Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley *and* Service Employees International Union Healthcare Pennsylvania, CTW, CLC. Case 04–CA–215690

September 11, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 5, 2019, Administrative Law Judge Geoffrey Carter issued the attached decision, and on February 19, 2020, he issued an errata. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. In addition, the General Counsel filed a limited cross-exception and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to amend the remedy,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley, Kingston, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in unit employees' terms and conditions of employment by implementing its last, best, and final offer at a time when the parties had not reached a valid impasse in bargaining for a collective-bargaining agreement.

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

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

(a) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on November 26, 2017, December 10, 2017, and January 26, 2018.

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

> All full-time, regular part-time and eligible per diem technical employees and service and maintenance employees employed by [Respondent] at its facility located [at] 562 Wyoming Avenue, Kingston, PA in the following job classifications: Assessment Referral Coordinator, Chemical Depend Technician, LPN, Medical Assistant, Mental Health Worker I, Nurse Assistant, Patient Care Coordinator, Psychometrist, Registration Intake Specialist and Unit Secretary.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral implementation of its final offer, with interest, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Make all delinquent contributions to the applicable benefit funds on behalf of unit employees that have not been paid since November 30, 2016, including any additional amounts due the funds, in the manner set forth in the remedy section of the judge's decision.

(f) Make unit employees whole for any expenses ensuing from the failure to make the required contributions to the applicable benefit funds, with interest, in the manner set forth in the judge's decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

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

[2] We amend the judge's remedy to delete the requirement that the Respondent immediately put into effect the terms and conditions of the collective-bargaining agreement that expired in 2016. We require, instead, that the Respondent rescind the unlawful unilateral changes only upon request of the Union.

[3] We have modified the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its Kingston, Pennsylvania facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 26, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 11, 2020

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John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in your terms and conditions of employment by unilaterally implementing our last, best, and final offer at a time when we have not reached a valid impasse in bargaining with the Service Employees International Union Healthcare Pennsylvania, CTW, CLC (the Union) for a collective-bargaining agreement.

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

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on November 26, 2017, December 10, 2017, and January 26, 2018.

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

All full-time, regular part-time and eligible per diem technical employees and service and maintenance

[4] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by [Respondent] at its facility located [at] 562 Wyoming Avenue, Kingston, PA in the following job classifications: Assessment Referral Coordinator, Chemical Depend Technician, LPN, Medical Assistant, Mental Health Worker I, Nurse Assistant, Patient Care Coordinator, Psychometrist, Registration Intake Specialist and Unit Secretary.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral implementation of our final offer, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL make all delinquent contributions to the applicable benefit funds on behalf of our unit employees that have not been paid since November 30, 2016, including any additional amounts due the funds.

WE WILL make our unit employees whole for any expenses ensuing from the failure to make the required contributions to the applicable benefit funds, with interest.

WILKES-BARRE BEHAVIORAL HOSPITAL CO., LLC D/B/A FIRST HOSPITAL WYOMING VALLEY

The Board's decision can be found at www.nlrb.gov/case/04-CA-215690 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Edward Bonett, Esq., for the General Counsel.
Kaitlin Kaseta, Esq., for the Respondent.
Steven Grubbs, Esq., for the Charging Party.

DECISION

GEOFFREY CARTER, ADMINISTRATIVE LAW JUDGE. In this case, the General Counsel asserts that Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act by, in late 2017 and early 2018, unilaterally implementing wage increases and the remaining terms of Respondent's final contract offer when the parties had not yet reached an overall good-faith impasse in bargaining for a successor collective-bargaining agreement. As explained below, I agree with the General Counsel that Respondent violated the Act as alleged.

STATEMENT OF THE CASE

This case was tried in Philadelphia, Pennsylvania, on August 5–6, 2019. The Service Employees International Union Healthcare Pennsylvania, CTW, CLC (Union) filed the charge at issue here on March 1, 2018, and filed an amended charge on May 18, 2018.

On December 28, 2018, the General Counsel issued a consolidated complaint covering this case and Cases 04–CA–143930 and 04–UD–161302. The General Counsel subsequently severed Cases 04–CA–143930 and 04–UD–161302 from this litigation, leaving Case 04–CA–215690 as the only case that the parties litigated in the August 5–6, 2019 trial.

In the consolidated complaint (as amended to limit the allegations to Case 04–CA–215690), the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing wage increases (on about November 26 and December 10, 2017) and its final offer (on about January 17, 2018) without reaching an agreement or bargaining to an overall good-faith impasse for a successor collective-bargaining agreement. Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union, and Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a Delaware limited liability company with an office and place of business in Kingston, Pennsylvania, engages in the business of operating a psychiatric hospital. In the 12 months preceding December 28, 2018, Respondent received gross revenues in excess of $250,000, and purchased and received goods at its Kingston, Pennsylvania hospital facility that were valued

[1] The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: p. 49, l. 25: "11/18" should be "11:18"; p. 50, l. 1: "11/25" should be "11:25"; p. 156, l. 2: "12/17" should be "$12.17"; p. 205, l. 24: "it didn't affect an enlistment" should be "it's an effect on the listener"; p. 207, l. 2: "Cheltenham" should be "health care"; p. 221, ll. 6, 8: "option" should be "doctrine"; p. 223, l. 20: "impasse—" should be "impasse doctrine"; p. 298, l. 23: "12/24" should be "12:24"; p. 301, l. 23: "12/24" should be "12:24"; p. 302, l. 4: "12/24" should be "12:24"; p. 318, l. 7: "4th" should be "14th"; p. 350, l. 21: "salt on arguments that affect" should be "arguments to that effect"; p. 370, l. 7: "ask" should be "add"; and p. 393, l. 3: "the thief" should be "defeat."

[2] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

in excess of $50,000 and came directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Wilkes-Barre Behavioral Hospital Co., LLC

Respondent operates a mental health facility that can serve up to 139 patients in various units, including units for adults, adolescents, children, and patients with a dual diagnosis (a mental health diagnosis coupled with drug and/or alcohol addiction). (Tr. 28–29, 199–202.)

2. Service Employees International Union Healthcare Pennsylvania

Since about 2014, the Union has served as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit at Respondent's facility:

> All full-time, regular part-time and eligible per diem technical employees and service and maintenance employees employed by [Respondent] at its facility located [at] 562 Wyoming Avenue, Kingston, PA in the following job classifications: Assessment Referral Coordinator, Chemical Depend Technician, LPN, Medical Assistant, Mental Health Worker I, Nurse Assistant, Patient Care Coordinator, Psychometrist, Registration Intake Specialist and Unit Secretary. [Hereafter, I refer to this unit as the technical, service and maintenance employees' unit.]

In a collective-bargaining agreement effective from November 21, 2014, to November 30, 2016, Respondent explicitly recognized the Union as the exclusive collective-bargaining representative of employees in the technical, service and maintenance employees' bargaining unit. (GC Exh. 2 (Article 1); see also Tr. 29.) Although the bargaining unit includes 149 employees in several job classifications, mental health technicians comprise approximately 80 percent of the bargaining unit. (Tr. 29–30, 164–165.)

The Union also serves as the exclusive collective-bargaining representative for all full-time, regular part-time and eligible per diem registered nurses (the registered nurses' unit). The registered nurses' unit is a separate appropriate bargaining unit and was covered by the same November 21, 2014 collective-bargaining agreement as employees in the technical, service and maintenance employees' unit, although for the registered nurses' unit the agreement was effective through November 30, 2017. (GC Exh. 2; see also Tr. 29–31.)

B. Bargaining for a Successor Collective-Bargaining Agreement—Overview

In fall 2016, Respondent and the Union began preparing to bargain for a successor collective-bargaining agreement for the technical, service and maintenance employees' unit. Respondent had consultant Robert Sincich serve as its chief negotiator, with assistance on the negotiating team from Respondent's human resources director and input from Respondent's administrators. The Union had director of collective-bargaining Kevin Hefty serve as its chief negotiator, with assistance on the negotiating team from one union organizer and approximately four employees. (Tr. 28, 30–33, 250–251, 255–256, 411.)

Before starting bargaining, Sincich met with Respondent's administration to identify objectives that Respondent hoped to address during contract negotiations. Respondent advised Sincich that its bargaining goals included: increasing wages through an across-the-board increase; working out contract language that would allow for increases to employees' share of health insurance costs; and bifurcation, the term that Respondent used for negotiating separate contracts for the technical, service and maintenance employees' unit and the registered nurses' unit. (Tr. 252–253, 375.)

In preparation for the start of bargaining, the Union sent an information request to Respondent on September 21, 2016. As part of that request, the Union asked Respondent to provide "[a]ny market wage analysis the employer has done or has access to for the job classifications in the bargaining unit." (CP Exh. 2.) Respondent received the Union's information request but did not provide any market wage analysis information because Respondent had not performed such an analysis at that time. (Tr. 437–438.)

C. Summary of Bargaining from October 11, 2016, Through April 25, 2017

On October 11, 2016, the Union and Respondent began bargaining for a successor collective-bargaining agreement. As ground rules for bargaining, the Union and Respondent agreed that they would submit any contract proposals in writing and that any agreement(s) reached would be subject to ratification by bargaining unit members. The Union and Respondent also agreed to use the expiring collective-bargaining agreement as the template for negotiations, and that provisions from the expiring agreement would be included in the new contract unless the parties agreed to changes. (Tr. 33–34, 253; GC Exh. 27, p. 1.) In November 2016, the parties agreed to use a mediator to assist with their bargaining sessions, and Respondent declined the Union's request to extend the expiring contract but promised to continue following the terms and conditions of employment set forth in that contract during negotiations. (Tr. 34–35, 256, 287; GC Exh. 27, p. 39.)

