Hospital Santa Rosa Inc. a/k/a Clinica Santa Rosa *and* Unidad Laboral de Enfermeras(os) y Empleados de la Salud. Case 12–CA–143221

January 3, 2017

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 16, 2016, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions with supporting argument.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

AMENDED REMEDY

In addition to the remedies provided in the judge's decision, we shall order the Respondent to pay the employees named in the Appendix to the complaint and compliance specification the amount opposite their names, less any applicable Federal or Commonwealth of Puerto Rico taxes. The total amount of backpay for each employee shall be calculated with interest, accrued to the day of payment, plus compensation to offset any adverse tax consequences, as set forth in the remedy section of the judge's decision, as modified.

ORDER

The Respondent, Hospital Santa Rosa, Inc., a/k/a Clinica Santa Rosa, Guayama, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, Unidad Laboral de Enfermeras(os) y Empleados de la Salud, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by failing and refusing

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act when it refused to provide the information the Union requested.

The Respondent excepts to the judge's conclusion that it changed the terms and conditions of employment of its unit employees by failing to pay them a $600-Christmas bonus without affording the Union adequate opportunity to bargain in violation of Sec. 8(a)(5) and (1) of the Act. The Respondent does not challenge the judge's findings that the Christmas bonus was a mandatory subject of bargaining, that the Respondent had a practice of paying the bonus to bargaining unit employees, that the parties did not reach impasse, or that the Respondent did not engage in meaningful bargaining with the Union. Rather, the Respondent argues only that under Puerto Rico Law No. 148 of June 30, 1969, as amended, P.R. Laws Ann tit. 29, sec. 501 et seq., it was not obligated to pay the bonus because it suffered financial losses in 2014, filed paperwork to obtain an exemption from paying the bonus with the Puerto Rico Department of Labor and Human Resources, and expected to receive an exemption upon completion of an audit. We reject this argument primarily because there is no record evidence that such an exemption was granted by the date the bonus payment was due under Puerto Rican law. Notably, no exemption had been granted by October 27, 2015, when the parties entered into the stipulation of facts and documents, and the Respondent has not offered to show that one was ever granted.

Moreover, even if the government of Puerto Rico had granted the Respondent's exemption request for the 2014 bonus, it does not follow that this exemption would have relieved the Respondent of its obligation under the National Labor Relations Act to provide the Union notice and an opportunity to bargain about the bonus payment, as the exemption would not have *prohibited* the Respondent from paying the 2014 bonus. See, e.g., *Watsonville Register-Pajaronian*, 327 NLRB 957 (1999) (Fair Labor Standards Act (FLSA) provision allowing employers not to pay overtime to exempt employees did not excuse employer's failure to bargain over unilateral changes to employees' schedules because the FLSA provision did not compel employer to bring employees within that exemption; employer could have complied with the FLSA simply by paying the employees overtime). Because an exemption would not prevent the Respondent from paying the bonus under Puerto Rican law, it still has an obligation to bargain with the Union over payment of the bonus.

Member Miscimarra concurs in finding that the Respondent violated Sec. 8(a)(5) on the basis that the Respondent did not except to the judge's finding that payment of the annual bonus was an established past practice and a term and condition of employment that, under the holding of *NLRB v. Katz*, 369 U.S. 736 (1962), the Respondent could not discontinue unilaterally. Because the Respondent did not except to this finding, it is not before the Board for review. See, e.g., *Can-Am Plumbing, Inc.*, 350 NLRB 947, 948 (2007), enfd. 340 Fed.Appx. 354 (9th Cir. 2009). Therefore, Member Miscimarra does not reach or pass on whether, under *Katz*, the payment of an annual Christmas bonus based on an obligation existing under Puerto Rico law constitutes a past practice that requires notice and the opportunity for bargaining prior to discontinuation of the bonus.

[2] The judge ordered the Respondent to "restore the full Christmas bonus benefit of $600 to the unit employees," but he did not name the employees entitled to that remedy. The General Counsel, having listed the names in the compliance specification, excepts. We shall modify the remedy to include the employees' names. In addition, we do not rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), which the judge cited in his decision. Instead, we rely on *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), which the judge properly applied in his recommended Order and notice. Further, we have substituted a "limited" bargaining order for the judge's recommended affirmative bargaining order. See *Mimbres Memorial Hospital*, 337 NLRB 998, 998 fn. 2 (2002), review denied sub nom. *NLRB v. CHS Community Health Systems, Inc.*, 108 Fed. Appx. 577 (10th Cir. 2004). We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language.

to pay the 2014 Christmas bonus without bargaining in good faith with the Union to impasse.

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

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

(a) Furnish to the Union in a timely manner the information requested by the Union on December 12, 2014.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

> All regular full-time and regular part-time registered nurses employed by the Employer at its facilities located in Guayama, Puerto Rico; excluding all other employees, office clerical employees, guards, other professional employees and supervisors as defined under the National Labor Relations Act.

(c) Rescind the change in the terms and conditions of employment of its unit employees that was unilaterally implemented on December 12, 2014, and make unit employees whole for the Respondent's failure to pay the 2014 Christmas bonus, by paying them the total amounts shown below opposite their names, with interest in the manner set forth in the remedy section of the judge's decision as amended, minus any tax withholdings required by Federal and Commonwealth of Puerto Rico laws.

	NAME	BACKPAY DUE
1.	ORTIZ RODRIGUEZ, ELIZABETH	$600
2.	RIVERA BURGOS, MYRNA	600
3.	FIGUEROA ORTIZ, ONELIA	600
4.	MUNOZ CEDERO, OLGA	600
5.	COTTO MONTANEZ, SANDRA	600
6.	VARGAS, ADELAIDA	600
7.	GONZALEZ RIVERA, LUIS	600
8.	CARRION ALICEA, IRIS	600
9.	PICART VAZQUEZ, MARIA	600
10.	ARROYO MEDINA, GLORIVEE	600
11.	REYES VELEZ, IRMA	600
12.	SANCHEZ RODRIGUEZ, JOSE I.	600
13.	RIVERA, GLORIA	600
14.	COLON PEREZ, LYMARIE	600
15.	CRUZ CRESPO, LUZ M.	600
16.	CRUZ MAURAS, CYNTHIA	600
17.	GOMEZ CAMACHO, YAMILCA	600
18.	MARTINEZ TORRES, ROSA	600
19.	ROSA GARCIA, MYRIAM	600
20.	SANTIAGO-FELIX, ADELA ,	600
21.	MORALES BAEZ. MARILYN	600
22.	LEBRON FIGUEROA, ENEIDA	600
23.	MONTANEZ MATOS, MARILYN	600
24.	ORTIZ ROMAN, NOEMI	600
25.	ESTRADA HERNANDEZ, ZAIDA	600
26.	RAMOS RODRIGUEZ, YANITZA	600
27.	ROSARIO MARTINEZ, LINDA	600
28.	FONTANEZ, YOLANDA	600
29.	MILIAN SALCEDO, ANGEL	600
30.	RIVERA SOLIS, JEANNETIE	600
31.	LUGO GONZALEZ, NASHIRA I.	600
32.	LA SANTA RODRIGUEZ, MARIBEL	600
33.	SUAREZ GOMEZ, ANNIBELLE	600
34.	ALICEA MELENDEZ,	600

	ADELAURA	
35.	JESUS ALVARADO, BERENICE	600
36.	SOSA RODRIGUEZ, EDNILYS	600
37.	ORTIZ JR., CARLOS	600
38.	VEGA CRUZ, NANETTE	600
39.	SALGADO CINTRON, VIVIANA	600
40.	DIAZ ROSARIO, HIDALIS	600
41.	BRITO LABOY, JENNIFER	600
42.	RIVERA ORTIZ, JUANITA	600
43.	VEGA COLON, SHEILA T.	600
44.	ORTIZ TORRES, MARIBEL	600
	TOTAL: $26,400	

(d) Compensate unit employees for the adverse income tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days from the date of this Order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(e) Within 14 days after service by the Region, post at its facilities in Guayama, Puerto Rico copies of the attached notice marked "Appendix"[3] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 12, 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 12, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 3, 2017

_____
Mark Gaston Pearce, Chairman

_____
Philip A. Miscimarra Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union, Unidad Laboral de Enfermeras(os) y Empleados de la Salud, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees by failing and refusing to pay the 2014 Christmas bonus without bargaining in good faith with the Union to impasse.

