

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

**VIRGINIA MASON MEDICAL CENTER,
The Respondent,**

and

Case 19-CA-29046

**UNITED STAFF NURSES UNION LOCAL 141
affiliated with UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC,
The Charging Party.**

*Richard Fiol, Esq., and Martin Eskenazi, Esq.,
Seattle, Washington, for the General Counsel.*

*Mark A. Hutcheson Esq., Robert F. Porcarelli, Esq.
and Sara S. Bowen, Esq., with them on brief,
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Seattle and Bellevue, Washington,
for the Respondent.*

DECISION

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned case in trial in Seattle, Washington, on March 23 and 25, 2004, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 19 of the National Labor Relations Board on February 27, 2004. The complaint is based on a charge filed by the United Staff Nurses Union Local 141 affiliated with United Food & Commercial Workers International Union, AFL-CIO (the Charging Party or the Union) against Virginia Mason Medical Center (the Respondent) on December 11, 2003, docketed as Case 19-CA-29046, and amended on December 25, 2003. The Respondent filed a timely answer and amended answer to the complaint.

The complaint, as amended at the hearing, alleges, and the answer denies, inter alia, that the Respondent on or about September 2, 2003, wrongfully orally disciplined employee Jeanette Rerecich and on September 8, 2003, issued her a written warning in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint further alleges, and the answer denies, that the Respondent in June 2003 restructured its Winslow facility operations resulting in the June 16, 2003, layoff of employee Denise Janetos and the September 24, 2003, layoff of employee Maree Zawoysky without notice to the Union or affording it an opportunity to bargain with respect to this conduct in violation of Section 8(a)(5) and (1) of the Act. The complaint further alleges that Respondent changed the work schedule of

employee Jeannette Rerecich without notice to the Union or affording it an opportunity to bargain with respect to this conduct in violation of Section 8(a)(5) and (1) of the Act. Finally the complaint alleges and the answer denies that the Respondent on or about September 26, 2003, withdrew its recognition of the Union as the exclusive representative of a unit of the Respondent's Winslow employees in violation of Section 8(a)(5) and (1) of the Act.

Findings of Fact

Upon the entire record herein, including helpful briefs from the Respondent and the General Counsel, I make the following findings of fact.¹

I. Jurisdiction

The Respondent is a non-profit corporation providing integrated health care in the Washington State, Puget Sound area. It operates an acute-care hospital in Seattle, Washington, and 19 non-acute care outpatient facilities, one of which is located in Winslow, Washington on Bainbridge Island. At all times material the Respondent has annually enjoyed gross sales of goods and services in excess of \$250,000 and has purchased and caused to be transferred and delivered to its Washington State facilities goods and materials of a value in excess of \$5,000, which originated outside the state.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act.

II. Labor Organization

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Evidence

1. Background

At all relevant times the Respondent has maintained a non-acute care outpatient clinic in Winslow, Washington (the Clinic). The Clinic is managed onsite by Clinic Manager Terri Hazelton, Clinic Supervisor Carla Mather and Clinic Section Head Dr. Kim Leatham. The facility is part of a system of clinics throughout the Puget Sound. The Clinic employs approximately 80 employees, including doctors, registered nurses, a pharmacist, and medical assistants.

2. Events Relevant to the Discipline of Ms. Jeanette Rerecich

Ms. Jeanette Rerecich is a longtime registered nurse and Clinic employee who had been working as part of the Clinic's Internal Medicine team. Ms. Rerecich testified that in the Spring of 2003 a morale committee made up of various non-management Clinic employees was formed to "attempt to identify clinic problems and come up with solutions in order to improve

¹ As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

morale." Ms. Rerecich testified she was a supporter of the idea but was not a member. She did receive e-mails from the committee however including one dated June 30, 2003, addressed to "the team" from the committee leader containing a summary of employee responses to the committee dealing with problems and suggestions for improvement. She testified that she:

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Believed that this was -- the team had said that they would keep the staff updated regarding their progress and, when I received this e-mail, that's how I perceived it, that it was an update from the team for the staff.

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Sometime in the first week of July, Ms. Rerecich had a discussion with a fellow employee, Ms. Janice O'Conner, regarding certain problems at the Clinic during which the content of the e-mail was mentioned by Rerecich. She testified:

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I asked [O'Conner] if she had a chance to look at the results of the findings of the committee and she informed me that she did not get the e-mail and asked if she could have a copy and so I printed it off and gave it to her.

20

Members of the Committee came to learn that Rerecich had given a copy of the e-mail communication to O'Conner and were evidently displeased. They sent an e-mail to Rerecich titled "Recent Episode of 'inappropriate behavior'", which stated:

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Some of the issues that we're clearing identified recently through our team's efforts were lack of trust, communication, confidentiality and honesty among management members. As a "team" we have tried to enforce these values among ourselves often times confronting each other in order to maintain a good open relationship.

30

We, as a group, would like to convey to you our disappointment in your inappropriate decision to share information that was confidential. It indicates to us that management is not only a fault for lacking these virtues [sic]. The issues raised should be directed toward the entire staff.

35

This type of behavior cannot be tolerated as it perpetuates the underlying problem we have here in the clinic. That being poor morale due to lack of trust. We will work through this. Hopefully as a group of individuals working closely together on a daily basis we will begin to recognize the importance of interacting with each other honesty [sic] openly and respectfully.

40

Those involved spoke of the matter to Clinic Section Head Dr. Leatham over the following days and management was made aware of employee unhappiness over the memo being provided to another employee.

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Ms. Rerecich testified that on September 2, 2003, in Clinic Manager Hazelton's office, the matter of the e-mail and her provision of the memo to another employee came up. Ms. Rerecich recalled:

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[Ms. Hazelton] said that -- that she knew that I had shared a confidential e-mail and informed me that this was not an okay thing to do and that I was the nurse on the team and that I should be careful of doing this, and my response to her was I did not know this was a confidential e-mail, it was not labeled confidential, that my impression when I did share it with Janice [O'Conner] was that this was an update from the team to the clinic staff.

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On September 8, 2003, Ms. Rerecich received a written warning on Respondent's preprinted form entitled: "Documentation of Written Warning for Inappropriate Behavior." The document was triggered by an event involving patient information confidentiality occurring on September 2, 2003, but the warning also referred to the "team" memorandum issue. The warning, the omitted portion of which addresses the September 2, 2003 patient confidentiality matter not under challenge herein, states in part:

This warning is being given for your continued demonstration of a pattern of unprofessional behavior, of exercising poor judgment as a health care provider & in demonstrating disruptive behavior. You have been counseled on these issues previously, specifically on February 1, 2003, July 9, 2003 & most recently on September 2, 2003.

* * * *

Past dates and subject of discussions we have had with you are:

* * * *

9/2/03 Sharing of a confidential e-mail with a co-workers that demonstrated a lack of good judgment & resulted in disrupting the morale of your coworkers & made them very angry

Please be advised that if corrective action is not undertaken immediately or if there are further demonstrations of such unacceptable behaviors, it may lead to further disciplinary action up to and including termination of employment.

3. Bargaining History

On September 8, 2000,² the Union filed a representation petition in Case 19-RC-14016 seeking to represent certain employees at the Clinic. On October 19, 2000, the Regional Director directed an election in Case 19-RC-14016 in the following unit (the Unit) of employees:

All registered nurses and all other professional employees employed by the Respondent at its Winslow (Bainbridge Island) facility, but excluding all physicians, all nonprofessional employees, and guard and supervisors as defined by the Act.

The Respondent sought Board review of the direction of election, but on November 14, 2000, the Board denied the Respondent's request for review. An election was held on November 17, 2000, and on December 6, 2000, the Regional Director issued a Certification of Representative certifying the Union as the exclusive representative of Unit employees for purposes of collective bargaining. The Respondent sought Board review of this certification, but the Board denied the request for review on January 3, 2001.

