No. _____

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CLERKS OFFICE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

United States Court of Appeals For the First Circuit

SOUTHCOAST HOSPITALS GROUP, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR REVIEW

Pursuant to Fed. R. App. P. 15(a)(1) and 29 U.S.C. § 160(f), Southcoast Hospitals Group, Inc. ("Southcoast") hereby petitions the Court for the review of the Decision and Order of the National Labor Relations Board (the "Board") in Case No. 01-CA-067303, entered on September 16, 2015 as 363 NLRB No. 9 (2015). A copy of the Decision and Order is attached hereto as Exhibit 1.

Southcoast respectfully requests that the Court reverse the Board's conclusions that Southcoast violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act and deny enforcement of the Board's Order.

Respectfully submitted,

SOUTHCOAST HOSPITALS GROUP, INC.,

By its attorneys,

Joseph D. Whelan (#63945)
Matthew H. Parker (#1141017)
WHELAN, CORRENTE, KINDER & SIKET LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Tel: (401) 270-4500
Fax: (401) 270-3760
jwhelan@wckslaw.com
mparker@wckslaw.com

Dated: September 30, 2015

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 15(c) and Fed. R. App. P. 25(d), I hereby certify that I served a copy of the foregoing document upon the following persons by Federal Express Overnight Delivery on September 30, 2015:

Betsy Ehrenberg, Esq.
Pyle Rome Eherenberg PC
18 Tremont Street, Suite 500
Boston, MA 02108-2301

I also certify that I served a copy of the foregoing document upon the Clerk of the Court on September 30, 2015 for service upon the National Labor Relations Board as follows:

Richard F. Griffin, Jr., General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

WCKS16259

EXHIBIT

1

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.

Southcoast Hospitals Group, Inc. *and* 1199 SEIU, United Healthcare Workers East. Case 01–CA–067303

September 16, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On June 12, 2013, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, to amend the remedy, and to adopt the judge's recommended Order as modified and set forth in full below.[2]

The principal issue in this case is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing HR 4.06, a hiring/transfer policy under which the Respondent gives preference to unrepresented employees over represented employees when filling positions at its nonunion facilities. The case also involves several allegations that the Respondent violated 8(a)(3) and (1) by refusing to consider and/or hire certain represented employees pursuant to HR 4.06.

The Respondent is a health care consortium comprising 3 hospitals in Massachusetts—Tobey, Charlton, and St. Luke's—and approximately 20 ancillary health facilities. Only Tobey has unionized employees: approximately 215 of its 550-person work force are technical, clerical, service, and maintenance employees represented by 1199 SEIU, United Health Care Workers East (the Union). There are approximately 4,800 unrepresented employees at all the other facilities. Employees at one hospital may apply for open positions at either of the other two hospitals.

Since at least June 1996, the parties' collective-bargaining agreement has provided that employees represented by the Union receive a preference over unrepresented employees in hiring and transferring to open unit positions at Tobey. Specifically, Section 8.1 of the agreement defines seniority as continuous employment in a position covered by the agreement; Section 8.2 provides that among the qualified applicants for an open position, "the most senior applicant shall be selected." Sometime in 1997 or 1998, during contract negotiations, Senior Vice President of Human Resources David DeJesus proposed that union-represented employees at Tobey could receive the same preference as unrepresented employees when applying for positions at Charlton and St. Luke's if the Union agreed to change the "most senior qualified" provision of the contract to a "best qualified" standard—which, in effect, would give unrepresented employees the same preference as represented employees to open unit positions at Tobey. The Union rejected the proposal.

Despite the Union's rejection, DeJesus created HR 4.06, which the Respondent unilaterally implemented on April 5, 1999.[3] In relevant part, HR 4.06 states:

> Upon application, regular status employees who are beyond the introductionary [sic] period will be given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates. Employees in a union will be considered internal candidates if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at the unionized site. Temporary and per diem status employees will be considered prior to external applicants . . . .
>
> Employees in a union whose collective-bargaining contract does not provide reciprocal opportunity to employees who are not members of the union will be considered external candidates.

[1] There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) by refusing to consider unit employee Noelia Nunes for the position of CNA-II. Accordingly, we affirm the judge's dismissal of that allegation.

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

[2] We shall substitute a new Order and notice to conform to the violations found and in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Durham School Services*, 360 NLRB No. 85 (2014).

[3] The Respondent argues that the Union is equitably estopped from challenging the maintenance and enforcement of HR 4.06 because the Union acquiesced in the Respondent's unilateral implementation of it for more than 11 years before filing the underlying unfair labor practice charges. We reject that argument for the reasons stated by the judge.

The judge found HR 4.06 unlawful, applying the framework of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). We agree with the judge, for the reasons stated in his decision, that HR 4.06 has at least a "comparatively slight" impact on represented employees' Section 7 rights under *Great Dane*: it discriminates against the Respondent's represented employees based on their representational status and their having obtained a contractual benefit through collective bargaining—both of which are protected by Section 7. In light of the adverse effect of HR 4.06 on the Section 7 rights of represented employees, "the burden . . . rests with the Respondent to establish a 'legitimate and substantial business justification' for the policy." *Legacy Health System*, 354 NLRB 337, 337 (2009), reaffirmed and incorporated by reference, 355 NLRB 408 (2010), enfd. 662 F.3d 1124 (9th Cir. 2011).

The Respondent has proffered two justifications. First, DeJesus testified that unrepresented employees had complained about being shut out of bargaining-unit positions when he previously worked at another health network that had a similar contractual preference for union-represented employees, so he promulgated HR 4.06 to avoid similar complaints by the Respondent's unrepresented employees. Second, the Respondent contends that HR 4.06 "reflects [its] efforts to level the playing field for unrepresented employees" by providing the employees at its two nonunion facilities with the same hiring preference received by represented employees at Tobey.

Initially, we agree with the judge that the evidence undermines DeJesus's complaint-avoidance rationale for HR 4.06. DeJesus did not identify a single unrepresented employee who had complained to him about the preference received by represented employees at Tobey, nor could he recall any complaints from unrepresented job applicants who were denied consideration for open bargaining-unit positions at Tobey. In essence, HR 4.06 was DeJesus's solution in search of a problem, and, as such, his reason for promulgating it does not establish a legitimate and substantial business justification.

We also agree with the judge that the Respondent's asserted desire to "level the playing field" is not a legitimate and substantial business justification for HR 4.06. As the judge pointed out, only about 215 of roughly 5000 positions at the Respondent's facilities are in the bargaining unit. The number of unit positions for which represented employees receive a hiring preference under Section 8.2 of the CBA pales in comparison to the number of nonbargaining-unit positions for which unrepresented employees receive a preference under HR 4.06.[4] Moreover, if a level playing field was truly the Respondent's goal, it has not explained why it did not limit the preference for unrepresented employees to the applicants' site of employment—a preference that would have been more analogous to the single-facility preference that represented employees receive. By extending HR 4.06 to every unrepresented facility in the Respondent's system, HR 4.06 confers an advantage to unrepresented employees seeking transfers at the expense of those represented by the Union. In that way, HR 4.06 does the opposite of "level the playing field."

Member Miscimarra, in his partial dissent, criticizes the use of (what he terms) "quantitative analysis" to determine whether HR 4.06 has a greater benefit on represented or unrepresented employees. Contrary to our colleague's assertion, however, we do not analyze the evidence "in order to guarantee that represented employees receive treatment that is the same or better" than unrepresented employees.[5] Rather, we do so to assess whether the Respondent's proffered business justifications are legitimate and substantial.[6] For the reasons explained above, we find that the Respondent's justifications, taken on their own terms, are undermined by the evidence. As such, they are not "legitimate and substantial" within the meaning of *Great Dane*.

Accordingly, we affirm the judge's finding that the Respondent has not established a "legitimate and substantial business justification" that outweighs the adverse effect that HR 4.06 has on the Section 7 rights of represented employees, who are effectively penalized with reduced career opportunities based on their representational status and their having obtained a contractual benefit through collective bargaining.[7] We therefore affirm

[4] The Respondent contends that HR 4.06, contrary to its terms, does not apply to transfers for positions that do not exist within the unit at Tobey. Even if true, given the overall size of the other facilities (4800 employees) relative to Tobey (550 employees), the total number of unit-similar positions at the other facilities dwarfs the number of unit positions at Tobey.

[5] Our colleague conflates the likelihood of a candidate successfully transferring with the number and location of transfer opportunities. HR 4.06 has a negative effect on represented employees, not because it makes it more difficult to be selected for a transfer, but because it limits the universe of job opportunities. Unit positions exist only at Tobey. Nonunit positions exist at all of the other facilities.

[6] Similarly, and contrary to our colleague's contention, we are not attempting to "pick and choose" among employment policies or to "force the parties to adopt" a single-facility preference. Rather, our hypothetical consideration of a single-facility preference is relevant to whether the Respondent's proffered business justification for HR 4.06—to "level the playing field"—is legitimate and substantial.

[7] Having determined that the Respondent has failed to establish a business justification defense, we find it unnecessary to decide whether HR 4.06 was motivated by antiunion considerations or was "inherently

the judge's finding that the Respondent's maintenance and enforcement of HR 4.06 violated Section 8(a)(3) and (1).[8]

Also for the reasons stated by the judge, we affirm his findings that Respondent violated Section 8(a)(3) and (1) by refusing, based on HR 4.06, to consider unit employees Christopher Souza for the position of building superintendent and Noelia Nunes for the positions of CNA-I, ORA-I,[9] ORA-II, and Mobility Aide;[10] delaying the hire of Nunes to the position of Mobility Aide, also based on HR 4.06; and refusing, on the same basis, to consider and/or hire other similarly situated employee-applicants known to the Respondent but not identified during the hearing.[11]

For the reasons explained below, however, we disagree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Nunes to the position of ORA-I at St. Luke's. Specifically, we find merit in the Respondent's argument that it would not have selected Nunes as an ORA-I, even in the absence of HR 4.06, because she lacked the requisite EKG and phlebotomy skills for the position. Accordingly, we reverse the judge and dismiss the allegation.

Initially, we agree with the judge that the Respondent was seeking to fill the ORA-I position for which Nunes applied, that she timely submitted her application during the posting period, and that the Respondent's only stated reason for refusing to hire her—HR 4.06—was unlawful. See *Legacy Health System*, 354 NLRB at 342. Accordingly, the burden shifts to the Respondent to affirmatively show that Nunes "would have in any event not accepted the position or would have been denied such position[] for lawful reasons." Id.

The judge found that the Respondent offered positions to other applicants who lacked certain required skills with the implicit understanding that it would later train them in those skills. In support, the judge found that the Respondent had offered the ORA-I position to three applicants who lacked the required skills of phlebotomy and/or EKG: Patrick Mentzer, Summer Sylvia, and Erika Dulude. The judge found that it was not clear if Mentzer had phlebotomy skills because he was in a phlebotomy program at the time the position was first posted, that Sylvia's application did not indicate phlebotomy or EKG skills, and that Dulude did not list phlebotomy skills on her resume.

Mentzer and Sylvia, however, were already working in ORA-I positions at St. Luke's when they applied; accordingly, they possessed the requisite skills. Furthermore, contrary to the judge's finding, Dulude's resume (included as part of her application) listed the phlebotomy skills of "capillary punctures" and "venipunctures."

In light of the above, we find that the record does not support the judge's finding that the Respondent hired applicants who lacked required skills. Because the ORA-I position required phlebotomy and EKG skills and Nunes admitted that she lacked those skills, we find, contrary to the judge, that the Respondent met its burden to prove that Nunes would have been denied the position even in the absence of HR 4.06.[12] See *Legacy Health System*, 354 NLRB at 342.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3. "The Respondent violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing HR 4.06, a discriminatory hiring/transfer policy that deprives represented employees of job opportunities on the basis of their representational status and their having obtained a contractual benefit through collective bargaining, in order to discourage membership in the Union or any other labor organization."

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destructive" of employees' Sec. 7 rights. See *National Football League*, 309 NLRB 78, 81 fn. 15 (1992); see also *Legacy Health System*, 354 NLRB at 337.

[8] The complaint alleges that the Respondent violated Sec. 8(a)(3) and (1) by maintaining and enforcing HR 4.06. The judge's conclusions of law and remedy, however, erroneously state that the Respondent violated Sec. 8(a)(1) by *promulgating* and maintaining HR 4.06. We shall amend the judge's conclusions of law and remedy to conform to the complaint allegations and the violations found.

