Laurel Bay Health & Rehabilitation Center *and* SEIU 1199 New Jersey Health Care Union. Cases 22–CA–27192, 22–CA–27324, 22–CA–27500, and 22–CA–27779

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 8, 2007, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

For the reasons set forth below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse and unilaterally implementing certain changes to its employees' terms and conditions of employment.[3]

Facts

The Respondent operates a nursing home and rehabilitation center. The Respondent and the Union began negotiating for a successor to their expiring collective-bargaining agreement in February 2005.[4] Throughout the parties' eight negotiation sessions, held from February to August 23, the contribution rate to the Union's health plan, the 1199 SEIU Greater New York Benefit Fund (Benefit Fund), remained a contentious issue.

During the first negotiation session, the Union's then negotiator[5] stated that its proposal for the Benefit Fund (21 percent of gross unit employee payroll, with a 24-percent cap during the contract term) was "nonnegotiable." At that time, the Union was in the midst of multiemployer negotiations with 20 New Jersey nursing homes represented by Attorney Morris Tuchman. Those contracts contained a most-favored-nations clause.[6] The Union modified its proposal on the Benefit Fund at the June 17 session. It proposed the same provision contained in the Tuchman master contract—a 22.33-percent increase to the Benefit Fund, with no contractual cap. Then, at the August 5 session, the Union proposed the 22.33-percent increase, but with no additional increases during the contract term absent mutual agreement. The Respondent rejected each of the Union's proposals.

At the last bargaining session on August 23, the Respondent made its final proposal, including an offer to pay 16 percent of payroll to the Benefit Fund. Union negotiator Alcoff stated that if the Respondent was unwilling to increase its contribution offer, the Union would be willing to "look at other plans," including the one the Respondent provided to its nonunion workers. Alcoff also stated that he would prepare a counterproposal. Although the Respondent claimed the parties were at impasse, Alcoff requested, and the Respondent agreed, to schedule another bargaining session. There have been no negotiation sessions since the August 23 meeting. The Respondent subsequently implemented certain changes to its employees' terms and conditions of employment.

Analysis

Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if the issue is "of such overriding importance" that it frustrates the progress of further negotiations. *CalMat Co.*, 331

[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.

The Respondent does not except to the judge's findings that it violated Sec. 8(a)(1) by announcing to its employees that their accommodated schedules would be eliminated, and violated Sec. 8(a)(3) and (5) by unilaterally ending an accommodated schedule for employee Sharon McLeod.

[2] 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.

[3] We adopt the judge's other contested findings of violations. However, in adopting the judge's finding that the Respondent's issuance of merit bonuses violated Sec. 8(a)(5), Chairman Schaumber does not rely on the judge's alternate finding that, under *McClatchy Newspapers,* 321 NLRB 1386, 1390 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998), even if a valid impasse was reached, the Respondent could not implement the merit increases without bargaining. See *California Offset Printers*, 349 NLRB 732, 738 fn. 5 (2007) (Member Schaumber, dissenting).

[4] All dates are in 2005, unless otherwise noted.

[5] Uma Pimplaskar was the Union's negotiator for the first two sessions; Justin Foley represented the Union for the third through sixth sessions; and Larry Alcoff took over for the last two sessions.

[6] The clause provided, in relevant part:

> In the event the Union enters into any collective bargaining agreement . . . on or after April 1, 2005 with a proprietary nursing home in New Jersey which provides for more favorable economic terms and conditions to the employer than those contained herein, such more favorable terms and conditions shall automatically be applicable to the Employers. . . .

NLRB 1084, 1097 (2000). Here, the Benefit Fund contributions clearly constituted such an issue. The dollar amounts were significant and, throughout most of the negotiation sessions, the parties remained steadfastly fixed in their respective positions: the Union adhering to the Tuchman agreement terms, and the Respondent refusing to contribute more than 16 percent of payroll. Had that status quo persisted, an overall impasse might well have been achieved. It did not persist.

Uncontradicted testimony reflects that at the final negotiation session on August 23, Alcoff stated that the Union was prepared to consider alternative medical insurance proposals, including the health care plan covering the Respondent's nonunion employees. Alcoff also stated that the Union would be preparing a counterproposal. In addition, Alcoff requested, and the parties agreed to, another bargaining session. Rather than test the Union's stated willingness to move, consider a union counterproposal, or follow through with an additional negotiation session, the Respondent claimed that the parties were at impasse and refused to meet again.

The party asserting impasse as a defense to unilateral action bears the burden of proof on the issue. *North Star Steel Co*., 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). We find that the Respondent has failed to carry that burden here. Rather than evincing the existence of a bona fide impasse over health insurance as of August 23, the record shows that the parties had agreed to meet again, that the Union would be preparing counterproposals, and that there was at least professed flexibility on health insurance alternatives. While, the Respondent might have reasonably doubted the sincerity of the Union's stated willingness to move from its Benefit Fund proposals, it did not test that doubt. Moreover, the evidence at the hearing established that the Union, in fact, agreed to contracts with six other nursing homes in New Jersey that did not include the Benefit Fund as the insurance plan for unit employees. Thus, we cannot conclude, as the Respondent contends, that the Union's August 23 representations were disingenuous and intended solely to stave off impasse. Based upon the foregoing, we find that the parties had not reached an impasse in bargaining, and that the Respondent violated Section 8(a)(5) when it unilaterally implemented various changes in the employees' terms and conditions of employment. Cf. *Newcor Bay City Division*, 345 NLRB 1229, 1238–1239 (2005) (the employer did not meet its burden of proving further negotiations would have been futile when it did not test the union's stated flexibility before declaring impasse).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laurel Bay Health & Rehabilitation Center, Keansburg, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Laura Elrashedy, Esq., for the General Counsel.
Alex Tovitz, Esq. (Jasinski & Williams, P.C.), of Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. This case was tried before me in Newark, New Jersey on February 13, 15, 16, and March 14, 2007. A Third Amended Consolidated Complaint was issued against Laurel Bay Health & Rehabilitation Center (Respondent, Employer or Laurel Bay) on February 2, 2007 based on various charges and amended charges filed by SEIU 1199 New Jersey Health Care Union (Union).[1]

The complaint alleges essentially that following the expiration of the collective-bargaining agreement between the Respondent and the Union, the Respondent unlawfully (a) implemented a 3% wage increase for all unit employees retroactive to August 14, 2005 (b) eliminated a transportation benefit providing bus/van service to and from work for unit employees (c) issued merit bonuses to unit employees and (d) eliminated nonstandard shifts for unit employees. It is alleged that the Respondent made these changes in mandatory subjects of bargaining in violation of Section 8(a)(5) of the Act without giving the Union an opportunity to bargain with it concerning those matters. It is also alleged that the Respondent eliminated the nonstandard shifts because its employees engaged in protected union activity in violation of Section 8(a)(3) of the Act.

The complaint further alleges that on various dates from August 31, 2005, the Union requested certain relevant and necessary information and that the Respondent failed to furnish it. Finally, it is alleged that on various occasions since October 4, 2005, the Union requested that the Respondent meet and bargain with it for the purpose of negotiating a successor collective-bargaining agreement and the Respondent failed to do so.

The Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses which will be discussed below.[2] On the entire record, including my

[1] The charge and first amended charge in Case No. 22–CA–27192 were filed on November 30, 2005 and January 24, 2006, respectively. The charge, first amended charge, and second amended charge in Case No. 22–CA–27324 were filed on March 21, April 27, and May 22, 2006, respectively. The charge and first amended charge in Case No. 22–CA–27500 were filed on July 28 and October 16, 2006, respectively. The charge and first amended charge in Case No. 22–CA–27779 were filed on January 12 and February 1, 2007, respectively.

[2] The Respondent's Answer to the Third Amended Consolidated Complaint, dated February 13, 2007, was proffered at the hearing. It is hereby received in evidence and has been attached to the exhibit file as Respondent's Exhibit 29.

observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation having its office and place of business in Keansburg, New Jersey, has been engaged in the operation of a nursing home and rehabilitation center. During the preceding twelve months, the Respondent in conducting its operations derived gross revenue in excess of $100,000 and purchased and received goods valued in excess of $5,000 directly from points outside New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union and the Respondent have been parties to collective-bargaining agreements for a number of years, the Union being the successor to Local 1115 which previously represented the employees. The Respondent admits that the Union has been the exclusive bargaining representative of its approximately 82 unit employees in the following collective-bargaining unit:

> All full-time and regular part-time licensed practical nurses, nurses aides, recreational aides, beauticians, housekeeping aides, laundry employees and dietary employees employed by the Employer at its Keansburg, New Jersey facility, excluding all office clerical employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

This case arises from negotiations between the parties to replace an expiring collective-bargaining agreement. The prior contract, which was for a five-year term from October, 1999 through September, 2004, provided, inter alia, that the employees were covered by the Respondent's health insurance plan.

In October, 2003 an extension agreement requested by the Union was executed which extended the agreement to March 31, 2005. The extension agreement provided that the health plan would be changed to the Union's Plan, later known as the 1199 SEIU Greater New York Benefit Fund (Benefit Fund). Pursuant to the extension agreement the Respondent agreed to make contributions of 18% of gross payroll to the Benefit Fund effective April 1, 2005. The extension agreement also set forth the Respondent's right to hire up to 25 "no-frills" employees who receive no benefits under the collective-bargaining agreement.

B. The Bargaining Sessions

The chief spokesperson for the Respondent was its attorney David Jasinski. He was accompanied by David Dennin, the Respondent's director of finance and occasionally by Linda Meehan, the director of human resources. The Union's first chief spokesperson was Uma Pimplaskar. She was replaced by Justin Foley who was succeeded by Larry Alcoff. Eight bargaining sessions were held, culminating in an assertion that impasse had been reached.

1. The meeting held in about February 2005

The narrative concerning the first two sessions in which Pimplaskar represented the Union is taken from Jasinski's testimony inasmuch as Pimplaskar, who is no longer employed by the Union, did not testify.

The Union submitted a written proposal to the Respondent at this or the second session. The Union did not make any wage proposals, but it made demands concerning the various Union funds.

The Union proposed that the Respondent make contributions to the Benefit Fund at the rate of 21% of gross payroll of all unit employees "which rate may be adjusted by the Trustees as necessary to maintain the level of benefits currently provided or as improved by the Trustees during the life of the Agreement. However, in no event shall the rate be increased above 24% of gross payroll during the life of this agreement."

In addition, the Union proposed that the Respondent make contributions as follows to each of the following funds:

> (a) SEIU National Industry Pension Fund: 2½% of the gross earnings of each unit employee.
> (b) Training and Education Fund: ½% of gross payroll.
> (c) New Jersey Healthcare Workers Alliance for Quality in Long Term Care - ½% of gross payroll.

The proposal also contained provisions for Union Activities and Communications, Seniority, Layoff and Recall, Transfer and Promotion, Discipline and Discharge and Labor-Management Committees.

Jasinski, whose testimony concerning Pimplaskar's comments was uncontradicted, stated that she announced that certain of the Union's proposals were "nonnegotiable," and that she would not participate in discussions concerning them. They included the Benefit Fund, the pension plan, her desire to obtain parity raises for the employees and the elimination of the "no-frills" provision. David Dennin, the Respondent's director of finance, quoted Jasinski as asking whether there was any room for negotiation on the requested increases to the funds. Pimplaskar responded by saying that she did not believe that there was any room for movement. Jasinksi replied that the Union was engaging in bad faith bargaining by refusing to discuss the issues of contributions to the Benefit Fund, pension plan and no-frills and parity. The General Counsel argues that Jasinski's testimony is not credible since the Union's written proposal did not contain a parity proposal.

Pimplaskar also stated that the Union was currently negotiating 40 to 45 other contracts with nursing homes in multiemployer bargaining with the "Tuchman" group of 20 New Jersey nursing homes represented by attorney Morris Tuchman. She claimed that if agreement was reached at Laurel Bay the contract would have to be approved and ratified by a "master committee" consisting of employees at facilities other than the Respondent. Jasinski said that he was interested in negotiating a contract for Laurel Bay, and only for its employees.

