

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VOCA CORPORATION, A SUBSIDIARY
OF RES CARE, INC.

and

Case 9-CA-38441
9-CA-38852-3
9-CA-39009
9-CA-39941
9-CA-39970

SERVICE EMPLOYEES INTERNATIONAL
UNION, DISTRICT 1199, SEIU, AFL-CIO

Mark Mehas, Esq., for the General Counsel.
Lawrence J. Harty and Kerry Hastings, Esqs.,
(*Taft, Stettinius & Hollister LLP*), of Cincinnati,
Ohio, for the Respondent.
Becky Williams, for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Columbus, Ohio, on March 26 and 27, 2003. The charges were filed by the Service Employees International Union, District 1199, SEIU, AFL-CIO (the Union), on April 26 and October 30, 2001, January 15, 2002, and January 13 and 23, and February 4, 2003, and the order consolidating cases, second consolidated complaint and notice of hearing (the complaint) was issued March 6, 2003. The complaint as amended at the hearing alleges that VOCA Corporation, a subsidiary of Res Care, Inc. (Respondent) violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with certain requested information. The complaint also alleges that Respondent violated those same sections of the Act by unilaterally increasing a sign-on bonus for newly hired nurses, implementing a delegated nursing system, twice implementing changes in the health insurance benefits, implementing a planned time off policy, and implementing changes in the retirement savings program.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office located in Louisville, Kentucky, has been engaged in providing residential training and education for at-risk youth and people with special needs primarily from its group homes located throughout several States of the United States

including the State of Ohio where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 at its group homes in Ohio directly from points located outside Ohio. Respondent admits and I find that it is an employer engaged
 5 in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

10 As indicated, Respondent provides residential training and education for at-risk youth and people with special needs primarily in group homes that it operates. Timothy Vogt is Respondent's labor relations manager. The Union represents about 600 service and maintenance employees at many of Respondent's facilities in Ohio.¹ Prior to late 1999 the unit employees were employed by VOCA, with whom the Union had a collective-bargaining
 15 relationship. In late 1999, as a result of a merger, Respondent assumed the operations from VOCA. The most recent collective-bargaining agreement ran from July 1, 1999, to June 30, 2001. Becky Williams has been the Ohio area director for the Union since October 2000.

20 The expired contract between the parties contained the following language concerning health insurance benefits:

In the future a review of Plans will be conducted at the end of calendar year. Based on that review, the Company may amend or change the Plan(s) and /or contribution rates once
 25 per calendar year. The Union and employees will receive thirty (30) days written notice of any change.

30 On June 7, 2000, an arbitrator issued an award that sustained a grievance that the Union had filed earlier. The arbitrator concluded that Respondent has breached the collective-bargaining agreement by increasing the percentage of health insurance costs that employees paid. The arbitrator required Respondent to reimburse employees for the additional money that they had paid for the health insurance. Respondent filed suit in Federal court seeking to vacate the award, but it was finally enforced in 2002. Meanwhile, on December 21, 2000, Williams requested the following information from Respondent:

35 We recently received a communication from you purporting to assert a dispute between the Union and the Company as to the historic percentage of health insurance premium rates paid by the Company and by members. Pursuant to your duty to bargain under the National Labor Relations Act, this is to request that you promptly identify
 40 those percentages asserted by the Union to be the historic rates with which you disagree, and the basis of your disagreement.

45 Additionally, please provide me with the following information:
 The total monthly premium costs for each category of VOCA bargaining unit employee (i.e. single, single + 1, family, etc.) for the years 1995, 1996, 1997, 1998, and 1999. The total bi-weekly

50 ¹ The unit is described as: "all service and maintenance employees, including Licensed Practical Nurses, Support Associates, dietary workers, and maintenance workers, but excluding professional employees, guards and supervisors, within each bargaining unit as certified by the NLRB."

premiums contributions paid by each category of VOCA bargaining unit employees for health insurance for the years 1995, 1996, 1997, 1998, and 1999.

5 Williams explained that she requested the information in order to ascertain the amount of money owed to unit employees under the arbitrator's award and then to possibly use that amount as leverage to gain concessions in the upcoming negotiations with Respondent.² At the hearing the parties stipulated that Respondent never disputed that the Union had a right to obtain this information.

10 On January 3, 2001, Williams requested the following additional information.

- 15 1. The name, social security number, birthday, gender, hire date, and regular hourly wage rate for every member of the bargaining unit broken down by group home;
 2. The number of hours worked, by employee, for the last twelve (12) month period and the total number of FTE's;
 - 20 3. A summary plan description of any existing retirement plan;
 4. The dollar amount contributed on behalf of each bargaining unit member, to the existing retirement plan, for the last two (2) year period;
 5. A total, if applicable, of the dollar amount available in each current employee's retirement account;
 - 25 6. A plan summary of all available health care insurance plans offered to bargaining unit members;
 7. A current listing of all bargaining unit employees, by plan, enrolled in the available health insurance plans;
 8. A breakdown of employer/employee premium contributions for the above health insurance plan;
 - 30 9. The total number of hours of sick leave paid to bargaining unit member for the most recent twelve (12) month period for which that data is available;
 - 35 10. The total number of overtime hours paid to each employee for the last twelve (12) months;
- I will need this information as soon as possible. If you have any questions or concerns, please do not hesitate to contact me.

