

Holyoke Visiting Nurses Association and O'Connell Professional Nurse Service, Joint Employers and Eileen M. Bourque. Case 1-CA-28424

March 12, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On September 16, 1992, Administrative Law Judge George F. McInerney issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Holyoke Visiting Nurses Association and O'Connell Professional Nurse Service, joint employers, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

“(a) Telling employees that they will not be referred because they engaged in protected and/or union activities and that employees should refrain from engaging in such activities.”

2. Substitute the attached notice for that of the administrative law judge.

¹The Respondents have 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 General Counsel excepts to the judge's failure to find that Francis O'Connell's statements to Eileen Bourque that Holyoke Visiting Nurse Association (HVNA) did not want her referred to it because she had engaged in union activity and that she should refrain from engaging in such activity violated Sec. 8(a)(1) of the Act. We find merit in this exception. The judge credited Bourque's testimony that O'Connell told her that HVNA Director Patricia Cavanaugh requested that she not be reassigned to HVNA because of Bourque's perceived demonstration of "allegiance" to the Union through support of the HVNA employees in their union activities and that Bourque should remain "neutral and uninvolved" with the HVNA employees. Under these circumstances, we find that these statements by O'Connell violated Sec. 8(a)(1) of the Act, and we shall accordingly modify the judge's recommended Order.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that they will not be referred because of their protected and/or union activities and that they should refrain from such activities.

WE WILL NOT fail to refer or fail to accept referrals of employees because of their protected and/or union activities.

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

WE WILL make Eileen Bourque whole, with interest, for any loss of earnings suffered by her on account of the refusal to refer or accept her referral.

HOLYOKE VISITING NURSES ASSOCIATION AND O'CONNELL PROFESSIONAL NURSE SERVICE

Gerald Wolper, Esq., for the General Counsel.

Albert R. Mason, Esq., of Springfield, Massachusetts, for the Respondent.

Eileen M. Bourque, of Easthampton, Massachusetts, pro se.

DECISION

GEORGE F. MCINERNEY, Administrative Law Judge. Based on a charge filed on July 2, 1991, by Eileen M. Bourque (Bourque or the Charging Party), which charge was amended by Bourque on August 6, 1991, the Regional Director for Region 1 of the National Labor Relations Board (Regional Director and the Board, respectively) issued a complaint on August 14, 1991, alleging that Holyoke Visiting Nurses Association (HVNA) and O'Connell Professional Nurse Service, Inc. (O'Connell)¹ were joint employers within the meaning of the National Labor Relations Act (the Act); and that, as joint employers, HVNA and O'Connell had discriminated against the Charging Party in violation of Section 8(a)(1) and (3) of the Act. The Respondents filed answers denying the

¹The two employers here may also be referred to as Respondent.

alleged joint employer relationship, and further denying the commission of any unfair labor practices.

Pursuant to notice contained in the complaint, a hearing was held before me in Boston, Massachusetts, on May 11, 1992, at which the Respondents were represented by counsel and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. After the conclusion of the hearing the General Counsel and the Respondents submitted briefs, which have been carefully considered.

Now, based on the entire record in this case, including my observation of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that HVNA is a corporation having an office and place of business in the city of Holyoke, Massachusetts, from which location, it provides home care and nursing services. During the calendar year ending December 31, 1990, HVNA derived gross revenues in excess of \$100,000, and purchased goods valued in excess of \$5000 from sources located outside the Commonwealth of Massachusetts.

The complaint further alleges that O'Connell also maintains its office and place of business in Holyoke, from which it operates a referral agency for nurses. Gross revenues for O'Connell were alleged to be over \$100,000 in the year ending December 31, 1990, and purchases from out-of-state vendors amounted to over \$5000. In addition, O'Connell was said to perform services valued at over \$50,000 for employees who themselves are engaged in interstate commerce.

These allegations were initially questioned by the Respondents here, but at the opening of the hearing, they were admitted, and I find, that the Respondents are employees engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answers admit, and I find that Local 285, Service Employees International Union, AFL-CIO (Local 285) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Joint Employer Issue*

Patricia Cavanaugh, director of hospice and former vice president for clinical services for HVNA testified that HVNA is a private, nonprofit organization which sends professional and paraprofessional people into the homes of other people who are ill, sometimes remaining in the home during an illness.

