

Beverly Enterprises—Massachusetts, Inc., d/b/a Beverly Manor Nursing Home and Hospital Workers Union, Local 767, Service Employees International Union, AFL-CIO. Cases 1-CA-31323, 1-CA-33587, 1-CA-31862, 1-CA-33978, and 1-CA-34299

April 9, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On April 15, 1997, Administrative Law Judge Steven N. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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 the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

In adopting the judge's finding that the Respondent violated Section 8(a)(5) by, inter alia, reducing the maximum 1996 wage increase from 4 percent to 3 percent, we reject the Respondent's contention that the 3-percent maximum increase was the result of its consistent application of an inflexible formula for computing wage increases that it had employed in past years. In a March 14, 1996 letter to the Union in response to its complaint over the reduction, the Respondent's human resources representative, Begley, characterized the maximum amount as a "compromise" between the parties' positions during stalled contract negotiations, in which the Respondent had proposed a 2-percent maximum figure and the Union had proposed a 4-percent maximum wage increase. The letter was a direct explanation of the Respondent's current administration of wage increases, and as such constitutes an admission that the 1996 maximum wage increases were not tied to any prior formula used by the Respondent.

We view the Respondent's established merit increase program as consisting mainly of fixed features, i.e., awarding standard 4-percent maximum increases to most (90 percent) employees following their annual appraisals. In this respect, the program resembles most closely the one in *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), which the Board discussed at length in *Daily News of Los Angeles*, 315 NLRB 1236,

¹The Respondent has 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

1239 fn. 28 (1995). Consistent with the discussion in *Daily News* of wage increases like those at issue in the instant case, the employees must be made whole for any loss of pay they may have suffered by reason of the Respondent's unilateral discontinuance of the merit increase program. In addition, as the judge correctly ordered, the 4-percent maximum increases must continue to be paid until changes in the program are agreed to or are lawfully implemented pursuant to a valid bargaining impasse.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Beverly Enterprises—Massachusetts, Inc., d/b/a Beverly Manor Nursing Home, Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, concurring.

I concur in the result. Although the past practice was that Respondent had discretion with respect to whether an individual employee would get a merit increase, and as to how much an employee would get, there was a fixed maximum of 4 percent with respect to such increases. It was this fixed maximum that was unilaterally changed to 3 percent, in violation of Section 8(a)(5). Thus, it is unnecessary to decide whether an employer violates the Act by continuing the past practice of exercising discretion as to matters that are variable and at the discretion of the employer.

Catherine E. D'Urso, Esq., for the General Counsel.
David B. Ellis, Esq. and *Jonathon A. Keselenko, Esq. (Foley, Hoag & Eliot)*, of Boston, Massachusetts, for the Respondent.

BENCH DECISION AND CERTIFICATION

STEVEN M. CHARNO, Administrative Law Judge. This case was tried before me in Boston, Massachusetts, on March 17 and 18, 1997. After oral argument on March 19, 1997, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. Appendix A is the portion of the transcript containing my decision, while Appendix B [omitted from publication]¹ contains corrections to that transcript. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the amended transcript containing my decision. Based on the findings of fact and conclusions of law contained therein and on the entire record in this case, I issue the following recommended²

¹Certain errors in the transcript have been noted and corrected.

²If 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.

ORDER

The Respondent, Beverly Enterprises—Massachusetts, Inc., d/b/a Beverly Manor Nursing Home, Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and to bargain in good faith with Hospital Workers Union, Local 767, Service Employees International Union, AFL–CIO (the Union), as the exclusive bargaining representative of its employees in the following appropriate collective-bargaining unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All full time and regular part-time service and maintenance employees, including nursing assistant, dietary aides, cooks, rehabilitation aides, and activity assistants employed by the Employer at its Plymouth, Massachusetts nursing home but excluding all managers, supervisors, RNs and LPNs, business office clericals, per diem casuals, Administrator, Director of Nursing, Director of Staff Development, Social Services Director, Activities Director/Coordinator, Dietary Manager, Medical Records Professional, maintenance supervisor, and guards within the meaning of the National Labor Relations Act.

(b) Unilaterally changing the terms and conditions of employment of its employees without having first bargained with the Union in good faith to impasse with respect to (1) the payment of annual wage increases to unit employees, (2) the timecard policy requiring all unit employees to pay \$5 for each lost timecard, or (3) any other term or condition of employment.

(c) 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) Immediately put into effect the annual 4-percent increases in wage rates which were issued to unit employees prior to January 1, 1996, and continue such increases in effect until it negotiates with the Union in good faith to a collective-bargaining agreement or reaches an impasse after bargaining in good faith, and make whole its unit employees for any loss of pay they may have suffered due to its unilateral change, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Eliminate the \$5 fee charged to unit employees for lost timecards until it negotiates with the Union in good faith to a collective-bargaining agreement or reaches an impasse after bargaining in good faith, and make whole its unit employees for any loss they may have suffered due to its unilateral change.

