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**Long Island Head Start Child Development Services, Inc. and Community and Social Agency Employees Union, District Council 1707, American Federation of State, County & Municipal Employees, Local 95, AFL-CIO. Case 29-CA-28712**

December 29, 2008

**DECISION AND ORDER**

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On August 20, 2008, Administrative Law Judge Raymond P. Green issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.<sup>1</sup>

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 29, 2008

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Peter C. Schaumber, Chairman

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Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Marcia E. Adams, Esq.*, for the General Counsel.

*David M. Cohen, Esq.*, for the Respondent.

*Thomas M. Murray, Esq.*, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on June 11 and 12, 2008. The charge was filed on January 11, 2008, and a complaint was

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

issued on April 30, 2008. In substance, the complaint alleges that the Respondent, in violation of Section 8(d) and Section 8(a)(1) and (5) of the Act, unilaterally modified the existing collective-bargaining agreement by modifying the job descriptions of employees by requiring them to clean classrooms and perform related duties.

The Respondent asserts that it made no material changes in the job duties of bargaining unit employees and that to the extent that any changes were made, they were made outside the 10(b) statute of limitations period. The Respondent also asserts that the contract contained a clear and explicit waiver by virtue of the management-rights clause.

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

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

*A. The Alleged Unfair Labor Practice*

In this case, the General Counsel contends that on November 14, 2007, the Respondent, when it issued a memorandum to employees, changed certain job duties of some of its bargaining unit employees. In pertinent part, the memorandum states:

As Head Start Staff, we are charged with maintaining a clean and safe healthy environment for the children that we service. In order to clarify the center staff's responsibility, we have updated the job descriptions to detail the requirements for maintaining a safe, clean, healthy environment. Please keep in mind that although these changes have always been a job requirement, the updated job descriptions effective Monday, November 19, 2007, will now include the following details per job title as it pertains to maintaining a safe, clean, healthy environment.

*Teacher, Teacher Assistant, Teacher Aide*

Other Duties as Assigned: . . . These other duties may include, but are not limited to cleaning the classroom; disinfecting the classroom materials; sweeping/mopping floors; cleaning classroom bathrooms; wiping tables; trash disposal; and cleaning up any spills. . . .

*Cook & Cook Assistants*

Other Duties as Assigned: . . . These other duties may include, but are not limited to cleaning the kitchen daily; classroom coverage as needed; disinfecting the kitchen supplies and materials; sweeping/mopping floors; cleaning bathrooms; trash disposal; and cleaning up any spills. . . .

*Center Secretary*

Other Duties as Assigned: . . . These other duties may include, but are not limited to classroom coverage as needed; cleaning the common areas, for example staff lounges; front desk; sweeping; trash disposal; and cleaning up any spills. . . .

*Family Advocate/Educator*

Other Duties as Assigned: . . . These other duties may include, but are not limited to cleaning and providing coverage for the classroom as needed; cleaning common areas; sweeping office space; trash disposal and cleaning up spills. . . .

It should be noted that the General Counsel does not contend that all of these changes represent new functions that the employees had not done before as a regular part of their job duties. Instead she focuses on only a few items relating to each job category as being new duties.

In the case of the teaching staff, the General Counsel asserts that the November 14 memorandum represents changes in job duties *only* insofar as it includes cleaning the classroom, sweeping/mopping floors, cleaning classroom bathrooms and trash disposal. (Trash disposal essentially means taking waste baskets outside to the dumpster.)

In the case of the kitchen staff, the General Counsel asserts that the only new changes are cleaning the kitchen daily and sweeping/mopping floors, cleaning bathrooms and trash disposal.

In the case of the secretary, she contends that the only new changes are cleaning the common areas, for example staff lounges; front desk; sweeping and trash disposal.

In the case of the family advocates, the General Counsel contends that the only new changes are cleaning common areas, sweeping office space and trash disposal.

The Respondent contends that the November 14, 2007 memorandum, by itself, made no new changes. Although acknowledging that in December 2006, these employees were assigned to more extensive cleaning functions, it argues that the February 14 memorandum, at most, merely memorialized alleged changes which were made outside the 10(b) statute of limitations period.