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

WE WILL furnish to the Union in a timely manner the information it requested on December 12, 2014.

[3] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

> All regular full-time and regular part-time registered nurses employed by the Employer at its facilities located in Guayama, Puerto Rico; excluding all other employees, office clerical employees, guards, other professional employees and supervisors as defined under the National Labor Relations Act.

WE WILL rescind the change in the terms and conditions of employment of our unit employees that was unilaterally implemented on December 12, 2014 and WE WILL make our unit employees whole for our failure to pay the 2014 Christmas bonus by paying each of them 600 dollars, plus interest accrued to the date of payment, minus any tax withholdings required by Federal and Commonwealth of Puerto Rico laws.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days from the date of the Board's order, a report allocating the backpay awards to the appropriate calendar year for each employee.

HOSPITAL SANTA ROSA, INC. A/K/A CLINICA SANTA ROSA

The Board's decision can be found at www.nlrb.gov/case/12–CA–143221 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.

Ana B. Ramos Fernández, Esq., for the General Counsel.
José Oliveras, Esq., of San Juan, Puerto Rico, for the Respondent.
Harold Hopkins, Esq., of San Juan, Puerto Rico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was scheduled for a hearing in San Juan, Puerto Rico on October 28, 2015. [1] The parties filed a joint motion and stipulation of fact on said date without opening the record. The parties stipulated and agreed that the facts recited in the stipulation are not in dispute and represent a full and complete record of the evidence necessary to issue a decision in the amended complaint. The parties further stipulated that no oral testimony is necessary or desired and the parties waived their right to a hearing on this complaint. On October 30, 2015, I accepted the joint motion and stipulation of fact and the parties' waiver of a hearing in this matter pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations.

The Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (Union) filed the charge on December 19. The Regional Director of the National Labor Relations Board (NLRB) issued a complaint on March 31, 2015, and a subsequent amended complaint on April 6. The amended complaint alleges that Hospital Santa Rosa, Inc., a/k/a Clinica Santa Rosa (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) when on or about December 12, the Respondent refused and failed to furnish the Union information requested which is necessary and relevant to the Union's performance of its responsibilities as the exclusive collective-bargaining representative of the employee unit. The complaint further alleges that since December 15, 2014, the Respondent eliminated the Christmas bonus benefit by refusing and failing to pay the 2014 bonus to the unit employees without affording a reasonable opportunity to bargain with the Union and without bargaining in good faith to lawful impasse. It is further alleged that the refusal of the Respondent to the 2014 bonus is inconsistent with the terms of its final collective-bargaining proposal made to the Union. The Respondent filed a timely answer denying the material allegations in the amended complaint (GC Exh.1a–e).[2]

On the entire record, and after considering the briefs filed by the General Counsel, the Union and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

At all material time, the Respondent, a Puerto Rico corporation with offices and place of business located in Guayama, Puerto Rico, has been engaged in the operation of an acute care hospital providing medical services. During the past 12 months, the Respondent had gross annual revenues in conducting its business in excess of $250,000 and has purchased and received at its Guayama hospital, goods valued in excess of

[1] All dates are in 2014 unless otherwise indicated.

[2] The General Counsel exhibits are identified as "GC Exh." and the joint exhibits are identified as "Jt. Exh." Joint exhibits in Spanish have been marked with the letter "a" and the English translation has been marked with the letter "b." The closing briefs for the General Counsel and Respondent are identified as GC Br. and R. Br., respectively.

$50,000 directly from points located outside the Commonwealth of Puerto Rico. As such, I find and it is admitted, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act (GC Exh. 1m).

I also find that at all times material, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following facts have been stipulated by the parties:

1. Respondent operates an acute care hospital in two buildings located in Guayama, Puerto Rico, consisting of approximately 89 beds, and provides inpatient, outpatient and emergency care services, primarily to residents of the municipality of Guayama and its vicinity. At all material times the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Gloria Diaz	Hospital Administrator
Dora A. Areizaga	Finance Department Director
Elena Santiago	Collection and Billing Contractor

2. Attorneys Jorge Pizarro (Pizarro) and Karla Rivera-Rubio (Rivera) served as legal counsels for Respondent during the period from August 1, 2014, until at least December 15, 2014, and represented the Respondent during negotiations with the Union concerning the payment of the 2014 Christmas Bonus to the unit employees.

3. On November 14, 2013, pursuant to a National Labor Relations Board election conducted in Case 12–RC–113295 on October 18, 2013 in which a majority of the votes was cast for the Union, the Union was certified as the exclusive collective-bargaining representative of the unit:

> All regular full-time and regular part-time registered nurses employed by the Employer at its facilities located in Guayama, Puerto Rico; excluding all other employees, office clerical employees, guards, other professional employees and supervisors as defined under the Act (GC Exh. 2 and 3).

To date, there has been no collective-bargaining agreement reached between Respondent and the Union.

4. Ariel Echevarria Martinez (Echevarria) and Ingrid Vega (Vega) are business agents employed by the Union. They represented the Union during negotiations with the Respondent concerning the payment of the 2014 Christmas Bonus to the unit employees.

5. In the Commonwealth of Puerto Rico, the payment of a Christmas Bonus is mandated by law. The Commonwealth of Puerto Rico Law No. 148 of June 30, 1969, as amended (Christmas Bonus Law), 29 L.P.R.A., Section 501 et seq., requires any employer who employs one or more workers or employees to pay a Christmas bonus. Law No. 148 provides that to be eligible for the Christmas bonus an employee must have worked a minimum of 700 hours during the period from October 1 of the previous year to September 30 of the year at issue. The amount to be paid is six percent (6%) of an employee's wages or salary up to a maximum bonus of $10,000. The total amounts to be paid by reason of said bonus shall not exceed 15% of the net annual profit of the employer within the period comprised from September 30 of the preceding year until September 30 of the year to which the bonus corresponds. The Law further provides that the bonus be paid within the period from December 1 to December 15, and establishes penalties for late and/or non-payment of the bonus. Puerto Rico Law No. 148 of June 30, 1969, as amended (Christmas Bonus Law), 29 L.P.R.A., Section 501, et seq. (Jt. Exh. 1).

6. Law No. 148 also provides a procedure for the exemption, or exoneration, of employers from their obligation to pay the Christmas Bonus in a particular year. An employer seeking an exoneration may make a request to the Secretary of the Puerto Rico Department of Labor and Human Resources (PDOL Secretary), who is responsible for determining whether a requesting employer is exempt from paying the Christmas Bonus that year.

