Virginia Mason Hospital (a Division of Virginia Mason Hospital Center) *and* Washington State Nurses Association. Case 19–CA–30154

August 23, 2011

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On September 12, 2006, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel, the Respondent, and the Union each filed exceptions, a supporting brief, and answering briefs to the corresponding exceptions.[1] The Respondent and the Union each filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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 only to the extent consistent with this Decision and Order Remanding, and to remand this case for further proceedings consistent with this Decision.

Introduction

This case concerns whether Respondent Virginia Mason Hospital (the Respondent or the Hospital) violated Section 8(a)(5) and (1) of the Act in connection with the implementation of a flu-prevention policy for its registered nurses, who are represented by Washington State Nurses Association (the Union).[2] More specifically, the issues presented are whether the judge correctly dismissed the allegation that the Hospital violated the Act by unilaterally implementing the flu-prevention policy without affording the Union notice and opportunity to bargain concerning the decision to implement the policy and its effects, and whether the judge correctly found that the Hospital unlawfully provided the Union false and misleading information and failed to timely provide relevant information requested by the Union.

The Hospital advanced several defenses to the 8(a)(5) unilateral-change allegation. It contended, and contends, that it had no duty to bargain before implementing its flu-prevention policy because (a) the policy went to the Hospital's "core purpose" and was exempt from mandatory bargaining under *Peerless Publications*, 283 NLRB 334 (1987); (b) the decision to implement the policy was subject to the balancing test the Supreme Court set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and applying that test, the balance tipped in favor of exempting the decision from mandatory bargaining; (c) Federal and State law required the Hospital to implement effective policies to control infection and communicable diseases; and (d) the Union waived bargaining when it agreed to the management-rights and zipper clauses of the parties' collective-bargaining agreement. The Hospital further contends that, assuming arguendo it had a duty to bargain, it fulfilled that duty.[3]

In dismissing the unilateral-change allegation, the judge relied solely on the rationale that the Hospital's decision to implement the flu-prevention policy was exempt from bargaining under *Peerless*. The judge did not address any of the Hospital's other defenses.

For the reasons discussed below, we reverse the judge's finding that the flu-prevention policy was exempt from bargaining under *Peerless*.[4] We will remand this case to permit the judge to address the Respondent's other defenses in the first instance. Pending the judge's decision on remand, we will defer ruling on the remaining issues in this case, which may ultimately be mooted.[5]

[1] The Union has requested oral argument. We deny the request as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Hospital initially contended that the registered nurses are not statutory employees under Sec. 2(3) of the Act. Subsequently, however, it abandoned that contention and joined the other parties in asking the judge not to address this issue. The judge complied with that request, and no party relevantly excepts. In discussing this matter, however, the judge misstated the Board's holding in *Gratiot Community Hospital,* 312 NLRB 1075 (1993), enfd. in relevant part 51 F.3d 1255 (6th Cir. 1995). We correct that misstatement here.

As does this case, *Gratiot* concerned unilateral changes affecting a registered nurse bargaining unit. According to the judge, the Board in *Gratiot* held that the changes would have been unlawful "even if all the nurses were statutory supervisors" because the parties voluntarily agreed to include them in the unit. The Board did not so hold. The issue in *Gratiot* was not whether the bargaining unit consisted entirely of statutory supervisors, but whether some or all of the "nursing supervisors," who had been voluntarily included in the unit, were statutory supervisors. Thus, even if all the "nursing supervisors" were statutory supervisors, the bargaining unit in *Gratiot* still included statutory employees. In contrast, if the Hospital's initial contention were correct, the unit here would consist entirely of supervisors or managerial employees excluded from coverage under the Act.

[3] In its answer to the complaint, the Hospital also contended that whether it had the right to implement the flu-prevention policy unilaterally was an issue of contract interpretation and should be deferred to the parties' grievance-arbitration process. As the Hospital has not since renewed that argument, we deem it waived.

[4] The Union has moved to strike a portion of the Hospital's answering brief in support of the judge's *Peerless* finding on the basis that the brief refers to documents that are not part of the record. Because we are reversing the judge's finding, we find it unnecessary to rule on the motion to strike.

[5] Accordingly, we do not address today the Union's argument that the judge erred in rejecting, on due-process grounds, the allegation that even if the Hospital had no duty to bargain over the *decision* to imple-

Facts

Relevant to the issue we address herein, the facts are as follows.

The Respondent is an acute care hospital in Seattle, Washington. It employs approximately 5000 employees. Of these, roughly 600 are registered nurses represented by the Union. At all relevant times, the Respondent and the Union were parties to a collective-bargaining agreement effective November 16, 2004, through November 15, 2007.

In September 2004, the Hospital announced that it was amending its "Fitness for Duty" policy to require its entire work force to be immunized against the flu. The Union grieved this change on behalf of the registered nurses, and the grievance went to arbitration. On August 8, 2005, an arbitrator issued an award in favor of the Union.[6] In conformity with this award, the Hospital has not required the nurses to be immunized.

In October and November 2005, at monthly meetings of a joint labor-management advisory committee, the Hospital informed the Union that it was considering requiring nonimmunized nurses either to wear a protective facemask or to take antiviral medication. At one of these meetings, management produced a form entitled "Declination of Annual Influenza Immunization 2005–06." The form stated that registered nurses who decline flu immunization must agree, no later than January 1, 2006, either to take a specified antiviral drug or to wear a protective mask "at all times while at work, including patient and public areas of the hospital."

On December 5, Barbara Frye, the Union's director of labor relations, objected to the declination form and to requiring the registered nurses to sign it as a condition of employment. Frye accused the Hospital of, among other things, not providing "a reasonable amount of time to bargain about the new working conditions you seek to unilaterally impose in your plan." Frye also requested several categories of information.[7]

On December 9, Charleen Tachibana, the Hospital's senior vice president and chief nursing officer, informed Frye that the Hospital had not distributed the declination form to managers or staff and that it had never considered requiring nurses to sign the form as a condition of continued employment. On December 29, John Waldman, the Hospital's director of labor relations, confirmed Tachibana's letter and added that the Hospital would not require the nurses to comply with the terms of the declination letter as a condition of employment.

That same day, Rose Methven, a nurse manager and admitted statutory supervisor, emailed a number of registered nurses, informing them that starting January 1, 2006, and through the end of the flu season in March, all nonimmunized staff working in patient care areas would have to wear masks. On December 30, David Campbell, the Union's attorney, protested Methven's directive as an "unlawful change in working conditions" and "inconsistent" with the Hospital's prior assurances.

On January 1, 2006, the Hospital implemented a flu-prevention policy requiring nonimmunized registered nurses to wear a facemask or take antiviral medication. A registered nurse in the critical care department testified that beginning January 1, she was required to wear a facemask at all times except when she was in the rest room, break room, or cafeteria. On January 3, Debra Madsen, the Hospital's attorney, acknowledged that the Tachibana-Frye correspondence and the Methven email had created confusion, but defended the new flu-prevention policy as within the Hospital's right to set a "standard of practice" under the managerial-rights provision of the collective-bargaining agreement. Madsen also stated that the Hospital would handle any noncompliance with the policy through its "standard processes, which may include progressive discipline."

The Judge's Decision and the Parties' Exceptions

As relevant here, the judge found that under *Peerless Publications*, supra, 283 NLRB at 334, the Hospital was not obligated to bargain over the decision to implement its flu-prevention policy because (1) the policy went directly to the Hospital's core purpose as an acute care

ment the flu-prevention policy, it nonetheless violated Sec. 8(a)(5) by failing to bargain concerning the *effects* of that decision.

We will also defer ruling on whether the judge correctly found that the Hospital violated Sec. 8(a)(5) by furnishing the Union false and misleading information and by failing to furnish requested relevant information in a timely manner. In excepting to the latter findings, the Hospital principally argues that because it had no duty to bargain over the flu-prevention policy, it had no duty to furnish information concerning that policy.

If it is ultimately determined that the Hospital had, and unlawfully failed to meet, a duty to bargain concerning the decision to implement the policy, then the Hospital's principal defense to the 8(a)(5) information allegation, and the Union's argument concerning "effects" bargaining, would be moot. Thus, it would be premature for us to address those issues now.

[6] *Washington State Nurses Assn. v. Virginia Mason Hospital*, FMCS 05-53154 (Aug. 8, 2005) (Escamilla, Arb.). The arbitrator's decision was upheld by both the Federal district court and the Ninth Circuit. See *Virginia Mason Hospital v. Washington State Nurses Assn*., No. C05-1434MJP, 2006 WL 27203 (W.D. Wash. 2006), affd. 511 F.3d 908 (9th Cir. 2007).

[7] Because we are not now deciding the allegations that the Hospital violated Sec. 8(a)(5) by furnishing false and misleading information and by failing timely to furnish relevant requested information, we will omit the facts relevant to those allegations.

hospital: to protect its patients' health;[8] (2) the policy was narrowly tailored to achieve the aim of preventing the spread of influenza; and (3) the Hospital appropriately limited the mask requirement to registered nurses who had declined other flu-prevention options. The judge also rejected the General Counsel's argument that the Hospital had violated Section 8(a)(5) by failing and refusing to bargain concerning the effects of its decision, finding that this issue was neither "substantively" alleged in the complaint nor litigated at the hearing.

The General Counsel and the Union except to the judge's finding that the Hospital was not obligated to bargain over the decision to implement the flu-prevention policy. The General Counsel does not contest the applicability of *Peerless* or except to the judge's finding that the policy went to the Hospital's core purpose. Rather, he asserts only that the policy was neither narrowly tailored nor appropriately limited. The Union argues, among other things, that *Peerless* is inapplicable here because the Board has declined to extend that decision beyond the newspaper industry.[9]

Discussion

"[L]abor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining." *Newspaper Guild v. NLRB*, 636 F.2d 550, 561 (D.C. Cir. 1980). The Hospital's decision to require nonimmunized nurses who opt not to take antiviral medication to wear a facemask plainly affected their working conditions. In addition, work rules enforceable through discipline are mandatory subjects of bargaining, e.g., *Praxair, Inc.*, 317 NLRB 435, 436 (1995), and the Hospital, though its attorney, Madsen, informed the Union that noncompliance with the flu-prevention policy would be handled through its "standard processes, which may include progressive discipline." Thus, absent a successful defense, the Hospital violated Section 8(a)(5) by unilaterally implementing the flu-prevention policy. *NLRB v. Katz*, 369 U.S. 736 (1962).

