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Unified Creative Programs, Inc. and Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO, CLC. Case 2-CA-34420-1

December 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 15, 2003, Administrative Law Judge Raymond P. Green issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent 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.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 29, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ The Charging Party 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.

We correct the following inadvertent error in the judge's decision. In the second paragraph of the decision, the judge incorrectly states the date of the election as January 11, 2001. The actual date of the election was September 7, 2001.

Allen Rose, Esq., for the General Counsel.
Andrew P. Marks, Esq., for the Respondent.
Jessica Drangel, Esq., for the Union.

DECISION*

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on May 8, 2003.¹ The charge in Case 2-CA-34420-1 was filed on March 1, 2002, and amended charges were filed on April 22 and May 30, 2002. A complaint was issued on June 28, 2002, and alleged as follows:²

1. That pursuant to an election conducted on January 11, 2001, in Case 2-RC-2243, the Union was certified as the exclusive collective-bargaining representative in a unit consisting of all full-time and regular part-time direct care workers, cooks, housekeepers, and drivers employed by the Employer at and out of its facilities located at 226B and 226D Bryant Avenue, White Plains, New York; 676 Elk Avenue, New Rochelle, New York; and Lincoln Avenue, Rye Brook, New York.

2. That the Respondent made the following unilateral changes in the terms and conditions of the aforesaid employees without bargaining with the Union.

(a) Changing procedures by which employees callout.

(b) Changing the method by which oncall employees are scheduled.

(c) Changing job qualifications of unit employees by disqualifying employees if they are employed at United Cerebral Palsy of Westchester.

(d) Implementing a schedule for dinner breaks.

(e) Eliminating the use of starting time grace periods.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

* Correction has been made according to an errata issued on August 7, 2003.

¹ At the hearing, the Respondent agreed to go forward notwithstanding the fact that there was another change that had been filed by the Union and was in the process of being investigated. Respondent explicitly waived any contention that it may have under *Jefferson Chemical Co.*, 200 NLRB 992, 994 (1972). In a related manner, the Union, although requesting that I hear the facts of this case, asked that I keep it open until after the Region decides whether to issue a complaint in the pending charge, and to consolidate this case with any newly issued complaint. As this would, in my opinion, unduly delay the processing of this matter, I rejected the Union's motion.

² At the hearing the General Counsel deleted the allegation that the Respondent unilaterally made a change that required employees to cover shifts of employees who called out.

II ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates four resident houses for individuals with cerebral palsy or other severe disabilities. The individuals who live at these houses are called “consumers.” The houses have employees who assist the consumers on a 7-day, 24-hour basis. (The employees normally are divided up into four, 8-hour shifts.)

The Union filed a petition in Case 2–RC–22434 on August 2, 2001. Pursuant to a Stipulated Election Agreement dated August 8, 2001, an election was held on September 7, 2001, and the Union obtained a majority of the valid votes counted. The Union was certified as the exclusive collective-bargaining representative on January 11, 2002.³

Bargaining commenced on January 31, 2002, and there is no contention that the Respondent has engaged in bad-faith bargaining. To the extent that the negotiations are relevant, it is only to demonstrate that the Respondent did not give prior notice to the Union about any of the alleged unilateral changes. Of course, the Respondent asserts that it did not make any material changes and, therefore, it was not required to give notice.

B. Alleged Change in Callout Procedures

When the parties refer to the callout procedure, they are referring to a longstanding requirement that employees call in 2 to 4 hours before their shifts start to advise that they would be unable to report to work. This rule has been embodied in the Respondent’s employee handbook for a long time and before the Union was certified. It states:

If you are unable to report for work for any reason, if you will arrive late, or must leave early, notify your supervisor or, in his/her absence, the designee, before the starting time.

The rule is also described in the staffing protocols, which are maintained in each house. This states:

All call outs are to be made to Management only, not to other Direct Care Workers.

The purpose of this rule is quite obvious. As many of the consumers are severely handicapped and require around-the-clock care, it is incumbent on supervision to know, ahead of time, when an employee is unable to report to his shift so that arrangements can be made to obtain a substitute. (And to this end, the Employer has a pool of oncall employees.) Also, on a more mundane level, it is necessary to know why an employee is not showing up because full-time and regular part-time employees receive certain benefits including sick and personnel time and, therefore, the payroll department has to know how to account for an employee’s absence.