As bargaining progressed, certain issues emerged as points of contention. Those issues, and the parties' bargaining about them in this timeframe, are discussed below.[3]

[3] In this section I only list proposals and "supposals" that reflect an actual or potential change in the party's bargaining position. (See Tr. 119–120, 301 (explaining that Respondent occasionally submitted "supposals" that did not modify its official bargaining position but presented ideas that were intended to spark discussion).) Accordingly, a blank table entry indicates that the party did not submit any new proposals or supposals on the bargaining topic in question.

1. Wages

Both the Union and Respondent agreed that a wage increase was warranted for bargaining unit employees, who earned an estimated median wage of $10 per hour. The parties disagreed, however, about the amount of any wage increases and how the increases should be calculated. (Tr. 145–146.) With that backdrop, the parties exchanged the following wage proposals:

Bargaining Session Date	Union Wage Proposal	Respondent Wage Proposal
October 11, 2016 (R. Exh. 14, p. 1; see also GC Exh. 27, pp. 1, 3; R. Exh. 13, p. 2; Tr. 145.)	$15/hour minimum wage for all employees, coupled with a fair across the board wage increase	
November 9, 2016 (R. Exhs. 4, pp. 6–7; 17, p. 1; see also GC Exh. 27, pp. 9, 12; Tr. 146.)	$3/hour increase in 2016 $1/hour increase in 2017 $1/hour increase in 2018	1% increase in 2016 1% increase in 2017 1% increase in 2018
November 16, 2016 (R. Exh. 22, p. 1; see also GC Exh. 27, p. 28.)	$2/hour increase in 2016 $1/hour increase in 2017 $1/hour increase in 2018	
November 21, 2016 (R. Exh. 25, p. 1; see also GC Exh. 27, p. 36.)	$1.50/hour increase in 2016 $0.75/hour increase in 2017 $0.75/hour increase in 2018	
December 8, 2016 (R. Exhs. 27, p. 5; 28, p. 1; see also GC Exh. 27, p. 41; Tr. 376.)	$1.50/hour increase in 2016 $0.50/hour increase in 2017 $0.50/hour increase in 2018	1.25% increase in 2016 1.25% increase in 2017 1.25% increase in 2018
April 25, 2017 (R. Exhs. 5, pp. 5–6; 35, p. 1; see also Tr. 376–377.)	$0.50/hour increase in 2016 $0.50/hour increase in 2017 $0.50/hour increase in 2018	1.75% increase upon ratification 2.0% increase in 2017 2.0% increase in 2018

2. Health insurance

In the expiring collective-bargaining agreement, Respondent was not permitted to increase the dollar amount that bargaining unit employees paid towards health insurance premiums and benefit levels (e.g., the cost associated with having coverage for the employee only, the employee and spouse, or employee and family). (GC Exh. 2 (Article 12, Sec. 2).) The Union hoped to have a similar rule in the successor agreement, while Respondent hoped to work out contract language that would give it more flexibility to increase the employees' share of health insurance costs. The parties exchanged the following proposals regarding health insurance:

Bargaining Session Date	Union Health Insurance Proposal	Respondent Health Insurance Proposal
October 11, 2016 (R. Exh. 14, p. 1; see also GC Exh. 27, p. 1; R. Exh. 13, p. 2.)	All employee health insurance costs frozen during contract term	
November 9, 2016 (R. Exhs. 4, p. 9; see also GC Exh. 27, p. 13.)		Respondent may increase health insurance costs at its discretion, but must provide 30 days advance notice
November 21, 2016 (R. Exh. 25, p. 1; see also GC Exh. 27, p. 36.)	Premium increases capped at 5% each year Deductible, co-insurance and out of pocket maximum—increases capped at 5% each year Co-pay increases capped at $5 each year	
December 8, 2016 (R. Exh. 27, p. 8.)		Premium increases capped at 20% each year Deductible, co-insurance and out of pocket maximum—increases capped at 10% each year Co-pay increases capped at $5 each year

Bargaining Session Date	Union Health Insurance Proposal	Respondent Health Insurance Proposal
April 25, 2017 (R. Exhs. 5, pp. 8–9; 35, p. 1; see also Tr. 144.)	Premium increases capped at 9% each year Deductible, co-insurance and out of pocket maximum—increases capped at 6% each year Co-pay increases capped at $5 each year	Premium increases capped at 12% each year Deductible, co-insurance and out of pocket maximum—increases capped at 7% each year Co-pay increases capped at $5 each year

3. "Pulling" employees to other facility units

Typically, mental health technicians are assigned to work in a specific facility unit on a regular basis (such that an employee would work regularly in, say, the adolescent unit). If another unit needs additional staffing, however, Respondent will "pull" (or float) employees from their regular unit to work in the unit that needs additional staff. The expiring collective-bargaining agreement did not have any language concerning pulling. (Tr. 162–164 (noting that while employees in other job classifications might be pulled, the issue of pulling primarily affected mental health technicians because they were assigned to specific units).)

During bargaining for the successor agreement, the Union proposed that the parties work out contract language that would prioritize keeping more senior employees on their regular units because having experienced employees stay on their units would be better for patient safety (since patients would receive care from employees with whom they are familiar), and because employees with more seniority should be rewarded by not being pulled to other units. Respondent expressed doubt about the need for a policy on pulling, and also voiced concern about any policy on pulling that would place the burden on the newest employees and thereby create problems with employee retention. (GC Exh. 27, pp. 16, 20–22, 27, 29, 35, 42–43, 45, 47; R. Exh. 18, pp. 2, 4–5; Tr. 160, 274.) The parties exchanged the following proposals on pulling:

Bargaining Session Date	Union Pulling Proposal	Respondent Pulling Proposal
October 11, 2016 (R. Exh. 14, p. 1.)	Pulling should occur in the following order: 1. Volunteers 2. Agency or contract employees 3. Employees who are not working on their regularly assigned unit (with employees working on a different shift going first, followed by per diem employees and then by regular employees) 4. Employees who are on their regularly assigned unit (with employees working on a different shift going first, followed by per diem employees and then by regular employees, each in order of seniority)	
November 9, 2016 (R. Exh. 17, pp. 1–2; see also GC Exh. 27, p. 13.)	Pulling should occur in the following order: 1. Volunteers 2. Agency or contract employees 3. Employees who are not working on their regularly assigned unit (with per diem employees going first, followed by employees working on a different shift, followed by regular employees, each in order of seniority) 4. Employees who are on their regularly assigned unit (with per diem employees going first, then employees working on a different shift, and then regular employees, each	

Bargaining Session Date	Union Pulling Proposal	Respondent Pulling Proposal
	in order of seniority)	
November 16, 2016 (R. Exhs. 21, p. 3; 22, p. 2; see also Tr. 280–282.)	Pulling should occur in the following order: 1. Volunteers, starting with the most senior employee 2. Agency or contract employees 3. Employees who are not regularly assigned to work in the unit, starting with the least senior employee 4. Employees regularly assigned to the unit, starting with per diem employees, and then regular employees (each starting with the least senior employee)	Pulling should occur in the following order: 1. Agency or contract employees 2. Per diem employees, on a rotating basis by seniority 3. Full-time and part-time employees on a rotating basis by seniority
November 21, 2016 (R. Exhs. 24, p. 2; 25, p. 2; GC Exh. 27, p. 36.)	Pulling should occur in the following order: 1. Agency or contract employees 2. Volunteers in the unit 3. Employees from other units; 4. The least senior per diem employee 5. The least senior regular employee (full-time or part-time)	Pulling should occur in the following order: 1. Agency or contract employees 2. Volunteers in the unit 3. Per diem employees, on a rotating basis by seniority 4. Full-time and part-time employees on a rotating basis by seniority
March 9, 2017 (R. Exh. 32, p. 4.)		Pulling should occur in the following order: 1. Agency or contract employees 2. Volunteers in the unit 3. Employees from other units 4. Per diem employees, on a rotating basis by seniority 5. Full-time and part-time employees on a rotating basis by seniority

4. Bargaining progress on other topics

The parties tabled some bargaining issues in this timeframe. For example, the parties did not resolve Respondent's request to bargain separate contracts for the technical, service and maintenance employees and registered nurses. (See R. Exh. 4, p. 2 (Respondent's November 9, 2016 proposal removing registered nurses from the union recognition language in the contract); GC Exh. 27, pp. 16, 48 (bargaining notes indicating that the Union preferred a single contract covering both bargaining units, while Respondent preferred a separate contract for registered nurses); Tr. 141–142.) Similarly, the parties did not resolve the Union's request for contract language that would ensure that employees would not have to work the same holidays in consecutive years (Respondent maintained that contract language was not necessary to address this issue). (R. Exhs. 14, p. 2; 33, p. 2; Tr. 169–170.)

By contrast, the parties did work out tentative agreements on a number of topics, including but not limited to: procedures for termination of seniority (Article 6.4); procedures and order for reducing staffing due to low census in a hospital unit (Articles 9.1–9.2); procedures for employees to use paid sick time (Article 17.3); accrual of seniority while an employee is on leave (Article 19.5); no strike language (Article 29.1); updated language regarding the labor-management committee (Article 30.1–30.2); and procedures for resolving disagreements about whether a union delegate abused the right to represent employees in disciplinary meetings and investigate and process grievances during work time (Memorandum of Agreement). (See R. Exhs. 4–5, 19, 21, 33; see also GC Exh. 2 (expired collective-bargaining agreement).)

