

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES¹**

**VANGUARD HEALTH SYSTEMS OF MICHIGAN
(VHS), A WHOLLY OWNED SUBSIDIARY OF
TENET, d/b/a DETROIT MEDICAL CENTER
(DMC)²**

Respondent

and

Case 07-CA-205394³

**LOCAL 283, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS (IBT)**

Charging Party

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

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¹ Throughout this brief the following references will be used:
Transcript: Tr (followed by page number)
General Counsel Exhibit: GC (followed by exhibit number)
Charging Party Exhibit: CP (followed by exhibit number)
Respondent Exhibit: R (followed by exhibit number)

² The Respondent amended its name at the hearing. (Tr 58)

³ The Respondent and Charging Party entered into a non-Board settlement resolving the allegations in Cases 07-CA-231933 and 07-CA-233469. These allegations were amended out of the Consolidated Complaint at the hearing. (Tr 6, GC Ex 1(cc)).

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COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE

Now comes Counsel for the General Counsel Robert A. Drzyzga who respectfully submits this brief to Administrative Law Judge Arthur Amchan, who heard this matter on June 4, 2019, in Detroit, Michigan.⁴

I. ISSUES

The issues presented are:

(1) Whether Respondent, since about July 14, failed and refused to bargain with the Charging Party as the exclusive collective bargaining representative of the unit regarding a change to the methods in which it determines how many hours an employee would need to work to be paid overtime, in violation of Section 8(a) (1) and (5), in the manner set forth in complaint paragraphs 9 and 10.

(2) Whether Respondent, on about July 23, unilaterally changed its method used to determine how many hours an employee would need to work to be paid overtime, without bargaining with the Charging Party as the exclusive collective bargaining representative of the unit, in violation of Section 8(a)(1) and (5) in the manner set forth in complaint paragraphs 9 and 10.

⁴ All dates are 2017 unless indicated otherwise.

Counsel for the General Counsel respectfully requests that the honorable Administrative Law Judge Amchan answer the above questions in the affirmative.

II. FACTS⁵

A. Collective Bargaining History

Respondent is a corporation with offices and places of business in Detroit, Michigan (Detroit facilities), and has been operating acute care hospitals providing inpatient and outpatient medical care. (GC 1 (y)). Respondent and the Charging Party have had a collective bargaining relationship dating back approximately 16 years for three separate bargaining units: Laboratory Assistants, Patient Management Care Associates (PMCA), and Couriers. (Tr 41-43). Charging Party President Steve Hicks has served as the Charging Party's representative for these bargaining units for the past 16 years and has been the Charging Party's lead negotiator for purposes of collective bargaining. (Tr 43)

This current case involves the Laboratory Assistants unit, hereafter Unit, which is defined as follows:

All full-time and regular part-time laboratory assistants, senior laboratory assistants, client service representatives 1 and client service representatives 2⁶, employed by Respondent at its facilities located at Detroit Receiving Hospital University Health Center, 4201 St. Antoine Street, Detroit, Michigan; Harper

⁵ The facts contained herein are a summary of those that Counsel for the General Counsel contends should be credited.

⁶ Based on Respondent's Amended Answer (GC 1 (aa)), Counsel for the Counsel proposed an amendment adding the client service representative 1 and 2 classifications into the Unit at the hearing. The parties stipulated to their inclusion. (Tr 6).

University Hospital, 3990 John R, Detroit, Michigan; Children's Hospital of Michigan, 3901 Beaubien, Detroit, Michigan; Sinai Grace Hospital, 6071 W. Outer Drive, Detroit, Michigan; 45250 Cherry Hill, Canton, Michigan (Canton PSC); 42700 Garfield Rd, Suite 100, Clinton Township, Michigan (Clinton Township-Stilson Center PSC); 9640 Commerce Road, Suite 105, Commerce Township., Michigan (Commerce-Edgewater PSC); Sinai Guild Medical Office Building (MOB), 1 William Carls Drive, Suite 110, Commerce, Michigan (Commerce- Huron Valley PSC); 14071 East 7 Mile Road, Detroit, Michigan(Detroit-DMC East 7 Mile PSC); 19460 Grand River Ave., Detroit, Michigan (Detroit- Grand River Health Center PSC); 4160 John R, Suite 802, Detroit, Michigan (Detroit-Harper Professional Building PSC); 4727 St. Antoine, Suite 301, Detroit, Michigan (Detroit- Hutzel Professional Building PSC); 3950 Beaubien, Detroit, Michigan (Detroit- Pediatric Specialty Center PSC); 6001 W. Outer Drive, Suite 310, Detroit, Michigan (Detroit- Sinai Grace Professional Building PSC); 4201 St. Antoine, Suite 4-D, Detroit, Michigan(Detroit- University Health Center PSC); 23077 Greenfield, Suite 402, Southfield, Michigan48075 (Southfield-Advance Building PSC); 27209 Lahser, Building 4, Suite 126, Southfield, Michigan (Southfield - DMC Lahser Campus PSC); 2300 Haggerty Rd, Suite 2060, West Bloomfield, Michigan (West Bloomfield- Lakes Building PSC), excluding office clerical employees, confidential employees, guards and supervisors as defined in the National Labor Relations Act.