[9] The judge found that the Respondent did not consider Nunes for the ORA-I position during the first posting period in October 2011, but did consider her when it reposted the position in December 2011.

[10] The judge found that the Respondent did not consider Nunes for the Mobility Aide position during the first round of consideration but did consider (and eventually hire) her for the position over a month later, after it had interviewed an external candidate.

[11] The judge approved the parties' stipulation that the Respondent reserved the right to argue the qualifications of any subsequently identified applicants at the compliance stage.

[12] Contrary to his colleagues, Member Hirozawa would affirm the judge's finding that the Respondent's refusal to hire Nunes to the position of ORA-I violated Sec. 8(a)(3) and (1). In his view, the Respondent failed to prove that it would not have hired Nunes even in the absence of HR 4.06. As the judge correctly pointed out, Mentzer's application did not state that he possessed phlebotomy skills, and Sylvia's application did not state that she possessed phlebotomy or EKG skills. (Member Hirozawa does not rely on the judge's discussion of Dulude, whose application showed that she possessed both skills.) The majority, relying on the fact that Mentzer and Sylvia were each already working at St. Luke's as an ORA-I at the time they applied for the transfer, assumes that this proves that they possessed the skills required for the job. Particularly in the circumstances presented here, however, where the Respondent's only stated reason for rejecting Nunes—the routine application of a discriminatory hiring/transfer policy—was unlawful, Member Hirozawa does not believe that the assumption relied on by his colleagues is sufficient to meet the Respondent's burden to prove that it *would* have rejected Nunes based on her lack of required skills, not merely that it could have.

Substitute the following for Conclusion of Law 5: "The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider applicants Christopher Souza and Noelia Nunes, by delaying its hiring of Noelia Nunes, and by refusing to consider and/or hire other similarly situated employees."

Delete Conclusions of Law 4 and 6 and renumber the paragraphs accordingly.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing HR 4.06, a discriminatory hiring/transfer policy, we shall order that the Respondent rescind HR 4.06 and notify its employees and the Union that it has done so.

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by its refusal to consider for hire Christopher Souza, Noelia Nunes, and other similarly situated applicants to be identified in a subsequent compliance proceeding, we shall order that the Respondent consider these discriminatees for future openings in the positions for which they applied or, if the positions no longer exist, for future openings in substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for its failure to consider them, the Respondent would have selected any of these applicants for the positions for which they applied, the Respondent shall be ordered to offer those individuals any such positions or, if the positions no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the Respondent's unlawful actions, and to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions.

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by delaying the hire of Noelia Nunes to the position of Mobility Aide, we shall order that the Respondent make whole Nunes for any loss of earnings and other benefits suffered as a result of its refusal to timely hire her.

Because the violations found do not involve a cessation of employment, 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 6 (2010).

Additionally, we shall order the Respondent to compensate Nunes and other similarly situated discriminatees, if any, to be identified in a subsequent compliance proceeding for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Southcoast Hospitals Group, Inc., Wareham, Fall River, and New Bedford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing HR 4.06, a discriminatory hiring/transfer policy that deprives represented employees of job opportunities on the basis of their representational status and their having obtained a contractual benefit through collective bargaining, in order to discourage membership in the Union or any other labor organization.

(b) Refusing to consider, refusing to hire, or delaying in hiring employees for positions for which they would have been timely considered and/or hired but for the Respondent's discriminatory hiring/transfer policy, in order to discourage membership in the Union or any other labor organization.

(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 purposes of the Act.

(a) Within 14 days from the date of this Order, rescind HR 4.06 and notify employees and the Union in writing that the policy has been rescinded.

(b) Consider employees Christopher Souza, Noelia Nunes, and any similarly situated employees found at a compliance proceeding to have been refused consideration under HR 4.06 for positions for which they applied for future openings in those positions or, if the positions no longer exist, for future openings in substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for its failure to consider them, the Respondent would have selected any of these applicants for the position for which he or she applied, the Respondent shall offer those individuals any such positions, replacing the current occupants of those positions if necessary, or, if the positions no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the Respondent's unlawful actions, and make them whole for any loss of earnings and other benefits suffered as a result of those unlawful actions in the manner set forth in the remedy section of this decision.

(c) Make Noelia Nunes whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful delay in hiring her to the position of Mobility Aide in the manner set forth in the remedy section of this decision.

(d) Compensate Noelia Nunes, Christopher Souza, and other similarly situated discriminatees, if any, to be identified in a subsequent compliance proceeding 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 for each employee.

(e) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful failure to consider for hire Christopher Souza and Noelia Nunes, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

(f) Remove from its files any and all references to the unlawful failure to consider for hire and/or hire other similarly situated discriminatees, if any, to be identified in a subsequent compliance proceeding, and notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

(g) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful delay in hiring Noelia Nunes to the position of Mobility Aide, and within 3 days thereafter, notify her in writing that this has been done and that the unlawful discrimination will not be used against her in any way.

(h) 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.

(i) Within 14 days after service by the Region, post the attached notice marked "Appendix"[13] in each of its hospitals and ancillary health facilities within the Respondent's network. Copies of the notice, on forms provided by the Regional Director for Region 1, 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 October 21, 2011.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 16, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with the judge that the Respondent's policy, HR 4.06, has a comparatively slight impact on employees' Section 7 rights under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).[1] I also join Chairman Pearce in finding that the Respondent established that it would not have selected employee Noelia Nunes for the ORA-I position, even in the absence of HR 4.06, because she lacked the requisite EKG and phlebotomy skills for the position.[2] I disagree, however, that HR 4.06 violates the

[13] 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."

[1] The General Counsel conceded, and the judge agreed, that HR 4.06 is not inherently destructive of employees' Sec. 7 rights under *Great Dane*.

[2] I disagree with my colleagues, however, that the burden shifted to the Respondent to prove that it would have rejected Nunes for the ORA-I position even in the absence of HR 4.06. As explained below, I would find HR 4.06 lawful, and therefore I would also find that the

Act. In my view, the Respondent has established a legitimate and substantial business justification for the policy, and the General Counsel introduced no evidence that HR 4.06 was motivated by antiunion animus.[3]

Respondent Southcoast Hospitals Group, Inc., is a consortium of three hospitals in southeastern Massachusetts—Tobey Hospital, Charlton Memorial Hospital, and St. Luke's Hospital—plus a number of other healthcare facilities. 1199 SEIU, United Healthcare Workers East (Union) represents a bargaining unit of approximately 215 employees at Tobey. The unit employees are covered by a collective-bargaining agreement (CBA) that grants them a hiring preference for unit positions at Tobey. Under this contractual preference, only unit employees may be considered during the first round of consideration of applicants for a vacant position. Employees from outside the unit—e.g., employees at Charlton and St. Luke's—may not be considered until the second round. Moreover, the CBA requires Tobey to select the most senior "qualified" applicant, and seniority is calculated based on continuous employment in a bargaining-unit position. In other words, a posted unit position at Tobey goes to the unit employee with the greatest unit seniority, provided he or she is minimally qualified—even if applicants from St. Luke's and/or Charlton are better qualified.

After unsuccessfully attempting to persuade the Union to accept a more level playing field for employees at all three hospitals, in 1999 the Respondent implemented HR 4.06. HR 4.06 provides that "[e]mployees in a union will be considered internal candidates"—i.e., included in a first round of consideration—for posted positions at Charlton and St. Luke's "if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at the unionized site." But if the CBA does not provide such reciprocal opportunity, bargaining-unit employees covered by that contract "will be considered external candidates" (i.e., evaluated during a second round of consideration). In other words, under HR 4.06, so long as bargaining-unit employees at Tobey are accorded preference in consideration for positions at Tobey under the CBA, employees at Charlton and St. Luke's receive preference in consideration for job postings at those two hospitals.[4] David DeJesus, the Respondent's senior vice-president of human resources, testified that the Respondent enacted the policy as "a matter of equity": "[I]f a position is posted at the Tobey site . . . , then people at St. Luke's or Charlton would not be considered in the first round at Tobey . . . . So if it works that way at the Tobey site, then our view [is] it should work the same way in the other direction" (Tr. 151).

In my view, the Respondent has "come forward with evidence of [a] legitimate and substantial business justification[ ]" for HR 4.06. *Great Dane*, supra, 388 U.S. at 34. Employers and employees alike have a strong interest in equitable and consistent treatment, an interest DeJesus specifically mentioned as justifying HR 4.06. The CBA provision giving preference in consideration to unit employees for positions at Tobey provides unit employees a bargained-for benefit. However, it also unquestionably imposes a corresponding burden on employees outside the unit who might be interested in Tobey positions. Nonunit employees' access to unit positions at Tobey is sharply limited. In particular, Tobey *cannot* consider nonunit employees—no matter how superior their qualifications—if a minimally qualified unit employee applies. HR 4.06 imposes on Tobey unit employees who desire transfers to St. Luke's or Charlton no

Respondent lawfully relied on HR 4.06 to refuse to hire Nunes. Similarly, I would find that the Respondent, in lawful reliance on HR 4.06, (i) lawfully refused to consider Nunes for the ORA-I position during the first posting period in October 2011 for the Mobility Aide position during the first round of consideration, and for the CNA-I and ORA-II positions, and lawfully delayed in hiring Nunes for the Mobility Aide position; (ii) lawfully refused to consider employee Christopher Souza for the position of building superintendent; and (iii) lawfully refused to consider and/or hire other similarly situated applicants known to the Respondent but not identified during the hearing.

[3] Under *Great Dane*, if the impact of challenged conduct on employee rights is comparatively slight and the employer comes forward with evidence of a legitimate and substantial business justification for the conduct, the General Counsel must prove an antiunion motivation to sustain a finding that Sec. 8(a)(3) has been violated. 388 U.S. at 34. The General Counsel litigated this case on the theory that the Respondent lacked a legitimate and substantial business justification for HR 4.06 and introduced no evidence of an antiunion motivation.

[4] Even under HR 4.06, unit employees at Tobey still receive more favorable treatment than do nonunit employees at Charlton and St. Luke's. As explained above, if a minimally qualified bargaining-unit employee applies for a unit position at Tobey, he or she *must* be selected. Tobey may not consider any second-round nonunit applicants if a minimally qualified unit applicant applies. However, according to the testimony of Anne Colwell, Respondent's vice-president of human resources, hiring managers at Charlton and St. Luke's *may* select a first-round applicant after considering second-round applicants (Tr. 242). In other words, under HR 4.06, hiring managers at the two nonunion hospitals *may* bypass a qualified first-round applicant to see if a better qualified applicant appears in the second round—and, if not, go back and select the first-round applicant after all. This also means that under HR 4.06, a superior applicant currently employed in a unit position at Tobey may be selected for a position at Charlton or St. Luke's, even if one or more qualified applicants from those two hospitals apply and are considered in the first round. The converse cannot happen under the CBA at Tobey.

Although the term "external candidates" in HR 4.06, read literally, appears to relegate unit employees at Tobey to the same status as applicants off the street, there are no exceptions to the judge's finding that in practice, unit applicants from Tobey are considered in the second round of the hiring process at St. Luke's and Charlton, *before* external candidates are considered.

greater restrictions than the CBA places on nonunit employees who may be interested in working at Tobey. In fact, HR 4.06 places Tobey's unit employees in a more advantageous position in two respects. First, in contrast to nonunit employees who may find themselves excluded from positions at Tobey based on restrictions over which they have no control, the Tobey unit employees have the ability to ensure first-round consideration for non-Tobey positions, since HR 4.06 makes this dependent on *whether* the CBA imposes transfer restrictions on Charlton and St. Luke's nonunit employees. Second, the Tobey CBA imposes more onerous restrictions on nonunit transfer candidates than those applicable to unit employees under HR 4.06. In this regard, the Tobey CBA does not permit nonunit candidates even to receive consideration if a unit candidate possesses the minimal qualifications for a bargaining-unit position. By comparison, the record reveals that, even if HR 4.06 affords preference to Charlton and St. Luke's nonunit employees (based on transfer restrictions contained in the Tobey CBA), the Respondent may consider unit applicants from Tobey (as second-round candidates) even if qualified nonunit candidates apply. See fn. 4, supra.