Finally, the parties made progress with developing language covering new employee orientation training. The Union initiated discussions on this topic by requesting that new employees receive training for multiple hospital units so the employees would have a foundation of knowledge if they were ever assigned to a different unit (e.g., as a result of being pulled). Although Respondent questioned whether such training was necessary as a part of orientation, by April 2017 each of the parties expressed support for the proposition that shortly after contract ratification, the patient care committee at the hospital would consider what type of training would be appropriate to orient new employees. (R. Exhs. 5, pp. 22–23 (Respondent's April 25, 2017 proposal);

14, p. 2 (Union's October 11, 2016 proposal); 35 (Union's April 25, 2017 package proposal including a tentative agreement to Respondent's April 25, 2017 proposal about employee orientation); see also R. Exh. 18, p. 3 (Respondent's November 10, 2016 bargaining notes, which question the need for orientation training); Tr. 165–169, 274, 291.)

Notwithstanding the progress with negotiations, Respondent asserted on more than one occasion that it was disappointed with the Union's movement towards Respondent's proposals. Respondent expressed this concern for the first time in the November 16, 2016 bargaining session (the fourth bargaining session), and reiterated its concern on November 21, 2016, and January 13, 2017. (GC Exh. 27, pp. 31, 35, 44; R. Exhs. 20, p. 2; 29, p. 1; Tr. 279, 293.) The Union also expressed some frustration with the progress of negotiations in a January 3, 2017 flyer that advised bargaining unit members that the parties made "some positive changes to several non-economic issues" in the contract but were "still far apart in regards to [] two of the most important issues: wages and healthcare." (R. Exh. 6; Tr. 173–174.)

D. Bargaining from May 31, 2017, Through August 25, 2017

1. May 31, 2017 bargaining session

In the May 31, 2017 bargaining session, the parties took stock of where things stood with bargaining. Respondent acknowledged that the parties had moved closer to each other on health insurance and wages and noted that the parties were still in a holding pattern on bifurcating the contract into separate documents for each bargaining unit, working out contract language about employees working the same holidays in consecutive years, and agreeing to a side letter about orientation training. Respondent also suggested that the parties drop their respective proposals on pulling such that the issue would not be addressed at all in the contract. The parties did work out additional tentative agreements during the meeting, including agreements on: payroll deductions for union dues (Article 3.3); payroll deductions for the Union's political action fund (Article 3.7); penalties that would apply if Respondent failed to remit union dues or other funds in a timely manner (Article 3.8); procedures for steps 3 and 4 of the grievance and arbitration process (Article 22.5); and the extent of the Union's right to post information on the union bulletin board at the facility (Article 28.5). (R. Exh. 36, pp. 1–2, 4; Tr. 311–312; see also R. Exhs. 32 (Respondent's March 9, 2017 "supposal" containing the language leading to the tentative agreements discussed in this section); 33, p. 2 (Union's March 31, 2017 proposal, including a package proposal on union activities that expressed agreement to certain aspects of Respondent's March 9 supposal).)

In the afternoon, the Union asked the employee members of its negotiating team to provide some information in support of the Union's wage proposal. As part of that discussion: a patient care coordinator noted that she had a bachelor's degree in psychology but earned $11.06 per hour; a mental health technician described his job as low-paying even with 13 years of experience working for Respondent; and a unit secretary stated that while she had 20 years of experience and handled various tasks, her hourly wage was only 30 to 50 cents more than the starting wage that other hospitals offered. (R. Exh. 36, p. 5.)

2. June 5, 2017—Union plans for informational picketing

On June 5, 2017, the Union sent a letter to Respondent to provide notice that the Union planned to engage in informational picketing for 3 hours on June 15, 2017. The Union planned the informational picketing to express its frustration with bargaining at the time. (R. Exh. 12; Tr. 175, 246–247.)

3. June 14, 2017 bargaining session

On June 14, 2017, in a relatively brief session, Respondent presented the Union with two supposals for consideration. Each of the supposals proposed new contract language concerning union access. Specifically, for the first time Respondent proposed that: Union representatives obtain approval from Respondent's director of human resources at least 2 business days before visiting the facility to administer the collective-bargaining agreement (Article 28.2); and no union business meetings be held at Respondent's facility (Article 28.8). Respondent proposed the additional restrictions on union representative visits and union meetings because, in Respondent's view, union representatives were not providing adequate or proper notice of visits and meetings.[4] (R. Exhs. 38–39; Tr. 36–37, 170, 315–321, 393–394, 428–431, 433–434; see also R. Exh. 37; GC Exh. 2 (Articles 28.2 and 28.8) (expiring contract provisions permitting Union representatives to visit the facility after informing Respondent of the visit and permitting the Union to conduct a reasonable number of union business meetings at the facility).)

Respondent's supposals also included two different approaches to wages increases. In one supposal, Respondent reiterated its offer of a 1.75 percent wage increase after ratification, followed by 2 percent wage increases in 2017, and 2018. (R. Exh. 38 (Article 11); see also Tr. 121–122, 146–147, 194, 315–317.) In the other supposal, Respondent offered a 1.25 percent wage increase after ratification, followed by 1.5 percent wage increases in 2017, and 2018, but also offered a memorandum of agreement promising to review the wages of mental health technicians within 90 days of contract ratification and, at Respondent's discretion, make wage adjustments after the wage review. (R. Exh. 39 (Article 11 & Memorandum of Agreement); see also Tr. 121–122, 146–147, 194, 315–317, 427–428.)

4. July 10, 2017 bargaining session

The July 10, 2017 bargaining session began with some confusion by the Union about whether it was its turn to provide a proposal (or a response to Respondent's proposals). After the parties (with input from the mediator) clarified that it was indeed the Union's turn, the Union took some time to caucus. (R. Exh. 40, p. 1; Tr. 120–121, 323–324, 415.)

Once the parties convened for a face to face discussion, the Union suggested that Respondent conduct a wage review as soon as possible (instead of waiting until after ratification, as indicated in one of Respondent's June 14 supposals) so the parties could

[4] On September 28, 2017, Respondent filed a grievance asserting that, on September 21, 2017, a union representative visited the facility without first notifying Respondent. (CP Exh. 1; Tr. 429–431.) There is no evidence that Respondent filed any similar grievances before September 28, 2017.

then negotiate with the wage review results in hand. In support of its request, the Union stated that higher wages were needed to improve employee retention, since Respondent's employees earned significantly less than their counterparts at two other hospitals in the area and could earn a comparable or higher hourly wage if they worked at companies like Lowe's or Home Depot. Respondent asked the Union if it had a proposal to offer, to which the Union stated that it would caucus and let Respondent know. (R. Exh. 40, pp. 1–2; GC Exh. 5, p. 1; Tr. 39–40, 118–119, 158, 189, 324–325, 414–415; see also Tr. 40 (noting that the Union wanted Respondent to conduct a wage review for mental health technicians because employees in that position comprised 80 percent of the bargaining unit, but also noting that the Union believed bargaining unit members in all positions were underpaid).)

After a caucus of approximately 30 minutes, the Union presented Respondent with a new proposal. The Union presented two options on wages: (a) increase mental health technician wages to a base rate of $12.17 per hour; increase all current employee hourly wages by $1.77 per hour; and provide a 2 percent wage increase on December 1, 2018; or (b) provide $0.50 wage increases on July 1 and December 1, 2017, and on December 1, 2018. For health insurance, the Union proposed capping: premium increases at 10 percent each year; deductible, co-insurance and out of pocket maximum at 6 percent each year; and co-pay increases at $5 each year. The Union rejected Respondent's proposed restrictions on union representative visits and union meetings and did not agree to bifurcating the contract.[5] (GC Exh. 5, pp. 1–2, 4; R. Exh. 40, pp. 2–3; Tr. 38–39, 41–42, 189.)

After another caucus (lasting approximately 1 hour and 50 minutes), Respondent asserted that it (Respondent) had fewer moves that it could make after 13 bargaining sessions. Respondent also presented its June 14 contract supposals as on-the-record proposals. (R. Exh. 40, p. 3; GC Exhs. 3–4; 5, pp. 2–3; Tr. 38, 45, 120, 122–124, 144–145, 323, 325.)

5. July 2017—Respondent's frustration with the Union's bargaining practices

On July 23, 2017, Hefty emailed Sincich to advise that the Union would need to cancel the parties' July 25 bargaining session because Hefty was involved in an unrelated NLRB hearing that Hefty expected would carry over into timeframe of the bargaining session. Hefty asked Sincich to let him know what other dates Respondent might be available to resume bargaining. Sincich replied to Hefty on July 24 with an offer to meet later in the afternoon on July 25. When Hefty did not respond, Sincich emailed Hefty again on July 25 to assert that the parties should still meet on July 25 because a union organizer who was part of the Union's negotiating team planned to visit Respondent's facility that evening to meet with bargaining unit members. Hefty did not respond to Sincich's July 25 email, and the parties did not meet for bargaining on July 25. (R. Exhs. 1, 41–42; Tr. 124–128, 184, 325–329, 435.)