The judge found that the Hospital established a successful defense under *Peerless*, supra. For the following reasons, we disagree, finding *Peerless* inapplicable, consistent with a line of Board decisions that have sharply limited its reach.

At issue in *Peerless* was whether the publisher of a newspaper violated Section 8(a)(5) by unilaterally implementing a code of ethics. Employees were bound to adhere to the code under penalty of discipline, so it plainly affected their terms and conditions of employment. Thus, the decision to implement the code of ethics was presumptively a subject of mandatory bargaining, and the Board's task was to determine whether the newspaper was privileged to act unilaterally, notwithstanding that presumption.

Taking up its task on remand from the District of Columbia Circuit, the Board first agreed with the court that "'editorial integrity of a newspaper lies at the core of publishing control,'" and, accordingly, that "a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would 'directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity,' without necessarily being required to bargain initially." *Peerless*, supra, 283 NLRB at 335 (quoting *Newspaper Guild*, supra, 636 F.2d at 560, 561).

To translate these general principles into a legal standard, the Board then set forth a three-step test. First, the "subject matter" of the implemented rule "must go to the protection of the core purposes of the enterprise." If it does, the presumption of mandatory bargainability is overcome. Second, the rule must be "narrowly tailored . . . to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous." Third, the rule must be "appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives." Id. Applying this test, the Board assumed without deciding that the newspaper's code of ethics met the first step "so as to overcome the initial presumption of mandatory bargainability," and found that it did not satisfy the second and third steps. Accordingly, the Board concluded that the newspaper had violated Section 8(a)(5). Id. at 336.

The Board's wording of the *Peerless* three-step test in general terms suggested its potential applicability beyond the news publishing industry. But in *King Soopers*, *Inc*., 340 NLRB 628 (2003)—which held that an employer violated its duty to bargain in connection with imposing a requirement that pharmacists use accuracy scanners in filling prescriptions—the Board stated that *Peerless* "was

[8] The judge emphasized that a large majority of the Hospital's patients are elderly and tend to have compromised immune systems, making them "especially susceptible to the flu virus."

[9] In addition, the Union contends that—assuming *Peerless* applies, and assuming the flu-prevention policy is found necessary to protect the Hospital's core purpose—the Hospital's *Peerless* defense nonetheless fails because it was not narrowly tailored.

The Union also contends that, even if the Hospital was not obligated to bargain over the decision to implement the policy, it was obligated to bargain over the effects of that decision and failed to do so. The General Counsel does not except to the judge's finding that failure to engage in "effects bargaining" was neither "substantively" alleged nor litigated. For the reasons stated above, supra fn. 5, we will hold the Union's "effects bargaining" argument in abeyance pending the judge's decision on remand.

decided within the unique context of the newspaper industry and is of limited applicability outside of the narrow factual situation presented in that case." 340 NLRB at 629. This limitation reflected the Board's intervening experience with *Peerless*. Between *Peerless* and *King Soopers*, the Board repeatedly declined to find that an employer's decision satisfied the *Peerless* standard and, thus, was exempt from bargaining.[10] In none of these cases did the Board ever find the first, "core purposes" step of the *Peerless* test met. Indeed, the Board did not so find in *Peerless* itself; it merely assumed as much. 283 NLRB at 336. Finally, in *King Soopers*, supra, the Board recognized that *Peerless* was decided under "unique circumstances" and essentially limited it to its facts. 340 NLRB at 629.[11]

There are strong reasons for sharply limiting the applicability of *Peerless*, as the Board has done. As the Board suggested in *Edgar P. Benjamin Healthcare*, supra, unless carefully limited, the "core purposes" exception would swallow the rule that decisions affecting employment conditions are subject to mandatory bargaining, in contrast to "core entrepreneurial decisions." 322 NLRB at 752. In that case, in response to thefts from patients, the employer unilaterally implemented a rule subjecting packages to search. Defending against the ensuing 8(a)(5) allegation, the employer argued that preventing theft of patient property was a "core purpose" of its business as a nursing home and thus an entrepreneurial matter. But the Board rejected the argument that "protecting the core purpose [of a business] is *an additional* basis for finding an employer's decision to be entrepreneurial," if the decision does not otherwise constitute a "change in the basic direction, scope, or nature" of the enterprise. Id. (emphasis in original).[12] It observed that "[e]mployers in every industry have a strong interest in preventing employee theft," and that if the employer's argument were correct, "the exemption from bargaining about core entrepreneurial decisions would be the rule rather than the exception, at least so far as security matters are concerned." Id.

Similar arguments based on an expansive application of the *Peerless* test are easily imagined. For the core purpose of a manufacturing enterprise to be realized, for example, the manufacturer needs punctual, sober employees. Nonetheless, attendance and substance-abuse policies are mandatory subjects of bargaining—not subjects enjoying merely a (rebutted) presumption of mandatory bargainability. See, e.g., *Dorsey Trailers, Inc.*, 327 NLRB 835, 852 fn. 26 (1999) (attendance); *Uniserv*, 351 NLRB 1361, 1368–1369 (2007) (substance abuse). Further examples could be multiplied, each one underlining why *Peerless* necessarily is a limited exception to long-established labor law rules. If *Peerless* were to apply generally, it is difficult to see what would prevent the statutory duty to bargain with respect to terms and conditions of employment from being eroded drastically.

Nothing in *Peerless* suggests that the Board believed it was making major changes in well-established doctrine. In understanding the proper reach of *Peerless*, moreover, it is worth noting the origins of the test announced there. That the employer in *Peerless* was a newspaper publisher injected a constitutional element into the analysis of that case that is missing here.[13] To be sure, a newspaper is not immune from regulation under the Act on First Amendment grounds simply because it is an agency of the press. *Associated Press v. NLRB*, 301 U.S. 103, 132–133 (1937). But as the District of Columbia Circuit pointed out,

> otherwise valid laws may become invalidated in their application when they invade constitutional guarantees, including the First Amendment's guarantee of a free press. So it would be with an interference by government with editorial content or other matters lying at the heart of a newspaper's independence.

Newspaper Guild, supra, 636 F.2d at 558. Stating that its decision preserved the publisher's "exclusive control over those aspects of its operation, without the burden of mandatory bargaining," the court "dismissed as without substance" the newspaper's First Amendment defense. Id. In so finding, however, the court was certainly mindful of, and to some extent influenced by, the constitutional issue:

[10] See *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750 (1996); *W-I Forest Products Co*., 304 NLRB 957 (1991); *American Electric Power Co.*, 302 NLRB 1021 (1991), enfd. mem. 976 F.2d 725 (4th Cir. 1992); *GHR Energy Corp.*, 294 NLRB 1011 (1989), enfd. mem. 924 F.2d 1055 (5th Cir. 1991).

[11] Our colleague disagrees that *Peerless* has been limited to its facts, characterizing the Board's limiting language in *King Soopers* as merely a "conten[tion]." On the contrary, that language was integral to the Board's rationale. The Board in *King Soopers* did not apply *Peerless* and find the "core purposes" test unmet. Rather, having limited *Peerless* to its facts, it declined to apply *Peerless* altogether. Instructed by *King Soopers*, we do likewise here.

[12] See generally *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 676.

[13] In its initial decision in *Peerless*, the Board said that a "first amendment exemption" was "neither the express nor implied basis for our conclusion." *Peerless Publications*, 231 NLRB 244, 244–245 fn. 3 (1977). But as discussed herein, First Amendment concerns did play a role in the District of Columbia Circuit's analysis. The Board accepted the remand, and therefore the court of appeals' opinion was the law of the case.

> In a very real sense, [editorial integrity] is to a newspaper or magazine what machinery is to a manufacturer. At least with respect to most news publications, credibility is central to their ultimate product and to the conduct of the enterprise. Moreover, as noted supra, *editorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration*.

Id. at 560 (emphasis added). Further underlining the role that constitutional avoidance played in its rationale, the court added that it "intimate[d] no opinion on the issues here in a context where credibility and integrity are claimed to occupy a central place with respect to a commercial enterprise not possessing the special characteristics of a news publication." Id. at 560 fn. 34.

In sum, when abstracted from its factual setting, step one of the three-step *Peerless* test—that the presumption of mandatory bargainability is overcome whenever the "subject matter" of the implemented rule "go[es] to the protection of the core purposes of the enterprise"— lacks a limiting principle necessary to prevent the exception from swallowing the rule; and in *Peerless* itself that limiting principle was supplied by the fact that the asserted "core purpose" came within the First Amendment's zone of protection.

This case does not present issues similar to those implicated in *Peerless*. It closely resembles, rather, those post-*Peerless* cases, already cited, in which the Board has found that employers violated their duty to bargain over unilaterally-implemented changes in employees' working conditions. That the case involves a hospital does not alter the analysis. The Act does not establish a narrower duty to bargain for health care employers, and our dissenting colleague does not argue otherwise. Neither the record here, nor the Board's own long experience, meanwhile, suggests that collective bargaining—which inevitably implicates how, when, and by whom patients are cared for[14]—has interfered with the core purposes of hospitals.

Accordingly, we reverse the judge's finding that the Hospital's decision to implement its flu-prevention policy was exempt from mandatory bargaining under *Peerless*. Because the judge did not consider the Hospital's remaining defenses to the 8(a)(5) unilateral-change allegation, we will remand this case for the judge to do just that, and for any further appropriate action consistent with this decision. To aid the judge in determining whether, as the Hospital contends, the Union waived bargaining concerning the policy, the judge may, if he wishes, seek supplemental briefing from the parties as to the application of *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), which was decided after the judge issued his decision and the parties briefed their exceptions thereto. As stated above, we will hold the remaining issues in abeyance pending the judge's decision on remand and the parties' further exceptions, if any.

[14] See, e.g., *Crittenton Hospital*, 343 NLRB 717, 717 fn. 3 (2004) (hospital violated duty to bargain by unilaterally requiring nurses to become certified in advance[d] cardiac life support).

ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Gregory Z. Meyerson for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. August 23, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Unlike my colleagues, I agree with the administrative law judge that the Respondent lawfully implemented its flu-prevention policy under the test set out by the Board in *Peerless Publications,* 283 NLRB 334 (1987).[1] I disagree that *Peerless* has been—or should be—limited to its facts.

