Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea *and* Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud. Case 24–CA–10505

April 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 30, 2007, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt his recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea, Mayaguez, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

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 unilaterally, without notice to or consultation with the Union, make changes in the wages, hours, and other terms and conditions of employment, including changes in sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans, and progressive disciplinary proceedings for our employees in the following units:

INCLUDED: All licensed graduate nurses employed by the Employer at its hospital located at Mayaguez, Puerto Rico.

EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

[1] We find it unnecessary to pass on the General Counsel's contention that the judge erred at the hearing in failing to grant an amendment to the complaint alleging that the Respondent unilaterally changed medical benefits in December 2006, in violation of Sec. 8(a)(5) and (1). We note in this regard that, on March 21, 2007, a charge was filed in Case 24–CA–10602 alleging that the Respondent unilaterally changed medical benefits.

[2] We find no merit to the Respondent's contention that to constitute a "perfectly clear" successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), an employer must hire all of the former employees. See *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977); *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996). Here, the parties stipulated that the Respondent employed a majority of the former employees on August 12, 2006, when it assumed operations, and did not inform employees of an intention to set initial terms and conditions of employment. Indeed, as the judge found, the former employees continued to be employed without change to their terms and conditions of employment. See *Grenada Stamping & Assembly, Inc.*, 351 NLRB No. 74 (2007).

[3] Though the judge found elsewhere in his decision that the Respondent violated the Act by unilaterally changing the method by which salary increases would be determined, he inadvertently failed to include that violation in his conclusions of law. We correct that oversight.

We also correct the judge's inadvertent omission of the word "not" in the fourth from the last sentence of the next to last paragraph in sec. III,A,2 of his decision. As corrected, that sentence states: "The Hospital's justification for its far-reaching prohibitions, namely, that it was necessary to insure the best possible service to its patients and visitors and to display an atmosphere of professionalism, fails to rebut the Board's presumption that essential patient care would not require such broad prohibitions."

[4] The judge inadvertently failed to include in the notice, consistent with his recommended Order, that the Respondent will not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. We have substituted a new notice for that of the judge.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

INCLUDED: All licensed practical nurses, pharmacy aides, escorts, and X-ray technicians, including respiratory technicians, operating room technicians, laboratory assistants, E.K.G., phlebotomists, and center supply technicians.

EXCLUDED: All other employees, including executives, executive secretaries, registered nurses, accountants, guards, professional personnel, and supervisors, as defined in the Puerto Rico Labor Relations Act.

INCLUDED: All laundry, maintenance, non-skilled, warehouse, parking, and housekeeping employees, cooks, diet department employees, and non professional employees, including plumber, mason, electrician, handyman and refrigeration technicians employed by the Employer.

EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, graduated nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

WE WILL NOT maintain an overly broad no-solicitation and no-distribution rule.

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

WE WILL rescind our no-solicitation and no-distribution rule promulgated on or about September 11, 2006, and notify our employees in writing that we have done so.

WE WILL, on request of the Union, rescind the unilateral changes in the terms and conditions of employment we made on or about August 2006, in sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans and progressive disciplinary proceedings, and WE WILL, on request of the Union, restore the terms and conditions of employment in the units in effect prior to August 2006, until such time as we negotiate in good faith with the Union to agreement or to valid impasse.

WE WILL make whole the employees in the units for any loss of pay or other benefits they may have suffered as a result of our unilateral changes outlined above.

METRO MAYAGUEZ, INC., D/B/A HOSPITAL PAVIA PEREA

Ayesha K. Villegas Estrada, Esq., for General Counsel.[1]
Jose R. Gonzales-Nogueras, Esq., and *Kayra D. Montanez-Laboy,Esq*., for the Respondent.[3]
Harold Hopkins Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case involves alleged unilateral charges in the terms and conditions of employment of employees in appropriate bargaining units, without prior notice to the employees' collective-bargaining representative and without affording the bargaining representative an opportunity to bargain with respect to this conduct and the effect of this conduct. The case also involves an allegation of interference with employees' rights regarding the promulgation and maintaining of an overly broad no-solicitation and no-distribution rule. This case originates from a charge filed on October 31, and amended on December 21, 2006, by Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud (the Union). The prosecution of this case was formalized on December 29, 2006, when the Regional Director for Region 24 of the National Labor Relations Board, acting in the name of the Board's General Counsel, issued a complaint and notice of hearing against Metro Mayaguez, Inc. d/b/a Hospital Pavia Perea (the Hospital).