The judge rejected the Respondent's business justification for HR 4.06 on the basis that there are more positions at Charlton and St. Luke's than Tobey, which prompted the judge to conclude that HR 4.06 gives employees at those hospitals preferential access to more positions than the CBA gives to unit employees at Tobey. My colleagues agree with the judge's reasoning in this regard. Contrary to the judge and my colleagues, I believe this analysis misses the mark for several reasons.

For starters, I believe the legality of transfer restrictions like those in HR 4.06 and the Tobey CBA is not controlled by a quantitative analysis of whether represented employees who desire positions elsewhere might benefit more or less than unrepresented employees who may seek positions in the bargaining unit. Under *Great Dane*, an employer need only have a legitimate and substantial business justification for a policy like HR 4.06. Nothing in our statute requires that employers adjust the policies applicable to *unrepresented* employees, based on collectively bargained restrictions contained in a CBA, in order to guarantee that represented employees receive treatment that is the same or better.

Additionally, not only does the judge's analysis improperly extend beyond the relevant issue here, which is whether HR 4.06 has a "legitimate and substantial" justification, it is unreasonable for the judge and my colleagues to focus selectively on the number of potential Tobey positions that might be desired by unrepresented employees in comparison to the number of potential Charlton and St. Luke's positions that might be desired by represented employees. Indeed, the rudimentary nature of the judge's analysis reinforces the inappropriateness of making such a comparison the basis for determining legality. For example, the judge disregards the two points already noted above: (i) represented employees at Tobey control, through their CBA, whether HR 4.06 imposes *any* limitations on potential transfer to positions at Charlton and St. Luke's; and (ii) the collectively bargained Tobey restrictions applicable to nonunit potential transferees are more onerous than those placed on represented Tobey candidates under HR 4.06. Even if one accepts the premise underlying the judge's analysis, which is that legality should turn on whether represented employees receive equal or better treatment than everyone else, it is unreasonable for the judge to focus only on the *larger number of positions* at Charlton and St. Luke's without also taking into account the *larger number of nonunit employees* who, in the first round, would predictably be competing for such positions.[5] Nor does the judge account for other factors—both objective and subjective—that could prompt employees to regard working at Tobey as more advantageous than working at Charlton and St. Luke's (or vice versa). These factors could range from differences in pay and benefits to the physical layout of the facilities, differences in equipment, variation in the types of procedures that are routinely performed, or the quality of the cafeteria food. In short, if the Board makes legality turn on how many positions at which locations might be most desirable from the perspective of potential unit and nonunit transferees, this clearly extends beyond the "drawing of lines more nice than obvious" where "the statute compels the task."[6] Rather, this would involve selective and arbitrary guesswork. I believe this would be contrary to the Board's limited role, which is to "oversee and referee the *process* of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties*."[7]

My colleagues state that if it were simply interested in equity, the Respondent could have adopted a facility-preference rule—i.e., Charlton employees would receive preference for openings at Charlton, and St. Luke's employees would receive preference for openings at St. Luke's. But a facility-preference rule, which my colleagues apparently would find permissible, would not

[5] My colleagues, too, focus on the larger number of unrepresented positions, and they state that HR 4.06 "limits the universe" of opportunities available to unit employees. This analysis, like the judge's, ignores the larger number of employees likely competing for positions at those locations.

[6] *Local 761, IUE v. NLRB*, 366 U. S. 667, 674 (1961).

[7] *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 107–108 (1970) (emphasis added).

operate in a materially different manner than HR 4.06, which my colleagues find unlawful: under both approaches, Tobey bargaining-unit employees would only receive preference for unit positions at Tobey (unless the Union agrees to remove that preference from the CBA). Furthermore, a facility-preference rule would have an obvious disadvantage unrelated to union considerations: it would impede the ability of nonunit employees at Charlton and St. Luke's to transfer freely between those two facilities. Accordingly, sound business reasons support HR 4.06 over a facility-preference rule. Finally, even though my colleagues may believe a facility-preference rule would be more equitable than HR 4.06, it is not the Board's place to pick and choose among alternative employment policies based on the Agency's appraisal of fairness. See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 490, 497 (1960) (federal labor policy does not permit the Board to create a "standard of properly 'balanced' bargaining power," nor does it "contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power"). If employees at Charlton and St. Luke's were represented by a union that had negotiated HR 4.06 as part of the collective-bargaining agreement applicable to those two facilities, it would clearly exceed the Board's authority to force the parties to adopt a different contractual arrangement that we believed was more equitable. See, e.g., Sec. 8(d) (stating that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) ("[W]hile the [NLRB] does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision . . . ."). The Board has no greater authority to impose a particular policy on an employer and its employees merely because the employees might be unrepresented.

I believe the record establishes a reasonable and "legitimate and substantial" business justification for HR 4.06, which is aimed at fostering equity in a generalized sense among potential transfer candidates *without regard* to whether they are represented or not. It bears emphasis that the General Counsel litigated this case exclusively on the theory that no such justification exists, and there is no evidence of an antiunion motivation. Therefore, I believe *Great Dane* requires a conclusion that the Respondent did not violate the Act by maintaining HR 4.06 or by applying it to Nunes, Souza, or similarly situated employees, which warrants dismissal of the complaint.

Accordingly, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. September 16, 2015

Philip A. Miscimarra, Member

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 maintain and enforce HR 4.06, a discriminatory hiring/transfer policy that deprives represented employees of job opportunities on the basis of their representational status and their having obtained a contractual benefit through collective bargaining, in order to discourage membership in the Union or any other labor organization.

WE WILL NOT refuse to consider, refuse to hire, or delay in hiring employees for positions for which they would have been timely considered and/or hired but for our discriminatory hiring/transfer policy, in order to discourage membership in the Union or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, rescind the discriminatory hiring policy and notify our employees and the Union in writing that the policy has been rescinded.

WE WILL consider employees Christopher Souza, Noelia Nunes, and any similarly situated employees found at a compliance proceeding to have been refused consideration under our unlawful hiring policy for positions for which they applied for future openings in those positions

or, if the positions no longer exist, for future openings in substantially equivalent positions. However, if it is shown at a compliance proceeding that, but for our failure to consider them, we would have selected any of these employees for the position for which he or she applied, WE WILL offer those individuals any such positions, replacing the current occupants of those positions if necessary, or, if the positions no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent our unlawful actions, and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful actions.

WE WILL make employee Noelia Nunes whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful delay in hiring her to the position of Mobility Aide.

WE WILL compensate employees Noelia Nunes, Christopher Souza, and other similarly situated discriminatees, if any, to be identified in a subsequent compliance proceeding, 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 for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful failure to consider for hire Christopher Souza and Noelia Nunes, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

WE WILL remove from our files any and all references to the unlawful failure to consider for hire and/or hire other employees similarly situated to Christopher Souza and Noelia Nunes, if any, to be identified in a subsequent compliance proceeding, and WE WILL notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful delay in hiring Noelia Nunes to the position of Mobility Aide, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful discrimination will not be used against her in any way.

SOUTHCOAST HOSPITALS GROUP, INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-067303 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.

Alejandra Hung, Esq., for the Acting General Counsel.
Anthony D. Rizzotti, Esq. and *Gregory A. Brown, Esq. (Littler Mendelson, P.C.)*, of Boston, Massachusetts, for the Respondent-Employer.
Betsy Ehrenberg, Esq. (Pine Rome Ehrenberg PC), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried on December 3 and 4, 2012, in Boston, Massachusetts. An amended complaint and notice of hearing was issued by the Regional Director for Region 1 of the National Labor Relations Board (NLRB) on September 21, 2012, based upon a charge filed by 1199 SEIU United Healthcare Workers East (the Charging Party or Union). The complaint alleges that Southcoast Hospitals Group, Inc. (the Respondent) has maintained a hiring policy which prohibits union-represented employees at one of its hospital from receiving consideration for employment at its other unrepresented facilities until the second round of review during the employment selection process.

Specifically, the complaint alleges that since April 24, 2011,[1] and in accordance with the described policy, the Respondent refused to consider employees represented by the Union at Tobey Hospital, to include Christopher Souza, Noelia Nunes, and others known to the Respondent, as transfer applicants to positions at facilities other than Tobey Hospital. Further, in accordance with the described policy, the Respondent refused to hire and/or delayed offers to hire employees represented by the Union at Tobey Hospital, including Noelia Nunes and others known to Respondent, as transfer applicants to positions at facilities other than Tobey Hospital.

The Acting General Counsel maintains that the Respondent, in granting a preference only to its employees who have not chosen to be represented by a labor organization for the purpose of collective bargaining, discriminates against union-represented employees on the basis of rights guaranteed by Section 7 of the National Labor Relations Act (NLRA or Act) and further, the Respondent has interfered with, restrain, and coerce such employees in the exercise of the rights guaranteed in Section 7 in violation of Section 8(a)(3) and (1) of the Act.

[1] All dates are in 2011, unless otherwise indicated.

Respondent filed a timely answer to the complaint denying the material allegations in the complaint. (GC Exh. 1.)[2] Six individuals were called to testify during the trial. After the close of the hearing, the briefs were timely filed by the Acting General Counsel and Respondent, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a Massachusetts corporation with its principal office and place of business located in Wareham at Tobey Hospital, is engaged in the business of health care services throughout southern Massachusetts and East Bay, Rhode Island. During a representative 1-year period, the Respondent derived gross annual revenue valued in excess of $250,000 and purchased and received goods and materials at its Tobey Hospital valued in excess of $5000 directly from suppliers located outside of the Commonwealth of Massachusetts. Accordingly, I find, as the Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

The Respondent Southcoast Hospitals Group was created in June 1996, and is comprised of three hospitals with approximately 20 ancillary health facilities. The three hospitals are located in Massachusetts with Tobey Hospital (Tobey) in Wareham, Charlton Hospital (Charlton) in Fall River, and St. Luke's Hospital (St. Luke's) in New Bedford. Of the three hospitals, only Tobey was and is represented by a labor union. The Union is the exclusive collective bargaining representative of an appropriate unit of technical, clerical, service and maintenance employees and is a party to a collective-bargaining agreement with Tobey.[3] The employees of the unit comprise approximately 215 of 550 employees at Tobey. The two other hospital facilities have never been represented by a labor organization. There are approximately 4800 employees comprising of the two nonrepresented hospitals and ancillary facilities. (Tr. 45; 161–162.)

The Acting General Counsel alleges that: (1) the Respondent violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing an employment selection process policy that prohibited represented employees at Tobey from receiving consideration at its unrepresented facilities for employment until the second round in the selection process; (2) the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider Christopher Souza (Souza), Noelia Nunes (Nunes), and other similarly situated union employees for hire at the Respondent's unrepresented facilities until the second round in the selection process; and (3) the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Nunes for the operating room assistant position and delayed in hiring her for a mobility aide position at the unrepresented St. Luke's facility.[4]

1. The employment selection process

As part of the process in selecting applicants for open positions, the Respondent has promulgated and maintained an employment selection process policy (HR 4.06) since April 1999. The purpose of the policy is to provide standards in recruiting, interviewing, and hiring applicants for open positions within the facilities. (GC Exh. 2.) In recruiting for internal and external candidates, HR 4.06, in relevant parts, stipulates

> A. Internal Applicants:
>
> Upon application, regular status employees who are beyond the introductionary period will be given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates. Employees in a union will be considered internal candidates if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at the unionized site. Temporary and per diem status employees will be considered prior to external applicants.
>
> B. External Applicants:
>
> Employees in a union whose collective bargaining contract does not provide reciprocal opportunity to employees, who are not members of the union, will be considered external candidates.
>
> External candidates may be selected if no employee is an ideal candidate, and if there is not an opportunity to train inexperienced internal candidates due to clinical/operational imperatives, turnover, lack of training resources, etc.

During the relevant time period from January 1 through December 31, the Union and the Respondent have been parties to a collective-bargaining contract (contract). Since January 1, the Union enjoyed a preference in the hiring and transferring of unit employees to open unit positions in Tobey. Under the terms of the expired and the contract in effect at the time of this complaint, *Section 8.2 "Vacancies"* require the Respondent to first consider unit employees for open bargaining unit positions. The union-represented employees are hired into open bargaining positions based on minimal qualifications and seniority during what is considered as the first round in the employment selection process. The nonrepresented employees working at St. Luke's and Charlton are considered internal candidates but are not considered until after the applications of all unit employees have first been reviewed and no selection made. If no unit employees have been selected, nonunit applicants would then be considered during the second round of interviews. (GC Exhs. 5 and 6.)