The General Counsel called Iris Monroe, a direct care worker employed in house 1 since November 2000, to testify about the callout procedure. According to Monroe, the procedure before December 2001, was that if an employee called into

the house to advise that he or she was unable to report to work, they would first try to talk to the shift supervisor, and only if the supervisor was unavailable, to one of the direct care workers who would take the call and enter the call in the house logbook. (Presumably so that the supervisor, upon return would be advised of the no-show and be able to arrange for a substitute.) She also testified, without any corroboration, that the then existing policy did not require the employees who called out to explain why they were unable to report to work.

On or about December 1, 2001, Deneen Boudreau-Popovic, the manager of house 1, issued a memo, which stated in pertinent part that when a second person calls out for the same shift, the person calling out needs to verbally speak to the direct care supervisor and cannot simply leave a message. The memo goes on to state that if the person calling out cannot reach the direct care supervisor after repeated tries, then he or she should call back to the house and let them know about this.

The memorandum issued on December 1, 2001, is however, substantially similar to a memorandum issued almost a year earlier on January 30, 2001. It, therefore, is hard to conclude that the December 1, 2001 memorandum represents any new change in the procedure.

In any event, Monroe testified that in January 2002, there was another change, this time requiring that people calling out (not just for second callouts) must speak to the house manager or the direct care supervisor.

According to Monroe, a third change occurred in March 2002, when the house manager, placed a memorandum in the house 1 logbook which referred the employees to the employee handbook and stated that when calling out, employees should speak directly to management on weekdays, as well as, on weekends. The memorandum also apparently advised employees that they could be asked why they were calling out.

The General Counsel also called Mark Welsh who testified as to what he perceived was the procedure for callouts at house 3. He was employed from May 1999 to March 2002 and worked as an oncall employee who generally worked on weekends.

Like Monroe, Welsh testified that when employees called out, they tried to call the shift supervisor but if that person was not available, would talk to one of the other employees who happened to answer the phone. He testified that the call would be entered into the logbook and that as far as he knew, employees were not required to give a reason for calling out.

At a house 3 staff meeting held on January 24, 2002, House Manager Ronald Ruphey told the employees that when they called out they should contact management and not simply leave a message with a fellow employee. This was followed up with another memorandum in June 2002 that stated:

It is imperative that you notify Carmen or myself whenever you will be absent. The residence staff will no longer take call out messages. It is your responsibility to insure that we are notified, so that we will be able to determine that the staffing is adequate.

As far as I can see, employees have always been required to call in if they were going to be absent or late. This rule pre-existed the advent of the Union and was designed to give su-

³ The parties agreed, as part of the Stipulated Election Agreement, that oncall employees who worked an average of at least 4 hours per week in the 13-week period preceding August 3, 2001, would be eligible to vote.

pervision sufficient time to obtain a substitute worker or require an employee to extend his or her shift if necessary to provide the coverage necessary to take care of the consumers. The evidence shows that before and after January 2002, employees who called in were often (but not always) asked why they were not coming to work, in part so that the Respondent could advise payroll how to account for their absence, or alternatively, to attempt to plead with an employee to come in.⁴

The General Counsel contends that whereas before, the employees could call the house to which they were assigned and talk to anyone about their intention to not come to work, the Respondent changed this policy so that after December 1, 2001, the employees were now required to call managers or supervisors directly instead of merely trying to call the shift supervisor at the house. To this end, the employees had available to them, the phone numbers of the individuals who they were supposed to call and it is hard for me to imagine that a few attempts to use the phone would be unduly burdensome.

I do not believe that this was a change. The Respondent's preexisting handbook makes it clear that employees who call out are required to advise supervision. Thus, the alleged change is essentially a reiteration of the existing rule. At best, Welch and Monroe testified that sometimes, when an employee attempted to call the shift supervisor, there were occasions when that person was not available and the person answering the call would take a message and enter the call in the logbook. This is not, in my opinion, really significant because their testimony indicates to me that the employees, in trying first to reach a supervisor, were well aware that this was the rule and that they were attempting to comply with it.

At most, the announcements in December 2001 and thereafter in 2002, were merely attempts to impress upon employees that the preexisting rule required them to call a supervisor when they were calling out and to this end, they were instructed to make a greater effort to do so and not simply to call the house and leave a message with a coworker.

