From: (b) (6), (b) (7)(C)
To: Morgan, Terry A.; Carol, Colleen J.; Bean, Terrance M.; SM-Region 7, Detroit
Cc: Bock, Richard; Szapiro, Miriam; Dodds, Amy L.; Shorter, LaDonna
Subject: Mercy Health Partners, 07-CA-258220, 07-CA-258340
Date: Tuesday, August 11, 2020 8:54:55 PM

The Region submitted these COVID-19 cases for advice as to whether the Employer violated Section 8(a)(5) of the Act by unilaterally implementing new policies and benefits and whether the Employer violated Section 8(a)(3) or (1) by adopting a policy that restricted the use of personal protective equipment (PPE) that was not Employer-issued equipment. We agree with the Region's recommendation to dismiss the charges, absent withdrawal.

We agree that the unilateral change allegations lack merit because the Employer had no duty to engage in pre-implementation bargaining and has satisfied its obligation to engage in post-implementation bargaining. In other COVID-related cases, we have concluded that an employer should be permitted to, at least initially, act unilaterally during the pandemic so long as its actions are reasonably related to the emergency situation. However, in addition, the employer must negotiate over the decision (to the extent there is a decisional bargaining obligation) and its effects within a reasonable time thereafter. *See Civitas*, 13-CA-258725, Advice Closing Email dated May 11, 2020. Here, the initial implementation of the policies and benefits (covering PPE, visitor restrictions, COVID-related paid leave and time away from work, delegation of ICU nurse duties to others, travel reimbursement policy to implement social distancing, event reporting processing for COVID-related events, and assignments/safety protocols for immunocompromised or pregnant staff) was permissible without first notifying the Union either because the changes were legally mandated (e.g. the visitor restrictions per state executive order) or reasonably related to the COVID-19 emergency. As to the Employer's post-implementation bargaining obligation, it has negotiated or communicated its position on each item as to which the Union has requested bargaining. Furthermore, the Region notes that the parties continued to meet on at least a weekly basis to negotiate pandemic-related effects on employees. Finally, we agree that the Employer's *MV Transportation* defense lacks merit because the changes at issue occurred after the CBA had expired, there is no evidence of an extension agreement, and the management rights clause expired with the agreement. *See KOIN-TV*, 369 NLRB No. 61, slip op. at 2-4 & n.10 (Apr. 21, 2020). Because dismissal is appropriate on these grounds, we need not decide the merits of the Employer's defense that certain policies were lawful under *Peerless Publications*, 283 NLRB 334 (1987), on the basis that they further the core purposes of the enterprise.

In addition, we agree that the PPE policy, which was implemented across hundreds of health facilities and has been applied to union and non-union employees alike, was not discriminatory or retaliatory.

This email closes these cases in Advice. Please contact us with any questions or concerns.

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