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[2] Testimony is noted as "Tr." (Transcript). The exhibits for the Acting General Counsel and Respondent are identified as "GC Exh." and "R. Exh." Joint exhibits are identified as "Jt. Exh." Closing briefs for the Acting General Counsel and Respondent are identified as "GC Br." and R. Br."

[3] The Union also represents licensed practical nurses in a separate contract, which is not a subject of this complaint. (Tr. 63.)

[4] GC Br. at 2, 3.

Consistent with Section 8.2 of the contract, it is not in dispute that unit employees at Tobey receive a preference over nonunit employees as applicants for bargaining positions. In similar fashion, nonunit employees applying for open positions at St. Luke's and Charlton would enjoy a preference of being considered in the first round under HR 4.06. The unit employees from Tobey applying for open nonbargaining positions would be considered in the second round only if no selection was made of a nonunit employee in the first round.

David DeJesus (DeJesus) was and is employed as the senior vice president for human resources for Southcoast Health System for the last 7 years. He was first employed by the Respondent in June 1996 as the vice president of human resources. He said that the Respondent was created in June 1996 when the three hospitals were combined into one health network. DeJesus stated that only Tobey was and is represented by the Union. DeJesus was responsible for creating HR 4.06 which was implemented on April 5, 1999. DeJesus explained that the purpose of HR 4.06 was to standardize hiring policies and practices across the three hospitals. Prior to working for the Respondent, DeJesus was employed at another health system that had two facilities with one being represented by a labor organization. He said that the unrepresented employees would complain to him that they felt disadvantaged for job vacancies because union employees would be able to bid on positions at their represented facility, but the unrepresented employees were not able to bid on bargaining positions at the represented facility. DeJesus said he was sensitive to these complaints when he began working with the Respondent.

DeJesus has served on the Respondent's bargaining committee from 1996 to 2010. He said he attempted to negotiate a reciprocal arrangement with the Union in 1997/1998 so that bargaining unit positions would be equally open to nonunion employees. He was unable to successfully bargain with the Union on opening up bargaining positions for nonunion employees. (Tr. 145–157; R. Exh. 1.)

In an effort to create uniformity, the Respondent decided not to consider union employees for nonbargaining unit positions at St Luke's and Charlton until after nonunion employees were first considered. DeJesus explained his rationale for HR 4.06

> It's, in our perspective, it's a matter of equity. That if a position is posted at the Tobey site and represented by either of the Unions, then people at St. Luke's or Charlton would not be considered in the first round at Tobey for the two contracts. So if it works that way at the Tobey site, then our view it should work the same way in the other direction. (Tr. 151.)

Consequently, HR 4.06 gave a preference to nonunion employees applying for open positions at the nonunion facilities. (Tr. 145–149.) DeJesus testified that a vacancy announcement for an open position is posted for 5 calendar days and all internal and external candidates' applications would be accepted during this 5-day period. He explained that nonunion employees applying for open positions at St. Luke's and Charlton would be considered in the first round at the two facilities. He said that union employees would be considered in the second round of interviews only if a nonrepresented employee is not selected. Despite what the policy states above, union employees at Tobey applying for open positions at either St. Luke's or Charlton are actually considered in the second round and not as external applicants (which would have placed the union employees in the third round of consideration). In Tobey, DeJesus explained that union employees are given first consideration for open bargaining positions based upon their qualifications and seniority. DeJesus lamented that the contract effectively prevents St. Luke's and Charlton employees from moving over to Tobey because the bargaining positions require that the union employee have only minimal qualifications for selection. (Tr. 150–154.)

Mary F. Medeiros (Medeiros) explained how HR 4.06 would interface with Section 8.2 of the contract at St Luke's and Charlton. Medeiros is currently employed as the human resources business partner at St. Luke's. Prior to that position, she served for 19 years as the human resources consultant at the same hospital. (Tr. 176–179.) Medeiros stated that, among other duties, she is responsible for guiding managers through the employment selection process, screening applicants, and providing statistical reports. Medeiros explained that the employment process begins when a manager completes an employment requisition for a position that needed to be filled. The requisition would include, among other things, the position, work shift, scheduled hours, and who is being replaced. After completing the requisition, the request is then forwarded to the director or vice president for approval.

Once the job requisition is approved, it is forwarded to the human resources office for posting. The posting of the vacancy is for 5 calendar days on the Respondent's intranet website and paper posted on the bulletin boards. Medeiros said that vacancies are routinely posted for 5 calendar days and is open for internal and external candidates so that the Respondent would not have to post a second time for external candidates.

Medeiros confirmed that union employees would be considered first before nonunion employees for open bargaining positions at Tobey. She said that at St. Luke's and Charlton, only regular scheduled employees working at these two hospitals are considered in the first round. Medeiros stated that union employees from Tobey would be considered in the second round, along with per diem employees if no candidate is selected. Medeiros said that external candidates are considered in the third round if an internal candidate is not selected. (Tr. 179–182; R. Exh. 2.) Medeiros reiterated that the union employees from Tobey would be considered in the second round only after the first round of nonunion employees have been considered and not selected. (Tr. 224.)

Anne Colwell (Colwell) is and has been employed as the vice president of human resources Southcoast Hospitals Group for the last 7 years. Colwell testified that under the contract with the Union at Tobey, represented employees with minimal qualifications would be hired for open bargaining positions in Tobey and nonunion employees would not even be considered. Colwell explained that open bargaining positions at Tobey would have the same 5 calendar day posting and unit employees applying within the 5-day period would be considered in the first round. Internal employees outside of the unit would be considered in the second round. (Tr. 236–238.) Colwell stated that under the contract, managers are not free to consider se-

cond round candidates if there is a qualified unit employee candidate. In contrast, Colwell testified that hiring officials in the nonunion facilities are not required to select a nonrepresented employee, but would be free to consider union employees during the second round of interviews in the hiring process. (Tr. 242.)

2. Christopher Souza's employment selection process

a. Souza's application was not considered

The Acting General Counsel contends that Christopher Souza (Souza), a represented employee at Tobey, was never considered for an open building superintendent position under the Respondent's HR 4.06 policy that gave first consideration to nonrepresented employees.

Souza testified that he was employed as a mechanic at Tobey for over 11 years and is a member of the appropriate unit represented by the Union. Souza's job title at Tobey is listed as the HVACPM Coordinator.[5] In May, the Respondent posted an open position for the position of building superintendent at one of St. Luke's facilities. The building superintendent position is a nonbargaining position. Souza timely applied online for the position through the Respondent's intranet application process. (Tr. 19–22.)

The position was posted on May 16 and had a 5-day posting period. Souza applied on May 18. (GC Exhs. 3 and 4.) Lucilia Darosa (Darosa) informed Souza in an email dated June 22, that "Just informing you that the position above has been filled and that another candidate was chosen for the position." (Jt. Exh. 1.)

Souza believed that Darosa was employed at the time in the Respondent's human resources office.[6] Souza replied back in an email to Darosa on June 23, stating that he was more than qualified for the position and did not understand why he was not interviewed. Souza was informed on the same day in a second email from Darosa the following

> At the same time, we would not be able to consider you for the first round interviews as you currently work at Tobey in a SEIU position. According to our policy (4.06) any Tobey (SEIU) and/or per diems are not considered in the first round of interviews. (Jt. Exh. 1.)[7]

Souza stated he looked into the policy, which he readily accessed on the Respondent's intranet. He said that HR 4.06 stated exactly what was represented to him by Darosa. He testified he was never aware of this policy even though he had been a union delegate. (Tr. 24–26.) Souza did not speak to his supervisor or anyone in management about the Respondent's refusal to consider him for the position. (Tr. 38, 39.) Instead, Souza complained to Lisa Lemieux shortly after receiving the emails from Darosa. (Tr. 30, 31.)

b. The involvement of Lisa Lemieux

Lisa Lemieux (Lemieux) was a union organizer at Tobey from 2005 to August 2012, and was involved in handling grievances, arbitrations, labor-management meetings, training stewards, and conducting membership meetings. Lemieux testified that Souza complained to her that the Respondent did not consider him for a building supervisor position at St Luke's because he was a member of the Union. Lemieux said that Souza also gave her a copy of HR 4.06. Lemieux denied being aware of HR 4.06, but maintained that she had received complaints from unit employees since 2005 about the hiring practices at St. Luke's and Charlton.

Admittedly, although made aware of these complaints since 2005, Lemieux never discussed the matter with the Respondent or filed a prior complaint with the Board until Souza complained in 2011. Lemieux also vaguely recalled some discussions over the Respondent's proposal on seniority and bidding for jobs during contract negotiations in 1998, but she could not recall what was discussed or what was the exact proposal made by the Respondent. Lemieux testified that she did not recall any discussion during the negotiations regarding the Respondent's employment selection process. (Tr. 64–67.)

Upon receiving and reviewing a copy of HR 4.06, Lemieux felt that the policy was discriminatory because "union workers were being treated differently than workers at St. Luke's or Charlton." Lemieux stated that she attempted to discuss the policy with Colwell shortly after Souza had complained, but was told by Colwell that management was not interested in discussing this topic. (Tr. 48–51, 60.) Colwell testified that she does not recall discussing HR 4.06 with Lemieux and only became aware of the alleged unfair labor practice charge in the summer/fall of 2011. (Tr. 238, 239.)

Lemieux pursued the matter further by surveying the Union membership as to how many were discriminated against when applying for jobs at St. Luke's and Charlton. She sent out an email on July 20 to approximately 100 out of 215 union members. The purpose of her email was to determine whether other union members were also denied consideration or selection to a nonunit position. Lemieux's email stated, in part

> It has come to our attention that Southcoast has been discriminating against the union members who have applied for other jobs at St. Luke's and Charleton [sic].
>
> —Tobey workers are being told that they will not even be considered because they are i [sic] the union.
>
> If you are one of those people or know somebody that this has happend [sic] to . . . please let me know. All this is to help us prepare for the filing of a labor board charge against Southcoast. (GC Exh. 7.)

Lemieux recalled receiving three responses. (Tr. 52, 67.) Lemieux received an email from Christine D'Arci (D'Arci) dated November 22, who was a union steward and a member of the union bargaining team at the time. The email from D'Arci was actually a forwarded email that D'Arci received from

[5] HVACPM is an acronym for heating, ventilation, and air conditioning preventative maintenance.

[6] Darosa was the human resource coordinator at the time. The parties stipulated that she was the agent for the employer only with regard to the two emails she sent to Souza on June 22 and 23. (Tr. 27.)

[7] The allegation raised with respect to Souza was limited to the failure of the Respondent to consider him for the building superintendent position and not a failure of the Respondent to hire him. (Tr. 33.)

Meaghan Carroll (Carroll) on November 8. At the time, Carroll was the Respondent's human resource coordinator. The email from Carroll to D'Arci referenced an open control desk coordinator position that D'Arci had applied for at St. Luke's. The email stated that consideration for this position is

> . . . currently in the first round of interviews. As an SEIU/MNA member, your application will be considered if the position remains open after the first round. (Jt. Exhs. 2 and 3.)

Subsequently, D'Arci was informed by Medeiros in an email dated November 17 that the position was filled. The Respondent never considered D'Arci for this position because the Respondent selected another applicant during the first round. (Tr. 51–55; Jt. Exhs. 2, 3.)[8]

Lemieux received a second response from Debra Ladd (Ladd) in an email dated July 22. Ladd was a unit employee and a union delegate at the time. (Tr. 55, 56; GC Exh. 7.) Ladd complained to Lemieux that since she was a member of the Union, she would not be considered for a nonbargaining position until the second round and that she would not likely be considered because there were numerous applicants at the other sites. (GC Exh. 7.)

Lemieux testified that she received a third response from Joan Monte (Monte), who was a nurse's assistant and union delegate at the time. Monte had informed Lemieux that there was another unit employee, Noelia Nunes, who was denied a nonbargaining position because of her union affiliation. (Tr. 78.)[9]

3. Noelia Nunes' employment selection process

a. The certified nursing assistant I and II vacancies

The Acting General Counsel alleges that the Respondent failed to consider Noelia Nunes (Nunes) for a certified nursing assistant-1 (CNA-I) and for a certified nursing assistant-2 (CNA-II) position at St. Luke's because of her union affiliation. Nunes testified that she was employed as a CNA at Tobey from 2010 to 2012, and is a member of the bargaining unit. During her employment at Tobey, Nunes had applied for five or six open vacancies in other Southcoast network facilities. All of Nunes' applications were completed on the Respondent's intranet website. The Respondent did not select Nunes on any of her prior applications.