In *Peerless*, the Board reaffirmed its view that a newspaper may, without bargaining, establish reasonable ethics rules that are aimed at protecting the newspaper's "editorial integrity . . . [which] lies at the core of publishing control." The Board, however, did not limit its decision to the facts of that case or to the news publishing industry. Instead, the Board laid out in broad, general

[1] I also agree with the judge's finding of no "effects" bargaining violation, for the reasons stated by him. Unlike the judge, however, because the Respondent was not obligated to bargain about its flu prevention policy, I would also find the Respondent was not obligated to provide the requested information to the Charging Party for purposes of bargaining about the policy and, therefore, did not violate Sec. 8(a)(5) of the Act.

terms the requirements for determining whether an employer's unilaterally established rules were privileged because they were designed to protect the "core purpose of the enterprise."[2] The statement of a general test seems unnecessary if *Peerless* was confined to its particular industrial context.

In subsequent cases, the Board has considered *Peerless* when assessing employer rules in different industries, although finding that the rules at issue were not necessary to protect the core purpose of the employer's enterprise. See *GHR Energy Corp.*, 294 NLRB 1011 (1989), enfd. mem. 924 F.2d 1055 (5th Cir. 1991) (petroleum refinery's "Policy Statement on Disloyalty"), and *American Electrical Power Co.*, 302 NLRB 1021(1991), enfd. 976 F. 2d 725 (4th Cir. 1992) (finding company's ethics code not central to core purpose of generating and transmitting electricity). Thus, although employers in other industries have yet to satisfy the *Peerless* test, the Board has nevertheless recognized the viability of a *Peerless* defense outside the context of an ethics policy in the newspaper business.

King Soopers, Inc., 340 NLRB 628 (2003), cited by my colleagues, is not to the contrary. There, the panel majority contended that the *Peerless* exception had "limited applicability outside of the narrow factual situation presented in that case," citing *Edgar P. Benjamin Health Center* 322 NLRB 750 (1996), and *W-I Forest Products Co*., 304 NLRB 957 (1991). However, in both of the cases, as in *GHR Energy* and *American Electrical Power*, the Board applied *Peerless* but found the employer failed to establish that the rule was designed to protect the "core purpose" of the business. *Edgar P. Benjamin Health Center*, supra at 752 (finding package inspection rules did not go to nursing home's core purpose of long-term care for elderly and infirm patients); *W-I Forest Products Co*., supra at 958–959 (finding ban on smoking did "not go to the heart of [lumber mill's] business").[3] The Board did not hold *Peerless* inapplicable to nursing homes or to lumber mills. Rather the Board reiterated that the *Peerless* exception to the general statutory bargaining obligation was narrow, limited to those rules aimed at protecting an enterprise's "core purpose."

In my view, the Respondent's flu-prevention policy is aimed at protecting the hospital's core purpose and satisfies the *Peerless* test. The Respondent is an acute care hospital caring for sick, elderly patients—the average age of a patient was 76 years of age—whose weakened immune systems make them particularly susceptible to the flu virus. The flu prevention policy was implemented to avoid the spread of the virus to the hospital's patients. A hospital's singular purpose of providing essential, often critical, care and treatment to the community has been recognized by the Supreme Court and the Board. "Hospitals carry on a public function of the utmost seriousness and importance." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 511–512 (1978). "The central 'business' of a hospital is not a business in the sense that term is generally used in industrial contexts. The hospital's only purpose is the care and treatment of its patients. . . . I would not elevate the interests of unions or employees, whose highest duty is to patients, to a higher plane than that of the patients." *NLRB v. Baptist Hospital, Inc*., 442 U.S. 773, 791–793 (1979) (Chief Justice Burger concurring). See also *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976) (recognizing that "the primary function of a hospital is patient care").

The judge in this case similarly observed that, "[a]t the risk of stating the obvious . . . hospitals exist to provide medical care . . . . [and] the last consequence that a hospital wants . . . is for patients to become ill as a result of their stay at the hospital. The Hospital's flu-prevention policy is designed to protect its patients." As the judge aptly concluded: "What can be more central to the Respondent's 'core purpose' than that? I can imagine little if anything that is more central to the Hospital's 'entrepreneurial purpose' than its attempt to keep its patients free of the influenza virus." I agree and find that, for the reasons stated by the judge, the Respondent lawfully implemented its flu-prevention policy under *Peerless*.

Dated, Washington, D.C. August 23, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[2] In addition to going to the "protection of the core purposes of the enterprise, " the Board held that "the rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives." 283 NLRB at 335.

[3] In *King Soopers* itself, relying particularly on *Edgar P. Benjamin Health Center*, the majority found that a retail grocery's store's policy requiring pharmacists to scan prescriptions to verify that the correct medication was dispensed did not go to protecting the core purpose of the business. 340 NLRB at 629. I express no opinion whether that case was correctly decided.

Richard Fiol, Esq., for the General Counsel.
Mark A. Hutcheson, Esq. and *Debra Madsen, Esq.,* of Seattle, Washington, for the Respondent.
Lawrence R. Schwerin, Esq., of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Seattle, Washington, on June 13–16 and July 11, 2006. Washington State Nurses Association (the Charging Party or the Union) filed an original and an amended unfair labor practice charge in this case on January 10 and March 13, 2006, respectively. Based on that charge as amended, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint on April 28, 2006. The complaint alleges that Virginia Mason Hospital, a division of Virginia Mason Hospital Center (the Respondent, the Employer, or the Hospital) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices and raising a number of affirmative defenses.[1]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for each party,[2] and my observation of the demeanor of the witnesses, I now make the following[3]

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a State of Washington corporation, with an office and place of business in Seattle, Washington, where it is engaged in the business of providing patient and health care services. Further, I find that during the 12-month period ending prior to the issuance of the complaint, the Respondent, in the course and conduct of its business operations, had gross sales of goods and services valued in excess of $250,000, and also purchased and caused to be transferred and delivered to its facilities within the State of Washington, goods and materials valued in excess of $5000, which originated outside Washington.

Accordingly, I conclude that the Respondent is now, and at all times material, has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a healthcare institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The Employer and the Union have had a long history of collective bargaining. The genesis of the current dispute is the Employer's implementation of influenza infection control measures. These measures included a requirement that all employees, including members of the bargaining unit represented by the Union, either be immunized against influenza, take an antiviral prophylaxis medication, or wear a facemask at various locations on the Employer's hospital property. It is the contention of the General Counsel and the Union that this influenza infection control policy is a mandatory subject of bargaining, and was implemented by the Employer unilaterally, without prior notice to the Union and without affording the Union an opportunity to bargain over the policy and its effects. Further, the General Counsel and the Union contend that the Employer has unlawfully failed and refused to timely furnish the Union with relevant information requested by the Union in regards to the implementation of the policy in question, and also that the information ultimately furnished was false and misleading. The complaint alleges that such conduct on the part of the Employer constitutes a failure to bargain in good faith with the Union in violation of Section (a)(1) and (5) of the Act.

The Employer acknowledges the implementation of influenza infection control measures. However, it denies any duty to bargain prior to taking the actions complained of in the complaint. To the extent that it had any duty to bargain with, or to furnish information to, the Union, the Employer contends that it fully complied with its duty. The Respondent's answer raises a number of affirmative defenses. Those defenses include its contention that the implementation of the policy in question was permitted under the "management-rights" and "zipper" clauses of the applicable collective-bargaining agreement between the parties, by which the Union waived the right to bargain over this matter. Further, it is the Respondent's position that the issue in dispute is essentially one of contract interpretation, which should be deferred to the grievance-arbitration provisions of the contract for resolution.

Finally, the Respondent argues that it is required by Federal and State law to implement effective infection control measures. Its decision to implement the particular policy in question is allegedly not a mandatory subject of bargaining. Counsel for the Employer contends that it is part of the Hospital's "standard of care," which is at the core of the Hospital's "entrepreneurial control." As such, the Union has no legal right to insist on bargaining over the implementation of the policy.

[1] All pleadings reflect the complaint and answer as those documents were finally amended.

[2] Counsel for the General Counsel also filed an "Erratum," which I have considered.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Regarding those issues in dispute, it is necessary for me to specifically indicate why a particular issue is no longer in dispute. The original complaint in paragraph 5 alleged a certain unit of the Respondent's "employees" represented by the Union to constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. That unit was described as follows: "All full time, part time and per diem nurses employed as registered nurses by Respondent, excluding all other supervisory and administrative/management positions and all other employees." In its original answer, the Respondent addressed paragraph 5 and indicated that while the unit was accurately described in the complaint, the Respondent "does not admit that the covered nurses are statutory employees within the meaning of Section 2(3) of the Act."

At the commencement of the hearing, the General Counsel and the Union took the position that the registered nurses in the collective-bargaining unit represented by the Union were statutory employees within the meaning of Section 2(3). However, the Respondent took the position that rather than statutory employees, the registered nurses in the unit were supervisors and/or managerial employees. Subsequently, in his case-in-chief, counsel for the Respondent offered a substantial amount of testimonial and documentary evidence with the intention of establishing the supervisory and/or managerial status of the registered nurses in the unit. Counsel for the General Counsel and counsel for the Union challenged that evidence through cross-examination. Further, both the Respondent in its continuing case-in-chief and the General Counsel and the Union in their anticipated cases in rebuttal apparently intended to offer significant additional evidence on the issue of the "employee" status of the registered nurses. At this point there was a recess in the hearing.