(GC 1 (y), para 6)

Respondent has recognized the Charging Party as the exclusive collective-bargaining representative of the above Unit in successive collective-bargaining agreements, the most recent of which was effective from January 1, 2012 to December 31, 2014, extended from time-to-time by the parties, and on June 29, 2017, renewed for successive 42-day periods unless canceled by either party. (GC 2-5). The collective bargaining agreements for the above laboratory Unit, since at least 2006 and continuing

to date, has contained the following provisions, in part, regarding hours of work and overtime:

ARTICLE VII HOURS OF WORK

Section 1 (A) Normal Work Schedule

Recognizing that the provisions of health care services may require regular work on seven days per week the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period and eight (8) hours per workday. The Employer reserves the right to change the regular work schedule to forty (40) hours per week. This schedule may be Monday through Friday or various alternate seven-day operations schedules with four (4) days off within the two - week period for full time employees.

...

Section 4 Overtime

The company will post one listings [sic] for scheduling overtime scheduled day off (SDO) and requests for daily overtime.

The following scheduling and eligibility principles shall apply:

- (a) Employees will sign-up to be considered for additional work.
- (b) Schedules will be made based on management determination of the most expeditious and cost-effective way to schedule overtime and its assessment of the employee's ability to perform the assignment.
- (c) Management will schedule overtime among those qualified to perform the work (i.e. assignment) by rotating it in an equitable fashion across pay periods by seniority. Employees will be assigned by most seniority, scheduled day off (SDO) first, if no employees take the overtime then the remainder of the shifts will be canvassed for volunteers.
- (e) Once scheduled employee will be responsible for working their scheduled time.
- f) Employees may be required to work overtime when there are no volunteers available Selection when there are insufficient qualified volunteers will be

based on drafting the least senior employees still working first and then the least senior to be called in When contacting the least senior to be called in only one call need be made.
(GC 2 and 3, p 10, GC 4, p 9)⁷

Neither of the above provisions indicate how many hours employee must work in a given work day or work week before they are paid overtime wage rates. (Tr 72-73) Nor does Article VII incorporate by reference, or otherwise identify, any Respondent policy that governs how many hours employees must work in a given work day or work week before they are paid overtime wage rates. (Tr 74-75). However, the past practice between the Respondent and Charging Party since at least 2006 has been to pay Unit employees overtime wage rates for any hours worked more than 8 hours per work day, or more than 80 hours worked in a two week pay period. Charging Party President Hicks testified that Unit employees *were always paid* for overtime for hours worked over 8 hours per day, or 80 hours over a pay period. (Tr 44). Indeed, Respondent's Supervisor Samantha Sutton corroborated Hicks' testimony in an email to other supervisors and managers that the rule has always been 8/80. Respondent's Manager of Labor Relations Catherine Reed further corroborated Hicks. (Tr 80, GC 6).