In July, the Respondent posted a vacancy for a CNA-I at St. Luke's. The CNA-I vacancy was posted on July 5 for 5 calendar days. (GC Exh. 9.) Nunes timely submitted her application through the Respondent's intranet website. Although the position at St. Luke's was identical to her CNA position at Tobey, Nunes said that she was interested in getting a transfer to St. Luke's because she lived closer to St. Luke's and it would greatly reduce her commuting time.

Nunes testified that approximately 2 weeks after her application was submitted on the Respondent's intranet website, she was informed that because she worked ". . . at Tobey Hospital and I was represented by the Union, I wouldn't be considered until [the] second rounds." Nunes did not keep a copy of the email, but believed it was sent from the Respondent's human resources office. She did not recall when and who had sent her that email. (Tr. 82–86.)

As part of the employment selection process, the Respondent maintains a job certificate for each posted position. Among other items, the certificate lists the names of the employees who had applied for the posted position. Alongside Nunes' name, it was noted "Tobey—not 1st round—Position filled during 1st round." Nunes was never interviewed for this position because the Respondent filled the position on July 20 during the first round. (GC Exh. 9.)

On August 9, the Respondent posted an open vacancy for a CNA-II at St. Luke's. The posting was opened for 5 calendar days until August 14. Nunes testified that she applied for the position in September. Nunes did not have the requisite medical assistant or EMT certifications that were preferred experience for the CNA-II position. Nevertheless, she believed she was qualified because she was told by coworkers that the Respondent will train and provide orientation for the successful incumbent who may lack the requisite and preferred skills. (Tr. 87–89.) Nunes testified she received an email informing her that the position was filled. The job certificate noted next to Nunes' name, "Late application, not interviewed." (Tr. 89; GC Exh. 10.)

The Respondent considered Nunes' job application for the CNA-II position as being submitted late and she was not interviewed. The posting stated that applications must be submitted from August 9 through 14. Nunes' application had a submission date of September 20. (GC Exh. 10.) The successful applicant was offered the position on September 15 during the first round of consideration. Medeiros testified that submissions after the posting date would be deemed as late and would be considered in the second round. In addition to Nunes, several other candidates' applications were submitted late and were not considered during the first round. (Tr. 181; R. Exh. 2; GC Exh. 10.)

b. The operating room assistant-I and II vacancies

The Acting General Counsel alleges that Nunes was not hired for the operating room assistant-1 (ORA-I) position and not considered for the ORA-II position due to her union affiliation. The Respondent initially posted the ORA-I vacancy from October 17 to 22. Nunes applied on October 17. (Tr. 92; GC Exh. 12.) Nunes was not considered for the ORA-I position until the second round because of HR 4.06. On the job certificate, it was noted alongside Nunes' name, "Not Hired, Position Filled—general—no interview SEIU (2d round)."

The initial posting was filled on November 29 with an offer of the job to Patrick Mentzer (Mentzer). Mentzer declined the position after learning that the Respondent decided to reduce the position's full-time schedule to 32 hours. (Tr. 197; GC Exh. 12.) The same position was then offered to Erika Dulude (Dulude) on December 9. Dulude accepted the position but the offer was rescinded after she was not medically cleared for employment. Dulude was not employed by the Respondent at

[8] D'Arci complained to Lemieux after the Union had filed its initial charge. (Tr. 70.)

[9] The Respondent requested the email from Monte, but was not available. (Tr. 55, 69, 78.)

the time and was considered an external candidate. The ORA-I was reposted on December 22 through 27 after the Respondent rejected Dulude for the position. Medeiros testified that if an open position is reposted, the applicants from the first job posting would not have to reapply. (Tr. 197.) The eventual successful candidate, Summer Sylvia (Sylvia), had withdrawn her application during the first posting, but reapplied under the second posting on December 22. Sylvia is a nonrepresented employee from Charlton. (GC Exh. 12.)

Nunes testified she was never considered for the ORA-I position. However, the job certificate for the second posting alongside Nunes' name noted, "Has applied for the second posting and application forwarded to manager." (GC Exh. 12.) It would, therefore, be reasonable to conclude that Nunes' application was considered during the second posting. In fact, Manager Marianne Almeida, did consider Nunes for the position, but determined that Nunes did not have EKG or phlebotomy experience. (R. Exh. 5.)

The ORA-I position required phlebotomy and EKG skills. (GC Exh. 12; Tr. 197.) The Respondent said Nunes did not have phlebotomy and EKG skills. (Tr. 189; R. Exh. 5.) Nunes admitted that she did not have the required phlebotomy skills. She said that as a CNA at Tobey, she had EKG skills. She maintains that she was informed by another coworker, Mary Guilotte (Guilotte), that the Respondent had taught the requisite skills to Guilotte once she was placed on the job. Nunes believed the Respondent would have taught her the phlebotomy and EKG skills once she was placed in the ORA-I position. (Tr. 93–95; 128.)

Shortly after the initial posting for the ORA-I vacancy, the Respondent posted a vacancy for an ORA-II position at St. Luke's from October 26 to November 1. The ORA-II position is a higher level position than ORA-I. (Tr. 204.) The ORA-II required knowledge of medical terminology. (GC Exh. 13.) Nunes applied for this position on October 27, but was not considered. On the job certificate, it was noted alongside her name, "Position Filled—no interview—Tobey site (not for 1st round)." (GC Exh. 13.) Nunes testified she applied for the position, but was subsequently informed by an email from human resources that the position was filled.

Nunes believed she was qualified for the ORA-II position and although she did not have the required knowledge in medical terminology, she again maintained that the Respondent would have trained her in this area. She was confident in learning her new skills within 2 days. (Tr. 95–99.) Medeiros distinguished the fact that the Respondent may consider an applicant who lacks a "preferred" skill and a manager may be willing to train that applicant, but an applicant that lacked a required skill would be considered unqualified. (Tr. 232–235.)

c. The mobility aide vacancies

The Acting General Counsel alleges that Nunes was not timely considered and selected for the position of a mobility aide position at St. Luke's. It is alleged that Nunes should have been considered earlier in the employment process and that the Respondent delayed her selection because of her union affiliation.

By way of background leading to this allegation, the Respondent initially posted an open vacancy for the mobility aide position on September 27 to October 1. The position was for a ". . . current 40 hour Mobility Aide in the Pilot Program" and "this was an internal posting (i.e., within the department for a temp employee to apply for a permanent opportunity)." (GC Exh. 10.) Nunes applied for the position on September 26, but was shortly informed by the human resources office that the position was filled. (R. Exh. 4.) A review of the job posting shows that this vacancy announcement was intended to place a temporary employee into the mobility aide position on permanent basis. There were four job applicants for the open mobility aide position. Except for the temporary employee who was selected, the remaining three applicants, including Nunes, had a notation alongside their names that stated "Not interviewed as the employee selected is already in the position." (GC Exh. 11.)

Medeiros stated the mobility aide announcement posted on September 27 was actually not a vacancy, but part of a pilot program to determine whether temporary positions could be converted to permanent positions. The aide position was temporarily filled with a nonpermanent employee for Respondent to determine whether the position was actually needed. She said that once the Respondent approved this position (and others) as permanent, the temporary employee already in the position would be made a permanent employee. The person selected for this position was Leslie Parent (Parent). Parent was a temporary employee in a mobility aide position at the time. Parent's application states, in part, "Have a temporary position as a mobility aide and would like to continue working for Southcoast Hospitals Group." (R. Exh. 3.) Medeiros stated that the mobility aide position was the same job held by Parent except it was now posted as a regular permanent position.

The Acting General Counsel does not dispute that Nunes was ineligible for the mobility aide position that was part of the Respondent's pilot program to convert a temporary employee into a permanent position.[10] (Tr. 185–187; R. Exh. 3.) Any allegations that the Respondent violated the Act for not considering Nunes for the mobility aide vacancy posted on September 27 are dismissed.

It is the second posting of the mobility aide position that is of controversy. The Respondent reposted the mobility aide position at St. Luke's from December 9 to 14. The position held by Parent became vacant when she resigned from the position. This position did not require knowledge of medical terminology, but it was nevertheless a preferred skill for an applicant to possess. Nunes said she did not have knowledge in medical terminology, but maintains that the Respondent would have trained her once she was in the position. Nunes timely applied for this position on December 12, and it was noted on the job certificate alongside her name that "Application was not reviewed by manager." The same certificate also noted that an external candidate, Doris Knight (Knight), was interviewed for the position on January 6, 2012. (GC Exh. 14.) Nunes, however, subsequently received a telephone call for a job interview from the human resources office. She could not recall the per-

[10] GC Br. at fn. 9.

son who had contacted her. Nunes said she was interviewed in January and offered the position shortly thereafter. It seems that Nunes was interviewed either on January 17 or 18, 2012. The Respondent selected Nunes for the position on January 30, 2012. (GC Exh. 16.)

Nunes said she gave 2 weeks' notice to her supervisor, but did not start her new job until March 15, 2012. Nunes was asked by her supervisor to stay in her former position a little longer because there was nobody available to replace her and Nunes agreed. (Tr. 99–102; 128; 135, 136.)

III. DISCUSSION AND ANALYSIS

Section 8(a)(3) of the Act makes it unlawful for an employer to discriminate against employees to discourage their membership in a labor organization. Section 8(a)(1) protects from employer interference of employees' rights to engage in protected and concerted activities. Section 7 of the Act provides that employees have the right to engage in protected and concerted activities. A hiring policy that discriminates on the basis of Section 7 considerations violates Section 8(a)(3) and (1). *Legacy Health System*, 354 NLRB 337 (2009).

A. The Union is Not Estopped From Challenging the Policy

As an initial matter, the Respondent contends that the Union is equitably estopped from challenging the preference policy because HR 4.06 has been in place for over 11 years before the time the Union filed the underlying unfair labor practice charges in this complaint. A union's constant acquiescence to an employer's unilateral action for sustained periods of time can equitably estop a union from demanding bargaining on that subject. *Manitowec Ice Co.*, 344 NLRB 1222 (2005); *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961).

The Respondent asserts that Lemieux was not a credible witness when she testified that she was unaware of HR 4.06 until it was brought to her attention by Souza. The Respondent contends that it had proposed to the Union the same type of preference enjoyed by employees at St. Luke's and Charlton conditional upon the Union's agreement to change the "most senior qualified" provisions of the contract to "best qualified" standard during their 1997–1998 contract negotiations. (R. Exh. 1.) The Respondent states that the Union rejected this proposal and therefore, the Union was undeniably aware of this policy at the time of bargaining. The Respondent argues that the Union's acquiescence to the employer's unilateral action in implementing HR 4.06 for a sustained period of time equitably estopped the Union from demands to bargain over this policy.

The Acting General Counsel maintains that the Union was not aware of the Respondent's practice of deferring unit employees at Tobey for open nonbargaining positions until after the first round of consideration. The Acting General Counsel argues that the Respondent unlawfully maintains and enforces this policy and is not arguing a violation of the Act when the policy was first promulgated. In addition, the Acting General Counsel is not seeking a finding of a violation for any unfair labor practice occurring more than 6 months prior to the filing of the instant charge.

"[A] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter. . . . [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter." *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357–1358 (D.C. Cir. 2008) (quoting *Dept. of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)).

I find that the Respondent failed to prove that the Union explicitly waived its right to bargain over changes to preference bidding for union jobs in 1998, and is therefore not estopped from challenging this policy. It presented no evidence that the parties fully discussed and consciously explored these changes or that the Union consciously yielded its bargaining rights.

For that reason, the Board requires "'clear and unmistakable' evidence of waiver" and "construe[s] waivers narrowly." See also *Honeywell Intl., Inc. v. NLRB*, 253 F.3d 125, 133–134 (D.C. Cir. 2001) ("Board correctly concluded that the Union did not clearly and unmistakably waive its protection against postexpiration unilateral termination of severance benefits."). To find a clear and unmistakable waiver, the evidence must show "that the parties have 'consciously explored' or 'fully discussed the matter on which the union has 'consciously yielded' its rights." Id.; see also *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994). In light of no evidence that the Union had clearly and unmistakenly waived its right to bargain over this preference policy, I will not infer a waiver by the Union of its right to bargain about that subject.