During the hiatus in the proceedings, the parties submitted to me a document entitled, "Joint Motion to Allow the Filing of an Amended Complaint and Amended Answer, and to Close the Hearing." (Jt. Exh. 2.) Further, the General Counsel submitted an amended complaint (GC Exh. 26) and the Respondent submitting an amended answer (R. Exh. 66). The amended complaint was identical to the original complaint with the exception that the term "employees," whereever it appeared in the original, was replaced with the term "registered nurses" in the amended complaint. Similarly, the amended answer was identical to the original answer with the exception that the amended answer now admitted paragraph 5 of the amended complaint in its entirety, including the allegation that the unit comprised of "registered nurses" was an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At the time the hearing resumed, I requested on the record statements from all counsels as to their respective positions regarding the issue of whether the registered nurses in the bargaining unit were statutory employees. All three parties declined to take a position on the "employee" status of the registered nurses. Further, all parties specifically requested that I not address this issue in my decision, contending that it was unnecessary for me to do so in order to resolve the underlying dispute. In support of this position, counsel for the General Counsel cited the case of *Gratiot Community Hospital,* 312 NLRB 1075 fn. 2 (1993). In that case, where there was an issue as to whether some of the nurses in the recognized bargaining unit were supervisors, the Board held that even if all the nurses were statutory supervisors, "the unilateral changes regarding them would nonetheless be unlawful." The Board noted that the parties to the collective-bargaining agreement had "voluntarily agreed to include supervisors in a unit," who were in fact covered by a contract at the time of the changes. Under those circumstances, the Board ordered the application of the terms of the collective-bargaining agreement to those supervisors. It distinguished this situation involving "voluntary" recognition from others where the Board acknowledged that an employer "could not be compelled to recognize" a union as the representative of a unit containing supervisors. The Board held that "the changes regarding the nursing supervisors [were] unlawful." (Cited cases omitted.)

In view of the unanimous position of the parties that I specifically not address the question of whether the registered nurses in the recognized bargaining unit[4] are statutory employees, and because I find the *Gratiot* case directly on point with the issue before me, I will make no finding regarding this issue. I agree with the parties that in light of the Board's holding in *Gratiot* it is unnecessary for me to address the issue of the status of the registered nurses in order for me to resolve the underlying dispute. Further, I will grant the motion of counsel for the General Counsel and counsel for the Union, unopposed by counsel for the Respondent, to disregard any evidence, testimonial or documentary, bearing on the question of whether the registered nurses are statutory employees. I will now proceed to resolve the underlying dispute.

B. The Background

The Respondent operates an acute care hospital in Seattle, Washington. The Union and the Respondent have a longstanding bargaining relationship with a current collective-bargaining agreement effective from November 16, 2004, through November 15, 2007. (GC Exh. 22.) In September 2004, the Respondent announced its intention to amend its "Fitness for Duty" policy to add a requirement that its entire work force, including the registered nurses represented by the Union, be immunized against influenza,[5] unless accommodated because of disability or religious belief. Thereafter, the Union filed a grievance under the terms of the then existing collective-bargaining agreement alleging a failure to bargain and unilateral change by the Respondent in its action requiring the immunization of, among other employees, the registered nurses. On August 8, 2005, an arbitrator issued an award on the grievance in favor of the Union, finding that the Respondent violated the terms of the contract by unilaterally implementing a mandatory flu immunization policy. The Respondent was "directed to cease and desist its intended implementation of the flu immunization policy

[4] There is no dispute that the Employer voluntarily "recognized" the Union as the representative of the registered nurses in the unit, which recognition has been embodied in successive collective-bargaining agreements. See amended complaint par. 5(b) and amended answer par. 5(a)–(c).

[5] The terms influenza and flu are used interchangeably throughout this decision.

and remove such condition of employment from its Fitness for Duty policy." (GC Exh. 23.) The arbitrator's decision is currently on appeal before the Ninth Circuit Court of Appeals.

In compliance with the arbitrator's decision, the Respondent did not require the registered nurses represented by the Union to meet the influenza immunization requirements of the fitness for duty policy. However, the policy remains in effect for all of its other employees, including doctors.

On October 25, 2005, representatives of the Hospital for the first time raised with representatives of the Union at a "conference committee"[6] meeting the Hospital's consideration of a plan to require nonimmunized registered nurses (RNs) to either take a drug (flu) treatment therapy or wear a protective facemask. At this meeting, as well as at a second meeting held on November 30, 2005, the committee members discussed the Respondent's desire to find some method of protecting its hospital patients, employees, and visitors from contracting the flu. It was at one of those two meetings where the Respondent's representatives produced a form entitled "Declination of Annual Influenza Immunization 2005–2006 Flu Season." (GC Exh. 6.)

This declination form indicated that each RN was "required" to be protected from the flu, and that any RN who declined to be immunized was required to obtain protection by one of two alternate methods, either by agreeing to take "Amantidine—a drug therapy treatment," or by agreeing "to wear a protective mask . . . at all times while at work, including patient and public areas of the hospital." There was apparently no dispute between the parties that the most effective method of protection from influenza was through immunization.[7] The Union indicated to the Respondent on numerous occasions its interest in a process of encouraging the RNs to agree "voluntarily" to immunization. However, the Union repeatedly indicated to the Respondent its opposition to any form of "involuntary," mandatory means of protection, whether that was through immunization, drug therapy treatment, or the wearing of a facemask. It is also undisputed that neither drug therapy treatment[8] nor the wearing of a facemask is as effective in preventing the contracting and spread of the flu as is immunization.

By letter dated December 5, 2005, Barbara Frye, the Union's director of labor relations, advised Charleen Tachibana, the Respondent's senior vice president and chief nursing officer, of the Union's strong objections to the Hospital's use of the declination form and to the demand that "RNs sign the form as a condition of continued employment." Further, the letter objected to the "new working conditions you seek to unilaterally impose in your plan," which allegedly "amounts to direct bargaining." Frye went on to request certain information "necessary to intelligently asses [sic] your plan," which information was requested be provided "within 3 business days." Among other items requested was the following: "4. All documents recording or reflecting objections, complaints or comments regarding the plans, forms or requirements referenced in response to items 2 and 3 above."[9] (GC Exh. 7.)

According to Tachibana, during the month of December 2005, the Hospital's influenza vaccine campaign was in "high gear," meaning efforts were underway to immunize as many employees as possible. However, for those employees unwilling to be vaccinated, the Respondent began to insist that alternate methods of protection be utilized. It was at this point that the Respondent posted signs "requesting" that "all persons" who had not been vaccinated for the flu "wear a mask at all times while in patient care areas." (R. Exh. 9.) These notices were posted at entrances to the facility. Tachibana testified that the message was targeted toward staff, visitors, and the employees of contractors. The Hospital employs approximately 5000 employees, of whom 599 are registered nurses in the bargaining unit. Forty kiosks to dispense facemasks, hand cleanser, and information about flu prevention were thereafter located around the facility where nonimmunized persons could access them. Tachibana estimated that of the hospital staff, approximately 98.5 percent were immunized during the 2005/2006 flu season. The remaining nonimmunized staff was comprised almost entirely of the registered nurses in the bargaining unit. Of course, they had the option of utilizing one of the alternative means of protection, either wearing a facemask or taking an antiviral medication.

By letter dated December 9, 2005, Tachibana responded to Barbara Frye's earlier letter, saying essentially that the Hospital was not going to use the declination form "as a condition of continued employment." However, the Respondent wanted to ensure that it "exhausted every opportunity for staff to . . . make their decision regarding immunization." Further, Tachibana informed Frye that "[i]f the Union still seek[s] additional information," she should contact the director of labor relations. (GC Exh. 8.) On December 19, 2005, Frye sent a letter to the Respondent's director of labor relations, noting that Tachibana had informed her that the Hospital did not intend to use the declination form and "will not be requiring nurses to comply with the terms therein as a condition of employment." Still, she continued that "even given this assurance, I reiterate our request for the information set forth in my previous letter. . . . ." (GC Exh. 9.)

On December 29, 2005, John Walburn, Respondent's director of labor relations, sent Frye a letter in which he confirmed as "accurate" Tachibana's earlier letter. Walburn acknowledged the accuracy of Frye's understanding that the Hospital would not be distributing the declination form and "such will not be required [sic] inpatient nurses to comply with the terms

[6] It is uncontested that this conference committee is a joint union/management committee that meets monthly, and its function is limited to an advisory rather than a decisionmaking capacity. The conference committee does not engage in collective bargaining, and its union members do not have the authority to negotiate on behalf of the RNs, at least not in that forum.

[7] Immunization can be achieved through either injection or spray inhalation of a vaccine. In either form, the immunization strengthens the body's immune system by the production of antibodies, which prevents the influenza virus from invading the body and causing an infection. (See the testimony of Charleen Tachibana.)

[8] Such a drug therapy treatment involves taking an antiviral medication orally on a regular regimen. It acts to treat or prevent the influenza infection once the influenza virus enters the body. (Testimony of Charleen Tachibana.)

[9] Items 2 and 3 refer to the Respondent's "immunization plans."

therein as a condition of employment." Further, he indicated that regarding the Union's request for information of December 5, 2005, "due to holidays and schedules, we will have to get back to you after the first of the year." (GCExh. 10.) However, on that same date, December 29, Rose Methven, a nurse manager,[10] sent an email message entitled "flu vacc. update" to a number of registered nurses in several departments. In that message, Methven states that "[s]tarting Sunday 1/1 all nonvaccinated staff working in patient care areas will wear masks (do not use the same mask all day—change periodically)." She goes on to indicate that all visitors, including the family members of patients who are not vaccinated, will be required to wear facemasks in patient areas. Methven concludes by indicating that this policy "will continue during the flu season through March." (GC Exh. 11.)

It is clear from the Union's subsequent action that it considered Methven's email message to be in contradiction with the recent written statements from Walburn and Tachibana. Having learned from its members of Methven's email, Union Attorney David Campbell sent a letter dated December 30, 2005, to the Respondent's chief executive officer, as well as to Tachibana, and to Steven Stahl, the Respondent's new director of labor relations. Campbell references and attaches the email message from Methven. He characterizes the "directive" as an "unlawful change in working conditions," and as "inconsistent with the assurances communicated to the [Union] twice in the last two weeks." He outlines the recent history of the declination form, including the correspondence between Frye, Tachibana, and Walburn. Finally, Campbell requests the immediate retraction of Methven's email and that it be communicated to all registered nurses. While not specifically making another request for information, he mentions that a request for information regarding the "proposed changes in working conditions" was previously made. (GC Exh. 5.) As of the date of Campbell's letter, none of the requested information had been forthcoming from the Respondent.

Counsel for the Respondent, Debra Madsen, by letter dated January 3, 2006, responded to Campbell. Madsen "acknowledge[d] the confusion that ha[d] been created through our correspondence with Ms. Frye and the referenced email from one of our nurse managers." However, she defended the Hospital's "infection control policy, such as masking," as a "standard of practice," which the Respondent had a right to implement under the "management-rights clause" found in article 18 of the collective-bargaining agreement. According to Madsen, any issues of "noncompliance" with the policy would be handled through the standard processes, which might include "progressive discipline." Further, she indicated the documents previously requested by B. Frye would be provided within the next 10-business days. (GC Exh. 12.)