In around the same timeframe, Respondent became increasingly frustrated with the Union's frequent practice of using the beginning of bargaining sessions to caucus and prepare proposals or responses to proposals (instead of arriving at the session with a proposal or response in hand).[6] The Union's caucuses at the start of bargaining sessions (up to the July 10, 2017 session) generally lasted between 10 and 45 minutes, with the exception of the following sessions: October 11, 2016 (1 hour and 30 minutes); November 9, 2016 (2 hours and 41 minutes); and July 10, 2017 (1 hour and 55 minutes). Both the Union and Respondent took caucuses and breaks of up to 4 hours or more in the middle of bargaining sessions to consider or prepare proposals (among other things) and were open to meeting face to face without exchanging proposals if the other party requested. (R. Exh. 15; Tr. 111–117, 190–192, 196, 202–203, 207–208, 259–262, 267–268, 278–279, 301–302, 304–305, 394, 408–409, 422; see also Tr. 33, 191, 203, 255 (noting that the rooms that the parties used for bargaining and caucuses were across the hall from each other); R. Exhs. 16, 18, 20, 23, 26, 29–30, 36, 40 (noting various bargaining session breaks that lasted between 1 hour and 45 minutes and 4 hours and 28 minutes).)

6. August 25, 2017 bargaining session

On August 25, 2017, the parties met for another bargaining session with a scheduled start time of 10:00 a.m. Initially, the Union's negotiating team caucused to prepare its next proposal, which it presented to Respondent at 11:00 or 11:10 a.m. On the topic of wages, the Union proposed that Respondent provide three $0.59 wage increases (August 2017, November 1, 2017, and November 1, 2018) to all bargaining unit employees, to achieve a total wage increase of $1.77. (The Union proposed a $1.77 increase because that would match the hourly wage that mental health technicians received at Moses Taylor Hospital, another psychiatric hospital in the area.) (R. Exhs. 15; 43, pp. 1–2; GC Exh. 7, p. 1; Tr. 48–49, 128–129, 331.)

In the discussion that followed, Sincich asked why the Union was proposing a wage increase for all bargaining unit members if the wage rates for mental health technicians were the real issue. Hefty responded that the wage rates for all bargaining unit members were too low and noted that the parties could compare the hourly wages of Respondent's patient care coordinators to the hourly wages of patient care coordinators across the United States. The Union added that it would be willing to adjust the dates of the proposed $0.59 wage increases to August 2017, September 1, 2018, and September 1, 2019. (GC Exh. 7, pp. 1–2; R. Exh. 43, p. 2; Tr. 49–50, 330–332, 416.)

After another caucus, Respondent presented the Union with

[5] The Union also indicated that it would accept Respondent's June 14 proposals for Articles 28.4 and 28.5 of the agreement. The agreements on those articles were already in place, however, as the updated version of Article 28.4 simply incorporated approved language from a memorandum of agreement about procedures for resolving disputes about union delegate work on work time, and the parties agreed to Article 28.5 in the May 31 bargaining session. (See Findings of Fact (FOF), Sec. II(C)(4), (D)(1), supra; Tr. 320 (discussing Article 28.4).)

[6] Occasionally, bargaining sessions did not start at the scheduled time because part or all of the Union's negotiating team was delayed in arriving. (See, e.g., R. Exh. 34 (noting a 37-minute delay on April 25, 2017); Tr. 308 (same); see also Tr. 265 (generally asserting that there were occasions where part or all of the Union's negotiating team were not present at the scheduled start time for bargaining).) To the extent that any such late-arrival delays occurred, the length of those delays is incorporated in the times outlined in this section.

its final offer. Respondent generally held its position on most contract issues, but combined its previous wage proposals into a single proposal of: a 1.75 percent wage increase after ratification; 2 percent wage increases in 2017, and 2018; and a memorandum of agreement promising to review the wages of mental health technicians within 90 days of contract ratification and, at Respondent's discretion, make wage adjustments after the wage review. Respondent also modified its position on union access, insofar as Respondent proposed (in Article 28.2) that Union representatives obtain approval from Respondent's director of human resources at least 24 hours before visiting the facility. (GC Exh. 6 (Articles 11, 28.4; Memorandum of Agreement Re: wage ranges for mental health technicians); Tr. 47–48, 332.)

In connection with its final offer, Respondent stated that time was of the essence and that Respondent reserved the right to implement its final offer if the Union did not accept the offer before 5:01 p.m. on August 28, 2017. Respondent took the position that time was of the essence because: the parties were approaching a year of bargaining; the Union canceled the July 25 bargaining session and was not (in Respondent's view) prepared for bargaining at the designated starting times for bargaining sessions; and Respondent believed it was important to address wage increases since employees had not had an increase for some time. (GC Exh. 6, p. 1; R. Exh. 43, p. 3; Tr. 50, 336–337; see also GC Exh. 2 (Article 11.1(b)) (indicating that the last wage increase that the bargaining unit received was on December 1, 2015).)

Hefty advised Sincich that the Union's negotiating committee rejected Respondent's final offer but remained prepared to continue bargaining. Among other concerns about the final offer, the Union objected to the idea of Respondent conducting a wage review and reserving the right to do whatever it (Respondent) wanted to with the wage review results after the contract was already in effect. In the Union's view, Respondent should instead conduct a wage review and then use the results to inform further bargaining with the Union about wages (as part of negotiations for a successor collective-bargaining agreement). The Union offered, however, to present Respondent's final offer to the bargaining unit for a ratification vote on August 29, 2017, and Respondent agreed to that timetable for such a vote. (Tr. 50–57, 333–334; R. Exh. 44; GC Exh. 7, p. 3.)

E. August/September 2017—The Ratification Vote and Aftermath

On August 29, 2017, the Union provided bargaining unit members with a summary of Respondent's final offer and held a ratification vote. Bargaining unit members voted to reject Respondent's final offer. Later on August 29, the Union posted notices at the facility about the results of the ratification vote. (Tr. 55–58, 129, 205, 421; GC Exh. 8.)

On September 5, 2017, Sincich emailed Hefty to advise that he (Sincich) had not been informed about the results of the ratification vote. (R. Exh. 2; Tr. 130–131, 338.) Hefty replied to Sincich on September 12, stating that the bargaining unit rejected Respondent's final offer and that the Union was prepared to resume bargaining and believed there was room to reach an agreement. (GC Exh. 9; Tr. 129–130, 338–339.) On September 18, Sincich responded as follows:

> To be clear, your union has rejected the Hospital's Last and Final proposal, dated August 25, 2017.
>
> The Hospital finds it difficult to believe there is "room for the parties to continue bargaining" when, in fact, there has been no indication, nor record, of any substantive modification of your position over the last three (3) bargaining sessions. Rather, your Union has continued to be evasive in its efforts to reach an agreement.

(GC Exh. 9; Tr. 131–132, 339; see also R. Exh. 11 (September 19 Union flyer stating that: by making a final offer Respondent indicated that the offer was the closest it could come to reaching an agreement; and the bargaining unit rejected the final offer as inadequate and would wait for new bargaining dates and see what Respondent did next); Tr. 243–245.) The parties nevertheless agreed to meet at 10:00 a.m. on October 6, 2017, for another bargaining session. (GC Exh. 9; Tr. 59, 132, 339.)

F. October 6, 2017 Bargaining Session

On October 6, the parties met for another bargaining session. At around the scheduled start time of 10:00 a.m., the Union requested a caucus that ended at 12:21 p.m. Once the parties met face to face, Sincich expressed frustration about not being notified promptly about the ratification vote results and about the amount of time that it took for the parties to resume bargaining. (R. Exh. 45, p. 1; GC Exh. 10, p. 2; Tr. 132–133, 341.)

Next, the Union reiterated its concern that employee wages were too low. The Union also presented a contract proposal that included the following ideas:

> (a) health insurance: cap premium increases at 10 percent each year; cap deductible, co-insurance and out of pocket maximum at 7% each year; and cap co-pay increases at $5 each year;
>
> (b) wages: 1–year contract that would include a $0.59 raise for all bargaining unit employees;[7]
>
> (c) pulling order: agency or contract employees; volunteers in the unit; employees from other units; per diem employees on a rotating basis by seniority; and full-time and part-time employees with less than 5 years of experience on a rotating basis by seniority;[8]
>
> (d) union access (Article 28.2): union representatives must inform Respondent's director of human resources at least 24 hours in advance of a proposed visit to the facility; and

[7] Both Hefty and Sincich agree that the Union proposed a shorter contract because it was proving to be difficult to work out a 3-year agreement. (Tr. 139, 342; R. Exh. 45, p. 2.) During trial, Hefty explained that the Union proposed a 1-year contract to secure a wage increase in the short term and use the contract year for a wage review and further negotiations. (Tr. 61.) Based on the evidentiary record, however, I do not find that Hefty provided that rationale to Respondent during the October 6 bargaining session. (See R. Exh. 45 (October 6 bargaining notes that do not mention the 1-year contract rationale that Hefty provided at trial); GC Exh. 10 (same); Tr. 343.)

[8] Approximately 70 percent of mental health technicians had less than 5 years of experience (and thus would be available for pulling under the Union's proposal). (Tr. 62, 162–164.)

(e) jury duty/witness leave (Article 20): tentative agreement to Respondent's proposal.

(GC Exh. 10, p. 1; Tr. 61–63, 138–139, 145, 340–342; see also R. Exh. 45, p. 2; GC Exh. 10, p. 2.)

