

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**JAG HEALTHCARE, INC.
d/b/a GALION POINTE, LLC**

and

**Cases 08-CA-039029
 08-CA-039112
 08-CA-039133**

**SERVICE EMPLOYEES INTERNATIONAL
UNION, DISTRICT 1199, WV/KY/OH**

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS**

Pursuant to Section 102.46 (d) of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the Acting General Counsel files this Answering Brief To Respondent’s Exceptions.¹ Based upon the reasons fully developed below, Counsel for the Acting General Counsel respectfully submits that the Decision of ALJ Geoffrey Carter should be adopted by the Board. Furthermore, Counsel for the Acting General Counsel respectfully submits that Oral Argument, as requested by Respondent, is not warranted in this case and that the request should be denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.²

¹ Hereafter, Administrative Law Judge Geoffrey Carter will be referred to as ALJ; JAG Healthcare, Inc., will be referred to as JAG, Respondent or Employer; Service Employees International Union, District 1199, WV/KY/OH will be referred to as Charging Party or Union; references to the official transcript will be referred to as Tr.____; Counsel for the Acting General Counsel’s exhibits will be referred to as GC Exh.____; Respondent’s exhibits will be referred to as R. Exh.____; pages and lines in the ALJ’s Decision will be referred to as ALJD P.____ L.____.

² Counsel for the AGC respectfully notes that the Respondent made no argument in support of its request.

TABLE OF CONTENTS

Table of Contents.....2

Table of Cases and Authorities.....4

Response to Respondent’s Exceptions Nos. 1, 2 and 3.....6

Response to Respondent’s Exception No. 4.....7

Response to Respondent’s Exception No. 5.....8

Response to Respondent’s Exception No. 6.....9

Response to Respondent’s Exceptions Nos. 7, 19 and 20.....10

Response to Respondent’s Exceptions Nos. 8, 9 and 18.....13

Response to Respondent’s Exception No. 10.....14

Response to Respondent’s Exceptions Nos. 11 and 28.....15

Response to Respondent’s Exceptions Nos. 12 and 26.....18

Response to Respondent’s Exceptions Nos. 13 and 27.....20

Response to Respondent’s Exception No. 14.....22

Response to Respondent’s Exceptions Nos. 15 and 23.....23

 Testimony of James Griffiths Regarding Staffing.....25

 Testimony of Miriam Walters Regarding Staffing.....26

 Testimony of Department Heads Regarding Staffing.....27

 Impact of Job Applications and Interviews Upon Staffing.....30

 Job Performance of Village Care Employees.....31

Response to Respondent’s Exception No. 16.....31

Response to Respondent’s Exception No. 17.....33

Response to Respondent’s Exception No. 21.....33

Response to Respondent’s Exception No. 22.....34

Response to Respondent’s Exception No. 24.....35

Response to Respondent’s Exception No. 25.....36
Response to Respondent’s Exception No. 29.....37
Certificate of Service.....39

TABLE OF CASES AND AUTHORITIES

Supreme Court Decisions:

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37-39 (1987).....12, 14

NLRB v. Burns Int’l Security Services, Inc., 406 U.S. 272, 277-81 (1972).....12

NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969).....38

Circuit Court Decisions:

Advanced Stretchforming Int’l, 323 NLRB 529, 530-531 (1997), enfd. in rel. part 233 F.2d 1176
(9th Cir. 2000).....12

Capital Cleaning Contractors v. NLRB, 147 F.3d 999 (D.C. Cir. 1998).....35

Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981).....33

Kessel Food Markets, Inc., 287 NLRB 426, 429 (1987), enfd. 868 F.2d 881, 884 (6th Cir. 1989),
cert. denied 493 U.S. 820 (1989).....11, 33, 34, 36

NLRB Decisions:

Emergency One, Inc., 306 NLRB 800 (1992).....37

Love’s Barbecue Restaurant No. 62, 245 NLRB 78, 82 (1979).....33

Opryland Hotel, 323 NLRB 723 (1997).....37

Planned Building Services, 347 NLRB 670, 674 (2006).....33, 38

Relco Locomotives, Inc., 358 NLRB No. 37, slip op. at 14 (2012).....22

Reno Hilton Resorts, 320 NLRB 197 (1995).....37

Roosevelt Memorial Medical Center, 348 NLRB 1016, 1022 (2006).....15

Specialty Hospital of Washington-Hadley, LLC, 357 NLRB No. 77, slip op. at 2 (2011).....14