Specifically, it is alleged the Hospital is, and has been since August 11, 2006, the successor to Pavia Health, Inc. d/b/a Hospital Pavia Perea (Pavia). It is alleged that from at least August 12, 2003, until about August 11, 2006, the Union had been the exclusive bargaining representative of employees in three appropriate bargaining units (units) and had been recognized as such by Pavia. It is also alleged this recognition has been embodied in successive collective-bargaining arguments, the most recent was by its terms effective from August 12, 2003, to May 31, 2006. It is alleged that the Union, since on or about August 11, 2006, has been the designated exclusive bargaining representative of the units. It is alleged that since on or about August 11, 2006, the Hospital, promulgated and since that time has maintained an overly broad no-solicitation and no-distribution rule. Finally, it is alleged that since on or about August 11, 2006, the Hospital made changes in the terms and conditions of employment of its employees in the units which changes are mandatory subjects of bargaining and that the Hospital did so without prior notice to the Union and without affording the Union an opportunity to bargain with the Hospital with respect to the changes and the effects of such changes. The conditions of employment alleged to have been changed relate to sick leave days, vacations, funeral leave, uniform incentives, college membership payment, perfect assistance (attendance) bonus, salary, retirement plan, and progressive disciplinary proceedings. It is alleged the actions of the Hospital violate Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

[1] I shall refer to counsel for the General Counsel as Government counsel and Government.

[3] I shall refer to counsel for the Respondent as counsel for the Hospital and Hospital.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I have studied the whole record, considered the briefs, and the authorities therein.

As more fully explained, I find the Hospital violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, SUCCESSOR STATUS, LABOR ORGANIZATION STATUS, AND SUPERVISOR/AGENT STATUS

The Hospital is a Commonwealth of Puerto Rico corporation with an office and place of business located in Mayaguez, Puerto Rico, where it is, and has been, engaged in the operation of a hospital providing medical, surgical and related health care services to the general public. Based on its operations starting about August 11, 2006, at which time it commenced its operations, the Hospital in conducting its operations will annually purchase and receive at its Mayaguez, Puerto Rico facility, goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. The evidence establishes, the parties admit, stipulate and I find, the Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is, and has been, a health care institution within the meaning of Section 2(14) of the Act.

The parties stipulated to the following facts regarding the successor employer status of the Hospital. On August 11, 2006, the Hospital purchased the assets of Pavia and has since August 12, 2006, operated the hospital and employed a majority of the employees who were previously employees of Pavia in the units set forth hereinafter. On August 12, 2003, Pavia and the Union executed three collective-bargaining agreements, one for each of the units set forth hereinafter. All three of the agreements were effective from June 1, 2003, to May 31, 2006. There was, however, no collective-bargaining agreement in effect between Pavia and the Union on August 11, 2006. The Hospital assumed control and began operations of Pavia on August 12, 2006. Before the Hospital assumed control and began operations on August 12, 2006, it did not inform employees of its intention to set initial terms and conditions of employment. Also before the Hospital assumed control and began operations on August 12, 2006, employees of Pavia were not required to file a job application for the Hospital, nor were they made an offer of employment or told they had to apply for employment with the Hospital. They were not interviewed in order to be hired by the Hospital. On August 17, 2006, the Union requested in writing that the Hospital meet and bargain with the Union. The Hospital for the first time responded to the Union, in writing, on August 29, 2006, in which it recognized the Union as the exclusive bargaining representative of the employees in the units described, below, but stated it did not agree to the terms of any prior collective-bargaining agreements between the previous employer and the Union. The Hospital indicated in its August 29 letter it would establish initial terms and conditions of employment for the employees in the units described.

The parties stipulated, and I find, the Hospital is a successor to Pavia; however, the issue of whether the Hospital is a "perfectly clear" successor employer is addressed elsewhere herein.

