

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

DYCOR TRANSITIONAL HEALTH - FRESNO LLC

Employer

And

**SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 2015**

Union

Case 32-CA-215700

DYCOR TRANSITIONAL HEALTH - FRESNO LLC

Employer

And

ROSALINDA LORONA

Petitioner

And

HEALTHCARE SERVICES GROUP, INC.

Involved Party

Case 32-RD-213130

**COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

This case involves a successor employer, Dycora Transitional Health – Fresno LLC (Respondent), that took over a long-standing bargaining unit represented by Service Employees International Union, Local 2015 (Union) in December 2016. While Respondent adopted the existing collective-bargaining agreement for its initial year of operation, at the end of the extended term in late December 2017 and early January 2018, while under an obligation to bargain its first contract with the Union, Respondent made two unilateral changes to its employees' terms and conditions of employment. These changes, as alleged in the Complaint, include altering the permanent start time of employees' shifts in the dietary department and ceasing its long-established practice of permitting dietary employees to eat leftover resident meals during their shifts. Respondent admits to making both changes without notice to and bargaining with the Union. Its sole defense on the merits is that these changes were de minimis, such that it had no obligation to notify or bargain with the Union. This defense must be rejected based on longstanding Board law that treats hours and the provision of meals and food items as mandatory subjects of bargaining that have a material and substantial impact on employees' terms and conditions of employment. Respondent asserts other procedural defenses that are similarly meritless, as will be discussed more fully below. While these unilateral changes could seem insignificant, from the employees' perspective it no doubt cast the Union as ineffective and weak, as is evidenced by the decertification petition that was filed with the regional office of the Board on January 17, 2018, and which has been consolidated with this matter.

II. PROCEDURAL HISTORY

From August 28, 2018 through August 30, 2018, a hearing was held in Fresno, California, before Administrative Law Judge Ariel Sotolongo on a complaint issued by the Regional Director

for Region 32. The complaint in Case 32-CA-215700 alleges that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act when it unilaterally changed the dietary department's shift schedule times and ceased its practice of allowing the consumption of leftover food by its dietary department employees without notice to or bargaining with the Union. As detailed below, Respondent's violations of Sections 8(a)(1) and (5) are clearly demonstrated by the uncontroverted facts presented during the hearing and fully supported by Board law.

On July 17, 2018, the unfair labor practice allegations of Case 32-CA-215700 were consolidated for hearing with two representation cases, 32-RD-213130 and 32-RD-213115, which relate to decertification elections conducted at Respondent's facilities in Fresno and Clovis, California. Upon the opening of the hearing in the consolidated matters on August 28, 2018, Case 32-CA-213115 was remanded the Regional Director of Region 32 in light of the Union's disclaimer of interest in the unit at issue in that case. During the hearing, testimony was taken on both the unfair labor practice allegations in Case 32-CA-215700 and the Union's objections in Case 32-RC-213130, both of which involve only Respondent's Fresno facility. This brief is submitted in support of the General Counsel's complaint allegations in Case 32-CA-215700. The Union's Objection Number 8 in Case 32-RD-213130 raises the same unilateral changes at issue in the unfair labor practice case as objectionable conduct by Respondent. Except to the extent that Objection 8 corresponds to the unfair labor practices at issue in Case 32-CA-215700, the Union's objections are not addressed in this brief.

III. FACTS¹

A. Background

Respondent operates a skilled nursing facility located at 2715 Fresno Street in Fresno, California. Since at least 2008, the Union has continuously represented employees employed by Respondent and its predecessor, Beverly Healthcare-California, Inc. d/b/a Golden Living Center - Fresno at the Fresno facility, as well as other locations not at issue in this proceeding. (Tr. 122-125; JT 1-2)

Beverly Healthcare and the Union were parties to a collective-bargaining agreement (Agreement), which was effective from January 1, 2014 to December 31, 2016. (Tr. 122-124; JT 1) In December 2016, Respondent took over management of the facility and, on December 6, 2016, executed a Memorandum of Understanding in which Respondent and the Union agreed to adopt the Agreement with alterations only to the wage, union security language, and term of the Agreement. The extended Agreement expired on December 31, 2017. (JT 2)

The bargaining unit represented by the Union includes certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, medical records assistants, receptionists, housekeepers, janitors and laundry aides working at several skilled nursing facilities, including the Fresno facility. (Tr. 123-124; JT 1 p. 1) The changes at issue here affected only the cooks, prep cooks, and dietary aides working in the dietary department at the Fresno facility. Raymond Gonzalez is the Director of Dining Services at the Fresno facility and he directly supervises the 22 to 23 employees working in the dietary department. (Tr. 28-29; 286-287)

¹ References to the record are as follows: Tr. for transcript; GC for General Counsel exhibits; JT for joint exhibits; ER for Respondent's exhibits; and U for the Union's exhibits.