7. In December 2010, December 2011, and December 2012, pursuant to the provisions of Law No. 148, Respondent paid annual Christmas Bonuses of $600 to all of its registered nurses. Copies of Respondent's payroll records show those Christmas bonus payments in 2010, 2011 and 2012 (Jt. Exh.s. 2, 3 and 4).

8. In December 2013, after the certification of the Union as the representative of Respondent's registered nurses, referred to herein as the unit employees, Respondent paid $300 to each of its unit employees. Respondent referred to said $300 payment as a "gift" in lieu of the 2013 Christmas Bonus. Respondent did not give the Union notice or an opportunity to bargain with respect to the elimination of the 2013 Christmas Bonus with respect to unit employees, or with respect to the payment of the $300 "gift" to unit employees in December 2013. The Union filed an unfair labor practice charge against Respondent regarding these matters in Case 12–CA–119177. Following the issuance of a Complaint in Case 12–CA–119177, Respondent and the Union entered into a Settlement Agreement in Case 12–CA–119177, which was approved by the Regional Director on July 31, 2014. A copy of the Settlement Agreement in Case 12–CA–119177 is attached (Jt. Exh. 5).

9. Pursuant to the Settlement Agreement in Case 12–CA–119177, Respondent paid each of the unit employees $300 in two equal installment payments made in August 2015, plus interest, to compensate them for the elimination of the 2013 Christmas Bonus payment. Each of the unit employees named in the Appendix to the Complaint, Compliance Specification and Notice of Hearing issued in Case 12–CA–143221 on March 31, 2015, as amended on April 6, 2015, worked at least 700 hours and earned at least $10,000 during the period from October 1, 2013 to September 30, 2014. Therefore, pursuant to the formula provided in Law No. 148, each of those employees is eligible for a 2014 Christmas bonus in the amount of $600.

10. On August 22, 2014, Respondent Attorney Pizarro

sent a letter to Union Business Agent Echevarria, informing the Union of Respondent's intention not to pay the 2014 Christmas Bonus to employees because of Respondent's "precarious financial situation" and offering to negotiate with the Union about "he nonpayment of the Christmas Bonus" (Jt. Exh. 6).

11. On August 29, 2014, Echevarria sent a letter to Pizarro, agreeing to negotiate, and requesting a proposal from Respondnt (Jt. Exh. 7).

12. On September 4, 2014, Pizarro sent a letter to Echevarria, proposing that the Union accept the decision of Puerto Rico Department of Labor (PDOL) regarding Respondent's request to be exempted from the payment of the 2014 Christmas Bonus to its employees (Jt. Exh. 8).

13. On September 15, 2014, Echevarria sent a letter to Pizarro, again requesting a proposal from Respondent regarding the 2014 Christmas Bonus (Jt. Exh. 9).

14. On September 23, 2014, Pizarro sent a letter and a "Proposed Stipulation for Christmas Bonus 2014" to Echevarria, proposing that the parties accept the PDOL's determination of Respondent's request for exemption from the 2014 Christmas Bonus payment (Jt. Exh. 10 and 11). On November 3, 2014, Echeverria sent a letter to Pizarro, requesting dates to negotiate (Jt. Exh. 12).

15. On November 3, 2014, Respondent attorney Rivera sent a letter to Echevarria, stating Respondent's availability on six dates in November 2014, including November 18, 2014 (Jt. Exh.Jt. Exh. 13). On November 4, 2014, Echevarria sent a letter to Rivera, confirming a negotiating session on November 18, 2014 (Jt. Exh. 14).

16. On November 18, 2014, the Respondent and the Union met to bargain about Respondent's intention not to pay the 2014 Christmas Bonus. The meeting took place at the facilities of the PDOL in Guayama, Puerto Rico. Hospital Administrator Gloria Diaz, Finance Department Director Dora Areizaga, and Attorney Rivera attended for Respondent. Union Agents Echevarria and Vega, and Shop Steward Maria Picart attended for the Union. Attorney Rivera started the meeting by informing the Union representatives that due to financial problems, it was the Respondent's intention not to pay its employees the Christmas bonus in December 2014.

17. Union Agent Echevarria asked what the economic impact of the payment of the Christmas Bonus was on Respondent. Respondent's representatives replied that the economic impact for the 36 employees in the RN bargaining unit would be $21,600 plus the employer's share of 7.65% for Social Security and Medicare taxes, and that the economic impact for all 150 Hospital employees, including the RNs, would be about $138,000 plus 7.65% for Social Security and Medicare taxes. Respondent's representatives further stated that the Respondent was not going to pay the Christmas bonus for 2014 because they could not afford it. Echevarria asked whether Respondent was willing to pay the Registered Nurses an amount for a royalty. Rivera replied that no royalty would be paid. Respondent' representatives stated that the hospital did not have money to cover payroll on November 21, 2014, and that Respondent would not pay the bonus, and that she was sure PDOL would exempt Respondent from paying the bonus. Echevarria explained that the Union was only negotiating on behalf of the RNs.

Echevarria stated that the Union was willing to seek alternatives including a payment plan. Respondent then proposed to reduce the unit employees' benefits such as vacations, sick leave, holidays and/or reimbursement for license fees. Echevarria replied that the parties should seek other alternatives because the Union was not willing to relinquish the unit employees' benefits, at least, not at that time. Echevarria further informed Respondent's representatives that the Union rejected Respondent's proposal of September 23, 2014, which provided that the parties would accept the determination of PDOL regarding Respondent's request for a complete exemption from payment of the Christmas Bonus in 2014 and that the Union would make a counteroffer. A meeting was scheduled for December 3, 2014.

18. On November 24, 2014, Union representative Echeverria sent a letter to Respondent attorney Rivera by letter, proposing payment of the 2014 Christmas Bonus to unit employees in the installments of $550 on or before December 15, 2014, and $50 on or before December 31, 2014. By separate letter from Echevarria to Rivera, also on November 24, 2014, the Union informed the Respondent that it would not be available to meet on December 3, 2014, as previously agreed, and requested that the Respondent provides available dates (Jt. Exhs. 15 and 16).

19. On November 25, 2014, Respondent attorney Rivera replied to Union Representative Echevarria by letter, rejecting the Union's proposal of November 24, 2015, and making a counterproposal to pay a $100 bonus to the unit employees on or before December 15, 2014. In that letter Respondent also offered to meet on any date up to December 15, 2015 (Jt. Exh. 17).

20. On November 25, 2014, by letter from Echevarria to Rivera, the Union rejected Respondent's proposal and the Union proposed that Respondent pay the 2014 Christmas Bonus to unit employees in installments of $500 on or before December 15, 2014, and $100 on or before December 31, 2014. In the same letter, the Union requested that Respondent provide the Union with a copy of the Exoneration Request that Respondent filed with PDOL, and confirmed the Union's availability to meet on December 12, 2014 (Jt. Exh.18).

21. On November 26, 2014, Rivera replied to Echevarria by letter, informing the Union that its proposal of November 25, 2014, was not accepted and urging the Union to accept Respondent's proposal to pay a $100 bonus to the unit employees on or before December 15, 2014. In that letter, Respondent further informed the Union that its Exoneration Request would be provided to the Union after it had been filed with PDOL, which had not yet occurred. Respondent ended that letter expressing its availability to meet on any date until December 15, 2014 (Jt. Exh. 19).