The Union, by letter of December 26, 2000, requested the Respondent recognize and bargain with it respecting the Unit. On January 24, 2001, the Respondent refused to recognize or bargain with the Union. An unfair labor practice charge was filed by the Union on February 12, 2001, in Case 19-CA-27401, respecting the refusal. Complaint issued on February 23, 2001, and the Board on April 18, 2001, in a decision reported at 333 NLRB No. 125 (2001), granted summary judgment in favor of the General Counsel. The Board's Order required the Respondent to post remedial notices for 60 days, to bargain on request with the Union and held, at page 2 of slip op.:

² I take administrative notice of the date of filing of the petition.

5 To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. F.2d 57 (10th Cir. 1965).

10 The Respondent refused to comply with the Board's order and the matter was taken to the United States Court of Appeals for the District of Columbia on the Respondent's petition for review. On May 28, 2002, in an unreported decision, the Court of Appeals for the District of Columbia issued its order denying the Respondent's petition and granting the Board's cross-application for enforcement, 35 Fed. Appx. 4 (2002), WL 1052019 (D.C. Cir.).

15 In response to the Court of Appeals' order, the Respondent posted the required Board notices starting on June 20, 2002 and, presumably, ending on or about August 20, 2002.³ On June 25, 2002, the Union requested a substantial amount of information from the Respondent respecting the Unit employees for the year preceding the request. The Respondent timely supplied the requested information. On August 28, 2002, the Union requested the Respondent meet to negotiate on October 1, 2, or 3, 2002. On August 30, 2002, the Respondent accepted the October 1, 2002, date for the first bargaining session. The parties met on October 1, 2002, in face-to-face bargaining and thereafter on multiple occasions over the following months with the final meeting held on September 26, 2003, which was the 22nd bargaining session.

25 During the course of bargaining, the parties negotiated and reached tentative agreement on various matters conditioned on complete agreement on a new contract. Thus on June 20, 2003, the parties reached a tentative agreement on contract language covering per diem employees including the following:

30 Per diem employees shall make a good faith effort to work at least one (1) eight hour shift every two pay periods, unless other specific arrangements are made with the Clinic in advance. Any per diem employee not meeting this commitment may be terminated due to lack of availability. In addition, a per diem employee may be terminated if the per diem employee has not worked at the Clinic for a period of no less than one year because of lack of available work at the Clinic.

35 On Wednesday, September 24, 2003, Clinic Manager Terri Hazelton received a document entitled: "Petition to Decertify the Union" dated September 23, 2003, which contained the text: "We the below would like to decertify the union", and bore the signatures of nine Unit members. The Respondent's agents at the September 26, 2003, bargaining session provided a copy of the letter to the Union's bargaining agents. At the same time, the Respondent's counsel told the Union bargainers that based on the document, the Respondent believed the Union did not have the support of a majority of Unit employees and that it would be unethical to continue bargaining in such circumstances. In light of this, the Respondent's counsel asserted, the Respondent was withdrawing recognition. The Respondent confirmed this position by letter the same day and has at all times thereafter refused to recognize or bargain with the Union as the representative of Unit employees.

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³ The Board's order required notices be posted for 60 days and there is no dispute the Respondent complied with the order following court enforcement.

4. Events Relevant to the Pre-Withdrawal of Recognition Bargaining Allegations

a. Employee Denise Janetos

5 Ms. Denise Janetos is a nurse practitioner. She began her employment with the Respondent in May of 1998 at another of the Respondent's clinics and transferred to the Clinic in the fall of 2001 working in the Clinic's Urgent Care department on a half time basis.⁴ In early 2003, Ms. Janetos took employment elsewhere, quit her regular Clinic employment, and on February 2, 2003, was converted to a per diem employee.⁵ From that time forward to mid-June 10 2003, Janetos worked some days and was unavailable for others days when called.

On June 13, 2003, following a telephonic message left by Clinic Manager Hazelton and a vacation delay, Hazelton and Janetos met at the Clinic alone in Hazelton's office. Ms. Janetos testified that Hazelton told her they would not be needing her any longer and that "they needed to clean up the roster of per diems and that they had hired someone to work in urgent care." 15 Ms. Janetos recalled that although Hazelton repeated the assertion that her release was necessary to clean up the roster, no other reason for her termination was provided.

On or about June 18, 2003, Janetos received a letter dated June 16, 2003, from the Respondent's Human Resources department, which stated in part: 20

Due to the evolving needs of the medical center and our current staffing needs, we have decided that we can no longer maintain your status as an on-call employee. Therefore this letter is to inform you that your position as a per diem employee at VMMC has been 25 terminated effective 6/8/03.

The letter gave no other reason for the termination.

Ms. Hazelton testified that Janetos was not terminated because the roster needed to be "cleaned out" because she had not worked recently, but rather testified that Janetos was 30 discharged because as a per diem employee she had been unavailable for work several times when called.

Ms. Janetos sent an e-mail to Dr. Leatham dated June 20, 2003, seeking 35 reconsideration of her termination. Her note states in part:

Terri [Hazelton] also confirmed to me that as a per diem resource I am not costing the clinic anything and the only reason VM is doing this is to "clear up the roster". I have a difficult time understanding this decision especially in light of the fact that there is a tentative union contract in place that VM has agreed to with language stating that per diem workers can be terminated if they have not worked in a year. This is not the case with me. I realize that there have been times when I was unable to fill in recently ... 40

Dr. Leatham responded on July 11, 2003 by e-mail. Her note begins: 45

I have taken a long time to respond to this because you are represented by the union and this is somewhat of a negotiation that must go through them. I have always been

50 ⁴ The Respondent describes the extent of employee employment in fractions of full time employment or FTE. Thus Janetos at this time was a ".5 FTE".

⁵ The Respondent's term "per diem" or per day employee is given to employees working on an as needed or on-call basis.

5 very open and willing to work directly with any one at the clinic. Terri, Gary and Karla and I work together to make many decisions about our employee roster. We all agreed to "clean up" the roster of per diems. There is a cost associated with keeping per diems on the roster as the organization's insurance and malpractice costs are based on the total number of professionals on our current roster. That is one of the driving reasons to keep it lean.

b. Employee Maree Zawoysky

10 Ms. Maree Zawoysky is a registered nurse who began working on the Clinic's family practice team in May 2001 as a per diem employee. At the end of 2002, Ms. Zawoysky became eligible for Social Security benefits which made it desirable to limit her hours at the Clinic to three days a month, a reduction from her previous availability.

15 Ms. Zawoysky worked until September 24, 2003, when she received a telephone call from Ms. Hazelton who told her: "because of restructuring and rescheduling, we will no longer need your services." Zawoysky went to the Clinic the following day and met with Karla Mather and Terri Hazelton. She testified that she expressed displeasure at the manner of her release and the three discussed the situation. Zawoysky recalled:

20 [Hazelton] talked about the restructuring of the clinic in terms of, instead of having family practice and internal medicine, they were combining those and calling it adult medicine. That was going to impact staffing and that was one reason that they would not need me, because they were putting Jeannette Rerecich on five 8-hour days instead of four 10-
25 hour days.

30 She worked in internal medicine and that would mean that they were needing to give some of their regular part-time employees -- you know, they were needing to find more hours for their other employees, regular part-time employees. So that was one reason. The other was that they had visited other clinics and were being encouraged to decrease the clinic roster. And then one of the final points that was made was my availability. Because I was not as available, because my availability had decreased to approximately three -- three days a month, they just felt that -- she just felt that I wasn't flexible enough as they needed me to be.

35 Ms. Hazelton sent Ms. Zawoysky a letter dated September 29, 2004, reiterating in writing the reasons for ending Zawoysky's position as a per diem employee at the Clinic. The letter states in part:

40 As I explained, like all the other VM Clinics, we have been asked to take a hard look at our staffing numbers. We certainly want to have sufficient staff to cover our patient needs, but we also must make sure we are using our staffing wisely and that we are providing work especially for those who have designated FTEs. As I referenced in our conversation with you and Karla, the need for less per diem staff is directly related to
45 changes over the last few months in our physician staff and the need to adjust the hours of regularly scheduled employees to enable use to schedule them according to their coded hours. This was not an easy decision to make, nor did we take it lightly or hastily without considering the impact on the Clinic.

