

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

RESCARE WEST VIRGINIA D/B/A VOCA  
CORPORATION OF WEST VIRGINIA, INC.

and

DISTRICT 1199, WV/KY/OH, THE HEALTH CARE  
AND SOCIAL SERVICE EMPLOYEES UNION,  
SEIU, AFL-CIO-CLC

Cases 9-CA-38771  
9-CA-38806  
(formerly 11-CA-19059)  
9-CA-39110

*David L. Ness, Esq.*, Counsel for  
the General Counsel.

*Frank Hornick*, of Huntington, WV,  
for the Charging Party.

*Mary G. Balazs, Esq.*, and *Kerry P.  
Hastings, Esq. (Taft, Stettinius &  
Hollister LLP)*, of Cleveland, OH, for  
Respondent.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. Respondent Rescare West Virginia d/b/a Voca Corporation of West Virginia, Inc., declared an impasse in bargaining on December 21, 2001, and unilaterally implemented portions of its last proposal on wages and other terms and conditions of employment. The General Counsel contends that Charging Party District 1199, WV/KY/OH, The Health Care and Social Service Employees Union, SEIU, AFL-CIO-CLC (Union), was still making proposals, the parties were not at impasse, and Respondent's declaration of an impasse, together with a variety of other acts, violated Section 8(a)(5) and (1) of the Act.<sup>1</sup> Respondent denies that it violated the Act in any manner.

Respondent, a corporation, operates group homes for the mentally disabled at various facilities in West Virginia, including homes in Beckley, Oak Hill, Lewisburg, Summersville, Clarksburg, Logan, Morgantown, and Princeton. During the year ending April 25, 2002, Respondent derived gross revenues in excess of \$250,000 and purchased and received at its group homes goods valued in excess of \$15,000 directly from points outside West Virginia. I

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<sup>1</sup> The charge in Case 9-CA-38771 was filed on May 30, 2001, and amended on October 29 and December 21, 2001. The charge in Case 9-CA-38806 (formerly Case 11-CA-19059) was filed on May 20, 2001, and amended on October 5 and 29, 2001. The charge in Case 9-CA-39110 was filed on February 27, 2002, and amended on April 17. The second consolidated complaint was issued on April 25, 2002. The hearing was held in Beckley, West Virginia, on August 26-28, 2002.

conclude, as Respondent admitted and stipulated, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care facility within the meaning of Section 2(14) of the Act. I also conclude, as Respondent stipulated, that the Union, which has represented employees at certain of Respondent's group homes since at least 1994, is a labor organization within the meaning of Section 2(5) of the Act.

The last collective-bargaining agreement between the parties was in effect from September 1, 1999, and expired by its terms on August 31, 2001. Negotiations for a new agreement began on July 23, 2001.<sup>2</sup> At that session, Frank Hornick, the Union's administrative organizer and chief negotiator, proposed changes to five non-economic contractual provisions: no-strike, no-lockout; management rights; health and safety; discipline; and Labor/Management Committees. He also proposed that the employees would receive an hourly wage increase of approximately \$1.75 to \$2 per hour, depending on their job classification and length of service. His proposal altered the 1999-2001 provisions, which had separate wage scales for each home, by proposing one wage scale for all homes throughout West Virginia.

Finally, he proposed a change of the employees' health insurance. The 1999-2001 agreement provided:

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

Under that provision, Respondent had changed its carrier in 1999 and 2000, and Hornick acknowledged that Respondent had the right to do so. With each change, Respondent maintained the approximate 65 percent of the insurance premiums that it had traditionally paid, leaving its employees, both full-time and part-time, to pay for the remaining 35 percent.

Hornick's new proposal was that Respondent pay the complete cost of the SEIU health insurance plan (SEIU plan) for all its full-time and part-time employees. That plan would cover them not only for their health insurance, but also dental and vision benefits. The parties very briefly discussed this plan, and the meeting lasted only "a couple of hours".

On July 30, two days before the next negotiation session, Respondent faxed its proposals regarding union recognition; union security (Respondent proposed an open shop provision); dues checkoff; no-strike, no-lockout; employment categories; probationary period; seniority; health and safety; personnel records; hours of work; holiday; unpaid leave of absence; discipline; grievance and arbitration; health insurance (Respondent wanted to retain the provision of its expiring agreement); and wages and benefits. Respondent also proposed a planned time off ("PTO") policy, which would give to its full-time employees, not part-time, a certain number of days that they could take off, based on each employee's total number of months of full-time service. PTO would substitute for the paid vacation, sick leave, bonus days, court action leave, and wedding leave that full-time and part-time employees received under the expiring agreement. PTO was discussed when the parties met on August 1, at which time the Union made additional proposals and offered counterproposal to certain of Respondent's proposals. There was brief discussion of Hornick's proposal of the SEIU plan; Respondent's chief negotiator, Steve Hendricks, replied that Respondent was not interested in changing its

<sup>2</sup> All dates are in 2001, unless otherwise indicated.

health insurance provision. The parties reached no agreements at this session, which again lasted only a couple of hours.