After a 2-hour and 13-minute caucus, Sincich told the Union that Respondent believed it was time to take care of its employees instead of haggling over issues like pulling. In particular, Sincich indicated that employees had not received a wage increase for nearly 2 years. Accordingly, Respondent made the following proposal:

(a) Wages: implement a 1.75 percent wage increase on October 15, 2017; implement a 2 percent wage increase after November 30, 2017; and review the wages of mental health technicians and, at Respondent's discretion, make wage adjustments after the wage review; and

(b) Continue to bargain all other items in conjunction with bargaining that would be starting for the registered nurses' unit's successor collective-bargaining agreement.

(R. Exh. 45, pp. 2–3; GC Exh. 10, p. 3; Tr. 63, 195, 343, 369–370, 377–378, 436.) Hefty responded that the Union would get back to Sincich about the proposal, and then the bargaining session concluded. (GC Exh. 10, p. 3; Tr. 63, 195–196, 343–344; see also Tr. 186.)[9]

G. November/December 2017—Respondent Unilaterally Implements Wage Increases

By October 23, 2017, Respondent had decided that the parties were at impasse and that it was going to proceed with implementing the wage provisions of its August 25, 2017 final offer. (GC Exh. 24; Tr. 380, 385–387, 419.) Consistent with that plan, on December 1, 2017, Respondent notified the Union of the following wage increases:

(a) A 1.75 percent wage increase for all bargaining unit employees, effective November 26, 2017;

(b) A 2 percent wage increase for all bargaining unit employees, effective December 10, 2017; and

(c) Wage increases for certain mental health technicians based on a wage review that Respondent conducted for that classification, with the wage increases effective December 10, 2017.

(GC Exhs. 11–13; see also Tr. 68–70, 73, 197, 347, 378.)

H. December 2017—the Union Responds to the Wage Increases

1. December 1, 2017 information request

On or about December 1, 2017, Hefty emailed Sincich to request information about the wage review that Respondent conducted for mental health technicians and the wage increases that Respondent implemented (or would be implementing) based on that review. Respondent answered on December 7 by providing a list of all mental health technicians and their original and new wage rates; and a chart showing the average annual wages for certified nurse assistants in the northeast region. (GC Exhs. 14, 25, 26 (indicating that before the wage increases and wage review, many mental health technicians were earning an hourly wage of $10.40); Tr. 70–71, 348–349.)

Later on December 7, Hefty emailed Respondent to ask the following question: "How did Respondent decide what to give each employee as a final rate? Is there a new scale or please explain how it was calculated." On December 8, Respondent explained that it established a new starting/base wage of $11.51 and a maximum wage of $16.61 and assigned specific wages within that range to individual mental health technicians based on their hire date. (GC Exh. 14; Tr. 70–72, 98.)

In practice, the wages that Respondent assigned to mental health technicians based on the wage review ranged from $11.51 to $13.89. Some mental health technicians did not receive a wage increase based on the wage review but did receive the 1.75 and 2 percent across the board increases. (GC Exhs. 25, p. 1; 26; Tr. 77, 185–186.)

2. Union flyer about wage increases

After receiving Respondent's December 1, 2017 letters about the forthcoming wage increases, the Union posted a flyer that stated as follows:

When we fight, we win!

On October 20th, we went on strike to demand better pay, increased training and safety and improved patient care and respect. While we are still in negotiations with CHS, we have some good news for all of the dedicated staff who have been working so hard to win a stronger contract:

We're finally getting a raise! Our chief negotiator received notice from CHS that the Hospital will be giving employees the following wage increases: [table showing 1.75 and 2 percent wage increases for the bargaining unit and a market adjustment for mental health technicians].

This is proof that when we stand together and fight as a union, we can win! Working together, we really do have the power to make improvements and hold CHS accountable to what's right by us and our patients. While we enjoy this small victory, it's important to remember that the fight's not over until we win serious improvements in our legally binding contract. Great work, team, and keep up the fight!

(GC Exh. 15 (emphasis omitted); Tr. 74–75, 176–179; see also Tr. 67–68, 175–176 (noting that the Union conducted a 1-day strike on October 20, 2017).)

3. Union letter to Respondent about wage increases

On December 20, 2017, Hefty sent Sincich a letter stating as follows (in pertinent part) about the wage increases and the status of bargaining:

[9] I do not credit Sincich's testimony that he advised the Union on October 6 that the parties were at impasse and that Respondent would therefore implement the wage provisions of its August 25 final offer. (Tr. 343, 384–385.) Sincich's October 6 bargaining notes tell a different story. Specifically, Sincich's October 6 bargaining notes: explicitly state that Respondent proposed that the parties agree to Respondent's wage increases and wage review and continue bargaining other items; and say nothing about any declaration of impasse. (R. Exh. 45, pp. 1–3.) I have credited those portions of Sincich's October 6 bargaining notes.

> I am in receipt of your December [1] letters in which you notify the Union that [Respondent] plans to implement wage increases for bargaining unit employees of 1.75% and 2% in successive pay periods.
>
> The Union maintains that we are not at impasse and remains ready and willing to negotiate wages, hours and other terms and conditions of employment including at our scheduled session on December 20th. While it is premature and improper to unilaterally implement terms of a proposed contract, the Union does not seek the reversal of these wage increases. We believe these increases are a good start towards increasing wages to where they need to be.
>
> The Union's acquiescence in this instance is on a non-precedent setting basis and in no way reflects our position if [Respondent] attempts to implement other terms and conditions of employment without the agreement of the Union.

(GC Exh. 16; Tr. 75, 360–361.)

I. December 20, 2017 Bargaining Session

On December 20, the parties met for another bargaining session.[10] Early in the meeting, Hefty stated that Respondent implemented wage increases when the parties were not at impasse but added that the Union did not object to the increases and would not ask for them to be reversed. Sincich expressed unhappiness about the flyer that the Union posted concerning the wage increases because the Union took credit for the increases. (GC Exh. 17, p. 1; R. Exh. 46, p. 1; Tr. 76, 153, 346–347.)

Next, Hefty reiterated that the Union needed information about the wage increases and the mental health technician wage review so the Union could adjust its wage proposals to account for what had occurred with the recent wage increases. Hefty added that Respondent should review the wages of bargaining unit employees in other job classifications. In support of that request, members of the Union's negotiating team explained (among other things) that: unit secretaries were taking on additional job duties without receiving any increase in pay; patient care coordinators were now earning less than mental health technicians even though the patient care coordinator position required a bachelor's degree; and admissions staff were paid low wages and had poor retention rates. The Union also provided Respondent with petitions signed by patient care coordinators and unit secretaries who asked Respondent to conduct wage reviews for their positions. (GC Exhs. 17, pp. 1–2; 19; R. Exh. 46, p. 2; Tr. 76–77, 82–83, 98, 148–151, 159, 189–190, 193, 348, 356–357, 442.)

Sincich expressed surprise and frustration upon hearing the Union's requests about wages, asserting that for months the Union had only been focused on mental health technician wages. Sincich added that he found it insulting that the Union took credit for the wage increases that Respondent implemented, given that (in Sincich's view) the Union had been stuck on pulling as an issue. The Union responded that it had been seeking raises for all employees throughout bargaining. (GC Exh. 17, p. 2; R. Exh. 46, p. 3; Tr. 357–359, 440.)

Turning to the topic of pulling, Sincich stated that he could not imagine a scenario where Respondent would agree to always having the least senior employee be the one to be pulled because that would create an employee retention issue. An employee member of the Union's negotiating team replied that seniority should count for something when deciding which employees to pull to other units. (GC Exh. 17, p. 2; R. Exh. 46, p. 3; Tr. 359–360.)

Towards the end of the session, the Union presented Respondent with another contract proposal. The proposal included the following new items:

> (a) Wages: "Increase all employees' wages by an amount to be revised and proposed later. The Union renews its request for how the Mental Health Tech Wage adjustments were computed and proposes a wage review for the Admissions, Patient Care Coordinators, Unit Secretaries"; and
>
> (b) Pulling order: agency or contract employees; volunteers in the unit; employees from other units; per diem employees on a rotating basis by seniority; and full-time and part-time employees with less than 6 years of experience on a rotating basis by seniority.

(GC Exh. 18; see also GC Exh. 17, p. 3; R. Exh. 46, p. 5; Tr. 80–81, 86–87 (noting that the revised pulling proposal made approximately five additional employees eligible for pulling), 148, 151–152, 171–172, 345, 356.)

J. Respondent's January 2, 2018 Letter to the Union

Sincich answered Hefty's December 20, 2017 letter on January 2, 2018 with a letter that stated as follows concerning the issue of impasse:

> On October 6, 2017, and again on December 1, 2017, we notified you that we were proceeding to implement certain compensation components of the Hospital's Final Offer of August 25, 2017.
>
> On December 20, 2017, several weeks after being notified of our implementation, you forwarded a most untimely, disingenuous letter asserting that the parties are not at impasse. Your belated effort to disavow the obvious, and to evade the fact of the matter—that we are at impasse—is pointless. Any duty to continue bargaining with your union was suspended at the time of our notifications referenced above, and you cannot rewrite our bargaining history through a vague, dissembling representation that you remain "ready and willing to negotiate." We recognize, of course, that even though you are straining to avert the consequences of impasse, you are trying to have it both ways, conceding that you are not seeking reversal of the wage increases about which you were notified. Nonetheless, it will be intriguing to see how you might actually seek such a reversal in the wage improvements we implemented since you publicly attempted to declare a "victory" for those improvements, misleading your members with your deceptive leaflet.
>
> [Respondent] recognizes its duty to continue bargaining with your union was only suspended upon impasse, and we will

[10] This particular bargaining session was scheduled for 2 hours, with a 10:00 a.m. start time. The Union and Respondent met at approximately 10:45 a.m. for face to face discussions. (R. Exh. 46, pp. 1, 4; GC Exh. 17, p. 1; Tr. 360, 443.)