As of January 1, 2006, the Respondent required that its registered nurses who had not been immunized for the flu either wear a facemask or take antiviral medication. Susan Dunn is a registered nurse (RN) who has been employed by the Respondent for 22 years. She works a 12-hour shift in the Respondent's critical care department. Dunn testified that after January 1, she was required to wear the mask at all times except for when she was in the rest room, break room, or cafeteria. As such, she was required to wear the mask for approximately 11 of the 12 hours in her workshift. According to Dunn, under the previous policy nurses were only required to wear a facemask when in close contact (within 3 feet) of a patient who had symptoms of a respiratory infection.[11] The longest continuous period of time during which she was required to wear a mask under the previous policy was 1 hour, with a total not to exceed 3 to 4 hours during the entire 12-hour shift. Of course, the Union contends that this change in the policy regarding the wearing of facemasks was dramatic, and had a very significant impact on the registered nurses. The record reflects that a number of nurses in the bargaining unit considered the wearing of the mask for long periods of time physically uncomfortable, and found it demeaning and stigmatizing.

On January 16, 2006, the Respondent, through Madsen, provided certain information that it believed was responsive to the items requested by the Union. (GC Exh. 13.) In determining whether the Respondent was complying in good faith with the Union's request for information, it is especially significant to follow the flow of information in response to the Union's request for those documents in item 4, as set forth in the letter from Barbara Frye dated December 5, 2005. Item 4 requested the following: "All documents recording or reflecting objections, complaints or comments regarding the plans, forms or requirements referenced in response to items 2 and 3 above." What the Union was seeking by this item was the reaction of its bargaining unit members to the masking policy as reflected in correspondence with hospital management through such means as email messages. In her response of January 16, Madsen furnished no information under item 4, concluding that as the declination form was never used, there were no comments about the form in the possession of the Respondent. Further, Madsen stated that to the extent that there were objections, complaints or comments to the masking and antiviral medications, they "have taken place within the religious and medical accommodation process." By this statement she was apparently suggesting that any such responses would be confidential and, therefore, not producible.

Attorney Campbell responded by letter dated February 8, 2006, indicating the Union's position that the Respondent had failed to furnish information in a timely manner, and in particular had totally failed to produce any documents in response to item 4 in the original request for information. Campbell pointed out that the Union's request was not limited to the declination form alone, but, rather, to any "plans, forms or requirements" as they involved flu prevention alternatives to immunization. (GC Exh. 14.) By letter of February 9, 2006, Debra Madsen informed Campbell that she was unable to comply with the request for "additional information" for approximately 1 week. However, she now understood that by item 4 in

[10] The Respondent's answer admits that Methven is a supervisor and agent within the meaning of the Act.

[11] It appears that this was the procedure recommended by the Department of Health and Human Services, Centers for Disease Control and Prevention for the use of masks to control influenza transmission. (GC Exh. 4.)

its request, the Union was seeking materials such as employee email postings to the Hospital's "internal VM Staff Forum," where employees commented about the flu prevention policy, which emails the Respondent would attempt to provide. (GC Exh. 15.)

By letter dated February 16, 2006, Debra Madsen submitted to the Union, among other information, employee email postings to the VM staff forum, an intranet all staff communication forum, concerning any objections, complaints, or comments pertaining to the Respondent's influenza prevention program. However, as Madsen pointed out in her cover letter, "These postings have been redacted so that the individual staff member's name and/or any personally identifiable information is not disclosed." (GC Exh. 16.)

In yet further correspondence on this subject, David Campbell sent the Respondent a letter dated March 7, 2006, in which he criticized the Hospital's response to the Union's request for information, specifically the submission of redacted versions of staff postings on the intranet. Campbell pointed out that as the postings had been available to hospital employees with access to the intranet, there did not appear to be a confidentiality basis for refusing to furnish the Union with identifying information. (GC Exh. 17.) There then followed some additional correspondence, the most significant of which is a letter from Debra Madsen dated March 15, 2006, in which the Respondent took the position that the "identities" of those employees who posted messages about the flu prevention policy on the Respondent's intranet were "not relevant" to the issues surrounding the policy. (GC Exh. 19.)

Finally, the parties met face to face on April 25, 2006, in an effort to resolve the continuing dispute as to whether the Respondent had furnished all relevant information requested by the Union. According to the testimony of B. Frye, it was at that meeting that the Respondent furnished the Union with the unredacted versions of the emails from the staff forum where employees, including registered nurses, now identified, had made comments, complaints, or objections about the Respondent's flu prevention program, including the masking and antiviral medication alternatives. The parties still did not agree that all requested information had been provided. However, in regards to that information under item 4 in the original request letter of December, 5, 2005, it is at least clear that the unredacted emails were not furnished to the Union until April 25, 2006, some 4-1/2 months later.

C. Legal Analysis and Conclusions

1. Institution of the Flu-prevention policy

Every year approximately 36,000 people in the United States die of influenza. It is transmitted from person to person through "droplets" containing the virus. Unfortunately, hospitals, where sick people are congregated, are especially susceptible to the spread of influenza. That is also the situation for elderly people, as both the sick and the elderly tend to have compromised immune systems. The Respondent's hospital facility has a patient population that averages 76 years of age. In fact, the Respondent's patient population is much older than many acute care general hospitals because it caters to an elderly population and does not service pediatrics or obstetrics. (See the testimony of Charleen Tachibana.)

Influenza is a preventable disease. In an effort to prevent the spread of all diseases, including influenza, healthcare facilities are required to have infection control policies and practices in place.[12] These standards are intended to be proactive and through education and infection control seek to mitigate the spread of disease. (Charleen Tachibana.)

The Respondent publishes an Infection Control manual. (R. Exh. 3.) As set forth in that manual (p. 3.5), "measures to prevent infectious disease transmission or ameliorate outbreaks may require the temporary or permanent use of additional immunizations, personal protective equipment, and. . . ." Chief Nursing Officer Tachibana testified that personal protective equipment would include such items as a facemask, latex gloves, and a gown. According to Tachibana, under the terms of the Hospital's infection control policy, there are times when registered nurses are required to wear gloves, or facemasks, or gowns when providing patient care. She characterized the requirement to wear protective equipment, including facemasks, as no different than the requirement that nurses wash their hands on a regular basis. In Tachibana's 30 years of employment with the Hospital, she is unaware of any occasion where the Hospital bargained with the Union over any aspect of its infection control policy.

It is undisputed that influenza is preventable. Immunization, either through inoculation or inhalation of the vaccine, is the most effective means of preventing the spread of the flu. It is also generally accepted that while less effective, the wearing of a facemask or a regimen of antiviral medication is at least some measure of protection against the flu.[13]

Complaint paragraph 8(a) alleges that on January 1, 2006, the Respondent "implemented an influenza immunization policy that requires unit employees to wear a mask and/or take an antiviral prophylaxis." As counsel for the Respondent repeatedly pointed out in his answer to the complaint, at trial, and in his posttrial brief, immunization only comes through inoculation or inhalation of the vaccine. Wearing a facemask or taking antiviral medication does not constitute immunization. That

[12] Federal regulations require that hospitals "participating in Medicare must meet certain specified requirements." (42 CFR § 482.1(a)(1)(i).) These requirements include "meeting standards for licensing established by the agency of the State or locality responsible for licensing hospitals" (42 CFR § 482.11 (b)(2)) and having an "active program for the prevention, control, and investigation of infections and communicable diseases" (42 CFR § 482. 42). Further, I will take administrative notice that the State of Washington requires that "Hospitals must develop and implement an infection control program. . . ." WAC 246-320-265 (Department of Health).

[13] The Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) has issued interim guidelines for the use of masks to control influenza transmission. According to those guidelines, "A combination of infection control strategies is recommended to decrease transmission of influenza in health-care settings. These include . . . having health-care personnel wear masks for close patient contact (i.e., within 3 feet) and gowns and gloves if contact with respiratory secretions is likely." The CDC makes this recommendation despite acknowledging that "no studies have definitively shown that mask use. . . prevents influenza transmission." (GC Exh. 4.)

"technicality" aside, what the Respondent did was to institute a policy requiring those registered nurses who declined to receive a voluntary inoculation or inhalation of the influenza vaccine to either wear a facemask when in patient care areas of the hospital or to take the antiviral medication. Nonimmunized visitors and contractors were encouraged to also use a facemask while in patient care areas. For those registered nurses who declined to either be immunized or take the antiviral medication, their option was limited to using a facemask, or face possible disciplinary action.

There is no question that the Hospital preferred for its registered nurses to be immunized and strongly encouraged them to do so. However, if they declined to do so after January 1, 2006, they were required to take antiviral medication or wear a facemask in patient care areas. Further, the testimony of at least one RN employed in the surgical care unit was undisputed that in a 12-hour shift it might be necessary to wear a mask for up to 11 out of 12 hours in order to be in compliance with the Hospital's policy. There was additional evidence that some nurses considered the wearing of the masks to be punitive, humiliating, stigmatizing, and physically demanding.

Paragraphs 8(b) and (c) of the complaint allege that the Respondent instituted its flu-prevention policy without bargaining with the Union, which bargaining the General Counsel contends was required because the wearing of a facemask and the taking of antiviral medication is allegedly a mandatory subject of bargaining. Among its many defenses, the Respondent takes the position that the institution of the flu prevention policy was not a mandatory subject of bargaining. I agree with the Respondent, essentially for the reasons expressed by counsel in his posthearing brief.

Infection control policies and the standard of care patients receive at the Respondent's hospital facility are at the "core of entrepreneurial control" by the Respondent. What purpose does any acute care hospital, or for that matter any healthcare facility, serve? Of course, the obvious answer is to provide medical care in order to cure the sick and injured, ameliorate pain, and generally provide for the medical needs of the community. In conjunction with providing medical care, any healthcare facility must naturally do its utmost to prevent the spread of disease through what is acknowledged to be a susceptible population. For the reasons explained earlier, the Respondent's elderly patient population, with their compromised immune systems, is at significant risk of contracting the flu while housed at the Respondent's facility. In order to ameliorate such a risk, the Respondent instituted a flu-prevention policy which, for those registered nurses who chose the option, required the wearing of facemasks or the taking of antiviral medication. I am of the view that such a policy is central to the entrepreneurial purposes for which the Hospital exists.

