

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

AMERICAN RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION,

Respondent.

And

Case Nos. 33-CA-15821
33-CA-15896
33-CA-16144
33-CA-16204
33-CA-16207
33-CA-16229
33-CA-16246
33-CA-16247
33-CA-16248

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
(AFSCME), COUNCIL 31, AFL-CIO

Charging Union.

**RESPONDENT'S EXCEPTIONS TO DECISION AND ORDER OF THE
ADMINISTRATIVE LAW JUDGE DATED NOVEMBER 4, 2011 (JD-67-11)**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, as amended, Respondent, American Red Cross, Heart of America Blood Services Region (the "Region" or the "Respondent"), by its counsel, Axley Brynelson, LLP, respectfully files the following exceptions to the Decision and recommended Order (the "Decision") issued in the above-captioned matters by Administrative Law Judge Arthur J. Amchan ("ALJ") on November 4, 2011.¹

¹ Citations to the Decision will be set forth as "ALJD" followed by page number and line numbers.

Respondent respectfully submits that the ALJ erred as a matter of either fact, law, or both fact and law, by the findings, conclusions and/or legal analysis identified in those portions of the Decision and recommended Order set forth in the following Exceptions:

Complaint Paragraph 6A

Exception 1: Respondent excepts to the Decision’s finding of fact that “[o]n about April 2, 2009, Respondent, pursuant to a national policy emanating from Red Cross headquarters in Washington, suspended making matching contributions to employees’ 401(k) accounts for its fiscal year 2010 (July 1, 2009 – June 30, 2010).” ALJD 3:38-40.

Exception 2: Respondent excepts to the Decision’s finding of fact that on about April 2, 2009 Respondent “also suspended giving merit pay increases to employees, and closed its defined benefit pension plan to new employees.” ALJD 3:40-41.

Exception 3: Respondent excepts to the Decision’s finding of fact that “in October 2010 (Fiscal Year 2011), unit employees received a lump sum payment of 3% of their base salary in lieu of a merit pay increase”, which “differed from prior practice in that the lump sum payment did not increase the base pay of the employees.” ALJD 3:42-44.

Exception 4: Respondent excepts to the Decision’s finding of fact that “[p]ursuant to the merit increases, employees received an increase in their base rate of pay predicated on their annual performance reviews.” ALJD 3:44-46.

Exception 5: Respondent excepts to the Decision’s finding of fact that “[i]n August 2011, the American Red Cross reinstated the matching contribution to the 401(k) plan and merit pay increases.” ALJD 4:1-2.

Exception 6: Respondent excepts to the Decision's finding that "...with regard to unit employees at HOA, Respondent did not rescind the 2009 change and return to pre-2009 status quo with regard to merit pay." ALJD 4:2-4.

Exception 7: Respondent excepts to the Decision's reference to and reliance upon the health insurance plan associated with the John Deere Company in discussing changes in health insurance beginning in 2010. ALJD 4:12-15.

Exception 8: Respondent excepts to the Decision's finding that Respondent violated Section 8(a)(5) with respect to changes to the 401(k) matching contribution, defined benefit pension plan, merit pay increases and health insurance. ALJD 4:24.

Exception 9: Respondent excepts to the Decision's conclusion that Respondent's argument that the *Mike O'Connor* line of cases is based on the assumption that the employer is aware of the election results or otherwise has evidence that the union has majority status at the time it acts is incorrect. ALJD 4:20-23.

Exception 10: Respondent excepts to the Decision's conclusion that the length of time between the election and the certification and the fact that no ballots were counted for over three years is immaterial. ALJD 4:25-28.

Exception 11: Respondent excepts to the Decision's erroneous assertion that the "Respondent's unsuccessful challenge to the ballots of the team leaders was responsible for the long delay in certification in a unit in which the employees overwhelming favored union representation" and the Decision's conclusion based on said assertion that the equities therefore support a finding that the Respondent unlawfully implemented unilateral changes. ALJD 5:41-45.

Exception 12: Respondent excepts to the Decision's rejection of Respondent's argument that Respondent was privileged to suspend the employer match to the 401(k) plan, terminate new employee participation in the Red Cross retirement system and make changes in health insurance benefits because these changes were made by the Red Cross at the national level. ALJD 6:35-39, 40.

Exception 13: Respondent excepts to the Decision's rejection of Respondent's argument that Respondent had a past practice of instituting whatever changes were made to 401(k), retirement system and health care benefits by the national Red Cross. ALJD 6:39-40.