State Distributing Co., 282 NLRB 1048, 1049 (1987).....11

United Rentals, Inc., 350 NLRB 951, 971 (2007).....38

U.S. Marine Corporation, 293 NLRB 669, 671 (1989).....32

Van Lear Equipment, Inc., 336 NLRB 1059, 1063 (2001).....14

Willamette Industries, 306 NLRB 1010 fn. 2 (1992).....37

National Labor Relations Board Rules and Regulations:

Section 102.45.....38

Section 102.46 (d).....1

Respondent's Exceptions Nos. 1, 2 and 3:

The Respondent asserts that the ALJ erred by finding that the Respondent “operates” skilled nursing facilities without further clarifying that the Respondent is a management company that contracts to provide services to nursing facility operators. The Respondent further asserts that the ALJ erred by finding that the Respondent “acquire(s)” small nursing homes, claiming that there is no evidence that the Respondent has any ownership interest in any nursing home relevant to the instant cases. Finally, the Respondent asserts that the ALJ erred by finding the Respondent signed a lease for the facility formerly operated as Village Care on June 29, 2010, or otherwise became legally bound by the referenced lease.

The ALJ correctly explained the Respondent's operations at ALJD P. 4, L. 4-6; P. 5, L. 25-27; and P. 5, footnote 8. Furthermore, the Respondent admitted in its Answer to the Consolidated Complaint that on or about June 29, 2010, it executed an Operations Transfer Agreement with 925 Wagner Operating, LLC, d/b/a Village Care Center, which transferred operational control of the nursing facility to the Respondent. GC Exh. 1(m).

James Griffiths, the Owner, President and CEO of JAG,³ began exploring the possibility of acquiring operational control of the facility at issue months in advance of June, 2010. Specifically, Griffiths testified that he visited the facility as early as February, 2010, along with Miriam Walters (Director of Nursing Services), Doug Walters (Director of Plant Operations) and Jana Hopkins. Tr. 142. David Cooley, JAG's Chief Financial Officer, testified that Griffiths Healthcare⁴ began looking into the facility as early as late 2009 or early 2010 through broker Jerry Ryan. Tr. 1509.

³ Griffiths testified that JAG is a corporation that helps manage and operate nursing homes. Tr. 126.

⁴ Articles of Incorporation for JAG Healthcare, Inc., which was preceded by Griffiths Healthcare, Inc., were filed with the Secretary of State for the State of Ohio on June 7, 2010. GC Exh. 16.

JAG's interest in, and pursuit of, the facility continued, as it submitted a Letter of Intent to lease the facility to Cardinal, dated February 26, 2010.⁵ GC Exh. 31. By letter dated May 14, 2010, Cardinal submitted a "CHOP" letter, or Change of Operator Notice, to the Ohio Department of Job and Family Services (GC Exh. 11), to notify the State of Ohio of the impending change in operator for the facility, as required by the Ohio Administrative Code. GC Exh. 17.

JAG, through its operator and license provider Galion Pointe, LLC,⁶ executed a Lease Agreement with Cardinal Nursing Homes, Inc. The Lease Agreement was executed on June 29, 2010 and became effective July 1, 2010. Tr. 129; GC Exh. 12. Prior to JAG's leasehold interest in the facility, the facility was sub-leased to 925 Wagner Operating, LLC. JAG assumed operational control of the facility from 925 Wagner Operating, LLC as of midnight on July 1, 2010, pursuant to a negotiated Operations Transfer Agreement executed on June 29, 2010. Tr. 133 – 136; GC Exh. 13.

As of the commencement of the administrative hearing on March 26, 2012, JAG operated nine different nursing facilities, including Galion Pointe. Tr. 127.

Counsel for the AGC concedes that the Respondent does not have an ownership interest in the physical structure of the facility in question, located at 925 Wagner Avenue, Galion, OH 44833. Cardinal Nursing Homes, Inc., owns the physical structure of the facility. Tr. 129, GC Exh. 12. The Respondent, however, did acquire operational control of the facility via a signed lease and the executed Operations Transfer Agreement with the previous tenant noted above. Tr. 126-136; GC Exhs. 12 and 13.

Respondent's Exception No. 4:

⁵ Although JAG CFO Cooley testified that the original Letter of Intent was rescinded in May, 2010, JAG's interest in the facility did not end and its failure to re-submit a Letter of Intent did not impede negotiations. Tr. 1551.

⁶ The Initial Articles of Incorporation for Galion Pointe, LLC, filed on May 3, 2010, can be found at GC Exh. 15.

