

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNITY HEALTH SERVICES, INC.	:	Case Nos. 28-CA-16762
d/b/a MIMBRES MEMORIAL HOSPITAL	:	28-CA-17278
AND NURSING HOME	:	28-CA-17390
	:	
vs.	:	
	:	
UNITED STEELWORKERS OF AMERICA	:	
DISTRICT 12, SUBDISTRICT 2, AFL-CIO-CLC	:	

**MIMBRES MEMORIAL HOSPITAL AND NURSING HOME’S
EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF
ADMINISTRATIVE LAW JUDGE WILLIAM L. SCHMIDT**

As the Respondent in the above-referenced cases, Mimbres Memorial Hospital and Nursing Home (hereafter, “Mimbres” or the “Hospital”) hereby files, by and through the Hospital’s Undersigned Counsel, these Exceptions to the Supplemental Decision (hereafter, the “Supplemental Decision”) issued in the above-referenced cases by Administrative Law Judge William L. Schmidt (hereafter, the “ALJ”) on July 28, 2010.

STATEMENT OF THE CASE

Exception No. 1: Mimbres excepts to the ALJ’s statement that, as part of the underlying proceedings, Administrative Law Judge Lana Parke required the Hospital to rescind the reduction in the hours for the respiratory department

“employees,” and “reimburse” employees for any loss of earnings and other benefits. See Decision p. 1.

Grounds: The ALJ’s statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 2: Mimbres excepts to the ALJ’s statement that the Hospital “agreed” to produce documents to the General Counsel as part of the General Counsel’s desire to issue a Second Amended Compliance Specification. See Supplemental Decision p. 2, Lines 5-10.

Grounds: The ALJ’s statement is not supported by the record as a whole.

FINDINGS OF FACT

I. The Record Developed After the Hearing Recessed

Exception No. 3: Mimbres excepts to the ALJ’s statement that the Second Amended Compliance Specification set forth backpay claims for employees in order to “reimburse” them for their losses. See Supplemental Decision p. 2, Line 45 to p. 3, Line 2.

Grounds: The ALJ’s statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 4: Mimbres excepts to the ALJ’s rulings with respect to the evidence the Hospital proposed in support of the Affirmative Defense set forth by ¶

37 of the Hospital's Answer to the Second Amended Compliance Specification.

See Supplemental Decision p. 4, Lines 43-45.

Grounds: The ALJ's rulings are not supported by the record as a whole and are contrary to Board precedent and case law.

Exception No. 5: Mimbres excepts to the ALJ's statement that a rescission remedial measure is intended to prevent respondents from taking advantage of their wrongdoing to the detriment of employees and to restore the status quo ante thereby allowing the bargaining process to proceed. See Supplemental Decision p. 4, Line 50 to p. 5, Line 2.

Grounds: The ALJ's statement does not accurately reflect current Board precedent and case law.

Exception No. 6: Mimbres excepts to the ALJ's conclusion that a bargaining representative does not waive its right to bargain over a mandatory subject where it refuses to meet and negotiate about that subject with an employer who has already implemented the change and ignores a court's order to restore the status quo ante.

See Supplemental Decision p. 5, Lines 3-6.

Grounds: The ALJ's conclusion is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 7: Mimbres excepts to the ALJ's conclusion that the proposed testimony of Don Carmody, Esq. lacked merit. See Supplemental Decision p. 5, Lines 8-10.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 8: Mimbres excepts to the ALJ's conclusion that the Regional Director's three compliance specifications define his position concerning the status of the Hospital's compliance. See Supplemental Decision p. 5, Lines 10-12.

Grounds: The ALJ's conclusion is not supported by the record as a whole, inconsistent with the ALJ's own analysis, and contrary to Board precedent and case law.

Exception No. 9: Mimbres excepts to the ALJ's statement that the Board has held that the agency is not bound by assurances given to employers by Board agents, especially when employee rights are at stake. See Decision p. 5, Lines 12-15.

Grounds: The ALJ's statement is contrary to Board precedent and case law.

Exception No. 10: Mimbres excepts to the ALJ's determination that statements made by the former compliance officer of Region 28 would have no probative value and the Hospital's ability to offer evidence of such statements did not justify the resumption of the hearing before the ALJ.

Grounds: The ALJ's determinations are not supported by the record as a whole and are contrary to Board precedent and case law.

II. The Reimbursement Formula and Its Application

Exception No. 11: Mimbres excepts to the ALJ's heading to the extent the heading refers to a "reimbursement" formula. See Supplemental Decision p. 5, Line 20.

Grounds: The ALJ's heading is not supported by the record as a whole and is contrary to Board precedent and case law.

