

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

QUEENS VILLAGE DAY SCHOOL, INC.

and

Case No. 29-CA-29618
29-CA-29798

DISTRICT COUNCIL 1707, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Aggie Kapelman, Esq., Brooklyn, NY, for the
General Counsel.

DECISION

Statement of Facts

Steven Fish, Administrative Law Judge: Pursuant to charges filed by District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO (the Union) in Case Nos. 29-CA-29618 and 29-CA-29798, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on September 23, 2009, alleging that Queens Village Day School, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging its employee, Daisy Sherrod, because she joined, supported or assisted the Union, and by unlawfully threatening to discharge employees if they joined or supported the Union and by creating the impression among its employees that their union activities were being kept under surveillance by Respondent.

On March 24, 2010, the Director approved a bilateral settlement, executed by Respondent and the Union, resolving the allegations set forth in the consolidated complaint.

On April 19, 2011, the Director issued an Order Revoking Settlement and Reissuing Consolidated Complaint and Notice of Hearing. The order asserted that Respondent has failed to comply with certain aspects of the agreement by failing to make six scheduled installment payments totaling \$13,168.00.

The order further concluded that due to Respondent's conduct in breaching the agreement and failing to cure the default, the settlement agreement was revoked and requested that pursuant to the terms of the agreement that the allegations in the amended complaint must be deemed to be true.

Respondent did not file an answer to the aforementioned Order Revoking the Settlement and Reissuing the Consolidated Complaint.

On May 17, 2011, a hearing was held before me in Brooklyn, NY. Respondent did not appear. Counsel for General Counsel requested that I grant a Motion for Summary Judgment based on Respondent's failure to file an answer to the reissued complaint. General Counsel also asked that I issue a bench decision. I denied General Counsel's request for a bench decision and reserved ruling on the summary judgment request. I also requested a brief on several issues, particularly the questions of whether service of the reissued complaint had been

the remedial provisions of this Settlement Agreement and liquidated damages.

B. Substantive Terms

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The Agreement provides that Respondent make whole its employee, Daisy Sherrod, by the payment of \$25,893.00, payable in installments with the schedule set forth below:

	<u>Backpay Amount</u>	<u>Date Due</u>
10	\$5,000	April 19, 2010
	\$2,575	May 15, 2010
15	\$2,575	June 15, 2010
	\$2,575	July 15, 2010
	\$2,575	August 15, 2010
20	\$2,575	September 15, 2010
	\$2,575	October 15, 2010
25	\$2,575	November 15, 2010
	\$2,575	December 15, 2010
30	\$ 293	January 15, 2011 [sic]

The agreement also provides for a posting of a notice by Respondent. The notice includes the following language. “We have been advised by Daisy Sherrod that she would not accept an offer of reinstatement to her former position if we to make such an offer to her.”

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II. The Alleged Failure to Comply

The reissued complaint asserts that Respondent failed to make the final six payments in the agreement, which totaled \$13,168.00.

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The complaint also alleges that on March 21, 2011, Elias Feuer, supervisory attorney of the Compliance Division, sent a letter to Keith Frank, attorney for Respondent, as well as to Dawn Kirby Arnold, Respondent’s bankruptcy attorney. The letter reflects that the Director had approved a settlement agreement providing that Respondent make certain installment payments to Daisy Sherrod and that Respondent had stopped making the required payments on August 15, 2010, and that Respondent must cure its default by March 28, 2011 by making payment of the unpaid balance of \$13,168.00. If not, the letter further asserts that General Counsel will reissue the complaint, previously filed and seek summary judgment.

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Attorney Arnold replied to Feuer’s letter on March 22. This letter asserts that Respondent filed a voluntary petition under Chapter 11 of the United Bankruptcy Code and that the bankruptcy code calls for an automatic stay of all legal proceedings against Respondent.

The letter also notes that the Director had appeared and filed a proof of claim in the Chapter 11 case. Finally, the letter demanded that the Region withdraw its “demands for payment and threats of legal action outside the bankruptcy court.”

5 By letter of March 31, 2011, Feuer responded to Arnold. The letter notified Arnold that it is settled law that Board unfair labor proceedings are excepted from the automatic stay issued by the bankruptcy court. Feuer cited numerous circuit and district courts’ decisions supporting that position. In light of such precedent, Feuer reiterated the Region’s intention to revoke the settlement agreement, reissue the complaint and file a motion for summary judgment.