The Respondent asserts that the ALJ erred by finding that James Griffiths made the final hiring decisions for staffing at Galion Pointe on July 1, 2010 because all of the evidence showed that he did not include or exclude anyone from being hired and otherwise had no material role in the decision-making process.

At hearing, Griffiths initially explained his involvement in the hiring process as “peripheral” (Tr. 137), but later called it a “collaborative process” during which time he met with department heads to gain their input on staffing. Tr. 155 – 156.

The record testimony further revealed that JAG’s Director of Nursing Services, Miriam Walters, identified James Griffiths as the decision-maker with final approval on everything related to hiring at the facility. Tr. 265.

Ms. Walters claimed credit for making the final staffing decisions regarding Nurse Aides and also testified that Griffiths was not involved in deciding to extend an offer of employment to Nurse Aides. Tr. 1158-1159. Walters’ testimony reflected, however, that at a minimum, Griffiths was consulted during the decision-making process. For the Respondent to boldly assert that Griffiths had “no material role in the decision-making process” simply misstates the facts adduced at the hearing.⁷

Respondent’s Exception No. 5:

The Respondent asserts that at ALDJ P. 6, L. 25 through P. 7, L. 2, the ALJ erred by finding that “Ms. Walters requested that Ms. Knight⁸ provide her with a roster showing union membership, and that she used this roster for illegal purposes...” The exception misstates the ALJD lines identified. The ALDJ, at P. 6, L. 25 through P. 7, L. 2, reads as follows:

⁷ Furthermore, Respondent’s citation to Tr. 1536-1537 makes no reference whatsoever to the hiring decisions made by James Griffiths or his role in that process.

⁸ Connie Knight is the Respondent’s Human Resources / Payroll Manager at the facility.

Knight also provided Walters with a roster of employees, on which Knight wrote each employee's job title and whether the employee was a member of the Union. Walters did not ask Knight for any input on employee job performance or which employees JAG Healthcare should hire.⁹

Miriam Walters testified that she used a listing (Tr. 262) and later recalled seeing a document similar to GC Exh. 56 when making staffing decisions at the facility on June 30, 2010. Tr. 330. She would later identify R. Exh. 18 as the document, provided by Knight, that she used and made notes on during the staffing process. Tr. 1193. The document in question clearly identified the bargaining unit employees, as they were identified by the letter "u" next to their names. Tr. 1193. See also Tr. 470, 475-476, 1107 – 1113, 1115, 1118, 1233 – 1234, and 1244 – 1248; GC Exh. 56 and R. Exh. 18. So, the record testimony is consistent with the ALJ's findings at ALDJ P. 6, L. 25 through P. 7, L. 2.

Respondent's Exception No. 6:

The Respondent asserts that the ALJ erred by finding that the Respondent kept track of the total number of former Village Care bargaining unit members that it was identifying for hire, and specifically for the purpose of depressing the number hired to avoid recognition of the union, because there is no testimony or other evidence to support the ALJ's reasoning, and all of the admitted testimony on the question is contrary to the ALJ's reasoning and finding.

To assert that there is no testimony or other evidence to support this finding simply ignores the facts and documentary evidence in the record. Not only did Miriam Walters make notes on R. Exh. 18, but she also kept additional, Union-related written notes during the staffing process. Tr. 298 – 309; GC Exh. 19 and 20. Walters admitted to writing the comments next to the names of the employees that appeared on GC Exh. 19. Next to the name Kayla Schramek, Walters wrote "good, union is stupid." Next to the name Melody, Walters wrote "good – said

⁹ Citations to the official transcript and exhibits omitted.

union was falling apart before we took over.” Significantly, STNA’s Kayla Schramek and Melody Stratton were hired by JAG as of July 1, 2010. Tr. 303; GC Exh. 21.

With respect to GC Exh. 20, Walters admitted to writing the numeric calculation that appears toward the bottom of the document. Tr. 308 – 309. Walters also admitted to writing notes next to the names of former Village Care bargaining unit members on R. 18. Tr. 1116-1120.

Based upon the above, the ALJ’s findings are reasonable and supported by the record testimony and documentary evidence cited, supra.

Respondent’s Exceptions Nos. 7, 19 and 20:

The Respondent asserts that the ALJ erred by finding that the Respondent communicated to Village Care employees attending a June 30, 2010 meeting that the Respondent would not recognize the union as the representative of the employees at Galion Pointe. The Respondent also asserts that the ALJ erred in finding that a successor employer that informs applicants that there will be no union causes an employer to forfeit any “Burns rights” to unilaterally set the initial terms and conditions of employment. Finally, the Respondent asserts that the ALJ erred by finding that the Respondent informed applicants for jobs at Galion Pointe that there would be no union at Galion Pointe and that the evidence shows that Griffiths statements were nothing more than statements of fact.