The Respondent and Charging Party have been negotiating a new collective bargaining agreement since approximately 2016. The parties have not reached a tentative agreement on Article VII, Hours of Work, during the Laboratory Unit negotiations, and

⁷ These provisions were taken from GC 2. These provisions are virtually identical in GC 2 through 4 with the exception in the first paragraph of Section 4 Overtime; GC 4 indicates that two listings will be posted, whereas GC 2 and 3 indicate one listings will be posted.

neither party has declared an impasse regarding any specific article in the contract, or in overall bargaining. (Tr 44-45, 80-81)

The most recent Laboratory Unit collective bargaining agreement also contains the following management rights provision:

ARTICLE II MANAGEMENT RIGHTS

Section I Right to Manage and Operate

The Employer retains and shall have the sole right and exclusive right and shall have a free hand to manage and operate the Employer including all of its operations and activities to decide the number of employees to establish Employer policies and procedures to determine the type and scope of services to be furnished to patients and the nature of the facilities to be operated, to establish schedules of operation and to determine the methods procedures and means of providing services to patients to elect to open and /or operate other hospital branches and clinics to merge or consolidate with any other hospital or medical hospital group and to discontinue a part or all of the operations of the Employer if in the sole judgment of the Employer it is deemed necessary or believed advisable to discontinue operating a part or all of the facility. All of such rights are vested exclusively in the Employer

Section 2

The Employer in addition to the rights set forth in above, shall have the right to promote, assign, transfer, suspend, discipline, discharge, lay off and recall, to make and establish work rules of conduct and fix and determine penalties for violation of such work rules, to maintain discipline and efficiency among employees, and to establish and assign contingent personnel, provided that such rights shall not be exercised by the Employer in contravention of any of the express provisions of this Agreement.

The Employer retains and shall have the sole and exclusive right to administer without limitation, implied or otherwise, all matters not specifically and expressly covered by the provisions of this Article or excepted by the provisions of any other Article of this Agreement.

The rights set forth in this Section are subject to the grievance procedure and arbitrability for reasonableness. (GC 2, p 3)

The above provision is broadly written and does not specifically address hours of work or how and under what circumstances overtime will be paid to Unit employees.

B. Events Leading to changes in the Unit Employees' Overtime Pay Formula

Recent negotiations for the lab assistants Unit began in November or December of 2016. (Tr 44).⁸ On June 22, Charging Party President Steve Hicks became aware that the Respondent was holding a meeting with his Laboratory Unit members to roll out changes to some policies. On June 23, Hicks sent an email to Respondent's Director of Labor and Employee Relations, Richard Martwick, objecting to the meeting and requesting that it be cancelled and that any matters in policies be addressed in bargaining for a new contract. (Tr 45-46, GC 8).

On June 23, a meeting was called and run by Respondent's Human Resource Director Jonita Edwards in the DRH conference room at Respondent's Detroit Receiving Hospital. Approximately seven members of the Unit were summoned to the meeting, including Crystal Perry and Melissa Burger. Perry, who attended in person, is a Charging Party steward and member of the bargaining committee. Burger, who was present via telephone, is the Charging Party's recording secretary, chief steward and is a member of the bargaining committee. This meeting was not a bargaining session. In that regard, not

⁸ As of June 4, 2019, the parties had completed approximately 30 bargaining sessions for a new agreement. No party declared impasse, and there was no tentative agreement on Article VII, Section 4 Overtime. (Tr 44)

all of the bargaining committees from either party were present; indeed, the lead negotiators for Respondent and Charging Party, Martwick and Hicks respectively, were not present. In addition, rank-and-file employees attended the meeting (Tr 11-13, 29-32).

Edwards gave a power point presentation outlining upcoming changes to the Respondent's Overtime Pay Policies. The purported purpose for the changes was to make the DMCUL (Unit) compliant with the Tenet/DMC policy for overtime. (GC 10, p 2). Under the old policy, Unit employees were paid overtime for any hours worked over 8 in a single work day or for more than 80 in a 14-day period. Pursuant to the proposed change, Respondent would only pay Unit employees overtime for hours worked over forty hours during a work week. (GC 10, p 3). That is, Respondent would not necessarily be paying overtime to employees who worked over eight hours in any given day. The presentation went on to note that the Fair Labor Standards Act (FLSA)⁹ did not require notification of the change, that the Charging Party was first notified of this change on June 23, the date of the presentation, and the effective date of the change was July 9. (GC 10, pp 5 and 12).

Steward Perry asked Edwards during the meeting why Respondent was not bargaining with the Charging Party about this matter. Edwards responded that this was not a bargaining matter. When Edwards was asked by another Unit member how she could just change the policy, Edwards replied DMC can make changes like this because it's their policy. (Tr 15). Chief steward Burger asked Edwards during the meeting "why

⁹ The presentation was silent regarding the application of the National Labor Relations Act and its standards.

are we having this meeting if Steve Hicks is not present?” Edwards responded that she can implement this policy because it was a new Tenet policy. (Tr 15).¹⁰ Perry and Burger never signed any documents indicating they were agreeing with the change to the overtime policy. (Tr, 16, 31).