The Respondent operates about 20 head start facilities in Long Island, New York. Its student population is about 300. It employs about 300 people in various categories, including teachers, teacher assistants, teacher aides, cooks and cook assistants, family advocates, and secretaries.

The Union has been the collective-bargaining representative for certain of the Respondent's employees for a number of years. The job classifications covered by the contract include the classifications described above. The last contract, which was executed on November 2, 2005, ran until November 30, 2007. (At the time of the hearing, the parties were engaged in collective bargaining and no new agreement had yet been reached.) That contract, although containing a grievance procedure, did not contain an arbitration provision.

The last contract contains some provisions that are arguably relevant to this case. The Respondent asserts that the Union has waived its right to bargain about the alleged changes. Article 25 is a management rights clause which states *inter alia*;

The Agency shall also have the right to promulgate working rules and procedures, to hire, lay off, promote, assign duties to, transfer, discipline or dismiss employees; to carry out the ordinary and customary functions of management and to determine the extent and scope of each job and to make and change work assignments.

At article 30 of the contract, there is a provision entitled: "Personnel Policies and Procedure Manual." This states:

All current practices, policies and procedures regarding personnel as set forth in the Agency's Personnel Policies and Procedures Manual shall remain in effect except where modified by this Agreement.

Regarding article 30, I note that at the time that the 2005 contract was executed, there was in effect a personnel policies and procedures manual that had been issued in 1999. In February 2006, the Company issued a revised manual and I can't see how the Respondent could conceivably contend, in the absence of evidence of the Union's explicit consent, that the collective-bargaining agreement incorporated by reference this later manual that was issued after the collective-bargaining agreement had been executed.

For many years, the Respondent used its own custodial employees to clean the day care facilities after the children were through for the day. At the same time, the evidence shows that many of the other bargaining unit day care employees, were accustomed to doing cleaning functions as an ancillary part of their work. For example, cooks and cook assistants cleaned the kitchens. Teachers and other classroom employees swept up after the children ate their meals and snacks. If a child had an accident, the clean up did not wait for the custodial staff to arrive at the scene. The classroom teacher or assistant would mop up a spill or clean a toilet.

In or about 2005, the Respondent started to subcontract out the cleaning work to an outside contractor. In this regard, the contractor hired and assigned one or two of its own employees to go into each center and clean up after hours. This would involve, among other things, mopping and sweeping floors, removing trash and cleaning bathrooms. At the same time, during the school day, bargaining unit employees, except perhaps for the secretaries and family advocates, continued to do some cleaning as part of the regular course of their work.

Everyone agrees that in December 2006, the Respondent, because of financial difficulties, decided to have the cleaning contractor go from a 5-days-per-week schedule to a 1-day-per-week schedule. As a consequence, supervisors at the various centers told the staffs that they would have to pitch in to do the cleaning work that had previously been done by the contractors. In some situations, the manager of a center simply let the employees arrange for themselves how they would accomplish this task.

There is no question but that the reduction in services provided by the cleaning contractor put an extra burden on the bargaining unit employees. Each center's employees were required to do more cleaning than they had done before and in some cases they had to do somewhat different types of cleaning. (Such as taking the trash out at the end of each day; cleaning bathrooms on a daily basis instead of merely cleaning up if a child made a spill; or mopping floors on a daily basis instead of just sweeping and/or vacuuming.) The bottom line, however, is that the teachers, the cooks, the secretaries, and the family advocates were expected to do more cleaning than they had done before.

Almost immediately, the Union began to receive complaints from some of the staff and on December 5, 2006, it filed a grievance that read:

On or about December 4, 2006, the Employer notified employees that they are now required to clean the facilities on a daily basis due to LI Head Start's contract with a cleaning company being amended from daily to weekly service. The Employer's demand is in violation of, but not limited to, the Hours of Work, Overtime, and Preparation Time provisions of the Collective Bargaining Agreement . . . , as well as the Human Resources Philosophy and Employment Sections of the Personnel Procedures Policy Manual.