50 Maree, I want to thank you again for your dedication and commitment to the Winslow Clinic. I know it has been difficult to adjust to all of the changes taking place especially with your need to contain your availability to only 3 days a month. But it is

very hard to stay current in one's practice and to adjust to ongoing changes without working on a more regularly scheduled basis. It is also more difficult to schedule per diems that have greater restrictions on the availability than others.

5 **c. The Schedule Change of Rerecich**

At the September 22, 2003 bargaining session, the Respondent told Union negotiators that the Clinic was going to change employee Rerecich's schedule from four 10-hour days to five 8-hour days. The Union responded that it did not have a problem with her schedule change so long as it was "okay" with Rerecich. On September 24, 2003, Rerecich received a voice mail to come into the office and discuss a schedule change. The next day Rerecich reported to work and was told she would be meeting with Mather and Hazelton.

15 Ms. Rerecich testified as to what happened at the meeting:

I went up to Terri [Hazelton's] office and Karla and Terri were there and I believe it was Terri who informed me that my schedule would be changing and she said that I would be now working five 8-hour days and so that I would be covering the internal medicine team all five days.

20 * * * *

I did not say anything. I did not feel it was an area that I could enter into or discuss because I had just received the written reprimand shortly before that. So I simply asked what my hours would be and what time they wanted me to come and what time they wanted me to leave.

25 Q Were you given any choice in deciding whether you wanted to change the schedule?

A When it was presented to me, it was -- I did not feel there was any room for any discussion, that it was a done deal.

30 **B. Analysis and Conclusions**

1. The Rerecich Discipline – Complaint Paragraph 6

35 The General Counsel argues that the September 2 verbal counseling and the September 8, 2003 written warning to Rerecich were each directed to Rerecich's act of sharing information with a fellow employee concerning terms and conditions of employment. Such actions are protected, the government argues, citing *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171 (1990). The General Counsel emphasizes that the Respondent has no rule limiting employee disclosure of matters concerning working conditions to fellow employees and that there was no restriction or limitation by the Respondent put on the memo shared. The counseling on September 2, the General Counsel notes, was specifically directed to that protected conduct and under the Respondent's procedures is part of a progressive discipline system. Further, argues the General Counsel, the September 8, 2003 written warning built on that counseling session, specifically referring to it as part of "a pattern of unprofessional behavior" which if repeated could lead to termination. Thus, the warning noted: "If there are further demonstrations of such unacceptable behaviors, it may lead to further disciplinary action up to and including termination of employment."

50 The Respondent makes several arguments. First, the Respondent notes that the written warning of September 8, 2003, addresses not the release of the memo but rather an independent and important breach of patient confidentiality that is not under challenge as

improper by the General Counsel. Second, the Respondent notes that the basis for the Respondent's discussion with Rerecich about the memo at no time dealt with the content of the memo, but rather the consequences of its release, i.e. staff disruption.

5 The General Counsel's cited cases and a host of others make it clear that employees engage in protected activity when they discuss working conditions with fellow employees. There were no special rules or restrictions put in place by the Respondent, which limited those rights at the workplace during working hours. The Respondent does not directly challenge this proposition, but rather asserts that it was not the content of the memorandum that caused the
10 Respondent to counsel Rerecich but rather that she "shared with others a committee e-mail that the committee - not VM management - intended to keep confidential" and "the disruption caused by her conduct." (Respondent's post-hearing brief at 20.)

15 Based on the record as a whole, including the arguments of the parties, I find that Rerecich was engaged in protected activity in passing along the memorandum, I further find that the Respondent may not rely on the "disruption" that Rerecich's protected conduct apparently caused to justify imposition of discipline. The events under challenge occurred during the period when the Union was engaged in bargaining for an initial contract. Employees frequently
20 have differing views respecting the entire process. Matters involving employee consideration and discussion of workplace morale and suggestions addressing them are often not matters of somnolent indifference to employees. Disruptions may well occur among employees in such a context. But the employer, the Respondent here, is not entitled to discourage or chill such protected activity because other employees became unhappy with it. Protected activity does not lose its protected character simply because it does not find favor with other employees.

25 I find and conclude the Respondent's counseling was punishment for protected activity and was explicitly designed to discourage such activity in future. And, given the context, the Respondent will not be heard to suggest that it did not or could not reasonably know that its
30 September 2, 2003 counseling session would have such an effect: That was its purpose. I find that the Respondent violated Section 8(a)(1) of the Act by counseling Rerecich on September 2. I therefore sustain complaint paragraph 6(a).

35 The Respondent argues that the September 8, 2003 written warning was directed to other non-protected conduct and not the sharing of the memorandum. The Respondent is correct that the patient case confidentiality discipline is the precipitating circumstance for the warning and discipline based on that conduct is not under challenge by the General Counsel. The Respondent is not correct, however, that the warning of September 8 does not incorporate
40 and, in the sense of a progressive discipline system, build on the memorandum's release and the September 2, 2003 counseling regarding it. Since the September 8, 2003 warning incorporates the earlier improper discipline for Rerecich's protected activity, it also improperly punishes the employee for engaging in that protected activity. Indeed the September 2 counseling session and the conduct it condemned was explicitly included in the list of conduct on the September 8 warning, coupled with the unambiguous statement that a repeat of such
45 conduct by Rerecich would cause further discipline to be administered. Thus, the protected conduct is specifically forbidden to Rerecich in the future and the warning threatens further discipline for engaging in such protected activity in future. The warning is so infused with reference to the earlier protected sharing of the memo that it is not possible to separate the portions of the memo directed to the more recent events involving patient confidentiality. I therefore find that the Respondent violated Section 8(a)(1) of the Act by issuing the written
50 warning to Rerecich on September 8. I sustain complaint paragraph 6(b).

2. The Pre-Withdrawal of Recognition Bargaining Allegations⁶ – Complaint Paragraph 7

The pre-withdrawal of recognition bargaining allegations discussed below are alleged in complaint paragraph 7(b) to constitute unilateral changes taken “without prior notice to the Union, and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.”

a. The Terminations of Janetos and Zawoysky

The General Counsel argues that Ms. Janetos and Ms. Zawoysky were laid off without the Union being informed of and provided an opportunity to bargain respecting their layoffs. The government asserts these two individuals represented some 10% of the bargaining unit and the Respondent was obligated to bargain with the Union before laying them off. The General Counsel argues, on brief at 10-11:

Normally layoffs after a union certification are not a management prerogative and are a mandatory subject of collective bargaining. *Farina Corp.*, 310 NLRB 318 (1993); *Porta-King Building Systems*, 310 NLRB 539 (1993). The Board has found that the bargaining obligation occurs even though the layoff in question is permanent rather than temporary. *Winchell Co.*, 315 NLRB 526 (1994). . . . Indeed, an employer may violate Section 8(a)(5) when it lays off a single employee without giving prior notice to the Union. See *Falcon Wheel Division*, 338 NLRB No. 70 (November 20, 2002), (the Board found that the layoff of one employee constituted a material, substantial, and significant change in the terms and conditions of employment).

The Respondent argues that it has a “no-layoff” policy and that it did not layoff, but rather terminated Ms. Janetos and Ms. Zawoysky “pursuant to its practice of ‘cleaning the rosters,’” (Respondent’s brief at 12.), i.e. terminating per diem employees who were not working sufficient hours to justify the increased costs of maintaining their per diem status.⁷ The Respondent argues that this is a long-standing practice and points to documentation received into evidence establishing significant system-wide and Clinic-based terminations of per diem, or on call, employees occurring from 1999. The Respondent concludes on brief at 13: “The terminations emanated from [the Respondent’s] long-standing practice: the terminations themselves did not constitute a change in policies or procedures such that notice or an opportunity to bargain was required.”

The Respondent further argues that the parties in fact bargained over Zawoysky’s termination prior to its implementation in that the Union demanded an increase in the Clinic hours of Ms. Waterman and those hours could only have come from Ms. Zawoysky. The Respondent also notes that the parties discussed the Janetos termination at the June 24, 2003

⁶ While the Respondent raises various defenses to its bargaining obligation as of and after the date of its withdrawal of recognition, it recognized and bargained with the Union generally during the relevant period. The Respondent’s amended answer paragraph 6(d) admits the Union was the exclusive collective-bargaining representative of Unit employees from December 6, 2000 until September 24, 2003 – a period including the time relevant herein.