5 A bargaining session scheduled for August 23 did not proceed, because Hornick did not show up on time, and Hendricks became impatient, not unjustifiably, because this had happened before, and he had requested Hornick to schedule the negotiations later, if he could not be on time; and Hendricks left. Later that day, he sent Hornick Respondent's proposal for merit wage increases that he had planned to present at the aborted session. The next negotiations were held all day and into the evening of August 30, the day before the 1999-2001  
10 contract was to expire. Hendricks had been trying earlier, without success, to get Hornick to tell him about the SEIU plan. On this day, Hendricks had made special arrangements to have Respondent's eastern region human resources director from Charlotte, North Carolina, attend. Being a member of Respondent's corporate benefits committee, she had intimate knowledge of the problems of health care coverage.

15 At this meeting, Hornick still insisted on the SEIU plan and finally produced a copy of its summary plan description, which he had not before. Strangely, Hornick never stated what the plan would cost, not even a "ballpark" figure, insisting that Respondent would have to pre-qualify before a rate could be determined; and Hornick never articulated which variation of the plan (there were several) that he wanted. Just as strangely, Hendricks never asked what plan  
20 Hornick wanted. At any rate, with Respondent bargaining about a proposal that it had very little knowledge of, it rejected it anyway, because it allowed the SEIU International to change the plan and its rates (whatever those were) at any time and because the Union still wanted Respondent to pay 100 percent of the insurance costs (whatever those were) for both full-time  
25 and part-time employees. At least under the health insurance provision of the expiring agreement, which Respondent wished to retain, Respondent could control its insurance costs by switching insurers; and it never had to pay more than 65 percent of the cost.

30 There was no progress. Nor was there any progress on Hendricks' proposal for merit wage increases, Hornick rejecting it on the ground that he wanted something for Respondent's longer-term employees, or on PTO. There was discussion that, although PTO was limited to full-time employees, Respondent had broadened the definition to those employees who had only 32, as opposed to 35, hours of work, so more employees would be covered. Hornick, however, was concerned that Respondent would use that definition to reduce the number of hours worked  
35 by full-time employees and wanted Respondent's assurance that it would not do so.

40 The next day, the final day of the 1999-2001 contract, the parties spent almost 13 hours trying to hammer out an agreement. Many provisions were tentatively agreed in the morning and the prior day: union recognition; union security; checkoff; no-strike, no-lockout; management rights; Labor/Management Committees; union rights; probationary period; seniority; no discrimination; personnel records; grievance and arbitration; miscellaneous; and savings clause. Otherwise, the parties remained apart on the issues of wages, days off, and health insurance, although there was some movement during the session. Respondent withdrew its proposal to base compensation on merit and offered annual percentage increases  
45 based on years of employment: 3 percent in the first three years of employment; 4 percent in the fourth and fifth years; and 5 percent for employees with five or more years of service, all with maximum wage rates for each job classification. Hendricks added a signing bonus if the contract were ratified. The Union's proposal contained generally higher rates (except for licensed practical nurses), but no maximum rates. The wages scale would increase 3 percent in  
50 the second and third years of the contract.

5 The Union agreed to accept the concept of Respondent's PTO policy, but wanted part-time employees to be eligible and the maximum annual PTO days set at 14, 24, and 29 days, depending on the employee's months of service, instead of 15, 20, and 25 days proposed by Respondent. No progress was made on the issue of health insurance, with Respondent still insisting on the selection of its own plan and the exclusion of part-time employees and the Union still wanting the SEIU plan, the cost of which Respondent could not compute. The Union did, however, conditionally accept Respondent's proposal that the cut-off for full-time status be reduced from 35 to 32 hours, if Respondent agreed not to reduce employees' current number of hours worked. However, this concession meant nothing, because of the Union's refusal to agree to the exclusion of part-time employees from PTO. At the end of the session, Hendricks presented Respondent's last, best, and final offer. Hornick, without making a counterproposal,<sup>3</sup> said that he would submit it to the membership, but would not recommend it. The employees voted unanimously to reject the offer.

15 The parties had made no plans to meet in the future, and it was not until October 9 that they met again, and then only after Hornick had called Hendricks in late September and stated that he had "movement" towards Respondent's last offer. But Hornick made no counterproposal on October 9, even after Hendricks reminded him that he had said that he had "movement." Hornick then promised to make a counterproposal; and the parties broke so that he could prepare one, but he never did. The mediator reported that Hornick was not prepared to make a counterproposal that day but wanted to schedule another date, and he would give Hendricks some proposals then. Hendricks said that Hornick had told him that he was going to come to that meeting with proposals, and did not; and Hendricks was not going to waste another day coming back if Hornick was not going to have something.

25 The mediator finally worked out a new date of October 29, but on condition that Hornick send Hendricks proposals in writing before that date. Hornick explained that he had wanted to make counterproposals at the October 9 meeting, but Hendricks prevented him from doing so by failing to answer what cost savings Respondent anticipated by its proposals for the PTO provision and to eliminate part-time employees from eligibility for health insurance and PTO. Hornick explained that, without such knowledge, he could not fashion a proposal that might address Respondent's concerns. On the other hand, Hornick had never asked for this information before the meeting; and his excuse has no merit, particularly in light of his earlier promise that he would have "movement."

35 Although the parties agreed to meet again on October 29, Respondent canceled the meeting because, contrary to what the federal mediator had assured, Hornick failed to forward to Respondent any Union proposals before October 29. What followed was a letter to Hornick dated November 19, from Respondent's then counsel, Edwin Hopson, notifying the Union that "effective January 1, 2002, the Company proposes to implement a change in health insurance provided to their employees. The new plan and employee contribution levels are described in the attachment to this letter. The Company is also providing employees with the same information." He made no mention of the fact that Respondent no longer planned to cover part-time employees. Hornick did not reply.

