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Virginia Mason Hospital (a division of Virginia Mason Hospital Center) and Washington State Nurses Association. Case 19–CA–030154

June 25, 2012

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

This case primarily concerns whether Respondent Virginia Mason Hospital (the Hospital) violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new policy to prevent the spread of influenza within the Hospital, and by other related conduct. Specifically, the complaint alleges that the Hospital failed to bargain in good faith with the Washington State Nurses Association (the Union) by:

- implementing the influenza policy without affording the Union notice and opportunity to bargain over the decision to implement the policy;
- failing to bargain over the effects of the decision to implement the policy;
- providing false and misleading information to the Union regarding its intention to implement the policy; and
- failing to timely provide information requested by the Union regarding the policy.

On September 12, 2006, Administrative Law Judge Gregory Z. Meyerson issued a decision in this proceeding.¹ The judge dismissed the allegation that the Hospital unlawfully implemented the influenza policy, finding that the policy was central to the Hospital's core purpose, narrowly tailored to achieve that purpose, and appropriately limited to the affected employees, and therefore was exempt from bargaining. *Peerless Publications*, 283 NLRB 334, 335 (1987). He found it unnecessary to address the Hospital's other defenses to this allegation. The judge also dismissed the allegation that the Hospital failed to bargain over the effects of its decision to implement the influenza policy, finding that the General Counsel had failed to allege or litigate that issue. However, the judge concluded that the Hospital had violated the Act by falsely telling the Union that it would not implement the policy, and by delaying 2-1/2 months before

¹ The General Counsel, the Hospital, and the Union each filed exceptions, a supporting brief, and answering briefs. The Hospital and the Union each filed reply briefs.

complying with the Union's information request for nurses' comments on the policy from its electronic discussion forum.

On August 23, 2011, the Board issued a Decision and Order Remanding in this proceeding. 357 NLRB No. 53. The Board reversed the judge's finding that the influenza policy was exempt from mandatory bargaining under *Peerless Publications*, supra, and ordered the judge to consider the Hospital's other defenses to the unilateral change allegation. *Id.*, slip op. at 4–5. The Board deferred ruling on the remaining allegations. *Id.* at 5.

On November 25, 2011, Judge Meyerson issued the attached supplemental decision. After considering the parties' supplemental briefs, the judge again found that the Hospital had not violated the Act by unilaterally implementing the influenza policy. The judge found that the Union had waived its right to bargain over this matter by agreeing to the management-rights clause of the parties' collective-bargaining agreement. The judge rejected the Hospital's other defenses. The Acting General Counsel and the Union each filed exceptions and supporting briefs. The Hospital filed an answering brief.

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

The Board has considered both of the judge's decisions and the record in light of the exceptions and briefs. We have decided to affirm the judge's rulings, findings, and conclusions in his supplemental decision concerning the implementation of the influenza policy, and we will dismiss that allegation.² We also have decided to affirm the judge's original rulings, findings, and conclusions as to the remaining allegations. Accordingly, we will dismiss the allegation that the Hospital failed to bargain over the effects of its decision to implement the influenza policy. Further, in agreement with the judge, we find that the Hospital violated Section 8(a)(5) and (1) by providing false and misleading information to the Union and by not timely providing relevant information requested by the Union. We therefore adopt the judge's recommended Order as modified and set forth in full below.³

² In adopting the judge's conclusion that the Union waived bargaining as to the influenza policy, we do not rely on the judge's discussion of testimony regarding the Hospital's Infection Control Manual and the parties not having bargained over its content (including its requirement to use "protective equipment" in certain circumstances).

Contrary to the judge and his colleagues, Member Hayes would dismiss the 8(a)(5) allegations related to the Union's information requests. In his view, the evidence of numerous communications among multiple officials of both the Respondent and the Union shows nothing more than a confused response, not a deliberately deceptive one, and subsequent confusion about the Union's requests and good-faith negotiations about how to comply with them.

³ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Virginia Mason Hospital (a division of Virginia Mason Medical Center), Seattle, Washington, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Providing false and misleading information to the Washington State Nurses Association (the Union) in response to the Union's request for relevant information.

(b) Failing and refusing to provide the Union in a timely fashion with requested relevant information necessary for the Union to perform its role as bargaining representative.

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

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

(a) Within 14 days after service by the Region, post at its hospital facility in Seattle, Washington, copies of the attached notice marked Appendix.⁴ Copies of the notice, on forms provided by the Regional Director for Region 19, 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 registered nurses are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current registered nurses and former registered nurses employed by the Respondent at any time since December 5, 2005.

9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall also substitute a new notice to conform to the Board's standard remedial language.

⁴ 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."

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

Dated, Washington, D.C. June 25, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the Washington State Nurses Association (the Union) as the exclusive representative of the registered nurses employed at our Seattle, Washington hospital facility (the bargaining unit) by providing false and misleading information to the Union about our intention to implement an influenza-prevention policy.

WE WILL NOT fail and refuse to timely furnish the Union with relevant and necessary information concerning our influenza-prevention policy, or any other relevant information needed by the Union in order to perform its representational activities on behalf of the members of the bargaining unit.

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

VIRGINIA MASON HOSPITAL (A DIVISION OF
VIRGINIA MASON HOSPITAL CENTER)