⁷ The number of employees on staff, which in this sense includes per diem employees, is a factor in the calculation of certain insurance costs. Thus the Clinic bears an incremental insurance cost -- the amounts were not litigated – for per diem employees on the roster.

negotiations.⁸ Further, counsel for the Respondent emphasizes the Union never asked for pre-implementation notice of termination of per diem employees and never asked for additional bargaining on the matters at issue here.

5 It is critical at the threshold of the analysis respecting these allegations to establish what was done to these employees and the basis for doing so. The allegations of the complaint sound only in a violation of Section 8(a)(5) of the Act. No contention has been made that the Respondent took the action it did because of the employees' protected activities or in order to manipulate the size of the bargaining unit.

10 Based on the record as a whole, I find that the Respondent terminated each employee and did not lay them off as the government contends. The Respondent's internal treatment of them as terminated makes this clear. Further, I find that for purposes of the analysis herein, the two individuals were terminated because the Respondent made a determination that the extent of availability of the two as per diem employees was insufficient to justify their retention on the employee roster. Additionally, I find that the Respondent has established a past practice both system-wide and at the Clinic in which it regularly removes individuals from the per diem roster by terminating them when the Respondent concludes their limited work availability is not sufficient to justify their retention as per diem employees.

20 Given the above: Was the Respondent obligated under the Act to provide notice and an opportunity to bargain to the Union before it terminated Ms. Janetos and Ms. Zawoysky? The General Counsel, citing several administrative law judge decisions, argues that an employer has an obligation to bargain over changes in unit composition, including terminations in newly certified units, even if the employer was following established practice because "it affected a change in the employee's status as an employee, and is at odds with established Board and judicial precedent, which holds that an employer must maintain the status quo during initial bargaining with a newly certified union and must notify the union before it effects a change in a mandatory subject of bargaining." (General Counsel's brief at 13.) Administrative Law Judge decisions are not binding precedent and the Board cases cited by the General Counsel⁹ are not definitive on the point at issue. I find the quoted proposition asserted by the General Counsel has not been adopted by the Board.

35 The Respondent, citing *McClatchy Newspapers, Inc., d/b/a The Fresno Bee*, 337 NLRB 1161 (2002) and *Praxair, Inc.*, 317 NLRB 435 (1995), notes that the Board traditionally requires informing the Union of the rules and standards for employees, but does not require predetermination notification of the application of those rules if they are applied in a manner consistent with past practice. Unless and until the Board adopts the standard the General Counsel advances or some other standard, the Respondent's cited cases are persuasive.

40 Further, I find no unsatisfied obligation to bargain over the effects of these terminations. Accordingly, I find there was no unfulfilled obligation on the part of the Respondent to bargain over the contemplated terminations of Ms. Janetos and Ms. Zawoysky either before or after their terminations. I shall therefore dismiss complaint paragraphs 7(a)(1) and (2).

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⁸ The Union raised the Janetos situation when it learned of her termination after the fact. It noted to the Respondent that Janetos was a good employee and that the Respondent had tentatively agreed to keep per diem employees on the roster for up to a year. The Respondent suggested it would consider the proposal.

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⁹ *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992), and *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991).

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b. Rescheduling Hours of Work for Ms. Rerecich

As described above, the Respondent informed the Union it intended to change Ms. Rerecich's hours at a bargaining session and the Union answered it agreed as long as Rerecich approved. Thereafter, Rerecich was informed by management of the change, she acquiesced, and the change was thereafter implemented.

The General Counsel argues, on brief at 18, that the "Respondent did not seek her approval in a non-coercive fashion, and thus violated its bargaining obligation". The government argues that given Rerecich's earlier discipline, found violative supra, she was particularly sensitive to possible additional employer discipline. In that context, she would reasonably have been unwilling to disagree with the Respondent's proposed schedule change and therefore the Union's condition on its approval of the change, i.e. that she approve, was not met.

The General Counsel makes two additional arguments. The General Counsel argues, on brief at 18:

First, Rerecich had requested representation [and] was told that it was not necessary. Had [the] Respondent answered yes, the Union would have been present with Rerecich to inform her that it was her choice whether she accepted the scheduled change.

The government thus urges that telling Rerecich that she need not have a union representative present was an element in the Respondent's course of conduct that broke its bargain with the Union.

I reject this argument because, under Board doctrine, employee union representation during a meeting with her employer is a right only when discipline is reasonably seen as possible as a result of the meeting. When the Respondent's agent told Rerecich that, for their meeting, such representation was unnecessary, she was in effect assuring Rerecich that discipline would not be involved in or result from the meeting. In my view Rerecich could reasonably only have taken assurance from the statement made by management, not the reverse as the General Counsel appears to argue.

Second, the General Counsel argues that the nature of the meeting with Rerecich at which the schedule change was discussed was inherently coercive and that it was therefore "reasonable for Rerecich to conclude that she had no ability to affect the schedule change". I also reject this argument because I find the circumstances of the Respondent's meeting were not improper or unreasonable. Thus, I find that, while Ms. Rerecich may have been unsettled during the arrangement of the meeting and in the meeting itself, the Respondent did not behave in an improper manner such that it would be held to have violated the earlier bargaining table agreement. And, since the Union had made the bargaining table agreement described without seeking time to contact Rerecich or to contemplate the matter further, no assertion that the Union had insufficient time to bargain about the change will stand.

Based on all the above, I find the Respondent did not violated Section 8(a)(5) and (1) of the Act respecting the Rerecich schedule change. I shall therefore dismiss complaint paragraph 7(a)(3).

3. The Withdrawal of Recognition Allegation – Complaint Paragraphs 5 and 8

Paragraph 5(a) of the complaint alleges the Unit is appropriate for collective bargaining within the meaning of the Act and the Respondent's amended answer denies that allegation.

5 Complaint paragraph 5(b) alleges a majority of employees in the Unit selected the Union as their representative in a Board election conducted in Case 19-RC-14016 and complaint paragraph 5(c) alleges the Union was certified as the representative of the unit in Case 19-RC-14016 on December 6, 2000. The Respondent's amended answer admits these latter allegations. Complaint paragraph 5(d) alleges that at all times since the Union's certification it has been the representative of Unit employees. The Respondent's amended answer admits the Union's exclusive status until September 24, 2003, "when the Union no longer had [the] support of the majority of the employees within the Unit." Finally, paragraph 8 of the complaint alleges and the amended answer admits that the Respondent withdrew its recognition of the Union on September 26, 2003, and paragraph 9 of the complaint alleges and the answer denies that the withdrawal constitutes a violation of Section 8(a)(5) of the Act. There is no dispute that the Respondent on and after that date has withheld and continues to withhold recognition of the Union and continues to refuse to bargain with it.

20 The Respondent asserts it was proper for it to withdraw recognition from and refuse to bargain with the Union, on and after September 26, 2003, for two independent reasons. First, the Respondent contends that by the date of its withdrawal of recognition the bargaining Unit was no longer appropriate for collective bargaining under applicable Board law. Second, the Respondent contends that as of September 24, 2003, it was relieved of any obligation to bargain with the Union because it learned that the Union no longer enjoyed the support of a majority of employees in the Unit as evidenced by the fact that nine¹⁰ Unit employees on or about September 23, 2003, signed and provided to the Respondent the employee petition quoted in full above opposing union representation.

30 These two contentions merit separate consideration.

a. The Appropriateness of the Bargaining Unit

35 Under the Act an employer's collective-bargaining obligation is to bargain with respect to an appropriate unit of employees. In the instant case, as set forth in detail above, the Board found the bargaining unit appropriate on April 18, 2001, and the Court of Appeals enforced that determination on May 28, 2002. The Respondent contends that as of September 26, 2003, the Unit was inappropriate.