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50 <sup>3</sup> I discredit Hornick's uncorroborated testimony that he countered with a wage proposal just one-half percent higher than Hendricks's, 3½, 4½, and 5½ percent. His alleged oral proposal was contrary to his normal method of printing his proposals, and none of his other written proposals refer to this reduced, oral counterproposal. Hendricks denied that it was made; and, based upon a review of the testimony, as well as having watched the witnesses as they testified, I have credited Hendricks whenever his testimony conflicted with Hornick's.

On December 18, Respondent and the Union met for the sixth and last time. Once again, Hendricks was expecting a counterproposal (he had been so told by the mediator in mid-November); but Hornick indicated that he was expecting some proposals from Hendricks, who, in turn, said that he had come to the negotiations expecting proposals from Hornick. Hendricks said: “[W]e’re not getting anywhere,” to which Hornick replied that he knew what Hendricks was trying to do, that he was trying to say they were at impasse and “we weren’t at impasse,” and he would give Hendricks some proposals. The Union side caucused and returned with a proposal reaffirming the Union’s earlier positions, with the following exception: “The Union proposes that the Company pays 90% and the Employee pays 10% of the cost of the premium for Health insurance either with SEIU Health and Welfare Plan or the Company’s current Health insurance plan.” Hendricks left the room with his team and returned about 30–40 minutes later, commenting that he had looked over the Union’s proposal, the Union had not made any substantial movement, and “we’re just stuck.”

Indeed, the Union’s proposal, at a minimum, increased Respondent’s cost from 65 to 90 percent, 25 percent over what it had been paying for its own insurance plan; and Hendricks still had no idea of the cost of the SEIU plan.<sup>4</sup> Furthermore, increasing Respondent’s contribution would mean that the employees would pay less, and more employees would sign up for insurance, increasing Respondent’s costs even more. Hornick replied: “I know what you’re trying to do, you’re trying to get to impasse. We’re not at impasse, I can keep proposing - I can keep making proposals all day long and I will make you some more proposals.”

The parties again separated, and later Hornick presented another proposal, this time reducing the minimum number of hours worked for full-time status from 35 to 30 hours, thus making that more employees eligible to be covered for health insurance, and adding 25 cents an hour to the Union’s prior offer of a wage scale for all of the job classifications. Hendricks contended that he did not feel that Hornick was serious about reaching an agreement, his proposal was regressive, the Union was “going backwards,” and Respondent was holding to its last, best, and final offer. Hornick answered that the Union had made two counterproposals and Respondent had made none, that Respondent was trying to get an impasse, and that “there was no impasse here, because they [Respondent] hadn’t made any counters, hadn’t made any attempt to bargain whatsoever.” Respondent left the room at that time and the meeting ended. There was no agreement to meet again.

By letter dated December 21, Hendricks wrote to Hornick that the parties were at impasse. He planned to implement the terms of his last offer, effective January 1, 2002. On January 1, 2002, Respondent changed its health insurance and implemented the PTO plan. In February, Respondent implemented the minimum and new hire rates, but it has not implemented the 3, 4, and 5 percent wage raises.

The Board defined impasse in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

...Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is

<sup>4</sup> Hornick did not give any figures for the cost of the SEIU plan, other than to say that it would be equal or less than what Respondent was then paying. However, only 20 percent of Respondent’s employees bought coverage for the insurance that Respondent provided, while under Hornick’s proposal the SEIU plan would be free or almost free; so all or almost all of Respondent’s employees were likely to participate, thus dramatically increasing Respondent’s costs.

disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

5           The bargaining history was admittedly brief, but there was ample time to reach an agreement. By starting the negotiations when they did, the parties were aware that the 1999–  
2001 agreement had a finite termination date of August 31, and the efforts of the parties were  
10           directed at that date. They seemed to have talked through by August 31 the positions that were  
important to them and spent more than 23 hours on the final two days of August pursuing those  
15           proposals. When no agreement was made then, the parties had ample time during the rest of  
the year to resolve their differences; yet, there was no substantial movement. I find that there  
was a sufficient history of bargaining and sufficient time for an agreement to be made.

15           There is nothing in the record to reveal that Respondent was not exercising reasoned  
judgment in proposing the various provisions about which the parties were at odds. Hendricks  
consistently listened to what Hornick was proposing and answered his arguments responsibly.  
On the other hand, I find Hornick’s behavior less than reasonable, particularly in proposing  
20           health insurance which had no cost and was bound to be rejected. That may have been his  
instructions from the International SEIU (“[T]he SEIU health insurance is a mandated thing that  
we are going to try and put in every contract.”); but the way he proceeded could not give  
Respondent any reasonable assurance that its past agreement, which it wanted to maintain,  
would not be more in its interests.

25           He recognized that the chasm between the positions of the parties was too deep to  
cross. He knew that the negotiations were failing and could not truly believe that he could  
somehow resurrect them by making counterproposals which made only minor concessions but  
never attacked the real problems and which in fact exacerbated the differences between the  
parties. Even the General Counsel’s brief recognized that Hornick’s belated second proposal to  
30           increase the employees’ wages more than he had originally proposed “would bring the parties  
farther apart,” not a showing that the parties were getting closer in their talks and thus leading to  
the conclusion that they were not at impasse.