B. Change to Dietary Department's Shift Schedules

On January 9, 2018, Respondent implemented a change to the dietary shift schedules in the dietary department, changing the scheduled start time of each shift to begin 15 minutes earlier. (GC 2) Director Gonzalez announced the shift schedule change to dietary employees on various dates between December 28, 2017 and January 5, 2018, during in-service meetings that he conducted in groups and with individual employees in the dietary department. (Tr. 32-322; GC 3) Respondent utilizes in-service meetings to announce new policies and instructions, and employees sign the in-service form to acknowledge receiving the information. During the in-service meetings regarding the schedule change, Director Gonzalez distributed the new shift schedule times chart to employees and employees signed the in-service forms acknowledging that they would be working under the new schedule on January 9, 2018. (Tr. 320-322; GC 3-4) Employees began working the new schedule on January 9, 2018. (Tr. 39-40, 291-292; JT 4)

Respondent implemented the shift schedule change without notice to, or bargaining with, the Union. (Tr. 126-127) On January 8, 2018, shortly after learning of the change from an affected employee, Union representative Pauline Grant-Clarke sent Respondent's Administrator, Ken Evans, a letter demanding that Respondent cease and desist from implementing any changes to the dietary employees' hours. (JT 3, p. 1-3) Evans did not respond to the cease and desist letter.

After receiving the Union's demand letter and shortly after employees began working under the new schedule, Respondent decided to return to the prior shift schedule times. Thus, on January 9, 2018, after employees arrived at work and began working under the new schedule, Director Gonzalez began verbally advising employees who had already appeared for work under the new schedule that Respondent would be returning to the prior schedule. Director Gonzalez

continued to advise employees of the return to the prior shift schedule as they appeared for work under the new schedule the following day, and he later called some employees by phone to advise them of the return to the prior shift schedule times. (Tr. 290-293)

Within a few days of sending the cease and desist letter on January 8, 2018, Union Representative Grant-Clarke received a call from a woman named Angela, who identified herself as the Fresno Assistant Administrator. Angela acknowledged receiving the Union's cease and desist letter, but indicated that Respondent would make whatever changes it wanted to. She did not advise the Union that Respondent would be rescinding the change. (Tr. 128-130) Indeed, Respondent did not notify the Union that the change was rescinded and Grant-Clarke only learned of the rescission from affected employees. (Tr. 131-132)

On January 19, 2018, the Union filed a grievance over the change to the shift schedules and Respondent's failure to bargain with the Union over the change. (JT 3, p. 5) Union Representative Grant-Clarke and Administrator Evans met to discuss the grievance on February 12, 2018, but during the meeting Evans denied any knowledge of the change to employees' hours. In subsequent emails between the Evans and Grant-Clarke, Evans argued that the change was never actually implemented, although he admitted that "there was one day on the am shift where staff did not realize we had not moved forward with the schedule change." (JT 3, p 17). At all times since the one grievance meeting held on February 12, 2018, Respondent has continued to deny that any change was ever made, has repeatedly demanded that the Union withdraw the grievance, and processing of the grievance has stalled completely. (Tr. 132-133, 136, 139-140; JT 3, p. 8, 13, 17, 22)

C. Change to Dietary Employees' Ability to Consume Leftover Meals

For many years, Respondent's dietary employees were permitted to consume leftover meals during their shifts. These were meals that were prepared for the residents, but leftover at the conclusion of the residents' meal service. Under this established practice, dietary employees regularly ate leftover breakfast, lunch, and dinner meals at the facility following the meals served during their shifts. (Tr. 47-51; 134-135) While Respondent had not issued written rules or policies reflecting this practice, the past practice is undisputed and admitted by both Director Gonzalez and Administrator Evans. (Tr. 96-97, 333-334, 342; JT 5) Dietary employee Victor Gonzales testified that he was advised by the cook when he was first hired that dietary employees were allowed to eat leftover meals, but had to wait at least 30 minutes following the completion of the meal service in order to make sure that all residents were served and to insure meals were available if any residents requested a second helping. Employee Gonzales testified that this was the procedure that the department followed throughout his year and a half tenure with Respondent and he ate breakfasts, lunch or dinner during his shift every day. (Tr. 47-50)