I also find that the Union did not implicitly waive bargaining and acquiesced to the policy when the Respondent promulgated HR 4.06. The Union did not object over the policy because it was not aware of the policy until Souza brought the matter to Lemieux's attention. The Respondent's authority to act unilaterally is predicated on the Union's waiver of its right to insist on bargaining. *Provena Hospitals*, 350 NLRB 808 (2007). At most, the Respondent had shown that it had proposed in 1998 to the Union the same preference for represented employees as given to the unrepresented employees to bid on open nonbargaining positions. However, aside from the proposal offered by the Respondent in 1998 (R. Exh. 1), no other evidence has been presented demonstrating the Union was aware of the policy until Souza complained to Lemieux.[11]

I credit the testimony of Souza when he denied knowledge of the policy until he searched for it on the Respondent's intranet website. I also credit Lemieux's testimony in its entirety. Lemieux denied knowing of the policy and vaguely recalled some discussions in 1998 about job bidding and seniority during contract negotiations. She denied recalling any discussions regarding the employment selection process. I find it totally reasonable for Lemieux not to recollect a proposal that was made one time by the Respondent more than 13 years ago. In addition, Lemieux was not the union representative during these negotiations and would not have had firsthand knowledge of

[11] The Respondent also contends that HR 4.06 was readily accessible on the employer's intranet website and therefore, the Union must have known of the policy. However, while the policy may have been open and notorious for viewing, the Union would still need to be aware of the policy in order to search for it on the Respondent's website.

the exchange of contract proposals by the parties.[12] It is a stretch to believe that the union acquiescence to a policy that it had no knowledge until recently made aware by Souza. Accordingly, I find that the Union never explicitly or implicitly waived its right to bargain over HR 4.06 and was therefore not estopped to challenge the policy. The Union simply cannot acquiesce in a policy unilaterally implemented by the Respondent when it had no knowledge or awareness of the policy.

B. The Employment Selection Policy is Not Inherently Destructive

The unfair labor practice charged here is premised on Section 8(a)(3) which requires a finding of discrimination when the employer's conduct is based upon an employee's union affiliation. In essence, the Acting General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act when it failed to timely consider and hire unit employees for nonbargaining positions by instituting a policy that proscribed the consideration of union employees for nonbargaining open positions until after all unrepresented applicants are considered. I agree with the Acting General Counsel.

The Supreme Court has recognized that "there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification . . . that the employer's conduct carries with it an inference of unlawful intent so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965). If an employer's conduct falls within this category, "the Board can find an unfair labor" practice even if the employer introduces evidence that the conduct was motivated by business considerations." *NLRB v. Great Dane Trailers,* 388 U.S. 26, 34 (1967). If it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of employee rights, no proof of an antiunion motivation is needed even if the employer introduces evidence that its conduct was motivated by business consideration.

The Acting General Counsel concedes that the policy was not inherently destructive of employee rights under *Great Dane Trailers,* supra. I agree and find that the policy did not absolutely preclude represented employees from obtaining nonrepresented positions at St. Luke's and Charlton. Rather, the Acting General Counsel maintains that the discriminatory impact on employees' Section 7 rights under the Act was comparatively slight, citing *Legacy Health Systems,* supra. If the adverse impact of the conduct on employee rights is

> ". . . comparatively slight, an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." *Great Dane Trailers,* at 34.

When the "resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful and an affirmative showing of improper motivation must be made." *Great Dane Trailers,* supra at 34; *NLRB v. Brown,* 380 U.S. at 289; *American Ship Building,* supra at 311–313.

Since the Respondent's policy is not an absolute prohibition of represented employees obtaining nonrepresented positions at Charlton and St. Luke's, I find that the policy has a comparatively slight impact on the employees' Section 7 rights consistent with *Great Dane Trailers,* supra.[13] In my opinion, HR 4.06 clearly constitutes discriminatory conduct and has a comparatively slight adverse impact on employee rights. By applying different standards for hiring eligibility between union-represented and nonrepresented employees, the Respondent has adversely affected the significant rights of represented employees protected by the Act, that is, the right to work unfettered by an employee's union affiliation. Such conduct constitutes discrimination against an employee's union affiliation and the plainest form of 8(a)(3) discrimination. Just as workers cannot be dismissed from employment because of their union affiliation, neither can they be denied employment because of their union affiliation.

The finding of a violation does not stop here and the inquiry now turns on whether the Respondent has proffered any legitimate and substantial interests for its policy and if so, was the discriminatory conduct motivated by an antiunion purpose. *Sierra Realty Corp,* 317 NLRB 832 (1995). The burden remains with the Respondent to establish a legitimate and substantial business justification for its policy. *National Football League,* 309 NLRB 78 (1992).

C. The Respondent Failed to Proffer Legitimate and Substantial Interests for its Policy

The Acting General Counsel maintains that the Respondent had failed to proffer any legitimate and substantial business justifications for the conduct and, therefore, there was no requirement for the Acting General Counsel to prove an antiunion motivation for the conduct.[14] In *Legacy Health System,* the employer, a hospital system, operated several facilities with multiple collective-bargaining agreements with various labor organizations as well as having many positions not represented by a labor organization. For a number of years, the Legacy Health System maintained an unwritten policy of prohibiting employees from simultaneously holding both bargaining and nonbargaining positions. This policy, however, does not prohibit employees from holding two bargaining unit positions nor from simultaneously holding two nonbargaining unit positions. The employer contends that the legitimate and substantial interests for its practice were the legal uncertainties of having employees simultaneously hold both bargaining and nonbargain-

[12] DeJesus testified that the union representative for the negotiations at the time was Katie D'Urso. (Tr. 155.)

[13] The record establishes that during the relevant timeframe, at least 14 union-represented employees from Tobey were considered and selected to nonbargaining positions. (R. Exhs. 6 and 7.)

[14] See GC Br. 19–21.

ing positions. Not unlike the situation in *Legacy Health System*, the Respondent's policy limits union-represented employees' career opportunities when the open position happens to be a nonbargaining job. The Board found in *Legacy Health System* that the hiring practice discriminated on the basis of Section 7 considerations and violated Section 8(a)(3) and (1) of the Act and that it was not necessary to determine if there was antiunion animus in the practice when the employer failed to proffer legitimate and substantial interests for its practice.

Here, I find that the Respondent has not established legitimate and substantial justifications for its preference policy to first consider nonunion candidates for open positions at the St. Luke's and Charlton facilities. The Respondent maintains that the policy is neutral and uniformly applied to nonunion and union-represented applicants. It argues that it has legitimate and substantial business interests to treat all of its employees equally and in hiring the best possible applicants for its open positions. I disagree with the premise for this rationale. A cursory review of HR 4.06 may seem like a neutral policy and it is laudable for the Respondent treat all employees in like fashion. However, such purported justification cannot condone conduct that is in fact related to the employees' union affiliation. Employees represented by the Union were refused consideration solely because of their union affiliation.

The Respondent contends that one of the benefits of working at Southcoast is the opportunity for career advancement, but nonunion employees are unable to apply for bargaining unit positions at Tobey due to the Union's contract which permits minimally qualified unit employees to be hired instead of potentially more qualified nonrepresented employees. DeJesus testified that he conceived HR 4.06 to help level the playing field by providing the same hiring preference at the two nonunion facilities so that nonunion employees would be able to advance in their careers.

DeJesus said HR 4.06 was promulgated due to a number of complaints he had received when he was previously employed at another health network which had a similar contract preference for union-represented employees. He maintained that the unrepresented employees were complaining they were essentially shut out of open bargaining positions. DeJesus was determined this would not happen when he became HR vice-president of Southcoast in 1996. My problem with his rationale is that the situation with DeJesus' former employer is not the same situation here. DeJesus was specifically asked if he had received complaints from employees in nonunion facilities about the alleged inequity when applying for Tobey union positions. DeJesus responded

> It comes up from time to time. People will say, individual candidates will ask why they can't be considered there if we're all part of Southcoast, that sort of thing.

I find DeJesus' testimony unpersuasive on this point. His testimony lacks specificity and detail information. DeJesus was vague in describing any complaints he may have received while employed with the Respondent. DeJesus did not identify any nonunion candidates who had complained to him that they were not able to advance in their career because of the preference in hiring union-represented employees at Tobey. DeJesus could not recall any specific written complaints from nonunion candidates that they were denied consideration for open bargaining positions at Tobey. One could reasonably infer that DeJesus may have anticipated an equity problem when he arrived at Southcoast due to the situation he encountered with his former employer. However, it is unreasonable and inappropriate for him to devise a solution for a problem that did not exist at Southcoast.

The so-called "leveling the playing field" rationale is also problematic for another reason. DeJesus testified that it was a matter of equity that if represented employees receive a preference for open bargaining positions, then nonrepresented employees should receive the same preference for nonbargaining positions. However, the staggering number of potentially open nonbargaining positions as compared to bargaining positions makes this equity rationale troublesome.

The Tobey union membership comprises of approximately 215 unit positions. There are over 4800 nonbargaining positions at the two nonunion hospitals and ancillary facilities. Nonrepresented candidates have a preference access to far greater open nonbargaining positions in the nonunion facilities to advance their careers. The limited number of bargaining unit positions that a nonrepresented employee is unable to apply would not unreasonably inhibit the career opportunities of these employees given the vast number of potentially open nonbargaining positions that are available. On the other hand, represented candidates are limited in their career advancements when they are not considered until the second round in the hiring process where the chances of being selected are greatly reduced. In my opinion, this does not level the playing field at all.

The Respondent affirmatively argues that assuming a violation of the Act, the violation was de minimis. (GC Exh. 2.) I disagree. The Respondent contends that only three unit employees complained of the policy after Lemieux sent out her email to approximately 100 unit employees. But, I find that Lemieux credibly testified that she had also received general complaints about not receiving transfers from unit employees since 2005. Although she did not fully investigate the reasons for the complaints, the complaints could well have been due to the Respondent's preference policy. Also, it is possible that the Union would have received far more than a handful of complaints if Lemieux's email went out to the full union membership. The fact that the three complaints came from union officials is immaterial. They were nevertheless valid complaints. Finally, the preference policy did not only affect Nunes and Souza or a handful of union members. It is hardly de minimis when the discriminatory policy potentially affects the wages and livelihood of the entire union membership. I find particularly revealing the difficult choice that Nunes had to make when she stated in her application for the ORA-I position that ". . . I know I have the Union here at Tobey but it's not an option for me, I rather go to S[t]. Lukes and not have the Union." (GC Exh. 12.) I also considered the emails received by Nunes and Souza which plainly stated that their membership in SEIU was the reason they were not considered during the first round of interviews for positions in the nonrepresented facilities. Clearly, it is not a de minimis policy when even a single em-

ployee is required to give up her union membership in order to obtain better wages or career opportunities. HR 4.06 discourages membership in the Union by refusing to consider or hire represented employees based solely on their union membership and is a violation of Section 8(a)(1) of the Act and I so find.

D. The Failure to Consider Souza, Nunes, and Similarly Situated Tobey Employees Violated Section 8(a)(3) and (1) of the Act

The Acting General Counsel contends that Souza was not considered for the building superintendent position due to his union affiliation. As noted above, since Souza was affiliated with the Union, his application was not considered until the second round under HR 4.06. Before he could be considered, the Respondent selected another candidate during the first round of consideration. Souza was informed by Darosa that because he worked in a SEIU position at Tobey, he would not be considered during the first round of interviews and HR 4.06 was cited by Darosa for her rationale.