40 Williams explained that she requested the information in preparation for contract negotiations. Williams also called Vogt and asked him to send the information. Vogt asked Williams to resubmit the request and on February 23, 2001, she did so. Williams informed Vogt that she needed the information as soon as possible. The first bargaining session was set for April 25, 2001. Prior to that meeting Williams discussed the Union's requests for information with Vogt. Vogt indicated he had no problem providing the information but it would take him some time to

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² Respondent contends that Williams' testimony in this regard is a fabrication because the information sought, even if provided, would have been insufficient to enable the Union to calculate the amount of money Respondent owed pursuant to the arbitration award. I reject that contention. There is no evidence of what additional information the Union may have already possessed that combined with the new information, could enable it to make those calculations. Moreover, the information sought by the Union was, at a minimum, a first step in the calculation process.

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gather the information; he said he would bring it to the first bargaining session. Vogt, however, did not provide the information at the first bargaining session. Instead he told the Union that he had not had the time to gather the information but would do so.³

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During bargaining Vogt was Respondent's chief negotiator. Williams headed the Union's bargaining team. Representatives from the group homes that the Union represented often supplemented the Union's team. Before actual bargaining began Vogt and Williams met for lunch to get acquainted. Vogt explained the paid time off (PTO) program was something that Respondent wanted to achieve in bargaining. This program involved combining all time off for vacation, sick leave, etc., in one pool of time available to employees to use for whatever reason. He explained that the program was companywide and Respondent had been able to have it accepted in bargaining with other labor organizations. Williams indicated that it was important to the Union that the employees have the Union's health care plan, instead of the plan provide in the collective-bargaining agreement, available to them. Vogt said that Respondent wanted to get what the parties referred to as "the West Virginia language" in the contract concerning health insurance. This is described in more detail below.⁴

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At the bargaining session on April 25, 2001, the Union made proposals concerning union rights, hours of work, vacation, sick leave, holidays, bonus days, other paid leaves, discipline, grievance and arbitration, health and safety, wages and benefits (the Union sought to have the SEIU's health plan replace the existing plan), miscellaneous, and duration. Respondent proposed elimination of the dues deduction and 4-hour call-in language, a change in the overtime language, new benefit language, separate wage scales, new advance step hire language, and the PTO program to replace all existing types of leave; Respondent explained that the latter was an effort to bring the unit employees in line with what Respondent officered other employees throughout the country. It is important to note that Respondent's proposals did not contain any actual proposed language; it merely listed the seven areas that it wished to change. Some of Respondent's proposals were discussed at this meeting.

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The parties met again on May 23 and 30, 2001. Williams was unable to attend those bargaining sessions; instead David Regan, the Union's president, was its chief negotiator. At the May 30, 2001 bargaining session, Respondent provided the Union with responses to the Union's proposals on union rights, hours of work, vacation, sick leave, holidays, other paid leaves, grievance and arbitration, wages and benefits, and miscellaneous. The parties reached agreement on the union proposals concerning other paid leave and part of miscellaneous.

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On June 14, 2001, Respondent sent the Union a letter concerning the Union's health care insurance proposal. In the letter Vogt explained that in February 2000, Respondent began a nationwide search for the best health care options for its employees. In the process,

³ These facts are based on Williams' credible testimony.

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⁴ Vogt testified that at this luncheon meeting he asked Williams if she had all the information that she needed. He testified that Williams answered that she did not know for sure what she had, but that if she needed more information she would let him know. Vogt testified that he explained that he did not gather the information himself, but that he could try and facilitate the matter. Vogt testified that Williams answered that she had the information needed to start bargaining. Although Williams did not specifically deny Vogt's assertions, based on my observation Vogt's demeanor of the witness and the record as a whole, particularly on the fact that the Union consistently pursued obtaining this information and the undisputed fact that Respondent has not provided any information to the Union at this point, I do not credit Vogt's testimony on this matter.

Respondent amassed four binders of about 4500 documents that Respondent offered to the Union if it was willing to pay the photocopying costs. Vogt listed a number of health insurance providers that Respondent had contacted. Vogt complained that although the Union had not yet given Respondent the rates that would apply for the Union's health care proposal, Respondent nonetheless had considered the information that had been provided. Vogt attached a letter from someone who had been asked by Respondent to assess the Union's plan; that letter explained the features of the plan and the reasons why that person recommended that Respondent not accept it.

At the bargaining session on June 20, 2001, Vogt had still not provided the information that the Union had requested earlier. He indicated to the Union that he believed that the information had been mailed to the Union but he would check to be sure. At this bargaining session the Union made proposals regarding dues checkoff, union rights, discipline, duration, hours of work, vacation, sick leave, holidays, grievance and arbitration, health and safety, and wages and benefits. During this meeting Vogt said that he wanted the language concerning health insurance benefits that was contained in the contract between Respondent's West Virginia facilities and the Union. This provision did not contain the language that the arbitrator relied on in concluding that Respondent was required to maintain the current percentages of what it and the employees paid for health care insurance.

The parties next met on June 27, 2001. At this bargaining session the Union made proposals concerning discipline, duration, hours of work, vacation, sick leave, holidays, other paid leaves, grievance and arbitration, wages and benefits, and the remainder of its proposal concerning miscellaneous. The Union withdrew its proposal concerning changes to union rights and health and safety. For its part, Respondent made a wage proposal and for the first time offered language setting forth the details of its PTO proposal; it also withdrew its proposal concerning changes to the checkoff of dues.