However, beginning on December 28, 2017 and continuing through January 30, 2018, Director Gonzalez conducted various in-service meetings with dietary employees during which he informed the employees that they were no longer permitted to eat any food prepared at the facility. He also advised them that they would be issued disciplinary warnings if they were found to have consumed food purchased by Respondent. Gonzalez informed the employees that the sole exception to this new policy was that cooks were permitted to consume a 2 ounce taste of the food they prepared. (Tr. 51-53, 293-298; GC 5)

It is undisputed that Respondent implemented this change without notice to, or bargaining with, the Union. (Tr. 137, 139) Union Representative Grant-Clarke only learned of the change

when she visited the facility during employees' meal break on February 12, 2018, and she saw dietary employees with food brought into the facility, rather than leftover meals. (Tr. 134-135) Grant-Clark raised the issue with Administrator Evans during their grievance meeting that day and Evans claimed he had no knowledge of the change and would look into it. (Tr. 137)

On February 16, 2018, Administrator Evans emailed Grant-Clark admitting that Respondent had "recently discontinued the practice of providing meals to the dietary staff." He acknowledged that the "practice has been to allow the dietary staff to eat any leftover food from the meal served." (JT 5) While he noted that employees had been taking extra food beyond that which was prepared for residents' meals, he agreed that effective that day the dietary employees could resume eating food that was left over from the main meals served to residents, consistent with its prior past practice. (JT 5) Sometime shortly thereafter, Director Gonzalez verbally advised the dietary employees that the Union had complained about the change and they could again eat the leftover meals following meal service. (Tr. 54-55, 97)

IV. ARGUMENT

The undisputed evidence establishes that the Respondent violated Section 8(a)(5) of the Act when it unilaterally implemented changes to the shift schedules and food consumption policy without giving the Union notice or an opportunity to bargain over the changes before they were implemented. Respondent's defense that the changes were de minimis and its other ancillary defenses, as explained more fully below, must be rejected because they are unsupported by both the record evidence and applicable legal authority.

A. Legal Framework for Unilateral Changes

An employer's duty to bargain with the union representing its employees encompasses the obligation to bargain over the following mandatory subjects— wages, hours, and other terms and

conditions of employment. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-682 (1981). Accordingly, an employer may not unilaterally change employees' wages, hours, and other terms and conditions of employment without first affording their collective-bargaining representative timely notice and a meaningful opportunity to bargain over any proposed changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Cook Dupage Transportation Co.*, 354 NLRB No. 31 (2009). This bargaining obligation extends to an employer's regular and longstanding practices concerning wages, hours, and other terms and conditions of employment, even if not required by a collective-bargaining agreement. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); see also *Coastal International Security, Inc.*, 352 NLRB 289, 294 (2008). The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term or condition of employment without negotiating with the union. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *Taino Paper Co.*, 290 NLRB 975, 977 (1988). The burden is then on the employer to show that the unilateral change was in some way privileged. *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 628 (1990).

The unilateral change doctrine not only applies to changes to employees' terms and conditions of employment while a collective-bargaining agreement is in effect, but also to changes to most types of employees' terms and conditions of employment after a collective-bargaining agreement expires. Specifically, if contract negotiations between an employer and a union are pending, an employer has a duty to maintain the status quo with the terms and conditions of employment set forth in an expired collective-bargaining agreement. *SMI/Division of DCX-CHOL Enterprises, Inc.*, 365 NLRB No. 152 (2017). In addition, the Board has held that when parties are engaged in negotiations for a collective-bargaining agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an

overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991). An exception to the duty to maintain the status quo arises where the parties have an established past practice of providing the employer with discretion to make certain changes. That is, a post-expiration discretionary change may be privileged if it is similar in kind and degree to an employer's pre-expiration exercise of discretion. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), slip opinion at 13.

B. Respondent Made an Unlawful Unilateral Change to the Dietary Department's Shift Schedule Times

Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally changed the dietary department employees' shift schedule times on January 9, 2018 and required employees to report to work 15 minutes earlier than under the department's prior shift schedule. In *Pepsi-Cola Bottling Company Of Fayetteville, Inc.*, 330 NLRB 900, 902 (2002), the Board stated unequivocally that a work schedule is a mandatory subject of bargaining and it is undisputed that Respondent did not give the Union notice of, or an opportunity to bargain over, the change before it was implemented.