Pimplaskar made a "laundry list" information request which included a list of unit employees, their rates of pay, hours worked and dates of hire. Dennin stated that the Respondent provided that information sometime thereafter. On March 8, 2005,[3] Jasinski forwarded "cost reports" information which consisted of census information for the facility, rate schedules, and expense data including contributions paid to the Benefit Fund. Jasinski's letter invited Pimplaskar to call if she wanted additional information. In his letter dated April 18, Jasinski stated that upon providing that information he asked her if she required any other information and she said that she did not.

2. The March 9th meeting

The Respondent presented its first written proposal. It sought to make changes in the method of determining eligibility for overtime. It also sought to change the definition of part-time workers eligible to participate and receive benefits and employer contributions to those who work 30 or more hours per week from the contract's definition of part-time workers as those who work 20 or more hours per week.

The proposal offered an entirely new grievance and arbitration provision, and suggested that no change be made in certain other provisions of the expiring contract. No economic proposals for wages and contributions to the various funds were made in this proposal.

The parties discussed their respective positions regarding the grievance and arbitration clauses. However, Pimplaskar announced that with respect to all of the other Union proposals "this [the Union's initial proposal presented at the first meeting] is the standard contract that [we] are going to negotiate and this is what [the Union] wants and this is what [the Union] is going to get." Jasinski stated that "in the background" was the Tuchman contract currently being negotiated, and it was his belief that that contract would "control" and that the Respondent would have to agree to the Tuchman contract for Laurel Bay.

3. Justin Foley becomes the Union's negotiator

On March 21, Jasinski was informed that Pimplaskar was being replaced as the Union's negotiator by Justin Foley. In a letter to Foley in April, Jasinksi asked for information concerning the financial condition of the Union's benefit funds which had not been provided, and for a complete Union economic proposal. On April 18, Jasinski wrote that he received partially responsive information but no financial records concerning the funds from 2004 to the present. The letter noted that a recent arbitration decision stated that the Benefit Fund was deteriorating and that increased contributions by the employers were needed to maintain the Benefit Fund. The letter also quoted the Union's bargaining position that "any proposals regarding the Fund and the employer's contribution to it are non-negotiable."

Foley responded by letter of April 26 with certain of the information requested. He promised to furnish the rest shortly, stating that the 2004 and 2005 financial reports have not been prepared. The letter did not challenge Jasinski's statement concerning the Union's alleged "non-negotiable" bargaining stance.

On May 14, Foley requested additional information regarding Laurel Bay and four other nursing homes which were currently in negotiations with the Union.[4] In a letter of May 21, Foley explained that such information for Laurel Bay was previously requested but not received by the Union.

Jasinski took exception to Foley's joint request for information, noting that each facility was separate and negotiating individually and insisted on receiving separate letters. Thereafter, the Union's next negotiator, Alcoff, continued to send one letter requesting information for the five nursing homes. The Union's position was that it was more "sensible" and time-saving to place in one letter rather than five, identical correspondence relating to substantially the same matters involving the five nursing homes particularly since, according to Foley, the proposals by the Union and the employers were very similar for each of the five facilities.

By letter dated May 17, Jasinski advised Foley that he had previously provided the requested information to Pimplaskar and was told by her that no further information was needed. Nevertheless, Jasinski promised to provide the requested information as soon as possible. On May 21, Foley advised that Jasinski had not provided certain of the prior information requested.

4. The mid-May meeting

Foley stated that the parties reviewed the outstanding requests for information, and then discussed the Union's demands and the Respondent's counteroffer previously made. This session lasted about 2½ hours.

5. The June 3 meeting

Foley testified that this session began with the parties reviewing outstanding information requests. They then discussed non-economic terms, but no agreement was reached.

Jasinski stated that at each of the three bargaining sessions, Foley announced that the Union would not "deviate" from the Tuchman master contract that was being negotiated. He quoted Foley as saying that his "hands were tied," stating that a "most-favored-nations" clause was being negotiated in the Tuchman agreement that prevented any difference being made between the Laurel Bay agreement and the Tuchman contract regarding the contributions to the funds including the Benefit Fund, pension, no-frills and parity increases. Jasinski stated that Foley explained that if the Union gave lesser rates to Laurel Bay, the most-favored-nations clause would require it to provide the same rates to other employers.

At hearing, Foley denied telling Jasinski that he could not deviate from the Union's proposals, and further denied that his hands were tied concerning proposals that he presented., Foley stated that the problem with the Respondent's Benefit Fund proposal was that the Fund's trustees set the minimum rate for contributions to the Fund, and that Jasinski's later proposal to contribute 16% of gross payroll to the fund was less than the minimum required.

The parties signed a memorandum of agreement, at the Union's request, extending the expired contract to June 30 in

[3] All dates hereafter are in 2005, unless otherwise stated.

[4] Pavilions at Forrestal, Monmouth Care, Milford Manor, and Pine Brook.

which the Respondent agreed to maintain the wages and benefits in effect from March 31, the date it was due to expire. The Respondent provided certain information requested including the gross payroll for 2004 and data concerning the use of agency employees. Jasinski stated that he told Foley that the information provided that day constituted all the data requested to date. This session lasted about three hours.

The following day, June 4, Foley wrote Jasinski saying that although the information provided was not everything he asked for he would review it. He also made an additional request for data which he claimed was requested at the prior day's session. This session consumed about three hours.

6. The June 17 meeting

Foley stated that this session began with the parties going over the outstanding information requests. Foley testified that although the Union did not receive all the information it requested, in an attempt to move the bargaining forward, it presented its first full economic proposal, in material part as follows:

(a) "The Employer shall pay 22.33% of gross payroll to participate in the Greater NY plan effective 6/15/05."
(b) Training and Education Fund—½% of payroll.
(c) Alliance in Long Term Care—½% of payroll.
(d) Pension—Increase to 2% of payroll effective 6/15/05 and up to 2.5% on 3/1/08.
(e) Wage increases of 4% per year plus parity increases in the wage scale.
(f) Parity Increases—By the expiration date of the contract, the housekeeping and dietary workers will have a minimum rate of $10/hour, CNAs will have a minimum rate of $11/hour and LPNs a minimum rate of $22/hour.
(g) Sick Days—Increase to 12 per year.
(h) Holidays—Add 3 personal days.
(i) Vacation—Add to the current contract that employees employed for 12 or more years are entitled to 5 weeks vacation.
(j) No-Frills—Employees hired before March 31, 2005 as no-frills employees shall be grandfathered into those positions. There shall be no other regularly scheduled no-frills employees.
(k) The Employer may use temporary and agency employees for the sole purpose of filling in for absent unit employees but make reasonable efforts to offer the work to a unit employee.

Jasinski protested that the proposal for a 22.33% increase to the Benefit Fund was greater than what was previously proposed in the Union's initial proposal presented in February - 21% which may be increased to no more than 24% of gross payroll during the life of the agreement.

Foley explained that the new proposal was not necessarily more expensive since the 22.33% increase was over the life of the agreement. He conceded, however, that the proposal does not say that the rate will remain the same over the life of the contract. It just states that 22.33% is payable effective June 15 with no mention of it being over the life of the contract or that the contribution rate is capped at 22.33%.

Foley stated that no agreement was reached on any of the Union's economic proposals, but the parties bargained concerning certain contract language, and agreement was reached on three of four issues concerning discipline and discharge.

Jasinski testified that the Union's economic proposal was identical to one he received at negotiations for other nursing homes he bargained for. He became convinced that the Union was not interested in addressing the Respondent's needs but sought to obtain the identical language in all the contracts it was bargaining.

Jasinski computed the increases sought and believing that this proposal was more costly to the Respondent than the Union's first proposal announced that given the Respondent's low census it could not afford the increases proposed by the Union. Jasinski recalled that Foley stated that the Union's hands were tied and that it could not and would not make any changes to its proposals because of the most-favored-nations clause in contracts being negotiated with other employers. Employer finance director Dennin quoted Foley as saying "the increase is the increase" and is "set in stone. You're paying this increase or your staff will not have health insurance." As noted above, Foley denied making these comments.

Dennin stated that at this or later sessions Foley asked for additional information, much of which had already been provided to the Union, including a list of unit employees, rates of pay, hours worked, dates of hire and information concerning per diem, part-time and agency employees. Dennin said that such information had been provided at the June 3 session. This session lasted about 3½ hours.

7. The July 8 meeting

Foley stated that following brief bargaining concerning non-economic issues, agreement was reached on one or two of fifteen non-economic issues.

The Respondent presented its economic proposal in which it offered to pay 16% of gross payroll for the life of the contract to the Benefit Fund for each employee having six months of continuous employment. It also proposed a 3% wage increase effective October, 2005, a 3% wage raise effective October, 2006, a 2% wage increase effective April, 2007, and a 2% raise effective October, 2007. The offer stated that a new hire's minimum wages were to be based on the new hire's years of service in the industry and her job category. The Employer proposed new hourly rates for no-frills employees and offered to increase those rates during the term of the contract. The proposal also included an annual merit bonus or merit pay based on work performance to be given by the Respondent in its sole discretion.

The Employer also proposed to make no contributions to the Union's Training and Education Fund, the Alliance in Long Term Care, and the Legal Fund. It proposed no change from the expired contract in sick days and holidays, and vacation of 5 days after 1 year of continuous service, 10 days after two years, and 15 days after 10 years. Jasinski told the Union that he believed that its proposal was fair, especially considering the Respondent's census problems.

Foley told Jasinski that the Union was dissatisfied with the Respondent's proposal. Specifically, according to Jasinski, the

Union wanted to reduce the number of no-frills employees or eliminate them altogether. According to Dennin, Foley said that the Union received a 22.33% increase at other facilities and that is what "he will get at all of his facilities." Jasinski replied that he did not care what Foley negotiated with other owners – "Laurel Bay is Laurel Bay." This session last about two hours.

A new session was scheduled for July 16. Foley canceled the meeting since he had tendered his resignation and would not be employed by the Union on that date. In canceling the meeting, Foley wrote to Jasinski that the Union would make a counterproposal and urged an off the record discussion with the Respondent's principals. He also wrote that he questioned whether the Employer is able or willing to "meet the Union's stated goals" which he defined at hearing as obtaining a coherent contract, fair pay for fair work, and contributions to the Benefit Fund. Jasinski, however, quoted Foley and earlier, Pimplaskar as saying that the Union's goal was the master agreement which by then had been signed and ratified.[5] Foley wrote a memo to Union president Milly Silva in which he described the status of negotiations. In it he described Jasinski as the "enemy" and stated that although the Employer has "listened to what's been going on" it put the "standard Jasinski bullshit on the table." Foley's memo did not mention that any information requests were outstanding.

8. The August 5 meeting

Following Foley's resignation, Larry Alcoff was assigned as the Union's negotiator. At the time of his appointment, Alcoff was the deputy director of long term care responsible for the nursing home unit of the SEIU National Union. He is an experienced bargainer and served as the Union's chief spokesman in numerous collective-bargaining negotiations.

Alcoff stated that he prepared a summary of the Union's non-economic items and successfully reached tentative agreement with Jasinski on many of those items, including seniority, parts of the layoff and recall proposal, parts of the transfer and promotion offer, and parts of the discipline and discharge proposal. This was done by Alcoff going through each proposal and hearing Jasinski's objection. Alcoff's approach was that he accepted Jasinski's objection and deleted that proposal in an attempt to "clear the table" and narrow the issues to those where there was serious dispute.

The parties also discussed the Respondent's non-economic proposals including its demand to eliminate daily overtime and overtime on the sixth or seventh day of the week. Alcoff made a counteroffer which was rejected at the next meeting.