A short time after the meeting, both Perry and Burger contacted Charging Party President Hicks and informed him of the upcoming changes to Respondent’s overtime policy announced on June 23. (Tr 16, 32-33). Perry, who as of June 23 had worked for the Respondent for 5 years, and Burger, a 14-year employee at the time, further testified that prior to the change on July 9, employees were always paid for overtime for hours they worked over 8 hours in a work day, or over 80 hours worked in a two week pay period. (Tr 10, 13-15, 26, 32-33).

In late June, Charging Party Hicks spoke to Respondent’s Human Resource Director Jonita Edwards on the phone. Edwards informed Hicks that the lab assistants were on different pay days and the Respondent wanted to combine all the lab assistants getting paid on the same day. Edwards said the Respondent wanted to move everyone to the same pay period and still pay them every two weeks. Hicks testified that Edwards made no mention of changing the overtime policy and there was never any discussion during this conversation about changing the overtime policy. (Tr 48-50). On July 9, Respondent implemented the changes to the Unit overtime policy.

¹⁰ The testimony of all the Charging Party’s witnesses: Hicks, Burger and Perry should be credited regarding all conversations taking place during meetings or phone calls. Their testimony is unrefuted since the Respondent failed to call any witnesses to rebut them. Caryl Williams-Bell, who attended the June 23 meeting, and Richard Martwick were not called as witnesses. An adverse inference should be drawn.

On July 13, Charging Party President Hicks attended a bargaining session in the Old Hutzel facility with the Respondent. As they were waiting for the Respondent's bargaining team to arrive, Hicks had a conversation with Valerie Dodson and Crystal Perry. Dodson and Perry told Hicks it was too bad there was nothing they could do to stop the recent changes to the overtime policy. Hicks asked them what they were talking about and they gave him some documents, approximately four or five pages, outlining the changes to the overtime policy. Hicks asked them why they did not think they could do anything about this because they were in bargaining and that the Respondent should be bargaining this matter and not making a unilateral change. Hicks asserts this was the first time he became aware that the overtime policy was changing. (Tr 51-53).

When Respondent's bargaining committee arrived, Hicks asked Respondent's Director of Labor and Employee Relations Richard Martwick, who is also Respondent's lead negotiator, if he knew that the Respondent was changing the overtime policy for the lab unit. Martwick responded that he did not. Martwick requested the paperwork Hicks had on the overtime changes and they discussed the matter for about 20 minutes. Martwick asked to make copies of the paperwork Hicks showed him and said he would get back with Hicks. The parties had no tentative agreements at that time on Article VII of the contract and the parties were not at impasse. As of June 4, 2019, the date of the hearing in this matter, there still was no agreement or impasse on these matters. (Tr 53-55).

Commencing on July 14, and ending on July 27, Hicks and Martwick exchanged a series of emails in which they presented their positions on Respondent's unilateral changes to the overtime policy. In summary, Hicks claimed that the Respondent made a unilateral change to the overtime policy by no longer paying employees for any hours worked over eight hours in a work day, was directly dealing with employees, requested bargaining and a return to the status quo, and indicated that he would take any legal action necessary to stop the unilateral change to the overtime policy. Martwick denied that there was unilateral change or any direct dealing, asserted that the language in Article VII of the contract authorized the Respondent to make the changes to the 40-hour week and overtime policy and refused to bargain. (GC 9). On August 29, Hicks filed the underlying unfair labor practice charge in this matter.

III. RESPONDENT'S UNFAIR LABOR PRACTICES

A. Legal Standards

Unilateral Change

An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining. “[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. 736, 743 (1962). “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of

employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *Katz*, supra at 747. “The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited, and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court’s emphasis)), enf’d, 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). Further, it is well settled that overtime constitutes a mandatory subject of bargaining. *Chef’s Pantry, Inc.*, 274 NLRB 775 fn. 6 (1985).

