United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 22, 2019

TO: David E. Leach III, Regional Director
Region 22

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: St. Barnabas Medical Center
Cases 22-CA-224139 and 22-CA-224866

530-6050-3355
530-6050-3385
530-6050-4100
530-6050-4133
530-6067-4001-1700
530-6067-4055-7700
530-6067-4055-8500
530-6067-4066

The Region's submission of these cases for advice presents two questions: (1) whether the Employer violated the Act by unilaterally ending its practice of having nurse managers and supervisors respond directly to phone calls, emails, and text messages from the Union's (b) (6), (b) (7)(C) concerning Union-related matters, including grievances, while increasing the HR department's involvement in grievance processing; and (2) whether the Employer violated the Act by telling an employee during an investigatory interview that (b) (6), (b) needed to submit a written statement or be suspended, and thereafter suspending the employee, where the Employer's practice had been to solicit written statements only on a voluntary basis. We conclude that the Employer has not violated the Act because (1) the changes in communication practices and HR involvement in grievance processing were not material and significant changes, and (2) there is insufficient evidence that the Employer has changed its practice to require written statements in investigatory interviews where the employee was not suspended for refusing to provide a written statement.

FACTS

I. Background

St. Barnabas Medical Center (the "Employer") is an acute-care hospital in Livingston, New Jersey. Since around 1980, CWA Local 1091, New Jersey Nurses Union (the "Union") has represented approximately 1,200 registered nurses working for the Employer. For the last nine years, a (b) (6), (b) (7)(C) nurse for the Employer has served as the Union's (b) (6), (b) (7)(C). The parties' most recent collective-bargaining agreement was ratified in March 2018 and implemented

retroactively to November 1, 2017. The agreement included the following grievance provision:

> Step 1. Within a reasonable time . . . , an employee having a grievance and/or his/her Union delegate or other representative shall take it up with his/her immediate supervisor. The Employer shall give its answer to the employee and/or his/her Union delegate or other representative within five (5) working days after the presentation of the grievance in Step 1.
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> Step 2. If the grievance is not settled in Step 1, the grievance may, within five (5) working days after the answer in Step 1, be presented in Step 2. When grievances are presented in Step 2, they shall be reduced to writing, signed by the grievant and his/her Union representative, and presented to the grievant's department head or his/her designee. A grievance so presented in Step 2 shall be answered by the Employer in writing within five (5) working days after its presentation.
>
> Step 3. If the grievance is not settled in Step 2, the grievance may, within five (5) working days after the answer in Step 2, be presented in Step 3. A grievance shall be presented in this step to the Director of Human Resources or Administrator of the Employer, or his/her designee; and he/she or his/her designee shall render a decision in writing within five (5) working days after the presentation of the grievance in this step.

II. Changed Communication Practices

For years, the Union (b) (6), (b) (7)(C) raised and resolved bargaining unit-related issues in direct contact with nurse supervisors and managers, including the Employer's (b) (6), (b) (7)(C) . Such communication often took place by text message, email, or phone. The general practice of direct contact between the Union (b) (6), (b) (7)(C) and nursing management extended to the parties' handling of grievances. When the Union (b) (6), (b) (7)(C) processed a grievance in the first two steps of the parties' contractual grievance process, (b) (6), (b) (7) did so by initiating direct contact with the managers responsible for hearing the grievances at those steps. In addition, the Union (b) (6), (b) (7)(C) and nursing supervisors and managers routinely worked together to resolve issues outside the formal grievance process.

In the first half of 2018, several events strained the Union (b) (6), (b) (7)(C) relationship with (b) (6), (b) (7)(C). In January or February,[1] while the parties were engaged in contentious bargaining for a successor agreement, the Union participated in a town hall-type meeting with State legislators. During the meeting, the Union elicited testimony from nurses about short staffing at the hospital, which had been a longstanding point of contention between the parties. On May 1, after ratification of the parties' eventual agreement, (b) (6), (b) (7)(C) referenced the Union's appeals to State legislators in a meeting with the Union (b) (6), (b) (7)(C) indicated that (b) (6), (b) (7)(C) felt the issues the Union had raised during negotiations reflected poorly on (b) (6), (b) (7)(C) and the hospital.

