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Park Avenue Investment Advisor, LLC d/b/a Met Hotel Detroit/Troy d/b/a Metropolitan Hotel Group *and* Local 24, UNITE HERE, AFL–CIO. Case 07–CA–060921

April 17, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The Acting General Counsel seeks a default judgment in this case on the ground that Park Avenue Investment Advisor, LLC d/b/a Met Hotel Detroit/Troy d/b/a Metropolitan Hotel Group (the Respondent) has failed to file an answer to the complaint. Upon a charge and amended charges filed by Local 24, UNITE HERE, AFL–CIO (the Union) on July 1, August 5, September 14, and September 19, 2011, respectively, the Acting General Counsel issued the complaint on September 19, 2011, against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On October 28, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on November 2, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent submitted a response, but the response was improperly and untimely submitted by facsimile after close of business on the date that the response was due. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by October 3, 2011, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated October 6, 2011, notified the Respondent that unless an answer was received by October 17, 2011, a motion for default judgment would be filed. By letter dated October 18, 2011, the Region granted the Respondent's request for an extension of time and stated that an answer must be filed by October 24, 2011. Nonetheless, the Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware company with an office and place of business in Troy, Michigan, has been engaged in the operation of a hotel providing food and lodging.

During calendar year 2010, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and purchased and received at its Troy facility goods valued in excess of $50,000 from other enterprises in the State of Michigan, including Consumers Energy, which other enterprises received these goods directly from points outside the State of Michigan.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Failure to Remit Dues Deducted From Employee Paychecks.

The complaint alleges that the parties' collective-bargaining agreement expired on January 31, 2011, and that, since about January 1, 2011, the Respondent failed to remit to the Union dues collected from unit employees. The complaint further alleges that this is a mandatory subject for the purposes of collective bargaining, that the Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain, and that the Respondent thereby refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. The Acting General Counsel's Motion for Default Judgment likewise urges us to find that the Respondent's actions violated Section 8(a)(1) and (5). For the reasons set forth below, we grant the motion for default judgment.

The Board addressed a similar situation in *Talaco Communications, Inc*., 321 NLRB 762 (1996), which also was a default-judgment proceeding where the complaint alleged that the respondent employer had failed to remit dues to the union that were deducted both during and after the term of the parties' collective-bargaining agreement. With respect to dues deducted from employ-

ee paychecks during the term of the agreement, the Board held, in accordance with long-standing precedent, that the employer's failure to remit the deducted dues to the union constituted an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act. The Board therefore ordered the employer to remit the withheld dues to the union as required by the agreement.

In contrast, with respect to dues deducted from employee paychecks after the parties' contract expired, the Board held that the employer's retention of the deducted dues violated Section 8(a)(1), rather than Section 8(a)(5), of the Act. The Board cited well-established precedent holding that an employer's obligation to abide by the terms of a dues-checkoff provision ceases with the expiration of the contract. The Board found that once an employer deducts dues from employees' paychecks, however, it is not entitled to keep the money for itself. If the dues were deducted pursuant to valid checkoff authorizations that have not expired or been revoked, the union is entitled to the money. If, on the other hand, the employees' checkoff authorizations expired or were revoked after contract expiration, then the employees are entitled to the money. The Board found that, in either event, the employer's retention of the checked-off dues interferes with, restrains, or coerces employees in the exercise of their Section 7 rights to join and assist a labor organization in violation of Section 8(a)(1) of the Act. The Board therefore ordered the respondent employer to remit the deducted dues to the union, or to the employees, depending on whether the employees' checkoff authorizations had expired or were revoked after contract expiration, an issue which the Board left to be determined in the compliance proceeding. See 321 NLRB at 763–764. Accord: *Able Aluminum Co*., 321 NLRB 1071 (1996), and *Valley Stream Aluminum, Inc.*, 321 NLRB 1076 (1996).