Alcoff presented a written counteroffer on economic issues. It included a demand that, effective October 1, 2005, the Respondent make Benefit Fund contributions at the rate of 22.33% of gross payroll. It further provides:

> In the event that the Trustees of the Fund determine that contributions in excess of 22.33% are required to grant the current benefits to the employees, the parties agree that, at the Union's sole option and discretion, to either provide that the parties promptly meet to propose plan revisions that will keep the contribution rates at 22.33% or make other modifications in other parts of the economic costs of the contract such that it covers the full percentage required by the Trustees. In the event that the parties cannot agree on the sort of plan revisions that will keep the rates at 22.33%, they agree to submit the dispute to final and binding arbitration with Martin Scheinman. In no event shall the contribution requirement of the Employer exceed 22.33% of gross payroll as above defined, except by mutual agreement.

Alcoff explained to Jasinski that this proposal provided for a 22.33% contribution over the life of the contract although it does not say that. He stated that arbitrator Scheinman did not have the authority to increase the rate beyond 22.33% because the proposal provides that in no event shall the contribution rate exceed 22.33% except by mutual agreement. This provision was virtually identical to that set forth in the Tuchman master contract. Alcoff's testimony that the Union's Benefit Fund proposal was "substantially different" from the Tuchman provision is simply not credible.

Alcoff compared the provisions of the Tuchman contract with the Union's offer of August 5. The terms of the "Per Diem/No-Frills and Temporary Employees" provisions were virtually identical. The amounts of the pay raises and the effective dates of the raises in both documents were also identical. One minor difference was that the parity raises in the Tuchman contract were awarded on the employee's anniversary date; the Laurel Bay proposal provided that they became effective on August 1 of each year.

The Union proposed that a 3% wage increase be given on August 1, 2005; 2.5% on August 1, 2006, 2% on March 1, 2007, 2.5% on August 1, 2007, and 2% on March 1, 2008. It also proposed a 40 cent per hour parity increase in addition to the wage raises to enable certain employees to reach $10 per hour.

Jasinski stated that he told Alcoff that this proposal was more costly than the one the Union made on June 17. Alcoff conceded that with employees earning about $7.25 per hour, the Employer would have to raise employees' wages by 27% in the first year of the contract for them to reach $9.45 per hour.

The Union also made an offer concerning no-frills, agency and temporary employees. Alcoff conceded that much of this new offer reflected language the Union achieved in other New Jersey contracts, reflecting a "pattern that developed," but stated that in bargaining he attempted to frame bargaining around such a pattern but then deviate from that pattern based upon the give and take of negotiations. Alcoff agreed that the Union's proposal "largely mirrored" the language in the Tuchman master agreement. For example, the wage raises and effective dates are identical. The proposals for no-frills, temporary and per-diem employees are substantially similar if not identical. The parity raise clauses were not the same.

Alcoff termed the Respondent's offer to pay 16% of payroll to the Benefit Fund "not realistic" since the rates for such coverage rose above even the 18% rate the Respondent was then paying pursuant to the expired contract. Alcoff testified that he told Jasinski that if the Employer was not willing to pay the

[5] The last bargaining session for the Tuchman master agreement was held on May 6. It was signed and ratified over the next six weeks through the end of June.

cost of the insurance "we have to look elsewhere for … another health insurance."

No agreement was reached at this session concerning any economic term. The only economic issues discussed were health insurance and overtime.

Jasinski testified about this session. He expressed frustration with the fact that Alcoff was the Union's third negotiator and they had to go over all the matters discussed with Pimplaskar and Foley. He further said that the Union's proposal was more expensive than the one proposed by Foley. He noted that Alcoff said many times that "we were going to get the Tuchman contract" and repeatedly mentioned that the agreement's most-favored-nations clause justified the Union's refusal to make any changes in its proposal or consider the Respondent's proposal. By then that clause was in effect as the Tuchman agreement had been executed in June. The clause states in material part as follows:

Article 35—Most-Favored-Nations

> 35.1. The Union, having committed itself to achieving better working conditions for all employees in the nursing home industry, represents that it intends to provide the same conditions for workers in all nursing homes with which it has collective bargaining agreements.
>
> 35.2. In the event the Union enters into any collective bargaining agreement . . . on or after April 1, 2005 with a proprietary nursing home in New Jersey which provides for more favorable economic terms and conditions to the employer than those contained herein, such more favorable terms and conditions shall automatically be applicable to the Employers, except that this provision shall not apply . . . [listed are exceptions not applicable to the Respondent].
>
> 35.3. This provision will apply only to the net economic impact reflected by the modifications provided for in this Agreement.

Alcoff testified that the most-favored-nations clause had little effect on the Laurel Bay negotiations since if a dispute under that clause was brought to arbitration, employers would not provide the proprietary information in an arbitration hearing involving other employers and the "net economic impact" would vary based on the number of hours scheduled, the number of employees working and their scheduled hours, and the amount of the patient census. He stated that net economic impact was almost impossible to prove in arbitration.

Alcoff, although conceding that the parties spoke about the Tuchman master contract and the most-favored-nations clause, denied saying that that contract was a reason why he could not deviate from his written counteroffer made at this meeting. Alcoff was not certain that he raised the most-favored-nations clause at bargaining, but accused Jasinski of repeatedly mentioning that clause as a "strawman." He told Jasinski that the Union's proposals are "largely drawn" from the Tuchman contract and the Union believed that the Respondent could afford to agree to that contract and that the Employer's employees deserved the same rates. However, he noted that there are "particular conditions" in each facility which might warrant a different approach. Accordingly, he suggested a different health insurance plan other than the Benefit Fund, stating that the Union was not "locked into" the Tuchman contract.

Dennin testified that Alcoff was "adamant" that he would get "everything in this proposal and nothing less," saying that "this is what I have at other facilities." Dennin explained the census problems at Laurel Bay in that it was a 123 bed facility with 23 empty beds.

Union organizer Alan Sable stated that Alcoff explained that other nursing homes had been able to afford the Union's proposals which were not unreasonable. He did not recall a specific discussion of the Tuchman contract. He recalled that the most-favored-nations clause was mentioned at the session but did not recall the context in which it came up. He recalled that Jasinski emphasized that he was not interested in entering into the same "deal" as the other New Jersey employers had agreed to.

Alcoff stated that although the Tuchman agreement was signed by the 20 nursing homes involved, each of those employers had separate "facility specific" parity raises included in each contract's "Schedule A." In addition, at least six employers did not agree to make parity raises. Some facilities had different pension contributions than others. In some contracts, the wage raises were not applied to the starting rates of pay, and in some they were. Alcoff further stated that pension contribution rates, the number of holidays, sick days and premium pay were different among the different employers in the Tuchman group. However, all of the participants in the Tuchman contract contributed to the Union's Benefit Fund at the 22.33% contribution rate.

Alcoff made no requests for information at this meeting which lasted about three hours.

9. The August 23 meeting

The Respondent orally modified its economic proposal made on July 8 to provide that the 3% pay raise, scheduled to become effective on October 1, 2005, should be made effective six weeks earlier, on August 14, 2005.

According to Alcoff, the parties bargained "back and forth" briefly regarding health insurance. David Dennin, the Respondent's finance director, said that the Employer did not want to pay any more than it was spending then for health insurance. He reasoned that if the Employer paid the increased wage and other increases demanded and also agreed to pay its counteroffer of 16% of gross payroll for health insurance, that sum would equal 18% of gross payroll for health insurance which it was currently paying.

Alcoff admittedly responded that such a suggestion is "not going to be possible," that there was "no way" that the Employer could remain in the Union's Benefit Fund at the rate it proposed. Alcoff stated that he asked Jasinski what he would do if the Benefit Fund rejected the Employer's 16% contribution offer and Jasinski replied that that was Alcoff's problem. Alcoff added that if that was all the Employer was willing to spend on health insurance the Union had to look for other health insurance—"we ought to look at other plans." Alcoff testified that the Union was not "locked into" the Benefit Fund and proposed considering other plans including the one the Respondent offered to its non-union workers. That prompted

Alcoff's request for information of August 31, discussed below, for the summary plan descriptions of the various plans offered to the Respondent's non-union employees. Alcoff conceded that there was nothing in writing prior to August 23 in which the Union offered to consider health insurance plans other than the Benefit Fund.

It should be noted that Dennin testified that he raised the issue of an alternative health plan in bargaining with Foley and Alcoff. He said that when the Employer protested that it could not afford the contribution rate requested he offered to put the unit employees in the Employer's health plan—the one the non-unit employees are currently enrolled in and the one in which the unit employees had formerly been a part of before they were transferred to the Union plan in about October, 2003. According to Dennin, the Union was not interested in this offer and wanted the unit employees to remain in the Union's plan. However, Dennin testified that Alcoff "may have asked if we had a plan" although he did not recall whether that question was asked at the August 23 session.

It should be noted that the Respondent's alleged offer to put its unit employees in the health plan it maintains for non-unit employees is not reflected in any of the Respondent's written proposals and contradicts the General Counsel's witnesses. Thus, Alcoff testified that at the August 5 and August 23 sessions, the Respondent's only offer regarding health insurance was to reduce its contribution to the Union's Benefit Fund. It made no proposal that another plan be obtained for the unit employees. Similarly, Foley testified that the Respondent did not make a proposal to place the unit employees in the plan it has for its non-union employees, and did not offer a different type of plan for those employees.

The Union's committee caucused and decided that Alcoff and one employee would meet with Jasinski and Dennin in an effort to determine the Respondent's intent in making such a minor adjustment in its offer—the earlier effective date for the wage raise.

Alcoff testified that during their meeting, he asked Jasinski if the parties could reach agreement. Jasinski was "very hostile," accusing him of personally bankrupting the Benefit Fund, and demanding to know why he did not tell the employees that the Fund's reserves were recklessly spent. Jasinski said the Respondent did not want to have the Union's plan but that it was forced into it. Alcoff responded that he was honest with the employees about the plan. He told Jasinski that he was proposing a large increase in premiums because the plan needed to ensure that it would be able to pay the claims it received. At hearing, Alcoff stated that he was told by the Benefit Fund's actuaries that contributions to the Fund were about 40% short of its cost. Alcoff also explained that he modified the wage proposal by spreading out the effective date of the increases so that the Employer could accommodate the increase in the Benefit Fund premiums. Needless to say, nothing was agreed to during that private conversation.

Alcoff stated that when he and Jasinski returned to the bargaining room, Jasinski announced that the Respondent's outstanding offer as amended that day was the Employer's "last, best and final offer." Alcoff replied that that was "surprising" since they had "virtually no discussion on economic issues in this bargaining."

Dennin testified that after he and Jasinski returned to the bargaining room, Alcoff announced that the Union must have the 22.33% Benefit Fund increase, the 12% wage increase, and that the wages of the lower paid employees must be brought up to $10.00 per hour by the end of the contract. Jasinski replied that the Benefit Fund and wage increases were too high and he could not agree that the lower paid employees be paid $10.00 per hour by the end of the contract.

Dennin said that both parties agreed that they were "going nowhere" and that Alcoff or Jasinski said that they were at an impasse. Dennin must be mistaken about Alcoff's making that remark since Alcoff and Jasinski testified that Alcoff said that the parties were not at impasse.

Alcoff then began to ask many questions of Jasinski concerning his written proposal of July 8. Such questions included the effective date for wage raises for probationary employees completing their probationary period; specific questions concerning the pay rate for a new hire assuming four years of experience; in determining merit pay increases, whether evaluative tools were used to measure skill, responsibilities, safety and training; whether the Employer had a policy on merit pay; the cost of the merit raises over the next three years; the number of no-frills employees employed; whether the Employer had a training and education policy or offered classes similar to the Union's; whether any employee was employed 10 years for purposes of vacation benefits. Jasinski replied that he did not know the answers to any of the questions posed by Alcoff. Finally, Alcoff asked whether the Employer costed out each of its proposals to determine how much money it would save if they were agreed to by the Union. Jasinski replied that he did not cost anything out and could not say what the savings would be.

