JD(SF)–22–10
Soldotna, Alaska

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

CENTRAL PENINSULA GENERAL HOSPITAL

and

Cases 19-CA-31917
19-CA-31968
19-CA-32046

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 341

David Schaff, Esq. of Anchorage, Alaska
and *Susannah Merritt, Esq.*
of Seattle, Washington, for the General Counsel

Heidi Drygas, Esq. of Anchorage, Alaska,
for the Charging Party.

James Juliussen, Esq. (Davis, Wright, Tremaine, LLP)
of Anchorage, Alaska for the Respondent

DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Kenai, Alaska on February 23, 2010, upon the second consolidated complaint (Complaint), issued on October 30, 2009, by the Regional Director for Region 19.[1] The consolidated the complaint issued on September 28, 2009 in cases 19-CA-31917 and 19-CA-3168 together with an additional charge in case 19-CA-32046, based upon charges filed by Laborer's International Union of North America, Local 341 (Union) with a second order consolidating Cases, consolidated complaint and notice of hearing in cases 19-CA-31979, 19-CA-32023 and 19-CA-32089 based upon charges filed by the Alaska Nurses Association.[2]

The Complaint alleges that Central Peninsula General Hospital (Respondent) violated Section 8(a)(1) and (3) of the Act by interrogating an employee about her union activities, by promulgating and maintaining a rule requiring employees to address work-related complaints exclusively through its supervisory chain of command, by promulgating and maintaining a rule

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[1] GC Exh. 1(y).

[2] The charges in the second order consolidating cases and consolidated complaint filed by the Alaska Nurses Association in cases 19-CA-31979, 19-CA32023 and 19-CA-32089 were withdrawn pursuant to a non-Board settlement agreement entered into by the parties prior to the hearing. Accordingly, at the hearing Counsel for the General Counsel moved to sever cases 19-CA-31979, 19-CA32023 and 19-CA-32089 from this proceeding. There being no objection, the motion was granted.

prohibiting solicitation on an employee's duty time, by issuing discipline to Janet Nilles (Nilles) for violating its no solicitation rule and for engaging in protected activity, by denying benefits to Nilles and by reducing Nilles hours because of her protected activities. In its answer, as amended, Respondent admitted most of the operative allegations of the Complaint but denied it had violated the Act.

Upon the entire record herein, including the briefs from the General Counsel and Respondent, I make the following.

Findings of Fact

I. Jurisdiction

Respondent admitted it is an Alaska corporation with an office and place of business located in Soldotna, Alaska, where it is engaged in the operation of an acute care hospital. Annually, Respondent in the course of its business operations derived gross revenues in excess of $250,000 and purchased and received at its facility goods valued in excess of $50,000 in directly from points outside the State of Alaska.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

This case involves an organizing campaign that was conducted by the Union at Respondent among its non-professional employees, Respondent's maintenance and enforcement of its non-solicitation policy and its Complaint Resolution Policy and the discipline it issued to its unit clerk Janet Nilles pursuant to its non solicitation policy. Nilles has been employed by Respondent since September 2007. Nilles was supervised by Suzanne Baxter (Baxter), the Director of Surgical Services and an admitted supervisor. Respondent's CEO was Ryan Smith (Smith) and Respondent's HR Director was Debbie Horner (Horner).

In the spring of 2008 the Union began organizing Respondent's non-professional employees. In response to the Union's organizing campaign, Respondent began conducting meetings with its employees that were conducted by CEO Ryan Smith. At one such meeting in late August 2008, Smith said that his prior experience dealing with the Teamsters' Union at South Peninsula Hospital was not good. In response Nilles spoke up at this meeting and said her experience with the Teamsters Union at South Peninsula Hospital was good and that her health insurance premiums at South Peninsula Hospital were three times less than those at Respondent and that there was a grievance procedure at South Peninsula Hospital.

Respondent also sent employees several anti-union emails from August 2008 to June 2009.[3]

In a series of emails[4] Respondent's labor consultant Rebecca Smith (Smith) and Respondent's Human Resources Vice President Sally Walker (Walker) discussed Nilles. On April 28, 2009, Smith told Walker, "You will be having trouble with Janet Nilles. She is going after Charlie (Franz)[5] to sway HP people. I will follow up more tonight. Can we send her back to NC?" (North Carolina) Walker responded, "We are aware of Janet. Are you aware of any specific comments she is reported to have said about Charlie? I she trying to sway HP staff when she goes to their home as a representative of LL341[6] or is she making the comments while at work."