O'Connell is a referral agency, supplying primarily registered nurses (RNs) and licensed practical nurses (LPNs) to hospitals and other institutions, and agencies which employ these professional employees. Francis O'Connell, the owner and chief administrator of O'Connell, testified that he hires employees² and refers them to jobs for which he has con-

tracted to supply employees. He stated that his Company bills his customers a flat amount for the services of these employees, sometimes adding mileage if the employees have to use their own cars, and then he pays the employees' salaries and benefits. O'Connell deducts Federal and state taxes, and social security payments. He pays for workers' compensation insurance, malpractice and general liability insurance, and automobile insurance when the employees' vehicles are used on O'Connell referrals.

A contract between O'Connell and HVNA³ sets out O'Connell's obligations to furnish qualified individuals; to provide copies of professional licenses; to maintain records of all work done and expenses incurred, to establish general standards for employees; to pay all wages, expenses, taxes and insurance for the employees; and to acquaint employees with HVNA's procedures and policies, including personnel qualifications.

There is no dispute over the obligations of O'Connell and its rights as an employer of registered nurses and licensed practical nurses. There is, likewise no dispute over the practice and procedures followed when registered nurses are sent by O'Connell to work at HVNA.⁴ When they go to work, at the same time as employees of HVNA, the nurses sent over by O'Connell report to one of HVNA's regular supervisor staff. They are then assigned a list of patients to be visited during that day. They receive a bag, or kit, containing supplies. The O'Connell nurses would discuss with the HVNA supervisors any data or special considerations required by each patient to be visited, and pick up supplies as needed from HVNA, although most often the supplies would be already available at the patients' homes. The nurses take patient charts with them and make notations during and after visiting patients. If any problems arise, the O'Connell nurses contact their HVNA supervisor. During the day the O'Connell employees take the same morning and afternoon breaks as the regular HVNA nurses, and take the same lunch hour, frequently at the same place as the HVNA nurses. At the end of the day the O'Connell nurses report back to the HVNA offices and report on their day's assignments including unusual problems, whether physicians were called, and other pertinent patient information.

Francis O'Connell himself testified that he was acutely responsive to the wishes of Pat Cavanaugh and other HVNA supervisors regarding the people he sent to work there. He indicated that this agency was his biggest account, and that if they did not want a nurse sent over, he would not send that person to HVNA. The decision would be made by HVNA.

On these undisputed facts, I find that O'Connell and HVNA are joint employers of the employees assigned by O'Connell to work at HVNA. While O'Connell alone hires the employees it furnishes to HVNA, O'Connell sets the wages for these employees; pays those wages and other benefits; pays for insurance for those employees, including workers' compensation, professional and automobile liability insurance; withholds Federal and state payroll deductions;

³ The contract entered in evidence was effective from May 1989 to May 1990, but was renewed on June 4, 1990, for a period of 1 year. The parties agreed that this was the contract which was effective during all times involved in this case.

⁴ We are not concerned here with employees other than registered nurses, or with locations other than HVNA's offices in Holyoke.

² Checking their personal and professional qualifications.

and binds itself to compensate HVNA for acts or omissions of those employees, the record shows that HVNA had the right to refuse to accept the services of employees it did not want, and could effectively recommend the removal of such employees from its premises. Moreover HVNA retained the right and authority to schedule, assign and direct O'Connell employees; subject those employees to all of its procedures and policies while the employees were on HVNA premises or assignments; and used its own supervisors to direct the work of the O'Connell employees. It is apparent that both O'Connell and HVNA exercised sufficient power over the employees in question to be considered joint employees. *Manpower, Inc.*, 164 NLRB 287 (1967). See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