The parties stipulated that as of the date of the issuance of the original complaint in this case, June 28, 2001, Respondent had not provided the Union with the information it requested in the January 3, 2001 letter.

The parties also met on June 29, 2001; this was the day before the contract was to expire. At this meeting Respondent made what it termed its last, best, and final offer. The only changes from its earlier proposals were to increase part-time holiday pay from time and half to double time and new language on call-ins. The parties reached tentative agreement on union recognition, union security, dues checkoff, no strike, no lockout, management rights, employment categories, probationary period, no discrimination, personnel records, labor management committees, savings clause, and drug and alcohol testing.

The Union and Respondent met on about October 15, 2001, but in a different framework. At the October 15 meeting the full bargaining teams were not present. Instead, the Union was represented by Williams, Regan, the Union's attorney, Michael Hunter. Two attorneys, including Edwin Hopson, represented Respondent for the first time. The purpose of this meeting was to attempt to resolve all outstanding issues between the parties, including contract negotiations, unfair labor practice charges and complaints, and other litigation in the Federal courts. The parties also met on October 25, 2001. Hopson credibly testified, without contradiction, that the meetings were to be off the record.⁵ At the hearing, Respondent objected

⁵ I do not credit Williams' testimony that at the October 25 meeting the Union invited its full bargaining team to participate with Respondent's full knowledge. Regan does not corroborate

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to the admissibility of the content of these meetings, contending that they were covered by Rule 408 of the Federal Rules of Evidence. That rule provides in pertinent part "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." I allowed testimony
 5 concerning the meetings to better assess whether they in fact were covered by Rule 408 and asked the parties to brief the matter. In its brief Respondent renews its objections and I am now persuaded by its arguments. The foregoing facts show that the October meetings were held to attempt to settle all outstanding issues between the parties, including legal disputes. It is also apparent that the parties intended that the meeting be off the record. Under these
 10 circumstances I conclude that the October 15 and 25 meetings were settlement discussions within the meaning of Rule 408. *Contee Sand & Gravel, Co.* 274 NLRB 574 (1985). The General Counsel concedes in his brief that the meetings "included discussion of settlement of other issues." But he argues that because there was no unfair labor practice charges pending concerning the unilateral changes alleged in this case at the time of the October meetings the content of the meetings should be admissible to help establish a violation in this case. In
 15 support of the argument the General Counsel cites *Goodman Holding Co.*, 276 NLRB 935 (1985). However, that case does not implicate Rule 408 because no party was seeking to admit the content of settlement discussions. Rather, the disputed evidence was concerned presettlement evidence being offered to shed light on postsettlement events.⁶ In *Miami System Corp.*, 320 NLRB 71 fn 2 (1995), *affd.* in part, *revd.* in part 111 F.3d 1284, 1293-1294 (6th Cir. 1997), the Board held that Rule 408 did not preclude the admissibility of unlawful threats made in the course of settlement discussions. Here, however, there is no contention that Respondent made unlawful statements during the October meetings. For similar reasons *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269 (8th Cir. 1983), is also inapposite. I therefore shall not consider the
 25 content of the October 15 and 25 meetings in determining whether Respondent violated the Act as alleged in this case.

As of October 24, 2001, Respondent had provided the Union with the information requested in items 1 through 5 in the January 3, 2001 letter. Respondent provided items 6, 7,
 30 and 8 to the Union on October 25, and November 26 and 28, 2001. Respondent never provided the Union with items 9 and 10. There is no evidence in the record that Respondent ever provided that information with the information that the Union had requested on December 21, 2000.⁷

On October 29, 2001, the Union by letter requested information from Respondent regarding health insurance coverage. This request was triggered by the discussions that the parties had on this subject at the October 25 meeting. That same day Respondent notified the Union that it had considered the Union's proposed health insurance plan and decided not to
 35 accept it.
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this testimony. Also, it is undisputed that none of the other alleged invitees appeared at the meeting and there is nothing to explain why they did not appear after they were allegedly asked
 45 to do so.

⁶ The General Counsel also cites *Jennmar Corp.*, 301 NLRB 623 (1991). But it does not appear that the Board passed on the ruling concerning Rule 408 that the judge made in that case.

⁷ The General Counsel in his brief suggests that some information was provided in March
 50 2002. However, that statement in the brief is not supported by any reference to a transcript or exhibit citation. I also note that Respondent does not contend that it provided this information to the Union.

5 Meanwhile, Respondent was having difficulty filling its positions for licensed practical nurses. By letter dated October 22, 2001, Respondent proposed to the Union the creation of a nursing program, called delegated nursing, whereby Respondent would train direct care workers to pass medication to patients, a function then being performed by the LPNs. Respondent offered to pay these employees an extra 25 cents per hour. The letter indicated that Respondent intended to implement the program in November. By letter dated October 26, 2001, the Union responded to Respondent's proposal concerning the delegated nursing program. The letter confirmed that a meeting had been set on October 31, 2001, to discuss the matter and that the Union felt that no changes should be made until the parties reached agreement.

15 On October 31, 2001, the Union and Respondent met to discuss the delegated nursing program. David Rastoka headed Respondent's team at this meeting where Respondent explained why it needed this program and how it would work. Rastoka explained how the pay scale that Respondent was offering for LPNs was less than what the market was paying but Respondent was unable to offer the market rate. The Union raised a number of other concerns. Williams complained that the Union was only allowed a week or so to consider the matter. Rastoka apologized and explained that Respondent had a critical problem that it needed to resolve. He said that there were about 20 workers who were willing to work as delegated nurses. Williams protested that Respondent had communicated with the workers about the program instead of first notifying the Union. Rastoka indicated that he planned to begin the training program on November 13, 2001. The meeting ended with Williams saying that she would get back to Respondent within a day or so.⁸ The next day Williams sent Rastoka the following letter.