It is, of course, well established that an employer must bargain with its employees' collective-bargaining representative over mandatory subjects of bargaining. See *NLRB v. Katz,* 369 U.S. 736, 743 (1962). However, not all subjects are mandatory subjects of bargaining even though they may impact "working conditions." In *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981), the Supreme Court recognized that sometimes there must be an analysis of the respective weight of management's right to operate its business versus the benefit to the collective bargaining process. According to the Court,

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. [452 U.S. at 678.]

It is worth noting that in cases where the Federal Courts and the Board have used a "balancing test," weighing an employer's duty to bargain against management's right to make fundamental business decisions, the language used in the various decisions appears to have originated in the concurring opinion of Justice Stewart in *Fibreboard Paper Products v. NLRB,* 379 U.S. 203, 223 (1964). In Justice Stewart's opinion, an employer had no duty to bargain collectively over those managerial decisions, "which lie at the core of entrepreneurial control." Those decisions which were "fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded" from the area of collective bargaining.

Further, the courts and the Board have repeatedly recognized that hospitals are unique places of employment. In *Beth Israel Hospital v. NLRB,* 437 U.S . 483, 494 (1978), the Supreme Court cited with approval the Board case of *St. John's Hospital & School of Nursing, Inc.,* 222 NLRB 1150 (1976), where the Board concluded that the special characteristics of hospitals justify a rule (concerning solicitation and distribution) different from that which the Board generally applies to other employers, and the Board noted that "the primary function of a hospital is patient care. . . ." See *Sacred Heart Medical Center,* 347 NLRB 537, 532 fn. 6 (2006). Also, language used by Chief Justice Burger in his concurring opinion in *NLRB V. Baptist Hospital*, *Inc.,* 442 U.S. 773, 791–793 (1979), is particularly useful in framing this issue in the case before me. As Justice Burger said, "I would think that no 'evidence' is needed to establish the proposition that the primary mission of every hospital is care and concern for patients and that anything which tends to interfere with that objective cannot be tolerated. . . . The hospital's only purpose is the care and treatment of patients. . . . I would not elevate the interests of unions or employees, whose highest duty is to patients, to a higher plane than that of the patients."

The seminal case from the Board on the issue of an employer's right to direct the central nature of its business is *Peerless Publication, Inc.,* 283 NLRB 334 (1987). Counsels from all three parties cite this case in their posthearing briefs. Of course, their views differ greatly as to the applicability of the case to the facts at hand. In *Peerless*, the Board noted a presumption that decisions affecting the terms and conditions of employment are mandatory subjects of bargaining. However, the Board held that an employer can overcome this presumption by establishing that its action involves the "core purpose" of its

business and is "narrowly tailored" to achieve a legitimate essential interest. Specifically, the Board said:

> In order to overcome this presumption, therefore, it is clear initially that the subject matter sought to be addressed by the employer must go to the "protection of the core purposes of the enterprise." Where that is the case, the rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives. [283 NLRB at 335.]

I am of the view that the Respondent's establishment of a flu-prevention policy, specifically the options of wearing a facemask or the taking of antiviral medication as an alternative to immunization by vaccine, goes directly to the "core purpose" of the Respondent as an acute care hospital. At the risk of stating the obvious, I would note that hospitals exist to provide medical care with the intention of curing disease or injury, making patients feel better, alleviating pain, or performing a requested medical service. In providing this medical care, the last consequence that a hospital wants to have happen is for patients to become ill as a result of their stay at the hospital. Unfortunately, occasionally this does happens, and in the case of influenza it can happen with disastrous consequences. As was noted earlier, some 36,000 Americans die every year of influenza and its complications. The Hospital's flu-prevention policy is designed to protect its patients. What can be more central to the Respondent's "core purpose" than that? I can imagine little if anything that is more central to the Hospital's "entrepreneurial purpose" than its attempt to keep its patients free of the influenza virus.

Clearly, this is not some frivolous, capricious, or unimportant matter. As was indicated earlier, elderly, infirm patients are especially susceptible to the influenza virus. This population comprises a large majority of the Respondent's patients. Ensuring a safe and sanitary environment is at the very core or heart of the Respondent's business as a health care provider. As such, I conclude that the Respondent's establishment of a flu-prevention policy, including the wearing of facemasks or the taking of antiviral medication, as an alternative to immunization by vaccine, meets the first of the Board's tests under *Peerless*.

There is no question that for those registered nurses who take the "option" of wearing a facemask, it can be rather intrusive, and certainly affects their working conditions. As was mentioned earlier, the requirement that a mask be worn continuously in patient care areas may result in the RNs who choose that "option" of having to wear the mask for most of her/his working hours. However, the essential point to remember is that the wearing of a facemask is in fact an "option." Clearly, the Respondent would prefer its employees to be immunized by injection or inhalation of the vaccine, as that is scientifically known to be the best method of preventing infection by the flu virus. For those registered nurses who harbor objections to taking the vaccine, religious, health, or otherwise, the Respondent provides the "option" of wearing a facemask while in patient care areas or of taking an antiviral medication. The other methods of flu prevention are much less overtly intrusive than the wearing of a facemask. Therefore, it seems to me that a nurse who selects the "option" of wearing a facemask has brought that intrusion upon her/him self and, thereafter, cannot legitimately be heard to complain about the extent of the intrusion.

The Respondent's flu-prevention policy is "narrowly tailored" to meet its legitimate objective of attempting to prevent the spread of influenza in a susceptible hospital population. It is not overly broad, vague, or ambiguous. The policy is plainly understood. It requires employees to take measures to prevent the spread of the flu in the hospital facility. For those registered nurses who decline to be immunized by injection or inhalation of vaccine, it requires that they either take antiviral medication or wear a facemask. There has been no suggestion, contention, or evidence offered that RNs who choose the option of wearing a facemask will be required to wear the mask once the flu season ends.

Further, I see no merit in counsel for the General Counsel's argument in his posthearing brief that the Respondent's policy is not narrowly tailored because it exceeds the CDC guidelines, which only suggest that health care providers wear a mask when they are within 3 feet of a symptomatic patient. (GC Exh. 4.) It is the Respondent's province to decide what measures are necessary to protect patients in its hospital facility. There is no reason why the Respondent cannot exceed the CDC guidelines on masking, especially where the Respondent offers its nurses a number of other options for preventing the spread of the flu. The Respondent's influenza prevention policy, which offers multiple options to its RNs, is reasonable and narrowly tailored to achieve a legitimate and necessary objective. It is not overly broad, vague or ambiguous. As such, it satisfies another of the Board's tests under *Peerless*.

The Respondent's policy in question is limited in its applicability to the affected registered nurses who decline other flu-prevention options. However, it should be noted that the wearing of a facemask for flu prevention is not the only item that RNs may be required by the Respondent to wear. As testified to by Charleen Tachibana, the nurses are required at certain times to wear gowns and latex gloves. Further, historically nurses in the critical care unit and in surgical units have been required to wear facemasks at specific times, such as when assisting with surgery or when caring for patients with certain types of injuries or illnesses. According to Tachibana, at no time did the Union ever request bargaining over the wearing of gowns, gloves, or historically facemasks by critical care/surgical unit nurses. Tachibana testified that all of these items, including the wearing of facemasks as an aid in flu prevention, are part of the "standard of care," which the Hospital expects of its registered nurses. She equates these items with the expectation under the standard of care that nurses will wash their hands numerous times a day at appropriate occasions. Certainly, it is reasonable for the Hospital to expect its registered nurses to follow a certain standard of care in conducting their professional patient care responsibilities.

I agree with the Respondent's contention that the application of the facemask flu-prevention option is appropriately limited

to those registered nurses who decline any of the three other options (immunization by injection, or inhalation of vaccine, or antiviral medication). It is limited in its application to the extent possible, while still serving as a viable option with some prophylactic value in influenza prevention. As such, it meets the final test required by the Board under *Peerless*.

In substance, I conclude that the Respondent's influenza control policy, and specifically those options consisting of the taking of antiviral medication or the wearing of a facemask when in patient care areas, is not a mandatory subject of bargaining. The policy is part of the essential nature of the Hospital's business, which policy is narrowly tailored to achieve a legitimate interest. *Peerless*, supra. Accordingly, assuming for the sake of argument that the Respondent failed and refused to bargain with the Union over the establishment of a policy regarding the wearing of facemasks when in patient care areas or the taking of antiviral medication, I find that such conduct did not constitute a violation of the Act, as the Respondent was under no legal obligation to bargain over such subjects.[14]

In his posthearing brief, counsel for the General Counsel contends that even assuming, arguendo, that the masking/antiviral medication policy is not a mandatory subject for bargaining as far as the decision to implement it is concerned, the "effects" of that decision would still constitute a mandatory subject over which the Respondent is required to bargain. This is an interesting argument. However, I believe that for several reasons it is without merit. To begin with, the issue of "effects" bargaining was really never substantively raised in the complaint nor litigated at the hearing. It is accurate that in paragraph 8(c) of the complaint there is standard "boilerplate" language alleging the Respondent's action to constitute a violation of the Act "with respect to this conduct and the *effects* of this conduct." (Emphasis added.) However, certainly such a cursory, passing reference cannot be considered adequate to alert the Respondent to an alleged lack of effects bargaining. I believe that such is reinforced by the total failure of counsel for the General Counsel or counsel for the Union to raise this contention in any way or at any time during the trial. The issue was simply not litigated before me. Frankly, I suspect that this "eleventh hour" claim by the General Counsel is likely the result of the realization that the underlying complaint allegation of a failure to bargain over the decision to implement the masking/antiviral medication policy may not constitute a violation of the Act, as not a mandatory subject of bargaining.

In any event, I am of the view that were I to now find that the Respondent violated the Act by not engaging in mandatory "effects" bargaining, there would be a clear denial of the Respondent's due process rights. As I said, this issue was neither alleged substantively in the complaint nor litigated before me. Therefore, I believe that it would be totally inappropriate for me to address the issue at this late date, and I decline to do so.