Alcoff also asked questions concerning the Respondent's earlier, written offer given to the Union on March 9. Such questions related to the Employer's providing benefits only to employees working 30 or more hours per week. Alcoff asked how many employees worked fewer than 30 hours. Jasinski asked him to make a request for information and said he did not know how much the Employer would save through this proposal. Alcoff asked how much the Employer would save by virtue of its overtime proposal eliminating daily overtime or overtime on the sixth or seventh day. Jasinski did not know the answer to those questions. Alcoff stated that his questions were aimed at a "substantive discussion" but since Jasinski did not respond to those questions, the possibility of having such a discussion was "very difficult."

Alcoff denied asking the questions in order to avoid a finding that impasse had occurred. At hearing, Jasinski described Alcoff's inquiries as hypothetical questions having no relationship to the bargaining, were never asked or considered before that time, and were posed only to suggest that the parties were not at impasse. Jasinski stated that there were no outstanding requests for information at the time he made his statement concerning the last, best final offer and the Union was able to make an economic offer consistent with the Respondent's position.

Alcoff testified that he then said that "we are not at impasse in this discussion. There is wiggle room on the proposal." He

stated that no one mentioned that impasse had occurred. Alcoff said that he would prepare a counteroffer, and asked to schedule another bargaining session, adding that he needed information on the types of questions he asked because he needed to know "in real terms" what the impact of the Respondent's proposals will be on the employees. He also said that the Union and the Respondent needed to cost their proposals. Jasinski did not have his calendar with him but that he (Jasinski) would call Union president Silva to schedule the next session.

Union organizer Sable heard Alcoff deny that the parties were at impasse, saying that the Union had reduced its proposals and that there were outstanding information requests concerning per diem rates and no-frills workers, and the Union needed additional information concerning merit pay and the health insurance plan provided for non-bargaining unit workers.

Alcoff stated that in the two sessions he had with Jasinski there was very limited "face to face" bargaining, and that no real discussions were held regarding the economic issues. However, Union organizer Sable he stated that the majority of the time at the August 23 session which lasted 1½ to 2 hours, was spent at the bargaining table. Alcoff blamed Jasinski, saying that he simply made a last offer that was really his first offer with one modest change.

In his letter of September 2 to Jasinski, Alcoff stated that at the end of the August 23 session he advised Jasinski that he would review the Respondent's proposals, cost them out and prepare a comprehensive counterproposal, and that Jasinski said that he would call Union president Silva to schedule the next bargaining session. He noted that "we are clearly not at impasse."

C. The Requests for Information and the Alleged Failure to Meet and Bargain

The complaint alleges that since about October 4, 2005, the Union requested that the Respondent meet and bargain with it for a successor collective-bargaining agreement, and that the Respondent failed to meet with it.

The complaint also asserts that on August 31, September 2, November 23, 2005, July 10, 2006 and on January 10, 2007, the Union requested and the Respondent failed and refused to furnish certain information. It is alleged that the requested information is necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees.

Jasinski testified that at the time of the final bargaining session with Alcoff on August 23, 2005, there were no outstanding information requests. Alcoff conceded that from the time he became the Union's negotiator and until the session of August 23, he did not make any written requests for information from the Respondent. Indeed, the complaint does not allege that the Respondent failed to provide any information prior to the end of bargaining on August 23.

Following the final bargaining session Alcoff sent a letter on August 31 to Jasinski advising that he is "preparing a comprehensive counterproposal on the remaining open issues" and requested information which would enable him to do so. In summary, the letter requested the summary plan descriptions of the various benefit plans offered to non-union employees and the cost of total monthly premiums for the employer and employee for those plans. The letter also requested a list of employees (a) working 30 or fewer hours per week (b) having four or more weeks of vacation (c) hired in the past six months and (d) employees who are no-frills employees. The letter also requested the amount of savings projected by the Respondent's vacation time proposal; wage surveys and factors relied on related to merit pay; policies on merit pay/bonuses; correspondence to the Union proposing merit pay; cost of the merit pay proposal; and the amount of overtime paid in the past 12 months. The Respondent's answer asserts that the August 31 letter did not constitute a proper request for information under the Act.

At hearing, Alcoff gave his reasons for requesting this information. Essentially, the information was requested in order to clarify certain parts of the Employer's proposal and to determine the costs and the impact on the employees of such proposals. His request for the summary description plans provided by the Respondent to its non-union employees related to his comments at the August 23 bargaining session that if the Respondent's offer of a 16% contribution to the Benefit Fund plans was not accepted they would have to look at other plans. In considering whether the Employer's plans could be considered as a substitute, Alcoff requested the descriptions of those plans.

In his letter of September 2 to Jasinski, Alcoff wrote that at the end of negotiations on August 23 he told Jasinski that he would "review your proposals, cost them out, and prepare a comprehensive counterproposal. In the letter, Alcoff responded to the Respondent's implementation of a 3% pay raise on September 1. The letter asked whether the Respondent also implemented the other parts of its proposal such as eliminating daily overtime and overtime on the 6th and 7th day; reducing vacation accruals and its contributions to the Benefit Fund; eliminating benefits for part-time employees; and whether it established a policy on merit pay. The letter also asked Jasinski to advise him as to available dates for negotiations. The Respondent's answer to the complaint asserts that the September 2 letter does not constitute a proper request for information under the Act.

On October 4 and 10, Alcoff sent letters to Jasinski asking that he provide the information that had been requested. The letter of October 4 advised that the Union was available for negotiations on October 10, 12 and the week of October 17 through 21, and requested that a mediator be present. Copies of the letter were sent to state and federal mediation agencies.

On November 14, Alcoff advised Jasinski in writing that the Union was available to bargain on fourteen dates in November and December.

On November 18, Jasinski advised that he was available to meet on December 1, 9, and 13 or 19. "Please call to confirm these dates. If you require any further information before this session, please advise. At the next session, we would expect the Union to come to the bargaining table prepared to make meaningful proposals directed toward reaching an amicable agreement that addresses the needs of our employees and this facility. We wish to avoid the game-playing by the Union and without the Union trying to force us to accept the agreement negotiated by other parties."

Jasinski's testimony that Alcoff never responded to his November 18 letter advising of his availability to meet on four dates in December was contradicted by Alcoff's letter dated November 23, in which he stated that the Union was available for negotiations on December 9 and 19 at 2:00 p.m. Alcoff's letter stated that he had not yet received the information requested in its letters of August 31 and September 2. Alcoff also requested information concerning certain alleged unilateral changes the Employer made. Such requests included information about the transportation policy, information concerning the policy and wage rates for no-frills employees, and a list of unit employees and data concerning their dates of hire, wage rates, job titles, last wage increase, and whether they are no-frills workers and whether they receive transportation to and from work. The last request was necessary according to Alcoff because he needed fresh information about the work force to supplement similar material received eight months before, at the start of bargaining. The Respondent's answer to the complaint asserts that the November 23 letter does not constitute a proper request for information under the Act.

Thus, the parties advised each other in writing that they were available to meet on December 9 and 19. Alcoff testified that on December 8, he phoned Jasinski's office and spoke to former paralegal Concetta Catis to confirm that they would meet the following day and ask that unit employees be released to attend the session. Later that day, Jasinski sent a fax stating "since I never heard from you to confirm the negotiation date for . . . December 9 . . . I scheduled other matters. While I don't believe that there is anyone to blame, it is presumptuous on your part to call my office at 1 o'clock the day before the negotiation session to confirm the date that I proposed long ago. I suggest in the future that both parties confirm dates in advance to avoid this from happening again. At your earliest convenience, please call to schedule a mutually convenient date for all parties."

On December 9, Alcoff wrote saying that Jasinski offered to meet on December 9, and that he (Alcoff) agreed to that date by letter dated November 23 and Jasinski did not respond to that letter. Alcoff stated that he called Jasinski's office twice on December 8, and found that Jasinski was not available and did not return his call. Alcoff reminded Jasinski that he had not replied to the information requests of August 31, September 2 and November 23. Finally, Alcoff asked Jasinski to confirm that they would meet on December 19.

On December 14, Jasinski wrote to Alcoff claiming that Union representative Norman Degeneste called on December 9 and said that the session scheduled for that date or for December 19 would be postponed because of an expected snowstorm.[6] He also wrote that he had "no record of the session for December 19th and in light of the impending snowstorm suggest alternate dates." Jasinski proposed meeting dates for December 28 or 29 or the week of January 9, 2006.

At hearing, Alcoff insisted that he gave no instructions to anyone, including Degeneste, to cancel the meetings of December 9 or 19, meeting, and that he was informed by Degeneste that he did not advise Jasinski that that session would be canceled.

On December 28, Alcoff, realizing that he had not responded to Jasinski's letter in a timely fashion, wrote that he was available on January 4, 18-20 and the week of January 23. Alcoff did not receive a response to this letter and on January 19 sent another letter offering "all dates between February 4 and March 2."

On January 26, 2006, Jasinski wrote asking for a copy of a contract between another employer and the Union which the Union later provided. The letter stated that the Union has "repeatedly stated that they cannot agree to any contract that deviates from contracts covering other New Jersey employers." At hearing, Alcoff denied making that statement.

On July 10, Alcoff wrote to administrator Willinger requesting certain information including a list of employees working on standard schedules and memos concerning accommodating schedules. This information was sought because of director of nursing Ernie Chan's statement to employees, discussed below, concerning the elimination of accommodating schedules. The letter also requested information concerning the transportation benefit. Further requests included information concerning employees receiving partial benefits and overtime. Alcoff admitted making an inadvertent error in sending the letter to Willinger and not Jasinski, but assumed that Willinger would forward it to him. The Respondent's answer to the complaint asserts that the July 10 letter does not constitute a proper request for information under the Act, but does not deny that it received the letter.

On October 30, Jasinski wrote, chastising Alcoff for writing to Willinger and not to him on July 3. The letter asserted that the Union had claimed on numerous occasions that its "hands are tied based on the most-favored-nations clause negotiated by other employers" and that "the Employer has no option and must join the Union's Health Plan and make contributions of at least 22.33%." The letter further stated that at the last session Alcoff stated that the parties were "light years apart." Further, Jasinski stated that the Respondent "early in these negotiations" provided the Union with all the documents responsive to its information requests but the Union has continued to ask for the same information. He accused the Union of delaying tactics and an "abuse of the process." Finally, Jasinski stated that although the parties are at impasse it will meet to bargain and asked for a "comprehensive counterproposal to our last best offer."

On December 1, Alcoff replied, denying that the parties are at impasse. He advised that at the last session they reviewed the open issues and the Union is prepared to present counteroffers as soon as the Respondent provides all the requested information. Alcoff noted that the Employer had not presented the Union with a written last, best and final offer. Alcoff denied acting in bad faith by requesting further information. He stated that Jasinski has "ignored every information request in the past fifteen months," the Employer made unilateral changes, the Union demanded bargaining and Jasinski did not respond. Alcoff also denied Jasinski's claim that the Union insisted on the Employer's continued participation in the Union's Benefit Fund. He stated that the Union requested information regarding health plans that the Employer offered its non-unit employees

[6] There was some confusion as to whether Degeneste was allegedly canceling the December 9 or the December 19 session.

"because we are prepared to consider other health insurance options." At hearing, Jasinski testified regarding that comment that that was the first time the Union indicated a willingness to consider health plans other than the Benefit Plan. Finally, the letter expressed Alcoff's willingness to meet during the weeks of December 12 and 19, but he stated that he needed the information requested in his June 23 letter.

By letter dated January 3, 2007, Jasinski stated that he would provide the Union with "additional information that you requested." The letter also requested copies of all contracts with New Jersey employers containing the "most-favored-nations clause." Jasinski proposed to meet during the week of January 29.

On January 10, in response to the Employer's request, the Union provided a copy of the Tuchman Agreement and other contracts. In its January 10 letter, the Union proposed meeting on January 30, 31 and February 1. Alcoff stated that just before sending this letter, he became aware that the Employer gave merit pay increases or bonuses to employees in late December. The letter requested information concerning the merit pay bonuses including who received them, the date they were given, their amount; information concerning evaluations or wage surveys used to determine the amount of the merit increase; and a copy of the merit pay plan. The Respondent's answer to the complaint asserts that the January 10 letter does not constitute a proper request for information under the Act.