Between September and November 2008 Nilles passed out authorization cards for the Union at Respondent's facility on at least 10 occasions. On November 13, 2008, while on a lunch break, Nilles approached Respondent's Dishwasher, Evelyn Moran (Moran) who was standing outside the cafeteria. Nilles asked Moran if she wanted to sign an authorization card. Moran declined. A few minutes later, when Nilles walked out of the lab, Moran pointed at her and said "That's the one who tried to get me to sign a union card."

The following day in the cafeteria Moran asked Nilles what department she worked in and Nilles replied Day Surgery. An hour later Nilles' supervisor, Baxter called Nilles into her office. There Baxter said that she had received a couple of complaints from Housekeeping, Registration and Environmental Services departments about Nilles handing out union cards. Baxter gave Nilles a corrective action[7] which provided that she was being disciplined for violating Respondent's policy CP-105 which provides that "no individual shall be permitted to solicit CPGH employees during any employee duty time." The corrective action also noted that "It was reported to me today by Human Resources that you have approached several hospital employees during working hours soliciting their signatures on union cards." According to the corrective action, "Several employees have reported to their supervisors that they are uncomfortable being constantly approached at work about union activities." At the end of the meeting Baxter said to Nilles, "You are not going to hand out any more union cards are you." While Baxter denied interrogating Nilles about Nilles' union activities, she admitted that she discussed with Nilles' the item on the corrective action about approaching employees about signing union cards. Baxter at the same time denied asking Nilles about handing out union cards. Given this inconsistency, I do not find Baxter's testimony credible and I will credit Nilles version of this conversation.

Respondent's no solicitation policy[8], CP-105, provides:

5. <u>Employees</u>. No individual or organization shall be permitted to solicit CPGH, Inc., employees during any employee's duty time. The Administration may make alternative arrangements for charitable organizations or individuals seeking to make charitable solicitations to CPGH, Inc. employees.

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[3] GC Exh. 2.
[4] GC Exh. 11.
[5] The Director of Heritage Place, a nursing home associated with Respondent.
[6] Laborers Local 341.
[7] GC Exh. 3.
[8] GC Exh. 3(a).

Respondent revised CP-105 on September 24, 2009. The revised policy was not physically distributed to employees nor was notice of the revision e-mailed to employees. Rather Respondent put the revised policy on its intranet z drive that includes all of Respondent's policies. Employees have access, while at work to Respondent's intranet. Revised CP-105 provides:

> 5. Employees. No individual or organization shall be permitted to solicit CPGH, Inc., employees during any employee's working time, including the working time of any employee making a solicitation or the working time of any employee to whom the solicitation is directed. The term "working time" does not include an employee's authorized lunch or rest breaks or other time when an employee is not required to be working. The Administration may make alternative arrangements for charitable organizations or individuals seeking to make charitable solicitations to CPGH, Inc. employees.

On February 2, 2009, Nilles discovered that she had not received a quarterly bonus[9] from Respondent. Nilles made inquiry in the HR department and a few days later Kaylee Hilton, an HR representative, told Nilles that she did not receive a bonus since she was under discipline.[10]

On April 1, 2009, Baxter spoke with Nilles and said she had spoken to Horner in HR and that Nilles was not yet off discipline and it could go on for six to nine months. Respondent's HR Director Debbie Horner admitted that employees are rarely held in disciplinary status for longer than six months and only when the discipline is for something egregious.

Horner claimed that Nilles' disciplinary status was extended because another complaint about Nilles was received in January 2009. No evidence was adduced concerning the nature of the complaint or whether it was investigated. Nilles was never informed of the alleged January 2009 complaint. Nilles was removed from discipline on July 14, 2009.[11]

As a result of the November 14, 2008 discipline, Nilles lost three bonuses from Respondent totaling $250. Respondent's fiscal year runs from July 1 through June 30. Horner confirmed that Nilles lost bonuses through the fourth quarter of 2009 (April through June 2009) since she was under discipline. However, Horner later claimed that Nilles received the $50 fourth quarter bonus based upon payroll records[12] reflecting that Nilles received a $504.76 year end bonus which Horner concluded must have included the $50 quarterly bonus. However the payroll record does not break the $504.76 bonus into year end and quarterly portions. Horner said that the year end bonus was calculated on the number of hours an employee worked during the fiscal year. Thus a full time employee would earn the full $500 bonus but an employee working half time would earn only $250.