22. On December 1, 2014, Union Agent Echevarria sent a letter to Respondent attorney Rivera, rejecting the Respondent's proposal for the payment of a bonus of $100 to the unit employees on or before December 15, 2014, and counter-offering that Respondent pay the unit employees the 2014 Christmas bonus in installments of $450 on or before December 15, 2014, and $150 on or before December 31, 2014.

23. By separate letter also dated December 1, 2014, from Echevarria to Rivera, the Union requested that Respondent provide the Union with a list of active and inactive unit employees entitled to the Christmas Bonus for year 2014 (based on employment from October 1, 2013 to September 30, 2014) (Jt. Exhs. 20 and 21).

24. By letter dated December 1, 2014, from Rivera to Echevarria, Respondent rejected the Union's proposal of that same date, and again reiterated its $100 bonus offer that it had initially made on November 25, 2014 (Jt. Exh. 22).

25. By letter dated December 3, 2014, from Respondent Attorney Rivera to Union Agent Echevarria, Respondent informed the Union that the Request for Exoneration of the Payment of the Christmas Bonus for year 2014 had been filed with PDOL, and Respondent enclosed to the Union copies of its letter dated November 21, 2014, from Respondent Executive Director and Chief Executive Officer Fernando Alarcon to the Secretary of the PDOL, Mr. Vance E. Thomas Rider, informing PDOL that Respondent would not pay its employees the 2014 Christmas Bonus, and a document entitled Financial Statement, September 30, 2014 (Jt. Exhs. 23, 24, and 25).

26. On December 4, 2014, by letter from Echevarria to Rivera, the Union again rejected the Respondent's proposal of November 25, 2014, and proposed that Respondent pay the unit employees the 2014 Christmas Bonus in installments of $400 on or before December 15 2014, and $200 on or before December 31, 2014 (Jt. Exh. 26).

27. By letter dated December 4, 2014, from Rivera to Echeverria, Respondent rejected the Union's proposal of that same date, and reiterated its offer of November 25, 2014, for a $100 bonus to the unit employees on or before December 15, 2014. Attached to that letter Respondent enclosed a list of 30 active unit employees and 10 inactive unit employees who were eligible for a Christmas Bonus, if one was to be paid (Jt. Exhs. 27 and 28).

28. On December 5, 2014, by letter from Echevarria to Rivera, the Union again rejected Respondent's proposal made on November 25, 2014, and proposing that Respondent pay unit employees the 2014 Christmas Bonus in installments of $350 on or before December 15, 2014, and $250 on or before December 31, 2014 (Jt. Exh. 29).

29. By letter dated December 9, 2014, from Rivera to Echevarria, Respondent rejected the Union's proposal of December 5, 2014, and asked the Union to reconsider its position in anticipation of the meeting scheduled for December 12, 2014 (Jt. Exh. 30).

30. On December 10, 2014, by letter from Echevarria to Rivera, the Union again rejected Respondent's $100 bonus proposal, and proposed that Respondent pay the 2014 Christmas Bonus to unit employees in installments of $300 on or before December 15, 2014, and $300 on or before December 31, 2014 (Jt. Exh. 31).

31. By letter dated December 11, 2014, from Rivera to Echevarria, Respondent rejected the Union's proposal of December 9, 2014. Respondent further stated that it had been exonerated from the 2014 Christmas Bonus requirement by PDOL, and therefore, was not obligated to pay the Christmas Bonus on December 15, 2014, or in subsequent installments. Respondent proposed that the Union accept the PDOL determination. Attached to that letter is a document entitled " "Report of Request for Exoneration Law No. 148 of June 30, 1969, as amended, Bonus year 2014" (Jt. Exh. 32).

32. A copy of the document entitled "Report of Request for Exoneration Law No. 148 of June 30, 1969, as amended, Bonus year 2014," which acknowledged PDOL's receipt of documents from Respondent in support of its request for exoneration from paying the 2014 Christmas Bonus, but did not contain a decision regarding that request (Jt Exh. 33) (Jt. Exh. 33(b) consists of the translation for page 7 only).

33. On December 12, 2014, representatives of Respondent and the Union met for the second time to bargain about the 2014 Christmas Bonus with respect to the unit employees. The meeting took place at the facilities of PDOL in Guayama, Puerto Rico. At this meeting, Gloria Diaz, Dora Areizaga, and attorneys Karla Rivera and Lloyd Isgut represented Respondent, and Union Representative Echevarria, Union Administrative Assistant Ruth Perez, and Shop Steward Maria Picart represented the Union. At the meeting, Echevarria asked Respondent for a copy of the letter whereby PDOL exempted Respondent from paying the 2014 Christmas Bonus, to which Attorney Rivera replied that PDOL had not yet made a decision on Respondent's request and that its final determination would eventually be found on PDOL's webpage.

Echevarria stated that all he received was a document from PDOL acknowledging receipt of the required documents in order to complete Respondent's exemption request. Attorney Rivera replied that the document provided was the only document that had been issued by PDOL and advised Echevarria that Respondent had fully complied with the local law; made reference to the letter dated November 26, 2014 whereby the Department of Labor made a preliminary determination, which in her view, constituted an exoneration from the payment of the bonus; and that in view of the latter there was no obligation to pay the bonus to all the employees (Jt. Exh. 34).

34. During that meeting of December 12, 2014, the parties exchanged several proposals as follows: Respondent, by Attorney Rivera, again rejected the Union's proposals for a $600 bonus to be paid in two installments, and proposed a

$110 bonus of which $55 was payable on January 15, 2015, and the other $55 on March 15, 2015. Echevarria rejected this proposal under the ground that local law mandated a $600 bonus to be paid on or before December 15, 2014. Attorney Rivera stated that PDOL exonerated about 670 companies from paying the 2014 Christmas Bonus and the Respondent was among them.

Union Representative Echevarria made the following three counteroffers regarding the 2014 Christmas Bonus:

(a) A first installment of $300 payable on or before December 15, 2014 and a second installment of $300 payable on or before January 15, 2015.

(b) A first installment of $300 payable on or before December 15, 2014 and a second installment of $300 payable on or before August, 2015.

(c) Payment of a $500 bonus.

Respondent rejected all three proposals, in succession. Respondent counter-offered a bonus of $120 per unit employee to be paid in a first installment of $60 on or before December 31, 2014, and a second installment of $60 on or before March 31, 2015. This proposal was rejected by the Union. The meeting ended without any agreement and without any further proposals being made by the parties.

36. By letter dated December 12, 2014, from Rivera to Echevarria, Respondent set forth its version of certain events at the bargaining session of December 12, 2014, and informed the Union about its availability to negotiate during the weekend of December 13 and 14, 2014 (Jt. Exh. 35).

37. On December 15, 2014, Respondent distributed a memorandum to its employees, including the unit employees, concerning the non-payment of the 2014 Christmas Bonus (Jt. Exh. 36).

38. By letter dated December 15, 2014, from Echevarria to Rivera, the Union set forth its version of bargaining concerning Respondent's demand for nonpayment of the 2014 Christmas Bonus with respect to unit employees (Jt. Exh. 37).

39. By letter dated December 15, 2014, from Rivera to Echevarria, Respondent set forth its version of the negotiation process concerning the 2014 Christmas Bonus and confirmed that Respondent was not going to pay the 2014 Christmas Bonus (Jt. Exh. 38).