35           In sum, regarding the issues of importance to the parties, as to which there was  
disagreement, Hornick clearly understood that Respondent would not accept the SEIU plan, but  
kept urging it. Hornick clearly understood that Respondent wanted to retain the latitude  
regarding health insurance and the percentages of responsibility that it possessed in the expired  
collective-bargaining agreement, yet he sought to hold Respondent responsible for 90 percent  
40           of the premium and refused to agree to the exclusion of part-time employees. Hornick clearly  
understood that Respondent was no longer willing to give as many days off as before, but  
wanted to have some outer limits (“[T]he system we had as far as accruing time off, it was better  
than what they had”) and would eliminate part-time employees, a concept that he would not  
accept. He angrily described Respondent’s treatment of part-time employees as “No benefits,  
no holidays, no nothing.” Hornick clearly understood that wages were an issue, and the Union  
had not come close to making an offer that had any reasonable chance of succeeding.

45           The only ray of hope was Hornick’s proposal that a part-time employee need have only  
30 hours of work, but that was wholly spoiled by his simultaneous proposal of even higher  
wages than he had proposed earlier in negotiations. His explanation of the benefit of his  
proposal—that he hoped that by making it, Respondent would reject it but move on other  
50           items—was nonsensical and unreal. He was looking for an appearance that the Union could  
resolve the differences over these items, but offered not counterproposals to get the parties

closer but counterproposals which were unhelpful and only emphasized how far apart they were.

5 Regarding the contemporaneous understanding of the parties, it suffices to repeat that, three months after the 1999–2001 agreement expired, in October, the parties met and could make not even one proposal. An agreed-upon meeting later in October had to be postponed because the Union had nothing to offer. Two months later, in December, the first minutes of negotiations were taken up with the parties' bickering about who should make a proposal, with neither ready to do so; and then the Union making a regressive one, solely for the purpose of  
10 attempting to prevent an impasse, rather than seeking an agreement. I find that there remained no "ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions." *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966). Until the Union changed its positions in a meaningful way, further bargaining would have been futile. *Aalsey Refractories Co.*, 215 NLRB 785 fn. 1 (1974).

15 I conclude that, solely by examining the bargaining history, there was an impasse and that Respondent was entitled under law to put into effect its last proposal. The complaint, however, alleges a number of other unfair labor practices which, the General Counsel contends, bear upon the question of whether Respondent bargained in good faith. If Respondent  
20 committed other unfair labor practices, the General Counsel contends, there could be no lawful impasse. I thus turn to those other allegations.

25 In about mid- to late January, according to quality living assistant (QLA) Lorna Blevins, she met with Chrissy Riggins, clinical supervisor of two of the Princeton homes, to discuss some grievances (Blevins could not recall what they involved) filed by an employee. After their meeting

30 When we came out of the office we was walking into the kitchen. And out of the blue she just said, well you all dont have a union. And thats all - -

35 The complaint alleges this as a Section 8(a)(1) violation. Riggins could recall no such conversation and testified: "There was not a whole lot of Union activity going on at that time and I wouldn't - I just can't foresee even making a statement to that effect. There was a Union in place so it makes no sense." I agree. I have no doubt that Blevins was attempting to tell the truth. She had quit her job and had no reason to fabricate her testimony. But this statement, "out of the blue," does not make sense. It has no context. There is nothing that was happening at that time or occurred in the conversation that gives it meaning. I find that Riggins was truthful and did not say it. I dismiss this allegation.

40 I find, to the contrary, that Mary McPherson was not truthful. She was a former unit employee who had signed an investigatory affidavit taken by a Board agent. When she testified, she had been promoted to a supervisory position. Her interests being completely different, she feigned, very badly I might add, an utter loss of memory about what she had said in her affidavit, except to say that "when the Labor Board questioned me, they more or less asked the questions  
45 and answered the questions." Finally, she testified that the affidavit contained truthful statements at the time. I do not believe her current lack of memory and believe her affidavit. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Accordingly, I find that Mary Bea Eaton, Respondent's regional vice-president, said to her on June 6 or 7:

50 [A]s of July 1, the non-Union Thompson Home in Glenwood, West Virginia would be starting out at seven dollars an hour, and if we were non-Union, we would get a one dollar an hour across-the-board. . . .[S]he had talked with Ruth Ann

Watkins at Bethany about decertifying the Union for years, and she said if the Princeton area would decert, we could give them more money. . . . [S]ince the last negotiations, she had tried to get more money, but she couldn't because we were Bargaining Unit employees.

5 Respondent did not call Eaton as a witness. In July, Respondent raised the starting wage rate of the Thompson home employees to \$7.00 an hour. I conclude that Respondent violated Section 8(a)(1) of the Act by promising that it would increase their wages if they would decertify the Union.

10 On June 12, the Union filed a class action grievance alleging that Respondent had manipulated the schedules of its Princeton employees in order to avoid paying them overtime. The Union contended that Respondent violated Article 13, Section 6, of the collective-bargaining agreement which provided, in part, that "[t]he work schedule shall be posted for a two-week period at least two weeks prior to the beginning of the schedule. An employee's posted schedule shall not be changed without the employee's approval." Changes in regular schedules had to be discussed in the Labor/Management Committee prior to implementation. Section 5 provided that overtime hours shall be equitably distributed, there shall be no mandatory overtime other than in emergency situations, and employees' schedules shall not be altered to avoid the payment of overtime.