On March 24, 2009, Nilles learned that her hours were being changed from 11 a.m. to 6 p.m. to 2 p.m. to 6 p.m. On March 27, 2009 Nilles spoke to Baxter and said that she had originally been hired to work from 2:30pm to 6pm. She added that her hours were changed to 1pm to 6pm in January 2008 and then changed again to 11 a.m. to 6 p.m. in October 2008. Nilles asked Baxter if she could keep her 11am to 6pm shift and Baxter said she could not but

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[9] GC Exh. 6.
[10] GC Exh. 7.
[11] GC Exh. 10.
[12] Resp. Exh. 5.

she could work from 1 p.m. to 6 p.m. Nilles asked Baxter if they could follow up on her discipline. Baxter said everything had been sent to HR. I credit Nilles testimony.

Baxter claimed that she cut Nilles' hours in March 2009 when another employee, Laurie Kesner (Kesner), left her position in Day Surgery and was replaced by Nathalie Carmichael (Carmichael). Kesner's hours had been 6:30 a.m. to 2:30 p.m. According Baxter, Nilles' hours were changed in January 2008 from her start time of 2:30 p.m. to 1 p.m. so that Kesner could have a lunch break. While in Day Surgery, Kesner began working two hours of her shift in Pre-Op. Baxter claimed that Kesner's two hours in Pre-Op, from 11 a.m. to 1 p.m., was the rationale for changing Nilles' start time from 1 p.m. to 11 a.m. in October 2008. Baxter claimed that when Carmichael was hired, Baxter did not know if Carmichael would work in Pre-Op for two hours as Kesner had. Baxter said she cut Nilles' hours because she did not want employees' hours to overlap when she did not know what Carmichael would be doing. Yet in an email to employees dated March 26, 2009, Baxter touted Carmichael's skills as including Pre-Op experience.[13] However, Carmichael has not performed any clerical duties in Pre-Op to date.

Respondent's Complaint Resolution Policy, HR-212[14] in effect since at least 2007 provides:

> CHP will provide employees with an opportunity to present their concerns and complaints to their supervisor in an informal discussion, information gathering, and resolution process. When an issue or complaint cannot be resolved with the Department Director following the informal process the employee must then exercise the complaint resolution process outlined below. This complaint resolution process shall be the exclusive means for resolving claims that arise in the workplace.

Respondent rescinded HR-212 on February 19, 2010 except for employees who are already utilizing the complaint resolution process.

B. The Analysis

1. The Alleged November 14, 2008 Interrogation

At paragraph 6 of the Complaint it is alleged that on November 14, 2008, Respondent through Baxter interrogated Nilles about her union activities. Respondent contends that this allegation is barred by Section 10(b) of the Act and denies that Baxter engaged in any interrogation.

Section 10(b) of the Act provides:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

However, Section 10(b) is not jurisdictional. It is an affirmative defense and, if not timely raised as an affirmative defense in the answer or litigated at the trial, it is waived if first raised in the brief to the ALJ. *Public Service Co.,* 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833 fn1 (1993).

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[13] GC Exh. 15.

[14] GC Exh. 1(s) at Appendix A.

In the instant case, Respondent raises the 10(b) issue for the first time in its post-hearing brief. In none of its answers[15] is a 10(b) defense raised nor was the matter litigated at the trial. Having failed to raise Section 10(b) as an affirmative defense to the charge in case 19-CA-31968 such a defense has been waived and cannot be considered.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000) the Board discussed the test to determine whether interrogation is unlawful under Section 8(a)(1) of the Act. In *Westwood* the Board applied the totality of the circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
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> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.[16]

The Board added:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.[17]

In this case there is evidence from the emails of Respondent's labor consultant Smith and Respondent's Human Resources Vice President Walker that they had singled Nilles out because of her union advocacy and that there was hostility toward her union activity. Respondent's CEO Ryan Smith also disclosed his hostility toward unions in his employee meeting attended by Nilles. Baxter was a high level manger in charge of several departments and 40 employees. The interrogation took place one on one in Baxter's office and was designed to ensure that Nilles did not engage in further union activity. Clearly, the purpose of this interrogation was to chill Nilles' rights to engage in Section 7 activity and violated Section 8(a)(1) of the Act as alleged.