The parties did not meet on any of the three dates suggested by Alcoff. No response to those offers of dates was received by Alcoff and no bargaining has been conducted since the last meeting on August 23, 2005. Jasinski stated that no further bargaining sessions have been held because the Union continues to assert that it needs additional information before the parties meet. However, according to Jasinski, the Employer has given the Union "every bit of information available to us; to meet with them would just be another exercise in futility as was evidenced by the negotiation sessions that we held with them."

The Union received no response to the requests for information contained in its letters of August 31, September 2, November 23, 2005, July 10, 2006 and January 10, 2007.

D. The Implementation of a Wage Increase and Merit Bonuses

The complaint alleges and the Respondent admits that on about September 1, 2005, following the expiration of the collective-bargaining agreement, the Respondent unilaterally implemented a 3% wage increase for all unit employees retroactive to August 14, 2005, consistent with its last offer. The Respondent's answer to the complaint asserts that the parties bargained to impasse and it therefore had the right to unilaterally implement its last best offer. Alcoff denied that the Union was given any notice of the implementation of the increase.

The complaint also alleges and the Respondent admits that on about December 29, 2006, it issued merit bonuses to unit employees. Alcoff stated that on January 4, 2007 he first learned, from employee McLeod, that a merit bonus was given in late December, and that he did not receive any prior notice from the Respondent.

E. The Alleged Elimination of a Transportation Benefit

Jennifer Horath, the Respondent's director of human resources testified that in September, 2005, Laurel Bay had about 15 vacancies for certified nurses' aides. It found that it could not obtain a sufficient number of replacements from the local area and sought employees from Newark. In early October, Horath and Ben Katsevich, the Respondent's administrator, brought job applications and interviewed prospective employees at the McEllis School, a health care training facility in Newark.

The school's representative and the interviewees themselves advised Katsevich and Horath that they needed transportation to Laurel Bay which was located 45 minutes away by car. The applicants were told that free transportation would be provided to and from one location in Newark.

On October 26, 2005, about 15 new employees began work. They were given a written "Employee Transportation Policy" by Katsevich which in material part stated that the Respondent "may decide to cancel the transportation service temporary [sic] or permanently at any time for any reason, without explanations. . . . Any CNA that is not using the Irvington transportation is not entitled for any type of benefits [sic] that may be considered as compensation for not using the transportation." However, employee Wanda Lewis, one of the new recruits, testified that she was never told that the van service would be temporary. The van service was provided only for these new employees.

About five of the new employees worked on each of the three shifts. A six-passenger van picked up employees for the first shift and brought them to Laurel Bay. At the end of that shift they were brought back to Newark and the next shift picked up.

In early June, 2006, Horath learned that the employees using the van service had their own transportation and did not need the van service. By then, only about six workers were using the service. Horath, director of nursing Ernie Chan, and Shantell Hampton, the Respondent's staffing coordinator met with all the workers who used the van service and informed them that as of July 10 it would be discontinued. Employee Latisha Reddick, one of the van users, testified that Chan told the workers that the meeting was being held because a couple of staff members who did not receive free transportation complained that others received that benefit. She quoted Chan as saying that he can become a "bastard" if he "gets pushed in the corner."

Horath testified that when the van policy was implemented the Union did not object, but she conceded that she did not know whether the Union was notified of the policy when it was created or whether it was even aware of the van service provided by the Respondent. She further stated that she did not inform the Union that the van service would be discontinued, and had no conversations with any management officials concerning whether the Union should be notified of its cancellation. She did not receive a request for information from the Union concerning the van service, and did not know whether the Union demanded bargaining concerning its discontinuation. Nor did she receive a grievance or any communication from the Union concerning the van service.

Alcoff testified that he was not notified by the Respondent that it had given a transportation benefit nor of its intent to eliminate that benefit but only learned from employees in June or July, 2006 that it was being discontinued. No grievance was filed concerning the cancellation of the van service.

F. The Elimination of Non-Standard Work Shifts

The Respondent operates a three-shift schedule of work: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m.

Sharon McLeod, a nursing assistant at the Respondent who has been employed for 6½ years and has been the Union's shop steward at the facility for two to three years, worked the 3:00 p.m. to 7:00 p.m. afternoon shift five days per week.

In about May or June, 2006, McLeod requested permission to change her schedule so that she would work the 7:00 a.m. to 3:00 p.m. shift on Wednesdays only so that she could attend a class that day at 5:30 p.m. She would continue to work her regular 3:00 p.m. to 7:00 p.m. shift the rest of the week. Her request was granted for about one month but then she was rescheduled to work her usual 3:00 p.m. to 7:00 p.m. shift on Wednesdays and she did so.

Upon learning that she was no longer permitted to work the morning shift on Wednesday, McCleod asked schedule coordinator Hampton and human resources director Horath for permission to accommodate her request and she was denied. She then filed a written grievance on June 27 with Horath who told her that it would be given to director of nursing Chan. The grievance was directed at Hampton's conduct toward her. It stated in relevant part:

> In the last few months, in executing my duties as Shop Steward, I have had to voice numerous complaints that staff have brought to me regarding the unfair practices she [Hampton] has been employing with regards to posting and allotment of overtime slots in the schedule.
>
> Since this time I have noticed a definite change in her behavior towards me that could be deemed discriminatory.
>
> Firstly, I made a verbal request for a change in my schedule so that I could work on Wednesday mornings instead of Wednesday evenings. For a time this request was honored, but since making complaints about her work, I have been told that this change can no longer be accommodated. However, as a longstanding employee of the facility for over six years, I feel that this treatment is unfair because I have never made a request for a schedule change. Yet during this time I have seen numerous employees come and go who have requested schedule changes and have had their requests granted.

The letter further stated that McLeod received no response to her requests for time off or for vacation, and noted that she spoke to management about Hampton's "unprofessional behavior on several occasions and have received no satisfactory response."

Nursing staff meetings were held on the following two days and were attended by 25 and 30 employees, respectively, at which Chan and Horath were present.

According to employee McLeod, Chan announced that the meeting concerned "special scheduling." He noted that he has tried in the past to accommodate the staff when they needed to change their work time due to child care or school, but he is "in a situation and when he feels as if he's cornered, he can become a bastard." He said that 11 employees have special schedules and he would speak to each one individually about their schedules.

Employee Wanda Lewis quoted Chan as saying that many employees were asking for special privileges such as days off and that he was being "pushed up against the wall" because "everyone was asking for the same days" and he could no longer accommodate these special schedules.

Employee Reddick stated that at the meeting concerning the van service which took place at about the time of the meetings relating to the accommodated schedules, Chan said that many employees complained to the Union and the Labor Board about 11 workers who had special schedules for religious reasons, and that those schedules would be stopped.

McLeod stated that two or three days after the meetings, Horath passed her in the hallway and asked how she was doing. McLeod replied "I'm doing." Horath responded that McLeod did not look very happy and McLeod answered that she was not happy because it appeared that 11 people were being punished because she asked for a schedule change. Horath responded that when she filed the grievance and used the word "discrimination" Chan "took it seriously." Horath denied that this conversation occurred.

McLeod testified that about one month later, she was asked by Joel Willing, the Respondent's president and administrator to meet with him in his office. He told her that she has been employed for six years and he has always tried to accommodate her. They then discussed her grievance. McLeod explained that she needed to attend a class on Wednesday evening but she is scheduled to work at that time. She suggested that her day off on Thursday be changed to Wednesday. Willing agreed and the grievance was settled in that manner. Thereafter, McLeod continued to have a day off on Wednesday. Apart from only one month in May or June in which she worked 7:00 a.m. to 3:00 p.m. on Wednesdays, she no longer was permitted to work that shift.

Human resources director Horath testified that she brought McLeod's request for a schedule change to Chan who said that granting the request would not be possible. After McLeod filed her grievance, Horath again spoke to Chan who said he wanted to "look more closely" at the issue of accommodated schedules and how they affected staffing at the nursing home. At that time he identified 11 employees who he believed were receiving accommodated schedules and decided that such schedules would be eliminated. Chan did not testify.

Horath stated that at the meetings with the staff, Chan mentioned that 11 employees received accommodated schedules which would be eliminated, but that he would meet with the employees to discuss the matter. Horath at first testified that Chan said nothing else at the meeting, but then on cross-examination noted that he said that all the requests for accommodating schedules are "becoming overwhelming," that 11 people receive such schedules, and that he "can be a mean bas-

tard." Horath did not recall him saying that he was being pushed against a wall or corner.

After the meetings, Horath examined the collective-bargaining agreement and noticed that it provided that employees must work every other weekend (Saturday and Sunday). She decided that as long as employees worked every other weekend they could retain their accommodated schedules. She determined that of the 11 employees receiving accommodated schedules, only three, Ara Awura, Juliana Jones and Simone Mentor, did not work every other weekend. She reported this to Chan, noting that there was no need to alter the schedules of the other eight workers.

The expired contract further provides that the regular work week shall be 37.5 hours consisting of five consecutive days per week but the contract does not state on which specific days of the week the employee must work except, as noted above, employees must work every other weekend.

The three workers were told that they had to work every other weekend. Horath testified that she sought to comply with the expired collective-bargaining agreement and for that reason required the three employees whose schedules were accommodated by not working every other weekend to work every other weekend.[7]

Mentor and Union representative Alcoff met with Horath in July, 2006. Mentor was unable to work on Saturdays for religious reasons. They agreed that she work every Sunday instead of every other Saturday and Sunday.

McLeod's daughter, Juliana Jones, was one of the three employees with accommodated schedules. She worked every Saturday but did not work on Sundays because of her school schedule. In late August she was told by Chan that she would have to work one Sunday per month pursuant to the contract and that the Respondent could no longer accommodate her requested schedule of not working Sundays.

The Respondent asserts that the expired contract's provisions permitted it to act as it did, as follows:

> *9. Work Week*
> F. The Employer is to provide scheduling of one weekend on with the following weekend off for all employees so that all employees will be on duty one weekend and off duty the following weekend.
>
> *21. Management Rights*
> The management of the establishment and the direction and control of the property and work force shall remain with the Employer. The rights herein described shall include but not be limited to: the right to hire; lay off; discharge for just cause; in case of emergencies to require that duties other than those normally assigned be performed except that "emergencies" shall not exist for longer than two days; to make reasonable working rules and regulations of procedure and conduct, and to determine work shifts. Provided however, that the exercise of all these rights must be consistent with the terms and conditions of this Agreement and are not to be used as to discriminate against any person by reason of Union membership.

Analysis and Discussion

I. THE ALLEGED UNILATERAL CHANGES

A. Was Impasse Reached

The complaint alleges that the Respondent made certain unilateral changes in its employees' terms and conditions of employment. "The general rule is that when parties are engaged in negotiations for a new agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Pleasantville Nursing Home*, 335 NLRB 961, 962 (2001), citing *Bottom Line Enterprises,* 302 NLRB 373 (1991). An employer violates Section 8(a)(5) and (1) of the Act by implementing its final bargaining proposals without reaching a bargaining impasse. *Cotter & Co.*, 331 NLRB 787, 787–788 (2000). The Respondent argues that an impasse in bargaining was reached.

In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." As later set forth in *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), the Board stated:

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

The burden of demonstrating the existence of impasse rests on the party claiming impasse—here the Respondent. *Serramonte Oldsmobile, Inc.,* 318 NLRB 80, 97 (1995). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are 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." *Taft,* above at 478.

Regarding bargaining history, Laurel Bay and the Union or its predecessor Local 1115 successfully negotiated three prior collective-bargaining agreements before the current negotiation. Jasinski represented the Respondent since 1995. No unfair labor practice charge had been filed against the Respondent prior to the instant matter.