15 At the first and second steps of the grievance procedure, Respondent denied the grievance on the ground that posted schedules had not been changed without employee approval. On July 12, the Union submitted a written request for copies of all previous schedules and time sheets for the past two years for Princeton Group Homes. By letter dated August 3, Pamela Hartline, human resources manager, replied: "In order to determine the legitimacy of this grievance, timesheets and schedules for the period in question should be sufficient to prove or disprove your point." Hartline requested that the Union "narrow [its] request to copies of materials that would have a direct correlation to the complaint made." Hornick replied on August 8 that two years of information was needed to establish a past practice. Respondent did not reply and did not supply the information.

25 The Union was trying to establish that, in the years before, the Homes did not change their schedules significantly, yet recently they were changing them all the time, without any input from the Labor/Management Committee. The time sheets would show that people had been denied overtime. The schedules would show that work had been scheduled, and the employees had been manipulated. Workers bid for schedules, for example, Monday through Friday, 9:00 a.m. to 5:00 p.m., and then were sent home one weekday so they could be assigned to work on a Saturday because the Home was short staffed. Normally, that would have been the employees' sixth day, paid at the overtime rate.

30 The Union's second request for information concerned a class action grievance that it filed on August 3, asserting that Respondent had changed its past practice of paying overtime for working on client vacations. When clients at one of the homes went on vacation, for example, to the beach for five days, employees would accompany them and care for them around the clock. Previously, according to the Union, the employees would be paid for a 12-hour day, or in this example 60 hours, 40 hours at straight time and 20 hours at time and one-half. However, Respondent refused to pay overtime, and the Union filed a grievance. On August 5, the Union requested the Church Lane group home payroll records for May through July of 1999 and 2000 to support the claim that there was a past practice of paying the 10-12 unit employees who worked at the Church Lane home in Princeton. Respondent did not supply the requested information.

The Board wrote in *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994):

5 [I]t is well settled that an employer, on request, must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty to provide information includes information relevant to contract administration and negotiations. *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987); and *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983).

10 It need not be shown that the information, if given, would aid the requesting party in advocating its grievance. It may be relevant for the purpose of giving that party information which would dissuade it from wasting its time and money in going forward with a grievance that would not be successful. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437.

15 The standard of relevancy is very broad when the information sought concerns the terms and conditions of employment within the bargaining unit. A party need not normally show specifically the relevance of what it demands. Rather, relevancy is presumed because the information goes to the core of the employer-employee relationship. The burden thus falls upon the employer to prove a lack of relevance. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

20 The Union's first information request, for the schedules and timesheets for the Princeton unit for the previous two years, was relevant to decide if Respondent had engaged in changing its employees' schedules without their approval or without prior discussion by the Labor/Management Committee or in order to avoid the payment of overtime to its employees. The second information request, for payroll records for the Church Lane home for the summer months of 1999 and 2000, was relevant to show whether Respondent had a past practice of paying overtime for client vacations.

25 I reject Respondent's contention that the Union's first information request was overbroad or unduly cumbersome. Respondent did not support this claim with any facts. Respondent had the burden of showing that compiling the requested work schedules was burdensome, *Tower Books*, 273 NLRB 671, 671 (1984); and it failed to do so. Regarding the second grievance, Respondent contends in its brief that it never denied a past practice of paying employees overtime for employee vacations with clients. However, it never took that position before this unfair labor practice proceeding. In any event, the Board does not pass on the merits of a union's claim of breach of a collective-bargaining agreement in determining whether information relating to the processing of a grievance is relevant. *Shoppers Food Warehouse*, at 259; *Reiss Viking*, 312 NLRB 622, 625 (1993).

30 That neither claim was processed to the third step of the grievance procedure is inconsequential. First, Respondent never gave the Union the information it needed to assess the validity of the grievance and to support it in the grievance machinery. In such event, the time requirements of the grievance machinery could well have been waived. Second, even assuming that the time requirements were strictly applied, the Union nonetheless had the duty to administer the contract to ensure that Respondent was complying with it. The Union had the right to the information sought by both requests to determine whether there existed facts to support the filing of a new grievance, with or without the pendency of an earlier grievance. The Union is entitled to prove its case before an arbitrator with evidence, or at least know that it has no claim, in which event it can avoid filing a grievance. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

The 1999–2001 collective-bargaining agreement provided that wages were paid according to a schedule setting forth the rate for a new hire, the rate upon completion of the probationary period, and the rates as of the anniversary date of hire from the first to the ninth years. Thus, for example, a support associate at the Beckley home who was employed for three  
 5 years automatically received an increase from \$6.12 to \$6.45 per hour. This method had been established since at least 1994. Since the expiration of the contract, Respondent failed to pay the employees of its Beckley and Princeton homes their anniversary date-of-hire wage increases. (I assume, from the limitation of the complaint’s allegation to these two facilities only that similar wage increases were paid to all of Respondent’s employees in its other facilities.)