The parties stipulated, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

Executive Director Jaime Maestre (Executive Director Maestre) and Human Resources Director Joannie Hernandez (HR Director Hernandez) are supervisors and agents of the Hospital within the meaning of Section 2(11) and (13) of the Act, and I so find.

II. THE APPROPRIATE BARGAINING UNITS

It is admitted, and I find, that since about August 11, 2006, the Union has been the designated exclusive bargaining representative of the Hospital employees in the units as specifically described below.

A. Graduate (Registered) Nurses

The parties stipulated that the following employees of the Hospital constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find:

> INCLUDED: All licensed graduate nurses employed by the Employer at its hospital located at Mayaguez, Puerto Rico.
>
> EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

B. Licensed Practical Nurses

The parties stipulated that the following employees of the Hospital, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find:

> INCLUDED: All licensed practical nurses, pharmacy aides, escorts, and X-ray technicians, including respiratory technicians, operating room technicians, laboratory assistants, E.K.G., phlebotomists, and center supply technicians.
>
> EXCLUDED: All other employees, including executives, executive secretaries, registered nurses, accountants, guards, professional personnel, and supervisors, as defined in the Puerto Rico Labor Relations Act.

C. Laundry, Maintenance, and Nonskilled Employees

The parties stipulated that the following employees of the Hospital constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find:

> INCLUDED: All laundry, maintenance, non-skilled, warehouse, parking, and housekeeping employees, cooks, diet department employees, and non professional employees, including plumber, mason, electrician, handyman and refrigeration technicians employed by the Employer.
> EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, graduated nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians,

respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. No-Solicitation and No-Distribution Policy

It is alleged at paragraph 9 of the complaint that since about August 11, 2006, the Hospital, promulgated, and since then has maintained, an overly broad no-solicitation and no-distribution rule.

1. Facts

As noted elsewhere herein when the Hospital assumed control and began operations on August 12, 2006, it did not inform employees of its intention to set initial terms and conditions of employment. The Hospital in a memorandum dated September 11, 2006, notified all employees effective that day it had established a "No solicitation and No Distribution" policy. A copy of the policy was attached to the memorandum. The memorandum was the only notice the Hospital provided to either the Union or employees regarding the policy.

The parties stipulated that Human Resources Director Hernandez would testify regarding the Hospital's no-solicitation and no-distribution policy in part as follows:

> This policy was instituted to insure the best possible service to our patients and visitors in an atmosphere of professionalism and seriousness without any interruption to the Hospital's operations. In addition, the policy seeks to eliminate traffic of persons in areas where they could have access to confidential information, which must be protected by the Hospital according to Federal and Puerto Rico law. This policy has been enforced even handedly without any discrimination whatsoever.

The Hospital's policy follows:

> POLICY OF NO SOLICITATION AND
> NO DISTRIBUTION OF HOSPITAL PEREA
>
> Purpose
>
> It is the goal of the Hospital Perea to provide and maintain an atmosphere leading to efficient work that promotes the continuous development of the skills of their associates free of unnecessary distractions, at the same time that maintains the highest standards in the quality of service to the patient. Furthermore, it is in the interest of Hospital Perea to promote efficiency while order and security is maintained to achieve providing the best work environment. For said reasons, the following regulations apply to the solicitation and/or distribution of any kind in the Hospital Perea facilities.
>
> Procedure
> Non-Associates
>
> Persons that are not associates of Hospital Perea cannot solicit or distribute any literature for any purpose in the facilities of Hospital Perea, including its parking areas. Without it being understood as a limitation, soliciting money is specifically prohibited, sales that are not part of the services rendered by Hospital Perea, solicit contributions or donations, take public opinion surveys, commercials or policies of any other nature, distribute leaflets, advertising or promotional material of any kind, except when the administration of Hospital Perea has given their written authorization for it and subject to the limitations that are imposed.
>
> Associates
>
> 1. No associate can solicit or distribute any literature for any purpose during working hours. Working hours include any period during which the associate that incurs the prohibited conduct is or should be in the facilities of Hospital Perea performing their duties or (b) the associate to who said conduct is directed, is or should be in the facilities of Hospital Perea performing their duties. Lunch breaks are not working hours.
> 2. No associate can solicit or distribute any literature for any purpose in the areas of the facilities of the Hospital Perea where they have or could have access and/or there is traffic of patients, family members, visitors, suppliers, contractors and/or the general public. The facilities of Hospital Perea include and are not limited to parking, Hospital, warehouses, work areas, clinic areas, reception, hallways, pharmacy and offices.
> 3. No associate can solicit or distribute any literature for the any purpose in the work areas. Work areas include all those areas of work. Work areas include all those areas in the facilities of the Hospital Perea where associates perform their work. This policy does not apply to sales, collections, solicitation or distribution of materials on behalf or through Hospital Perea. Any doubt or question should be directed to Mrs. Joannie Hernandez, Director of Human Resources.