30 After carefully considering the employer's nursing delegate position/program, the Union has concluded that additional information will be needed in order to fully consider and respond to your proposal.

Please provide the following information as soon as possible.

- 35 1. A copy of the procedure that will be used to determine employee eligibility.
2. A list of employees names who currently would not be eligible for this program.
3. All documents used to determine the above employees' ineligibility.
4. The total number of dollars available for the new position/program.
- 40 5. A detailed description of the train program.
6. Dates the training may be offered.
7. A copy of the procedure to be used for addressing medication errors.
8. The length this position/program is intended to be in place.
9. A copy of the job description for the position/program.
- 45 10. The total number of staff needed to implement the changes.

If you have any questions, please feel free to contact me.

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⁸ The foregoing facts are based on a composite of the credible portions of the testimony of Williams and Rastoka.

Williams later learned that Respondent had selected employees to participate in the delegated nursing training program to begin on November 13, 2001. Respondent thereafter implemented the new program. On November 16, 2001, the Union received the information that it had requested on November 1. Williams was away on vacation during the Thanksgiving holiday. On December 7, she wrote to Rastoka acknowledging the receipt of the information and requesting that they meet before the program was implemented. Rastoka testified that he provided Williams with the information and heard no objections from the Union concerning the implementation of the program. Ratoska testified that had the Union objected, he would not have gone forward with training the unit employees.

Also, during the course of the meeting on October 31 described above, one of Respondent's representatives, Jeanne Thomas, mentioned in passing how she had increased the sign-on bonus for LPNs from \$500 to \$1000 and was still unsuccessful in recruiting any nurses. Williams responded with surprise, stating that this was the first time she had heard of the increase. She asked why the Union was not notified; the representative replied that the Union was not entitled to notice, that the management-rights clause in the expired contract allowed Respondent to do so.

Returning to the health insurance matter, by letter dated November 9, 2001, Respondent notified the Union that it would implement a change in employees' health insurance effective January 1, 2002. It provided the Union with some of the details of the new plans. Respondent also advised unit employees that it had notified to the Union that it intended to replace the current health plans with two similar plans effective January 1, 2002. Respondent provided the employees with information concerning the new plans. Williams learned of this from the unit employees on Friday, November 16, 2001. That afternoon Regan prepared a letter to Respondent that was mailed to it on Monday, November 19, 2001. That letter read:

I received your letter dated November 9, 2001 in which you propose to alter the existing health insurance plan for bargaining unit members at the homes and facilities we represent in Ohio.

As always, the Union remains committed to reaching a comprehensive settlement to all outstanding issues in the various collective bargaining agreements which expired in June. Health insurance is one of several issues which needs to be resolved between the Union and Res Care/VOCA. As you know, we have made multiple information requests in order to facilitate the negotiations with regard to health care and other issues and we are still awaiting numerous pieces of information to which we are absolutely entitled.

We would propose convening a meeting of the parties respective negotiating committees in order to directly discuss all unresolved issues including health care. We do not wish to discuss issues, or reach agreements on individual issues, in isolation. Rather, we would prefer to reach a comprehensive tentative agreement that each party could present to their respective constituencies for ratification.

Given Res Care/VOCA's recent history and behavior I would remind you that Res Care/VOCA is legally obligated to bargain with SEIU/District 1199 and any attempt to further institute unilateral changes to wages, hours, terms and conditions of employment will be vigorously opposed by the Union.

5 However, Respondent never received the letter.⁹ By letter dated November 30, 2001, Regan advised Hopson that the Union had received information it had requested¹⁰ and wanted to arrange dates for the parties to engage in further negotiations. On December 6, 2001, Hopson replied with suggested bargaining dates; this letter, of course, made no reference to the Union's November 16 letter. By letter dated December 19, 2001, Hopson notified Regan that certain proposals he made in the "off-the-record discussion on October 25, 2001" were withdrawn and that Respondent reverted to its last, best, and final offer made earlier in June. He further informed the Union that Respondent intended to implement the PTO portion of its final offer on January 1, 2002, because "it appears that we are at impasse."

10 On January 1, 2002, Respondent made certain changes in the terms and conditions of employment of the unit employees that included the implementation of its proposals concerning health insurance¹¹ and PTO. According to the Union, some employees lost up to 15-paid days off per year under the PTO program. At the time that Respondent made these changes the outstanding issues regarding reaching a new collective-bargaining agreement included wages, health insurance, PTO, grievance and arbitration, paid delegate training, strike and lockout, discipline, health and safety, contract duration, and hours of work.

15 It should be noted that the Respondent's failure to provide item 9 of the Union request made on January 3, 2001, was directly related to the Union's proposal to increase sick leave for the unit employees.

20 The parties met on January 15, 2002. The purpose of this meeting was to discuss all outstanding issues and the full bargaining committees were present. The Union presented a revised and detailed proposal to reach a contract. Respondent examined the proposal but did not change its bargaining position. The parties also discussed the PTO program that Respondent had implemented earlier that month. Respondent maintained its position that the PTO policy brought the unit employees in line with what the rest of the employees were receiving. Vogt stated that Respondent had declared impasse and Williams said that she had no knowledge of any declaration of impasse. Vogt said that he had mailed the letter to Regan and Williams countered that she did not receive it. Williams asked how Respondent could declare impasse when they had not fully debated PTO and when the Union had not received the information it had requested concerning use of sick leave.