40. A letter dated December 12, 2014, from PDOL to the Union's Executive Director concerning Respondent's Exoneration Request for the 2014 Christmas Bonus (Jt. Exh. 39).

41. A letter dated September 12, 2014, from the Respondent to CPA Hiram Irizarry concerning the audit for the Request for Exoneration of the Christmas bonus (Jt. Exh.Jt. Exh. 40).

42. Respondent's Declaration for Christmas Bonus Exoneration Request and Statement of Gain and Losses to the PDOL dated December 16, 2014, reflects a loss of $98,685 during the year ending on September 30, 2014 (Jt. Exh. 41).

43. Respondent has not paid its employees in the unit represented by the Union anything for a 2014 Christmas Bonus. Respondent did not implement its final offer to the Union of a $120 bonus to be paid to unit employees in two installments, and Respondent has not made payment or provided any benefit to its unit employees in lieu of the payment of the 2014 Christmas bonus.

44. A letter issued by the PDOL on October 26, 2015, concerning the status of Respondent's Request for the Exoneration of the 2014 Christmas Bonus (Jt. Exh. 42).

a. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing and failing to provide the Union with information requested

The complaint alleges that since on or about December 12, 2014, the Union orally requested that the Respondent furnish the Union with information regarding the financial statements previously provided to the Union.

The payment of a Christmas bonus is mandated by law in the Commonwealth of Puerto Rico (the Commonwealth of Puerto Rico Law No. 148 of June 30, 1969, as amended (Christmas Bonus Law)). 29 L.P.R.A., Section 501 et seq., requires any employer who employs one or more workers or employees to pay a Christmas bonus. Law No. 148 provides that to be eligible for the Christmas bonus an employee must have worked a minimum of 700 hours during the period from October 1 of the previous year to September 30 of the year at issue. The amount to be paid is six percent (6%) of an employee's wages or salary up to a maximum bonus of $10,000. The total amounts to be paid by reason of said bonus shall not exceed 15% of the net annual profit of the employer within the period comprised from September 30 of the preceding year until September 30 of the year to which the bonus corresponds. The Law further provides that the bonus be paid within the period from December 1 to December 15, and establishes penalties for late and/or nonpayment of the bonus. (Jt. Exh. 1). Law No. 148 also provides a procedure for the exemption, or exoneration, of employers from their obligation to pay the Christmas Bonus in a particular year. An employer seeking an exoneration may make a request to the Secretary of the Puerto Rico Department of Labor and Human Resources (PDOL Secretary), who is responsible for determining whether a requesting employer is exempt from paying the Christmas Bonus that year.

The Respondent informed the Union on August 22, 2014 of its intention not to pay the 2014 Christmas bonus because of the Respondent's "precarious financial situation" and offered to negotiate with the Union over the "non-payment of the Christmas bonus." In September, the Respondent informed its accountant to prepare the audit and financial documents for filing the "Application for Waiver Declaration of Christmas Bonus (Jt. Exh. 40)."

The parties met for the first time on November 18, 2014 to bargain over the non-payment of the Christmas bonus. The Union agent Echevarria inquired as to the economic impact of the payment of the Christmas Bonus on Respondent. Respondent's representatives replied that the economic impact for the 36 employees in the RN bargaining unit

would be $21,600 plus the employer's share of 7.65% for Social Security and Medicare taxes, and that the economic impact for all 150 Hospital employees, including the RNs, would be about $138,000 plus 7.65% for Social Security and Medicare taxes. Respondent then asserted that it was not going to pay the Christmas bonus for 2014 because they could not afford it.

On November 26, the Respondent was informed by PDOL that financial statements and waiver application has been received and the documents and an audit would be conducted of the accounting documents to verify the losses submitted in the financial statements (Jt Exh. 34b).

On December 3, the Respondent informed the Union that the request for exoneration of the payment of the Christmas bonus was received by PDOL and provided a copy of the letter sent to PDOL and the financial statements filed with PDOL (Jt. Exh. 25b).

On December 12, the parties met for a second time to bargain over the non-payment of the Christmas bonus. During this bargaining session, the Union requested the following information relating to the financial statements filed by the Respondent with PDOL:

Page 2- "Accounts receivable $58,673"
What are they?
Amounts
Period of time

Page 2 "Prepaid Expenses $242,037"
What are those expenses?
What accounts it's referring to?
Period of time

Page 6 "Other accounts receivable $225,925"
Disclosure of accounts
Period of time

Page 6 "Other Assets $16,000"
Disclosure
Period of Time
Total

Discussion and Analysis

The counsel for the General Counsel maintains that the information is necessary and relevant for the Union to perform its duties as the exclusive collective-bargaining representative of the unit employees. The counsel for the General Counsel argues that the financial information requested by the Union was necessary and relevant to the bargaining negotiations because the Respondent was alleging an inability to pay the bonus due to its adverse financial situation. The General Counsel maintains that the information requested is critical for the Union to evaluate and verify the validity of the Respondent's exoneration request and would clarify the amounts and identity of the accounts receivable and expenses referenced in the Respondent's financial statements to PDOL (GC Br. at 18–22).

The counsel for the Respondent maintains that it was willing to provide the information requested, but in turn requested that the Union sign a confidentiality agreement because of the confidential financial nature of the information. The Respondent argues that the confidential agreement is necessary when the information deals with financial facts such as accounts payable, accounts receivable, assets, amounts of expense, and to avoid releasing the identity of potential creditors to the public (R. Br. at 6–8).

It is a violation of Section 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested for bargaining responsibilities. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). It is well settled that an employer is obligated to furnish information requested by its employees' collective-bargaining agent that is relevant and necessary to the Union's bargaining responsibilities and contract negotiations. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). As to information regarding the unit employees, there is a presumption that the information is relevant to the Union's bargaining obligation. When the information requested of an employer is about the employees or operations other than those represented by the Union, it is necessary for the Acting General Counsel to prove relevancy. Relevancy should be broadly construed and absent any countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed. The burden to show relevancy is not exceptionally heavy, requiring only that a showing be made of a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967). The standard for relevancy is the same, whether relevancy is presumed or proved by specific evidence. The standard to apply is a liberal discovery-type standard. *Acme Industrial Co.,* supra at 437.

The issue is whether the information sought has any bearing to the bargaining negotiations. Here, the Union was seeking information on four key financial items to the negotiations regarding the Christmas bonus. The Union needed information on the identity of the accounts receivables and payable and the pre-paid expenses and assets already referenced in the financial statements submitted to the PDOL and to the Union.

The Board has held that a demand to "open the books" to the union to provide general financial information is relevant if the employer alleges an inability to pay. *Truitt*, 351 U.S. at 153. Here, the Respondent stated it was unable to pay the bonuses. Further, the Union never demanded full financial disclosure. My review shows that the Union's request for the financial data was narrowly tailored and in response to the Respondent's own financial statements that had already been disclosed to the Union. See *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006). In this regard, I find that the information requested was very specific and was in direct response to the Respondent's financial statements. The Respondent maintains that it could not afford to pay the bonuses. The Union's request for information to identify the pre-paid expenses of $242,037 would have verified for the Union that the expenses were legitimate in the Respondent's assertion that its expenses exceeded its inability to pay. Similarly, the information on identifying the Respondent's assets and its accounts receivable of $225,925 and $58,373 and when payable would assist the Union in verifying if the Respondent was indeed able to pay.