2. Guiding principles, analysis, and cnclusions

The Board's rules and presumptions regarding limitations or restrictions by hospitals on solicitation and distribution by its employees are different from that which the Board generally applies to other types of employers. A unanimous Board in *St. John's Hospital & School of Nursing,* 222 NLRB 1150 (1976), concluded that special characteristics of hospitals justify a rule different from that which it generally applies to other employers. The justification, as stated by the Board, rests on the need by hospitals to avoid disrupting of patient care and disturbance of patients in hospital settings. In *St. John's Hospital,* supra, the Board stated:

> We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted. For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treat-

> ment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients-particularly those who are seriously ill and thus need quiet and peace of mind. Consequently, banning solicitation on nonworking time in such areas as described above would seem justified in hospitals and to the extent that Respondent's rule prohibits such activity in those areas it is valid.

The Board's holding that prohibiting solicitation in immediate patient-care areas was justified but that prohibition in areas other than immediate care areas, absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted, was unjustified and unlawful was upheld by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). The Supreme Court in *Beth Israel Hospital*, supra, inferred Congress intended for the Board to appropriately balance the interests between hospital employees, patients, and employers related to solicitation and distribution. The Supreme Court noted, "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review" quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957). The Supreme Court in *Beth Israel Hospital*, supra, affirmed the Board's order requiring the hospital to rescind its prohibition against solicitation in the hospital's cafeteria and coffee shop because the hospital failed to justify the prohibitions as necessary to avoid disruption of its operations or disturbance of its patients. In *Beth Israel Hospital*, supra, the Supreme Court concluded:

> We therefore hold that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in non-working areas, where the facility has not justified the prohibitions as necessary to avoid disruption of healthcare operations or disturbance of patients, is consistent with the Act. We hold further that, with respect to the application of that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients.

The Supreme Court in *Baptist Hospital, Inc*., 442 U.S. 773 (1979), noted the Board had never published a more definite list of "immediate patient-care areas" than set forth in *St. John's Hospital & School of Nursing,* supra, which included patients' rooms, operating rooms, and places where patients received treatment, such as X-ray and therapy areas. The Supreme Court also noted in *Baptist Hospital* that it appeared that the Board in that case assumed the validity of prohibitions on solicitation only in those limited areas, treating any broader ban as presumptively invalid. The Supreme Court noted that the Board's presumption did nothing more than place on the hospital therein the burden of proving, with respect to areas to which it applies, that union solicitation may adversely affect patients. The Supreme Court found the hospital met its burden with respect to its ban on solicitation and distribution in the corridors and setting rooms adjoining or accessible to patients' rooms and treatment rooms. The Court noted that small public rooms or sitting areas on the patient-care floors, as well as corridors themselves provide places for patients to visit family and friends, as well as for doctors to confer with patient's families often during crisis times. The Court noted there was nothing in the evidence for doubting the testimony of hospital officials that union solicitation in the presence or within the hearing of patients may have adverse effects on their recovery. The Court noted the importance of a hospital's interest in protecting patients from disturbance. The Supreme Court in *Baptist Hospital*; however concluded, notwithstanding the absence of any direct evidence contradicting the importance of a tranquil hospital atmosphere to successful patient care, that a total ban on solicitation or distribution was essential to patient case. Thus, the Court affirmed the Board's order insofar as it found a ban on solicitation and literature distribution in the hospital's first floor cafeteria, gift shop, and lobbies was unlawful.