Respondent will likely argue that the schedule change was so minor that it was not material or substantial. However, this argument is without merit and should be rejected. Requiring employees to report to work at a different time can have a severe impact on employees, particularly when they have worked under a fixed schedule for a significant period. Union representative Grant-Clark and employee Gonzales both testified that some dietary employees were very upset about the change as it impacted their personal lives and many already arrived to work very early in the morning. Indeed, the change implemented by Respondent required some morning shift employees to arrive at work as early as 4:45 a.m. (Tr. 38, 131; GC. 4, 5) In *Pepsi-Cola*, the Board found that a schedule change requiring employees start their shifts 15 minutes

earlier each day constitutes a material, substantial and significant change to employee terms and conditions of employment. *Id.* at 902; See also *Hedison Manufacturing Co.*, 260 NLRB 590 (1982) (finding that requiring employees to report to their workstations 5 minutes earlier than the previous reporting time is a material, substantial and significant change). Thus, there can be no valid argument that a 15 minute change is immaterial or insufficient to violate the Act.

It appears that the Director Gonzalez was attempting to minimize the change when he testified that Respondent had a 15 minute grace period for employees arriving to work. (Tr. 323) However, moving the schedule start times back by 15 minutes would simultaneously move the grace period back by 15 minutes, so the impact of Respondent's change is not nullified or minimized by the application of the pre-existing grace period since employees would exceed the grace period 15 minutes earlier under the new schedule and would be subject to discipline by Respondent for an attendance violation 15 minutes earlier. (Tr. 325-326)

Respondent will also likely argue that the change was not material or substantial because it was rescinded shortly after it was implemented or that it never actually went into effect. As an initial matter, it cannot credibly be argued that the change did not go into effect because the change was not rescinded until after employees began working under the new shift schedule. In addition, the Board has found that even a one-time change to employees' schedules as short as 15 minutes constituted a material, substantial and significant change requiring an employer to give notice to and bargain with the Union prior to implementing the change. *Rangaire Co.*, 309 NLRB 1043 (1992) (overruling the ALJ to find that employer's cessation of past practice of providing an extra 15 minutes of paid lunch break once per year on Thanksgiving constituted a material, substantial and significant change). Moreover, the fact that Respondent rescinded the change after receiving the Union's complaint over its unilateral action does not negate the violation here, which relates to

the implementation of the change without regard for the Union and in violation of its obligation to bargain with the Union about such changes. Indeed, even if the change never actually went into effect, Respondent could still be found to have violated Section 8(a)(5) of the Act by announcing the change without bargaining. *See ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992) (the Board held that the Employer violated Section 8(a)(5) of the Act where it announced a unilateral change, even without ever implementing it because a reasonable employee would believe the change was effectively implemented when announced, which thereby damaged the bargaining relationship). As such, the fact that Respondent rescinded the change at issue shortly after it was implemented does not negate its violation of the Act. Moreover, although not specifically alleged, Respondent's unilateral rescission of the change is a separate Section 8(a)(5) violation as it was done without notice to and bargaining with the Union. *See JPH Management*, 337 NLRB 72, 73 (2001)(unilateral rescission found to be a unilateral change.) In fact, the manner in which Respondent rescinded the change, by directly approaching each affected employee, is further support for another 8(a)(5) violation of direct dealing.

C. Respondent Made Unlawful Unilateral Changes to Its Past Practice of Allowing Dietary Department Employees to Consume Leftover Meals

Respondent also violated Section 8(a)(1) and (5) of the Act when it unilaterally changed its established past practice of allowing dietary employees to eat leftover meals at the conclusion of residents' meal service without giving notice to the Union of, or an opportunity to bargain over, the change before it was implemented.

The fact that a particular working condition or benefit is not expressly embodied in the governing collective agreement is immaterial where satisfactorily established by practice or custom. *See Citizens Hotel Co.*, 138 NLRB 706, 712-713 (1962); *Frontier Homes Corporation*, 153 NLRB 1070, 1072-1073 (1965); *Central Illinois Public Service Co.*, 139 NLRB 1407, 1415

(1962). Regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective-bargaining agreement. As such, these past practices cannot be changed without offering the unit employees' collective-bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc.*, 349 NLRB at 244, citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *DMI Distribution of Delaware, Ohio, Inc.*, 334 NLRB 409, 411 (2001). This is no less true where the practice is denominated a "privilege," voluntarily instituted or bestowed by the employer. *Central Illinois Public Service Co.*, 139 NLRB at 1415.

Here, employee Gonzales testified that he consumed leftover meals every day during his shift for a year and a half. Indeed, the established past practice of permitting dietary employees to consume leftover meals was admitted by both Director Gonzalez and Administrator Evans. (Tr. 47-51, 134-135, 96-97, 333-334, 342; JT 5) As with the schedule change, there can be no credible claim that Respondent notified the Union or offered the Union an opportunity to bargain over the change before it was implemented, as there is no evidence of any such notice whatsoever to the Union. While Director Gonzalez seemed to suggest during his testimony that Grant-Clarke might have seen the new shift schedule times posted in the kitchen, she credibly testified that she never went in that area. (Tr. 88-89, 338-339) Moreover, even if she did go in the area, the chance that a Union representative might happen to see a posting at the facility is insufficient to meet Respondent's obligation to give clear notice to the Union of a planned change and an opportunity to bargain over it before it is implemented.