> continue to fulfill our bargaining obligation—as we did this past Wednesday, December 20, 2017—even having reached an impasse, for so long as you proceed in an earnest, good faith manner.
>
> Toward that end, we will be wholly responsive to any bona fide proposal from you to overcome our impasse and conclude a mutually acceptable agreement in spite of our present impasse.

(R. Exh. 49.)

K. January 17, 2018 Bargaining Session

In the morning on January 17, 2018, Hefty emailed Sincich to advise that the Union's negotiating team was running late due to snowy weather and school delays but would be able to meet at noon. The parties accordingly convened at noon but got off to a slow start because the Union was confused about which bargaining unit (technical, service and maintenance employees' unit or registered nurses' unit) the parties would be discussing.[11] After establishing that the session was for the technical, service and maintenance employees' unit and providing the Union some time to prepare, the parties began face to face bargaining at approximately 12:36 p.m. (R. Exhs. 3; 50, p. 1; GC Exh. 20, p. 1; Tr. 83–85, 133–137, 184–185, 363–364, 366, 418–419; see also R. Exh. 51 (indicating that the mediator, who was present for the January 17 session, did not become involved in the registered nurses' unit bargaining until January 24, 2018); Tr. 365.)

Initially, the parties discussed Respondent's method for calculating the wage increases for mental health technicians. Among other questions, the Union asked how Respondent considered employee experience (including experience at other hospitals) and job performance. Sincich explained that Respondent used the information that it had on file concerning experience and did not consider job performance as a factor in granting wage increases. (R. Exh. 50, p. 2; GC Exh. 20, pp. 1–2; Tr. 85–86, 366–367.)

Respondent next addressed the Union's contract proposal from December 20. In Respondent's view, the Union did not make much substantive movement with its proposal, and instead: made a regressive proposal by requesting wage reviews for additional job classifications; and engaged in surface bargaining with its proposal on pulling. Sincich also asserted that the parties were at impasse and that Respondent accordingly would proceed with implementing the remaining elements of its August 25, 2017 final offer. The Union disagreed, asserting that: it did not believe the parties were at impasse and believed that the parties could reach a reasonable accord; it had been proposing wage increases for other job classifications throughout bargaining; and it had consistently sought counter-proposals from Respondent and thus was not surface bargaining. The bargaining session concluded at approximately 12:50 p.m. (GC Exh. 20, p. 2; R. Exh. 50, p. 3; Tr. 88, 367; see also Tr. 370.)

L. The Union Renews its Information Request

On January 24, 2018, Hefty emailed Respondent to renew the Union's "request for information on how the [mental health technician] rates were determined." Hefty provided a list of 17 employees for which the Union was "requesting an explanation for how their rate was determined." (GC Exh. 23 (noting that Hefty emailed Respondent again on February 20, 2018, to ask about the status of the Union's information request); Tr. 92–94 (noting that Respondent did respond to the Union's inquiry at some point after February 20, 2018, but did not provide answers to the Union's questions about how Respondent calculated the new wage rates for mental health technicians).)

M. January 26, 2018—Respondent Implements the Rest of its Final Offer

On January 26, 2018, Sincich sent a letter to Hefty to state that Respondent would be implementing the remaining components of its August 25, 2017 final offer. Sincich stated as follows in the letter:

> As you know, [Respondent] and your union have been engaged in bargaining for a collective bargaining agreement for the Service, Maintenance and Technical Unit[] since October 11, 2016. The prior collective bargaining agreement expired upon November 30, 2016.
>
> On August 25, 2017, [Respondent] provided your union its Final Offer for the successor agreement, which you unequivocally rejected. During our October 6, 2017 bargaining session, you were informed of [Respondent's] intention to implement the across-the-board and Mental Health Technician wage increases covered by the Final Offer. Said wage increases were implemented effective November 26, 2017 and December 10, 2017, consistent with [Respondent's] Final Offer.
>
> As explained to you during our January 17, 2018 bargaining session, [Respondent] considers your union's December 20, 2017 revised proposal to be clearly surface in nature while also adding regressive wage demands. I informed you during our January 17, 2018 session that [Respondent] would now be implementing the remaining components of its August 25, 2017 Final Offer.
>
> [Respondent] recognizes the duty to continue bargaining with your union was only suspended upon impasse, and we will continue to fulfill our bargaining obligation—as we did Wednesday, December 20, 2017, and again Wednesday, January 17, 2018—even having reached an impasse, if your union now engages in good faith bargaining.

(GC Exh. 21; see also Tr. 87–88, 420.) There is no dispute that Respondent subsequently implemented the remaining terms of its August 25, 2017 final offer. (Tr. 88–92, 94; GC Exhs. 6 (August 25, 2017 final offer, setting terms for health insurance, grievance filing procedures and pulling, among other topics), 22 (summary of changes that Respondent implemented).)

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors,

[11] The parties began bargaining in about October 2017, for a successor collective-bargaining agreement covering the registered nurses' unit. (Tr. 67, 77–78.)

including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

B. Complaint Allegations and Applicable Legal Standards

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by taking the following actions without reaching a successor collective-bargaining agreement with the Union concerning the technical, service and maintenance employees' bargaining unit and without first bargaining to an overall good-faith impasse: implementing wage increases for the bargaining unit on November 26 and December 10, 2017; and implementing its final offer on January 17, 2018.

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.[12] The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue and must show that 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. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3–4 (2016).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the 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. The party asserting impasse bears the burden of proof on the issue. *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 139 (2014), enfd. 807 F.3d 318 (D.C. Cir. 2015).

If an employer makes a unilateral change to a term and condition of employment, it may still assert certain defenses. For example, the employer may assert that the change: did not alter the status quo (e.g., because the change in question was part of a regular and consistent past pattern); did not involve a mandatory subject of bargaining; was not material, substantial and significant; or did not vary in kind or degree from what has been customary in the past. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (2019); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20. In addition, the employer may assert that the contractual language privileged it to make the disputed change without further bargaining (the "contract coverage" defense). Under the contract coverage defense, the Board will determine whether the parties' collective-bargaining agreement covers the disputed unilateral change. In making that determination, the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation, and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. Since a collective-bargaining agreement establishes principles that govern a myriad of fact patterns, the Board will not require (as a prerequisite to the defense) that the agreement specifically mention, refer to or address the employer decision at issue. If the contract coverage defense is not met, then the Board will determine whether the union waived its right to bargain about a challenged unilateral change. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11–12.

C. Did Respondent Violate the Act when it Unilaterally Implemented Wage Increases on November 26 and December 10, 2017?

1. Summary of facts

When the parties began negotiating for a successor collective-bargaining agreement in October 2016, wages, health insurance and pulling were at or near the top of the list of areas of disagreement. On wages, both Respondent and the Union believed that wage increases were needed but disagreed as to the amounts of the increases. On health insurance, the Union hoped to freeze all costs, while Respondent aimed to gain the flexibility to increase the employees' share of health insurance costs as needed. And for pulling, the Union wanted to establish a framework that would use seniority as a primary factor in determining which employee would be pulled to another hospital unit, while Respondent doubted that a pulling framework was necessary and was opposed to any framework that would result in the least senior employees always being the ones to be pulled to other units. (FOF, Sec. II(C)(1)–(3).)

Over a series of 11 bargaining sessions between October 2016 and May 2017, the parties made progress on a variety of issues, including closing the gap on wages, health insurance and pulling, and reaching tentative agreements on several other topics. (FOF,

[12] Separate and apart from the unilateral change doctrine, an employer also has a "duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain," unless an exception to that duty applies. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11–12, 16–17, 20 (2017) (emphasis in original).

Sec. II(C)–(D)(1).) On wages, the Union reduced its proposed increases from a total of $5 per hour to a total of $1.50 per hour over a 3-year period, while Respondent raised its proposed increases from 1 percent each year (for 3 years) to 1.75 percent (year 1), 2 percent (year 2) and 2 percent (year 3). (FOF, Sec. II(C)(1).) On health insurance, the parties agreed that Respondent should have the flexibility to increase employee health insurance costs while being subject to caps on the amount of increases to premiums, deductible/co-insurance/out-of-pocket maximums, and co-pays. (FOF, Sec. II(C)(2) (indicating that by April 25, 2017, the parties were 3 percent apart on their proposed caps for health insurance premiums, 1 percent apart on their proposed caps on deductible/co-insurance/out-of-pocket maximums, and were agreed on a $5 annual cap for co-pays).) And on pulling, the parties agreed on the first three categories of employees that should be pulled (agency/contract employees; volunteers; employees from other units), but disagreed about the role of seniority when deciding which per diem employees or full-time/part-time employees should be pulled, insofar as the Union proposed that the least senior employee on duty be the one who is pulled, while Respondent wanted pulling to rotate based on seniority. (FOF, Sec. II(C)(3).)