40 The Respondent does not base its claim on a change in the factual circumstances of the instant Unit. Indeed the factual evidence submitted into evidence by the Respondent in support of its unit claim herein is the identical record that had been before the Board and the Court in making their findings in the unfair labor practice case, discussed supra, that the Unit is appropriate. Rather the Respondent contends that the Board's decisional law has changed and that the new Board law commands reversal of the Board and Court of Appeal's earlier findings that the Unit is appropriate.

50 ¹⁰ The parties were in agreement respecting the identity and unit inclusion of 18 Unit employees, which group included the nine petitioner signers. The parties disagree regarding the Unit placement at the time of the withdrawal of recognition of Ms. Janetos and Ms. Zawoysky.

The Respondent basis its argument on four Board cases: *St. Luke's Health System*, 340 NLRB No. 140 (November 28, 2003); *Budget Rent A Car Systems, Inc.*, 337 NLRB 884 (July 26, 2002). *Trane, an Operating Unit of American Standard*, 339 NLRB No. 106 (July 29, 2003) and *Dattco, Inc.*, 338 NLRB No. 7 (September 27, 2003). These cases do not cite let alone
 5 reverse the Board's unit determination reported at 333 NLRB No. 125 (2001). Rather the cases deal with unit issues of the type involved in the unit determination herein in a manner, the Respondent argues, which favors, indeed requires, a different result.

The General Counsel notes on brief at 20:

10 It is well settled that absent special circumstances, or newly discovered evidence that was previously unavailable, the Board will not reexamine an underlying certification or representation case. *KI Corporation*, 310 NLRB 1233 (1993), citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 162 (1941).

15 The General Counsel argues further that the cases cited by the Respondent on the issue not only do not represent a change in the law, they are simply but a few of a multitude of cases in which the Board has applied its balancing tests to reach different results in considering bargaining unit appropriateness in different situations and circumstances. The government
 20 asserts that the Respondent is simply seeking to re-argue an issue it lost on the same evidence in the earlier case but now advances yet again in the present case and that the Board does not allow a de novo review of the underlying unit appropriateness and the Union's certification in these circumstances citing *Nursing Center of Vineland*, 318 NLRB 901 (1995).

25 Based on the record as a whole, and essentially for the reasons cited by the General Counsel, I find that it is inappropriate to reconsider the Unit issue herein. I therefore find that the original Unit is appropriate and reject the Respondent's contrary arguments. The cases cited by the Respondent simply do not compel a different unit result and, in the context of this case, do not allow a rejection of the earlier unit findings made by the Board and the Court of
 30 Appeals.

b. The Issue of Loss of Majority Status

35 It is critical to an analysis of the issues raised by the Respondent's withdrawal of recognition, and its contention of Union loss of majority support as justifying the withdrawal, to understand the special rules which control the Board's post-election certification period. First, and of critical significance to considering the issues herein, a certified union must be recognized as the exclusive representative of unit employees and bargained with on its request by the
 40 certified unit employees' employer for a full year following the union's certification. Thus the certification period is often referred to as the certification year. Based on long-standing Board doctrine, an employer simply may not withdraw recognition and bargaining based on issues of employee support during the certification year.

45 The Board has put this rule in place to provide stability in bargaining for an initial period following certification and to allow the new employee representative an opportunity to enter into an initial collective-bargaining agreement with the employer. During the certification year, a majority of unit employees are by explicit Board ruling simply and irrebuttably presumed to support the certified representative. This has implications beyond the earlier proposition that an employer may not withdraw recognition based on loss of employee support for the Union during
 50 the certification year. Given this irrebuttable presumption of employee support for the certified union during the initial certification period, actual evidence of loss of such support may not be used by an employer to withdraw recognition, even when the certification year has passed at

the time the employer withdraws recognition. *Chelsea Industries, Inc.*, 331 NLRB 1648 (2000),
enfd. 285 F.3d 1073 (2002).¹¹

5 Following the end of the certification period, in the absence of a contract, the union
enjoys a rebuttable presumption of majority employee support. The presumption establishes a
prima facie requirement that the employer continue to recognize and bargain with the union.
That prima facie case may be rebutted, however, if the employer affirmatively establishes that at
the time of its withdrawal of recognition, the union no longer has the support of a majority of unit
employees.

10 The Respondent's basis for abandoning bargaining and withdrawing recognition of the
Union, other than the argument that the bargaining unit was inappropriate, rejected above, is the
proposition that on September 23, 2003, as communicated to the Respondent on
September 24, 2003, in the form of an employee petition, the Respondent had evidence that the
15 Union no longer had the support of a majority of unit employees. Implicit in the Respondent's
argument is the proposition that these events occurred at a time when there was no legal
restriction or prohibition on either: (a) the Respondent's reliance on employee sentiments or, (b)
the Respondent's right to withdraw recognition based on those sentiments or for any reason.

20 Through the argument and analysis, it is necessary to be aware that there are two
separate certification period restrictions at issue: one deals with limitations on the time
employee sentiments may be measured and the second is the period during which the employer
may take action of those sentiments. The threshold issue respecting the Respondent's
argument is whether or not either or both of the events involved herein: i.e. the date of the
25 Respondent's withdrawal of recognition and, second, the date or dates on which the employees
sentiments were polled, occurred during the certification period. It is appropriate to initially
consider those issues, which require a review of the chronology of events.

30 The Union was certified on December 6, 2000. The dates the employee sentiment at
issue was expressed and the date of the Respondent's withdrawal of recognition each fell in late
September 2003, far more than a year after the date of the Union's certification. The
certification year period however is susceptible to extension in certain circumstances and that
was the case herein.

35 The Respondent did not agree with the Board's finding of unit appropriateness and
sought judicial review of that resolution which, under Board procedures, required the
Respondent to refuse to recognize and refuse to bargain with the Union after its certification.
The Respondent therefore refused to recognize the Union or commence bargaining. The Board
unfair labor practice proceeding took place and a Board decision issued. As quoted supra, the
40 Board ordered the Respondent to recognize and bargain with the Union and held as part of its
remedy:

45 To ensure that the employees are accorded the services of their selected bargaining
agent for the period provided by law, we shall construe the initial period of the
certification as beginning the date the Respondent begins to bargain in good faith with
the Union. (333 NLRB No. 125 (2001), slip op at 2)

50 The Court of Appeals enforced the Board order and thereafter, as set forth in detail supra, the
Respondent and the Union engaged in a series of actions culminating in face-to-face bargaining

¹¹ The Board has provided potential de minimus exceptions to this rule that will be
discussed, infra.

starting on October 1, 2002. The parties differ on the significance of these pre-face-to-face bargaining events to the question of when the certification period commenced.

5 The issue as to that matter is: when under Board law in this context did the Respondent begin to bargain with the Union so as to start the running of the certification period? The Respondent had recognized the Union and provided information to it respecting unit employees in June 2002. The parties first physically met and bargained on October 1, 2002. If bargaining started in June 2002, well over a year had passed in bargaining before the September 24 and 26, 2003, events at issue herein and the certification period limitations under consideration
10 herein are not applicable to the Respondent's actions. If bargaining began with the first face-to-face meeting on October 1, 2002, then the certification year had not concluded in the month of September 2003, and employee support for the Union was irrebuttably presumed and could not be alleged by the Respondent to be otherwise and, independently of the majority issue, the Respondent could not in any event withdraw recognition based on a purported loss of employee
15 support for the Union.

20 Counsel for the General Counsel asserted at trial that the September 2003 events in controversy here occurred during or within the certification period. Counsel for the General Counsel took the position: "What we are saying, or our position, is that we are. We are saying that the bargaining began in October of 2002 and that the events of September of 2003 are within one-year period" and "our position is that the information request is not enough to trigger the one-year bargaining period."¹²

25 The Respondent makes several arguments regarding when the certification period began in the instant case. First, it argues that for purposes of establishing when bargaining began, the triggering date is the date the Respondent responded to the Union's bargaining information request in June 2002. Second, it argues that, even if the date of commencement of bargaining is generally held to be the date of first meeting and face-to-face collective bargaining,

30 ¹² The Respondent argues on brief at 18:

35 The General Counsel did not allege in the complaint any failure to provide the Union with a full 12 months of bargaining. Indeed the General Counsel did not raise the issue. Under these facts, [the Respondent's] withdrawal of recognition was appropriate and lawful.