Respondent may argue that the change to employees' ability to eat leftover meals is not material or substantial. However, in *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), the

Supreme Court found that “[t]he availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers The terms and conditions under which food is available on the job are plainly germane to the working environment,” citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964), and as such require bargaining. In *Sprain Brook Manor Nursing Home, LLC*, 359 NLRB 929, (2013), as adopted following a de novo review at 361 NLRB 607 (2104), the Board found that an employer’s discontinuation of its practice of providing hot lunches to employees after the nursing home residents had been fed constituted an unlawful unilateral change to a material and substantial term of employment, even when the employer had replaced the hot lunches with sandwiches and salads. Indeed, the Board has found that an employer’s practice of merely providing free coffee to employees constitutes a mandatory subject of bargaining and therefore cannot be unilaterally eliminated. *Beverly Enterprises*, 310 NLRB 222, 239 (1993); *E. I. du Pont de Nemours & Co.*, 311 NLRB 893, 898 fn. 12 (1993). See also *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21 (2015) (unlawful unilateral change were employer ceased past practice of providing sample products from quality assurance kitchen to employees); *Central Mack Sales*, 273 NLRB 1268, 1289 (1984)(unlawful unilateral change when employer replaced free coffee with coffee vending machines); *Poletti’s Restaurant*, 261 NLRB 313, 320 fn. 16 (1982)(unlawful unilateral change when employer ceased providing free desserts); *Southern Florida Hotel & Motel Ass’n*, 245 NLRB 561, 569 (1979) (unlawful unilateral change when employer ceased providing two free beers or soft drinks daily and providing a snack to certain employees who worked the night shift). Clearly, Respondent’s practice of allowing employees to eat free leftover meals during their shifts constitutes a material and substantial term and condition of employment such that it could not be

changed without notice to or bargaining with the Union. When Respondent failed to do so, it violated Section 8(a)(1) and (5) of the Act.

Director Gonzalez tried to minimize the change when he testified that about a week after the change he had eliminated any overages and the department was close to “zero-waste.” (Tr. 299) This self-serving testimony is not credible and would not negate the unilateral change, even if it were true. First, employee Gonzales credibly testified that the department had to prepare extra meals in case residents didn’t get a meal for some reason or asked for a second helping. (Tr. 48-49) Thus, it would be impossible for the department to become zero waste unless Respondent stopped preparing second meals or somehow estimated the exact number of second meals requested. The need to have extra meals available for residents was confirmed by Director Gonzalez in his testimony and corroborated by Administrator Evans when he advised the Union that dietary employees could resume eating leftover meals and noted that they could do so only after all residents had eaten “as we must allow for residents who request second helpings.” (Tr. 294; JT 5) In light of this requirement, Director’s Gonzalez’ claim of “zero- waste” and no leftover meals simply cannot be credited. Moreover, even if there were no waste and no leftover meals for employees to consume, the unilateral change still occurred and remained in place. Notably, the change made by Respondent included a threat of discipline if employees were found to have consumed food and this new condition of employment remained in place even if there were no leftover meals to consume. Thus, even if Respondent had been able to somehow divine the exact number of meals needed for each service every day during the 6 weeks it remained in place, the change was still in effect during that period and still constituted a significant and material change to employees’ terms and conditions of employment in violation of the Act.

As discussed above with respect to Respondent's unilateral rescission of the shift schedule change, the fact that Respondent ultimately agreed to return to its past practice of allowing employees to eat leftover meals after the Union complained about the change approximately six weeks after it was implemented in no way negates Respondent's violation of the Act and, in fact, would support additional violations of the Act based on Respondent's unilateral rescission of the change and its direct dealing with employees when the change was rescinded.

D. Respondent's Unilateral Changes Were Not Privileged by the Parties' Collective-Bargaining Agreement

Respondent will likely argue that it was privileged to make these unilateral changes pursuant to the parties' collective-bargaining agreement and that Agreement's management-rights clause operated as a waiver of the Union's right to bargain over the implementation of these changes. This argument is wholly without merit and should be rejected.