In the June 14 and July 10, 2017 bargaining sessions, Respondent introduced two new concepts. First, on wages, Respondent introduced the possibility of conducting a wage review, albeit limited to mental health technicians and with Respondent having discretion to decide whether any wage increases were warranted based on the wage review results. Second, Respondent proposed new restrictions on the ability of union representatives to access the facility to administer the collective-bargaining agreement and to hold union meetings. The Union opposed the restrictions on union access but supported the idea of doing a wage review as a way to inform the parties' ongoing negotiations about wages. The Union also moved closer to Respondent on health insurance, as the Union increased its proposed cap on premiums to 10 percent (Respondent remained at 12 percent). (FOF, Sec. II(D)(3)–(4) (explaining that under Respondent's proposal concerning union access, union representatives would need to obtain Respondent's approval 2 business days before any visit to the facility, and union meetings would not be permitted at the facility).

On August 25, 2017, Respondent presented the Union with a final offer that generally reflected Respondent's prior offers, but modified the proposed union access restriction to require union representatives to obtain approval 24 hours in advance of visiting the facility. Respondent also asserted that time was of the essence in reaching a contract, in part because Respondent wanted to provide a wage increase to employees. The Union responded that it was not inclined to accept Respondent's final offer and was prepared to continue bargaining, but agreed to present the final offer to the bargaining unit for a ratification vote. The bargaining unit voted to reject the final offer. (FOF, Sec. II(D)(5), (E).)

In the October 6, 2017 bargaining session, the Union presented a proposal that included the following moves: agreeing to Respondent's proposed 7 percent cap on health insurance deductible/co-insurance/out-of-pocket maximums; agreeing to Respondent's proposal that pulling occur on a rotating basis by seniority, except that full-time/part-time employees with 5 or more years of experience would be exempt from pulling; proposing a 24-hour notice requirement for union representative visits to the facility; and agreeing to Respondent's proposed contract language for jury duty/witness leave. Respondent again stressed the importance of employee wage increases, and with that in mind, proposed that the parties: agree to implement a 1.75 percent and a 2 percent wage increase in October and November 2017, respectively; agree to have Respondent review mental health technician wages and implement any wage increases for that classification that Respondent deemed appropriate based on the review; and continue bargaining all other issues in conjunction with bargaining that would be starting for the registered nurses' unit's successor agreement. (FOF, Sec. II(F).)

Later in October 2017, Respondent decided to implement two wage increases (of 1.75 and 2 percent) and also increase the wage rates of several mental health technicians based on a wage review that Respondent conducted. Respondent notified the Union of its plans on December 1, 2017, and unilaterally implemented the wage increases on November 26, 2017 (1.75 percent increase) and December 10, 2017 (2 percent increase; and wage increases for mental health technicians). (FOF, Sec. II(G).) Respondent maintains that it was within its rights to unilaterally implement the wage increases because the parties were at impasse after the October 6, 2017 bargaining session.

2. Analysis

After considering the evidentiary record and the applicable legal standards, I find that the parties were not at impasse when Respondent unilaterally implemented the November 26 and December 10, 2017 wage increases. The parties met for 15 bargaining sessions between October 11, 2016, and October 6, 2017, and each party participated in those sessions in good faith by exchanging multiple proposals, working out tentative agreements on several issues, and closing the distance between each other on key issues such as wages, health insurance and pulling. In addition, it is clear that neither the Union nor Respondent was at the end of its rope during or after the October 6, 2017 bargaining session, such that further bargaining would have been futile. To the contrary, the Union offered a proposal that moved towards Respondent on several issues, including health insurance and union access (an issue that Respondent added to negotiations for the first time in June 2017). Respondent similarly recognized that additional bargaining was possible, as demonstrated by its offer on October 6 to continue bargaining on all topics except for wages, which Respondent was keen to lock into place. Given the state of negotiations, the parties were not at impasse when Respondent decided to unilaterally implement the November 26 and December 26, 2017 wage increases.[13] See *Stein Industries,*

[13] Respondent does not argue that the parties reached an overall impasse based on a deadlock over a single issue (wages). Respondent therefore has arguably waived the single-issue impasse defense. In any event, I do not find that the parties reached an overall impasse based on any deadlock over wages because a single-issue impasse cannot arise where, as described in this section, it was still possible for the parties to make progress on other issues in negotiations. See *Atlantic Queens Bus Corp.*, 362 NLRB 604, 604 (2015) (explaining that a party asserting a single-

Inc., 365 NLRB No. 31, slip op. at 3–5 (2017) (finding no impasse where the union had made concessions and indicated that it had additional flexibility in negotiations); *Royal Motor Sales*, 329 NLRB 760, 772 (1999) (finding that the parties were not at impasse, in part because one of the union's proposals demonstrated flexibility and significant movement, and thus raised the possibility that further negotiation might produce other or more extended concessions), enfd. 2 Fed.Appx. 1 (D.C. Cir. 2001).

In finding that the parties were not at impasse after the October 6, 2017 bargaining session, I note that I have considered whether the Union engaged in conduct that prevented the parties from either reaching agreement or a genuine impasse. (See R. Posttrial Br. at 37–39; see also *Jefferson Smurfit Corp.*, 311 NLRB 41, 60 (1993) (finding that an employer reasonably concluded that further bargaining would not be fruitful, in part because the union was engaging in conduct that was preventing the parties from reaching an agreement or a genuine impasse).) The evidentiary record does show that the Union: frequently used the beginning of bargaining sessions to caucus and prepare proposals or responses to proposals; canceled the July 25, 2017 bargaining session due to a conflict with an NLRB proceeding in an unrelated case; delayed approximately 2 weeks before notifying Sincich that the bargaining unit voted to reject Respondent's August 25, 2017 final offer; and proposed a 1-year contract during the October 6, 2017 bargaining session. While some of those events may not have been ideal, they do not come close to misconduct that can be said to have prevented the parties from reaching an agreement or impasse. Indeed: the Union's caucus practices generally produced substantive proposals or ideas for the parties to discuss (see FOF, Sec. II(C)–(D)); the Union provided a credible reason for canceling the July 25 bargaining session and did not cancel any other sessions (see FOF, Sec. II(D)(5)); the Union communicated (in the September 12, 2017 email notifying Sincich of the August 29 ratification vote results) that it believed there was room to continue bargaining towards an agreement and, consistent with that assertion, presented a substantive proposal to Respondent at the next bargaining session on October 6, 2017 (see FOF, Sec. II)(E)–(F)); and the Union's proposal of a 1-year contract was not regressive (as Respondent contends), but rather was aimed at exploring whether a short term agreement might be a useful tool to agree on terms while continuing negotiations for a longer contract. (See FOF, Sec. II(F).) I therefore find that Respondent's argument on this point falls short and stand by my finding that the parties were not at impasse when Respondent unilaterally implemented the November 26 and December 10, 2017 wage increases.

Since the parties were not at a valid impasse and no other defenses apply, I find that Respondent violated Section 8(a)(5) and (1) of the Act when Respondent unilaterally implemented wage increases on November 26 and December 10, 2017.[14]

D. Did Respondent Violate the Act when it Unilaterally Implemented the Remaining Provisions of its August 25, 2017 Final Offer on January 26, 2018?

1. Summary of facts

In addition to the facts summarized above (see Discussion and Analysis Sec. C(1)), the evidentiary record shows that after being notified that Respondent would be unilaterally implementing wage increases, the Union (on about December 1 and 7, 2017) requested information on the wage review for mental health technicians and how Respondent calculated the wage increases for mental health technicians. The Union also posted a flyer informing bargaining unit members (in a celebratory tone) that they would be receiving wage increases as a result of standing together and fighting as a union. Respondent provided some information about the wage review and the specific raises (if any) that individual mental health technicians would receive but did not describe how Respondent calculated the individual wage increases. (FOF, Sec. II(H)(1)–(2).)

On December 20, 2017, the Union notified Respondent that while the Union did not believe that the parties were at impasse when Respondent unilaterally implemented the wage increases, the Union would not ask Respondent to reverse the wage increases and was prepared to continue bargaining. The parties also met for a bargaining session on December 20, at which the Union: reiterated its request for information about how Respondent calculated the wage increases for mental health technicians because that information would enable the Union to adjust its wage proposals to account for what had already occurred; proposed that Respondent conduct similar wage reviews for three other job classifications in the bargaining unit that had wage rates that were too low (including patient care coordinators, who used to be paid more than mental health technicians but were now paid less due to the wage increases for mental health technicians); and presented a revised proposal on pulling that would permit any full-time/part-time employees with less than 6 years of experience to be pulled on a rotating basis based on seniority. Respondent, meanwhile, objected to the Union flyer about the recent wage increases because the Union took credit for the increases, and objected to doing wage reviews for other job classifications because (in Respondent's view) the Union had previously been focused only on the wages of mental health technicians. (FOF, Sec. II(H)(3), (I).)

On January 2, 2018, Respondent sent a letter to the Union to assert that the parties were at impasse (and had been since October 6, 2017), and to add that notwithstanding that view, Respondent would continue to bargain with the Union in an effort to negotiate a successor collective-bargaining agreement. Subsequently, on January 17, 2018, the parties met for another bargaining session, at which they briefly discussed whether

issue impasse has the burden of proving three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of overriding importance in the bargaining; and (3) that the impasse as to the single issue led to a breakdown in overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved).

[14] Since I have found that the parties were not at impasse when Respondent implemented the wage increases, I need not address the General Counsel's alternate (but related) arguments that: there was no impasse because Respondent did not share the results of its mental health technician wage review with the Union before implementing the wage increases (see GC Posttrial Br. at 23, 25–28); and the wage increases were unlawful because Respondent did not previously offer them at the bargaining table (see GC Posttrial Br. at 28–30).