10 The increases are due because of employees’ length of service. These increases are not, as Respondent contends, annual wage increases due to all employees, regardless of their years of service. Respondent’s defense that increases were limited to the period between the commencement and termination dates of the agreement is based on Article 25, Section 2, which  
 15 reads

20 Any bargaining unit employees who are off the scale will receive a three percent (3%) lump sum payment on their anniversary date each year of these Agreements. Full time employees will receive three percent (3%) based on no less than 2080 hours or actual hours worked, whichever is greater and part time employees shall receive three percent (3%) on actual hours paid for the previous twelve (12) months.

25 This provision, at best, limits increases to the years 1999–2001 only as to those employees who have reached their 10th year of employment. There is no similar language in the section dealing with employees with less than 10 years of employment. Furthermore, the paragraph does not limit the Board’s ordinary rule that the provisions of an expired agreement still apply after the expiration date, unless bargaining over a change of the provision results in an impasse. In fact, as found below, Respondent changed its insurance carrier long after the  
 30 1999–2001 agreement expired and had no qualms in arguing in its brief that it was justified in making that change.

35 I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay the increases to all its unit employees at these homes. The granting of wage increases was a term and condition of employment that was unilaterally changed by Respondent without any prior notice to the Union. *Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 198 (1991). “[W]henver the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse . . . during the period of collective bargaining.”  
 40 *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970). “[T]he vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997) (quoting *NLRB v. Dothan Eagle*, 434 F.2d at 98).

45 The General Counsel also contends that the statements by management that employees would not get their wage increases until a new contract was signed violated Section 8(a)(1) of the Act. On October 10, Riggins told an employee that no one who was hired after August 31 would be paid raises until there was a new contract, because Respondent “did not have a pay scale to go by.” Home managers Connie Lester and Kerrie Steele told employees in October  
 50 that they would get no increase until Respondent got an agreement. The lack of an agreement could be the fault of either Respondent or the Union. But if there were no Union, there would not

have to be any agreement at all. Therefore, it was the Union that was responsible for the discontinuance of employees' regularly scheduled wage increase. By erroneously claiming that the lack of a contract prevented such an increase, and by linking that circumstance to the fact that the Union had not agreed to a new contract, Respondent violated Section 8(a)(1) of the Act.  
5 *Laidlaw Waste Systems*, 307 NLRB 52, 54 (1992).

Since at least 1994, the Union used a grievance form which had its insignia, name, and address at the top left, and spaces for the Union representative's signature, the article of the contract that was allegedly violated, the statement of the grievant and remedy sought, and each  
10 side's position at the four steps of the contract's grievance procedure. After the contract expired, Respondent refused to accept the Union grievance forms. Anita Coeburn, Beckley homes area program administrator, returned three grievances to Allen on September 21, saying that they had to be transferred to Respondent's "Employee Concern" form, which it used at its nonunion facilities. That form omits any reference to the Union, it does not contain a section to designate  
15 the article of the agreement that was violated, and there is no space for the Union representative's signature.

On October 10 Riggins returned the Union grievance forms to Dana Reed, QLA and grievance chairperson for the Princeton homes' employees, with the comment that Respondent was no longer accepting grievances because "we did not have a contract." Reed could transfer the concern over to the Employee Concern form and then Respondent would see what it could do about it. When QLA David Haynes asked Travis Roberts, Princeton homes quality employment coordinator, on October 10 why management had not written an answer on a union grievance involving the call-out procedure, Roberts replied that "we have been told not to accept  
20 grievances until the contract is settled." Several minutes later, Wanda Fowler, Princeton homes employment supervisor, told Haynes that "they were not accepting the grievances any more" and that he could instead fill out an Employee Concern form.

The parties had an established practice of using the Union grievance form for the filing and processing of grievances under prior collective-bargaining agreements, and Respondent did not give the Union prior notice or any opportunity to bargain over the change of the forms. Respondent's statements to employees that it would not accept union grievance forms and that they would have to use the nonunion Employee Concern form until the parties reached agreement on a new contract not only denigrated the Union by suggesting to employees that they no longer had access to the grievance procedure in which the Union would continue to participate as their representative. Even Respondent's form, by eliminating all references to the collective-bargaining agreement, denied the existence of the Union; and the supervisors denied the existence of the Union as the employees' collective-bargaining representative. *Circuit-Wise, Inc.*, 306 NLRB 766 (1992). Respondent would now determine how "concerns," not  
30 "grievances," would be processed.  
35  
40

Respondent's conduct thus reflects not immaterial and insignificant changes in employees' terms and conditions of employment, as Respondent contends, but an attack on the Union and the collective-bargaining process itself. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing use of the union grievance forms and Section 8(a)(1) of the Act by its supervisors' statements effectuating that policy.  
45

The final unfair labor practice allegation is that Respondent unlawfully and unilaterally changed its health insurance. The relevant provision of the 1999-2001 agreement, quoted above at page 2, permitted Respondent to change its health plan, as it had done each year and as Hornick admitted that Respondent had the right. An arbitrator had ruled that Respondent could change the health insurance and contribution level once a year. Past practice thus  
50

validated Respondent's unilateral implementation. *Post-Tribune Co.*, 337 NLRB No. 192 (2002). The Union was given ample notice that Respondent intended to make the change and failed to object to it. *Stone Container Corp.*, 313 NLRB 336 (1993). I conclude that Respondent did not violate the Act and dismiss this allegation. In doing so, I reject the General Counsel's contention that the application of this provision is limited to the exact dates of the expired agreement, relying on Article 25, Section 5, that "During the term of these Agreements, benefits will be made as set forth in Appendix B [Benefits], which is hereby incorporated by reference and made a part of these Agreements." At least up until December 19, Respondent continued to cover its employees for health care.