Inasmuch as HR 4.06 has a comparatively slight adverse impact on union-represented employees, I find that the policy violates Section 8(a)(3) and (1) of the Act by relegating a represented employee to the second round of consideration. As such, Souza should have been considered along with all internal candidates during the first round of consideration. For Souza, the Acting General Counsel does not contend that he should have been hired for the building superintendent position.[15]

The Acting General Counsel also contends that Nunes was not considered for the CNA-I, CNA-II, and the ORA-II positions. With regard to the CNA-I, Nunes was specifically informed by an email from the HR office that her application would not be considered until the second round because she was represented by the Union. With regard to the ORA-II position, the Respondent's job certification noted that Nunes' application was not for the first round of consideration. As with Souza, I find that the Respondent's policy of not considering represented employees until the second round of review has a comparatively slight adverse effect on Nunes when the Respondent failed to proffer any legitimate and substantial interests in promulgating such a policy. As such, the Respondent violated Section 8(a)(3) and (1) when it failed to consider Nunes for the CNA-I and ORA-II positions.[16]

The Acting General Counsel argues that since HR 4.06 is a preference policy given to nonrepresented employees over union-represented employees, the impact of this policy affects all represented employees at Tobey who may have applied for open positions at the Respondent's nonunion facilities and were not considered. As such, there are employees similarly situated to Nunes and Souza known only to the Respondent who were also adversely affected when not considered during the first round of review. With regard to these yet to be identified employees, I find that their employee rights were also adversely affected by HR 4.06 in violation of Section 8(a)(3) and (1).

With regard to Nunes and the CNA-II position, it is not disputable that she was clearly late in the submission of her application for the CNA-II position. The posting of this vacancy was from August 9 to 14. There was no reposting of the vacancy announcement or extension of time for the submission of applications for this position. On this point, Medeiros credibly testified that late applicants, whether represented or nonrepresented employees, would not be considered until the second round of review. The successful candidate was selected on September 15. Nunes submitted her application on September 20 and after the selection was made. Although Nunes was never informed that her application was late, it was obviously not submitted within the posting period. Consequently, her application could not be considered in the first round of review even absent the preference policy because of her late submission. This was equally true for several other applicants, both represented and nonrepresented employees, who had submitted their applications after the vacancy deadline. (GC Exh. 10.) Thus, Nunes was not singled out for disparate treatment due to her union affiliation since the record shows that both represented and nonrepresented employees with late submissions were also not considered. (GC Exh. 10.)

Therefore, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it failed to consider Nunes for the CNA-II position. I find no merit in the allegation that Nunes was not considered for the CNA-II in violation of the Act and this allegation is dismissed.

E. The Refusal to Hire Nunes for the ORA-I Position and Similarly Situated Tobey Employees Violated Section 8(a)(3) and (1) of the Act

The Acting General Counsel alleges that Nunes was not considered and not hired for the ORA-I position due to her union affiliation. It is without dispute that the Respondent did not considered Nunes' application until the second round as it was noted on the job certificate next to her name that she was "Not Hired, Position Filled—general-no interview SEIU (2d round)." Consequently, I find that the Respondent violated Section 8(a)(3) and (1) of the Act when Nunes was denied consideration during the first round due to her union affiliation.

As narrated above, this position was offered to Mentzer, who subsequently declined the position. Medeiros testified that the position was reposted and that the applicants from the first job

[15] Souza admittedly did not fully complete his job application when he failed to list his skills, qualifications, certifications, and licenses which would have enhanced his selection for the position. (Tr. 35–37; GC Exh. 4.)

[16] The parties agreed that the issue regarding the CNA-I and ORA-II positions was a "failure to consider" and not a "failure to hire." (Tr. 111.) Nevertheless, testimony was taken as to the qualifications of the candidates for this position. The Respondent argues that Nunes would not have been considered because of a lack of qualifications for this position. Medeiros stated that the CNA-I position required "a Massachusetts nurse's aide certification and previous experience in acute care or long-term preferred." The person selected, Christine Cabral (Cabral), was already a CNA in the intensive critical unit (ICU) for the last 6 years working in the same facility. (Tr. 189–192; GC Exh. 9.) Similarly, the Respondent also argues that Nunes lacked the required knowledge of medical terminology for the ORA-II position. The Respondent, however, failed to distinguish between a failure to consider and a failure to hire. As noted, the Respondent did not consider Nunes during the first round of review because of the preferential policy. Whether or not the Respondent would have hired Nunes to these two positions is not an issue before me.

posting would not have to reapply. After the reposting, the position was offered to Dulude, an external candidate. However, the offer made to Dulude was subsequently rescinded by the Respondent. Eventually, the Respondent selected Summer Sylvia for the position. (R. Exh. 5.)

Nunes testified she was not considered and not selected for the ORA-I position.[17] I find, however, that Nunes was in fact considered for the ORA-1 position during the second posting. Alongside Nunes' name for the second posting was a notation that stated "Has applied for the second posting and application forwarded to manager." (GC Exh. 12.) It would, therefore, be reasonable to conclude that Nunes' application during this second posting was considered. In fact, Manager Marianne Almeida, did consider Nunes for the position, but determined that Nunes did not have EKG or phlebotomy experience. (R. Exh. 5.)

The controversy here is whether Nunes should have been considered during the first posting of this position and ahead of an external candidate.

The ORA-I position required phlebotomy and EKG skills. (GC Exh. 12; Tr. 197.) The Respondent said Nunes did not have phlebotomy and EKG skills. (Tr. 189; R. Exh. 5.) Nunes admitted that she did not have the required phlebotomy skills and was not certified for EKG, but maintains that she was informed by another coworker (Mary Guilotte) that the Respondent had taught Guilotte the requisite skills that she lacked once she was placed on the job. Nunes believed the Respondent would have also trained her in phlebotomy and EKG skills once she was placed in the ORA-I position. (Tr. 93–95; 128.) Medeiros, however, distinguished the fact that the Respondent may consider an applicant who lacks a "preferred" skill and a manager may be willing to train that applicant, but an applicant that lack a required skill is considered unqualified. (Tr. 232–235.)

It is without dispute that Nunes did not have the required phlebotomy and EKG skills for the ORA-I position. The job posting required phlebotomy and EKG skills of the candidates. Nunes testified without contradiction that another employee was taught job skills after obtaining a new position. Medeiros did not contradict this statement, but rather, stated that a supervisor may train an incumbent employee who lacks a preferred skill, but a required skill would make a candidate unqualified in the first instance. On this point, I find that Medeiros' testimony not worthy of consideration.

From my review of the job applications, it would seem that the Respondent was also willing to train the successful applicant on the required skills. The Respondent offered the ORA-I position to Mentzer during the first round of the initial posting of the position.[18] Mentzer had EKG skills and was already in an ORA position at the time of the first posting. He was in the process of obtaining his phlebotomist certification, it is not clear that he had such skills at the time of his application.[19] With the two other applicants, Dulude and Sylvia, who were offered the position after Mentzer had declined the position, it was clear they did not possess all the skills needed for the ORA-I position. Dulude listed EKG as one of her skills in her resume, but did not include knowledge of phlebotomy in her list of skills. Sylvia's application did not specifically indicate phlebotomy and EKG skills. (GC Exh. 12.) Consequently, it is reasonable to conclude that in this situation, even if the ORA-I position required phlebotomy and EKG skills, candidates were offered this position without the required skills with the implicit understanding that the successful candidate would be trained in those skills.

Nunes was bypassed by the Respondent during the first round in order that an external candidate, Dulude, could be reached in the employment process. The bypassing of Nunes is inconsistent with the Respondent's stated policy to consider internal candidates (regardless if they are union represented or not) before external candidates. Dulude was working at a restaurant at the time the offer was made to her. Dulude was trained as a medical assistant and possessed EKG skills but phlebotomy skills were noted on her resume. Sylvia was a CNA at the time, but, like Nunes, she did not complete the work experience and qualifications section of her application which would have listed her skills in EKG and phlebotomy. But unlike Nunes, Sylvia was nevertheless selected. It is also important to note that Sylvia had actually withdrawn her application during the first round of consideration. As a result, the Respondent violated the employee rights of Nunes when her application was not considered in the first round along with Sylvia's application and before Dulude's application.

The Acting General Counsel argues that HR 4.06 is a preference policy given to nonrepresented employees over union-represented employees, the impact of this policy affects all represented employees at Tobey who may have applied for open positions at the Respondent's nonunion facilities and were not hired. As such, there are similarly situated employees, like Nunes, known only to the Respondent also adversely affected when they were not hired for nonrepresented positions due to HR 4.06. With regard to these yet to be identified employees, I find that their employee rights were also adversely affected by HR 4.06 in violation of Section 8(a)(3) and (1).

F. The Refusal to Consider and Delay in the Hiring of Nunes for the Mobility Aide Position Violated Section 8(a)(3) and (1) of the Act

The Acting General Counsel alleges that Nunes was not timely considered for the position of mobility aide at St. Luke's and that the Respondent delayed her selection to this position because of her union affiliation in violation of Section 8(a)(3) and (1) of the Act. I agree.

As noted, the mobility aide position encumbered by Parent became vacant shortly after she was selected and the Respondent reposted the same position from December 9 through 14.

[17] The Board in *FES*, 331 NLRB 9 (2000), makes clear that it should be determined at the unfair labor practice hearing rather than the compliance stage of the proceeding whether the Respondent's failure to hire the applicants for employment constituted unlawful refusals to hire.

[18] The Respondent had offered the position to another nonrepresented employee before making the offer to Mentzer. This individual declined the position on November 23. (GC Exh. 12.)

[19] Medeiros was not certain if Mentzer had phlebotomy skills in his former ORA position. (Tr. 232.)

The Acting General Counsel argues that but for the Respondent's policy, Nunes would have been considered during the first round when the position was reposted. Nunes timely applied for this position on December 12, but was not considered with a notation alongside her name, "Application was not reviewed by manager." Instead, the Respondent considered and interviewed Knight, an external candidate, on January 6, 2012. The Acting General Counsel maintains that Knight, an outside candidate, should not have been considered before Nunes. Nunes was not interviewed for this position until either January 17 or 18, 2012, and the Respondent selected her for the position on January 30, 2012. (GC Exh. 16.)

The Acting General Counsel also maintains that Nunes was selected to this position because the Board had commenced an investigation into the charges in this complaint during the same timeframe as the mobility aide employment selection process. The Respondent denies that it had selected Nunes because of the pending Board investigation.

It is not necessary for me to address the allegation that Nunes was selected because the Respondent was concerned over the Board's investigation since I find that discriminatee Nunes should have been considered before Knight, an external candidate, for this position. The Respondent has consistently stated that external candidates would not be considered until all nonunion and union candidates were considered. Medeiros testified that the Respondent only review external candidates if there are no qualified internal applicants in the first or second round. This was not the case here. Knight was interviewed on January 6, 2012. Nunes was interviewed either on January 17 or 18. At the minimal, Nunes should have been considered on December 15 when the Respondent considered a nonrepresented internal employee (Sherrie LaBrode) for the position (GC Exh. 14) and Nunes was not because of HR 4.06.[20]

The Respondent argues that Nunes would not have received the ORA-I and the mobility aide positions even in the absence of the policy and that there were other reasons why she was not selected. To establish a discriminatory refusal to consider, the Acting General Counsel bears the burden of showing: 1) that the respondent excluded applicants from a hiring process; and 2) that antiunion animus contributed to the decision not to consider the applicants for employment. To establish a discriminatory refusal to hire, the Acting General Counsel must show: 1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; 2) that the applicants had experienced or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and 3) that antiunion animus contributed to the decision not to hire the applicants. *FES* at 12. Once this is established, the burden shifts to the Respondent to show that it would not have considered the applicants even in the absence of their union affiliation or activity. *Wright Line*, 251 NLRB 1083 (1980); *FES*, supra.

However, under *Great Dane's* "comparatively slight" standard, it is unnecessary to decide, after determining that the Respondent has failed to establish its business justification defense, whether the policy was motivated by antiunion considerations. Inasmuch as I had determined that the Respondent has not made this requisite showing, I need not decide whether the Acting General Counsel established that the policy was motivated by antiunion animus. *National Football League*, supra at 81 fn. 15 (". . . we also need not decide whether the General Counsel otherwise established that the rule was motivated by antiunion considerations" when the respondent failed to establish legitimate and substantial business justifications for the rule, citing *Great Dane*).

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) when Nunes was not selected to the ORA-I position and when it failed to consider her during the first round of review which consequently delayed her appointment to the mobility aide position.[21]

CONCLUSIONS OF LAW

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

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

3. The Respondent violated Section (a)(1) of the Act by promulgating and maintaining a policy giving first consideration to nonrepresented employee applicants and not considering union-represented employee applicants until the second round of review in the employment selection process solely because of their union affiliation.