"The right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by 'an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.'" *TCI of New York*, 301 NLRB 822, 825(1991). In addition, waivers of statutory rights are not to be "lightly inferred." *Georgia Power Co.*, 325 NLRB 420 (1998). Thus, a general contractual provision will not be inferred to include a waiver a statutorily protected right, instead, such a waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by

the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

As an initial matter, there are no contractual provisions related to the past practice permitting employees to eat leftover meals. In addition, the management-rights clause, while broadly worded, does not contain a clear and unmistakable waiver related to this term and condition of employment. (JT 1 at p. 3) As such, Respondent cannot meet its burden to establish a waiver by the Union with respect to changes made to employees’ ability to consume leftover meals beginning on December 28, 2017, when the Agreement remained in effect.

Article 13 of the Agreement refers to hours of work and requires the posting of work schedules to be made 10 days in advance and notes that they cannot be changed without mutual agreement between Respondent and the affected employee. However, the Agreement clarifies that the provisions of Article 13 are intended only to “provide a basis for determining the number of hours of work for which an employee shall be entitled to be paid at overtime rates, and shall not be construed as a guarantee to any employee of any specified number or hours of work either per day or per week.” (GC 1 p. 11) As such, this provision, while it mentions the posting of employees’ weekly work schedules, does not clearly and unmistakably waive the Union’s right to notice and bargain over changes to the department’s fixed shift schedule times. In addition, the fact that Respondent noted on the shift schedule times chart that “hours may be subject to change,” does not establish that the Union waived its right to notice and bargain over changes to the schedule. Indeed, employee Gonzales testified that the shift schedule times had not changed during his year and a half tenure and the shift schedule times chart had been posted continuously without change during that period, and Respondent presented no evidence whatsoever of any prior changes to the department’s fixed shift schedule times. (Tr. 32, 44, 89; GC 2)

While the Agreement's management-rights clause references Respondent's right to "direct and schedule the workforce," the Agreement expired on December 31, 2017 and the rights preserved in that clause expired with it. (JT 2) The Board has consistently held that a management-rights clause does not survive the expiration of a contract. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001); *Ryder/Ate. Inc.*, 331 NLRB 889 fn. 1 (2000). Thus, even assuming arguendo that this language is sufficient to constitute a clear and unmistakable waiver of the Union's right to bargain about changes to the fixed shift schedule times, Respondent implemented the change on January 9, 2018 at a time when the contract was expired and the Agreement's management-rights clause was no longer in effect. As such, Respondent was not privileged by any contractual provision, including the management-rights clause, to unilaterally implement the change to the department's shift schedules.

E. Respondent's Unilateral Changes Were Not Made Pursuant to a Well-Established Past Practice.

Respondent may argue that its unilateral implementation of these changes did not violate the Act because the changes were made pursuant to a historical practice of making such changes as allowed under the Board's ruling in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). This argument is wholly unsupported by the record testimony and should be rejected.

First, there is no evidence whatsoever that Respondent had a past practice of making changes to the dietary department's shift schedule times. Employee Gonzales' testimony that Respondent had not previously changed the shift schedule times during his year and half of employment is uncontroverted and Respondent failed to present evidence of any similar changes prior to its January 9, 2018 change. (Tr. 32, 44, 89; GC 2) Indeed, Respondent's counsel did not even question Director Gonzalez about any prior changes to the shift schedules during his testimony.

Similarly, employee Gonzales testified that he had been permitted to eat leftover resident meals throughout his year and half of employment prior to Respondent's unilateral cessation of that privilege. (Tr. 50-51). Union Representative Grant-Clarke also testified that dietary employees had always been permitted to eat leftover meals since she began representing the unit in 2013. (Tr. 135) Director Gonzalez testified that prior dining service managers had different views of what food or how much food could be consumed by dietary employees, suggesting that perhaps he was merely establishing his preference in accord with this past practice, although he did not affirmatively state this. However, his testimony is entirely vague and fails to establish that Respondent had a past practice of making changes to its policies related to dietary staff consuming leftover meals, and his testimony is completely silent as to whether any such changes, if they even occurred, were made on a unilateral basis. While employee Gonzales' testimony about eating meals throughout his tenure is uncontroverted, to the extent that his testimony conflicts with Director Gonzalez' vague claim of prior changes, Gonzales' testimony should be credited as he is current employee who was testifying under subpoena and such testimony has been found by the Board to be particularly reliable, since such witnesses are testifying adversely to their own economic interest. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, 152, fn. 2 (2014); *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003).