40 At the conclusion of the General Counsel's case-in-chief, just before the government rested, I noted on the record – apparently for the first time - the seemingly evident fact that the record evidence of the bargaining session chronology suggested that the parties time in face-to-face bargaining did not span a full calendar year and, in light of the certification year extension in the earlier Board case, asked the parties their positions respecting the certification year issue. The General Counsel and the Respondent counsel took the positions noted. The Respondent was therefore explicitly on notice of the issue from the time the government rested. The General
45 Counsel did not address the certification year issue in its post hearing brief, however I find it inappropriate to conclude the General Counsel has abandoned its on the record position as quoted above. Given all the above, I find no basis to reject the government's argument.

50 The Ninth Circuit Court of Appeals in *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 907 (9th Cir. 1990), discussed precisely the Respondent's claim here that the complaint did not disclose the "certification year" issue finding the employer there had a full and fair change to litigate the issue. I find that is also true here where the issue was discussed at some length before the General Counsel concluded his case in chief.

other factors justify the Respondent's conduct herein. Thus the Respondent argues that the cases consider both a labor organization's delay and procrastination in initiating bargaining and, further that the cases are flexible when the employer takes action based on events occurring a very short time before the end of the certification period.

5

Turning to the first argument of the Respondent, I find that the appropriate date for determining the start of the certification year herein is the date the parties first met in face-to-face bargaining, October 1, 2002. The Board, with court approval, has specifically held in this context that the date of commencement of bargaining is the date of the first formal bargaining and not the date other earlier actions such as the time an agreement to bargain occurs or pre-bargaining information is requested or supplied. *Dominguez Valley Hospital*, 287 NLRB 149 (1987), enfd. sub. nom. *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 907 (9th Cir. 1990); *Van Dorn Plastic Machinery Co.*, 939 F.2d 402, 404 (6th Cir. 1991)(specifically overruling prior law using the date of provision of information); *Jasco Industries, Inc.*, 328 NLRB 201, 201 (1999). See also, *Chelsea Industries, Inc.*, 331 NLRB 1648, fn. 4 (2000), enfd. 285 F. 3d 1073 (D.C. Cir. 2002); *The L. Suzio Concrete Company*, 325 NLRB 392, fn. 8 (1998), enfd. 173 F.3d 844 (2d Cir. 1999).

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The Respondent's assertion that the conduct of the Union during the period preceding the beginning of bargaining is relevant in evaluating if special circumstances apply to the beginning of a particular certification period has Board support. The Board in *Dominguez Valley Hospital*, *supra*, made this clear:

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Of course, if there is a significant delay in the commencement of bargaining attributable to inexcusable procrastination or other manifestations of bad faith on the part of the bargaining representative, equating the commencement of the certification year with the first bargaining session would not be warranted. (287 NLRB 149 at 150)

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The Court, in enforcing the decision, specifically approved of the Board's qualification of the rule to prevent unions from manipulating it to their advantage. *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 907 (9th Cir. 1990).

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The Board discussed this caveat in *Van Dorn Plastic Machinery Co.*, 300 NLRB 279 278, (1990) fn. 4:

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Of course, if there is a significant delay in the start of bargaining attributable to inexcusable procrastination or other manifestation of bad faith on the part of the union, then equating the start of the certification year with the first bargaining session would not be warranted. *Dominguez Valley Hospital*, *supra*. We find no such procrastination here.

45

Although the instant case does not afford an occasion to outline the possible indicia of procrastination and bad faith, it would be appropriate to consider whether a union has refused, without adequate explanation, requests by a ready and willing employer to commence bargaining negotiations. In this way, the rule announced today does not leave the commencement of the certification year within the unrestricted discretion of one of the parties. . . .

50

Turning to the record evidence of the period of time between the May 28, 2002, Court of Appeals enforcement of the Board's bargaining order in the earlier unfair labor practice case and the physical meeting of the parties in face-to-face bargaining on October 1, 2002, the following chronology is evident. Following the Court's order on May 28, 2002, the Respondent

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5 posted the required Board notices on June 20, 2002. The notices were apparently posted for the requisite 60 days, i.e. until about August 20, 2002. Following the conclusion of notice posting, Regional Office compliance monitoring was concluded in due course and the case was administratively closed soon thereafter. The Union asked for pre-bargaining information on June 25, 2002, and the Respondent provided the requested information within a few days. On August 28, 2002, the Union requested the Respondent meet to negotiate on October 1, 2, or 3, 2002. On August 30, 2002, the Respondent accepted the October 1, 2002, date for the first bargaining session.

10 The record contains no evidence of the parties' activities during this period other than that recited above. There is no evidence of why the Union undertook the efforts it did at the times it did. There is no evidence that the Respondent complained of the scheduling of events or of delay in beginning face-to-face bargaining. Examining the chronology of events without more, it is impossible to find "significant delay in the commencement of bargaining attributable to inexcusable procrastination or other manifestations of bad faith on the part of the bargaining representative." I reach this conclusion for several reasons.

20 First, the Board has made it clear that a labor organization is justified in taking the time necessary to renew contacts and support among unit employees whose desire for and support of union representation is likely tested by the substantial period of time that passes after the election but before the court orders bargaining during which the employees go without an employer recognized collective-bargaining representative. It is a simple, if regrettable, fact of life in the way the statute is structured, in the Board's administration of the representation side of the Act, and in the process of judicial review of the Board certifications of representatives, that years rather than months must pass from Board certification of a union to a final court order requiring that the employer recognize the union. In both the Board and the enforcing Court of Appeals' decisions in the *Van Dorn Plastic Machinery Co.* and *Dominguez Valley Hospital* cases, *supra*, the Board and the Court of Appeals discussed and rejected employer arguments regarding argued union delays in starting face-to-face bargaining of the type advanced by the Respondent herein. Thus, for example the Sixth Circuit explicitly recognized the undermining effect the passage of time that occurs during the litigation of certifications and the time the union might need to get back up to speed: "[T]he Union is fairly entitled to the three or four months it took to reestablish its ties with the members of the bargaining unit." *Van Dorn Plastic Machinery Co.*, 939 F.2d 402, 404 (6th Cir. 1991).

35 Second, the Respondent, as the employer arguing that the equities require the certification period be shortened, is asserting an affirmative defense and the burden of proof as to this matter is explicitly on it. The basis in the cases for shortening the period is the union's "inexcusable procrastination or other manifestation of bad faith." The Respondent submitted no evidence beyond the chronology discussed to show Union bad faith. There was no suggestion that the Respondent complained or protested the passage of time that passed before the first scheduled face-to-face meeting for bargaining. I find the Respondent has not met its burden of proof to show that the Union, in the period before the first bargaining session, engaged in any inexcusable procrastination or other manifestation of bad faith. I find therefore that the beginning of the certification period on the facts of this case is the date of the parties first face-to-face bargaining session: October 1, 2003.

50 The Respondent also argues that it is simply inequitable to disallow its reliance on employee dissatisfaction because it was but a few days short of the end of the certification period. The Respondent cites two recent cases in support: *LTD Ceramics, Inc.*, 341 NLRB No. 14 (January 30, 2004), and *Lee Lumber & Building Materials Corp.*, 334 NLRB 399

(2001).¹³ The Board in *LTD Ceramics* addressed the employer's ability to withdraw recognition in reliance on a decertification petition signed by 97 out of 171 employees. Forty-nine employees signed the petition on the final day of the certification year, the remaining 48 employees signed in the next 5 days. The employer withdrew recognition in reliance on the petition the following day, 6 days after the end of the certification year's expiration. In *LTD Ceramics, Inc.*, the Board held at page 3 of slip op:

We are unwilling to conclude that the Respondent's reliance on a decertification petition received after the certification year is invalidated by the fact that some employees signed the petition on the final day of the certification year. In this regard, we agree with the judge, for the reasons set forth in his decision, that the circumstances of this case are quite different from those in *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002), in which the Board held that an employer could not withdraw recognition on the basis of a decertification petition signed by employees and received by the employer 5 months before the end of the certification year.