Clear and Unmistakable Waiver

The purported waiver of a union's bargaining rights is effective if and only if the relinquishment was "clear and unmistakable." *Provena St. Joseph Medical Center*, 350 NLRB 808, 2007. See also, e.g., *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) (“[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable”). In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), the Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." In particular, the Board has held that generally worded management rights or zipper clauses will not, in themselves, be construed as waivers of statutory

bargaining rights. *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) (unilateral no-tobacco rule), enfd. 25 F.3d 1044 (5th Cir. 1994); *Johnson-Bateman Co.*, 295 NLRB at 184-88 (unilateral drug testing program). Absent specific contract language, an employer must show that the issue was "fully discussed and consciously explored" and that the union "consciously yielded" its interest in the matter. *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529, 1530 (2000) (quotations omitted), citing *Metropolitan Edison*, 460 U.S. at 708; *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999).¹¹ The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in the contract. As the Board noted in *Provena*, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right unilaterally to take the action in question.¹²

As illustrated in *Provena*, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver when a contract does not specifically mention the action at issue.¹³ In interpreting the parties' agreement, relevant factors to consider include: (1) the wording of the proffered sections of the

¹¹ See also *Johnson Bateman*, 295 NLRB at 185-186 (Board found that union did not waive its right to bargain about a drug/alcohol testing policy by agreeing to a management rights clause authorizing the employer to unilaterally issue, enforce, and change company rules, noting that the clause was couched in general terms and made no reference to any particular subject areas, and that there was nothing in the bargaining history suggesting that the parties even discussed drug/alcohol testing during negotiations).

¹² *Provena* at 812 n.19, citing *New York Mirror*, 151 NLRB 834, 839-840 (1965).

¹³ *Provena*, 350 NLRB at 810-813 (Board based its waiver conclusions on such factors as contractual language, the parties' bargaining history, and the reading of several contractual provisions "taken together").

agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.¹⁴ To meet the waiver test, it is not sufficient to find that contractual language can be reasonably interpreted to cover certain conduct if other interpretations are possible as well.¹⁵

Incorporation by Reference

Whether a separate document is part of the collective bargaining agreement is determined by examining the intent of the parties. For example, in *Adkins v. Times World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), cert denied 474 U.S. 1109 (1986), a case that involved the issue of whether an addendum was part of a collective bargaining agreement, the court looked at the language of the addendum, the negotiation history of the addendum, and whether the parties' conduct indicated an understanding that the two documents represented one composite group of obligations.¹⁶ The court in *Adkins* determined that the addendum and the collective bargaining agreement were part of the same contract. In examining the language of the addendum, the court noted that the very

¹⁴ The Board generally has considered the first three of these factors in making "clear and unmistakable" waiver determinations. See generally *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992); *Johnson-Bateman*, 295 NLRB at 184-187.

¹⁵ See *Provena*, 350 NLRB at 812, 822 n.19 (quoting *Metropolitan Edison*, 460 U.S. at 708). See also *Verizon North, Inc.*, 352 NLRB 1022, 1022 (2008) (no clear and unmistakable waiver where contractual language regarding "leave of absence" was susceptible of two interpretations).

¹⁶ Cf. *Cutter Laboratories, Inc.*, 265 NLRB 577 (1982) (employer's refusal to sign collective bargaining agreement based on incorporation of side letter detailing health care benefits without caveat language found unlawful where employer and the union evinced their intention to integrate side letter into the agreement).

title of the instrument, ‘addendum,’ suggests an inseparable link to another instrument.¹⁷ Moreover, the court observed that the addendum commences “notwithstanding anything to the contrary in the aforesaid agreement.”¹⁸ The court reasoned that this language tightens the bond between the collective bargaining agreement and the addendum. When reviewing the negotiation history of the addendum, the court concluded that the addendum had no existence separate from the collective bargaining agreement. The addendum was executed at the completion of a collective bargaining agreement and re-executed upon the renewal of the following three collective bargaining agreements. Finally, the court observed that in addition to both the employer and union acknowledging that both documents were part of the same contract, one of the plaintiffs in the case, a laid off journeymen and president of the local union, understood the addendum to be part of the collective bargaining contract as he initially filed a grievance concerning the layoffs, thereby invoking the grievance and arbitration provisions of the collective bargaining agreement.

The Board has found under similar circumstances that documents, such as plan descriptions or summary plan descriptions, which are the primary reference for identifying the medical or life insurance benefits that the employers have agreed to provide, are not incorporated into the collective-bargaining agreement absent specific

¹⁷ 771 F.2d at 832.

¹⁸ Ibid.

agreement to that effect. *Amoco Chemical Co.*, 328 NLRB 1220 (1999), enf. denied (D.C. Cir. 2000).