4. The Respondent violated Section 8(a)(1) of the Act by discouraging membership and other protected activities in a labor organization in promulgating and maintaining a policy giving first consideration to nonrepresented employee applicants.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider applicants Christopher Souza, Noelia Nunes, and other similarly situated employees for hire.

[20] The Respondent selected Nunes for the position on January 30, 2012. Nunes said she gave a 2-week notice to her supervisor, but did not start her new job until March 15, 2012. Nunes was asked by her supervisor to stay in her former position a little longer because there was nobody available to replace her and Nunes agreed. To the extent that the Acting General Counsel believes that this delay was discriminatory, I find that it was not. The Respondent's hiring practices allow for up to 4 weeks before the applicant is placed or until the new position becomes available. (GC Exh. 2.) Here, in addition to the fact that Nunes' placement in her new position was shortly after the 4-week window, she also explicitly agreed to stay in her former position until another employee could be hired to replace her.

[21] As noted, under *FES*, supra, the appropriate time in the Board proceedings to litigate the relative qualifications of the applicants is during the unfair labor practice hearing. The Acting General Counsel contends that there were other discriminatees known to the Respondent but were not identified or litigated during the hearing. The parties stipulated that if this case was to reach a compliance proceeding, the Respondent reserved the right to argue the qualifications of any identified applicants for each of the posted positions. To that regard, I make the following correction to the transcript: At p. 244, LL. 6–9, the word "not" should be added at L. 7, to read as follows: ". . . the Hospital is reserving its right and [*not*] waiving its right to argue whatever arguments may exist based on the qualifications of the various applicants for each posted positions."

6. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Noelia Nunes and other similarly situated employees.

7. The unfair labor practices set forth above affect commerce within the meaning of the Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act by promulgating and maintaining a discriminatory hiring policy, I recommend that the Respondent rescind the policy and notify its employees and the Union that it has done so. Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by its refusal to consider for hire Christopher Souza, Noelia Nunes, and other similarly situated applicants to be identified in a subsequent compliance proceeding, I recommend that these discriminatees be considered for positions which they had applied or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to hire Noelia Nunes to the position of ORA-I and Mobility Aide, I recommend that Nunes be offered employment to either position of her choice. If Nunes decides to retain the position of mobility aide, she would nevertheless be made whole for backpay from when the Respondent failed to select her for the ORA-I position to when she was eventually selected to the mobility aide position.

Further, I recommend that other similarly situated discriminatees, if any, to be identified in a subsequent compliance proceeding be hired into the positions which they applied or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make Nunes and other similarly situated discriminatees to be identified in a subsequent compliance proceeding whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with 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, in accordance with the decision in *Latino Express*, 359 NLRB No. 44 (2012), the Respondent shall compensate Nunes and other similarly situated discriminatees to be identified in a subsequent compliance proceeding for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[22]

The Respondent, Southcoast Hospitals Group, Inc., in Wareham, Fall River, and New Bedford, Massachusetts, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a discriminatory policy with respect to the consideration, selection, employment, and hire of transfer applicants that deprives employees of job opportunities on the basis of whether their current position is or is not a union-represented position.

(b) Refusing to timely consider or hire employees into positions they would have been timely considered or hired but for the Respondent's discriminatory hiring policy.

(c) Discouraging membership in the Union or any other labor organization by refusing to consider, employ, or delay employment of represented employees for employment because of their union affiliation or other protected activities or to discriminate against them in any other manner with respect to their hire or terms and conditions of employment.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, rescind the discriminatory hiring policy, and notify its employees and the unions with which it has collective-bargaining agreements that the policy has been rescinded.

(b) Within 14 days from the date of this Order, consider employees Christopher Souza, Noelia Nunes, and other discriminatees to be determined at a compliance proceeding for the positions to which they had applied for and were not considered but for the Respondent's enforcement of its unlawful hiring policy or, if the positions no longer exist, to substantially equivalent positions as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, hire employee Noelia Nunes and other discriminatees to be determined at a compliance proceeding in the positions to which they would have been hired but for the Respondent's enforcement of its unlawful hiring policy, replacing the current occupants of those positions if necessary, or if the positions no longer exist, to a substantially equivalent positions and make them whole in the manner set forth in the remedy section of this decision.

(d) File a special report with the Social Security Administration allocating Nunes' backpay and other discriminatees to be determined at a compliance proceeding to the appropriate calendar quarters and compensate her for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*

(e) Preserve and, within 14 days of this Order, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

[22] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Within 14 days after service by the Region, post the attached notice marked "Appendix"[23] in each of its hospitals in Tobey, St. Luke's, Charlton, and all ancillary health facilities within the Respondent's network system. Copies of the notice, on forms provided by the Regional Director for Region 1, 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. 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 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. 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 October 21, 2011.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington D.C. June 12, 2013

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 maintain and enforce an employment selection policy that discriminates against, discourages, and disadvantages union-represented employees by deferring consideration of their transfer applications at our nonunionized facilities until after nonrepresented employees' transfer applications have been considered.

WE WILL NOT refuse or delay to consider union-represented employees for employment transfer because of the terms of a collective-bargaining agreement to which they are subject.

WE WILL NOT refuse to consider or hire current employees for positions on the basis of union considerations.

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

WE WILL notify the Union, within 14 days, with which we have collective-bargaining agreement, that we have rescinded the employment selection and hiring policy with respect to the transfer of union-represented applicants for employment at nonunion facilities.

WE WILL consider employees Christopher Souza, Noelia Nunes, and other similarly situated discriminatees to positions to which they applied and would have been considered and to offer them employment to those positions if applicable, or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they have enjoyed but for our unlawful refusal to consider and hire them.

WE WILL offer employment to Noelia Nunes in the position to which she would have been hired, replacing the current occupant of this position if necessary or to a substantially equivalent position, and make her whole, with interest, for any loss of earnings and other benefits she may have suffered as a result of our unlawful conduct.

WE WILL offer employment to other discriminatees to positions which they would have been hired, replacing the current occupants of those positions if necessary or, to substantially equivalent positions, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered.

WE WILL compensate Noelia Nunes and other discriminatees 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 calendar days from the date of the Board's Order, remove from our files any and all references to the unlawful consideration of Christopher Souza and refusal to hire Noelia Nunes and other discriminatees and WE WILL, within 3 days thereafter, notify them and other discriminatees in writing that this has been done and that the unlawful discrimination will not be used against them and others in any way.

SOUTHCOAST HOSPITALS GROUP, INC.

[23] 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."

No. _____

2015 OCT -1 A 9:30
CLERKS OFFICE
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

United States Court of Appeals For the First Circuit

SOUTHCOAST HOSPITALS GROUP, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Southcoast Hospitals Group, Inc. hereby gives notice that its parent corporation is Southcoast Health System, Inc., which is a nonprofit corporation, and that no publicly-held corporation owns 10% or more of its stock.

[SIGNATURES TO FOLLOW ON SUBSEQUENT PAGE]

Respectfully submitted,

SOUTHCOAST HOSPITALS GROUP, INC.,

By its attorneys,

Joseph D. Whelan (#63945)
Matthew H. Parker (#1141017)
WHELAN, CORRENTE, KINDER & SIKET LLP
100 Westminster Street, Suite 710
Providence, RI 02903
Tel: (401) 270-4500
Fax: (401) 270-3760
jwhelan@wckslaw.com
mparker@wckslaw.com

Dated: September 30, 2015

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that I served a copy of the foregoing document upon the following persons by Federal Express Overnight Delivery on September 30, 2015:

Betsy Ehrenberg, Esq.
Pyle Rome Eherenberg PC
18 Tremont Street, Suite 500
Boston, MA 02108-2301

Richard F. Griffin, Jr., General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

WCKS16261

United States Court of Appeals
For the First Circuit

2015 OCT -1 A 9:31

FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOTICE OF APPEARANCE

No. **Short Title:** Southcoast Hospitals Group, Ir

The Clerk will enter my appearance as counsel on behalf of ***(please list names of all parties represented, using additional sheet(s) if necessary)***:
Southcoast Hospitals Group, Inc. as the

[ ] appellant(s) [ ] appellee(s) [ ] amicus curiae

[✔] petitioner(s) [ ] respondent(s) [ ] intervenor(s)

Signature

September 30, 2015
Date

Matthew H. Parker
Name

Whelan, Corrente, Kinder & Siket LLP
Firm Name (if applicable)

401-270-4500
Telephone Number

100 Westminster St., Ste. 710
Address

401-270-3760
Fax Number

Providence, RI 02903
City, State, Zip Code

mparker@wckslaw.com
Email (required)

Court of Appeals Bar Number: 1141017

Has this case or any related case previously been on appeal?

[✔] No [ ] Yes Court of Appeals No._____

Attorneys for both appellant and appellee must file a notice of appearance within 14 days of case opening. New or additional counsel may enter an appearance outside the 14 day period; however, a notice of appearance may not be filed after the appellee/respondent brief has been filed without leave of court. 1st Cir. R. 12.0(a).

Counsel must complete and file this notice of appearance in order to file pleadings in this court. Counsel not yet admitted to practice before this court must promptly submit a bar application. 1st Cir. R. 46.0(a)(2).

United States Court of Appeals
For the First Circuit

2015 OCT -1 A 9:30

FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOTICE OF APPEARANCE

No. **Short Title:** Southcoast Hospitals Group, Ir

The Clerk will enter my appearance as counsel on behalf of ***(please list names of all parties represented, using additional sheet(s) if necessary)***:
Southcoast Hospitals Group, Inc. as the

[ ] appellant(s) [ ] appellee(s) [ ] amicus curiae

[✔] petitioner(s) [ ] respondent(s) [ ] intervenor(s)

Joseph D. Whelan imp
Signature

September 30, 2015
Date

Joseph D. Whelan
Name

Whelan, Corrente, Kinder & Siket LLP
Firm Name (if applicable)

401-270-4500
Telephone Number

100 Westminster St., Ste. 710
Address

401-270-3760
Fax Number

Providence, RI 02903
City, State, Zip Code

jwhelan@wckslaw.com
Email (required)

Court of Appeals Bar Number: 63945

Has this case or any related case previously been on appeal?

[✔] No [ ] Yes Court of Appeals No._____

Attorneys for both appellant and appellee must file a notice of appearance within 14 days of case opening. New or additional counsel may enter an appearance outside the 14 day period; however, a notice of appearance may not be filed after the appellee/respondent brief has been filed without leave of court. 1st Cir. R. 12.0(a).

Counsel must complete and file this notice of appearance in order to file pleadings in this court. Counsel not yet admitted to practice before this court must promptly submit a bar application. 1st Cir. R. 46.0(a)(2).

WHELAN, CORRENTE,
KINDER & SIKET LLP

Matthew H. Parker
mparker@wckslaw.com
401.270.3262

2015 SEP 31 A 9:28
FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

September 30, 2015

Via Federal Express

Clerk of Court
United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
One Courthouse Way
Boston, MA 02210

2015 OCT -1 A 9:31
FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

Re: Southcoast Hospitals Group, Inc.
Vs: National Labor Relations Board

Dear Clerk:

Enclosed for filing please find the following:

1. An original and 4 copies of Southcoast Hospital Group, Inc.'s ("Southcoast") Petition for Review (including 1 copy for service upon the Respondent);

2. An original and 3 copies of Southcoast's Corporate Disclosure Statement;

3. An original and 3 copies of Joseph D. Whelan's Notice of Appearance; and

4. An original and 3 copies of Matthew H. Parker's Notice of Appearance.

We will pay the filing fee online after the case has been docketed. Thank you for your attention to this matter.

Very truly yours,

Matthew H. Parker

MHP:cl

Enclosures

Cc: Betsy Ehrenberg, Esq.

Wcks16260

Press here to seal. Press here to seal. Press

Page 1 of 2

ORIGIN ID:PVDA (401) 270-4500
MATTHEW H. PARKER
WHELAN CORRENTE KINDER & SIKET, LLP
100 WESTMINSTER STREET
SUITE 710
PROVIDENCE, RI 02903
UNITED STATES US

SHIP DATE: 30SEP15
ACTWGT: 1.00 LB
CAD: 105131348/INET3670

BILL SENDER

TO CLERK OF COURT
US COURT OF APPEALS 1ST CIRCUIT
JOHN JOSEPH MOAKLEY US COURTHOUSE
ONE COURTHOUSE WAY
BOSTON MA 02210
(617) 748-9057
INV:
PO:
REF: SOUTHCOAST
DEPT:

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