It is true that as of June 30, 2010, or even as of July 6, 2010, JAG had not formally executed a written agreement with the Union. So, the Respondent could have accurately and lawfully stated that it did not have a contract with the Union. The record testimony clearly established, however, that beginning on June 30, 2010, Griffiths repeatedly announced his intention to refrain from ever recognizing the Union.

Specifically, Union Organizer Dawn Courtright and employee Julianne Barnhart encountered Griffiths at the facility on June 30, 2010. Courtright introduced herself (Tr. 146; 610) and asked Griffiths if he would recognize the Union. Tr. 59; 146; 610. According to Courtright and Barnhart, Griffiths refused to recognize the Union and referenced that none of his other facilities were Union and that this one would not be Union, either. Tr. 59; 610. Griffiths admitted to refusing to recognize the Union. Tr. 146.

Multiple witnesses in attendance at the meeting conducted by Griffiths on June 30, 2010 testified that Griffiths announced to employees that none of his other facilities were Union and that as of July 1, 2010, Galion Pointe would not be a Union facility either. Tr. 343, 391, 617, 627, 660, 692, 709-710, 722, 741, 830, 901, 910-911, 1015, 1618; R. Exh. 4, at P. 2. Even Griffiths admitted to stating that he told employees at the meeting that none of his other facilities were Union. Tr. 154.

A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a successor are incurred." State Distributing Co., 282 NLRB 1048, 1049 (1987).

When a successor employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the predecessor's employees to ensure its nonunion status. Kessel Food Markets, Inc.,

287 NLRB 426, 429 (1987), *enfd.* 868 F.2d 881, 884 (6th Cir. 1989), *cert. denied* 493 U.S. 820 (1989).

The testimony and documentary evidence also established that on June 30, 2010, the Respondent orally announced the unilateral changes in terms and conditions in employment that were to become effective July 1, 2010. Tr. 148-152, 154-155, 177-178, 229, 393, 623-627, 693-695, 780-781, 783-784, 833-835, 860-861, 897-899, 1316, 1614-1615, 1670; R. Exh. 4. These announced changes were also confirmed by Respondent's handbook and other written policy documents. GC Exh. 14.

While a successor employer is often free to set initial terms and conditions of employment, the Respondent in this matter was precluded from doing so because of its contemporaneous unfair labor practices. NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 277-81 (1972); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37-39 (1987).

By declaring at the outset that there would be no union at its facility, the Respondent, as a successor that discriminatorily refuses to hire a majority of its predecessor's employees in order to avoid recognizing and bargaining with a union, forfeited its Burns right to set initial terms and conditions of employment without first bargaining with the Union. Accordingly, the evidence supports a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages and benefits when it commenced operations. Advanced Stretchforming International, 323 NLRB 529, 530-531 (1997), *enfd.* in relevant part 233 F.2d 1176 (9th Cir. 2000).

Griffiths later testified, with the help of leading questions, that none of his statements regarding Unions were accompanied by promises of benefits for those who did not support a Union or threats against those who did. He also denied making any unlawful rules with regard to

Union solicitation. Tr. 1617 – 1620. Based upon the multiple employee witness accounts, and the fact that not a single non-supervisory employee presented testimony to corroborate Griffiths’ version of the comments made during the meeting, the evidence strongly demonstrates that the testimony of the former employees was rightfully credited by the ALJ over the testimony presented by Griffiths.

Respondent’s Exceptions Nos. 8, 9 and 18:

The Respondent asserts that the ALJ erred by incorrectly counting the number of members from the former Villager Care bargaining unit and incorrectly finding that the majority of the workforce at Galion Pointe was comprised of former Village Care bargaining unit members. The Respondent excepted to the ALJ’s use of July 1, 2010 as the appropriate date for determining the relevant employee compliment. The Respondent also asserts that the ALJ erred by incorrectly counting the number of workers at Galion Pointe who were not members of the former bargaining unit at Village Care based on his findings that several employees working at Galion Pointe were assigned on a “temporary basis” to work at Galion Pointe, and that several additional employees working at Galion Pointe should not be counted because they had supervisory responsibilities. Finally, the Respondent asserts that the ALJ erred in concluding that the Respondent was the successor to Village Care.