I find that Respondent violated Section 8(a)(5) and (1) of the Act when it refused to provide the information requested. In

my opinion, such information is relevant for the Union to negotiate from a knowledgeable position about the identity of its assets, the accounts receivables and when payable after the Respondent asserted inability to pay the bonuses. I find that the information was necessary and relevant in order to verify the accuracy of the Respondent's claim that it was unable to pay.

The Confidential Nature of the Information

Having found the information to be relevant to the Union's responsibilities in bargaining, I turn next to the issue of confidentiality. It is well settled that substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. I have considered the Respondent's contentions that even if the information was relevant (as I found it was), its interest in protecting the confidential information outweighs the need of the Union for the relevant information. I find that it does not.

As the Board explained in *National Steel Corp*., 335 NLRB 747, 748 (2001):

> With respect to the confidentiality claim, it is well established that an employer may not avoid its obligation to provide a union with requested information that is relevant to bargaining simply by asserting a confidential interest in the information. Rather, the employer has the burden to seek an accommodation that will meet the needs of both parties.

I agree with the General Counsel that the Respondent failed to establish that the information was confidential. The Respondent failed to provide any specificity as to the confidential nature of the information sought. The record shows that the Respondent provided the financial statements to PDOL and to the Union. The financial statements were therefore records available for review by the public through PDOL. In addition, the Respondent did not restrict or limit disclosure when the financial statements were provided to Union. Since the amounts of the pre-paid expenses, assets and accounts payable and receivable were already identified by the Respondent, the Union merely sought information on the identity of the accounts and assets and when such accounts would be received or paid by the Respondent. Instead, the Respondent asserted a blanket claim that such information was confidential and private.

Further, even assuming that the Respondent has a legitimate privacy or confidential concern over releasing the information, it was obligated to notify the Union of its concern and to bargain for an accommodation that would satisfy the Union's need for the information and the employer's need to keep the information confidential. *West Penn Power Co.*, 339 NLRB 585 (2003); *Salem Hospital Corp.,* 358 NLRB 837 (2012), reaffirmed and incorporated by reference, 361 NLRB No. 61 (2014). Here, the Respondent maintains that it was willing to release the information provided that the Union signed a confidential agreement. I do not disagree with the Respondent that a confidential agreement would have been appropriate assuming that the information was indeed confidential. In the past, the Union had agreed to sign a confidential agreement. However, on this occasion, the Respondent insisted on the inclusion of a severe penalty of $200,000 in damages if the Union breached the agreement. The Respondent never sought a penalty in its previous confidential agreements with the Union. The Respondent never asserted that the penalty was necessary this time because the Union had breached an agreement in the past or that the Union was untrustworthy. There was simply no basis to extract such a severe penalty on the Union on this occasion.

The Respondent argues that under *E. W. Buschman Co. v. NLRB*, 820 F.2d 206 (6th Cir. 1987), the Sixth Circuit vacated the Board's decision finding that it was not an unfair labor practice where the employer refused to provide the financial information when the union refused to maintain the confidentiality of the information.[3] However, that case is easily distinguishable. In *Bushman*, the union requested complete financial statements, including disbursements and revenues. Here, such information had already been provided by the Respondent to PDOL and to the Union. As noted, the Union merely wanted the Respondent to identify these accounts and when they were to be received or disbursed by the Respondent. Further, unlike *Bushman*, the penalty here of $200,000 has no legitimate basis and is unreasonable on its face.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it failed to meet its burden that the information sought by the Union was confidential and even assuming the confidential nature of the information, the Respondent failed to establish that the Union had been untrustworthy in confidential matters to justify the unreasonable and severe penalty of $200,000 for breaching the agreement.

b. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively in good faith or to lawful impasse with the Union regarding the payment of the 2014 Christmas Bonus

The counsel for the General Counsel argues that the parties were not at impasse on December 12. The General Counsel further argues that the Respondent did not bargain in good-faith because the Respondent made clear at the outset of negotiations that it had no intentions to pay the 2014 bonus (GC Br. 24–29). In turn, the Respondent maintains that the parties were at impasse on December 12 and no further proposals had been made by the parties since that time (R. Br. 14–16).

On August 22, Respondent Attorney Pizarro sent a letter to Union Business Agent Echevarria, informing the Union of Respondent's intention not to pay the 2014 Christmas Bonus to employees because of Respondent's "precarious financial situation" and offering to negotiate with the Union about "the nonpayment of the Christmas Bonus" (Jt. Exh. 6). On August 29, Echevarria sent a letter to Pizarro, agreeing to negotiate, and requesting a proposal from Respondent.

No proposal was received by the Union but instead, on September 4, Pizarro sent a letter to Echevarria, proposing that the Union accept the decision of PDOL regarding Respondent's request to be exempted from the payment of the 2014 Christmas Bonus to its employees (Jt. Exh. 8).

On September 15, Echevarria sent a letter to Pizarro, again

[3] I am bound only to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by the lower courts. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

requesting a proposal from Respondent regarding the 2014 Christmas Bonus. On September 23, Pizarro sent a letter and a "Proposed Stipulation for Christmas Bonus 2014" to Echevarria, again proposing that the parties accept the PDOL's determination of Respondent's request for exemption from the 2014 Christmas Bonus payment.

On November 3, Echeverria sent a letter to Pizarro, requesting dates to negotiate. The Respondent informed the Union on November 3 that it was available on six dates in November. The parties confirmed a negotiating session for November 18 (Jt. Exh. 14).

On November 18, the Respondent and the Union met to bargain about Respondent's intention not to pay the 2014 Christmas Bonus. Rivera started the meeting by informing the Union representatives that due to financial problems, it was the Respondent's intention not to pay its employees the Christmas bonus in December 2014. Echevarria inquired as to the economic impact of the payment of the Christmas Bonus on the Respondent. The Respondent provided a response and again reiterated that it was not going to pay the Christmas bonus for 2014 because it could not afford it. Echevarria asked whether Respondent was willing to pay the Registered Nurses an amount for a royalty. Rivera replied that no royalty would be paid. The Respondent also asserted that that it did not have money to cover payroll on November 21, and that Respondent was sure PDOL would exempt it from paying the bonus.

The Union was willing to seek alternatives including a payment plan. The Respondent proposed to reduce the unit employees' benefits such as vacations, sick leave, holidays and/or reimbursement for license fees. Echevarria replied that the parties should seek other alternatives because the Union was not willing to relinquish the unit employees' benefits, at least, not at that time. Echevarria further informed Respondent's representatives that the Union rejected Respondent's proposal of September 23, which provided that the parties would accept the determination of PDOL regarding Respondent's request for a complete exemption from payment of the Christmas Bonus in 2014 and that the Union would make a counteroffer. A meeting was scheduled for December 3, 2014.

On November 24, the Union proposed payment of the 2014 Christmas Bonus to unit employees in the installments of $550 on or before December 15, and $50 on or before December 31. By separate letter from Echevarria to Rivera, also on November 24, 2014, the Union informed the Respondent that it would not be available to meet on December 3, 2014, as previously agreed, and requested that the Respondent provides available dates (Jt. Exhs. 15 and 16).

On November 25, the Respondent rejected the Union's proposal of November 24, and made a counterproposal to pay a $100 bonus to the unit employees on or before December 1. The Respondent also offered to meet on any date up to December 15, 2015 (Jt. Exh. 17).