Although eight bargaining sessions were held, the first four meetings were not productive inasmuch as no economic proposals were presented at those meetings. The Union presented its economic proposals at the fifth meeting, and the Respondent presented its economic proposals at the sixth meeting. In the seventh meeting, in an effort to move the negotiations, Alcoff accepted many of the Respondent's objections to its proposals and withdrew those demands. Also at the seventh meeting, Alcoff presented a written counteroffer to the Respondent's proposals. At the eighth and final meeting the Respondent

[7] The General Counsel sought to discredit Horath's believability in this regard by asking whether the Respondent deducted union dues from its employees wages. Horath's answer that it did not is consistent with the legal principle that the dues deduction requirement does not survive a contract's expiration. *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 667 (2000).

made its last, best and final offer and claimed that impasse had occurred. Thus, although there were eight meetings, serious negotiating did not occur until the seventh meeting.

Another factor, the good faith of the parties, is put in question by the Respondent. It asserts that the Union did not enter negotiations with an intent to reach agreement, but rather bargained in bad faith. The Respondent contends that the Union appointed relatively inexperienced bargainers Pimplaskar and Foley, gave them no authority to reach agreement and that they acted as they did in order to "stall" the negotiations until the Tuchman agreement, containing the most-favored-nations clause, was concluded. Indeed, Alcoff described Foley as an "inexperienced bargainer" who had not bargained a contract to conclusion. Both Pimplaskar and Foley were supervised by Alcoff in their preparation and presentation of the Union's proposals and their bargaining strategy.

In addition, the Respondent asserts that the Union had a fixed position in which it insisted on certain raises in the Benefit Fund, demanded the same terms as the Tuchman agreement, and engaged in regressive bargaining.

The main issue as to which there was basic disagreement was an important one—the contribution to the Benefit Fund. The parties seemed far apart on this issue with the Union demanding that the Respondent make contributions at a certain level and the Respondent refusing to do so. There is much facial appeal in the Respondent's argument that the Union would not deviate from its position on that issue. Thus, its first demand, made in February, 2005, was for an increase of 21% of gross payroll with a cap of 24% during the life of the agreement. Its next demand, made on June 17, was for an increase of 22.33% with no assurance that it could not be raised. The Union's final demand, made on August 5 was for a 22.33% increase which could not be raised except by mutual agreement.

Accordingly, it is clear that the Union maintained a relatively fixed position regarding this vital issue until the final bargaining session on August 23. The evidence supports a finding that the Union sought the same Benefit Fund raises as that set forth in the recently negotiated Tuchman master contract. Thus, the increase demanded by the Union was virtually identical to that in the Tuchman contract. The Respondent's argument that the Union was reluctant to deviate from the increase set forth in the Tuchman contract because of the most-favored-nations-clause present there is also supported by the record. Thus, Jasinski quoted all the Union's bargainers as saying that they could not accept any lower benefit increase than that in the Tuchman agreement. Although Foley and Alcoff denied those comments, Jasinski gave uncontradicted testimony that Pimplaskar had the same approach.

Indeed, there is nothing in the Union's written proposals to indicate that it intended to depart from the Tuchman agreement regarding raises in the Benefit Fund. The parties' course of bargaining demonstrates that the Union never proposed a Benefit Fund increase which was lower than the raise ultimately agreed to in the Tuchman agreement—22.33%,[8] and the Respondent consistently insisted that it would not agree to a higher rate than its offer of 16%. See *Richmond Electrical Services*, 348 NLRB 1001, 1002–1003 (2006), cited by the Respondent.

Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if that issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations. *Calmat Co.,* 331 NLRB 1084, 1087 (2000). Because the Benefit Fund increase was an issue of such critical and overriding importance, the parties' possible impasse over that issue until August 23 justified the Respondent's belief that further bargaining would be futile. However, if impasse occurred, it was broken at the final, August 23 session when Alcoff suggested that the Union would consider another plan, including the Respondent's plan for its non-union employees, and prepare a counteroffer.

Regarding the final factor, the Union did not consider the parties to be at impasse. When the Respondent announced on August 23 that it was making its last, best and final offer, I credit Alcoff's testimony that he announced at that meeting that if the Respondent would not raise its offer on the Benefit Fund, the Union would "look at other plans," including the plan the Respondent provided its non-union workers. Respondent's official Dennin conceded that Alcoff may have asked if the Employer had a plan. As conceded by Dennin, there was at least a mention of alternative plans made at the meetings, with Alcoff inquiring if the Employer had a plan. Alcoff suggested that there was "wiggle room" in the proposal, and that he would prepare a counterproposal. He requested, and the Respondent agreed to another bargaining session. Such statements support a finding of no impasse. *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1064 (2006).

The evidence supports a finding that, on August 23 Alcoff was willing to consider other health plans. Thus, his credited testimony was that following the signing of the Tuchman agreement, in 2005 the Union signed contracts with six named nursing homes in New Jersey in which those contracts did not provide that the Benefit Fund would be the representative health plan for the unit employees.

The Union demonstrated its willingness to compromise by Alcoff's acceding to the Respondent's objections to the Union's proposals at the August 5 meeting, and in its letter of August 31, before the Respondent implemented any of its proposals, advising Jasinski that he would prepare a counterproposal on the remaining open issues, including the Benefit Fund.

"For impasse to occur, both parties must be unwilling to compromise." *Grinnell Fire Protection Systems Co*., 328 NRLB 585, 585 (1999),or believe that further proposals could no longer be fruitful. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *Larsdale, Inc.*, 310 NLRB 1317, 1318 1993). "Impasse can exist only if both parties believe that they are 'at the end of their rope.'" *Cotter & Co.,* 331 NLRB 787, 788 (2000). Thus, there must be a contemporaneous understanding by both parties that they had reached impasse. *Essex Valley Visiting Nurses Assn.,* 343 NLRB 817, 841 (2004). Here, the Union believed that the parties were not at impasse and so advised the Respondent at the final meeting.

In *Cotter & Co.,* 331 NLRB 787, 788 (2000), in finding that no impasse had taken place, the Board noted that prior to the respondent's declaration of impasse, there had been movement

[8] The initial demand for a 21% raise was capped at 24%.

on important issues and the union had demonstrated flexibility. Here too, on August 23, the Union advised that it would consider another plan, inquired as to the Respondent's health plan in effect for its nonunit employees, and said that it would prepare a counterproposal.

In light of Alcoff's protestations and questions after impasse was declared on August 23, his offer to prepare a counterproposal, and agreement by both sides to meet again, it appears that the "contemporaneous understanding" of the parties at that time regarding the state of the negotiations weighs against a finding that a valid impasse was reached. *NewcorBay City Division*, 345 NLRB 1229, 1239 (2005). In light of the Union's willingness to continue bargaining I cannot find that the parties had reached a deadlock on this issue. Whether the parties could be expected to resolve their differences is unknown. What is known is that the Union offered, and the Respondent agreed to continue to bargain.

J. D. Lunsford Plumbing, 254 NLRB 1360, 1364–1365 (1981); *Calmat Co*., 331 NLRB 1084, 1099 (2000); and *Richmond Electrical Services*, all cited by the Respondent, may be distinguished in that the unions in those cases refused to accept any terms different than standard, area contracts and in *Richmond*, the union conceded that the most favored nations clause precluded it from agreeing with the employer on a lower wage than the one in the industry-wide agreement. Here, however, the Union agreed to consider the Respondent's health plan in effect for its nonunion workers, indicated flexibility by stating that it would prepare a comprehensive counterproposal, and maintained that there was wiggle room in its proposal.

"It is well settled that parties have a continuing obligation to bargain even though they have reached a lawful impasse." *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1017 (2006). The Supreme Court stated in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982):

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." . . . Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." . . . Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

As the court stated in *Taft*, "although some bargaining may go on even in the presence of a deadlock, it is a "fundamental tenet of the Act that even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement. . . . The Board's finding of impasse reflects its conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful." *Television Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968). "Anything that creates a new possibility of fruitful discussion (event if it does not create a likelihood of agreement) breaks an impasse . . . [including] bargaining concessions implied or explicit." *PRC*, 280 NLRB 615, 636 (1986). Here, Alcoff's statements at the August 23 session that the Union would consider another health plan including the Respondent's plans provided for its non-union workers certainly created a "new possibility of fruitful discussion." Accordingly, if an impasse had occurred prior to August 23 it was broken by the end of the session that day.

In finding that no impasse occurred, the Board in *NewcorBay City Division*, above at 1239, observed that when the respondent asserted that the parties were at impasse, the union agent asked to continue bargaining and assured the employer that it was prepared to negotiate. It was expected that the union would make concessions depending on what information the employer provided. The Board found that no impasse occurred even though the union "had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining." See *Ead Motors*, above at 1064. The Board also noted that although a "wide gap" existed between the parties' positions, no impasse occurred where there was a possibility of further movement on important issues. *Newcor*, above at 1238–1239. Similarly, the evidence here shows that the Union officials were not at the end of their negotiating rope, but were ready and apparently willing to negotiate further.

As in *Serramonte Oldsmobile*, 318 NLRB 80, 98 (1995), at the final bargaining session, "all the elements of a genuine impasse in bargaining were in place." However, in *Serramonte* as here, Alcoff's statements represented "serious movement—a substantial effort" to bridge the gap in positions. Thus, Alcoff's statement that the Union would consider another health plan and that he would prepare a counterproposal signaled that movement was possible. That does not mean that the Union could be expected to change its position and withdraw from its insistence that the Tuchman agreement's Benefit Fund rate be agreed to, but it is "realistically possible" that continued discussion would have been fruitful. Inasmuch as the Union did not, by August 23 request, receive or evaluate the health insurance plan provided by the Respondent to its non-unit employees, it cannot be said that the Union would have made no further movement on that issue in a later session.

Similar to the instant case, in *Grinnell Fire Protection Systems Co.,* 328 NLRB 585, 586 (1999), the Board found that no impasse had occurred where the union had not yet offered specific concessions, but on the last day of negotiations had declared its intention to be flexible, said it did not want impasse, sought another bargaining session and asked for a federal mediator. "The essential question is whether there has been movement sufficient 'to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.'" *Hayward Dodge*, 292 NLRB 434, 468 (1989). I find that such ray of hope presented itself at the last bargaining session here.

Rochester Telephone Corp., 333 NLRB 30, 65 (2001), cited by the Respondent, is distinguishable. The Board held there that "a party's bare assertions of flexibility on open issues and its generalized promise of new proposals [do not clearly establish] any change, much less a substantial change in that party's negotiating position. . . . Such a change must surely encompass a new position or specific proposals responsive to the employer's bargaining proposals." Here, the Union sought specific information as to the open issues, specifically the most important one—the Benefit Plan. The Union said that it would consider

other plans which was a substantial change from its prior position, and asked for the summary plan descriptions of the plans in effect for the Respondent's nonunit employees and the monthly costs to the Respondent and the employees for the plans. Armed with such information it is conceivable that the Union would change its position.

The Respondent asserts that Alcoff asked numerous questions at the end of the August 23 bargaining session in an attempt to preclude an otherwise valid impasse. *E.I. du Pont & Co*., 346 NLRB 553, 558 fn. 9 (2006). Although there is some support for finding that Alcoff desperately asked a large number of questions of Jasinski at the last session in order to forestall a finding of impasse, and perhaps he did so inasmuch as Jasinski declared that impasse had occurred, nevertheless, he asked those questions in a good-faith effort to explore the Respondent's proposals and prepare a counteroffer responsive to those proposals. He also indicated a willingness to meet again.

I thus cannot find that the Union's willingness to continue talks was a "mere token offer" made for the ulterior purpose of precluding the unilateral implementation of certain terms. *NLRB v. H & H Pretzel Co.,* 831 F.2d 650, 656 (6th Cir. 1987), as argued by the Respondent. In that case the union did not make a new proposal or indicate a willingness to compromise further on any specific issue. Here, the Union offered to make a new proposal, offered to consider other health plans and said there was wiggle room in its proposal. In addition, Alcoff's questions were all relevant to the Respondent's bargaining proposals and were intended to elucidate such proposals and permit the Union to learn their basis so that it could prepare counterproposals.

In *ACF Industries LLC*, 347 NLRB 1040, 1043 (2006), cited by the Respondent, the Board found that the union's request for information made after months of extensive bargaining and after its rejection of the employer's final offer was "purely tactical and was submitted solely for purposes of delay." Unlike here, the Board noted that no negotiations were scheduled and the union showed no interest in post-implementation bargaining.