As stated, the complaint here alleges that the parties' contract expired on January 31, 2011, and that, since about January 1, 2011, the Respondent ceased remitting to the Union dues payments collected from unit employees. We find that by failing to remit the collected dues to the Union from January 1 through January 31, 2011, the Respondent has violated Section 8(a)(5) and (1) of the Act. However, to the extent that the complaint alleges that the Respondent ceased remitting dues that were collected after the contract expired, we find that the Respondent has violated Section 8(a)(1) of the Act. As discussed above, *Talaco Communications* holds that if the dues at issue were collected from employees after the expiration of the contract, the failure to remit those dues violates Section 8(a)(1) rather than Section 8(a)(5), and that the appropriate remedy is to require the dues to be remitted to the Union or to the employees, depending on whether the dues were collected pursuant to valid, unexpired, and unrevoked checkoff authorizations.[1]

B. Remaining Complaint Allegations

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Remo Polselli	Owner and Managing Partner
Hanna Karcho	Partner
Rebecca Heath	Manager
Meagan McCarthy	General Manager (until about June 2011)
Kim Russo	General Manager (until about mid-August 2011)
Dan Russo	Food and Beverage Manager (until about mid-August 2011)

The following employees (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Line Cook, Banquet Cook, Garde Manager, Steward/Utility, Bartender, Banquet Bartender, Banquet Bar Porter, Housekeeping Attendant, Laundry, Houseperson, Restaurant Server, Room Service Server, Host/Hostess/Cashier, Banquet Houseperson, Banquet Cashier/Coat Check, Coffee Break Attendant, Banquet Server, Guest Service Associate/Bell Person, and Guest Service Associate/Night Auditor employed by Respondent at its Troy, Michigan facility; but excluding managerial, supervisory, maintenance, sales, administrative, accounting, security, and confidential employees, and all other personnel.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by the Respondent. This recognition was embodied in a collective-bargaining agreement, which was effective for

[1] In *Advanced Telephonics, Inc.*, 341 NLRB 317 (2004), the Board partially denied a motion for default judgment in a proceeding in which the complaint alleged that a respondent's failure to remit deducted union dues violated Sec. 8(a)(1) and (5). The Board found that the complaint's language was not sufficient to allege a violation of Sec. 8(a)(1) based on the respondent's failure to remit dues to the union that had been deducted after the collective-bargaining agreement expired, and the Board denied the motion for default judgment in this regard. To the extent that the Board's decision in *Advanced Telephonics* is inconsistent with our decision, it is overruled.

the period of February 1, 2008 through January 31, 2011, which agreement was assumed by the Respondent on October 21, 2009.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about January 1, 2011, the Respondent unilaterally suspended payments to the Wayne County HealthChoice program for unit employees' health insurance, making some payments only in a sporadic and intermittent fashion.

Since about March 2011, the Respondent unilaterally suspended payments to the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance.

Since about June 1, 2011, the Respondent unilaterally suspended payments to the National Retirement Fund for the unit employees.

Since about July 8, 2011, the Respondent unilaterally disregarded seniority with respect to the scheduling of its unit employees.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording it a meaningful opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct on the unit.

At various times from January 2011 through March 2011, the Respondent and the Union met for the purpose of negotiating a successor collective-bargaining agreement to the 2008–2011 agreement described above.

Since about March 1, 2011, the Respondent canceled four sessions for the negotiation of a successor collective-bargaining agreement to the 2008–2011 agreement described above and has not met since with the Union.

CONCLUSIONS OF LAW

1. By failing to remit to the Union and/or the employees any checked off union dues it has deducted and retained after expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By the conduct described in section II.B., above, and by failing to remit to the Union dues collected prior to the expiration of the collective-bargaining agreement, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees, in violation of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing, since about March 1, 2011, to bargain with the Union as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondent, on request, to bargain with the Union as the exclusive collective-bargaining representative of the unit employees and, if an understanding is reached, to embody the understanding in a signed agreement.