In my opinion, there was no significant change in the rule or practice and in this respect, I conclude that this allegation of the complaint should be dismissed. *Civil Service Employees Assn.*, 311 NLRB 6 (1993); *Goren Printing Co.*, 280 NLRB 1120 (1986); *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978).

C. Alleged Change in Schedule of Oncall Employees

The General Counsel alleges that on or about January 24, 2002, the Respondent made a change in the method by which oncall employees were scheduled. He contends that this change was announced by Ruphuy, the manager of house 3, when he told employees that oncall employees would not be given any permanent slot on the schedule.

The Employer's staffing protocols, which preexisted the Union's organizing campaign, defines employees as follows:

⁴ For example, Monroe testified that on one recent occasion, she called and spoke to Supervisor Genette and said that she wasn't coming in because she wasn't feeling well. According to Monroe, Genette asked if "it was that bad that she couldn't come in." Obviously, in this instance, Genette asked Monroe why she was going to be absent, not to impose some kind of discipline on her, but simply so that she could try to persuade Monroe to come in.

Each Residence Manager will strive to fill all empty slots by hiring permanent full or part-time staff. On-call staff are to be utilized as they are intended—sporadically to fill in for full or part-time staff. No on-call staff will be given permanent hours, unless they are in the process of obtaining their abstract or certifications.

....

On Call Staff are just that, they are utilized if a regular staff calls out to fill in, or they are scheduled in advance to fill in for a planned vacation, or someone out on disability. They are also utilized if we have a vacancy that we have not been able to fill; in this instance we make every attempt to spread the time between all appropriate on call staff.

Thus, the evidence here shows that for many years an oncall employee is, by definition, a person who does not have a permanent schedule, except in limited circumstances, which are not relevant herein.

It is also noted that the use of oncall staff is extremely important to the Respondent. Given the need to have adequate staff to assist severely disabled people on a 24 hour/7-day a week basis, the Respondent has to have a pool of people who are available to work when one or more of its regular employees are unavailable for any reason. It seems that for the most part, people who have oncall positions also have other jobs.

The General Counsel produced one witness, Mark Welch to support his contention. Welch testified that he was first hired as an oncall employee in May 1999. He testified that he was normally available for work on Saturdays and Sundays and that for a 3-year period, he knew he was supposed to work on those 2 days without having to look at the weekly posted schedule.

Because Welch was available to work on the weekends, it is not surprising that he was normally asked to come to work on weekends. But that is not synonymous with him having a regular schedule despite being classified as an oncall employee. There were numerous occasions in the period from May 1999 to January 2002 when he was asked to and worked on different days during the week. There were occasions when he was not asked to come in to work on a Saturday or Sunday. And there were occasions when he showed up for work on a Saturday or Sunday only to discover that he hadn't been assigned to any work.

After the announcement by House Manager Ruphuy, which simply restates the existing written policy, the evidence shows that Welch continued to be called on a variety of days including on Saturdays and Sundays.

In my opinion, the General Counsel's evidence does not establish that oncall employees, including Welch, ever had regular scheduled workdays or hours and, therefore, Ruphuy's restatement of existing policy, cannot be construed as a change. Accordingly, it is my opinion, that there was no requirement that the Respondent give notice to the Union.

D. Alleged Change Whereby the Respondent Disqualified for Employment Anyone Employed by Cerebral Palsy of Westchester Inc.

The only witness that the General Counsel offered in support of this allegation was Vanessa Grove who was employed as an oncall employee.

Groves testified that after asking for a permanent position, she was told by Ruphey in January 2002, that she “couldn’t work for the day treatment center and work for the House.”⁵ Prior to this alleged conversation, Groves had been given, in October 2001, a regular 2-day-per-week shift to replace another worker who was out on disability. Knowing that this employee would be coming back, Groves desired a regular part-time position.

There was, in my opinion, no credible evidence to show that the Respondent, at any time, made a rule or practice, whereby it rejected job applicants who also held jobs at Cerebral Palsy of Westchester. In fact, the Respondent produced credible evidence that several people, including Wanda Badhu, Irene Rizzario, Keshia Franklin, and Patsy Mark were hired and also had jobs at Cerebral Palsy of Westchester.

F. Dinner Breaks

The complaint alleges that the Respondent unilaterally changed dinner breaks by instituting fixed schedules.

General Counsel’s Exhibit 10 is a memorandum dated February 25, 2002, issued to Ruphey to the staff of house 3. This states:

Effective immediately all staff will be required to take their breaks.