10 III. Service of the Complaint and Respondent’s Failure to Answer

As related above, the Director issued the Order Revoking the Settlement Agreement and Reissuing the Consolidated Complaint on April 19, 2011.

15 The affidavit of service in the formal papers, signed and sworn to by two agents of the Region, reflects that the order and the reissued complaint was served by regular and certified mail on Respondent at its address¹ and by regular mail on both Frank and Arnold, Respondent’s attorneys.

20 No answer to the reissued complaint was filed by either Frank or Arnold or anyone else on behalf of Respondent.

25 On May 5, 2011, Sharon Chau, Counsel for General Counsel, sent a letter by regular mail and by fax to Respondent and to Frank. The letter reflects that Respondent was served with the reissued complaint and that its answer was due on May 3, 2011. The letter further reflects that unless an answer is received by May 13, 2011, the Region would seek a default judgment. The letter also reminded Respondent and its attorney that the hearing was scheduled for May 17, 2011. No answer was filed by Respondent or by either of its attorneys.

30 On May 9, 2011, Frank sent a letter to the Director advising that his firm does not represent Respondent in the matter of the reissued complaint. A copy of this letter was also sent to Chau and to Respondent. At the hearing on May 17, 2011, no one from Respondent appeared.

35 After the close of the instant hearing, General Counsel sent to the undersigned a copy of a notice, signed by a United States bankruptcy judge, dated June 3, 2011, dismissing (upon application by the debtor) Respondent’s bankruptcy petition.

40 IV. Analysis Service of Reissued Complaint

Section 102.113 (a) and (e) of the Board’s Rules and Regulations sets forth the Board’s provisions dealing with service of complaints and compliance specifications.

45 Section 102.113 *Methods of service of process and papers by the Agency; proof of service.—(a) Service of complaints and compliance specifications.* Complaints and accompanying notices

50 ¹ This address used was alleged in the initial complaint as Respondent’s main facility, and this allegation was admitted in Respondent’s answer to that complaint.

of hearing, compliance specifications, and amendments to either complaints or to compliance specifications, shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(e) *Proof of service.* In the case of personal service, or delivery to a principal office or place of business, the verified return by the individual so serving the same, setting forth the manner of such service shall be proof of the same. In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

Furthermore, Section 102.121 of the Board's Rules states as follows: Sec. 102.121 *Rules to be liberally construed.*—The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the Act.

In interpreting the above sections, the Board has long held that procedural requirements regarding proof of service of documents should be liberally construed and that when documents have in fact been received, technical defects in the form of service do not affect the validity of service. *Control Services Inc.*, 303 NLRB 481 (1991); *Rome Specialty Co.*, 84 NLRB 55, 56 (1949) (Board finds that service of charge by regular mail rather than by certified mail valid since employer did not deny actual receipt of charge); *Olin Industries v. NLRB*, 192 F.2d 799 (5th Cir. 1952) (use of ordinary mail rather than registered mail represents a mere technical defect in service); *Sears Roebuck & Co.*, 117 NLRB 522, 523 fn. 3 (1957) (service of objections by ordinary mail to petitioner's address presumptive proof of service).

Here, the evidence supports the conclusion, which I make, that Respondent in fact received a copy of the reissued complaint. The complaint was sent by regular mail to Respondent at its address and there is no evidence that it was returned by the post office. Further, Respondent has made no assertion that it did not receive the document. Thus, for this reason alone, service has been established. *Apex Electric Services*, 356 NLRB #172 fn. 3 at slip op p. 1 (2011) (failure of postal service to return documents served by regular mail indicates actual service of those documents on Respondents); *Long Island Realty Group of L.I.*, 356 NLRB #176 slip op at 3 fn. 3 & 4 (2011) (compliance specification and order to show cause sent by regular mail and no evidence that method was returned; Board concludes that service has been accomplished); *Lite Flight Inc.*, 285 NLRB 649, 650 (1987), *enfd.* 843 F.2d 1392 (6th Cir. 1988); (failure of post office to return compliance specification to Region sent by ordinary mail to respondent indicates that respondent was actually served); *National Automatic Sprinklers*, 307 NLRB 481, 481 fn. 1 (1992) (compliance specification mailed by regular mail to last known address of respondent); *Sears Roebuck*, *supra*.