B. *The Refusal to Refer Eileen Bourque*

Eileen Bourque was employed as a registered nurse by O'Connell during 1990 and 1991. Bourque could work only on day shifts and, as a result, she was assigned by O'Connell almost exclusively to duties with HVNA, since that agency worked on an 8 to 4:30 schedule 5-days a week. O'Connell's records of assignments to HVNA from May 21, 1990, to June 27, 1991, show that Bourque worked at HVNA 8 days (out of 9) at the end of May 1990, the 19 days out of 21 days in June when assignments to HVNA were made;⁵ 21 days out of 21 days in July, 17 days out of 22 days in August; 7 days out of 18 in September, 12 days out of 22 days in October; 12 days out of 16 days in November; 12 days out of 16 days in December; then in 1991, 7 days out of 17; in February 6 days out of 18; in March 11 days out of 17; in April 16 days out of 20; in May 18 days out of 22; and in June, up to the June 27, 9 days out of 19.⁶

Bourque testified that she had taken vacation time in September and October 1990, which would tend to explain the lower percentage of days worked in those 2 months.

Eileen Bourque was not a member of any labor organization, and O'Connell's operation was nonunion. HVNA, however, was unionized, and its nurses were represented during this period by Local 285 of the Service Employees International union.

Beginning in September 1990, the Union and HVNA were engaged in negotiations looking to a new collective-bargaining agreement. In general, these negotiations do not concern us, except for one issue. That was a question of security for employees while in the parking lot at HVNA's building, and in passing between their cars and the building. Dorothy Roche, a former employee of HVNA, who had been employed in the September 1990-January 1991 period, and was a member of the Union's negotiating team in that period, testified credibly, and without contradiction, that HVNA was located in a bad part of town; that the parking lot of their building was used by drug dealers and users, prostitutes, and other menacing and undesirable persons. Roche testified, as did Bourque and Cavanaugh, that at least one employee, and probably two, had been assaulted in the parking lot, or on entering the HVNA building from the parking lot. HVNA

⁵All of these monthly figures compare the days Bourque worked to the total days in that month when any employees were assigned from O'Connell to HVNA.

⁶Bourque left her employment with O'Connell sometime in June 1991.

was aware of the issue and, according to Pat Cavanaugh, they had engaged the Holyoke police for a while, then they had hired two different security services to attempt to take care of the problem. Cavanaugh thought that the hiring of the second security service early in December had settled the problem, but Roche maintained that the issue continued to rankle the Union. She stated that at a meeting in January, the Union voted to engage in a protest of the lack of progress in negotiations in the form of "work-to-rule" tactics.⁷

Following this decision, the HVNA nurses and other employees began the work-to-rule campaign in the mornings by assembling in the parking lot before the 8 a.m. starting time, then proceeding into the building, as a body, precisely at 8 o'clock.⁸

Eileen Bourque, although not a party to any of this union activity, was aware from talking to and overhearing HVNA employees discuss the situation and the work-to-rule campaign. Bourque was also concerned about the dangers in and around the parking lot. She testified that she had been used to arriving at the facility at 7:40 or 7:45 a.m. and walking into the building. If the door was locked, she would wait outside until someone who had a key came along.⁹ However, after the attacks on others, Bourque would remain locked in her car until she saw someone else heading for the building. On one day, Bourque was not specific about the date, but it must have been mid-January,¹⁰ she arrived at her usual time, then had to sit and wait for 10 or 15 minutes. Finally the work-to-rule group assembled and as they were walking in, Bourque joined the group and entered the building with them.

This did not escape the attention of Pat Cavanaugh, who was called to a window of the HVNA building, and observed Bourque walking in with the demonstrating HVNA employees. Cavanaugh must have assumed that Bourque was expressing solidarity with the HVNA employees, because, as she put it, she was "concerned" because she didn't know if Bourque "understood who she works for," that is, whether she worked for O'Connell or for HVNA. Cavanaugh thereupon got on the telephone with Francis O'Connell and asked him "what's going on with Eileen?" O'Connell said he would find out and get back to her. According to Cavanaugh, O'Connell did get back to her very soon, and explained that Bourque had walked in with the HVNA people because she had no key and was concerned about her safety in walking, alone, from her car to the building.¹¹

⁷Work-to-rule is a tactic employed mainly in the public sector, where strikes are not permitted by law. The union members agree that they will continue to work, but abide, exactly, by the rules. Hopefully, the tactic will cause consternation on management's part, and help to move negotiations forward.

