facilitator, family outreach facilitator, health awareness facilitator, diabetes center nurse educator, physical therapy RN, cardiac rehabilitation nurse, Mother-to-be program RN, pain management RN, ambulatory/outpatient diagnostic RN, women's health specialist, health enhancement associate, lead instructor (health enhancement), coordinator clinical support (family outreach), O.R. nurse, and service coordinator I, case managers, Wilkes-Barre Academic Medicine, LLC registered nurses, and childbirth facilitator.

(b) Resume paying increases to the unit employees' base hourly wage rate based on experience levels as described in article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(c) Make eligible employees whole for any losses sustained as a result of the unlawful change made as of January 27, 2014, with interest, in the manner set forth in the remedy section of this decision.

(d) 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 back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wilkes-Barre, Pennsylvania, copies of the attached notice marked "Appendix."[6] 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. 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 January 27, 2014.

(f) 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.

Dated, Washington, D.C. November 17, 2014

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 unilaterally discontinue to pay increases to the unit employees' base hourly wage rate based on experience level as described by article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement.

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, before implementing any changes in your wages, hours, or other terms or conditions of employment, notify and, on request, bargain collectively with the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP), AFL–CIO (the Union) as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time graduate and registered nurses employed by Wilkes-Barre Hospital Company, LLC, 575 North River Street, Wilkes-Barre, including certified registered nurse anesthetist, nurse epidemiologist, clinical educator, continuing care nurse (discharge planner), tumor registry nurse, patient advocate, RN tech scanner (cardiology), RN special procedures, instructor, cardiology/ultrasound RN, lead instructor (Hospital Services division), cardiology RN, neurophysiology RN, radiation oncology RN, respiratory RN, radiology special procedures, cath. lab nurse, RN unit secretary, IV therapy nurse, staff RN, coordinator QI, coordinator UM,

[6] 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."

clinical care coordinators, relief charge nurse, employee health nurse, occupational health nurse/case manager, family enhancement facilitator, family outreach facilitator, health awareness facilitator, diabetes center nurse educator, physical therapy RN, cardiac rehabilitation nurse, Mother-to-be program RN, pain management RN, ambulatory/outpatient diagnostic RN, women's health specialist, health enhancement associate, lead instructor (health enhancement), coordinator clinical support (family outreach), O.R. nurse, and service coordinator I, case managers, Wilkes-Barre Academic Medicine, LLC registered nurses, and childbirth facilitator.

WE WILL resume paying increases to the base hourly wage rates based on experience level to eligible employees as described in article 25, sections 4 and 5 and the chart at appendix A of the April 30, 2011–April 30, 2013 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make eligible employees whole, with interest, for any losses sustained as a result of the unlawful cessation of giving pay raises based on experience level as of January 27, 2014.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

WILKES-BARRE HOSPITAL COMPANY, LLC D/B/A
WILKES-BARRE GENERAL HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-123748 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.

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District of Columbia Circuit

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FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
SEP 10 2015
CLERK

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September 9, 2015

Office of the Clerk
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, Room 5205
Washington, D.C. 20001

15-1318

Re: Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital Petition for Review of Decision and Order of the National Labor Relations Board

Dear Clerk of Court:

As attorney for the Petitioner, Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital in the above referenced matter, I hereby enclose a Petition for Review of a Decision and Order of the National Labor Relations Board, a copy of the Decision and Order of which review is sought, a Certificate of Service of the Petition for Review upon Counsel for the Respondent National Labor Relations Board and Counsel for the Pennsylvania Association of Staff Nurses and Allied Professionals, AFL-CIO, and a check in the amount of five hundred dollars ($500.00) in payment of the filing fee required.

Kindly advise if any additional information is required at this time, and address all correspondence concerning this matter to me at the address written above.

Thank you.

Respectfully submitted,

Carmen M. DiRienzo

Carmen M. DiRienzo, Esq.
Counsel for Petitioner