(c) On request, bargain with the Union as the exclusive representative of its employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and embody any understanding reached in a written agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, personnel records, and re-

ports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Plymouth, Massachusetts facility copies of the attached notice marked “Appendix C.”² 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 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. 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 employees and former employees employed by the Respondent at any time since February 26, 1996.

(f) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

²If 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.”

APPENDIX A

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(D)on’t go away because I will get back to you as soon as I can.

Thank you.

MR. KESELENKO: Thank you.

MS. D’URSO: Thank you.

(Whereupon, a brief recess was taken.)

JUDGE CHARNO: Back on the record.

. . . derived goods and revenues in excess of \$100,000 annually. To wit, purchases and received goods valued in excess of \$5000 outside of the State. Have submitted—and I find that Respondent is an employer engaged in commerce within the meaning of Section 226 and 227 of the Act, and is a health care institution within the meaning of Section 214.

The Union is admitted to be and I find is a labor organization within the meaning of the Act.

On March 23, 1993, the Union was certified as the exclusive collective-bargaining representative of employees in the following units: “All full-time and regular part-type and time service and maintenance employees, including nursing assistants, dietary aides, cooks, rehabilitation aides, and activity assistants employed by Respondent at its Plymouth, Massachusetts nursing home, but excluding all managers, supervisors, RNs and LPNs, business office clericals, per diem casuals, administrator, director of nursing, director of staff development, social services director, activities director/coordinator, dietary manager, medical records

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professional, guards, maintenance supervisor, and all other supervisors within the meaning of the National Labor Relations Act.”

The consolidated complaint sets forth a group of alleged violations in Section 8(a)(1) of the Act. In discussing those, I would like to note the—I believe the evidence relating to Mr. Ray Martinez is too remote in time to be probative in this proceeding, given the fact that Mr. Martinez was not shown to be employed by Respondent during any of the alleged—during the time when any of the alleged violations—when any of the violations alleged in the complaint were alleged to have taken place.

The first 8(a)(1) allegations concern evidence relating to a November 1993 meeting. The basis for the General Counsel’s allegation is confined in the testimony of Diana Hemil, or Diana Curtis as she was known at the time. Ms. Hemil was unable to tell us when she testified whether at the time of the November meeting she was a member of the unit, or an accepted office clerical employee. She testified merely that she believed she was performing duties relating to both positions.

Given the absence of probative evidence that Ms. Hemil was a member of the unit, I find that the General Counsel did not meet the requisite burden of proof, and therefore conclude that Respondent did not violate the Act as alleged in paragraph 7(a) and paragraph 7(b)(1) of the complaint.

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The second alleged violation of Section 8(a)(1) involves testimony by Ms. Gace that Director of Nursing Toomey told Ms. Gace that Ms. Gace could “thank the union” for the denial of the shift change request, which Gace had made to Toomey. Toomey was no longer in Respondent’s employ at the time she testified, and her testimony that she had not handled the type of requests made by Gace was corroborated by Hemil’s wholly credible testimony concerning Hemil’s duties as schedule coordinator. Given the improbability of the situation having occurred as described by Gace, I credit Toomey’s denial.

The final 8(a)(1) allegation involves Ms. Remick’s testimony that Assistant Director of Nursing Norman stated that the union would have to reduce its bargaining demands or Respondent would close its doors, or words to that effect. Norman, who was no longer employed by Respondent at the time she testified, testified without refutation that she was not involved in any way in collective-bargaining negotiations, and denied the comment attributed to her by Remick.

Remick testified that at the time of the alleged comment she was the foremost union organizer employed by Respondent. Given the inherent probability of the alleged situation, together with the lack of interest Norman had in the proceeding, I credit her denial over Remick’s testimony. Accordingly, the relevant 8(a)(1) allegation will be dismissed.

Contract negotiations between the Union and Respondent

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began in June of 1993. The General Counsel contends that from July 26, 1993, until the end of February 1994, Respondent failed to meet with the Union “at reasonable times

and for reasonable intervals” for the purpose of negotiating a collective-bargaining agreement.

The record establishes that the parties met on 11 occasions during the 7-month period during April 1993 and February 1994. There is no probative evidence that the negotiating sessions on any of those sessions exceeding 4-1/2 hours of length. During that period, however, the parties reached agreement on the majority of points of contention between them, and most of those agreements were focused on proposals which had been advanced by the Union.

I conclude, therefore, that the record does not demonstrate “behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement” because the focus of the Board’s decision in *Exchange Arts Co.*, 139 NLRB 710, 714–715 (1962). I therefore conclude that neither the frequency nor duration of the negotiating sessions during the 7-month period has been demonstrated to show bad-faith bargaining by Respondent.