Treatises have also addressed this same issue:

.. so long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document...

Williston on Contracts § 30.25 (4th ed. 1999)

Impasse

Whether a bargaining impasse exists “is a matter of judgment.” *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for rev. denied, 395 F.2d 622 (D.C. Cir. 1968). The bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Id.* In order for genuine impasse to occur, the parties must have “exhausted all avenues for reaching agreement,” there must be “no realistic possibility that continuation of discussion at that time would have been fruitful,” and both parties must be unwilling to compromise. *Hayward Dodge*, 292 NLRB 434, 468 (1989). *See also Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586 (1999) (finding no impasse, in large part because although union said it could not accept employer’s wage offer, it did not say it could not lower its own wage offer), *enforced*, 237 F.3d 187 (4th Cir. 2000).

B. Respondent Unilaterally Changed its Overtime Policy

There is no question that terms and conditions of employment related to overtime hours are mandatory subjects of bargaining. *Chef's Pantry, Inc.*, 274 NLRB 775 (1985). At least since the beginning of the parties collective bargaining relationship in 2006, Respondent compensated Unit employees with overtime pay for any hours worked more than eight per day or more than 80 hours in a two-week period. This practice was in place for at least 11 years. This is an established past practice. As the Board has held, a practice is established when the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004). Unit employees were always paid for overtime in this manner and could reasonably expect to be paid this way. There is no record evidence that Unit employees were paid for overtime in a different manner. Furthermore, it is evident that this past practice governs how employees will be paid overtime because the collective bargaining provision regarding overtime is silent on how many hours an employee must work in a given time period to be paid for overtime. (GC 2, Article VII, Section 4).

Notwithstanding its obligation to do so, Respondent denied the Charging Party's request to bargain over the change in its overtime policy and implemented the policy on July 13. (GC 8-10). Reaching impasse in bargaining under these circumstances is impossible because no bargaining occurred, the change was announced and implemented

as a *fait accompli* and Respondent's Labor Relations Manager Reed admitted that there was never an impasse at any time. (Tr 80-81).

C. The Charging Party did not waive its right to bargain.

As illustrated in *Provena, infra*, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver when a contract does not specifically mention the action at issue. Applying those factors here, it is apparent that the Charging Party did not clearly and unmistakably waive its right to bargain over the unilateral implementation of the overtime policy. As to the first factor, the language in the agreement, nothing in "Article VII, Section 4, Overtime" identifies how many hours Unit employees are required to work before being paid for overtime. Although Article VII, Section 1(A) allows the Respondent to change to a 40-hour work week, it does not indicate that corresponding changes to the payment of overtime are authorized or indicate the number of hours an employee is required to work in a work day or work week before overtime is paid. (GC 2) Quite simply, the work week and overtime are related, but *separate* issues.

Likewise, in "Article 2 – Management Rights" there is no language that addresses how many hours an employee must work before they are paid for overtime. There is no language that "expressly or by necessary implication" as required by *Provena*,¹⁹ gives the Respondent the right to change overtime. The management-rights clause contains the

¹⁹ *Provena* 350 NLRB at 812 n.19.

kind of broad, general language that the Board has repeatedly held to be insufficiently specific to constitute a clear and unmistakable waiver. See, e.g., *Dorsey Trailer, Inc.*, 327 NLRB 835, 836 (1999), enfd. in rel. part, 233 F.3d 831 (4th Cir. 2000) (contractual right to make “fair and reasonable rules” was “too vague” to constitute a waiver of right to bargain over attendance policy changes); *Hi-Tech Cable Corp.*, 309 NLRB 3, at 4 (1992), enfd. mem. 25 F.3d 1044 (5th Cir. 1994) (“general” contractual right to make “reasonable rules and regulations” insufficient to constitute clear and unmistakable waiver); *Johnson-Bateman*, 295 NLRB at 185 (general right to change rules without reference to specific subject matters is not a “clear, unequivocal, and unmistakable” waiver). See also, *The Bohemian Club*, 351 NLRB 1065, 1067 (2007) (right to modify “methods, means and procedures” is “general language” insufficient to act as waiver).