Remedy: Withdraw the demand that employees clean facilities and make the Union whole in every way.

By letter dated January 5, 2007, the Respondent proposed a settlement of the grievance by offering to allow one teacher aide and or cook assistant from each center an opportunity to work an additional hour per day (at the overtime rate), to provide cleaning services. This offer was meant not to abrogate the obligation of other employees to do the extra cleaning, but to mitigate some of those tasks.<sup>1</sup>

By letter dated January 11, 2007, the Union responded by stating:

Management's offer of "work an additional hour per day not to exceed five hours per week" to 35 hour employees based on seniority is agreeable to the Union with the condition that agreements are reached regarding cleaning responsibilities that can be reasonably expected to be performed in one hour, specific to each center or center size.

Please be advised that many members have expressed concerns about the ability of the suggested cleaning schedule to maintain the facilities in an acceptable manner. If health and safety matters arise, the Union will respond.

The record shows an e-mail exchange on January 31, 2007 between the Union and management. In pertinent part, the Union's e-mail states:

I e-mailed you on January 26 regarding an "outcry" from our members who reported that Center Managers were "directing staff to clean far above their pre December 4, 2006 cleaning duties." . . . If seeking assistance from Human Resources is met with hostility, and if meetings are not scheduled, are we to return to the days when this Union sought assistance from Federal Compliance Offi-

cers, the National Labor Relations Board, the Office of Children and Family Services and Day care Licensing? . . . It has been two weeks and you have yet to respond regarding your availability to meet. Please respond with a meeting date so that we may confer "regarding cleaning responsibilities that can be reasonably expected to be performed in one hour, specific to each center or center size."

In pertinent part, Thalia Anthony responded as follows:

I will not be able to meet with you personally in February for we have a Federal Review that we have to prepare for. [H]owever I will assign to another Human Resources representative along with someone from the Management Team who will be able to discuss the issue with you in February.

On February 26, 2007, the Union filed a charge in Case 29-CA-28187 that alleged inter alia that; "Since in or around a date more than six months prior to the filing of this charge, the above named employer . . . has failed and refused to honor or implement the terms of a settlement agreement concerning a grievance the Union filed regarding the cleaning duties of classroom staff.

In March 2007, the Union's attorney withdrew the charge in Case 29-CA-28187 based on his belief that the Respondent was going to bargain over the terms of the previously described grievance settlement and the means to implement those terms. (As should be obvious, the grievance settlement did not fully resolve what if any additional cleaning duties would be required of the bargaining unit employees despite an employee at each center being allowed to work 1 overtime hour per day). *That charge was never refiled or reinstated.* And by this time, about 4 months had passed since the Employer has announced to its employees that they were required to do more cleaning.

Later in March 2007, the parties met to discuss dental insurance and the cleaning issue. With respect to the latter, the Union's representatives stated that its members were still being required to do more cleaning than they should. Management responded that they were doing the best that they could. From the Union's point of view, the issue remained unresolved and the employees continued to do the extra cleaning work.

The parties met again in September 2007. At this meeting, the Union's representatives proposed that either (a) the Respondent hire a traveling custodian to go to all of the facilities, or (b) the Respondent increase to five, the number of days done by the contractor, or (c) allowing two bargaining unit employees, (instead of one), to work overtime hours to do the extra cleaning. As all of these proposals would entail additional costs, the Respondent rejected them.

As noted above, on November 14, 2007, the Respondent issued revised job descriptions for the unit employees. These job descriptions, in unnecessary detail, essentially described the cleaning duties that these people had been assigned to do on and after December 4, 2006. In my opinion, these new job descriptions put into writing and therefore merely memorialized the extra cleaning duties that the employees had been required to perform from December 4, 2006. Those extra cleaning assignments were immediately known by the Union and were the subject of an ongoing grievance and negotiation from December 5, 2006, through September 2007.