The burden of proving a well-established past practice rests not on the General Counsel, but on the party asserting that practice as an affirmative defense. *Eugene Iovine, Inc.*, 328 NLRB 294 fn. 2 (1999) (no past practice where record evidence failed to establish circumstances of hours reductions in past years, and employer merely asserted hours reduction was due to slow work during holiday season and/or principal temporarily providing less work to contractor); compare *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (finding past practice where parties

stipulated that employer made annual changes to healthcare benefits over twelve year period and record evidence showed that changes did not materially vary in kind or degree from year to year). Here, there is absolutely no evidence of historical changes to shift schedules and only vague testimony about different preferences of prior managers regarding dietary employees' consumption of food. Respondent provided no evidence to establish any specific prior changes to the shift schedule times or the food policies, no information about the date any claimed changes were made, or how long any such changes were in effect. Most significantly, even assuming that Respondent had been able to establish that it had previously made changes to its shift schedule times or food consumption policies, Respondent has utterly failed to provide any evidence regarding whether such changes were made unilaterally or whether there was bargaining and/or Union agreement to such changes. Without evidence that such prior changes were made unilaterally, Respondent has clearly failed to establish a past practice of making unilateral changes to its shift schedule times or food consumption policies and, therefore, cannot meet its burden under *Raytheon*. Accordingly, this argument must be dismissed.

F. Deferral is Not Appropriate

Respondent contends that these unfair labor practice allegations should be deferred to resolution through the parties' grievance and arbitration process under *Collyer Insulated Wire*, 192 NLRB 837 (1971). However, as detailed below, these allegations are not appropriate for deferral.

The Board has stated that deferral is appropriate when the following factors are present: (1) the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of Section 7 rights; (3) the parties' agreement provides for arbitration in a very broad range of disputes; (4) the parties' arbitration clause clearly encompasses the dispute at issue; (5) the party seeking deferral

has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is well suited to resolution by arbitration. *San Juan Bautista Medical Center*, 356 NLRB No. 102 (2011); *Wonder Bread*, 343 NLRB 55, 55 (2004).

Deferral is not appropriate in the instant case because none of the factors set forth by the Board are present. Regarding the first factor, this dispute has not arisen within the confines of a long and productive collective-bargaining relationship. The parties have only had a collective-bargaining relationship since December 2016 and have not independently negotiated a collective-bargaining agreement, but instead extended the predecessor Agreement for the first year of its bargaining relationship. In addition, the parties' collective-bargaining relationship has been severely impeded by the decertification election and the unresolved representational status of the Union. As to the second factor, the objections to the decertification election at issue in this consolidated matter assert that Respondent acted with animosity toward employees' free exercise of Section 7 rights during its anti-Union campaign. Thus, the first and second factors clearly disfavor deferral of these matters.

While the parties' collective-bargaining agreement did provide for arbitration of a broad range of disputes as described in the third factor, the parties' contract expired on December 31, 2018, prior to the unilateral implementation of the January 9, 2018 schedule change. Since the obligation to arbitrate grievances expired with the contract, the unilateral change with respect to the schedule change is not appropriate for deferral. The fourth factor requiring that the employer's arbitration clause clearly encompass the dispute is not met either. The grievance and arbitration procedure set forth in the parties' contract provides that that process is available for disputes "involving the interpretation or application of the express written provisions of this Agreement." (JT 1 at p. 20). Here, the dispute over Respondent's unilateral changes is not about

the interpretation and application of ambiguous contractual provisions, but rather over the evidence regarding past practice and the alleged changes to that practice, and the interpretation of the relevant legal authority. As such, the third and fourth factors do not support deferral of these matters.

During the hearing, Respondent's counsel indicated that Respondent is willing to utilize arbitration to resolve these disputes in satisfaction of the fifth factor, and this is raised as an affirmative defense in its answer. However, the record clearly demonstrates that the Union unsuccessfully attempted to move its grievance related to Respondent's unilateral change to the shift schedules times forward through the grievance process on numerous occasions. On each occasion, Respondent flatly denied any change was made, refused to process the grievance, and demanded repeatedly that the Union withdraw its grievance. (JT 3 at pp. 4, 6, 7, 13, 17, and 22) Respondent's documented response to the Union's attempts to process the grievance casts serious doubt on the genuineness of Respondent's claimed interest in resolving these matters in arbitration delineated by the fifth factor of the Board's inquiry.