Furthermore, the record establishes additional support for the conclusion that Respondent actually received the reissued complaint. Thus, on May 3, 2011, Board Agent Chau mailed a letter to Respondent and to its attorney. The letter indicates that Respondent had been served with the reissued complaint, that no answer had been filed and that unless an answer was filed by May 13, the Region would seek a default judgment.

This letter did not result in the filing of an answer, but did produce a letter from

Therefore, contrary to the position expressed in the letter from Respondent's bankruptcy attorney, the bankruptcy proceeding does not deprive the Board of jurisdiction to proceed on the reissued complaint. Nor does the automatic stay in the bankruptcy proceeding apply to the Board complaint. Thus, the bankruptcy proceeding does not provide a defense to nor a justification for Respondent's failure to file an answer to the reissued complaint.

VI. Ruling on Motion for Summary Judgment

Based upon the uncontroverted allegations in the reissued complaint, Respondent has failed to comply with the terms of the settlement agreement by failing to remit the agreed upon backpay amounts due to Daisy Sherrod. Consequently, pursuant to the compliance provisions of the settlement agreement set forth above, I find that all of the allegations of the reissued complaint are true. *Déjà Vu Mechanicals Inc.*, 356 NLRB #37 slip op at 1-2 (2010); *U-Bee Ltd.*, 315 NLRB 667, 668 (1994).

Accordingly, I recommend that General Counsel's Motion for Summary Judgment be granted.

Based upon the entire record, I make the following:

Findings of Fact

A. Jurisdiction

At all material times, Respondent, a domestic corporation, with its principal office and place of business located at 219-32 Jamaica Avenue, Queens Village, New York, herein called the Jamaica Avenue facility, and with three other facilities locate at: 127-08 Merrick Blvd., Springfield, New York, herein called the Merrick Blvd. facility; 111-12 Farmers Blvd., St. Albans, New York, herein called the Farmers Blvd. facility; and 220-03 Hempstead Ave., Queens Village, New York, herein called the Hempstead Ave. facility, has been engaged in the operation of day care centers for children. During the past twelve-month period, which the period is representative of its annual operations in general, Respondent, in the course and conduct of its business operations described above: (a) derived gross revenues valued in excess of \$250,000 and (b) purchased and received at its facilities referred to above, goods, products and materials valued in excess of \$5,000 directly from points located outside the state of New York. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

I also find that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. The Alleged Unfair Labor Practices

At all material times, Vernetta C. Brown has held the position of executive director and part-owner, and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent of Respondent acting on its behalf.

On or about a date precisely unknown in April 2009, Respondent, by its agent, Brown, at the Merrick Blvd. facility, threatened to discharge employees if they joined, supported or assisted the Union.

On or about May 7, 2009, Respondent, by its agent, Brown, at the Merrick facility, threatened to discharge employees if they joined, supported or assisted the Union, and created an impression among its employees that their Union activities were being kept under surveillance by Respondent.

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On or about May 15, 2009, Respondent discharged its employee, Daisy Sherrod.

Since on or about May 15, 2009, Respondent has failed and refused to reinstate or offer to reinstate Daisy Sherrod to her former position of employment.

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Respondent discharged and refused to reinstate Sherrod because Sherrod joined, supported or assisted the Union and in order to discourage its employees from engaging in such activities or other concerted activities for the purpose of mutual aid or protection.

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Conclusions of Law

By the conduct described above, Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act and has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. The unfair labor practices of Respondent, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

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Remedy

Having found that Respondent was engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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Although the notice to employees in the settlement agreement stated that Sherrod would not accept an offer of reinstatement, that agreement has been revoked, so reinstatement is appropriate. *Phoenix Finishing Inc.*, 354 NLRB #64 slip op at 3 (2009); *Symphony Cleaners*, 344 NLRB 684, 686 (2005); *Manhattan Health Clean*, supra at 1039.

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It is also appropriate to order Respondent to make whole Sherrod for any loss of earnings suffered by her as a result of Respondent's unlawful conduct.