⁸They also took breaks and lunch hours, and left for the day, in the same unified fashion.

⁹As an O'Connell nurse Bourque did not have her own key.

¹⁰Bourque worked on January 16, but became ill with what was diagnosed as pneumonia, and was not able to work until released by her doctor as of February 5. The incident she was testifying about must have occurred before January 16.

¹¹Cavanaugh placed these conversations as taking place at the end of November or beginning of December, based, I find, on her memory of when one security guard outfit was replaced by a second, more reliable, group. However, she did say that she kept a "list" of telephone calls as to which she expects return calls. She did not

Cavanaugh derived ever having told O'Connell that he should not refer Bourque to HVNA.

Francis O'Connell recalled receiving a call from Pat Cavanaugh, he thought it was sometime in December, but recalled that negotiations were going on. Cavanaugh told him that Bourque had waited in her car and walked in to the building with the union people. She told O'Connell that she wanted to know the reason that this was happening. O'Connell said he then asked Bourque about the situation, she explained about the safety problem. O'Connell then got back to Cavanaugh, the explanation was acceptable to her, and that was that. O'Connell did not recall when he spoke to Bourque about the situation, but he presented no appointment records, or any other testimony which would help to establish when it happened. He did deny ever threatening Bourque, or telling her she would not be referred to HVNA.

The incident was recalled, somewhat similarly, by Eileen Bourque. She testified that on February first, after she received the doctor's certificate releasing her to return to work as of February 5, she dropped it off at O'Connell's office. Then, on February 4 she was called by O'Connell's secretary and asked to meet with Francis O'Connell on that Wednesday, the 6th.

At the meeting, only O'Connell and Bourque were present. O'Connell told Bourque that she had been observing walking into the HVNA offices with the work-to-rule group of HVNA employees. He said that Pat Cavanaugh had told him that this was a change from Bourque's normal reporting time and that "as far as she (Cavanaugh) was concerned it was a demonstration of Bourque's allegiance of the Union." O'Connell quoted Cavanaugh as requesting that Bourque not be reassigned to HVNA.

Bourque explained to O'Connell her reasons for walking in with the group. She talked about safety, about having no key, and affirmed that she had in "no way" taken part in any union activity, attended no meetings, nor wore any badges, and that she felt she was being unfairly judged guilty by association. Bourque asked if she could speak to Pat Cavanaugh, but O'Connell said no, that he would speak with Cavanaugh and explain Bourque's reasons concerning security. He then told Bourque that if Cavanaugh wanted to stand by her decision, they did not have to give any reasons, he would not send Bourque to them again. He explained to Bourque that he had delayed meeting with her on this matter because she had been sick and he did not want to trouble her. He told her that she should not mention this meeting, that HVNA was his bread and butter, and that if that was what they wanted, he would oblige them. O'Connell concluded by telling Bourque that she should remain neutral and uninvolved with the HVNA staff. Her relationship was professional only, and had no involvement with the Union.

A week or so later, about February 13 or 14, O'Connell called Bourque. He apologized for not getting back to her sooner, but pleaded the press of business and late shifts. He told Bourque that Cavanaugh understood the safety issue and that everything was back to normal.

Bourque then asked about scheduling. O'Connell told her the school vacation week of February 18 to 22 was already assigned, but if anything else came in she would be consid-

ered for assignment. As it turned out, Bourque worked all of that vacation week, and thenceforth, as noted above, regularly until June 1991, but she was not referred to HVNA, or anywhere else, from February 5 to 19, excluding February 12 and 18, which show up on O'Connell's schedule as days when no one was referred to HVNA.

What happened here does not seem to be in question. Bourque walked in to the HVNA office with the protesting HVNA employees. She was observed by Pat Cavanaugh. Cavanaugh called O'Connell for an explanation. O'Connell asked for, and received, an explanation from Bourque. O'Connell called Cavanaugh. She accepted Bourque's explanation. O'Connell notified Bourque and the incident was ended.

The problems come with the timing, and what was said, and both of these questions depend on the credibility of the witnesses here.