Exception 14: Respondent excepts to the Decision's mischaracterization of Respondent's position, i.e., by stating that Respondent argued that it was "entitled to make a unilateral change in terms and conditions of employment of its employees simply because ANRC may make such a change with respect to unorganized employees of other divisions or chapters." ALJD 6:42-45.

Exception 15: Respondent excepts to the Decision's finding that "[t]he status quo for employees at HOA was that they would receive a matching contribution to their 401(k), etc." ALJD 7:1-2.

Exception 16: Respondent excepts to the Decision's finding that "[i]n light of Respondent's HOA's bargaining obligation, it was obligated to bargain with the Union regarding any change to the status quo." ALJD 7:2-4.

Exception 17: Respondent excepts to the Decision's finding that "[t]he only exception to such a [bargaining] obligation would be one in which HOA employees had reason to believe that there would [be] a regularly occurring change to the terms and conditions of their employment implemented pursuant to objective criteria." ALJD 7:3-7.

Exception 18: Respondent excepts to the Decision's finding that Respondent has not established that it was required to implement benefit changes. ALJD 7:9.

Complaint Paragraph 6B

Exception 19: Respondent excepts to the Decision's finding that "[i]n April 2009, without prior notice to the Union, about 17 of these employees became team supervisors." ALJD 7:20-21.

Exception 20: Respondent excepts to the Decision's finding that "[t]he rest of the team leaders were deprived of their monitoring function when working on blood drives in which the goal was to obtain blood from 25 or more donors." ALJD 7:21-23.

Exception 21: Respondent excepts to the Decision's finding that "[t]he promotion of some team leaders to team supervisor[s] and the change in the duties of the team leaders was implemented by the American Red Cross throughout the country." ALJD 7:28-30.

Exception 22: Respondent excepts to the Decision's reference to the Union's protest of any changes with respect to the team leader and/or team supervisor positions as motivated by a desire to remove team leaders from the bargaining unit as such a reference is irrelevant to any legal analysis of alleged Section 8(a)(5) violations. ALJD 7:32-34.

Exception 23: Respondent excepts to the Decision's legal conclusion that "[i]t is a violation of Section 8(a)(5) to unilaterally promote a unit employee to a supervisory position if that employee continues to perform unit work because the personnel action in effect changes the status quo by taking unit work away from the bargaining unit". ALJD 8:5-8.

Exception 24: Respondent excepts to the Decision's finding that the Respondent violated the Act by promoting the team leaders to supervisory positions and having them perform what had heretofore been bargaining unit work. ALJD 8:10-12.

Exception 25: Respondent excepts to the Decision's finding that the Respondent has not established that it was required to comply with the ANRC policy on assigning supervisors to blood drives in which 25 or more donors are expected. ALJD 8: at fn.2.

Exception 26: Respondent excepts to the Decision's finding that Respondent's Biomedical Services Compliance Plan leaves open the possibility that a Local Operating Procedure regarding the assignment of supervisors may also be appropriate where dictated by the requirements of the NLRA based upon the Decision's erroneous interpretation of the Plan and improper inferences drawn therefrom. ALJD 8: at fn.2.

Exception 27: Respondent excepts to the Decision's conclusion that Respondent's Biomedical Services Compliance Plan leaves open the possibility of negotiating with the Union an alternative to removing employees from the bargaining unit based upon the Decision's erroneous interpretation of the addendum to the Plan as to the meaning of "desired state" and improper inferences drawn therefrom. ALJD 8: at fn.2.

Complaint Paragraphs 6D and 6E

Exception 28: Respondent excepts to the Decision's finding that Jake Irions works every weekend, which he did not do prior to February 11, 2011. ALJD 9:11-12.

Exception 29: Respondent excepts to the Decision's finding that Respondent implemented the change in truck loading duties without bargaining and has refused to rescind the change. ALJD 9:16-17.

Exception 30: Respondent excepts to the Decision's finding that changes to loading duties affected both MUAs and Supply Clerks in a significant way. ALJD 9:29-30.

Exception 31: Respondent excepts to the Decision's finding that "[r]equiring Jake Irions to come to work at 0300 rather than 0600 and requiring him to work weekends is an obvious material change to the terms and conditions of his employment." ALJD 9:30-32.

Exception 32: Respondent excepts to the Decision's finding that Respondent violated Section 8(a)(5) in making changes to the hours and duties of the MUAs and Supply Clerks. ALJD 9:33-34.