2. The Complaint Resolution Policy

In *Martin Luther Memorial Home, Inc.,* 343 NLRB 646 (2004) the Board held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Board starts with the principle that a rule is unlawful if it *explicitly* restricts

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[15] GC Exhs 1(u), 1(v), 1(aa).
[16] *Westwood* at page 939.
[17] *Id*. at page 940.

activities protected by Section 7. However, if the rule does not explicitly restrict activity protected by Section 7, a violation depends on a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

One of the employer's rules in *Martin Luther King* at 654-655 provided: "Selling or soliciting anything in the building or on company property (the premises) whether you are on duty or off duty, unless you have been given written permission by the Administrator." The Board affirmed the ALJ who reasoned that, "Given its present form, it is not "far-fetched" that reasonable employees could conclude that some Section 7 activity could be covered by this rule. . . ."

Another employer rule in *Martin Luther King* at 655 provides: "Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting." Again the ALJ was affirmed by the Board when he found:

> In my opinion this rule can reasonably be read as encompassing Section 7 activity. For example, the rule as written would prohibit employees from engaging in protected concerted activities concerning wages, conditions of employment, or safety issues if it interfered with production or a business meeting. It could be construed to prohibit employees from voicing concerns over terms and conditions of employment during a group meeting and if the concerns escalated they could interfere with production.

Here Respondent's Complaint Resolution Policy explicitly limits employees to the use of this procedure for resolving workplace disputes. This policy limits employees in their right to engage in protected-concerted activity with each other or with a collective bargaining representative in dealing with wages, hours and other terms and conditions of employment under Section 7 of the Act.

I find that Respondent's Complaint Resolution Policy violates Section 8(a)(1) of the Act under *Martin Luther King* as it explicitly limits Section 7 activity or could reasonably be construed by employees as limiting such activity. While Respondent may have rescinded its Complaint Resolution Policy it did not do so until February 19, 2010, and thus violates the Act as alleged in complaint paragraph 6.

3. The No Solicitation Rule

Counsel for the General Counsel contends that Respondent's no solicitation policy embodied in CP-105 until September 24, 2009, limited employee solicitation while on "duty time" and violated section 8(a)(1) of the Act. General Counsel argues further that Respondent failed satisfactorily to explain to its employees that "duty time" did not encompass break or lunch time or time other that working time. Respondent counters that the term "duty time" is the functional equivalent of "working time" and that it explained to its employees that "duty time" did not include break, lunch or other than working time.

Contrary to Respondent's assertion, the Board has never held that "duty time" is the functional equivalent of "working time." Rather the Board in *Aluminum Casting & Engineering Co., Inc.* 328 NLRB 8, 9 (1999) has held:

> Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by maintaining in its rules of conduct a no-solicitation

rule that prohibits employees from "[s]oliciting or selling on company premises except when all concerned are relieved from duty." Although our dissenting colleague claims that this rule is "unambiguous," the Board has squarely held that "duty" time rules such as this one are ambiguous and overbroad because they "reasonably could be understood to mean that [employees] were prohibited from [engaging in] protected concerted activity from the time that they came on duty or began their shift, including during breaks or meal periods." *Central Security Services,* 315 NLRB 239, 243 (1994). Citing *Southeastern Brush Co.,* 306 NLRB 884 fn. 1 (1992), the *Central Security* Board analogized a "duty" time rule to an overbroad and unlawful "company" time rule, and implicitly distinguished a "duty" time rule from a "working" time rule, which is presumptively lawful under *Our Way*, 268 NLRB 394 (1983), cited by our dissenting colleague. Accordingly, we conclude that the judge properly found the Respondent's "duty" time rule to be unlawful conduct under established Board precedent.

Further, where an employer has an ambiguous no solicitation rule that is presumptively unlawful on its face it, ". . . has the burden of showing that it communicated or applied the rule in such a way as to convey an intent clearly to permit solicitation during break times or other non work periods. See *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); *J. C. Penney Co*., 266 NLRB 1223, 1224–1225 (1983)." *Ichikoh Manufacturing, Inc*. 312 NLRB 1022 (1993).

Contrary to Respondent's assertion, there is insufficient evidence that it communicated to its employees that the term "duty time" meant working time and did not include break or lunch periods. While Horner testified that she explained that "duty time" meant working time to several employees, she was able to identify only one example. Such limited explanation does not satisfy the Board's requirement that Respondent communicate to all of its effected employees that they could in fact engage in solicitation during nonworking time.

I conclude that prior to September 24, 2009, Respondent's no solicitation policy embodied in CP-105 violated Section 8(a)(1) of the Act as alleged in complaint paragraph 7.