Hopson's letter to the Union, informing it of the change of its health insurance, did not advise it of the fact that the insurance would no longer cover part-time employees as of January 1, 2002, which the parties stipulated is what happened. The record does not show when that decision was made and which part-time employees were excluded, those with less than 35 or those with less than 32 hours per week, and whether there were any part-time employees who previously purchased insurance and were then excluded from coverage. That being so, the change may well have been made after the parties reached their impasse, and on this record I must so assume. Accordingly, Respondent had the right to implement such changes in health insurance, assuming that there was a lawful impasse; and I return now to the issue concerning whether the violations that I have found prove that Respondent's bad faith was such that no lawful impasse may be found.

The unfair labor practices were: a supervisory statement that employees would receive a pay raise if they decertified the Union; refusal to provide information relating to grievances; discontinuance of some employees' customary pay raises without bargaining with the Union; refusal to accept union grievance forms following expiration of the contract; and some statements of supervisors which violated Section 8(a)(1). There is no evidence that these had any impact on the bargaining. The General Counsel also urges that consideration be given to the withdrawal of recognition of the Union which represented the employees of the Greenbrier Day Program in Lewisburg, a subject of an unfair labor practice charge that was settled. Nonetheless, the General Counsel contends that Respondent's conduct demonstrated its bad faith in bargaining, a factor in determining whether a valid impasse existed under *Taft Broadcasting*.

By letter dated June 1, Hendricks advised Hornick that Respondent had received objective evidence that a majority of the employees of the Greenbrier Day Program in Lewisburg no longer desired to be represented by the Union. He wrote that Respondent would not enter into negotiations concerning that unit for a successor collective-bargaining agreement, but would honor the terms of the agreement until its August 31 expiration date. Hornick wrote back on August 24, almost three months later, that he had "in [his] hand . . . a petition with an overwhelming majority of the workers' signatures." Although the letter stated that the petition was enclosed, Respondent, while admitting that it had received the letter, denied that it had ever received the petition; and Hornick's letter does not indicate at the end an "encl.," not did the Counsel for the General Counsel call as a witness Hornick's secretary who sent the letter. I find that the petition was not mailed.

I am, however, satisfied that such a petition was signed on July 23 and 24 by 11 of the 14 employees who were employed in the unit on September 1. Hornick testified that, at the negotiations of August 30, he raised the issue of the Greenbrier Day Program as an outstanding issue. He accused Hendricks of taking the position that the Union did not represent the employees after the expiration of the contract, yet he produced no petition showing that that was true. He then handed to Hendricks across the table his July petition as proof that the Union

continued to have the support of the employees. Hendricks, Hornick testified, actually held the petition in his hand. But Debra Allen, a QLA and Union executive board member for the Beckley unit, only partially corroborated Hornick's testimony. She testified that Hornick "put [the petition] on the table toward" Hendricks, who was sitting across from Hornick, and told him that he had signatures of the employees saying that they were interested in the Union. She did not testify that Hornick pushed it to Hendricks or that Hendricks ever actually looked at it or held it.

Once again, Hendricks denied that he saw the petition and, by letter dated September 1, advised Hornick that Respondent's "withdraw[al] of recognition has occurred and the Greenbrier Day Program is [no] longer represented by District 1199." I find that Hendricks was not so foolish that he would have withdrawn recognition if he truly had seen or possessed the employees' later petition. In fact, Hendricks called Hornick's "bluff" when he claimed on August 31 that he had a petition. Hendricks suggested that there be an election, to which Hornick replied that he would think about it; and the issue was never raised again. I thus believe that Hendricks did not see Hornick's petition until preparation for the trial.

However, that does not relieve Respondent from responsibility under the Act. *Levitz*, 333 NLRB No. 105 (2001),<sup>5</sup> requires Respondent to establish the "actual loss of majority support" before it could lawfully withdraw recognition from the Union. Here, although Respondent received a petition signed allegedly<sup>6</sup> by 9 employees in May that they did not want the Union to represent them, the Union had a later petition in July from 13 employees that they did. Respondent, therefore, has not met its burden of proof that the Union had, in fact, lost majority support when, on September 1, Respondent withdrew recognition. The fact that Respondent may have had an honest, but mistaken, belief in May that the Union had lost majority support based on its earlier antiunion petition is irrelevant. *Levitz*, slip op. at 8. Even relying on the petition that it possessed, on September 1, there were 14 employees in the unit and only 6 of them had signed Respondent's May antiunion petition. Respondent's withdrawal of recognition thus violated Section 8(a)(5) and (1) of the Act, with or without *Levitz*.

However, Hornick, by his own admission, continued to bargain for the Greenbrier employees without regard to Respondent's withdrawal of recognition. That issue was mentioned once, at the negotiations of August 30, and was quickly dropped. The other unfair labor practices were never even raised, including the change of insurance coverage which was announced a month before the parties' last negotiating session.. There is no presumption that an employer's unfair labor practices automatically preclude the possibility of meaningful negotiations and prevent the parties from reaching good-faith impasse. *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1569-1570 (10th Cir. 1993); *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enfd. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982). I conclude that Respondent's unfair labor practices did not affect the impasse, because they did not directly impede negotiations and "did not contribute to the deadlock in negotiations so as to prevent a lawful impasse." *Litton Systems*, 300 NLRB 324, 333 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992). The impasse thus was not the result of bad-faith bargaining. Compare *Pertec Computer Corp.*, 284 NLRB 810 (1987). Accordingly, there was an impasse in bargaining which permitted Respondent to implement its last offer or any part of it, and I dismiss the remaining allegations of the complaint.

