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Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. and California Nurses Association. Case 20–CA–202742

December 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the California Nurses Association (the Union) on July 18, 2017, the General Counsel issued the complaint on July 28, 2017, and amended the complaint on August 21, 2017, alleging that Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 20–RC–188438. (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed answers and an amended answer admitting in part and denying in part the allegations in the complaint and amendment to the complaint, and asserting affirmative defenses.

On September 12, 2017, the General Counsel filed a Motion for Summary Judgment. On September 15, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The Union filed a statement in support of the General Counsel’s Motion for Summary Judgment.

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

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union’s certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the certified unit does not share an overwhelming community of interest with the Union’s larger unit of Registered Nurses in which the unit at issue here would be included, that certain objectionable conduct occurred during the critical period of the election warranting over-

turning the election results, and that the Regional Director failed to resolve all challenged ballots.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a California corporation engaged in the operation of acute-care hospitals with facilities located throughout Northern California.³

¹ In addition, the Respondent advances two affirmative defenses to complaint allegations that could not have been raised below. First, the Respondent contends that the complaint and amendment to the complaint fail to state a claim under the Act. Second, the Respondent contends that the complaint allegations are barred to the extent that they were not filed within the statute of limitations set forth in Sec. 10(b) of the Act. The Respondent has not offered any explanation or evidence to support either of these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel’s motion for summary judgment in this proceeding. See, e.g., *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enf. 2006 WL 4539237 (D.C. Cir. 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995).

² Chairman Miscimarra would have granted review in the underlying representation proceeding with respect to Objection 1, finding that the request for review raised a substantial issue as to the appropriate standard to apply in evaluating a party’s use of photographs of unit employees without their prior authorization or consent. While he otherwise agreed with the denial of review, he did not pass on the holding in *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011), and he noted his continued disagreement with *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enf. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and that he continues to adhere to his dissenting views regarding the Election Rule. See Election Rule, 79 Fed. Reg. 74308, at 74430–74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson); id. at 74434–74441 (dissenting views regarding the Final Rule’s acceleration of the preelection timeline). While he adheres to these views, Chairman Miscimarra agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

³ In its answer, the Respondent denies the complaint allegation that it has been, at all material times, “a California corporation engaged in the operation of acute-care hospitals with facilities located throughout Northern California,” but it “admit[s] and allege[s]” the following:

During the 12-month period ending November 16, 2016, in conducting its business operations described above, the Respondent derived gross revenues in excess of \$250,000, and purchased and received at the Respondent's facilities, goods and materials valued in excess of \$5000, which originated from points located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union, California Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held by mail ballot between December 30, 2016, and January 19, 2017, the Union was certified⁴ on February 16, 2017, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, employed by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals located within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards, and supervisors, as defined by the Act.

Kaiser Foundation Hospitals (KFH) is a nonprofit public benefit and charitable corporation organized under the laws of the State of California that owns and operates general acute care hospitals in Northern California, and also owns ambulatory (outpatient) clinics, including facilities in Oakland, Richmond and Santa Rosa, California. . . . The Permanente Medical Group, Inc. is a professional medical corporation organized under the laws of the State of California that provides medical services for Kaiser Permanente members in Northern California and has its headquarters in Oakland, California.

The Respondent's denials do not raise an issue of fact warranting a hearing, particularly in light of its admission that it is an employer engaged in commerce and a health care institution within the meaning of the Act.

⁴ By unpublished Order dated May 17, 2017, the Board denied the Respondent's request for review.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since at least about August 17, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since September 5, 2017, the Respondent has failed and refused to do so.⁵

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since September 5, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Kaiser Foundation Hospitals and The Permanente Medical Group, Inc., Northern California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the California Nurses Association (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

⁵ In the original complaint, the General Counsel alleged that the Union orally requested that the Respondent recognize and bargain with it about June 30, 2017, and Respondent denied that allegation in its original answer. The amended complaint replaced that allegation with an allegation that "since at least . . . August 17, 2017," the Union requested that the Respondent recognize and bargain collectively with it, and the Respondent admitted that allegation. Although the Respondent's amended answers admit its refusal to bargain by letter dated September 5, 2017, they do not refer to its refusal to bargain by letter dated July 17, 2017, which the Respondent admitted in its original answer. As a determination regarding the date on which the Respondent first received the Union's request to bargain does not affect the remedy, we find it appropriate to rely on the uncontested facts that the Respondent received a bargaining request on August 17, 2017, and refused to bargain by letter dated September 5, 2017.

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

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, employed by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacramento location, excluding managers, guards, and supervisors, as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Northern California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 20, 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-

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

ployees and former employees employed by the Respondent at any time since September 5, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 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. December 16, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the California Nurses Association (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All Registered Nurses whose primary duties are to perform discharge planning, case management, utilization review, resource management, benefit review, regulatory compliance, coordination of care and coordination to outpatient locations, employed by the Employer, Kaiser Foundation Hospitals (KFH), including Patient Care Coordinators and Patient Care Coordinators-Case Managers at its hospitals within KFH's Northern California region and at the non-KFH hospitals where KFH assigns such employees to provide contracted services (currently only St. Joseph's Medical Center in Stockton, California); and all Registered Nurses employed by the Employer, The Permanente Medical Group, as Patient Care Coordinators-Case Managers in the trauma program services department at the South Sacra-

mento location, excluding managers, guards, and supervisors, as defined by the Act.

KAISER FOUNDATION HOSPITALS THE
PERMANENTE MEDICAL GROUP, INC.

The Board's decision can be found at <https://www.nlr.gov/case/20-CA-202742> 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.