Further, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to remit to the Union dues that were collected from unit employees before the expiration of the collective-bargaining agreement, we shall order the Respondent to remit such collected dues to the Union as required by the agreement, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Having found that the Respondent has violated Section 8(a)(1) by retaining for itself any dues deducted from the pay of unit employees after the expiration of the collective-bargaining agreement, we shall order the Respondent to remit those sums to the Union, provided that the dues were deducted pursuant to valid, unexpired, and unrevoked dues-checkoff authorizations. If the dues were deducted pursuant to expired or revoked checkoff authorizations, the Respondent shall return any withheld dues to the employees, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally suspending payments to (1) the Wayne County HealthChoice program for unit employees' health insurance, making some payments only in a sporadic and intermittent fashion; (2) the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance; and (3) the National Retirement Fund for the unit employees; we shall order the Respondent to, on request of the Union, rescind the unilateral suspension of payments and restore the status quo ante that existed pri-

or to the unilateral suspension of payments.[2] In addition, the Respondent shall make the unit employees whole for any losses suffered as a result of its unlawful conduct by making all delinquent payments or contributions to the Wayne County HealthChoice program, the UNITE HERE Health "Culinary" Fund, and the National Retirement Fund, that have not been made since about January 1, March, and June 1, 2011, respectively, including any additional amounts due the funds on behalf of unit employees in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).[3] We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, having found that the Respondent unilaterally disregarded seniority with respect to the scheduling of its unit employees, we shall order the Respondent to make the unit employees whole for any losses suffered as a result of its unlawful conduct in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[4]

[2] As part of the requested remedies in the complaint, the Acting General Counsel requests that the Respondent advise employees, in writing, of the rescission of its unilateral suspension of fund payments, remittance of dues, and use of seniority to govern scheduling of employees. To the extent that this requested remedy goes beyond the notice to employees discussed in par. 2(h) of this Order, we deny the request.

[3] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[4] The Acting General Counsel's motion seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no unilateral disregard of seniority with respect to the scheduling of its unit employees. Further, the Acting General Counsel requests that the Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited there.

ORDER

The National Labor Relations Board orders that the Respondent, Park Avenue Investment Advisor, LLC d/b/a Met Hotel Detroit/Troy d/b/a Metropolitan Hotel Group, Troy, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Local 24, UNITE HERE, AFL–CIO, as the exclusive collective-bargaining representative of the unit employees in the following appropriate unit:

> Line Cook, Banquet Cook, Garde Manager, Steward/Utility, Bartender, Banquet Bartender, Banquet Bar Porter, Housekeeping Attendant, Laundry, Houseperson, Restaurant Server, Room Service Server, Host/Hostess/Cashier, Banquet Houseperson, Banquet Cashier/Coat Check, Coffee Break Attendant, Banquet Server, Guest Service Associate/Bell Person, and Guest Service Associate/Night Auditor employed by Respondent at its Troy, Michigan facility; but excluding managerial, supervisory, maintenance, sales, administrative, accounting, security, and confidential employees, and all other personnel.

(b) Failing to remit to the Union dues collected from unit employees prior to the expiration of the collective-bargaining agreement.

(c) Interfering with, restraining, and coercing its employees in the exercise of their rights to join and assist a labor organization, by failing to remit to the Union dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to the employees' valid, unexpired, and unrevoked checkoff authorizations, or by deducting and failing to return to the employees dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to expired or revoked checkoff authorizations.

(d) Unilaterally suspending payments to the Wayne County HealthChoice program for unit employees' health insurance, making some payments only in a sporadic and intermittent fashion.

(e) Unilaterally suspending payments to the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance.

(f) Unilaterally suspending payments to the National Retirement Fund for the unit employees.

(g) Unilaterally disregarding seniority with respect to the scheduling of its unit employees.

(h) 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.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Remit to the Union all dues collected from unit employees prior to the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of this decision.

(c) Remit either to the Union or to the employees, as determined at the compliance stage of this proceeding, all dues deducted from employees' pay after the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of this decision.