25 On October 28, 2002, Respondent notified the Union that it had conducted an annual review of its health coverage plans and decided that changes were appropriate and increases in employee premiums were necessary. Respondent provided details of the changes it intended to make effective January 1, 2003. On November 15, 2002, the Union replied and requested a meeting to discuss the matter. The Union expressed its disagreement with the conclusion that

45 ⁹ I credit the testimony of Mary Jo Ivan, the Union's assistant to the president, that she correctly addressed the envelope and mailed the letter to Respondent on November 19, 2001. I also credit Hopson's testimony that he never received this letter.

¹⁰ Although the letter did not specifically indicate, this obviously referred to the information that the Union had requested concerning health insurance in the October 29 information request described above.

50 ¹¹ Hopson testified in summary fashion that Respondent had to act by January 1, 2002, because the old health care plans were no longer available and the employees could not be left without health care coverage. However, no supporting details were provided and no foundation was established to show his first-hand knowledge of this situation. I do not credit this testimony.

an increase in employees' premiums was necessary. Respondent did not reply to that letter. The parties stipulated that: "On January 1st, 2003, Respondent made changes to the terms and conditions of employment of unit employees, including changes in health insurance." Regan
 5 conceded that Respondent had the right to change health care plans but not employee costs. Since at least 1999 Respondent has made changes to the health care plans effective January 1 of the following year. These changes were made without bargaining with the Union; instead, as required under the contract Respondent gave the Union 30 days notice of the changes.

10 The contract with VOCA contained a 401(k) plan under which VOCA contributed 25 cents for every dollar contributed by the employee. Approximately 25 per cent of the unit employees participated in the plan. Effective January 1, 2003, Respondent liquidated that plan and transferred the funds into its own 401(k) plan. Employees were given notice of this transfer and other details of the new plan by letter dated November 14, 2002. There were a number of
 15 changes under the new plan and the employees were not given a choice of the specific plans to which money was to be invested.¹² Instead, Respondent transferred the money into what it believed were similar investment programs.

20 III. Analysis

A. Refusal to Provide Information

25 Upon request, an employer must provide a union with information that is relevant and necessary for the union to perform its obligations as the collective bargaining representative of the employees. *NLRB v. Acme Die Casting Co.*, 385 U.S. 432 (1967). Also, an employer must provide the information to the union within a reasonable period of time. *Consolidated Coal Co.*, 307 NLRB 69 (1992). In its brief, Respondent indicated that it took no position concerning the allegations in the complaint pertaining to a refusal to provide information.

30 Regarding the request the Union made on December 21, 2000, concerning health insurance in the aftermath of the arbitration award, the information was clearly relevant to allowing the Union to police the award and develop contract proposals. Indeed, Respondent makes no argument that it was not required to give the Union this information.

35 Turning to the January 3, 2001 request made the Union, all of the information there pertained to the terms and conditions of employment of unit employees. It was patently relevant to allow the Union to monitor the existing contract and to prepare collective-bargaining proposals. Yet, by October 24, 2001, Respondent had only provided the Union with the
 40 information requested in items 1 through 5 requested in the January 3, 2001 letter. Respondent provided items 6, 7, and 8 to the Union on October 25 and November 26 and 28, 2001. Respondent never provided the Union with items 9 and 10.

45 It is apparent that Respondent took many months to provide the Union with the requested information. Much of the bargaining process had elapsed in the meantime. The information was not so extensive as to justify such a lengthy delay. Respondent offers no justification for the delay. By unreasonably delaying providing the Union with requested information that is relevant and necessary for the Union to perform its duties as the collective-

50 ¹² Respondent argues that there are inconsistencies between the testimony given by Carol Walters on this subject and other evidence in the record. I base my finding on this matter on the document Respondent produced and sent to the employees. This is sufficient to establish that Respondent made changes to the 401(k) plan.

bargaining representatives of the unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.

5 Respondent never did provide the Union with items 9 and 10 of the January 3, 2001 request and, so far as this record shows, any of the information requested by the Union on December 21, 2000. Respondent provides no justification for its failure to do so. By failing to provide the Union with the information it requested on December 21, 2000, and items 9 and 10 of the the information it requested on January 3, 2001, information that is relevant and
10 necessary for the Union to perform it duties as the collective-bargaining representatives of the unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.

B. Changes in Health Insurance

15 An employer may not make changes in the terms and conditions of employment of unit employees without first giving the union notice and an opportunity to bargain about the proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer may implement such changes after having bargained in good faith with the union and after reaching impasse. Impasse occurs after good faith negotiations have exhausted the prospects for reaching an
20 agreement. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). No lawful bargaining impasse maybe reached if the employer commits serious unfair labor practices that precede the alleged impasse and undermine a union's ability to bargain with the employer. *Circuit-Wise*, 309 NLRB 905, 918 (1992).