Even assuming, for arguments sake, that it is appropriate to address the issue of "effects" bargaining, I conclude that this is also not a mandatory subject of bargaining. It can not be separated from the issue of the implementation of the masking/antiviral medication policy. As I have concluded, the requirement that the RNs wear masks when in patient care areas or take antiviral medication, assuming they declined the other options available to them in the Respondent's flu-prevention policy, is essential to the core purposes for which the Respondent operates. It cannot be divorced from the logical result of a failure to comply with the Respondent's policy, which, presumably, is some adverse consequence. However, it must be noted that there was no probative evidence offered at the trial as to specifically what adverse consequence that would be.[15] In fact, Charleen Tachibana credibly testified that no registered nurse represented by the Union has been discharged or disciplined in any way for a failure to wear a facemask in accordance with the Respondent's influenza control policy. Further, she testified that no RN in the bargaining unit has been threatened with termination by the Respondent for a failure to abide by the masking policy. Accordingly, I conclude that even assuming a failure by the Respondent to bargain over the "effects" of its policy, such conduct would not constitute a violation of the Act, as in such circumstances this is not a mandatory subject of bargaining.

In summary, I conclude that the General Counsel has failed to meet its evidentiary burden and establish by a preponderance of the credible evidence that the Respondent's implementation of an influenza prevention policy, which included the options of wearing a facemask or taking antiviral medication, and the effects of such conduct constituted a violation of Section 8(a)(5) and (1) of the Act. Accordingly, I shall recommend dismissal of complaint paragraph 8 and all its subparagraphs.

2. False and misleading information

Paragraph 7 of the complaint alleges that on or about December 29, 2005, the Respondent responded to the Union's request to bargain over an "influenza immunization policy" by providing false and misleading information about its intention to implement such policy.

As was set forth in detail earlier, the Respondent first raised the issue of requiring its nonimmunized registered nurses to either wear a facemask or take antiviral medication as two options in its influenza prevention program while at the conference committee meetings with the Union held on October 25 and November 30, 2005. It was also at one of those meetings where the Respondent first produced the form entitled "Decli-

[14] The Respondent raises a number of affirmative defenses to the failure to bargain allegation in the complaint. One of those defenses is the Respondent's contention that it did, in fact, bargain with the Union about the facemask and antiviral medication options in the flu-prevention policy. However, in light of my finding that these matters did not constitute mandatory subjects of bargaining, and, thus, there was no duty to bargain with the Union, I find it unnecessary to rule on the other defenses raised by the Respondent.

[15] In a letter to the Union dated January 3, 2006, the Respondent's attorney, Debra Madsen, indicates that any "noncompliance" with the influenza prevention policy "will be handled through our standard processes, which may include progressive discipline." (GC Exh. 12.) It would seem, therefore, that the Respondent is acknowledging that should any member of the bargaining unit ultimately be disciplined for noncompliance with the policy, the Union could file a grievance over that discipline under the terms of the existing collective-bargaining agreement.

nation of Annual Influenza Immunization 2005-2006 Flu Season." Thereafter, by letter dated December 5, 2005, from Barbara Frye, the Union objected to the Hospital's use of the declination form, to the demand that the "RNs sign the form as a condition of continued employment," and to the "new working conditions" the Respondent sought to "unilaterally impose" in its "plan," which allegedly "amount[ed] to direct bargaining." Further, Frye went on to request certain information "necessary to intelligently asses [sic] [the Respondent's] plan." Frye's letter was addressed to Charleen Tachibana. (GC Exh. 7.)

By letter dated December 9, 2005, Tachibana responded to Frye's earlier letter, saying essentially that the Hospital was not going to use the declination form "as a condition of continued employment." However, the Respondent wanted to ensure that it "exhausted every opportunity for staff to . . . make their decision regarding immunization." Further, Tachibana informed Frye that "[i]f the Union still seek[s] additional information," she should contact the director of labor relations. (GC Exh. 8.) On December 19, 2005, Frye sent a letter to the Respondent's director of labor relations, noting that Tachibana had informed her that the Hospital did not intend to use the declination form and "will not be requiring nurses to comply with the terms therein as a condition of employment." Still, she continued that "even given this assurance, I reiterate our request for the information set forth in my previous letter. . . ." (GC Exh. 9.)

On December 29, 2005, John Walburn, the Respondent's director of labor relations, sent Frye a letter in which he confirmed as "accurate" Tachibana's earlier letter. Walburn acknowledged the accuracy of Frye's understanding that the Hospital would not be distributing the declination form and "such will not be required [sic] inpatient nurses to comply with the terms therein as a condition of employment." Further, he indicated that regarding the Union's request for information of December 5, 2005, "due to holidays and schedules, we will have to get back to you after the first of the year." (GC Exh. 10.) However, on that same date, December 29, Rose Methven, a nurse manager and acknowledged supervisor, sent an email message entitled "flu vacc. update" to a number of registered nurses in several departments. In that message, Methven states that "[s]tarting Sunday 1/1 all nonvaccinated staff working in patient care areas will wear masks (do not use the same mask all day-change periodically)." She goes on to indicate that all visitors, including the family member of patients who are not vaccinated, will be required to wear facemasks in patient areas. Methven concluded by indicating that this policy "will continue during the flu season through March." (GC Exh. 11.)

It is clear from the Union's subsequent action that it considered Methven's email message to be in contradiction with the recent written statements from Walburn and Tachibana. Having learned from its members of Methven's email, Union Attorney David Campbell sent a letter dated December 30, 2005, to the Respondent's chief executive officer, as well as to Tachibana, and to Steven Stahl, the Respondent's new director of labor relations. Campbell references and attaches the email message from Methven. He characterizes the "directive" as an "unlawful change in working conditions," and as "inconsistent with the assurances communicated to the [Union] twice in the last two weeks." He outlines the recent history of the declination form, including the correspondence between Fry, Tachibana, and Walburn. Finally, Campbell requests the immediate retraction of Methven's email and that it be communicated to all registered nurses. While not specifically making another request for information, he mentions that a request for information regarding the "proposed changes in working conditions" was previously made. (GC Exh. 5.) As of the date of Campbell's letter, none of the requested information had been forthcoming from the Respondent.

Counsel for the Respondent, Debra Madsen, by letter dated January 3, 2006, responded to Campbell. Madsen "acknowledge[d] the confusion that ha[d] been created through our correspondence with Ms. Frye and the referenced email from one of our nurse managers." However, she defended the Hospital's "infection control policy, such as masking," as a "standard of practice," which the Respondent had a right to implement under the "management rights clause" found in Article 18 of the collective-bargaining agreement. According to Madsen, any issues of "noncompliance" with the policy would be handled through the standard processes, which might include "progressive discipline." Further, she indicated the documents previously requested by B. Frye would be provided within the next 10-business days. (GC Exh. 12.) In any event, as of January 1, 2006, the Respondent instituted the policy and required that its registered nurses who had not been immunized for the flu either wear a facemask or take antiviral medication.

The correspondence clearly shows that the Respondent furnished contradictory, inconsistent responses and statements of position to the Union. Tachibana's letter of December 9, 2005, informed the Union that the Respondent was not going to use the declination form "as a condition of continued employment." Walburn's letter of December 29, 2005, confirmed the Union's understanding that the Respondent would not be distributing the declination form, and that the RNs would not, as a condition of employment, be required to comply with the terms set forth in the declination form. Obviously, this correspondence left the Union with the reasonable impression that the Respondent was not going ahead with its proposed policy to require nonimmunized nurses to wear facemasks or take antiviral mediation. However, also on December 29, 2005, Methven sent an email message to a number of RNs informing them that as of January 1, 2006, the policy would be in effect, and all nonimmunized nurses would be required to wear facemasks in patient care areas.

The Respondent's letter from Madsen dated January 3, 2006, "acknowledge[d] the confusion that ha[d] been created through our correspondence. . . ." but, in any event, defended the Hospital's institution of the infection control policy. That policy had gone into effect January 1, 2006. While the confusing and inconsistent information may have been unintentional, perhaps simply the result of poor communication among the managers and supervisors, it was never the less damaging to the Union. Obviously, the wearing of facemasks was an issue of great concern to the members of the bargaining unit, and the confusing and inconsistent statements from management made it very difficult for the Union to respond to those concerns.

In my view, the fact that the Respondent did not have to bargain with the Union about the implementation of the flu pre-

vention policy, which I conclude was a nonmandatory subject of bargaining, did not relieve the Respondent of the duty to truthfully inform the Union of its intentions regarding the policy. In order for the Union to properly address the concerns of its members and the need to decide what action it should take regarding the policy, the Union required accurate information from the Respondent. That was not what it received. In this respect, I am in agreement with the General Counsel and the Charging Party that the Respondent, having furnished false and misleading information about its intention to implement the flu prevention policy, was in effect refusing to bargain in good faith with the Union.

In *Assn. of D.C. Liquor Wholesalers,* 300 NLRB 224 (1990), the Board found that an employer had supplied "contradictory" responses to the union representing its employees in responding to an information request. Id. at fn. 1. The Board adopted the finding of its administrative law judge that such conduct was false and misleading and constituted a violation of Section (8)(a)(5) and (1) of the Act. The matter before me is similar. The Union was prejudiced in its representational responsibility to its bargaining unit members by having been given contradictory information as to the Respondent's intention to implement the flu-prevention policy. Without accurate information as to the Respondent's intention, the Union's decision making ability was significantly hampered. The misleading information also caused the Union to be "undercut" in the eyes of its members, who expected that the Union's representations about the Respondent's intentions would be accurate. Whether deliberate or not, I find the Respondent's action to constitute a failure to bargain in good faith.

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith, as alleged in paragraph 7 of the complaint.

3. Failure to provide information in a timely manner

The General Counsel alleges in paragraph 6 of the complaint that since December 5, 2005, the Respondent has failed and refused to provide the Union in a timely manner with "all documents recording or reflecting objections, complaints or comments regarding the plans, forms or requirements regarding immunization plans . . .," which documents were requested by the Union.