The judge in the case had held at page 9 of slip op.:

In the case at issue, some of the signatures were collected during the last hours of the last day of the certification year. It is therefore not a question of months or days before the certification year has expired but a question of hours. I cannot, and do not, find that I can believe that the Board meant for its rules announced in cases such as *Centr-O-Cast* and *Chelsea* to be applied in such a rigid and mechanistic way as to void what I have found to be otherwise perfectly valid expressions of the employees' sentiments. The Board does not lightly make use of the doctrine of de minimus. But I believe that it would fault me if I were not to do so here. Accordingly, I find and conclude that the petition was not invalidated because some of the signatures thereon were placed there during the last hours of the last day of the certification year. Instead, I find that their prematurity was so slight as to be insignificant in this case, especially in view of the fact that, as found elsewhere herein, there is no basis to find that Respondent participated in or encouraged the gathering of the signatures on the petition.

The Board's *LTD Ceramics* decision allows a de minimus exception to the proposition that employee sentiment expressed during the certification year may not be used by an employer to justify post-certification period withdrawal of recognition. To the extent it allows any certification year sentiment, even that sentiment "collected during the last hours of the last day of the certification year," to be used as employer evidence of the union's loss of majority employee support, it supports the Respondent's argument here. Having considered the cases and the Respondent's argument in light of the entire record herein, I do not find the cited case or the de minimus doctrine as applied by the Board in that case controls the result in the instant case for the following reasons.

First, and critically, *LTD Ceramics* modifies, to at least an extent, the Board's *Chelsea Industries* standard by which the Board up to that point held, without exception, that certification year sentiments of employees may not be used by an employer, even after the expiration of the certification year, to withdraw recognition of the certified union. The case does not address the separate and independent issue relevant herein of certification year limitation or prohibition of an employer's withdrawing recognition and ceasing bargaining during the certification year.

¹³ *Lee Lumber & Building Materials Corp.* is not on point because it deals with "bargaining for a reasonable period" remedies rather than representation case certification periods.

This is an important distinction because the Board's rationale underlying the certification year limitations on an employer's right to end bargaining is to give the newly certified union engaged in initial contract negotiations a guaranteed uninterrupted year of bargaining. The Board's holding in *LTD Ceramics* does not address this, in effect, guaranteed period. The limits on the employer's actions during that period were irrelevant because on the facts of *LTD Ceramics*, the certification year had ended well before the employer withdrew recognition. In effect in *LTD Ceramics* the labor organization had its guaranteed one year of bargaining. If the Respondent's argument in the instant case is to be accepted and it is allowed to withdraw recognition within the certification year itself, the certification year would no longer be an insulated period for undistracted, uninterrupted bargaining. Rather the first year of bargaining for an initial contract will be susceptible to bargaining clouded by claim and counterclaim respecting union majority support among employees – precisely the type of dispute the Board has explicitly tried to avoid in the initial certification setting. And the first year of bargaining will also be susceptible to interruption by employer withdrawal of recognition and or cessation of bargaining or be undermined by the threat of withdrawal from or cessation of bargaining. This result the Respondent advances here seems to run contrary to the Board's efforts to achieve stability in the first year of initial bargaining and should not lightly be inferred from collaterally applicable cases. Accordingly, I find the holding in *LTD Ceramics* is not relevant to the critical factor at issue herein, whether the certification year may be shorted by allowing certification year withdrawal of recognition.

Second, even as to the question of whether employee sentiments may be relied on if taken during the certification period, I find the *LTD Ceramics* decision is distinguishable on its facts from the situation presented herein. The *LTD Ceramics* case involved a portion of a large group of employees who expressed their sentiments regarding the union a very short period of time before the certification year ended: "not a question of months or days before the certification year has expired but a question of hours." While the employee sentiments herein were expressed, but a week before the expiration of the certification year, that 7-day period is significantly longer than the period of hours involving, but a portion of the employee sentiments at issue in *LTD Ceramics*. The de minimus argument that persuaded the Board in *LTD Ceramics* in my view does not extend to the factual situation presented here.

Given all the above, I find there is no basis to shorten the certification year or to allow or permit the Respondent on the facts of this case to withdraw recognition on an assertion of union loss of majority employee support during the certification year. Further, I find it inappropriate on the facts of this case for the Respondent to rely at any time on expressions of employee sentiment occurring a week before the end of the certification year.

Since the Respondent was foreclosed from withdrawing recognition from the Union during the certification year based on purported the Union's loss of majority employee support, it violated Section 8(a)(5) and (1) of the Act in so doing. I therefore will sustain the complaint paragraph 8.

c. Summary and Conclusions regarding Withdrawal of Recognition

I have found that the Union was certified in Case 19-RC-14016 on December 6, 2000 as the representative of the Respondent's Unit employees and that the Unit at all relevant times has been appropriate for collective bargaining. I have therefore rejected the Respondent's assertion that it had no obligation to continue to recognize or bargain with the Union on and after September 26, 2003, because the Unit was inappropriate for bargaining.

I have further found as a result of the Board's order of April 18, 2001, enforced by the Court of Appeals on May 28, 2002, that the initial period of the certification began on the date the Respondent began to bargain with the Union, i.e. October 1, 2002. In reaching this conclusion, I have rejected the Respondent's argument that the Union engaged in inexcusable
 5 procrastination or other manifestations of bad faith in the period before bargaining commenced.

Given my finding that the certification year commenced on October 1, 2002, I further find that the Respondent was precluded from withdrawing recognition from the Union until the certification year ended on September 30, 2003. Since it withdrew recognition and
 10 simultaneously failed and refused to continue bargaining with the Union on September 26, 2003, the Respondent violated Section 8(a)(5) and (1) of the Act in so doing.

As a separate and independent conclusion, given my finding that the certification year commenced on October 1, 2002, I find that the Respondent was precluded from relying on any expressions of employee opposition to union representation made before the end of the certification year on September 30, 2003, as a basis for withdrawing recognition from the Union. More particularly I have found that the employee petition signed by employees on September 23 and 24, 2003, may not be relied on. In making this finding, I have considered and rejected the Respondent's argument that the employee sentiment was expressed so close to the end of the certification period that the doctrine of de minimus should be applied to allow the sentiment to be relied on.
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The Respondent was obligated by the earlier Board and court orders to recognize and bargain with the Union. Since the Respondent was foreclosed from relying on employee sentiments expressed during the certification year on September 23 and 24, 2002, the Respondent offered no valid basis for withdrawing recognition from and ceasing bargaining with the Union, irrespective of whether or not – as found supra – it took its actions during the certification year. I find therefore that the Respondent violated Section 8(a)(5) and (1) of the Act in so doing.
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Given all of the above, and further because of my finding that it is inappropriate for an employer to rely on employee sentiments expressed at least a week before the end of the certification period, it is unnecessary to determine if the petition signed by employees on September 23 and submitted to the Respondent on September 24, 2003, provides evidence of a loss of majority employee support for the Union as of September 26, 2003.
 35

Remedy

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices. Further the language on the Board notices will conform to the Board's decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), that notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.
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The remedy for the Respondent's wrongful discipline of employee Rerecich shall include traditional expungement and notification requirements. The remedy for the Respondent's wrongful withdrawal of recognition presents special issues for any remedy will not be based simply on the violation of Section 8(a)(5) of the Act found herein, but must also take into account the fact that the Respondent's conduct is a violation of the orders of the Board and the Court of Appeals in the original unfair labor practice case.
 50

In *Dominguez Valley Hospital*, 287 NLRB 149 (1987), the Board discussed the length of time the employer should be required to bargain in the circumstances presented herein at 151:

5 The judge concluded that the Respondent's premature withdrawal of recognition from the Union and subsequent refusal to bargain warranted a 1-year extension of the certification year. Contrary to the judge, we find no basis for a complete renewal of the certification year or for requiring the Respondent to bargain for another full year. Thus, the Respondent bargained with the Union in apparent good faith for almost 10 months before its premature withdrawal of recognition—a significant consideration when fashioning an appropriate remedy. Contrary to the Respondent's contention, however, 10 this substantial period of good-faith bargaining does not warrant limiting the Respondent's bargaining obligation to the remaining 2 months of the certification year. Instead, given the disruptive effect that the Respondent's premature withdrawal of recognition has had on the bargaining process, we conclude that a 6-month extension of the bargaining year is appropriate. As the Board held under comparable facts in *Colfor, Inc.*, 282 NLRB 1173 (1987), such a 6-month extension will provide the parties with a reasonable interval in which to resume negotiations and, possibly, reach an agreement, without unduly saddling employees with a bargaining representative they may no longer support. Thus, we shall extend the certification year for an additional 6 months.