25 Here, Respondent made changes in employees' health care coverage effective January 1, 2002. Respondent contends that it was privileged to do so because it has reached impasse in bargaining with the Union. However, I have concluded above the Respondent violated the Act by its delay in providing the Union with information that was relevant to collective bargaining. The unlawful conduct directly frustrated the Union ability to bargain with Respondent; the Union
30 did not have basic information necessary to effectively formulate proposals and to present facts and arguments based thereon; these matters are the essence of good-faith bargaining. Respondent cites *Microwave Cooking Products*, 300 NLRB 324, 333 (1990). In that case, the Board concluded that the employer had unlawfully changed a rule concerning patio and cafeteria meetings and special lunch privileges and failed to grant a semiannual wage increase.
35 The Board further concluded that those unfair labor practices did not have a significant impact on whether or not an agreement could be reached. However, in this case, I have already concluded above that the delay in providing the information directly frustrated the Union's ability to bargain. In a similar vein, Respondent also points out that by November 28, 2001 it had provided the Union with all the information that it had requested concerning health insurance
40 and yet the Union failed to make any counterproposals based on the information. Respondent argues that this demonstrates that the lack of information had no impact on the Union's bargaining position. I am not persuaded. By the time Respondent provided the Union with the information Respondent had already declared impasse and was moving forward with its unilateral changes. The Union was thus deprived of the relevant information during the most
45 critical times of the collective-bargaining process—before minds were made up. I thus reject the contention that a lawful impasse existed prior to the changes in the health insurance plans implemented on January 1, 2002.¹³

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¹³ I therefore find it unnecessary to resolve other arguments made by the General Counsel regarding the absence of a lawful impasse.

Respondent also argues that provisions in the expired collective-bargaining agreement allowed it to make the changes in health insurance without first bargaining with the Union even in the absence of an impasse. It relies on the language in the contract set forth above. That language does indeed allow Respondent to make certain changes in health care insurance without first bargaining with the Union. However, the Board has held that waivers of bargaining rights made by a union and contained in a contract expire with the contract. *Ironton Publications, Inc.*, 321 NLRB 1048 (1996). I therefore reject this contention.¹⁴ Respondent next argues that nonetheless a practice had developed that allowed it to continue to make those changes unilaterally even after the contract expired. However, the Board had held that simply because a practice has developed does not mean that a union is unable to demand bargaining over the matter in the future. *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). Respondent cites *Shell Oil Co.*, 149 NLRB 283 (1964). The Board, however, has held that *Shell Oil* and similar cases have been overruled sub silentio by more recent cases. *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54 fn 7 (2001). Moreover, I note that the facts in this case make it distinguishable even from the dissenting opinion in *Beverly*. The dissent focused on the need for an employer to make the day-to-day management decisions necessary to operate the business even after the contract, with its management rights clause, has expired. Here, the issue involves changes in health care insurance benefits, a matter unrelated to such concerns. I therefore conclude that *Shell Oil* is not controlling. Respondent also cites *Post Tribune Co.*, 337 NLRB No. 192 (2002). In that case the Board concluded that an employer did not violate the Act when it changed the amounts employees paid for health insurance because the employer had acted in a manner consistent with past practice. But in that case the union did not object to the change in benefits or request bargaining until after the change had occurred. In this case, as described below, I conclude that the Union had put Respondent on notice that it desired to bargain before further changes in the health insurance plans were made. I conclude that *Post Tribune* is also inapposite. Finally, Respondent argues that the Union waived its right to bargain concerning the health care insurance changes because the Union failed to object in a timely manner to the November 9, 2001 letter announcing the changes. As set forth above, I have concluded that the Union did object to the changes and sent a letter setting forth the objections to Respondent, but that Respondent did not receive that letter. However, a waiver of bargaining rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 708 (1983). Here, even though Respondent did not receive a direct response to its November 9 letter, it did receive the Union's November 30 letter that indicated that the Union wanted to bargain further on the health insurance matter. This, taken in the context of the Union's collective-bargaining position on health care insurance, is sufficient to show that Respondent has not met its burden of demonstrating that the Union waived its right to bargain over the January 1, 2001 health insurance changes. Respondent cites *Stone Container Corp.*, 313 NLRB 336 (1993), to support its contention. However, in that case, as Respondent itself points out in its brief, the union gave no indication at all that it objected to the employer's proposed course of action until after the employer had implemented it. That is not the case here, where Respondent had notice that the Union opposed any change in the health care plans. In sum, Respondent was required to bargain to impasse with the Union over these changes and I have concluded above that it failed to do so.¹⁵ By implementing changes in the health care insurance benefits of unit employees on January 1, 2002, without first bargaining to

¹⁴ Respondent points out that Regan conceded that Respondent had the right to change health care insurance plans. However, this testimony must be taken in context. I understand Regan's testimony to mean only that under the expired contract Respondent had that right.

¹⁵ Respondent implies that there was some exigency that required it to implement new health care plans by January 1, 2001. However, Respondent has failed to produce any credible evidence to support that contention. I therefore reject it.

lawful impasse with the Union concerning those changes, Respondent violated Section 8(a)(5) and (1) of the Act.

5 As described above, Respondent also made changes in the health insurance program the following year. On October 28, 2002, Respondent notified the Union that increases in employee premiums was necessary. Respondent provided details of the changes it intended to make effective January 1, 2003. On November 15, 2002, the Union replied and requested a meeting to discuss the matter and expressed its disagreement with the conclusion that an
10 increase in employees' premiums was necessary. Respondent did not reply to that letter. Instead, on January 1st, 2003, Respondent again made changes in concerning the employees' health insurance. In that instance Respondent did not bargain at all with the Union concerning the new changes. Respondent raises no defenses to this conduct that have not already been rejected. By unilaterally making changes on January 1, 2003, in the health insurance benefits
15 provided to employees Respondent violated Section 8(a)(5) and (1) of the Act.