On the times, I have already found, based on the testimony of Dorothy Roche, that the Union vote to engage in work-to-rule was in January, and that the work-to-rule demonstrations in which Roche observed Bourque, also occurred in January, not too long before the parties reached agreement. Cavanaugh seems to place the time for the events in this case back in late November or early December, but she seems to pin her recollection on the changes in security measures taken by management, rather than the Union's reactions to the progress of negotiations. I have also noted that Cavanaugh did not bring in her records which could have shown the telephone calls between O'Connell and herself.

Likewise, O'Connell brought in no appointment books or other records showing a meeting with, or call to, Bourque in that November or December time period.

On these facts, and my impressions of the demeanor of the witnesses here, I credit the testimony of Bourque and Roche that the work-to-rule unified walk to HVNA's offices took place in January.

As to the contents of conversations between the parties, it is clear, first, that Cavanaugh was upset, despite her protestations to the contrary, by the work-to-rule demonstrations. The Union succeeded in grabbing her attention. Her own testimony showed it. She was upset with the sight of Bourque marching, in lockstep, with the union people, right into the HVNA offices. She picked up the telephone and called O'Connell to ask him for an explanation. And I believe, from her testimony and her demeanor, that she told O'Connell something to the effect that he should not send Bourque to HVNA anymore.

O'Connell, of course, would have been upset by this. But he appeared to me to be a person who would act tactfully and compassionately in dealing with people. He is a registered nurse himself, after all. Thus, it is completely consistent with my view of him that he would wait until her release date from her physician, February 5, to call her in to talk about the matter, just as it is consistent with my observations of him, that he would not let Bourque go to Cavanaugh, but he would undertake to smooth things out himself. He accomplished that result and Bourque was again assigned to HVNA.

Bourque's testimony was candid and straightforward, and my observations of her demeanor convince me that she was telling the truth in her descriptions of her conversations with O'Connell.

produce that list here, however, and I think the testimony of Bourque and Roche is more credible as to the timing of the incident.

I, therefore, find that Cavanaugh told O'Connell, sometime around January 16, that Bourque was not to be sent to HVNA. O'Connell, in turn, waited until Bourque was cleared to return to work to meet with her on February 6. He told her what Cavanaugh had said, obtained Bourque's explanations, and then worked the matter out with Cavanaugh. O'Connell then called Bourque around February 13 or 14 and told her that things were back to normal.

Since the action against Bourque resulted from Cavanaugh's conclusion that Bourque was supporting the Union, the action that Cavanaugh and O'Connell took against Bourque constituted a violation of Section 8(a)(1) of the Act. *Guerdon Industries*, 255 NLRB 610 (1981). Further, this discrimination against Bourque to interfere with perceived impressions of union activity, constitute a violation of Section 8(a)(1) and (3) of the Act. *New River Industries*, 299 NLRB 773 (1990); *Armstrong Rubber Co.*, 283 NLRB 625 (1987).

The facts noted above, show that Bourque would have worked at least some of the days that HVNA used referrals from O'Connell in the period between February 5, 1991, when Bourque was released by her doctor, and February 19, when she was actually assigned to HVNA. The question of just how many days must wait until the compliance stage of this proceeding.

IV. THE REMEDY

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom, and that they take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondents unlawfully discriminated against Eileen Bourque during February 5 to 19, 1991, but have since reinstated her to her former position, I shall recommend that the Respondents make Bourque whole for any loss of earnings she suffered as a result of the discrimination against her together with interest thereon.¹²

CONCLUSIONS OF LAW

1. Holyoke Visiting Nurses Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. O'Connell Professional Nurse Service is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

3. Holyoke Visiting Nurses Association and O'Connell Professional Nurse Service are joint employers within the meaning of the Act.

4. The Respondents, by refusing to refer or to accept referral of Eileen Bourque from February 5 and 19, 1991, violated Section 8(a)(1) and (3) of the Act.

¹² See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondents, Holyoke Visiting Nurses Association and O'Connell Professional Nurse Service, joint employers, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to refer or refusing to accept services of employees because of their protected and/or union activities.

(b) 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) Make Eileen Bourque whole for any loss of earnings, plus interest suffered because of the Respondent's unlawful actions against her.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at their locations in Holyoke, Massachusetts, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹³ 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.

¹⁴ 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."