Respondent considered factors such as job performance and work experience when Respondent calculated wage increases for individual mental health technicians. Respondent then asserted that the Union made a regressive proposal on wages (by asking for wage reviews for three additional job classifications) and engaged in surface bargaining with its revised proposal on pulling. Respondent added that the parties were at impasse and that it would implement the remaining elements of its August 25, 2017 final offer. The bargaining session ended after the Union disagreed with Respondent's assessment of the status of bargaining and the Union's December 20, 2017 proposals. (FOF, Sec. II(J)–(K).)

On January 24, 2018, the Union reiterated its request for information about how Respondent calculated wage increases for mental health technicians. On January 26, 2018, Respondent unilaterally implemented the remaining terms of its August 25, 2017 final offer. (FOF, Sec. II(L)–(M).)

2. Analysis

I find that the parties were not at impasse when, on January 26, 2018, Respondent unilaterally implemented the remaining terms of its August 25, 2017 final offer. First, the Board has long held that a finding of impasse is precluded if that outcome is reached in the context of serious unremedied unfair labor practices that affect the negotiations. *Royal Motor Sales*, 329 NLRB at 762, 764. That principle certainly applies here, where Respondent unlawfully implemented wage increases in November and December 2017, when wages were one of the top bargaining priorities for both parties. Indeed, the unlawful new wage increases became the focus of the parties' discussions during bargaining on December 20, 2017, and January 17, 2018, effectively pushing aside other issues that even Respondent had previously (on October 6, 2017) agreed could still be bargained.

Second, under consistent Board precedent, a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159–1160, 1170 (2006); see also *Colorado Symphony Assn.*, 366 NLRB No. 122, slip op. at 34 (2018) (employer's failure to provide information that would have enabled the union to understand the employer's contract proposal precluded a finding that the parties were at impasse); *Centinela Hospital Medical Center*, 363 NLRB 416, 416–417 & fn. 8 (2015) (employer's failure to provide information that the union requested about a major issue in negotiations precluded a finding that the parties were at impasse); *E.I. Du Pont De Nemours & Co.*, 346 NLRB 553, 558 (2006) ("It is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse."), enfd. 489 F.3d 1310 (D.C. Cir. 2007). That precedent applies here, because the evidentiary record shows that the Union was still trying to gather information about the mental health technician wage review and wage increases when Respondent cut off bargaining and unilaterally implemented its final offer. Indeed, the Union sought information about the wage review and increases in both the December 20, 2017, and January 17, 2018 bargaining sessions, and reiterated its need for that information in a January 24, 2018 email. Respondent did provide some initial responsive information (such as a list of each mental health technician and the new wage that each technician would receive) but had yet to provide information establishing how it calculated the new wages. Since the Union's information request was still outstanding and wages were a major issue in negotiations, I cannot find that a valid impasse existed on January 26, 2018.

Third, the Union was not at the end of its rope with bargaining when Respondent unilaterally implemented its final offer on January 26, 2018. As noted above, the Union requested information about the wage review and wage increases for mental health technicians because the information could spark further negotiations about wage increases for bargaining unit members in other job classifications that the Union maintained were underpaid. The Union also (on December 20) made a new offer on pulling. Those actions, coupled with the offers that the Union made on October 6, 2017, demonstrate that the Union was not at the end of its rope with bargaining, and that the parties were not at impasse.

In connection with this third point (that the parties were not at impasse as of January 26, 2018), I again have considered whether the Union engaged in conduct prevented the parties from either reaching agreement or a genuine impasse. The evidentiary record shows that in this time period the Union: proposed that Respondent conduct wage reviews for three additional job classifications; issued a flyer celebrating the November/December wage increases as a result of standing together and fighting as a union; and modified its offer on pulling such that approximately 5 additional regular employees would be eligible to be pulled. Respondent maintains that the wage review proposal was regressive, the union flyer was misleading, and that the pulling proposal was evidence of surface bargaining. (See R. Posttrial Br. at 38–39.) I do not find that any of the Union's actions rise to the level of preventing the parties from reaching an agreement or impasse. The Union moved towards Respondent with its offer on pulling and did so even after receiving no counter proposal on the issue from Respondent between October 6 and December 20, 2017. (See FOF, Sec. II(F), (I).) I therefore do not see the Union's pulling proposal as surface bargaining. As for the Union's suggestion that Respondent conduct wage reviews for three other classifications, I do not see that proposal as regressive because the Union maintained throughout bargaining that wages in those classifications were too low, and it was now apparent (based on the mental health technician wage increases) that a wage review could provide a foundation for Respondent to agree that wage increases were warranted. (See FOF, Sec. II(C)(1), (D)(1), (4), (6), (F), (I), (K).) Finally, the Union flyer celebrating (and arguably taking credit for) wage increases was an understandable and permissible effort to spin the unilaterally implemented wage increases as a positive development for bargaining unit members. (See FOF, Sec. II(G), (H)(2).) In short, none of the Union's actions impeded bargaining, and I stand by my finding that the parties were not at impasse when Respondent unilaterally implemented the rest of its final offer on January 26, 2018.

Finally, I reject Respondent's argument that even if the parties were not at impasse Respondent had an independent right to implement its final offer because of the Union's alleged bad faith

bargaining tactics.[15] (See R. Posttrial Br. at 39–40.) As a preliminary matter, I do not find that the Board has recognized such a defense. Instead, when one party asserts that another party has engaged in bad faith during bargaining, that issue is addressed in the context of evaluating whether the parties have reached a good faith impasse and whether it would be futile to engage in additional bargaining. See, e.g., *Jefferson Smurfit Corp.*, 311 NLRB at 60 (finding that the employer correctly concluded, based on the parties' bargaining sessions and the union's conduct, that further bargaining would not be fruitful and that it should implement its final offer). In any event, for the reasons that I have stated above (in this section and in my analysis of Respondent's unilateral decision to implement wage increases), I do not find that the Union engaged in any misconduct that prevented the parties from reaching an agreement or a genuine impasse. Respondent's proffered defense therefore also falls short on the merits.

Since the parties were not at a valid impasse and no other defenses apply, I find that Respondent violated Section 8(a)(5) and (1) of the Act when Respondent, on January 26, 2018, unilaterally implemented the remaining terms of its August 25, 2017 final offer.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

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

3. By, on or about November 26 and December 10, 2017, unilaterally implementing wage increases for employees in the technical, service and maintenance employees' bargaining unit without first bargaining with the Union to a good-faith impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By, on or about January 26, 2018, unilaterally implementing the remaining terms of its August 25, 2017 final offer for a collective-bargaining agreement for the technical, service and maintenance employees' bargaining unit without first bargaining with the Union to a good-faith impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices stated in conclusions of law 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Respondent shall immediately put into effect all terms and conditions of employment provided by the technical, service and maintenance employees' unit contract that expired on November 30, 2016, and shall maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. In addition, Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decisions to implement wage increases and the remaining terms of its final offer. Backpay for these violations shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits (including changes to health insurance benefits), as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, supra. I further recommend that Respondent be ordered to make all contributions to any fund established by the collective-bargaining agreements with the Union which were in existence on November 30, 2016, and which contributions the Respondent would have made but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 4 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

Respondent, Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley, Kingston, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to comply with the terms and conditions of employment that are set forth in the technical, service and maintenance employees' unit's collective-bargaining agreement that expired on November 30, 2016, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

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

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

(a) On request of the Union, restore, honor and continue the terms of the collective-bargaining agreement with the technical,

[15] For the reasons stated herein, I also reject this proffered defense as it might be applied to Respondent's unilateral decisions to implement wage increases on November 26 and December 10, 2017.

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

service and maintenance employees' unit that expired on November 30, 2016, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

(b) Make employees in the technical, service and maintenance employees' bargaining unit whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral implementation (on November 26 and December 10, 2017) of wage increases, and unlawful unilateral implementation (on January 26, 2018) of the remaining terms of its August 25, 2017 final offer, with interest, as provided for in the remedy section of this decision.

(c) Make contributions, including any amounts due, to any funds identified in the technical, service and maintenance employees' collective-bargaining agreement that expired on November 30, 2016, which Respondent would have paid but for the unlawful unilateral changes, as provided for in the remedy section of this decision.

(d) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Kingston, Pennsylvania, a copy of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 26, 2017.

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

Dated, Washington, D.C., November 5, 2019

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to comply with the terms and conditions of employment that are set forth in the technical, service and maintenance employees' unit's collective-bargaining agreement that expired on November 30, 2016, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

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

WE WILL, on request of the Union, restore, honor and continue the terms of the collective-bargaining agreement with the technical, service and maintenance employees' unit that expired on November 30, 2016, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

WE WILL make employees in the technical, service and maintenance employees' bargaining unit whole for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral implementation (on November 26 and December 10, 2017) of wage increases, and our unlawful unilateral implementation (on January 26, 2018) of the remaining terms of our August 25, 2017 final offer.

WE WILL make contributions, including any amounts due, to any funds identified in the technical, service and maintenance employees' collective-bargaining agreement that expired on November 30, 2016, which we would have paid but for the unlawful unilateral changes.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

WILKES-BARRE BEHAVIORAL HOSPITAL CO., LLC D/B/A FIRST HOSPITAL WYOMING VALLEY

The Administrative Law Judge's decision can be found at

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

https://www.nlrb.gov/case/04-CA-215690 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.