The Union (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) met again eight days later, on May 9. They discussed having regular phone calls to address nursing issues that could potentially lead to grievances, and (b) (6), (b) (7)(C) said that calling (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C) drive home would be good for (b) (6), (b) (7)(C) The Union (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) also agreed to a 48-hour response time for emails. Changing topics, (b) (6), (b) (7)(C) told the Union (b) (6), (b) (7)(C) that on June 6, an appraiser would come to the hospital in connection with the hospital's bid for a certification recognizing its nursing services. (b) (6), (b) (7)(C) said that up to five Union delegates could meet with the appraiser, and HR personnel would be present during that meeting.

Although the Union (b) (6), (b) (7)(C) said nothing at the time, (b) (6), (b) (7)(C) understanding was that such appraisers generally meet with unions without employer representatives present. A few days later, (b) (6), (b) (7)(C) called the appraising organization to ask about this, and the organization confirmed the Union (b) (6), (b) (7)(C) understanding.

A day or two after the Union (b) (6), (b) (7)(C) call to the appraising organization, (b) (6), (b) (7)(C) called the Union (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) revealed that the organization had notified (b) (6), (b) (7)(C) of the Union (b) (6), (b) (7)(C) call. (b) (6), (b) (7)(C) said, further, that it makes the hospital look bad and creates the appearance that the Employer is not working together with the Union. (b) (6), (b) (7)(C) was very upset and angry during this conversation.

On June 6, the Union (b) (6), (b) (7)(C) and other Union representatives met with the appraiser. During the meeting, the Union (b) (6), (b) (7)(C) discussed the staffing issues that the Union had raised in the recent negotiations. The appraiser asked the Union (b) (6), (b) (7)(C) for copies of citations the hospital had received in response to Union staffing complaints, as well as the staffing complaint forms.

The next day, the Union (b) (6), (b) (7)(C) attempted to meet with the appraiser to provide the requested documents. (b) (6), (b) (7)(C) initially refused to allow a meeting, saying that the appraiser was in other meetings all day. After the Union (b) (6), (b) (7)(C) explained to (b) (6), (b) (7)(C) that the appraiser had asked for documents and that (b) (6), (b) (7)(C) was there to deliver them, (b) (6), (b) (7)(C) allowed (b) (6), (b) (7)(C) to meet with the appraiser for five minutes. The Union

[1] All subsequent dates are in 2018.

(b) (6), (b) (7)(C) delivered the documents and arranged for the appraiser to return them to (b) (6), (b) later that day in the care unit where (b) (6), (b) worked.

When the Union (b) (6), (b) (7)(C) returned to (b) (6), (b) (7) unit, (b) (6), (b) (7) found that (b) (6), (b) assignment had been changed from specific patient beds to a "float" position. (b) (6), (b) (also learned from colleagues that (b) (6), (b) (7 immediate supervisor had been huddling with other employees in the care unit to tell them the appraiser was coming back to re-survey their unit on that day because of information the Union (b) (6), (b) (7)(C) had given the appraiser. The Union (b) (6), (b) (7)(C) approached (b) (6), (b) (7 supervisor and told (b) (6), (b) that the appraiser was coming to the unit only to return staffing complaint forms and documents that the Union (b) (6), (b) (7)(C) had given (b) (6), (b) (7 The supervisor said that this information was not coming from (b) (6), (b) (7 it was coming from (b) (6), (b) (7)(C, and (b) (6), (b) kept the Union (b) (6), (b) (7)(C) in the float position.

Two weeks later, on June 21, the Union (b) (6), (b) (7)(C) sent (b) (6), (b) (7)(C two text messages requesting a phone call. On June 26, having received no response, the Union (b) (6), (b) (7)(C) followed up with another text message. (b) (6), (b) (7) also sent (b) (6), (b) (7)(C some emails and left (b) (6), (b) (7 voicemails around this time. (b) (6), (b) (7)(C never responded to any of those contacts.

On June 27, the Employer's (b) (6), (b) (7)(C) sent the Union (b) (6), (b) (7)(C) a letter (the "HR letter") stating as follows:

> So that there will be no confusion with regard to what you may or may not say to a manager, henceforth, if you have any issues please call [Human Resources representative]. Do not place any telephone calls or emails regarding NJNU issues to members of the Nursing Management Team.
>
> Under this new procedure, we believe we will be able to more expeditiously respond to your concerns and avoid any confusion regarding your issues.