The sixth factor set forth by the Board is also not met here because these disputes are not well-suited to resolution by arbitration. "A dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute." *San Juan Bautista*, supra; see also *Collyer*, supra at 842. Here, there is no contractual provision relating to Respondent's food consumption policy and the management-rights provision related to the schedule change had expired when the shift schedule change was implemented. Thus, contract language is not at the heart of these allegations and it is not necessary to interpret the contract to find a violation in this case. Rather, the inquiry here is whether Respondent complied with its statutory obligation to notify and bargain with the Union prior to making these changes and must be analyzed under the relevant statutes and

case law and does not present a legitimate dispute about the interpretation of contract language. Disputes such as these, which turn primarily on the interpretation of statute and case law are not, “eminently well-suited to resolution by arbitration,” and are not deferred by the Board. *Avery Dennison*, 330 NLRB 389, 390-391 (1999) (“The Board’s policy against deferral in matters of statutory interpretation is well established. Moreover, established Board policy also disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board.”).

Finally, assuming *arguendo* that the six factors were met and these unfair labor practice allegations were suitable for deferral, it is not appropriate to defer these allegations due to the related and overlapping objections at issue in consolidated representation matter, which are not deferrable. The Board declines to defer where the deferrable allegations are inextricably related to non-deferrable allegations. *Windstream Corp.*, 352 NLRB 44, fn.1 (2008), *affd.* after remand, 355 NLRB 406 (2010). Given the complete overlap of the unfair labor practice allegations and the objections raised by the Union, deferral of the unfair labor practice allegations to arbitration while the same allegations continued to be litigated in the representation case would result in the type of inefficient, piece-meal, resolution that the Board has consistently avoided. *Daimler Chrysler Corp.*, 344 NLRB 1324, 1324 fn.1 (2005) (Board disfavors piece-meal deferral of complaint allegations); *Avery Dennison*, 330 NLRB at 390-391 (“Board policy . . . disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board.”). As such, deferral of the unfair labor practice allegations is not appropriate.

G. The ALJ Hearing This Matter is Properly Appointed

In its affirmative defenses, Respondent contends that the administrative law judge assigned to this case was not properly appointed by a “Head of Department.” See generally *Raymond J. Lucia Cos. v. SEC*, 138 S. Ct. 2044 (2018). This argument fails, because the NLRB’s administrative law judges have been properly appointed by the Board itself. The Board Members, acting collectively, are a “Head of Department” to whom appointing authority may constitutionally be entrusted. *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 512-13 (2010) (explaining that for multimember independent agencies, the “Head of Department” with constitutional appointing authority is the members of the agency acting collectively). Moreover, both the National Labor Relations Act and the Administrative Procedure Act expressly authorize the Board to appoint administrative law judges. *WestRock Services, Inc.*, 366 NLRB No. 157 (2018) (citing Section 4(a) of the NLRA, 29 U.S.C. § 154(a), and Section 11 of the Administrative Procedure Act, 5 U.S.C. § 3105 (as amended)). As it made clear in *WestRock*, the Board has exercised this express authority to appoint each of its currently-serving administrative law judges to their current position. *Id.*, slip op. at 2. Accordingly, Respondent’s argument should be denied.

V. REMEDY

In light of the fact that the unlawful unilateral changes at issue here have already been rescinded, Respondent should be ordered to cease and desist from any like and related conduct, bargain in good-faith, and post the Board’s standard notice to all unit employees. A copy of the proposed notice is attached.

VI. CONCLUSION

Based on the preceding, it is clear that Respondent made unlawful unilateral changes to unit employees' terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act.

DATED AT Oakland, California this 4th day of October 2018.



Amy Berbower
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PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

WE WILL NOT fail and refuse to bargain in good-faith with the Service Employees International Union, Local 2015 (the Union), your representative in dealing with us regarding wages, hours, and other working conditions of the employees in the following unit:

All certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, medical records assistants, receptionists, housekeepers, janitors, and laundry aides.

WE WILL NOT make changes in wages, hours, and working conditions, including changing the starting times of shifts in the dietary department and ending the practice of allowing employees in the dietary department to eat extra food prepared for, but not eaten by, residents, without reaching agreement or an overall good-faith impasse.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL bargain collectively in good-faith concerning wages, hours and other terms and conditions of employment with the Union as the exclusive representative of our employees in the above-described unit.

WE HAVE, upon the Union's request, rescinded all changes to your terms and conditions of employment that we made without bargaining with the Union.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

DYCORA TRANSITIONAL HEALTH – FRESNO LLC

Employer

and

**SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 2015**

Union

Case 32-CA-215700

DYCORA TRANSITIONAL HEALTH - FRESNO LLC

Employer

and

ROSALINDA LORONA

Petitioner

and

HEALTHCARE SERVICES GROUP, INC.

Involved Party

Case 32-RD-213130

Date: October 4, 2018

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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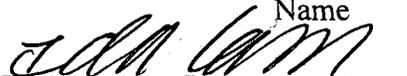
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October 4, 2018

Ida Lam, Designated Agent of NLRB

Name



Signature