4. The Nilles Discipline

Counsel for the General Counsel contends that in enforcing its no solicitation policy against Nilles by issuing her written discipline on November 14, 2008 violated Section 8(a)(1) and (3) of the Act. Respondent argues that Nilles misunderstanding of Respondent's no solicitation policy caused her to violate the prohibition on solicitation during an employee's working time.

The law is clear that an employer who disciplines an employee for violation of an overly broad no solicitation rule violates Section 8(a)(3) of the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112, n.3 (2004). Respondent's argument defies logic since its rule on its face is overly broad and violates Section 8(a)(1) of the Act, as found above. I conclude that the discipline issued to Nilles violates Section 8(a)(1) and (3) of the Act as alleged in paragraph 7 of the Complaint.

5. The Denial of Nilles' Bonuses

There is no dispute that Nilles was denied bonuses from November 2008 to July 2009 as a result of being in disciplinary status. As the denial of the bonuses flows from Nilles' unlawful discipline for violating an unlawful no solicitation rule, it follows that the denial of bonuses was a further violation of Section 8(a)(1) and (3) of the Act as alleged in paragraphs 8(a) through (c) of the Complaint. *Double Eagle Hotel & Casino*, 341 NLRB 112, n.3 (2004). The evidence was

insufficient to determine the exact amount of bonuses to which Nilles is entitled and that will be left to compliance.

6. The Change in Nilles' Hours

Counsel for the General Counsel takes the position that the change in Nilles hours was in retaliation for her union activities. Respondent counters that it reduced Nilles hours without regard to her union activities. Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."[18]

In 8(a)(3) cases the employer's motivation is frequently at issue, therefore the Board applies a causation test to resolve such questions. *Wright Line*, 251 NLRB 1083, 1088 (1980). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. "The critical elements of discrimination cases are protected activity known to the employer and hostility toward the protected activity." *Western Plant*, 322 NLRB 183, 194 (1996). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. *Id*. at 194. In dual motivation cases, once General Counsel has established a prima facie case the burden shifts to Respondent to show that it would have disciplined the employee even in the absence of protected activity.

There is no doubt that General Counsel has established a prima facie case that Respondent violated Section 8(a)(3) of the Act by reducing Nilles' hours. Nilles was engaged in extensive union activities shortly before her hours were cut in March 2009, including solicitation of employees to sign authorization cards on behalf of the Union in November 2008 and speaking out in favor of the Union to CEO Smith in August 2008.

It is undisputed that Respondent was aware of Nilles' union activities and expressed hostility toward her as recently as April 28, 2009 in the emails between Smith and Walker in which it was said Respondent would have trouble with Nilles. Nilles discipline, the denial of her bonuses and the cut in her hours was preceded by her union activities. Having established a prima facie case that Section 8(a)(3) has been violated the burden shifts to Respondent to show it would have cut Nilles hours even in the absence of her union activities.

According to Respondent, Nilles hours were changed in October 2008 from 1 p.m. to 6 p.m. to 11 a.m. to 6 p.m. in order to cover for Day Surgery clerical employee Kesner who worked two hours in Pre-Op, from 11 a.m. to 1 p.m.. Respondent contends that when a new employee, Carmichael, was hired to replace Kesner, Baxter did not know if Carmichael would work in Pre-Op for two hours requiring clerical coverage in Day Surgery and Baxter did not want employee overlap. To date Respondent has not used Carmichael in Pre Op.

Counsel for the General Counsel argues that Respondent's reasons for cutting Nilles' hours are pretextual. In support of this position Counsel for the General Counsel makes several arguments. First, Baxter initially tried to cut Nilles by three hours a day which did not result in a return to the status quo before Kesner worked in Pre OP. Second, Respondent misstated that Nilles was being put back into her previous shift which was 1 p.m. to 6 p.m. but rather was to work from 2 p.m. to 6 p.m. Third, Baxter did not inform Nilles that her hours had been extended in October 2008 to cover Kesner's time in Pre Op. Fourth, Respondent cut Nilles' hours before

[18] 29 U.S.C. Section 158(a)(3).

it knew whether Carmichael would work in Pre Op and failed to provide this explanation to Nilles when her hours were cut. Fifth, Baxter touted Carmichael's skills in Pre Op. Sixth, Baxter's rationale that she did not want employee overlap does not make sense since there was already overlap between Nilles' and Kesner's hours.