The Board in *Brockton Hospital*, 333 NLRB 1367 (2001), found a violation of the Act where the hospital there prohibited the distribution of union literature in a vestibule adjacent to its front lobby. The Board in *Brockton Hospital* noted:

> We adhere to the Board's established precedent. Under that precedent, a hospital's prohibition of solicitation or distribution of literature in immediate patient care areas, even during employees' nonworking time, is presumptively lawful. Restrictions on solicitation, during nonworking time, or distribution of literature, during nonworking time and in nonworking areas, however, are presumptively unlawful even with respect to areas that may be accessible to patients. The Supreme Court has upheld these presumptions as consistent with the Act, and we find no support in the record of this case for departing from these well-settled principles.

Although the Hospital's rule here speaks in terms of "working hours," the descriptions provided thereafter, to include the notification that lunch breaks are not included, appears to bring that term more closely in line with the more acceptable term "working time." It is also true, as asserted by the Hospital, that it can lawfully prohibit solicitation and distribution on its premises without further justification so long as it is in immediate patient care areas; however, such prohibition applies only to patient rooms, operating rooms, and places where patients receive treatment such as X-ray and therapy. The Hospital's rule here far exceeds acceptable limitations. The rule, for example, forbids solicitation and distribution in "the areas of the facilities" at the Hospital, as well as any place where patients, family members, visitors, suppliers, contractors or the general public "could have access." The Hospital's rule prohibits solicitation and distribution specifically in, but not limited to, its parking facilities, warehouses, reception areas, hallways, pharmacy facilities, and offices. The Hospital's justification for its far-reaching prohibitions; namely, that it was necessary to insure the best possible service to its patients and visitors and to display an atmosphere of professionalism, fails to rebut the Board's presumption that essential patient care would require such broad prohibitions. For example, the Hospital has failed to show any justification for its prohibition on solicitation and/or distribution in its parking facilities, warehouses, reception areas, or in its pharmacy. Likewise, the Hospital's blanket

prohibition regarding solicitation and distribution, without justification, in areas patients "could have access to" constitutes an overly broad and unlawful policy. Simply stated, the Hospital's no-solicitation and no-distribution policy is unlawfully broad.

I reject the Hospital's request that I reevaluate the Board's policy of considering a ban on places such as parking lots, warehouses, reception areas, pharmacies, and offices as being unlawful. Any request for such reevaluation should be directed to the Board, as I am required to follow and apply Board law.

B. Unilateral Changes to Terms and Conditions of Employment

It is alleged at paragraph 10 of the complaint that since August 11, 2006, the Hospital made changes to the terms and conditions of employment of employees in the units that are mandatory subjects of collective bargaining without prior notice to the Union and without affording the Union an opportunity to bargain with the Hospital about the conduct or the effects of the conduct. The alleged changes include sick leave days, vacations, funeral leave, uniform incentives, college membership payment, perfect assistance (attendance) bonus, salary, retirement plan, and progressive disciplinary proceeding.

Government counsel, at the conclusion of the Government's case, stated she had no evidence to suggest any unilateral changes with respect to funeral leave, college membership payment, or salary.

Counsel for the Union presented a witness that gave testimony with regard to salary changes.

1. Facts

(a) Funeral leave and college membership payment

Inasmuch as no evidence was presented to suggest any unilateral changes with respect to funeral leave or college membership payment, I dismiss those allegations.

(b) Salary

The Government called no witnesses or presented any evidence regarding unilateral changes in salary; however, as noted earlier, the Union called one witness related to salary changes.

Operating room graduate nurse Ferdinand Velez testified that in the past, pursuant to the collective-bargaining agreement, the employees were given an annual pay increase at an amount called for in the collective-bargaining agreement. Velez said that between September and October 2006 Operating Room Supervisor Angela Gau told him she had met with the operating room employees and noted Velez had not been present. According to Velez, Supervisor Gau approached and "she told me come, I'm going to orient you regarding the new changes that are going to take place" adding "she wanted to orient me." Velez testified Operating Room Supervisor Gau told him employees would be given an employment evaluation on their employment anniversary with the Hospital and that salary increases would be made in accordance with the evaluation. Velez acknowledged he had not yet been evaluated pursuant to the policy he was told about by Supervisor Gau.