After receiving the letter, the Union (b) (6), (b) (7)(C) continued trying to contact (b) (6), (b) (7)(C, as well as other nurse managers, via texts, emails, and calls. (b) (6), (b) (7)(C has not responded. Other managers have likewise failed to respond to contacts from the Union (b) (6), (b) (7)(C). At least some of the Union (b) (6), (b) (7)(C) attempted contacts with managers concerned grievances or potential grievances.

Commensurate with the HR letter, the Employer has also altered its process for responding to the Union (b) (6), (b) (7)(C) requests to meet in the first two steps of the formal grievance process. In August, the Union (b) (6), (b) (7)(C) emailed a grievance to a manager and requested available dates to meet with (b) (6), (b) (7 for a Step-1 meeting. Rather than receiving a direct response from the manager per past practice, the Union (b) (6), (b) (7)(C) received a response from an HR representative. The HR representative thereafter acted as an intermediary for scheduling the grievance hearing. Before the

HR letter, Human Resources staff did not get involved in grievance processing until the third step.

On July 20, the Union filed a charge that, as subsequently amended, alleges that the Employer violated Section 8(a)(5), (3), and (1) by unilaterally terminating contact and discussion between the Union and the nursing department in contravention of decades-old practice and retaliating against the Union [redacted] for [redacted] union activity.

III. The Investigatory Interview

Employee A works for the Employer as a registered nurse. [redacted] was scheduled to work on February 18. On February 15, Employee A requested managerial approval to trade that shift for a colleague's [redacted] shift. [redacted] made the request using an electronic system maintained by the Employer.

Having not received approval of the trade request by the next day, Employee A attempted to speak with a manager about the request, but [redacted] was unsuccessful in reaching one. When the Employer had still not acted on the request by February 17, Employee A brought it up with a supervisor. Based on the supervisor's response, Employee A thought the supervisor was orally granting the switch request. Accordingly, [redacted] went to work on [redacted] instead of February 18.

The Employer, however, considered the trade request unapproved and expected Employee A on February 18. When Employee A went to work on [redacted], a nurse manager interviewed [redacted] about the situation in the manager's office. During the interview, the nurse manager instructed Employee A to make a written statement about the shift trade and refused to accept an oral account instead.

Employee A believed the demand for a written account and refusal to accept an oral account were wrong. [redacted] interrupted the interview to contact the Union [redacted], who joined the interview shortly after. After the Union [redacted] arrival, the nurse manager continued to demand a written statement from Employee A and stated that Employee A would be suspended if [redacted] did not provide one. The Union [redacted] responded that Employee A could give an oral statement and the nurse manager could take notes, but that Employee A should not be required to give a written statement. [redacted] added that no nurse had ever had to give a written statement in an investigatory interview. The nurse manager said that if Employee A did not give a written statement right there, [redacted] would be suspended. The Union [redacted] asked if the suspension was for refusing to give a written statement at that time, and the nurse manager either said "yes" or nodded affirmatively. Employee A did not provide a statement, and the Employer suspended [redacted] at the conclusion of the meeting.

Employee A remained suspended for three work shifts before returning to the hospital on [redacted] for a meeting with the nurse manager, other managers, and the

Union [redacted]. The managers told Employee A that [redacted] had violated the Employer's policies regarding shift-trade requests because all such requests must be approved in writing. Employee A responded with an oral account of the incident, including what [redacted] interpreted as a supervisor's approval of the trade. The managers then recounted Employee A's past issues concerning time and attendance. The Employer issued Employee A a final written warning and a three-day suspension with "time served."[2]

On August 2, the Union filed a charge alleging, as subsequently amended, that the Employer violated Section 8(a)(5), (3), and (1) in connection with the investigatory interview of Employee A. Among other things, the Union alleged that the Employer unlawfully failed to negotiate with the Union over a policy of suspending employees for failing to provide a written statement, and unlawfully threatened to suspend and suspended an employee for failure to make a written statement.

ACTION

I. Changed Communication Practices

We conclude that the Employer has not violated the Act by ceasing its practice of having nursing managers respond directly to phone calls, emails, and text messages from the Union [redacted] and increasing HR's involvement in grievance processing because these were not material and significant changes.

An employer violates Section 8(a)(5) and (1) when it changes employee terms and conditions of employment without first providing its employees' union with notice and an opportunity to bargain, unless the union waived the right to bargain about the change.[3] Grievance handling procedures are considered terms and conditions of employment.[4]

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[2] Since Employee A had already missed three work shifts on suspension, [redacted] returned to work immediately.