As to General Counsel's arguments, while Baxter initially tried to cut Nilles' shift by three hours, in the end her hours were cut by the two hours Nilles had been covering while Kesner was in Pre Op. I find no probative value to the fact that Baxter did not tell Nilles why her hours had been extended in October 2008 to from 1 p.m. to 6 p.m. to 11 a.m. to 6 p.m. While Baxter touted the new employee's skills in Pre Op and cut Nilles' hours before the new employee started, Baxter said she was not sure if the new employee would work in Pre Op at the time she started. This does not establish that the reasons for cutting Nilles' hours were false and is not incredible. Prior to the time Kesner worked in Pre Op she and Nilles overlapped only 1 ½ hours of their shifts. Baxter's rationale that she did not want employee overlapping shifts is not false since reducing Nilles hours did cut back on overlap. Moreover, Respondent did not assign Carmichael to work in Pre Op, no longer requiring Nilles to cover for an absent clerk in Day Surgery. This alone justifies Respondent's reduction in Nilles' hours. I conclude that Respondent's explanation for cutting Nilles' hours was not pretextual and that Respondent would have cut Nilles' hours in the absence of her union activities since she no longer had to cover for Kesner. I will dismiss complaint allegation 8(d).

Conclusions of Law

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

1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

    a. Interrogating employees about their union and other protected concerted activities.

    b. Promulgating and maintaining an overly broad no solicitation rules prohibiting employees from engaging in solicitation during "duty hours."

    c. Promulgating and maintaining a rule which limits employees' rights to engage in Section 7 activity.

4. Respondent violated Section 8(a)(1) and (3) of the Act by:

    a. Issuing written discipline to Janet Nilles for violating an overly broad no solicitation rule and for engaging in union and other protected-concerted activity.

    b. Denying Janet Nilles quarterly bonuses for violating an overly broad no solicitation rule and for engaging in union and other protected-concerted activity.

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

6. The Respondent did not otherwise violate the Act as alleged in the Complaint and the remaining complaint allegations will be dismissed.

The Remedy

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

The Respondent having discriminatorily disciplined employees and denied employees benefits, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of denial of the benefits to date of proper offer of reinstatement of the benefits, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[19]

ORDER

The Respondent Central Peninsula Hospital, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   a. Interrogating its employees about their union and other protected-concerted activities.

   b. Promulgating and maintaining overly broad no solicitation rules prohibiting employees from soliciting during “duty time.”

   c. Promulgating and maintaining a rule limiting employees’ rights to engage in Section 7 activity.

   d. Disciplining employees and withholding benefits in retaliation for violating an overly broad no solicitation rule and for engaging in union or other protected-concerted activity.

   e. 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 designated to effectuate the policies of the Act:

   a. Make Janet Nilles whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

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

b. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Janet Nilles and within 3 days thereafter notify the employee in writing that this has been done and that the discipline will not be used against her in any way.

c. Cease giving force and effect to the unlawful no solicitation rule prohibiting employees from soliciting while on "duty time" and inform all employees that they are free to solicit other employees during non work times.

d. Cease giving force and effect to HR Complaint Resolution Policy, HR-212.

e. 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 papers, 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.

f. Within 14 days after service by the Region, post at its Soldotna Alaska facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 19, 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 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 Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 14, 2008.

g. 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.

[20] 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."

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. June 7, 2010

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John J. McCarrick
Administrative Law Judge

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 do anything that interferes with these rights. More particularly:

WE WILL NOT discipline you for violating any overly broad no solicitation rule or because you support or engage in activities on behalf of LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 341.

WE WILL NOT ask you questions about your Union support or activities or the Union support and activities of other employees.

WE WILL NOT maintain and enforce any rule which limits your right to engage in activities protected under Section 7 of the Act.

WE WILL NOT maintain and enforce any rule which limits your right to solicit fellow employees during “duty time.”

WE WILL immediately rescind and give no effect to the written discipline issued to Janet Nilles on November 14, 2009 and we will remove any reference to that discipline from our records.

WE WILL immediately make Janet Nilles whole with interest for the wages and benefits she lost because we disciplined her.

WE WILL rescind or otherwise amend policy CP-105 which prohibits solicitation of fellow employees during “duty time” and make it clear to all employees that they are free to solicit other employees during non working times.

WE WILL rescind or amend Complaint Resolution Policy, HR-212 which interferes with your right to engage in activities protected under Section 7 of the Act.

CENTRAL PENINSULA GENERALHOSPITAL
(Employer)

Dated _____ By _____
(Representative) (Title)

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

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

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

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

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above. The final decision and this notice are available in either English or Spanish.