No evidence was presented to dispute Velez' account regarding salary increases. I credit his testimony and find that management, through Operating Room Supervisor Gau, announced a change in the method by which salary increases would be determined.

(c) Sick leave days

The parties stipulated that Pavia allowed employees to accumulate a maximum of 240 hours of sick leave. As of August 12, 2006, the Hospital provided each employee with a maximum of 96 hours of sick leave. Since August 12, 2006, Hospital policy allows employees to accumulate a maximum of 96 hours of sick leave per year but allows employees to carry 120 hours over from year-to-year pursuant to Puerto Rico law. These changes are undisputed.

(d) Vacations and holidays

Pavia liquidated all accrued vacation hours and the Christmas Bonus as of August 11, 2006.

On October 26, 2006, the Hospital, in a memorandum to management, listed 15 employee holidays for 2007. The Hospital's holiday schedule did not include January 9, Eugenio Maria de Hostos Day; March 22, Abolition Day; November 19, Discovery of Puerto Rico Day; and, December 31, New Year's Eve, which days were part of Pavia's holiday schedule. The Hospital's schedule did, however, include October 12, Discovery of America Day; November 23, the day after Thanksgiving; and, December 24, Christmas Eve which were not part of Pavia's holiday schedule.

Since August 2006, the Hospital has paid employees who work a holiday at a rate equal to twice their hourly rate. Pavia did not pay employees who worked a holiday at a double rate, but instead paid regular wage rates but allowed employees to accumulate a day off to be taken at a later time when coordinated with management.

The parties stipulated that in order for an employee to receive the Hospital's double pay for a holiday the employee, if scheduled, must work the day before and the day after the holiday.

The Hospital contends that Pavia's prior policy was unlawful under Commonwealth of Puerto Rico laws.

The above changes are undisputed and self-explanatory.

(e) Uniform incentives

It is stipulated that since August 2006,the Hospital provides three uniforms yearly to all employees that require the use of uniforms rather than paying a clothing allowance to its employees.

Pavia on the other hand, provided licensed graduate nurses and licensed practical nurses with a $320 yearly allowance for uniforms. Pavia also provided pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians, laundry, maintenance, nonskill, warehouse, parking, housekeeping employees, cooks, diet department employees, and nonprofessional employees, including, plumbing, mason, electrician, handyman, and refrigeration technicians with a $200 yearly allowance for uniforms.

The change from providing uniform allowances to providing actual uniforms is undisputed and self-explanatory.

(f) Perfect assistance bonus[4]

Under Pavia the perfect assistance (attendance) bonus consisted of $90 monthly with all bargaining unit employees eligible for the bonus.

Since about August 2006, the Hospital implemented a quarterly perfect assistance (attendance) bonus that pays $225 for perfect assistance (attendance) during a 3-month period. Since August 2006, operating room technicians, radiology technicians, respiratory therapy technicians, licensed graduate nurses and licensed practical nurses have been the only employees eligible to participate in the perfect assistance (attendance) bonus.

Under Pavia, for the purposes of the perfect attendance bonus, an employee was considered tardy if he/she arrived 10 minutes past the hour of arrival. Since August 2006, for purposes of the perfect attendance bonus, an employee is considered tardy if he/she arrives 7 minutes past the hour of arrival.

The Hospital announced in a memorandum dated January 29, 2007, that the quarterly perfect assistance (attendance) bonus applied to all regular employees and at a rate of $270.

The undisputed changes show that the bonus of $90 determined on a monthly basis was changed initially to $225 (later to $270) determined on a quarterly basis. The attendance bonus was initially changed to apply only to certain select employees rather than all employees and paid every 3 months rather than every month. The time for tardiness was reduced by 3 minutes.

(g) Retirement plan

Pavia's 401(k) plan provided for a matching contribution of 50 cents for every dollar that the employee designated under the plan up to a maximum of .3 percent of the employees' salary.