Even assuming that there had been impasse before the end of the August 23 session, there was no legally cognizable impasse on September 1, the date of the Respondent's unilateral implementation of the wage increase. This is so because any impasse was broken when the Union informed the Respondent on August 23 that it was prepared to make a counterproposal and that it sought further bargaining. Accordingly, any impasse that arguably existed here was broken prior to the Respondent's unilateral implementation of the wage increase. See *Jano Graphics, Inc*., 339 NLRB 251, 251 (2003), where the Board found that any impasse that existed was broken when the union informed the employer that it had new proposals and was seeking further bargaining. Here, although the Union did not present new proposals it immediately sought information at the last session, announced that it would prepare a counterproposal and in a letter sent eight days letter which stated that it was preparing a "comprehensive counterproposal." Thus, assuming that the information was forthcoming a counterproposal may have been made.

> The mere fact that the Union refuses to yield does not mean that it never will. Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset. Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and late in the process. *Detroit Newspaper Local 13 v. NLRB,* 598 F.2d 267, 273 (D.C. Cir. 1979).

It thus cannot fairly be said that by the end of the August 23 session or thereafter, the parties had exhausted all possibilities of reaching agreement. Accordingly, the Respondent's declaration of impasse, implementation of parts of its final offer, and unilateral changes in its employees' terms and conditions of employment were premature and violated Section 8(a)(5) and (1) of the Act.

B. The Alleged Unilateral Changes in Conditions of Employment

Section 8(a)(5) prohibits an employer from unilaterally instituting changes regarding wages, hours, and other terms and conditions of employment before reaching a good faith impasse in bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962).

The complaint alleges that following the expiration of the collective-bargaining agreement on March 31, 2005, the Respondent made unilateral changes in certain mandatory subjects of bargaining with respect to the terms and conditions of its employees without giving the Union an opportunity to bargain with it concerning those matters. The answer to the complaint asserts that the Respondent was entitled to make changes and implement parts of its final offer because it reached impasse in negotiations with the Union, it did not have an obligation to bargain with the Union regarding permissive subjects of bargaining, and that the contract's "management rights clause" permitted it to make such changes.

I have found above that the parties had not reached impasse in bargaining, and that if an impasse was reached it was broken at the final bargaining session on August 23.

In addition, it is well settled that a "contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the parties' contrary intentions." *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005); *Blue Circle Cement Co.,* 319 NLRB 954, 954 (1995); *Paul Mueller Co*., 332 NLRB 312, 313 (2000). There is no evidence in the expired contract or elsewhere that the parties intended the management rights clause to survive the expiration of the agreement. Accordingly, the Respondent may not rely on the management rights clause in the expired contract to justify its unilateral changes.

Even assuming that the management rights clause survived the expiration of the contract, a unilateral change in a mandatory subject of bargaining is permitted only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). The Court stated there that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" To meet the "clear and unmistakable" standard, the

contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp.,* 330 NLRB 1363, 1365 (2000). No such showing has been made here.

1. The implementation of a wage increase

The complaint alleges and the Respondent admits that on about September 1, 2005, following the expiration of the collective-bargaining agreement, it implemented a 3% wage increase for all unit employees retroactive to August 14, 2005. The Respondent's answer to the complaint asserts that the parties bargained to impasse and it therefore had the right to unilaterally implement its last best offer.

First, inasmuch as I have found above that no legally permissible impasse occurred, the Respondent was not privileged to implement its 3% wage offer. Second, the Respondent gave no notice to the Union that it would implement a wage increase. By doing so it violated Section 8(a)(5) of the Act.

2. The issuance of merit bonuses

The complaint also alleges and the Respondent admits that on about December 29, 2006, it issued merit bonuses to unit employees. The Respondent's answer asserts that "any wage adjustments . . . were consistent with its legal obligations to the Union." Alcoff stated that on January 4, 2007, he first learned, from employee McLeod, that a merit bonus was given in late December. The Union did not receive any prior notice from the Respondent that it would give merit bonuses to unit employees.

The expired contract states that "nothing contained herein shall prevent the Employer from giving merit increases, bonuses, or other similar payments provided the Union has first been apprised of same." The Employer's offer presented to the Union on July 8, 2005, stated that upon the employee's anniversary, it has the right, in its sole discretion to provide a merit bonus or merit pay to employees and that such decision shall not be subject to the grievance and arbitration procedure.

I credit Alcoff's undisputed testimony that no notice was given to the Union that the Respondent intended to issue merit bonuses. Even according to the expired contract the Respondent was required to advise the Union of such bonuses. It is clear that it did not do so. The Union not only did not waive its statutory right to be notified of the implementation, the expired contract required that the Union be notified of its implementation.

I also find, as set forth above, that no valid impasse had been reached at the parties' last bargaining session, and that no valid impasse existed at the time of the implementation of merit bonuses 16 months after the last bargaining session. Accordingly, inasmuch as no impasse had occurred at the time the bonuses were implemented, the Respondent could not validly implement the increases.

Assuming that impasse had occurred, ordinarily, an employer may establish new terms and conditions of employment as set forth in its bargaining proposals. However, an exception exists where clauses confer on an employer "broad discretionary powers that effect recurring unilateral decisions regarding changes in the employees' rates of pay. . . . Allowing the employer to implement upon impasse a clause that reserved the right to unilaterally exert unlimited managerial discretion over future pay increases would be so inherently destructive of the fundamental principles of collective bargaining that it would not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996).

Even if a valid impasse was reached, merit increases, being a mandatory subject of bargaining involving the application by the Respondent of "unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria. . . ." could not have been implemented without bargaining over the method of implementation. *McClatchy Newspapers*, above at 1390. "Such a result would be antithetical to our statutory system of collective bargaining meant to promote industrial stability." *McClatchy,* above at 1391. See *Colorado-Ute Electric Assn*., 295 NLRB 607, 609 (1989). In this connection it should be noted that the facts in *McClatchy* are similar to those here. In *McClatchy*, the expired agreement included a merit increase pay system which, as here, gave the employer "ultimate discretion over the timing and amount of individual merit increase" and which were not subject to the grievance-arbitration provisions of the contract. See *NLRB v. Katz*, 369 U.S. 736, 746 (1962). The result in *McClatchy* therefore controls here.

I accordingly find and conclude that the Respondent's issuance of merit bonuses violated Section 8(a)(5) of the Act.

3. The elimination of a transportation benefit

It is alleged that the Respondent unilaterally unlawfully eliminated a transportation benefit providing bus/van service to and from work for unit employees.

The Respondent denies that its actions violated the Act and alternatively asks that this allegation be deferred to the grievance-arbitration provisions of the parties' contract. Regarding its request for deferral of this allegation, the Respondent argues that it has continued to process grievances arising under the contract and offers, in its brief, to waive any timeliness defenses and proceed directly to arbitration. I find that deferral is inappropriate inasmuch as the contract expired 16 months before the elimination of the transportation benefit. Accordingly, "there is no contract in existence under which the parties are mutually bound by an agreed-upon grievance-arbitration procedure." *Arizona Portland Cement Co*., 281 NLRB 304 fn. 2 (1986).

It is clear that providing free transportation to its employees is a term and condition of employment and is thus a mandatory subject of bargaining.

It is undisputed that the Respondent never notified the Union that it was instituting this benefit and never notified it that it was discontinuing it. Although the Respondent argues that the transportation was a temporary service and that the employees were notified that it could be discontinued at any time, it was, nevertheless, a benefit provided to employees and a mandatory subject of bargaining.

By failing to notify the Union of the discontinuance of the free van service and by unilaterally eliminating it, the Respondent violated Section 8(a)(5) of the Act.

4. The elimination of non-standard work shifts

It is alleged that the Respondent unilaterally eliminated non-standard work shifts for its unit employees in violation of Section 8(a)(5) of the Act and in violation of Section 8(a)(3) of the Act.

As set forth above, shop steward Sharon McLeod requested and was granted, for about one month, a change in her schedule so that she could work the 7:00 a.m. to 3:00 p.m. shift instead of the 3:00 p.m. to 7:00 pm. shift on Wednesdays. Thereafter, that accommodation was denied. It is undisputed that no notice was given to the Union that her accommodated schedule would be eliminated.

The Respondent's defense to this allegation is that the management rights clause in its expired contract permitted it to take this action. The management rights clause provides that the Respondent has the right to "to determine work shifts." As I have found above, the management rights clause did not survive the expiration of the contract.

The evidence supports a finding that 11 employees had accommodated schedules where, for one reason or another, their work schedules differed from those they were assigned by the Respondent. They had apparently requested those different schedules as an accommodation and were granted those accommodated schedules.

The Respondent's reaction to McLeod's filing of a grievance to the elimination of her accommodated schedule was to investigate which of the 11 workers were not adhering to the contract's requirement that they work every other weekend.[9] It determined that only three employees were not working every other weekend as required. It was decided that the other 8 employees, who did work every other weekend could retain their accommodated schedules. However, although McLeod apparently did work every other weekend, she was not permitted to retain her accommodated schedule.[10] No evidence was adduced as to whether employees other than McLeod who enjoyed accommodated schedules in fact retained those schedules as testified by Horath although she quoted Chan as saying that the accommodated schedules of all 11 employees would be eliminated.

Thus, although McLeod worked every other weekend she was not permitted to retain her accommodated schedule which she had enjoyed for one month, and pursuant to which she worked the early shift on Wednesdays. The fact that the matter was subsequently settled by changing her day off to Wednesday at her request does not alter the fact that her accommodated schedule was unilaterally changed by the Respondent without notice to the Union.

Inasmuch as the General Counsel has the burden of proving that the accommodated schedules of the eight employees were actually eliminated, and since there is no evidence to contradict Horath's testimony that the eight employees other than McLeod retained their accommodated schedules, the affirmative Order issued herein will be confined to McLeod.

I accordingly find that the Respondent, in violation of Section 8(a)(5) of the Act eliminated the accommodated schedule of Sharon McLeod unilaterally without offering to bargain with the Union about that matter.

The complaint also alleges that the accommodated schedules were eliminated in retaliation for the employees' union activity. The evidence supports this allegation. As set forth above, shop steward McLeod's grievance which complained that other employees were granted accommodated schedules, prompted a meeting by nursing director Chan at which he announced that the accommodated schedules of 11 employees would be eliminated. McLeod's testimony, corroborated in material part by official Horath, quoted Chan as saying that such requests are "becoming overwhelming," he believes that he is being "cornered" and can be a "bastard."

There was no evidence as to why such requests were overwhelming and what prompted Chan to announce that he could be a "bastard". Inasmuch as the meetings of all nursing staff were held shortly after McLeod filed the grievance, it is clear that Chan's announcement was related to that grievance. His reaction to the grievance complaining that other employees enjoyed such accommodated schedules was his announcement that all accommodated schedules would be eliminated. I accordingly find that the counsel for the General Counsel has made a prima facie showing that the elimination of McLeod's accommodated schedule was motivated by her filing the grievance. *Wright Line,* 251 NLRB 1083 (1980).

The Respondent has not met its burden of proving that it would have eliminated McLeod's accommodated schedule if she had not filed a grievance. It gave no reasons why it did not restore her schedule as it had, according to Horath, decided not to eliminate the schedules of those who worked every other weekend. Although McLeod suggested that she change her day off so that she could attend class on Wednesday evening, such a change should not have been necessary. I accordingly find and conclude that the Respondent eliminated McLeod's accommodated schedule in violation of Section 8(a)(3) of the Act.

In addition, I find that Chan's announcement that all accommodated schedules would be eliminated violated Section 8(a)(1) of the Act.

II. THE UNION'S REQUESTS FOR INFORMATION

It is alleged that on August 31, September 2, November 23, 2005, July 10, 2006 and January 10, 2007, the Union requested and the Respondent failed and refused to furnish certain information. It is alleged that the information is necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees. The Respondent's answer to the complaint asserts that it provided the Union with "any and all information as required under the Act and as requested," and that the letters set forth above do not constitute valid information requests under the Act.

