From: (b) (6), (b) (7)(C)
To: Morgan, Terry A.
Cc: Bock, Richard; Szapiro, Miriam; Shorter, LaDonna; Weth, Patricia
Subject: Mercy Health General Campus, 07-CA-258425 (case-closing email)
Date: Wednesday, June 10, 2020 1:00:28 PM

The Region submitted this COVID-19 case for advice as to whether the Employer violated Section 8(a)(5) of the Act by unilaterally changing its work-from-home and attendance policies. We agree with the Region's recommendation to dismiss the charge, absent withdrawal.

As noted by the Region, the unilaterally-implemented expanded work-from-home policy did not apply to the unit employees, but rather only to non-unit employees who could "fulfill all of their duties at home," since RNs (and all other "patient facing" employees) were never allowed to telework in light of their face-to-face patient-care duties. Thus there was no change to the unit employees' working conditions. In addition, under an 8(a)(3) analysis, there is no evidence or assertion of an anti-Union motive under *Wright Line.* See, e.g., *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122 (2019) (employer did not violate Section 8(a)(3) by denying its union-represented employees a one-time paid holiday that was offered to its unrepresented employees, where unlawful motive was not established).

As to the attendance policy, on about March 12, at the very beginning of the COVID-19 emergency, the Union proposed to the Employer that "[a]bsences resulting from potential risk of exposure to COVID-19 shall not result in any disciplinary action or other adverse consequences." On March 15, the Employer essentially agreed and issued a modified attendance policy, consistent with the Union's proposal, that would "temporarily pause all attendance and tardy-related penalties, including attendance and tardy-related corrective action." Although it is unusual that the Employer responded by issuing a policy essentially adopting the Union's proposal without having first responded to the Union that it was agreeing to the proposal, the Employer's actions are understandable in these circumstances where, as an acute-care hospital, time was of the essence in dealing with the emergency pandemic situation.

In any event, even assuming that the Employer's implementation of these two policies constituted unilateral changes, it is the General Counsel's view that an employer should be permitted to, at least initially, act unilaterally during emergencies such as COVID-19 so long as its actions are reasonably related to the emergency situation. However, in addition, the employer must negotiate over the decision (to the extent there is a decisional bargaining obligation) and its effects within a reasonable time thereafter. Here, the Employer would likely have had no bargaining obligation in this situation, where the unilateral changes appear to have been reasonably related to the pandemic emergency. And the Region notes that the parties have continued to negotiate the effects of various pandemic-related proposals as they arise.

This email closes this case in Advice. Please feel free to contact us with any questions. Thank you!

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