Since about August 2006, the Hospital implemented a 401(k) plan which provides a matching contribution of .25 cents for every dollar the employee designates under the plan up to maximum of .6 percent of the employees' salary.

These changes are undisputed.

(h) Progressive disciplinary proceedings[5]

On August 23, 2006, the Hospital in a written Memorandum "To All Personnel" from HR Director Hernandez, stated:

> REGULATION OF PROGRESSIVE DISCIPLINE
>
> Attached is the Progressive Disciplinary Regulation that will apply to all of our employees from now on. You must sign the acknowledgement of receipt and return it to your supervisor immediately.
>
> It will be your responsibility to read this regulation and if you have any doubt, you should consult with your supervisor immediately.
>
> Thank you for your accustomed cooperation.

The 22-page progressive disciplinary regulation attached to the August 23, 2006 memorandum, indicated the regulations were necessary to establish a pattern of conduct for the employees. The Hospital noted it did not desire to apply disciplinary sanctions but it was enumerating offenses and sanctions that would result from violations of its regulations. The Hospital noted; "[t]he violation on behalf of an associate [employee], of any of the regulations contained in this Manual, will be a justified cause for disciplinary action on behalf of the Hospital, including in some cases the suspension or discharge of the associate." The Hospital listed 78 "infractions" of its regulations and the specific discipline for each infraction with some infractions resulting in discharge.

It is admitted the Hospital established these regulations on August 23, 2006.

2. Guiding principles, analysis, and conclusions

The Act, specifically Section 8(a)(5), requires an employer to bargain with its employees' collective-bargaining representative in good faith regarding wages, hours, and other terms and conditions of employment. An employer must notify and bargain with its employees' collective-bargaining representative before imposing changes in its employees wages, hours, and other terms and conditions of employment. However, a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The Supreme Court in *Burns*, supra, set forth an exception to the general rule that a successor employer may set initial terms and conditions of employment unilaterally. The Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

This exception is referred to as the "perfectly clear" *Burns* caveat. The Board interpreted the "perfectly clear" language in *Burns* in *Spruce Up Corp*., 209 NLRB 194, 195 (1974), enfd. per curium 529 F.2d 516 (4th Cir. 1975), where it stated:

> We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

It is undisputed and admitted that the Hospital is a successor employer to Pavia and, as such, has a duty to recognize and bargain with the Union. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 42–46 (1987). Simply stated, the Hospital purchased the assets of Pavia on August 11, 2006, and starting on August

[4] While the written stipulation of facts and complaint allegations make reference to "perfect assistance bonus" it appears the parties use that term interchangeably with "perfect attendance."

[5] It is alleged in the complaint and stipulation of facts as "Progressive Disciplinary Proceedings or Action" but it is captioned in the document as "Progressive Disciplinary Regulation" or "Regulation of Progressive Discipline.'

12, 2006, operated the same hospital at the same location, with the same medical services and facilities without any hiatus in providing its services to its customers with the same employees. Although the Hospital concedes it is a successor employer and concedes (or at least does not dispute) that it made the changes in question at the times indicated, but asserts it was free to do so because it was not a "perfectly clear" successor within the meaning of *Burns*.

I am fully persuaded the undisputed facts in this case are sufficient to establish a "perfectly clear" successorship pursuant to the *Burns* exception. The Hospital did not require the employees of the predecessor to fill out job applications, nor were they offered employment by the Hospital rather all they had to do was show, as usual, for work and they continued to be employed without change to the terms and conditions of their employment. The employees of the predecessor were not asked to apply for work nor were they even interviewed before they continued their employment. Viewed from the employees' perspective, it would seem to be perfectly clear that they were being employed without change to the terms and conditions of their employment.

Likewise, the Hospital upon assuming control (August 11) of and beginning operation (August 12) of the Hospital did not inform employees of any intentions on its part to set initial terms and condition of employment. The Hospital announced no such intention until approximately some 17 days later and its announcement even at that late time was vague.

In summary, the facts are sufficient to establish that the incumbent employees were actively led to believe, or at least misled by tacit inference into believing, that they would be retained without change in their terms and conditions of employment.

Having found, as I do, that the Hospital is a "perfectly clear" successor, I find the changes it admittedly unilaterally made violated Section 8(a)(5) and (1) of the Act.