C. PTO Policy

As indicated above, on January 1, 2002, Respondent implemented its PTO policy. Item
20 9 of the Union's January 3, 2001 request for information was "The total number of hours of sick leave paid to bargaining unit member for the most recent twelve (12) month period for which that data is available." This information, obviously relevant to the Union's ability to assess and respond to Respondent's PTO proposal, was never provided to the Union. Respondent attempts to downplay the significance of its failure to provide this information by arguing that the
25 Union had sufficient information to conclude that Respondent's proposal could have resulted in the loss of 15 days of leave for some employees. This argument misses the point, which is not whether the Union had some information to assess the proposal. The point is whether the Union had all the information to which it was entitled in order to assess Respondent's proposal, make counterproposals, and attempt to persuade Respondent that its proposal was too harsh.
30 For reasons stated above, the unlawful failure to provide this information made a lawful impasse impossible. By implementing its PTO proposal on January 1, 2002, without first bargaining to lawful impasse with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

D. Delegated Nursing Program

35 As described above, effective November 13, 2001, Respondent began implementing the new delegated nursing program. Respondent first notified the Union of its desire to create that program by letter dated October 22, 2001. On October 26, 2001, the Union responded to Respondent's proposal and on October 31, 2001, the parties met to discuss the delegated
40 nursing program. At the meeting Respondent indicated that it planned to begin the training program on November 13, 2001. The meeting ended with the Union saying that it would get back to Respondent within a day or so. True to its word, the next day the Union sent Respondent a letter that requested additional information in order to more fully consider Respondent's proposal. On November 16, 2001, the Union received the information that it had
45 requested on November 1. Despite the fact that the Union had indicated that it needed more information before it could respond, Respondent proceeded nonetheless to proceed with the implementation of the plan before the Union even received the information.

50 As indicated above, an employer may implement changes in working conditions only after it has bargained to impasse on the matter with the union that represents the employees affected by the change. Here, Respondent first gave notice to the Union on October 22, the parties met for the first and only time on October 31, the Union, in effect, indicated that it needed more time and information to consider the matter, yet Respondent proceeded

nonetheless on November 13. From these facts I conclude that the parties were not yet at impasse. Again citing *Stone Container*, supra, Respondent argues that the Union waived its right to bargain by failing to object to the implementation of this program. I disagree. The Union certainly put Respondent on notice that its desire to bargain over the matter. Once it did that, it was incumbent on Respondent to bargain in good faith with the Union until impasse. Respondent failed to do this.¹⁶ By implementing the delegated nursing program without first bargaining to impasse on that matter with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

E. Sign On Bonus

At a meeting on October 31, 2001, the Union learned for the first time that Respondent had increased the sign on bonus for LPNs by \$500. Respondent did so without first giving the Union an opportunity to bargain concerning the matter. The Board has held that similar bonuses are mandatory subjects of bargaining. *Intergrated Health Services, Inc.*, 336 NLRB No. 13 (2001). Respondent claims that the Government has failed to prove that there was any change in the sign on bonus. I disagree. Respondent placed Jeanne Thomas, who made the statements at the October 31, 2001 meeting concerning the change, in a position where it appeared that she was speaking with authority and with knowledge of the subject and on behalf of Respondent. Rastoka did not contradict Thomas at the meeting nor did Respondent otherwise clarify or correct the statement of fact that she made at the meeting. I conclude that Thomas' remarks constitute an admission of a party opponent and therefore fully support the findings that I have made. In any event, Respondent's answer to the complaint states, "Respondent admits that it increased the sign-on bonus to \$1500 for newly-hired Unit nurses at the Columbus, Ohio Units from about August, 2001 until about December, 2001." The answer further admitted that this was a mandatory subject of bargaining and that Respondent made this change without first bargaining with the Union. By unilaterally increasing the signon bonus, Respondent violated Section 8(a)(5) and (1) of the Act.

F. 401(k) Plan

As indicated above in more detail, effective January 1, 2003, Respondent liquidated the existing 401(k) plan and transferred the funds into its own 401(k) plan. In its answer Respondent admitted that it made changes in the 401(k) plan on January 1, 2003, that the matter was a mandatory subject of bargaining, and that it did so without bargaining with the Union. For reason previously stated, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the 401(k) plan.¹⁷

Conclusions of Law

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by:

1. Unreasonably delaying providing the Union with requested information that is relevant and necessary for the Union to perform it duties as the collective-bargaining representatives of

¹⁶ Respondent points to Rastoka's testimony that he would have delayed implementation of the program if the Union had objected. I have earlier indicated that I discredit this testimony as after the fact speculation. Importantly, Rastoka never advised the Union of that information.

¹⁷ I shall leave for the compliance portion of these proceedings the determination of the details of the changes that were encompassed within Respondent's unlawful action.

the unit employees.

5 2. Failing to provide the Union with the information it requested on December 21, 2000, and items 9 and 10 of the information it requested on January 3, 2001, information that is relevant and necessary for the Union to perform its duties as the collective-bargaining representatives of the unit employees.

10 3. Implementing changes in the health care insurance benefits of unit employees on January 1, 2002, and January 1, 2003, without first bargaining to lawful impasse with the Union concerning those changes.

15 4. Implementing the paid time off (PTO) policy on January 1, 2002 without first bargaining to lawful impasse with the Union.