(d) On request of the Union, rescind the unilateral suspension of payments to the Wayne County HealthChoice program for unit employees' health insurance; the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance; and the National Retirement Fund for the unit employees; and restore the status quo ante that existed prior to the unilateral suspension of payments.

(e) Make all delinquent contributions to the Wayne County HealthChoice program for unit employees' health insurance; the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance; and the National Retirement Fund for the unit employees; that have not been made since about January 1, 2011, and make the unit employees whole for any expenses ensuing from its failure to make such payments, including any additional amounts due the funds on behalf of unit employees, with interest, in the manner set forth in the remedy section of this decision.

(f) Make the unit employees whole for any losses suffered as a result of its unlawful disregarding of seniority with respect to the scheduling of its unit employees, with interest, in the manner set forth in the remedy section of this decision.

(g) 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 if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Troy Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, 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 facility 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 January 1, 2011.

(i) 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.

Dated, Washington, D.C. April 17, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[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 fail and refuse to bargain collectively and in good faith with Local 24, UNITE HERE, AFL-CIO, as the exclusive collective-bargaining representative of the unit employees in the following appropriate unit:

> Line Cook, Banquet Cook, Garde Manager, Steward/Utility, Bartender, Banquet Bartender, Banquet Bar Porter, Housekeeping Attendant, Laundry, Houseperson, Restaurant Server, Room Service Server, Host/Hostess/Cashier, Banquet Houseperson, Banquet Cashier/Coat Check, Coffee Break Attendant, Banquet Server, Guest Service Associate/Bell Person, and Guest Service Associate/Night Auditor employed by Respondent at its Troy, Michigan facility; but excluding managerial, supervisory, maintenance, sales, administrative, accounting, security, and confidential employees, and all other personnel.

WE WILL NOT fail to remit to the Union dues collected from unit employees prior to the expiration of the collective-bargaining agreement.

WE WILL NOT interfere with, restrain, and coerce you in the exercise of your rights to join and assist a labor organization, by failing to remit to the Union dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to the employees' valid, unexpired, and unrevoked checkoff authorizations, or by deducting and failing to return to the employees dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to expired or revoked checkoff authorizations.

WE WILL NOT unilaterally suspend payments to the Wayne County HealthChoice program for our unit employees' health insurance, and WE WILL NOT make some payments only in a sporadic and intermittent fashion.

WE WILL NOT unilaterally suspend payments to the UNITE HERE Health "Culinary" Fund for our unit employees' life, vision, and dental insurance.

WE WILL NOT unilaterally suspend payments to the National Retirement Fund for our unit employees.

WE WILL NOT unilaterally disregard seniority with respect to the scheduling of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees, and if an understanding is reached, put in writing and sign the agreement.

WE WILL remit to the Union all dues we collected from unit employees prior to the expiration of the collective-bargaining agreement, with interest.

WE WILL remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, any dues we deducted from employees' pay after the expiration of the collective-bargaining agreement, with interest.

WE WILL, on request of the Union, rescind the unilateral suspension of payments to the Wayne County HealthChoice program for unit employees' health insurance; the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance; and the National Retirement Fund for the unit employees; and WE WILL restore the status quo ante that existed prior to the unilateral suspension of payments.

WE WILL make all delinquent contributions to the Wayne County HealthChoice program for unit employees' health insurance; the UNITE HERE Health "Culinary" Fund for unit employees' life, vision, and dental insurance; and the National Retirement Fund for the unit employees that have not been made since about January 1, 2011, and WE WILL make the unit employees whole for

any expenses ensuing from our failure to make such payments, including any additional amounts due the funds on behalf of unit employees, with interest.

WE WILL make the unit employees whole for any losses suffered as a result of our unlawful disregarding of seniority with respect to the scheduling of our unit employees, with interest.

PARK AVENUE INVESTMENT ADVISOR, LLC D/B/A MET HOTEL DETROIT/TROY D/B/A METROPOLITAN HOTEL GROUP