On November 25, the Union rejected Respondent's proposal and proposed that Respondent pay the 2014 Christmas Bonus to unit employees in installments of $500 on or before December 15, and $100 on or before December 31. In the same letter, the Union requested that Respondent provide the Union with a copy of the Exoneration Request that Respondent filed with PDOL, and confirmed the Union's availability to meet on December 12 (Jt. Exh. 18).

On November 26, the Respondent informed the Union that its proposal of November 25 was not accepted and urged the Union to accept Respondent's proposal to pay a $100 bonus to the unit employees on or before December 15. In that letter, Respondent further informed the Union that its Exoneration Request would be provided to the Union after it had been filed with PDOL, which had not yet occurred. Respondent ended that letter expressing its availability to meet on any date up to December 15, 2014 (Jt. Exh. 19).

On December 1, the Union rejected the Respondent's proposal for the payment of a bonus of $100 to the unit employees and counter-offered that Respondent pay the unit employees the 2014 Christmas bonus in installments of $450 on or before December 15, and $150 on or before December 31. On December 1, the Respondent rejected the Union's proposal and again reiterated its $100 bonus offer that it had initially made on November 25 (Jt. Exh. 22).

By letter dated December 3, Respondent informed the Union that its request for exoneration of the payment of the Christmas Bonus for year 2014 had been filed with PDOL and a copy of that letter to PDOL and a document entitled "Financial Statement, September 30, 2014" were provided to the Union (Jt. Exhs. 23, 24, and 25).

On December 4, the Union again rejected the Respondent's proposal of November 25, and proposed that Respondent pay the unit employees the 2014 Christmas Bonus in installments of $400 on or before December 15 and $200 on or before December 31 (Jt. Exh. 26). The Respondent rejected the Union's offer on the same date and reiterated its offer of November 25, for a $100- bonus on or before December 15.

On December 5, 2014, the Union again rejected Respondent's proposal made on November 25, and proposed that the Respondent pay unit employees the 2014 Christmas Bonus in installments of $350 on or before December 15 and $250 on or before December 31(Jt. Exh. 29).

On December 9, 2014, the Respondent rejected the Union's proposal of December 5, and asked the Union to reconsider its position in anticipation of the meeting scheduled for December 12 (Jt. Exh. 30).

On December 10, the Union again rejected Respondent's $100 bonus proposal, and proposed that Respondent pay the 2014 Christmas Bonus to unit employees in installments of $300 on or before December 15 and $300 on or before December 31 (Jt. Exh. 31).

On December 11, the Respondent rejected the Union's proposal of December 10. Respondent further stated that it had been exonerated from the 2014 Christmas Bonus requirement by PDOL, and therefore, was not obligated to pay the Christmas Bonus on December 15 or in subsequent installments. Respondent proposed that the Union accept the PDOL determination.

On December 12, representatives of Respondent and the Union met for the second time to bargain about the 2014 Christmas Bonus. At the meeting, Echevarria asked the Respondent for a copy of the letter whereby PDOL exempted

Respondent from paying the 2014 Christmas Bonus, to which Rivera replied that PDOL had not yet made a decision on Respondent's request and that its final determination would eventually be found on PDOL's webpage. During the meeting, the parties exchanged several proposals as follows:

Respondent again rejected the Union's proposals for a $600 bonus to be paid in two installments, and proposed a $110 bonus of which $55 was payable on January 15, 2015, and the other $55 on March 15, 2015. The Union rejected this proposal under the ground that local law mandated a $600-bonus to be paid on or before December 15 and made the following three counteroffers regarding the 2014 Christmas Bonus:

> (a) A first installment of $300 payable on or before December 15, 2014 and a second installment of $300 payable on or before January 15, 2015.
>
> (b) A first installment of $300 payable on or before December 15, 2014 and a second installment of $300 payable on or before August, 2015.
>
> (c) Payment of a $500 bonus.

Respondent rejected all three proposals and counter-offered a bonus of $120 per unit employee to be paid in a first installment of $60 on or before December 31 and a second installment of $60 on or before March 31. This proposal was rejected by the Union. The meeting ended without any agreement and without any further proposals being made by the parties.

The Respondent has not paid its employees anything for a 2014 Christmas Bonus. Respondent did not implement its final offer to the Union of a $120 bonus to be paid to unit employees in two installments, and Respondent has not made payment or provided any benefit to its unit employees in lieu of the payment of the 2014 Christmas bonus.

Discussion and Analysis

An economic bonus, such as a year-end Christmas bonus, is clearly a mandatory subject of bargaining where the employer has followed a practice of paying it to applicable employees. *Santa Cruz Skilled Nursing Center, Inc*., 354 NLRB No. 25, slip op. at 4 (2009) (not reported in Board volumes); *Bonnell/Tredegar Industries*, 313 NLRB 789 (1994). This principle applies even in the absence of a contractual provision recognizing such a practice, as the practice becomes an implied condition of employment premised on the presumed mutual agreement of the parties. Accordingly, any unilateral change in an implied term or condition of employment violates Section 8(a)(5) and (1) of the Act. *Finch, Pruyn & Co.*, 349 NLRB 270, 277 fn. 31 (2007); *Lafayette Grinding Corp.*, 337 NLRB 832 (2002).

After bargaining for two sessions, the parties stopped and no further proposals were offered. The counsel for the General Counsel argues that the parties were not at impasse and the Respondent did not bargain in good faith in that it was a fatal accompli when the Respondent announced before the first bargaining session that it had no intentions to pay the Christmas bonus.

An *impasse* occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 fn. 5 (1988). The burden of proving that an *impasse* exists falls upon the party asserting such a defense. *North Star Steel Co.*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). Moreover, there is a duty to refrain from implementation unless an *impasse* has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises,* 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).

In considering whether an *impasse* has been reached, the Board will consider the totality of the circumstances. Such analysis includes the following factors: (1) fluidity of position; (2) continuation of bargaining; (3) nature and importance of issues and the extent of difference in position; (4) bargaining history and progress in negotiations; (5) demonstrated willingness to consider the issues further; (6) duration of hiatus between bargaining sessions; (7) number and duration of bargaining sessions; and (8) contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting*, 163 NLRB 475 (1967).

I find that the parties had not reached impasse after their last bargaining session on December 12. The *Taft* factors are evident in this situation. There was fluidity in the parties' positions; bargaining was continuing; the bonus was important to the Union; the parties offered proposals that demonstrated their willingness to continue negotiating; the number and duration of the bargaining sessions were few and more sessions could have proved fruitful; and the parties have a history and progress in negotiations.

The record shows that the parties met twice to negotiate over the bonus. The bonus was very important to the Union and the sole reason the parties initiated and engaged in bargaining. Although the parties only met twice, there was fluidity in the give-and-take proposals based upon the proposals communicated through correspondence between the parties. The Union initially proposed two bonus installments to the unit employees of $550 and $50 on November 24. The Respondent countered with $100. The Union rejected the proposal and offered that the Respondent pay in two installments of $500 and $100 on or before December 31. The Union's proposal was rejected by the Respondent and it urged the Union to accept the $100 bonus offer that was previously rejected. On December 1, the Union rejected the Respondent's $100-proposal in lieu of the bonus and countered with a proposal for the Respondent to pay the bonus in two installments of $450 and $150 before the end of the year. The Respondent rejected the proposal and again reiterated its $100 offer. On December 4, the Union proposed that the Respondent pay in two installments of $400 and $200 on or before December 31. This offer was rejected by the Respondent. On December 5, the Union proposed two installments of $350 and $250 before the end of the year. This was rejected by the Respondent. The Union, on December 10, proposed two installments of $300 and $300 payable by December 31. The Respondent rejected this offer and proposed that the Union accept the determination to be made by PDOL on its exemption application, which had not yet been approved. On December

12, the Respondent offered $110, of which $55 would be paid by January 15, 2015 and the second $55 on March 15, 2015. This was rejected by the Union and it made three counter offers of (1) $300 on or before December 15 and $300 on or before January 15, 2015; (2) $300 on December 15 and second installment of $200 on or before August 2015; or (3) a payment of a $500 bonus. All three proposals were rejected by the Respondent, but Respondent proposed $120 payable in two installments of $60 before December 31 and $60 on or about March 31, 2015.