5. Implementing the delegated nursing program without first bargaining to impasse on that matter with the Union.

20 6. Unilaterally increasing the signon bonus paid to licensed practical nurses.

7. Unilaterally changing the 401(k) plans.

Remedy

25 Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall require that Respondent to provide the Union with the information requested on December 21, 2000, and items 9 and 10 of the information it requested on January 3, 2001. I shall require Respondent, upon request by the Union, to
 30 rescind the existing health insurance plans and restore the health insurance plans that were in effect prior to January 1, 2001, and make employees whole for losses that they suffered as a result of Respondent's unlawful conduct in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980). I shall also require Respondent, upon request by the Union, to rescind the paid time off (PTO) policy and restore the paid leave system that existed before January 1,
 35 2001, and make employees whole for the losses they suffered as a result of Respondent's unlawful conduct with interest as indicated in *Florida Steel Corp.*, 231 NLRB 651 (1977). I shall require Respondent, upon request of the Union, to rescind the delegated nursing program. I shall require Respondent, upon request of the Union, to rescind the changes in the 401(k) plans that it made on January 1, 2003, restore the 401(k) plans that existed before the unlawful
 40 change, and make employees whole for the losses they suffered in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

45 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

50 ¹⁸ 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.

ORDER

5 The Respondent, VOCA Corporation, a subsidiary of Res Care, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Unreasonably delaying providing the Union with requested information that is relevant and necessary for the Union to perform its duties as the collective-bargaining representatives of the unit employees.

(b) Failing to provide the Union with information that is relevant and necessary for the Union to perform its duties as the collective-bargaining representatives of the unit employees.

15 (c) Implementing changes in the health care insurance benefits of unit employees without first bargaining to lawful impasse with the Union concerning those changes.

20 (d) Implementing a paid time off (PTO) policy without first bargaining to lawful impasse with the Union.

(e) Implementing the delegated nursing program without first bargaining to impasse on that matter with the Union.

25 (f) Unilaterally increasing the sign on bonus paid to licensed practical nurses.

(g) Unilaterally changing the 401(k) plans.

30 (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

35 (a) Provide the Union with the information requested on December 21, 2000, or items 9 and 10 of the information it requested on January 3, 2001.

40 (b) Upon request by the Union, rescind the existing health insurance plans and restore the health insurance plans that were in effect prior to January 1, 2001, and make employees whole for losses that they suffered as a result of Respondent's unlawful conduct in the manner set forth in the remedy section of this decision.

45 (c) Upon request by the Union, rescind the paid time off (PTO) policy and restore the paid leave system that existed before January 1, 2001, and make employees whole for the losses they suffered as a result of Respondent's unlawful conduct in the manner set forth in the remedy section of this decision.

(d) Upon request of the Union, rescind the delegated nursing program.

50 (e) Upon request of the Union, rescind the changes in the 401(k) plans that it made on January 1, 2003, restore the 401(k) plans that existed before the unlawful change, and make employees whole for the losses they suffered in the manner set forth in the remedy section of this decision.

5 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

10 (g) Within 14 days after service by the Region, post at its facilities in Ohio at which the Union represents employees in the unit described above, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous
15 places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current
20 employees and former employees employed by the Respondent at any time since March 1, 2000, the approximate date on which Respondent began unlawfully delaying providing information to the Union.

25 (h) 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.

Dated, Washington, D.C. July 7, 2003

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William G. Kocol
Administrative Law Judge

50 ¹⁹ 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."

APPENDIX

NOTICE TO EMPLOYEES

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unreasonably delay providing the Union with requested information that is relevant and necessary for the Union to perform its duties as the collective-bargaining representatives of the unit employees.

WE WILL NOT fail to provide the Union with the information that is relevant and necessary for the Union to perform its duties as the collective-bargaining representatives of the unit employees.

WE WILL NOT make changes in the health care insurance benefits of unit employees without first bargaining to lawful impasse with the Union concerning those changes.

WE WILL NOT implement a paid time off (PTO) policy without first bargaining to lawful impasse with the Union.

WE WILL NOT implement a delegated nursing program without first bargaining to impasse on that matter with the Union.

WE WILL NOT unilaterally increase the sign-on bonus paid to licensed practical nurses.

WE WILL NOT unilaterally change the 401(k) plans.

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

WE WILL provide the Union with the information it requested on December 21, 2000, and with items 9 and 10 of the information it requested on January 3, 2001, information that is relevant and necessary for the Union to perform its duties as the collective-bargaining representatives of the unit employees.

WE WILL, upon request by the Union, rescind the existing health insurance plans and restore the health insurance plans that were in effect prior to January 1, 2001, and make employees whole for losses that they suffered as a result of our unlawful conduct.

5 WE WILL, upon request by the Union, rescind the paid time off (PTO) policy, restore the paid leave system that existed before January 1, 2001, and make employees whole for the losses they suffered as a result of Respondent's unlawful conduct.

WE WILL, upon request of the Union, to rescind the delegated nursing program.

10 WE WILL, upon request of the Union, rescind the changes in the 401(k) plans that we made on January 1, 2003, restore the 401(k) plans that existed before the unlawful change, and make employees whole for the losses they suffered.

15 VOCA CORPORATION, A SUBSIDIARY OF RES
CARE, INC

(Employer)

20 Dated _____ By _____
(Representative) (Title)

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35 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.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

40 **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, (513) 684-3663.

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