<sup>5</sup> Respondent contends that *Levitz* should be overruled, a contention made solely to preserve the issue should exceptions be filed to this Decision. Obviously, as an Administrative Law Judge, I cannot overrule a Board decision.

<sup>6</sup> There was no proof that, as of the date of the petition, there were signatures of nine employees on the petition or that whatever number of employees who signed the petition constituted a majority of the employees.

## Remedy

5 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. In particular, I shall recommend that Respondent immediately restore and place in effect for the Beckley and Princeton unit employees all wage increases or other benefits they suffered by discontinuance of their anniversary date-of-hire wage increases since September 1, 2001, which were due under the 1999-2001 collective-bargaining agreement, and make them whole for any wage increases which were not paid to them as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also furnish the Union with copies of time sheets and schedules for the 2-year period before July 12, 2001 for its Princeton unit employees, and the payroll records for the months of May through July in 1999 and 2000 for its Princeton unit employees at the Church Lane Group Home.

15 On these findings of fact and conclusions of law and on the entire record, including the briefs filed by the General Counsel and Respondent, and my observation of the witnesses as they testified, I issue the following recommended<sup>7</sup>

## ORDER

20 Respondent Rescare West Virginia d/b/a Voca Corporation of West Virginia, Inc., its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

(a) Informing its employees that they would receive a wage increase if they decertified the Union as their collective-bargaining representative.

30 (b) Informing its employees that it was not accepting their grievances, or that they would not receive their anniversary date-of-hire wage rate increases, until Respondent and the Union signed a collective-bargaining agreement.

35 (c) Failing and refusing to provide the Union with copies of time sheets and schedules for the 2-year period before July 12, 2001 for its Princeton unit employees and the payroll records for the months of May through July in 1999 and 2000 for its Princeton unit employees at its Church Lane Group Home.

40 (d) Failing and refusing to bargain in good faith with the Union by denying its Beckley and Princeton unit employees their anniversary date-of-hire wage rate increases and by changing the grievance procedure, refusing to use the standard Union grievance form and insisting that an internal form called "ResCare Employee Concern Form" be utilized, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

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

50 <sup>7</sup> 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.

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

5 (a) Upon request, furnish the Union with copies of time sheets and schedules for the 2-year period before July 12, 2001 for its Princeton unit employees and the payroll records for the months of May through July in 1999 and 2000 for its Princeton unit employees at its Church Lane Group Home.

10 (b) Restore and place in effect for its Beckley and Princeton unit employees all wage increases or other benefits they lost by its discontinuance of their anniversary date-of-hire wage increases since September 1, 2001, which were due under the 1999-2001 collective-bargaining agreement between it and the Union, and make them whole for any wage increases which were not paid to them, in the manner provided in the Remedy section of this Decision.

15 (c) 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 backpay due under the terms of this Order.

20 (d) Within 14 days after service by the Region, post at its facilities in Beckley, Oak Hill, Lewisburg, Summersville, Clarksburg, Logan, Morgantown, and Princeton, West Virginia copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 7, 2001.

35 (e) 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 Respondent has taken to comply.

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

45 Dated, Washington, D.C. February 6, 2003

Benjamin Schlesinger  
Administrative Law Judge

50 <sup>8</sup> 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 inform our employees that they would receive a wage increase if they decertified the District 1199, WV/KY/OH, The Health Care and Social Service Employees Union, SEIU, AFL-CIO-CLC (Union), as their collective-bargaining representative.

WE WILL NOT inform its employees that we were not accepting their grievances, or that they would not receive their anniversary date-of-hire wage rate increases, until we and the Union signed a collective-bargaining agreement.

WE WILL NOT fail and refuse to provide the Union with copies of time sheets and schedules for the 2-year period before July 12, 2001 for our Princeton unit employees and the payroll records for the months of May through July in 1999 and 2000 for our Princeton unit employees at our Church Lane Group Home.

WE WILL NOT fail and refuse to bargain in good faith with the Union by denying our Beckley and Princeton unit employees their anniversary date-of-hire wage rate increases and by changing the grievance procedure, refusing to use the standard Union grievance form and insisting that an internal form called "ResCare Employee Concern Form" be utilized, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

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

WE WILL upon request, furnish the Union with copies of time sheets and schedules for the 2-year period before July 12, 2001 for our Princeton unit employees and the payroll records for the months of May through July in 1999 and 2000 for our Princeton unit employees at our Church Lane Group Home.

WE WILL restore and place in effect for our Beckley and Princeton unit employees all wage increases or other benefits they lost by our discontinuance of their anniversary date-of-hire wage increases since September 1, 2001, which were due under the 1999–2001 collective-bargaining agreement between us and the Union, and make them whole for any wage increases which were not paid to them, with interest

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RESCARE WEST VIRGINIA D/B/A VOCA  
CORPORATION OF WEST VIRGINIA, INC.

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](http://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.

**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.