The parties did not meet after December 12, but all indications point to the fact that the parties were willing to continue to negotiate over the bonus. There is no evidence that the Respondent announced impasse or discussed impasse at the December 12 meeting. The Union was frustrated but never expressed that the parties were at impasse. Indeed, the Respondent by letter dated December 12 informed the Union of its availability to negotiate during the weekend of December 13 and 14 (Jt Exh. 35). Unfortunately, this letter was sent late on December 12 and just before the commencement of the weekend. The letter was not received until the following Monday, December 15.

The Respondent's late movement to meet over the weekend after the parties' December 12 meeting regarding the major impediment on this issue presented a "ray of hope" warranting further bargaining. *Atrium at Princeton, LLC,* 353 NLRB 540, 561 (2008), reaffirmed and incorporated by reference, 356 NLRB 5 (2010), enfd. 684 F.3d 1310 (D. C. Cir. 2012). Accordingly, there was no impasse between the parties at that point. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999). Under the circumstances, the Respondent's unilateral implementation concerning the non-payment of the bonus without affording the Union a meaningful opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

Moreover, I find that the actions of the Respondent by announcing to the Union on August 22 that Respondent had no intention to pay 2014 Christmas bonuses to employees was a clear indication that Respondent was not engaging in meaningful bargaining with the Union and tantamount to a fait accompli. The announcement made directly to the Union that a change in a mandatory subject is being implemented—instead of proposing it to the employee's bargaining representative—suggests a fait accompli and is inconsistent with the duty to bargain. *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994). See also *Burrows Paper Corp.*, 332 NLRB 82, 83 (2000) ("after . . . announcement of the wage increase to employees, we find that the Union could reasonably conclude that the matter at this point was a fait accompli, i.e., that the Respondent had made up its mind and that it would be futile to object to the pay raises"); *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982) ("most important factor" dictating finding that employer's announcement of change was "fait accompli" was that it was made without "special notice" in advance to the union, the union's officers "having become aware of this merely because they themselves were employees"), enfd. 722 F.2d 1120 (3d Cir. 1983).

This conclusion is buttressed by the fact that the Respondent informed the unit employees on December 12 that it was not paying the bonus before there was any impasse. In circumstances where it is clear that the employer has no intention of bargaining, the Board has found the implementation of the changes to be nothing more than fait accompli. Id.; *FirstEnergy Generation Corp.*, 358 NLRB 842, 848 (2012), vacated under *Noel Canning* and reaffirmed by the Board at 362 NLRB No. 66 (2015).[4]

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Hospital Santa Rosa, Inc., a/k/a Clinica Santa Rosa is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Unidad Laboral De Enfermeras (OS) Y Empleados De la Salud is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to fully provide the relevant information to the Union in its December 12, 2014 request.

4. The Respondent violated Section 8(a)(5) and (1) of the Act on or about December 12, 2014 by changing the terms and conditions of unit employees by failing to pay them the customary $600-bonus, without affording the Union adequate opportunity to bargain with Respondent regarding this conduct.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Hospital Santa Rosa, Inc. has engaged in certain unfair labor practices, I shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be ordered to, on request, bargain with the Union as the exclusive bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

The Respondent shall also be required to rescind its decision, on the Union's request, the non-payment of the 2014 Christmas bonus and to restore the full Christmas 2014 bonus benefit.

The Respondent is to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The make whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent additionally shall be ordered to (1) compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum and (2) file

[4] In finding that the parties did not reach impasse and that the Respondent failed to bargain in good-faith because it had no intentions to pay the bonus, I find it unnecessary to address the remaining argument of counsel for the General Counsel that assuming the parties were at impasse, the Respondent was obligated to make sure that changes to the terms of employment that were implemented must be consistent with its last offer to the Union.

a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters, as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014). Consistent with the Board holding in *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016), the Respondent shall be required within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, to file its report allocating backpay with the Regional Director and not with the Social Security Administration. The Respondent will be required to allocate backpay to the appropriate calendar years only.

The Respondent shall also be ordered to provide to the Union the information requested on December 12, 2014 that is necessary and relevant for the Union in its role as the exclusive collective-bargaining representative of the unit employees.

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

ORDER

The Respondent, Hospital Santa Rosa, Inc., a/k/a Clinica Santa Rosa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing, refusing to provide to the Union, Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud, information requested without a monetary penalty that is necessary and relevant to its role as the exclusive representative of a unit of employees consisting of all regular full-time and regular part-time registered nurses employed by the Respondent at its facilities located in Guayama, Puerto Rico; excluding all other employees, office clerical employees, guards, other professional employees and supervisors as defined under the Act.

(b) Failing and refusing to pay the 2014 Christmas bonus to the unit employees.

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

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

(a) Provide to the Union the information requested without requiring the Union to agree to a monetary penalty.

(b) Rescind the decision for the non-payment of the 2014 Christmas bonus and restore the full Christmas bonus benefit of $600 to the unit employees.

(c) Make the unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes in wages, hours, benefits, and other terms and conditions of employment

(d) Compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) On request, bargain with Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud as the exclusive collective bargaining representative of the unit employees concerning wages, hours, and other terms and conditions of employment.

(f) 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.

(g) Within 14 days after service by the Region, post at its existing facilities in the Puerto Rico area copies of the attached notice marked "Appendix"[6] in the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 12, 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 jobsites 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 December 12, 2014.

(h) 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.

Dated, Washington, D.C. June 16, 2016

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 the Federal labor law and has ordered us to post and abide by 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 benefits and protection

Choose not to engage in any of these protected activities.

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

[6] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations."

The Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union) is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and regular part-time registered nurses employed by the Respondent at its facilities located in Guayama, Puerto Rico; excluding all other employees, office clerical employees, guards, other professional employees and supervisors as defined under the Act.

WE WILL NOT change the unit employees' wages, hours, or other terms and conditions of employment without first notifying the Union and giving it a meaningful opportunity to bargain about such changes to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.

WE WILL NOT refuse or delay in promptly furnishing the information requested by the Union that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the employees in the above unit.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the unit described above concerning wages, hours, and other terms and conditions of employment.

WE WILL, on the Union's request, rescind the decision on the nonpayment of the 2014 Christmas bonus to the unit employees and restore the full 2014 Christmas bonus benefit.

WE WILL make the unit employees whole, with interest, for any losses sustained due to our unlawfully imposed changes in wages, benefits, and other terms and conditions of employment.

WE WILL provide the Union with the information it requested on December 12, 2014, without requiring the Union to agree to a monetary penalty.

HOSPITAL SANTA ROSA, INC., A/K/A CLINICA SANTA ROSA

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12–CA–143221 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.