20 The Court of Appeals in enforcing the Board's decision discussed the remedy required by the Board:

25 The Board here actually rejected the ALJ's conclusion that there should be a full year's extension. The Board extended the certification year for only six months. It stated that extension for that period was needed because of "the disruptive effect that the Respondent's premature withdrawal of recognition has had on the bargaining process. . . . The Board believed a mere two-month extension would fail to provide a reasonable period for the parties to resume negotiations. See also *Colofor*, 282 NLRB at 1175 (six-month extension ordered although parties only two months short of full bargaining year). We recognize the Board's expertise in structuring remedies for violations of the Act, see *General Teamsters Local No. 162*, 782 F. 2d at 844, and hold that the extension order did not constitute an abuse of discretion. (*Medical Hospital of Compton*, 907 F.2d 905, 910 (9th Cir. 1990).

35 The Board in *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, (1990), again in a similar setting, also adopted a 6-month extension of the certification period and the Court of Appeals enforced that order, 939 F.2d 402, 404 (6th Cir. 1991).

40 Based primarily on the Board's teachings as set forth above and the circumstances herein, and based on the record as a whole, I find it appropriate to adopt the remedy set forth in each and include the following affirmative obligation on the Respondent:

45 Recognize the Charging Party on resumption of face-to-face bargaining in good faith and for 6 months thereafter as if the initial year of certification had been extended for that period.

Conclusions of Law

50 On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

5 2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party represents the Respondent's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

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All registered nurses and all other professional employees employed by the Respondent at its Winslow (Bainbridge Island) facility; but excluding all physicians, all nonprofessional employees, and guard and supervisors as define by the Act.

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4. The Respondent violated Section 8(a)(1) of the Act on September 2, 2003, by counseling and thereafter on September 8, 2003, by issuing a written warning to employee Jeanette Rerecich because she engaged in the protected concerted activity of sharing materials concerning employee working conditions with another employee.

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5. The Respondent violated Section 8(a)(5) and (1) of the Act on or about September 26, 2003, by:

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(a) withdrawing recognition of the Charging Party as the representative of the employees in the unit described above and failing and refusing to bargain with the Union respecting those employees during the one year period of actual bargaining following the certification of the Charging Party as the employees representative.

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(b) withdrawing recognition of the Charging Party as the representative of the employees in the unit described above and failing and refusing to bargain with the Union respecting those employees at a time when the Charging Party was irrebuttably supported by a majority of unit employees.

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6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise violate the Act as alleged in the complaint and the complaint allegations not sustained herein shall be dismissed.

ORDER

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Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.¹⁴

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The Respondent, Virginia Mason Medical Center, its officers, agents, successors, and assigns, shall:

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¹⁴ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

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1. Cease and desist from:

5 (a) Counseling and thereafter issuing a written warning to employee Jeanette Rerecich because she engaged in the protected concerted activity of sharing materials concerning employee working conditions with another employee.

10 (b) Withdrawing recognition of the Charging Party as the representative of the employees in the Unit described above and failing and refusing to bargain with the Union respecting those employees during the one year period of actual bargaining following the certification of the Charging Party as the employees representative.

15 (c) Withdrawing recognition of the Charging Party as the representative of the employees in the Unit described above and failing and refusing to bargain with the Union respecting those employees at a time when the Charging Party was irrebuttably supported by a majority of unit employees.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

20 2. Take the following affirmative action designed to effectuate the policies of the Act:

25 (a) Rescind and withdraw, and not in the future rely on, any record of the September 2, 2003, counseling session of employee Jeanette Rerecich directed to her sharing materials concerning employee working conditions with another employee and notify her in writing that this has been done and that the counseling session will not be used against her in future.

30 (b) Rescind and withdraw, and not in the future rely on, any record of the September 8, 2003, written warning of employee Jeanette Rerecich and notify her in writing that this has been done and that the warning will not be the basis for any discipline against her in future.

35 (c) Recognize and bargain with the Charging Party as the exclusive representative of the employees in the unit described above and, if an agreement is reached, embody the agreement in a signed contract.

40 (d) Recognize and bargain with the Charging Party on resumption of face-to-face bargaining in good faith and for six months thereafter continue bargaining as if the initial year of certification had been extended for that period.

45 (e) Within 14 days after service by the Region, post copies of the attached Notice at its Winslow (Bainbridge Island), Washington Clinic facilities set forth in the Appendix¹⁵. Copies of the notice, on forms provided by the Regional Director for Region 19, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, 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

50 ¹⁵ If this Order is enforced by a Judgment of the 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."

5 employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the Winslow (Bainbridge Island), Washington Clinic 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 the closed facility at any time after September 26, 2003.

10 (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.

15 The allegations of the complaint not sustained herein shall be and they hereby are dismissed.

20 Issued at San Francisco, California this 14th day of June 2004.

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Clifford H. Anderson
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Act provides that employees may discuss among themselves their terms and conditions of employment without being disciplined by their employer.

Further, the National Labor Relations Board conducts employee elections for collective-bargaining representatives. When a labor organization wins such an election, it is certified as the representative of employees, and the employer is obligated to recognize and bargain with the labor organization as the exclusive representative of its employees for at least a year after the beginning of face-to-face bargaining in an effort to reach a collective bargaining agreement.

After a trial at which we appeared and offered evidence and argument, the National Labor Relations Board has found:

1. That we improperly counseled and disciplined employee Jeanette Rerecich for sharing a document concerning employee terms and conditions of employment with another employee, and,
2. That we recognized and bargained with the United Staff Nurses Union Local 141 affiliated with United Food & Commercial Workers International Union, AFL-CIO concerning our Winslow (Bainbridge Island) Clinic registered nurses and other non-physician professional employees, but improperly withdrew recognition and ceased bargaining with the before the conclusion of the required one year minimum period.

The National Labor Relations Board has required that we post this notice and abide by its terms.

Accordingly, we give our employees the following assurances.

WE WILL NOT interfere with, restrain, or coerce our employees by counseling and thereafter issuing a written warning to an employee because she/he engaged in the protected concerted activity of sharing materials concerning employee working conditions with another employee.

WE WILL NOT refuse to bargain in good faith with the United Staff Nurses Union Local 141 affiliated with United Food & Commercial Workers International Union, AFL-CIO by withdrawing recognition at a time when we were not lawfully permitted to do so.

WE WILL rescind and withdraw, and not in future rely on any record of our September 2, 2003 counseling session or our September 8, 2003 written discipline of employee Jeanette Rerecich and **WE WILL** notify her in writing that this has been done and that the counseling session and written warning will not be used against her in future.

WE WILL recognize and bargain with United Staff Nurses Union Local 141 affiliated with United Food & Commercial Workers International Union, AFL-CIO as the exclusive representative of the employees in the unit described below and, if an agreement is reached, embody the agreement in a signed contract.

WE WILL recognize the United Staff Nurses Union Local 141 affiliated with United Food & Commercial Workers International Union, AFL-CIO on resumption of face-to-face bargaining in good faith and for six months thereafter as if the initial year of certification had been extended for that period.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

The bargaining unit of our employees represented by United Staff Nurses Union Local 141 affiliated with United Food & Commercial Workers International Union, AFL-CIO is:

All registered nurses and all other professional employees employed at our Winslow (Bainbridge Island) facility; but excluding all physicians, all nonprofessional employees, and guard and supervisors as defined by the National Labor Relations Act

VIRGINIA MASON MEDICAL CENTER

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.