A. Facts

Exception No. 12: Mimbres excepts to the ALJ's statement that Judge Parke recommended and the Board adopted any type of "reimbursement" remedy. See Supplemental Decision p. 5, fn. 5, Lines 25, 40-45.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 13: Mimbres excepts to the ALJ's conclusion that the compliance officer's review of the Hospital's records and his investigation led him to devise any type of "reimbursement" formula. See Supplemental Decision p. 6, Lines 1-5.

Grounds: The ALJ's conclusion is not supported by the record as a whole and is contrary to Board precedent and case law.

B. Further Findings and Analysis

Exception No. 14: Mimbres excepts to the ALJ's finding that the reimbursement formula devised by the regional compliance officers is reasonable. See Supplemental Decision p. 7, Lines 25-30.

Grounds: The ALJ's conclusion is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 15: Mimbres excepts to the ALJ's rejection of the Hospital's defense that the remedy awarded by the Board applied only to full-time respiratory therapists. See Supplemental Decision p. 7, Lines 40-45.

Grounds: The ALJ's ruling is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 16: Mimbres excepts to the ALJ's finding that the remedial action devised by Judge Parke and adopted by the Board applies to all unit employees in the respiratory department without regard to their position. See Supplemental Decision p. 7, Lines 40-45.

Grounds: The ALJ's finding is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 17: Mimbres excepts to the ALJ's implication, if any, that Nohail Syed was classified as a respiratory therapist assistant for the duration of his employment with the Hospital. See Supplemental Decision p. 7, fn. 7, Line 45, 50.

Grounds: The ALJ's implication, if any, is not supported by the record as a whole.

Exception No. 18: Mimbres excepts to the ALJ's finding that the determination of who is, and who is not, a full-time employee in the context of the proceedings before the ALJ is very problematic. See Supplemental Decision p. 8, Lines 10-15.

Grounds: The ALJ's finding is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 19: Mimbres excepts to the ALJ's analysis with respect to how Ms. Grant's testimony should affect the question of who is eligible for the remedy awarded by the Board. See Supplemental Decision p. 8, Lines 18-27.

Grounds: The ALJ's analysis is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 20: Mimbres excepts to the ALJ's analysis as set forth in footnote 8 of the Supplemental Decision.

Grounds: The ALJ's analysis is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 21: Mimbres excepts to the ALJ's reference to the remedy awarded by the Board as a "reimbursement" remedy. See Supplemental Decision p. 9, Lines 25-27, 30-33.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 22: Mimbres excepts to the ALJ's conclusion that the determination of who is, and who is not, a full-time respiratory therapist should be based upon all the relevant circumstances. See Supplemental Decision p. 9, Lines 45-50.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 23: Mimbres excepts to the ALJ's conclusion that, while lower than the amount requested by the General Counsel, any backpay is owed to Natalia Gordon, Cindy Hayes, Judith Parra, Dan Pattarozzi and Nohail Syed. See Supplemental Decision p. 10, Lines 17-37 to p. 11, Lines 7-35.

Grounds: The ALJ's conclusion is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 24: Mimbres excepts to the ALJ's implication that Pedro Herrera would be eligible for the remedy awarded by the Board in the event he becomes a full-time employee. See Supplemental Decision p. 11, Line 5.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 25: Mimbres excepts to the ALJ's conclusion that, aside from the backpay adjustments set forth on pages 10-11 of the Supplemental Decision, no further adjustments are warranted. See Supplemental Decision p. 11, Lines 35-38.

Grounds: The ALJ's conclusion is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 26: Mimbres excepts to the ALJ's determination that no adjustments should be made to the backpay computation for Anthony Acosta. See Supplemental Decision p. 11, Lines 35-45.

Grounds: The ALJ's determination is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 27: Mimbres excepts to the ALJ's determination that no adjustments should be made to the backpay calculations for Michael Scott Lloyd. See Supplemental Decision p. 11, Line 50 to p. 12, Line 5.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

III. Other Objections Advanced by Respondent

Exception No. 28: Mimbres excepts to the ALJ's statement that the Compliance Specifications sought "reimbursement" for the reduction of hours. See Supplemental Decision p. 12, Lines 13-15.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 29: Mimbres excepts to the ALJ's determination that the Hospital's position that the reduction in hours occurred specifically on April 23, 2001 is not factually supported. See Supplemental Decision p. 12, Lines 28-30.

Grounds: The ALJ's determination is not supported by the record as a whole.

Exception No. 30: Mimbres excepts to the ALJ's determination that the Regional Director acted reasonably by including all of the April 2001 pay periods in his backpay calculation. See Supplemental Decision p. 12, Lines 35-37.