The third factor, bargaining history, contradicts the contention that the Charging Party waived its bargaining rights on this specific subject. There is no record evidence of the Charging Party conceding this matter in past or current negotiations. The Charging Party’s lead negotiator Hicks testified that the past practice since inception of the collective bargaining relationship was for Unit employees to be paid overtime for any hours worked over eight hours in one day. Hicks’s testimony is corroborated by an email sent by Respondent’s Supervisor Sutton who indicated the same. (Tr 44, GC 6). Hicks further testified that in current negotiations since 2016 the parties have not reached any agreements on Section VII Hours of Work; the parties are currently still bargaining for a

new agreement, and the parties have not reached have not reached impasse. (Tr 44-45, 80-81).

Indeed, Hicks first objected to the changes on June 23 when he first learned of the meeting regarding Respondent's announced intent to changes to the established overtime policy and requested that the matter be handled in bargaining. Nevertheless, in the meeting on June 23 Respondent Edwards announced the change as a *fait accompli*. On July 13, during a bargaining session, Hicks again voiced his objection when the Respondent made its *only attempt ever* to modify the overtime policy and implemented the change on July 9. Hick's objection to the unilateral change negates any claim that the Charging Party consciously yielded its right to bargain about this issue.

As to the fourth factor, there are no other contractual provisions that weigh in favor of a waiver on this subject. The contract contains language in Article VII, Section 4 (GC 2) defining under what circumstances overtime will be assigned and the procedure for assignments, but it is silent on the formula to determine how many hours must be worked in a given day or pay period for Unit employees to be paid for overtime. Nothing in Article II, Management Rights (GC 2) relates to the minimum number of required hours or suggests a managerial right to redefine the scope of how many hours a Unit employee must work to be compensated for overtime.

Further, any Respondent argument that any of its policies regarding the payment of overtime are incorporated by reference lacks merit. There is no specific reference to

any of its underlying overtime pay policies in Articles II and VII regarding the payment of overtime. Respondent's own policies indicate that the terms of the contract apply:

Policy

The DMC will apply uniform pay provisions to its work force. Such provisions will be in effect within all covered operating units. No other pay provisions other than those provided for, or described, herein, will be recognized.

The definitions and procedures enumerated below shall apply unless such definitions or procedures are specified in a contract to which The Detroit Medical Center is a signatory. In such cases, the terms of the contract shall govern for employees covered by that contract and such terms will take precedence over this policy.

(R1, HR 202 Pay Administration Policies Page: 3 of 33)

Respondent's argument is further undercut by the fact that some of its policies were referenced in these same contracts. For example, Article XV provides that employees participate in flexible benefits as other non-bargaining unit members. (GC 2-4).²⁰ However, there is no record evidence that any of its overtime policies were incorporated by reference, were discussed in any collective bargaining sessions at any time since the inception of the collective bargaining relationship, or that the parties specifically intended to include the Respondent's pay policies in any of its collective

²⁰ Counsel for the General Counsel does not concede that *any* of Respondent's policies, those referenced in articles of the contract or any that are not, were ever legally incorporated into any of the past collective bargaining agreements. There is no record evidence that the matters covered by *any* of these policies were ever fully discussed and conceded by the Charging Party at any time during the collective bargaining history of the parties. Respondent's only witness at the hearing, Catherine Reed, was never involved in the past negotiations of these agreements and did not testify about the parties bargaining history.

bargaining agreements. Further, these policies exist separately and apply to all employees who work for the Respondent. There is no evidence that the overtime policy in question was ever created in conjunction with the past Unit collective bargaining agreements, was executed in conjunction with those past agreements, or existed solely because of the agreements. *Adkins v. Times World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), cert denied 474 U.S. 1109 (1986); *Amoco Chemical Co.*, 328 NLRB 1220 (1999).

For all the above reasons, the contractual language, past practice, and bargaining history all fail to establish a clear and unmistakable waiver.

IV. CONCLUSION

Based on the above and the record, Counsel for the General Counsel respectfully requests that the Administrative Law Judge Amchan find that Respondent violated Sections 8(a)(1) and (5) of the Act as alleged in the Consolidated Complaint as amended and recommend the appropriate order to remedy, as noted in the attached addendum, said violations.

Respectfully submitted this 15th day of July 2019.