[3] *See, e.g.*, *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 32-33 (May 7, 2018), *enforced*, --- F. App'x ----, 2019 WL 1239801 (D.C. Cir. Mar. 12, 2019).

[4] *See id.*, slip op. at 32; *Public Service Co. of New Mexico*, 360 NLRB 573, 583 (2014), *enforced*, 843 F.3d 999 (D.C. Cir. 2016); *Bethlehem Steel Co. (Shipbuilding Division)*, 136 NLRB 1500, 1502 (1962) ("[a] method for presenting and adjusting grievances which deal with 'wages, hours, and other terms and conditions of employment' is manifestly related to those matters," and therefore is a mandatory subject of bargaining), *enf. denied on other grounds*, 320 F.2d 615 (3d Cir. 1963).

However, this rule does not apply to changes that are not material, substantial, or significant.[5] In *Public Service Co. of New Mexico*, the Board found the following three changes to a first-step grievance procedure to be material: (1) supervisors would no longer go forward with discussion of a grievance unless the union described the grievance with particularity; (2) in certain circumstances, supervisors would no longer sign for receipt of a written grievance after meeting with a steward about the grievance, which resulted in the employer refusing to advance grievances to the second step; and (3) requiring a second supervisor to be present during the initial grievance meeting.[6] The Board found that "all three of these changes . . . created unprecedented procedural hurdles and clearly impeded the processing of grievances."[7] However, the Board found insignificant a new requirement that union representatives schedule grievance meetings with supervisors in advance where no evidence was submitted that supervisors were unwilling to schedule time to discuss grievances or that any grievances were untimely as a result.[8]

Here, the Employer, without bargaining, made changes that affected how the parties resolved grievances in multiple respects, none of which establish a violation. The Employer arguably changed the parties' grievance handling procedure by interposing HR as a coordinator for scheduling the discussion of grievances in the first two steps of the contractual procedure. But the interposition of HR as scheduling coordinator in the instant case was akin to the new scheduling requirement that the Board found insignificant in *Public Service Co.* The Union has presented no evidence that, because of the Employer's changes, resolution of grievances through the parties' contractual procedure has been delayed to a significant extent, or that the changes have otherwise affected the processing of grievances through that procedure.[9] Moreover, the Employer has not substituted HR personnel for the managerial decisionmakers that the contract calls for, and the contractual language does not

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[5] *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

[6] 360 NLRB at 574, 584.

[7] *Id.* at 575.

[8] *Id.* at 584

[9] *See Central Telephone Co. of Texas*, 343 NLRB 987, 987, 1000 (2004) (HR rep's participation in grievance meeting by telephone rather than in person was insignificant change where another management representative attended in person); *cf. Murray American Energy*, 366 NLRB No. 80, slip op. at 1, 32-33 (change in hearing location for certain grievance meetings from grievants' place of work to location 15-30 minutes' drive away was material); *Barnard College*, 340 NLRB 934, 934 & n.5, 944-45 (2003) (refusing to meet with two union representatives, rather than one, at grievance meeting was unlawful change).

preclude HR acting as a scheduling coordinator. Therefore, this was not a material, substantial, or significant change.

The Employer also changed its practice regarding informal communications outside of the grievance process. Thus, for years, direct lines of contact between the Union (b) (6), (b) (7)(C) and nursing management, including contact by email, phone, and text message, served as an expeditious informal means of resolving disputes both before and after the disputes were submitted to the formal grievance process. The elimination of that practice, together with the Employer's greater reliance on HR to communicate with the Union, necessarily forces the Union to rely more heavily on the contractual grievance procedure and/or deal more frequently with HR instead of or in addition to nursing managers. However, the informal lines of communication that the parties at times relied on to resolve grievances were not themselves part of the parties' grievance handling procedure; they were an alternative to that procedure, and the Employer's unilateral decision to cease relying on that alternative did not affect the grievance handling procedure itself. In other words, the Employer has simply changed its lineup of representatives for dealing with the Union, which it has the right to do.[10] This too was not a material, substantial, or significant change to employee terms and conditions of employment.

The Employer's changed practices also did not violate Section 8(a)(1) even if the Employer adopted them in retaliation for Section 7 activity. Section 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7."[11] In determining whether an employer's conduct violated Section 8(a)(1), "[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."[12] Conduct violating Section 8(a)(1) includes certain forms of retaliation for the protected Section 7 activity of employees or their bargaining representative.[13]

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[10] *See New Brunswick General Sheet Metal Works*, 326 NLRB 915, 921 (1998) (employer "had every right to choose who would be on its negotiating committee just as the Union selected its own committee").