It is undisputed that in a letter dated December 5, 2005, Barbara Frye, the Union's director of labor relations, expressed the Union's concern about the Respondent's plan to require that nonimmunized nurses either wear facemasks in patient care areas or take antiviral medication, and also concern over the use of the declination form. In her letter to the Respondent, Frye requested "further information . . . to intelligently asses [sic] your plan." A list of items was requested, including item 4, "All documents recording or reflecting objections, complaints or comments regarding the plans, forms or requirements referenced in response to items 2 and 3 above." (GC Exh. 7.) Items 2 and 3 refer to the Respondent's "immunization plans."

What the Union was seeking in item 4 was principally records of any objections raised, complaints about, or comments regarding the flu-prevention plan made by bargaining unit members to the Respondent. Simply put, what the Union wanted to see was the reaction of its bargaining unit members to the masking policy as reflected in correspondence with hospital management through such means as email messages. It is undisputed that the Hospital maintains an intranet all staff communication forum known as the "VM Staff Forum." It was certainly reasonable to assume that at least some objections, complaints, or comments made by RNs to the Respondent about the masking policy would have been through email postings to this forum.

It is the position of the Respondent, as expressed in counsel's posthearing brief, that the information requested by the Union in the December 5, 2005 letter (GC Exh. 7) was not relevant, was confusing, and that, in any event, the Respondent made a good-faith attempt to comply with the request. I do not agree. To begin with, the requested material was clearly relevant. There is no dispute that certain of the registered nurses represented by the Union were very unhappy and highly upset about the Respondent's flu-prevention policy and the requirement that they wear a facemask in patient care areas if they declined other methods of flu prevention. The Board has repeatedly held that information regarding unit employees is presumptively relevant. See *Industrial Welding Co.,* 175 NLRB 477 (1969); *Magma Copper Co.,* 208 NLRB 329 (1974). As the bargaining representative, the Union had the responsibility of gathering information about its members' feelings regarding the Respondent's policy. It was attempting to do just that when it requested any such information in the possession of the Respondent.

While I have concluded that the Respondent had no duty to bargain with the Union over the imposition of its flu prevention policy, the Union still had the right to the requested information. The Union needed the requested information in order to determine how its members felt about the policy, so it could intelligently decide what course of action to follow regarding the Respondent's establishment of this policy. The information sought was certainly relevant to the Union's role as a bargaining representative. In my opinion, the Union would have been negligent in its representational responsibilities had it not requested the information in question. Since the Union's request concerned the bargaining unit employees and their concerns about the Respondent's flu prevention policy, the information requested was relevant.[16]

It was not until April 25, 2006, at a face-to-face meeting, where the Respondent finally furnished the Union with what it had been requesting for 4-1/2 months, since December 5, 2005, that being "unredacted" copies of the RNs' email messages to the "VM Staff Forum" regarding the flu-prevention policy. Even if the delays in furnishing the information were not intentional, they display a lack of interest on the part of the Respondent's managers in furnishing the requested information in any sort of a timely fashion. Such conduct does not constitute a "good-faith" effort on the part of the Respondent's managers to fulfill the duty of timely furnishing the requested information.

[16] Although there may have been other methods of obtaining this same information, such as by polling its members, this does not prevent the Union from making the request, nor relieve the Respondent of the duty to furnish the information.

The chronology is clear. Tachibana first responded on December 9, 2005, to the request with a direction for the Union to contact the Respondent's director of labor relations. (GC Exh. 8.) Next, John Walburn advised the Union on December 29, 2005, that he could not "get back to you until after the first of the year." (GC Exh. 10.) Attorney Debra Madsen then became involved and on January 3, 2006, advised the Union that the documents requested by the Union would be provided within "the next 10 business days." (GC Exh. 12.) On January 16, 2006, Madsen provided certain information to the Union. However, she furnished no information under item 4 in the Union's original request, concluding that as the declination form was never used, there were no comments about the form in the possession of the Respondent. Further, Madsen stated that to the extent that there were objections, complaints or comments to the masking and antiviral medication, they "have taken place within the religious and medical accommodation process." (GC Exh. 13.) By this statement she was apparently suggesting that any such responses would be confidential and, therefore, not producible.[17]

Union Attorney Campbell responded by letter dated February 8, 2006, indicating the Union's position that the Respondent had failed to furnish information in a timely manner, and in particular had totally failed to produce any documents in response to item 4 in the original request for information. Campbell pointed out that the Union's request was not limited to the declination form alone, but, rather, to any "plans, forms or requirements" as they involved flu prevention alternatives to immunization. (GC Exh. 14.) I am of the view that to the extent there was any confusion or uncertainty on the part of the Respondent as to what information the Union was seeking under item 4, Campbell's letter of February 8 totally eliminated such confusion or uncertainty.

By letter of February 9, 2006, Madsen informed Campbell that she was unable to comply with the request for "additional information" for approximately 1 week. However, she now understood that by item 4 in its request, the Union was seeking materials such as employee email postings to the Hospital's "internal VM Staff Forum," where employees commented about the flu prevention policy, which emails the Respondent would attempt to provide. (GC Exh. 15.) Madsen next submitted to the Union by letter dated February 16, 2006, among other information, employee email postings to the "VM Staff Forum," the intranet all staff communication forum, concerning any objections, complaints, or comments pertaining to the Respondent's influenza prevention program. However, as Madsen pointed out in her cover letter, "These postings have been redacted so that the individual staff member's name and/or personally identifiable information is not disclosed." (GC Exh. 16.)

In yet further correspondence on this subject, David Campbell sent the Respondent a letter dated March 7, 2006, in which he criticized the Hospital's response to the Union's request for information, specifically the submission of redacted versions of staff postings on the intranet. Campbell pointed out that as the postings had been available to hospital employees with access to the intranet, there did not appear to be a confidentiality basis for refusing to furnish the Union with identifying information. (GC Exh. 17.) There then followed some additional correspondence, the most significant of which is a letter from Debra Madsen dated March 15, 2006, in which the Respondent took the position that the "identities" of those employees who posted messages about the flu-prevention policy on the Respondent's intranet site were "not relevant" to the issues surrounding the policy. (GC Exh. 19.)

Finally, the parties met face to face on April 25, 2006, in an effort to resolve the continuing dispute as to whether the Respondent had furnished all relevant information requested by the Union. According to the testimony of Barbara Frye, it was at that meeting that the Respondent furnished the Union with the unredacted versions of the emails from the staff forum where employees, including registered nurses, now identified,[18] had made comments, complaints, or objections about the Respondent's flu prevention program, including the masking and antiviral medication alternatives. The parties still did not agree that all requested information had been provided.

In any event, in regards to that information under item 4 in the original request letter of December 5, 2005 (GC Exh. 7), it is clear that the unredacted emails were not furnished to the Union until April 25, 2006, some 4-1/2 months later. Even if one were to conclude that the original request was confusing, any such confusion or uncertainty was eliminated by Campbell's clarifying letter of February 8, 2006. (GC Exh. 14.) Still, it took the Respondent another 2-1/2 months, until April 25, 2006, to finally provide the Union with the documents it was seeking.

The Board has held that an unwarranted delay in furnishing relevant requested information is as much of a violation of the Act as is a refusal to furnish the information at all. *Woodland Clinic,* 331 NLRB 735, 736 (2000) (7-week delay unreasonable); *Postal Service,* 308 NLRB 547, 550 (1992) (4-week delay unreasonable). Of course, every situation is different. However, in the matter before me, the Respondent delayed in getting the requested information to the Union for a minimum of 2-1/2 months, from February 8 to April 25, 2006. Certainly the Respondent should have understood the urgency with which the Union viewed this matter. The masking/antiviral medication options had gone into effect on January 1, 2006, for those RNs who declined to be immunized. Numerous RNs in the bargaining unit were highly upset about the policy and the Union had been attempting to obtain information on this issue since December 5, 2005. The Respondent was aware of all this, yet repeatedly delayed in furnishing the Union with the requested information.

The Respondent's conduct constituted a failure to timely furnish the Union with the information requested in item 4 of the Union's request letter dated December 5, 2005. Accord-

[17] While the Respondent initially made a confidentiality argument to the Union, counsel for the Respondent did not renew this argument before the undersigned at trial or in his posthearing brief.

[18] Unless it was able to identify those employees who communicated with the Respondent through email messages to the intranet site, the Union would be unable to determine which, if any of them, were members of the bargaining unit.

ingly, I find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 6 and its subparagraphs.

CONCLUSIONS OF LAW

1. The Respondent, Virginia Mason Hospital (a division of Virginia Mason Medical Center), is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a healthcare institution within the meaning of Section 2(14) of the Act.

2. The Union, Washington State Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following registered nurses employed by the Respondent, herein collectively called the unit, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time, part time and per diem nurses employed as registered nurses by the Respondent, excluding all other supervisory and administrative/management positions and all other employees.

4. At all times material, the Union has been the exclusive representative of all the registered nurses within the appropriate unit described above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By the following acts and conduct the Respondent has violated Section 8(a)(5) and (1) of the Act:

(a) By responding to the Union's request for relevant information by providing false and misleading information.

(b) By failing and refusing to provide the Union in a timely fashion with requested relevant information necessary for the Union to perform its role as bargaining representative.

6. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the 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.

The Respondent shall be required to post a notice that assures its registered nurses that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Virginia Mason Hospital (a division of Virginia Mason Medical Center), Seattle Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Providing false and misleading information to the Union in response to the Union's request for relevant information.

(b) Failing and refusing to provide the Union in a timely fashion with requested relevant information necessary for the Union to perform its role as bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing its registered nurses in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its hospital facility in Seattle Washington, 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 and maintained for 60 consecutive days in conspicuous places including all places where notices to registered nurses are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current registered nurses and former registered nurses employed by the Respondent in the bargaining unit at any time since December 9, 2005.

(b) 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.

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

Dated at Washington, D.C., September 12, 2006.

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.

[19] 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.

[20] If this Order is enforced by a judgment of a 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."

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT refuse to bargain in good faith with the Washington State Nurses Association (the Union) as the exclusive representative of the registered nurses employed at our Seattle, Washington hospital facility (the bargaining unit) by providing false and misleading information to the Union about our intention to implement an influenza prevention policy.

WE WILL NOT fail and refuse to furnish the Union in a timely fashion with relevant and necessary information concerning our influenza prevention policy, or any other relevant information needed by the Union in order for it to perform its representational activities on behalf of the members of the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

VIRGINIA MASON HOSPITAL (A DIVISION OF VIRGINIA MASON HOSPITAL CENTER)