/s/Robert A. Drzyzga
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**V. ADDENDUMS TO COUNSEL FOR THE GENERAL
COUNSEL'S TRIAL BRIEF**

**ADDENDUM I
PROPOSED ORDER**

1. Cease and desist from

(a) engaging in the conduct described in paragraph 9 and 10, or in any like or related manner interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

(b) engaging in the conduct described in paragraphs 9 and 10, or in any like or related manner, failing and refusing to bargain collectively and in good faith with the Charging Party as the exclusive collective-bargaining representative of the Unit.

2. Take the following affirmative action:

(a) Upon request by the Charging Party, rescind the change regarding the method used for calculating overtime described above in paragraph 10.

(b) Upon request, bargain collectively and in good faith with the Charging Party as the exclusive collective bargaining representative of the Unit regarding wages, hours, and other terms and conditions of employment.

(c) Make employees whole for loss of wages suffered as the result of the unilateral change regarding the method used for calculating overtime, with interest in accordance with Board policy.

(d) Post appropriate notices.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

ADDENDUM II
NOTICE POSTING

(To be printed and posted on official Board notice form)

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, A 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 interfere with, restrain or coerce you in the exercise of the above rights.

WE WILL NOT fail and refuse to recognize and bargain collectively and in good faith with Local 283, International Brotherhood of Teamsters (IBT) (Union) as your exclusive collective bargaining representative in the following appropriate unit (the Unit):

All full-time and regular part-time laboratory assistants, senior laboratory assistants, client service representatives 1 and client service representatives 2, employed by Respondent at its facilities located at Detroit Receiving Hospital University Health Center, 4201 St. Antoine Street, Detroit, Michigan; Harper University Hospital, 3990 John R, Detroit, Michigan; Children's Hospital of Michigan, 3901 Beaubien, Detroit, Michigan; Sinai Grace Hospital, 6071 W. Outer Drive, Detroit, Michigan; 45250 Cherry Hill, Canton, Michigan (Canton PSC); 42700 Garfield Rd, Suite 100, Clinton Township, Michigan (Clinton Township- Stilson Center PSC); 9640 Commerce Road, Suite 105, Commerce Township., Michigan (Commerce-Edgewater PSC); Sinai Guild Medical Office Building (MOB), 1 William Carls Drive, Suite 110, Commerce, Michigan (Commerce- Huron Valley PSC); 14071 East 7 Mile Road, Detroit, Michigan (Detroit- DMC East 7 Mile PSC); 19460 Grand River Ave., Detroit, Michigan (Detroit- Grand River Health Center PSC); 4160 John R, Suite 802, Detroit, Michigan (Detroit-Harper Professional Building PSC); 4727 St. Antoine, Suite 301, Detroit, Michigan (Detroit- Hutzel Professional Building PSC); 3950 Beaubien, Detroit, Michigan (Detroit- Pediatric Specialty Center PSC); 6001 W. Outer Drive, Suite 310, Detroit, Michigan (Detroit- Sinai Grace Professional Building PSC); 4201 St. Antoine, Suite 4-D, Detroit, Michigan (Detroit- University Health Center PSC); 23077 Greenfield, Suite 402, Southfield, Michigan 48075 (Southfield- Advance Building PSC); 27209 Lahser, Building 4, Suite 126, Southfield, Michigan (Southfield - DMC Lahser Campus PSC); 2300 Haggerty Rd, Suite

2060, West Bloomfield, Michigan (West Bloomfield- Lakes Building PSC), excluding office clerical employees, confidential employees, guards and supervisors as defined in the National Labor Relations Act.

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

WE WILL NOT in any like or related manner fail and refuse to bargain collectively and in good faith with Local 283 as the exclusive collective bargaining representative of our employees in the Unit.

WE WILL, if requested by the Union, rescind any or all changes to the method of overtime computation that we made without bargaining in good faith with the Union.

WE WILL pay you for the wages and other benefits lost because of the changes to the method of overtime computation that we made without bargaining in good faith with the Union.

WE WILL meet and confer with the Union's designated representatives for purposes of collective bargaining.

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(Employer)

Dated _____ **By:** _____
: _____ (Representative) (Title)

**VANGUARD HEALTH SYSTEMS OF MICHIGAN (VHS), A
WHOLLY OWNED SUBSIDIARY OF TENET, d/b/a DETROIT
MEDICAL CENTER (DMC)
Case 07-CA-205394**

CERTIFICATE OF SERVICE

I certify that on the 15th day of July, 2019, I e-filed a **COUNSEL FOR THE
GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE**, and
served a copy electronically on the following parties of record:

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