At the time the unit was certified, Respondent was subcontracting its housekeeping and laundry work. During the last week of September 1995, Respondent began hiring its own

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housekeeping and laundry employees. On October 12, 1995, the Union asked in writing for certain information concerning the new hires. To wit, “name, address, home telephone, job category, scheduled hours, shift, floor assignment, hire date, pay, date and percentage of last raise.”

As Mrs. Valedano pointed out to me yesterday, the last two requests were impossible to meet since hires of less than 1 month’s tenure would not have received the raise customarily granted by Respondent on the annual anniversary of their hire date. Mrs. Valedano credibly and candidly testified that the Union had indicated that it desired the information which I just described for two purposes.

First, to bargain on behalf of the housekeeping and laundry workers whom the Union believed should be in the unit, and second, to ascertain whether the housekeeping and laundry workers were receiving comparable pay to that received by kitchen workers, a group already represented by the Union. At an October 31, 1995 negotiating session, Mr. Bagely, the chief spokesperson for Respondent, verbally informed the Union of the rate of pay and benefits received by the housekeeping and laundry workers. Mr. Bagely and Mrs. Valedano both testified to this effect without controversy.

There is no evidence that the Union ever indicated the information supplied on October 31 was inadequate to meet its comparability objective, or that it ever identified its renewed

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request for all of the information just described as being related to its comparability objective. Under these circumstances, I find that Respondent supplied information sufficient to meet the Union’s professed comparability objective in a timely fashion.

A dispute thereafter arose between Respondent and the Union over the question of whether the Union represented Respondent’s housekeeping and laundry employees. On November 20, 1995, the Union filed a unit clarification petition

with the Board, and a hearing was held on the issue on December 4 of that year. Respondent supplied information fully responsive to entirety of the Union's request at sometime around February 1996. That compliance with the Union's request was, however, admittedly unintentional.

On June 26, 1996, the Board issued an order which stated that Respondent's housekeeping and laundry employees were not part of the bargaining unit. Accordingly, the full range of information sought by the Union was not shown to be necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit. Accordingly, Respondent's failure to provide that full range of information in a timely manner did not violate the Act.

The parties held a last negotiating session on December 13, 1995. At that session they discussed wages for the first time in over a year. That finding is based on Mr. Bagely's notes

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of this session, and his testimony concerning those notes. When Respondent proposed a 2-percent annual wage increase, the Union professed shock and did not immediately make a counteroffer or abandon the 4-percent figure it previously offered.

A prior spokesperson for the Union had stated in October 1994 that it would be very difficult for the Union to sell an increase of less than 4 percent to the unit. I believe that those are the only two pieces of evidence of record concerning the Union's position on the matter of wages, other than the fact that when they were requesting 5 percent, they suggested that Respondent would have to come up from its position. This evidence clearly falls short of establishing the existence of an impasse on the question of wages, under any conceivable set of standards.

The Union again, when it pressed for Respondent's recognition of the Union's representation of housekeeping and laundry workers, Respondent again declined. Tempers appeared to flare and the union spokesperson departed, saying he needed to check the housekeeping and laundry employee issue with his attorney, that he would call Mr. Bagely, and that the latter shouldn't hold his breath.

Between 1990 and 1995 Respondent gave its employees a 4-percent maximum wage increase on the anniversaries of their respective dates of employment. In 1996, Respondent gave unit

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employees a maximum wage increase of 3 percent. As the testimony in this proceeding indicated, the maximum wage increase was given in excess to 90 percent of the employees in both 1995 and 1996. Respondent's 1996 action was taken without notice to or bargaining with the Union.

Around January 1996, Respondent shifted from using paper timecard to using plastic timecards bearing a magnetic strip. When the change was made Respondent implemented a policy requiring all unit employees to pay a \$5 fee for lost timecards. Respondent took this action without notice to or bargaining with the Union. Since the policy was implemented, Respondent has collected the fee on at least 17 occasions. There is no evidence that any other fee for lost equip-

ment has been implemented or modified since the bargaining unit was certified.

The amount of the unit's annual wage increases and the imposition of lost equipment fee are terms and conditions of employment of the unit and are mandatory subjects for collective bargaining. Respondent's unilateral modification of these terms and conditions of employment in the absence of impasse are a violation of Section 8(a)(5).

For 4 months in 1996, the Union wrote Mr. Bagely purporting to request bargaining over Respondent's change from the 4- to the 3-percent annual wage increase, but in fact was preconditioning further negotiations on Respondent's

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remedying the alleged unfair labor practice. On April 23, 1996, Respondent supplied information requested by the Union concerning the timecard issue.