Exception 33: Respondent excepts to the Decision's finding that contrary to Respondent's position it is not sufficient to offer to bargain about its unilateral changes in contract negotiations but rather an employer is required to rescind changes and bargain in good faith regarding a collective bargaining agreement. ALJD 9:36-38.

Complaint Paragraph 6F

Exception 34: Respondent excepts to the Decision's finding that a change to the PTO carryover was implemented without prior notice to the Union and without providing the Union an opportunity to bargain. ALJD 10:1-2.

Exception 35: Respondent excepts to the Decision's conclusion that the forfeiture of leave hours is clearly material both with regard to the handful of employees who have already forfeited such hours and with regard to those who may do so in the future. ALJD 10:12-14.

Exception 36: Respondent excepts to the Decision's finding that the Respondent has not met its burden of showing that the Union had "clear and unequivocal notice of the violation outside the 10(b) period" and that notice to unit employees did not provide such notice to the Union. ALJD 10:22-25.

Exception 37: Respondent excepts to the Decision's legal conclusion that the 10(b) period begins to run only when the unfair labor practice occurs, in this case on January 1, 2011,

well within six months of the Union's charge, which the Decision erroneously states as being filed on February 25, 2010. ALJD 10:17-19, 25-27.

Exception 38: Respondent excepts to the Decision's finding that the change to PTO carryover violates Section 8(a)(5). ALJD 10:27.

Complaint Paragraph G

Exception 39: Respondent excepts to the Decision's finding that "on several occasions since Respondent recognized the Union, non unit employees have performed bargaining unit work." ALJD 10:31-32.

Exception 40: Respondent excepts to the Decision's finding that "[o]n April 11, two supervisors, Kahla Crackel and Sophia Frederick performed unit work during a blood drive." ALJD 10:34-35.

Exception 41: Respondent excepts to the Decision's finding that "[o]n March 11 and April 23, 2011 Rachel Jaksula, a team supervisor, did the same thing." ALJD 10:35-36.

Exception 42: Respondent excepts to the Decision's finding that "[a]t an April 25 bargaining session, Respondent promised that non-unit employees would not perform bargaining unit work" to the extent the Decision applies said statement to work performed by instructor/trainers and team supervisors. ALJD 10:36-37.

Exception 43: Respondent excepts to the Decision's finding that Respondent did not establish that the work of supervisors was consistent with past practice. ALJD 10:43-44.

Exception 44: Respondent excepts to the Decision's finding that the lack of evidence in the record as to the reason team supervisors were doing what normally would be considered bargaining unit work is a subset of the past practice issue; therefore, it was Respondent's burden to establish that fact and that it did not. ALJD 10:46-47 and 11:1-4.

Exception 45: Respondent excepts to the Decision’s finding that Respondent violated Section 8(a)(5). ALJD 11:4-5.

Complaint Paragraph 7F

Exception 46: Respondent excepts to the Decision’s finding that the “fact that the Union indicated that it knew the names of some employees who had been disciplined and or terminated did not excuse the Respondent’s failure to respond to the request.” ALJD 12:18-20.

Exception 47: Respondent excepts to the Decision’s inference that Respondent failed to attempt to reach accommodation with the Union so the requested information could be provided. ALJD 12:30-32.

Exception 48: Respondent excepts to the Decision’s finding and conclusion that Respondent violated the Act in failing to provide the Union with the information it requested about employee discipline. ALJD 12:18, 32-33.

Complaint Paragraphs 8B and 8C

Exception 49: Respondent excepts to the Decision’s finding that Respondent violated the Act by refusing to bargain over employee discipline. ALJD 15:22.

Conclusions of Law

Exception 50: Respondent excepts to the Decision’s “Summary of Conclusions of Law” in its entirety. ALJD 16:29-45; 17:1-14.

Remedy

Exception 51: Respondent excepts to the Decision’s proposed Remedy in its entirety, including but not limited to, the appropriateness of ordering Respondent “to honor the Union’s certification for a six-month period commencing from the date upon which it rescinds all of its illegal unilateral changes.” ALJD 17:18-43.

Order

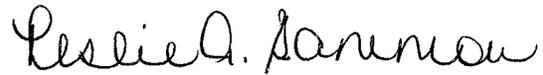
Exception 52: Respondent excepts to the Decision's recommended Order in its entirety.

ALJD 18:5-40; 19:1-34.

Dated: December 19, 2011.

Respectfully submitted,

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