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In this regard, Respondent agreed in the settlement agreement to pay Sherrod a total of \$25,893.00, payable in installments. As reflected above, Respondent has made the first four installment payments, but has failed to make the final six payments. The General Counsel's motion states that there is an outstanding balance due to \$13,168.00. I shall, therefore, recommend that Respondent immediately remit these payments to the Region for payment to Sherrod. *Phoenix Finishing*, supra, 354 NLRB at 3; *Symphony Cleaners*, supra, 344 NLRB at 686.

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However, the backpay due to Sherrod should not be limited to this amount. As set forth above, the settlement agreement provided that in the event of non-compliance, the Board could "issue an order providing a full remedy for the violations found as is customary to remedy such violations, including, but not limited to, remedial provisions of this settlement." Thus, under this language, it is appropriate to provide the "customary" remedies of reinstatement, full backpay, expungement of the Respondent's personnel records and notice of posting. *Sidhal Industries*,

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356 NLRB #67 slip op at 8 and 9 (2010); *Phoenix Finishing*, supra, 354 NLRB #64 slip op at 3.

Therefore, additional backpay is due to Sherrod in addition to the \$13,168.00 that Respondent has failed to remit. Since it is unclear from this record whether the \$25,893.00 agreed upon by Respondent represents the equivalent of full backpay for the pre-settlement period, the backpay period for Sherrod shall commence on the date of the unlawful discrimination against Sherrod with any amounts already paid to be deducted from Respondent’s backpay liability. *Sidhal Industries*, supra slip op at 1 fn. 2.

The additional backpay due to Sherrod shall be computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and compounded on a daily basis. *Kentucky River Medical Center*, 356 NLRB #8 (2010).

Further, Respondent shall be required to remove from its filed any reference to the unlawful discharge of Daisy Sherrod and notify her in writing that this has been done and this unlawful conduct will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Queens Village Day School, Queens Village, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging employees because of their support for or activities on behalf of District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO, herein called the Union, or any other labor organization.

(b) Threatening to discharge employees because of their support for or activities on behalf of the Union or any other labor organization.

(c) Telling employees that they are discharged because of their support for or activities on behalf of the Union or on behalf of any other labor organization.

(d) Creating the impression that you are watching or spying on the Union activities of employees.

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

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

⁴ 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.

(a) Remit to Region 29 the payment of \$13,168.00 to be disbursed to Daisy Sherrod in accordance with the settlement agreement and to make Daisy Sherrod whole for any additional loss of earnings and other benefits suffered as a result of the discrimination against her. The backpay period shall begin on the date of Respondent’s unlawful discrimination against Daisy Sherrod, with any amounts already paid to be deducted from Respondent’s backpay liability.

(b) Within 14 days from the date of the Board’s Order, offer Daisy Sherrod employment, without prejudice to her seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employee hired to fill her former position.

(c) Within 14 days from the date of the Board’s Order, if it has not already done so, remove from its files any reference to the discharge of Daisy Sherrod, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records of stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its four Queens, New York facilities, copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2009.

Dated, Washington, D.C., July 6, 2011.

 Steven Fish,
 Administrative Law Judge

⁵ 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.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT fire you because of your support for or activities on behalf of District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO, herein called the Union, or on behalf of any other labor organization.

WE WILL NOT threaten to fire you because of your support for or activities on behalf of the Union or on behalf of any other labor organization.

WE WILL NOT tell you that we fired you because of your support for or activities on behalf of the Union or on behalf of any other labor organization.

WE WILL NOT create the impression that we are watching or spying on your Union activities.

WE WILL NOT in any like or related manner interfere with your exercise of any of the rights stated above.

WE WILL remit to Region 29 the payment of \$13,168.00 to be disbursed to Daisy Sherrod in accordance with the settlement agreement and to make Daisy Sherrod whole for any additional loss of earnings and other benefits resulting from our discharge of her, less any monies we have already paid in satisfaction of the money we owe to her, plus interest.

WE WILL within 14 days from the date of the Board's Order, offer to reinstate Daisy Sherrod to her former position of employment, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE HAVE removed from our files any reference to our unlawful discharge of Daisy Sherrod and have notified her in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, notify Daisy Sherrod in writing that her discharge will not be used against her in any way.

QUEENS VILLAGE DAY SCHOOL, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.