[11] 29 U.S.C. § 158(a)(1).

[12] *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946)); *see also Gossen Company*, 254 NLRB 339, 347 (1981) (espousing same well-established principle), *modified on other grounds*, 719 F.2d 1354 (7th Cir. 1983).

[13] *See, e.g.*, *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 3 (Sept. 28, 2018) (employer's removal of employees' toolboxes from

The Union has presented some evidence indicating that the Employer's changed communication practices were motivated in part by hostility to the Union (b) (6), (b) (7)(C) protected Section 7 activity. However, even assuming that the Employer acted with a retaliatory motive, the Employer's conduct lacks a tendency to interfere with the free exercise of Section 7 rights. As explained above, the Employer has not materially changed the parties' grievance procedure, and the Employer has not changed any other term or condition of employment. Although the Union would prefer the continuation of managers' prior responsiveness to the Union (b) (6), (b) (7)(C) contacts, the (b) (6), (b) (7)(C) remains able to address grievances and other matters with the Employer. Accordingly, the Employer's conduct did not interfere with the Union (b) (6), (b) (7)(C) or other employees' exercise of their Section 7 rights.[14]

II. The Investigatory Interview

We conclude that the Employer's conduct vis-à-vis Employee A during that employee's investigatory interview did not violate the Act because there is insufficient evidence that the Employer has changed its practice where Employee A was not suspended for failing to provide a written statement.

Under settled Board law, new work rules that invoke discipline are mandatory subjects of bargaining.[15] In *Murtis Taylor Human Services Systems*, the Board found unlawful an employer's unilateral imposition of a requirement that an employee subjected to an investigatory interview review the notes the employer made during the interview, make any necessary corrections, and then sign the document to attest to its veracity.[16] Here, however, there was no similar change because the Employer

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employer's car dealership unlawful because action was retaliation for employees' protected strike activity).

[14] The Employer also did not unlawfully threaten the Union (b) (6), (b) (7)(C) with discipline for attempting to contact nursing managers. The Employer said, in the context of explaining the new policy: "Do not place any telephone calls or emails regarding NJNU issues to members of the Nursing Management Team." In context, this language would be understood as a statement that the Employer was changing its communication practices, and not as a threat of discipline should the Union (b) (6), (b) (7)(C) attempt to contact managers.

[15] *Murtis Taylor Human Services Systems*, 360 NLRB 546, 570 (2014); *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

[16] 360 NLRB at 548 & n.14, 570.

did not in fact suspend Employee A for failure to provide a written statement.[17] Thus, although the interviewing manager's statements to Employee A and the Union (b) (6), (b) (7)(C) linked Employee A's suspension with (b) (6), (b) failure to provide a written statement, the evidence indicates that the Employer suspended Employee A "pending investigation" on (b) (6), (b) (7)(C) primarily because it believed (b) (6), (b) had missed a scheduled shift without authorization. The duration and paid or unpaid nature of Employee A's suspension were unclear until the Employer, at a meeting on (b) (6), (b) (7)(C), issued Employee A an unpaid three-day suspension with "time served." There was no mention at that meeting of Employee A's refusal to provide a written statement and Employee A returned to work without providing such a statement. Under these circumstances, we conclude that the Employer did not violate Section 8(a)(5) by implementing a discipline-backed rule requiring written statements.

The Employer's conduct vis-à-vis Employee A also did not violate Section 8(a)(1) under *NLRB v. J. Weingarten, Inc.*[18] because the Employer's conduct would not reasonably tend to discourage employees from maintaining grievances or requesting a *Weingarten* representative.[19]

Based on the foregoing, the Region should dismiss the charges, absent withdrawal.

/s/
J.L.S.

ADV.22-CA-224139.Response.St.Barnabas.(b) (6), (b) (7)

[17] The Employer concedes that it had no policy requiring written statements before this incident, and indeed contends that it still has no such policy. The Employer's defense to the charge allegations is that it suspended Employee A pending investigation because of (b) (6), (b) underlying conduct, and not because (b) (6), (b) (7) refused to provide a written statement.

[18] 420 U.S. 251 (1975).

[19] *Cf. Management & Training Corporation*, 366 NLRB No. 134, slip op. at 6-7 (July 25, 2018); *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279 n.10 (1992).