On June 1, 1996, the Union's chief negotiator and a group of individuals representing the Service Employees International Union committed a trespass at Respondent's facility while ostensibly handbilling Respondent's employees. On June 17, 1996, the Union again wrote Respondent offering to bargain if the latter rectified all outstanding conduct which the Union perceived to be violative of the Act.

On June 25, 1996, Respondent's administrator, Mrs. Valedano, wrote the Union withdrawing recognition based solely and explicitly on the events of June 1. During the hearing, I excluded evidence relating to the June 1 events on the ground that the evidence concerning those events did not rise to the level found by the Board in other cases to justify cancelling the Union's certification. I hereby reaffirm that ruling for the reasons I gave when I originally made it.

Respondent now contends that it withdrew recognition on two additional grounds. First, because the Union was dormant and had abandoned its responsibilities, and second, because the Union made conditional offers to bargain. Assuming that both reasons are something more than posttalk rationalizations, neither provides the justification for Respondent's actions. Respondent has supplied no decisional authority, and I'm aware

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of none which would permit a withdrawal of recognition simply because the Union is argued to have violated Section 8(a)(5) by making a conditional offer to bargain.

The facts of record do not permit a conclusion that the Union has abandoned its responsibilities. All of the relevant evidence demonstrates that the union was extremely upset over Respondent's refusal to recognize the Union as the representative of Respondent's housekeeping and laundry employees. A hiatus in negotiations pending the outcome of that issue would not have been unreasonable, but that hiatus could not have been brought to a close until the day after the recognition was withdrawn.

The record does not demonstrate that the Union was unable or unwilling to perform its representative functions. A break in negotiations does not constitute a basis to withdraw registration in the absence of a demonstration of loss of support. *Penex Aluminum Corp.*, 288 NLRB 439, 441 (1988). The existence of outstanding unfair labor practices constitute a valid reason for breaking off collective bargaining negotiations. *J. H. Rutter-Rex Mfg. Co.*, 209 NLRB 6, 7 (1974).

I therefore find that Respondent withdrew recognition unlawfully, and thereby violated Section 8(a)(5) of the Act. Since any holding the record open now would clearly delay the disposition of this matter, the General Counsel's motion to hold

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open the record pending their evaluation of additional charge is denied, and General Counsel's Exhibit 23 is rejected.

Let me ask both of the parties if they have observed my omission of any element of the complaint which should be resolved at this point, since my notes are somewhat chaotic.

MS. D'URSO: Nothing aside from remedy, Your Honor.

MR. KESELENKO: Likewise.

JUDGE CHARNO: All right. Obviously, the remedy status quo—I believe that since 8(a)(5) violations, failure to bargain in good faith, have been demonstrated, a bargaining order is appropriate under the circumstances of this case. I will upon receipt of the transcript and my correction of any perceived transcript errors, I will issue the appropriate order. Time for exception does not begin to run until that order issues.

Are there any other matters to take up before I close the record in this proceeding?

MS. D'URSO: No, Your Honor.

MR. KESELENKO: I have one question, Your Honor. The decertification petition was dismissed, presumably on the grounds that at the time it was filed they were unfair labor practice that tainted the petition—given your rulings at the time that the petition was filed, there were no unfair labor practices. All the ones that you did find occurred after the decertification petition was filed. Therefore we do request that that petition be reinstated.

APPENDIX C

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 refuse to recognize or to bargain with the Hospital Workers Union, Local 767, Service Employees International Union, AFL-CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including nursing assistant, dietary aides, cooks, rehabilitation aides, and activity assistants employed by the Employer at its Plymouth, Massachusetts nursing home but excluding all managers, supervisors, RNs and LPNs, business office clericals, per diem casuals, Administrator, Director of Nursing, Director of Staff Development, Social Services Director, Activities Director/Coordinator, Dietary Manager, Medical Records Professional, maintenance supervisor, and guards within the meaning of the National Labor Relations Act.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees without having first bargained with the Union in good faith to impasse with respect to (a) the payment of annual wage increases or (b) the \$5 fee charged to unit employees for lost timecards.

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

WE WILL immediately put into effect the annual 4-percent increases in wage rates which were issued to unit employees prior to January 1, 1996, and continue such increases, until we negotiate with the Union in good faith to a collective-bargaining agreement or reach an impasse after bargaining in good faith, and WE WILL make whole our unit employees for any loss of pay they may have suffered due to our unilateral change, with interest.

WE WILL immediately eliminate the \$5 fee charged to unit employees for lost timecards, until we negotiate with the Union in good faith to a collective-bargaining agreement or reach an impasse after bargaining in good faith, and WE WILL make whole our unit employees for any loss they may have suffered due to our unilateral change.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and embody any understanding reached in a written agreement.

BEVERLY ENTERPRISES—MASSACHUSETTS,
INC., D/B/A BEVERLY MANOR NURSING HOME