I specifically reject the Hospital's contention that the Board's traditional remedy of restoring, on request by the Union, pre-existing terms and conditions of employment constitutes a punitive remedy. Any argument for change regarding established Board remedies is best advanced to the Board.

CONCLUSIONS OF LAW

1. Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea is a "perfectly clear" successor to Pavia Health, Inc. d/b/a Hospital Pavia Perea.

2. Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

3. Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud is a labor organization within the meaning of Section 2(5) of the Act.

4. The following units are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All licensed graduate nurses employed by the Employer at its hospital located at Mayaguez, Puerto Rico.

EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

INCLUDED: All licensed practical nurses, pharmacy aides, escorts, and X-ray technicians, including respiratory technicians, operating room technicians, laboratory assistants, E.K.G., phlebotomists, and center supply technicians.

EXCLUDED: All other employees, including executives, executive secretaries, registered nurses, accountants, guards, professional personnel, and supervisors, as defined in the Puerto Rico Labor Relations Act.

INCLUDED: All laundry, maintenance, non-skilled, warehouse, parking, and housekeeping employees, cooks, diet department employees, and non professional employees, including plumber, mason, electrician, handyman and refrigeration technicians employed by the Employer.

EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, graduated nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

5. At all material times, the Union has been the exclusive representative of the employees in the above-described appropriate units, for the purpose of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

6. The Hospital violated Section 8(a)(1) of the Act by about August 2006 promulgating and thereafter maintaining an overly broad no-solicitation no-distribution rule.

7. The Hospital violated Section 8(a)(5) and (1) of the Act by making changes to the terms and conditions of employment of employees in the units, described infra, which changes include sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, retirement plans, and progressive disciplinary proceedings without prior notice to the Union and without affording the Union an opportunity to bargain with the Hospital with respect to this conduct and the effects of this conduct.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Hospital has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Hospital promulgated and maintained an overly broad no-solicitation and no-distribution rule, I shall recommend the Hospital rescind its no-solicitation and no-distribution policy and notify its unit em-

ployees in writing that it has done so. Having found the Hospital unilaterally changed sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans, and progressive disciplinary proceedings of its unit employees, I shall recommend the Hospital cease and desist from making unilateral changes in wages, hours, and other terms and conditions of employment in the appropriate the units, and that the Hospital make whole the employees for any loss of pay or benefits they may have suffered as a result of the Hospital's unilateral changes. I shall also recommend that the Hospital, on request of the Union, rescind its unilateral changes including sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans, and progressive disciplinary procedures it put into effect on or about August 11, 2006, and continue in effect the terms and conditions of employment in effect prior to August 2006, until such time as the Hospital negotiates in good faith with the Union to an agreement or valid impasse.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[6]

ORDER

The Respondent, Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea, Mayaguez, Puerto Rico, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad no solicitation and no distribution rule.

(b) Unilaterally, changing working conditions without prior notice to or affording the Union an opportunity to bargain with respect to changes and the effects of such changes specifically including changes to sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans, and progressive disciplinary proceedings.

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

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

(a) Rescind its overly broad no-solicitation and no-distribution rule established on September 11, 2006, and notify employees in the units, in writing, that the policy has been rescinded.

(b) On request of the Union, rescind the unilateral changes made to terms and conditions of employment of employees in the units specifically with respect to sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans, and progressive disciplinary proceedings, and continue in effect the terms and conditions of employment in effect prior to August 2006, until the Hospital negotiates in good faith with the Union to agreement or valid impasse.

(c) Make whole the employees in the units for any loss of pay or benefits they may have suffered as a result of the above-described unilateral changes, in the manner set forth in the Remedy section of this decision.

(d) 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, one copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Mayaguez, Puerto Rico, copies of the attached notice marked "Appendix"[7] in both English and Spanish. Copies of the notice on forms provided by the Regional Director for Region 24 after being signed by the Hospital's authorized representative, shall be posted by the Hospital and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Hospital 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 Hospital has gone out of business or closed the facility involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Hospital at any time since August 11, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 24, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Hospital has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

[6] 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.

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