Grounds: The ALJ's determination is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 31: Mimbres excepts to the ALJ's analysis of Cascade Painting Co., Inc., 277 NLRB 926 (1985), and the ALJ's statement of what the standard remedy would be for a case of this type. See Supplemental Decision p. 13, Lines 4-12.

Grounds: The ALJ's analysis and statement are not supported by the record as a whole and are contrary to Board precedent and case law.

Exception No. 32: Mimbres excepts to the ALJ's conclusion that NLRB v. Dodson's Market, Inc., 553 F.2d 617 (9th Cir. 1977), and Chauffeurs, Teamsters and Helpers Local Union No. 171 v. NLRB, 425 F.2d 157 (4th Cir. 1970), are factually distinguishable from the above-referenced cases, together with the ALJ's

efforts to distinguish the cases. See Supplemental Decision p. 13, Lines 17-52 to p. 14, Lines 1-10.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 33: Mimbres excepts to the ALJ's determination that the Board could and did lawfully apply the remedy awarded by the agency to employees hired after the date on which the hours reduction took place. See Supplemental Decision p. 14, Lines 10-15.

Grounds: The ALJ's statement is not supported by the record as a whole and is contrary to Board precedent and case law.

Exception No. 34: Mimbres excepts to the ALJ's determination that he lacked the authority to consider the Hospital's argument that interest on top of any backpay award would be punitive. See Supplemental Decision p. 14, Lines 15-20.

Grounds: The ALJ's determination is contrary to Board precedent and case law.

Exception No. 35: Mimbres excepts to the ALJ's decision to reaffirm his previous ruling denying the Hospital's motion to dismiss the First Amended Compliance Specification on the grounds that the General Counsel failed to investigate and pled interim earnings. See Supplemental Decision p. 14, Lines 20-50 to p. 15, Lines 1-9.

Grounds: The ALJ's determination is not supported by the record as a whole and is contrary to Board precedent and case law.

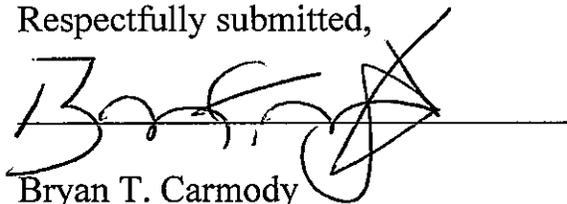
SUMMARY

Exception No. 36: Mimbres excepts to the ALJ's determination that the employees listed in the ALJ's "Summary" are entitled to the stated amounts (or for that matter, any amount) of backpay. See Supplemental Decision p. 16, Line 50 to p. 17, Lines 1-25.

Grounds: The ALJ's determination is not supported by the record as a whole and is contrary to Board precedent and case law.

Dated: September 3, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan T. Carmody", is written over a horizontal line. The signature is stylized and includes a large, sweeping flourish at the end.

Bryan T. Carmody
134 Evergreen Lane
Glastonbury, Connecticut 06033
(203) 249-9287
bryancarmody@bellsouth.net

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STATEMENT OF SERVICE OF RESPONDENT'S EXCEPTIONS

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the original of the Respondent's Exceptions to the Supplemental Decision of Administrative Law Judge William L. Schmidt (hereafter, the "Exceptions") are being filed this date by Mimbres Memorial Hospital and Nursing Home in the above-captioned matter via E-Filing at www.nlr.gov, being the website maintained by the National Labor Relations Board.

The Undersigned further certifies that a copy of the Exceptions is being provided this date to the following by way of E-mail and Federal Express:

David T. Garza, Counsel for the General Counsel
National Labor Relations Board, Resident Office 18
210 Walnut Street, Room 439
Des Moines, Iowa 50309
(515) 284-4391 (phone)
(515) 284-4713 (fax)

David.Garza@nlrb.gov

United Steelworkers of America, District 12,
Subdistrict 2, AFL-CIO-CLC

Charging Party

Attention: Manny Armenta

3150 Carlisle Blvd. NE, Suite 110

Albuquerque, NM 87110

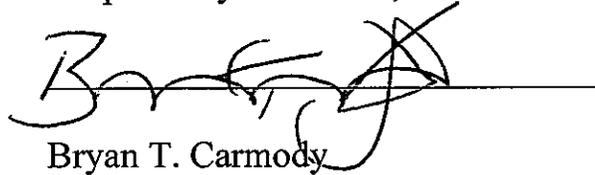
(505) 878-9756

(505) 878-0763

marmenta@usw.org

Dated: September 3, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan T. Carmody", is written over a horizontal line. The signature is stylized and cursive.

Bryan T. Carmody

134 Evergreen Lane

Glastonbury, Connecticut 06033

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bryancarmody@bellsouth.net