The five letters requesting information and Alcoff's reasons for the requests are discussed in detail above. Broadly, the five letters requested information (a) so that the Union could prepare a counterproposal to the Respondent's final offer (b) clarifying the Respondent's proposals (c) regarding terms and con-

[9] There is nothing unlawful or improper in the Respondent's requiring employees to work every other weekend.

[10] There was no claim that McLeod did not work every other weekend.

ditions of employment of the unit employees (d) concerning whether the Respondent implemented other parts of its final offer (e) concerning alleged unilateral changes made by the Respondent (f) including a list of employees with their dates of hire, wage rates, benefits, etc. to update previous information received.

As set forth above, I have found that no valid impasse has occurred. Even assuming, however, that impasse took place, an employer has an obligation to furnish information in order to enable the union to perform its duties as the collective-bargaining representative of the unit employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–437 (1967). The Board has held that because an impasse is viewed as "only a temporary deadlock or hiatus" in bargaining, the bargaining process contemplates that with the passage of time following such a hiatus, positions will be modified and bargaining will be resumed. During such a hiatus, an employer has a duty to supply relevant information. Accordingly, it has been held that an employer cannot justify its refusal to provide relevant information because the request was made after impasse. *Watkins Contracting, Inc*., 335 NLRB 222, 225 (2001). Regardless of whether the parties reached impasse, the Union remained the bargaining agent for the unit and was presumptively entitled to information that it needed to carry out its representative duties.

In *Caldwell Mfg. Co.,* 346 NLRB 1159, 1159–1160 (2006), the Board set out the relevant law:

> An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations. Generally, information pertaining to employees within the bargaining unit is presumptively relevant. . . . The burden to show relevance is not "exceptionally heavy," and "the Board uses a broad, discovery-type of standard in determining relevance in information requests."

Moreover, the Respondent's own bargaining positions made the requested information directly relevant. In *Caldwell*, above at 1160, the Board found that the employer "premised its bargaining positions on specific assertions and the charging party requested information to evaluate and verify the respondent's assertions and develop its own bargaining positions." It stated that certain information requested of the employer was relevant and necessary "to evaluate the accuracy of the respondent's specific claims and to respond appropriately with counterproposals." It found that the union's requests were "narrowly tailored in response to the respondent's own claims. . . ." Accordingly the Board found that the "respondent, in the course of bargaining, made the information relevant and created the obligation to provide the requested data." Here, too, the Union sought certain information in order to clarify the Respondent's claims, enable it to cost out the Respondent's proposals and develop a comprehensive counterproposal.

I accordingly find that the information requested in the five letters, all of which was presumptively relevant in that it pertained to the unit employees, was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees. The Respondent's reasons for failing to provide the information requested, that it was only an attempt to stall bargaining and that the information requested was duplicative of information already given to the Union do not have merit.

The Respondent's failure to furnish the information requested violated Section 8(a)(5) of the Act.

III. THE RESPONDENT'S ALLEGED FAILURE TO MEET AND BARGAIN

It is alleged that since October 4, 2005, the Union requested that the Respondent meet and bargain with it for the purpose of negotiating a successor collective-bargaining agreement and the Respondent failed to do so. The Respondent's answer asserts that the Union engaged in surface bargaining and has failed to act and/or bargain with the Respondent in good faith.

Section 8(d) of the Act defines the duty to bargain collectively as the mutual obligation of the parties to "meet . . . and confer in good faith. . . ." "It is well settled that parties have a continuing obligation to bargain even though they have reached a lawful impasse." *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1017 (2006); *Paul Mueller Co*., 332 NLRB 312, 317 (2000).

In its October 4, 2005 letter, the Union advised that it was available for negotiations on seven dates in October and requested that a mediator be present. Not having received a response, on November 14 Alcoff advised that the Union was available on fourteen dates in November and December. On November 18, Jasinski advised that he could meet on December 1, 9, and 13 or 19, and asked Alcoff to call to confirm. I noted above that Jasinski's testimony that Alcoff did not respond to this letter was contradicted by Alcoff's letter of November 23 in which he confirmed that he was available on December 9 and 19. As set forth above, the parties agreed that they were available to meet on December 9 and 19, and Alcoff called Jasinski's office on December 8 to confirm their meeting the following day. Inexplicably, Jasinski's fax of December 8 stated that he (Alcoff) did not confirm the December 9 date and that he (Jasinski) was not available on December 9, but did admit that Alcoff called on December 8 to confirm their meeting.

As Jasinski had previously committed to meet on December 19, Alcoff immediately sought to hold him to that date but Jasinski claimed that Union agent Degeneste called to cancel that meeting due to an impending snowstorm. Alcoff credibly denied that Degeneste would have or could properly have canceled the meeting, particularly since the parties had not met for nearly four months and the Union was trying to have a negotiating session.

In late December, Alcoff wrote, and suggested four meeting dates in January, 2006. No response was received and Alcoff wrote again on January 19, stating that he was available on every day between February 4 and March 2. No response to this offer was made.

Despite Jasinski's claim in his October 30, 2006 letter that he was willing to meet, he has not replied to a number of the Union's requests to meet and bargain and in fact has not met with the Union through the date of the hearing, 1½ years after the final bargaining session in August, 2005. Thus, Alcoff offered

to meet in mid December, 2006 and in late January and early February, 2007. No response was received by the Respondent.

The above makes it clear that the Respondent had no intention of fulfilling its obligation to meet and bargain with the Union. Despite the fact that the Union proposed numerous dates to bargain, the Respondent failed to meet with it on any. The Respondent proposed meeting in only two periods of time: December 9 and 19, 2005, and during the week of January 29, 2007. The Union agreed to December 9 and 19, 2005 and to January 30, 31 and February 1, 2007. However, no meeting took place because of the actions of the Respondent in denying that Alcoff timely confirmed one December meeting and incredibly claiming that a Union agent cancelled the other December meeting. The Respondent never confirmed the Union's agreement to meet in January and February, 2007.

The Respondent claims that it did not meet with the Union because the Union refused to meet unless it was given the information requested. I have found above that the information was presumptively relevant and necessary to the Union's performance of its representational duties. In addition, the Union did not condition meeting on its receipt of the information requested. It offered to meet without condition but the Respondent failed to respond to its requests. When the Respondent agreed to meet, it did not confirm the dates it had requested.

Based on the above, I find and conclude that the Respondent has not met its obligation to meet and bargain with the Union in good faith.

CONCLUSIONS OF LAW

1. The following employees constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses, nurses aides, recreational aides, beauticians, housekeeping aides, laundry employees and dietary employees employed by the Employer at its Keansburg, New Jersey facility, excluding all office clerical employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

2. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the above unit.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse and unilaterally implementing certain changes in its employees terms and conditions of employment when the parties were not at a valid, good-faith impasse in bargaining.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a 3% wage increase for unit employees.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating a transportation benefit providing bus or van service to and from work for unit employees.

6. The Respondent violated Section 8(a)(5) and Section 8(a)(3) and (1) of the Act by unilaterally ending an accommodated schedule for Sharon McLeod.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally issuing merit bonuses to unit employees.

8. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply information requested by the Union in its letters of August 31, September 2, November 23, 2005, July 10, 2006 and January 10, 2007, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees

9. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to meet with the Union since October 4, 2005 for the purpose of negotiating a successor collective-bargaining agreement.

10. The Respondent violated Section 8(a) (1) of the Act by announcing to its employees that their accommodated schedules would be eliminated.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, inasmuch as I have found that no legally valid impasse in bargaining has been reached, I recommend that the Respondent be ordered to rescind the unilateral changes it made on or after April 1, 2005, but nothing in the Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union. I shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Laurel Bay Health & Rehabilitation Center, Keansburg, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with SEIU 1199 New Jersey Health Care Union as the exclusive bargaining representative of the employees in the following unit:

> All full-time and regular part-time licensed practical nurses, nurses aides, recreational aides, beauticians, housekeeping aides, laundry employees and dietary employees employed by the Employer at its Keansburg, New Jersey facility, excluding all office clerical employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

[11] 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.

(b) Implementing its last offer to the Union or parts of its last offer before the parties have reached a lawful impasse during negotiations.

(c) Making unilateral changes in its unit employees' terms and conditions of employment without first bargaining with the Union to impasse.

(d) Failing and refusing to supply information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the Respondent's unit employees.

(e) Failing to meet with the Union to engage in good faith bargaining for the purpose of negotiating a successor collective-bargaining agreement.

(f) Announcing to its employees that their accommodated schedules would be eliminated.

(g) 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, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time licensed practical nurses, nurses aides, recreational aides, beauticians, housekeeping aides, laundry employees and dietary employees employed by the Employer at its Keansburg, New Jersey facility, excluding all office clerical employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

(b) On request, cancel and rescind all terms and conditions of employment which it unlawfully implemented or unlawfully eliminated on and after April 1, 2005, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(c) At the Union's request, restore to unit employees the terms and conditions of employment that were applicable prior to April 1, 2005, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining.

(d) At the Union's request, restore the accommodated schedule given to Sharon McLeod pursuant to which she worked the 7:00 a.m. to 3:00 p.m. shift on Wednesdays.

(e) Make whole the unit employees for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, on and after April 1, 2005, plus interest.

(f) Furnish to the Union in a timely manner the information requested in the Union's letters dated August 31, September 2, November 23, 2005, July 10, 2006 and January 10, 2007.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful elimination of Sharon McLeod's accommodated schedule, and within 3 days thereafter notify her in writing that this has been done and that such action will not be used against her in any way.

(h) 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.

(i) Within 14 days after service by the Region, post at its facility in Keansburg, New Jersey, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 22, 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. 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 August 31, 2005.

(j) 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.

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 or refuse to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with SEIU 1199 New Jersey Health Care Union as the exclusive bargaining representative of the employees in the following unit:

[12] 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."

> All full-time and regular part-time licensed practical nurses, nurses aides, recreational aides, beauticians, housekeeping aides, laundry employees and dietary employees employed by the Employer at its Keansburg, New Jersey facility, excluding all office clerical employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT implement our last offer to the Union or parts of our last offer before we and the Union have reached a lawful impasse during negotiations.

WE WILL NOT make unilateral changes in your terms and conditions of employment without first bargaining with the Union to impasse.

WE WILL NOT fail or refuse to supply information that is relevant and necessary to the Union's performance of its duties as your exclusive collective-bargaining representative.

WE WILL NOT fail to meet with the Union to engage in good faith bargaining for the purpose of negotiating a successor collective-bargaining agreement.

WE WILL NOT announce to you that accommodated schedules would be eliminated.

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

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time licensed practical nurses, nurses aides, recreational aides, beauticians, housekeeping aides, laundry employees and dietary employees employed by the Employer at its Keansburg, New Jersey facility, excluding all office clerical employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

WE WILL on request, cancel and rescind all terms and conditions of employment which we unlawfully implemented or unlawfully eliminated on and after April 1, 2005, but nothing in this Order shall be construed as requiring us to cancel any unilateral changes that benefited you without a request from the Union.

WE WILL at the Union's request, restore to unit employees the terms and conditions of employment that were applicable prior to April 1, 2005, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining, and make you whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, on and after April 1, 2005, plus interest.

WE WILL at the Union's request, restore the accommodated schedule given to Sharon McLeod pursuant to which she worked the 7:00 a.m. to 3:00 p.m. shift on Wednesdays and WE WILL make Sharon McLeod whole for any losses suffered by reason of the elimination of her accommodated schedule, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful elimination of Sharon McLeod's accommodated schedule, and within 3 days thereafter notify her in writing that this has been done and that such action will not be used against her in any way.

WE WILL furnish to the Union in a timely manner the information requested in the Union's letters dated August 31, September 2, November 23, 2005, July 10, 2006 and January 10, 2007.

WE WILL 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 payments due under the terms of this Order.

LAUREL BAY HEALTH & REHABILITATION CENTER