<sup>1</sup> The letter states inter alia;

"However, please note that the Teachers, Teacher assistants, Teacher Aides, Cooks, cook Assistants are required to maintain a safe, clean and healthy environment for the head Start children that we service. This requirement is inclusive of, but not limited to cleaning up spills, and wiping down the tables as per the recommended cleaning procedure. The Cooks and Cook Assistants are additionally required to maintain a safe, clean, and healthy environment as delineated in their job description which states, "Assures that all sanitation procedures for dishwashing and cleaning are followed as required by State and local procedures."

### B. Discussion

There is no dispute that as of December 4, 2006, the Respondent caused a change in the job functions of the unit employees. This occurred because it changed its arrangement with a cleaning contractor so that the contractor reduced the number of days per week that it sent a cleaning employee to each Head Start Center. When this happened, there is no dispute that the Respondent required the bargaining unit employees, in all classifications at each center, to pitch in and do the cleaning work that had been done by the contractor's employee on the days that he no longer was present.

Except for secretaries and family advocates, who ordinarily did no cleaning before December 4, 2006, all of the other employees did at least some cleaning either in the classroom, bathrooms or kitchens. But when the contractor was reduced to 1-day-per-week, all center employees were required to do extra cleaning work during the course of their day's work. Thus, while before they may have done some cleaning that was incidental to their normal job functions they now had to do the cleaning functions that had previously been done by a contractor's employee who had been assigned to the Center.

In my opinion there was a material unilateral change made in the terms and conditions of employment for the unit employees. But it is also my opinion that this change occurred on December 4, 2006. The Union was aware of this change and it filed a grievance on December 5, 2006. For the next 9 months there were talks between management and union representatives on how to deal with the change. During that time, the parties reached what amounts to a partial grievance resolution on January 11, 2007. When the Union became dissatisfied with how that turned out, it filed an unfair labor practice charge in Case 29-CA-28187 that alleged, in part, that the Company had failed to honor or implement the grievance settlement. That charge was timely filed with respect to the December 4, 2006 unilateral change. But it was withdrawn in March 2006, and was not reinstated thereafter.

There were further negotiations that culminated in a meeting on September 25, 2007. At that meeting the Union made three alternative proposals that were rejected.

Finally, on November 14, 2007, the Respondent issued a new set of job descriptions that stated that the bargaining unit employees could be required to do certain specific cleaning tasks. I really don't understand why the Respondent's human resource manager felt that it was necessary to do this, but as she did, the General Counsel alleges that these new job descriptions constituted new unilateral changes.

It is my opinion that the job descriptions did not constitute changes in the working conditions of the employees *as they existed on or before November 14, 2007*. The real change took place on December 4, 2006, and the November 14 document merely memorializes the changes that had already occurred. See *Alamo Cement Co.*, 277 NLRB 1031 (1985).

As previously described, there is no question but that on December 4, 2006, the Respondent unilaterally changed the job duties of bargaining unit employees by requiring them to do more cleaning than what they had previously done. It was not so much a question of whether a person had to use a broom or a mop, a wet towel or a dust cloth, or take out the garbage. All of these are more or less the same. They are simple tasks that do not require any special skill or equipment and fall within the general category of cleaning. What was different, in my opinion, was the amount of work that was required, in that the employees, after December 4, had to divide up and do the work that had previously been done by a contractor's employees.

Had a charge been filed in relation to the December 4, 2006 changes, there would be no question that a complaint would have been timely under Section 10(b) of the Act. And in fact, a charge was filed in Case 29-CA-28187. However, that charge was withdrawn and was never reinstated. The present case is based on a completely different charge and this does not allege a violation based on the change that took place in December 2006, but alleges that a unilateral change took place on November 14, 2007. However, if the November 14 change merely memorialized the change that had already taken place on December 4, 2006, then the present charge must be barred by the Act's statute of limitations. See *John Morrell & Co.*, 304 NLRB 896, 899 (1991), where the Board stated: "As a general rule, a withdrawn charge may not be reinstated after the 6-month period prescribed by Section 10(b)." In that case, the Board concluded that the Employer did not engage in fraudulent concealment and that the Union knew or should have known of the evidence necessary to file a timely charge.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 20, 2008

<sup>2</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.