Staff A: 7:30–8:00

Staff B: 8:00–8:30

Staff C: 8:30–9:00

It is important to note that in the event of an emergency or a recreational trip, the Residence Manager or the Direct Care Supervisor will adjust the breaks.

General Counsel’s Exhibit 18 is a memorandum dated February 25, 2002, that was issued to the staff of house 1. This stated:

Effective [imminently] we will be scheduling dinner breaks.

Staff B will take his or her break at 7:00pm–7:30 pm

Staff A will take his or her break at 8:00pm–8:30 pm

Staff C will take his or her break at 8:30pm–9:00 pm

Staff D will take his or her break at 9:00pm–9:30 pm

In the event of emergency or a recreational activity the Manager or Direct Care Supervisor will adjust the breaks.

In support of this allegation, the General Counsel offered the testimony of Welch and Monroe.

⁵ According to Groves, this remark was made in the context of a counseling by Ruphey who told her that she could not leave work 2 hours before the end of her shift.

With respect to house 3, Welch testified that before the posted breaktimes, the employees usually took a half hour dinner break at any time after the consumers ate; after the table was cleared up and after other “things [were] taken care of.” He testified that the employees normally would start taking their dinner breaks after 7 p.m. and that the order would normally be determined by which employees asked to go on break or said that they needed to go.

Iris Monroe testified that at house 1, the employees normally asked the shift supervisor to go on dinner breaks between 8 and 9 p.m., after the staff finished bathing the consumers. She testified that at times, an employee had to take a later dinner break if a consumer had a behavior problem.

The posting of the break schedules at houses 1 and 3 did not change the employees’ entitlement to a half hour break. Nor did it change the period in which breaks normally were taken. (7 to 9:30 p.m.) The schedule attempted to allocate the time for taking dinner breaks to when employees had completed the particular tasks that they had been assigned to do for the week. The employees were given rotating assignments each week. For e.g., administering medication would take place at a different time from cleaning up the dining room. Therefore, each week, each employee would be free earlier or later than the others, depending upon when his or her assignment was completed.

Despite the posting of the notices, Monroe testified that the procedure for taking dinner breaks did not really change because the timing of dinner breaks depends on what is going on at the house at any given time.

In conclusion, it is my opinion that the posting of the dinner break schedules did not amount to a significant or material change in employee working conditions. Before and after the posting, the employees were entitled to a half hour break. Before and after the posting, the period during which employees took their break was approximately between 7 and 9:30 p.m. Before and after the posting, the determination of which employee would go on break first, second, third, or fourth, was essentially determined by what work that individual was assigned to do for the week because they could only go on dinner break when they had free time to do so. Before and after the posting, the determination of when an individual was to take his or her break was at the discretion of the house supervisor. And before and after the posting, there was a degree of flexibility necessitated by the exigencies of the consumers’ needs and a fixed schedule was not, in fact, followed.

G. Alleged Elimination of Starting Time Grace Period

The only person presented to support this allegation was Mark Welch, who as noted above, was an oncall employee who usually worked on weekends. Notwithstanding his non-presence at the facility when most of the other workers were there, he testified that employees were allowed to arrive up to 10 minutes late on the 4 p.m. to midnight shift without being penalized.

Welch testified that this was changed on January 24, 2002, when it was announced at a house 3 staff meeting that if employees were going to be late, they must call in to management and that they were required to enter the correct time when they came in or left.

Welch testified that sometime in 1999, a person named Dennis Balovnic, who he described as the manager of house 3, told him that it was okay if he arrived within 10 minutes of the start of his shift. Welch also testified that that some of the other employees told him that they had arrangements whereby they could arrive late and sign in at their normal start times. The latter testimony is hearsay and no other employee corroborated the assertion that any employees were allowed a 10-minute grace period or allowed to enter a start time other than when they actually started.

The Respondent offered the testimony of Annette Grady who asserted that employees have always been required to enter their actual start times on the sign in sheets. This, she states, is so that the Employer can accurately calculate the employee's pay.

I conclude that the General Counsel has not shown by credible evidence that the Employer has ever knowingly permitted

employees to sign in at times other than their scheduled starting times or that it had a policy of allowing employees a 10-minute grace period. Therefore, I conclude that in this respect, the General Counsel has failed to establish that there has been any unilateral change.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 15, 2003

⁶ 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.