The facility continued to provide nursing services to its residents and patients without interruption once the Respondent assumed operational control at midnight on July 1, 2010. Tr. 133, 143, 182; GC Exh. PST 2, Exh. C.

The ALJ correctly stated Board precedent at ALJD P. 28, L. 11, that a successor employer inherits the collective bargaining obligations of its predecessor if a majority of the successor’s employees in an appropriate unit had been employed by the predecessor and if there

exists a substantial continuity between the enterprises. Specialty Hospital of Washington-Hadley, LLC, 357 NLRB No. 77, slip op. at 2(2011); Van Lear Equipment, Inc., 336 NLRB 1059, 1063 (2001). No dispute exists as to appropriate unit or continuity of operations.

The ALJ also correctly stated Board precedent at ALJD P. 28, L. 22, and noted that the triggering factor for when a successor employer becomes obligated to bargain is when a majority of employees in the successor employer's bargaining unit were employed by the predecessor. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46 (1987).

The evidence supports a finding that the Respondent intentionally obscured the employee compliment at Galion Pointe as of July 1, 2010 by temporarily transferring employees from other JAG facilities to perform bargaining unit work. Tr. 1153, 1632; GC Exh. 23, 24, 51, 52, 53 57 and 58. In addition to those temporary employees, at least eight (8) JAG employees from other JAG facilities performed bargaining unit work on a permanent basis at Galion Pointe beginning on July 1, 2010. Tr. 1214-1225; GC Exh. 57. When added to the fifteen (15) former Village Care bargaining unit members who were hired by JAG effective July 1, 2010, JAG employed 23 individuals at the facility in bargaining unit positions as of that date. Tr. 98, 1155; GC Exh. 37. Therefore, the Respondent's bargaining obligation triggered as of July 1, 2010.

Respondent's Exception No. 10:

The Respondent essentially asserts that the ALJ erred by finding that Ms. Ronk (Director of Nursing), Ms. Fortney (Administrative Assistant) and / or Ms. Shuster (Director of Activities) noted which former Village Care employees attended a press conference outside the facility on July 2, 2010, because Al Claypool (Maintenance, Housekeeping and Laundry Director), the person alleged as the sole source for that fact, did not testify to that fact at the hearing.

The ALJ correctly credited the testimony of employee Mary Siegenthal regarding this fact. ALJD P. 15 L. 30-32; P. 16, L. 1-2; Tr. 842-843. The ALJ also correctly noted the admissions of Fortney and Ronk regarding this matter at ALJD P. 16, L. 2, fn. 29; Tr. 1685-1686, 1711-1712.

Notably, Al Claypool (who was still under the employ of the Respondent as a Supervisor at the time of the hearing) was not called by the Respondent to rebut the factual testimony offered by Siegenthal. An ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent. Roosevelt Memorial Medical Center, 348 NLRB 1016, 1022 (2006).

The Respondent further asserts that no evidence was adduced showing any record or communication of the alleged monitoring. The notes of Amanda Ronk relating to her observations of employee Natalie Archer, however, make mention of the former Village Care employees outside the facility. GC Exh. 28(a-b).

Respondent's Exceptions Nos. 11 and 28:

The Respondent asserts that the ALJ erred by finding that Ms. Atkins intended to quit her then full-time job at McDonald's in order to allow her to work full-time at Galion Pointe in July 2010 because "the uncontradicted, non-hearsay, testimony showed that Ms. Atkins' actual plan was to continue to work at McDonalds full-time, while working at Galion Pointe, and that she quit her job at Galion Pointe because the Galion Pointe schedule interfered with Ms. Atkins' work at McDonalds. The Respondent also asserts that "the ALJ erred in concluding that the AGC met its burden of proof, and that the Respondent did not prove its affirmative defense, as to the allegations made by the AGC regarding Ms. Atkins, particularly since the uncontradicted

evidence was that Ms. Atkins terminated her employment at Galion Pointe after working there for one shift because that job conflicted with her full-time job at McDonalds..., and no evidence was adduced that linked Ms. Nolen's termination to an intent to dissuade other employees from engaging in activity protected by the Act.”

In support of Exceptions Nos. 11 and 28, Respondent offers a portion of Ms. Atkins' cross-examination, Tr. 748, conclusory testimony of Miriam Walters at Tr. 1186-1188, and the testimony of Connie Knight, at Tr. 1323-1324, 1350. At Tr. 748, Ms. Atkins only confirmed that the word “union” was not used by Ms. McKelvey during her brief conversation with Ms. Atkins.

The testimony of Ms. Knight or Ms. Walters, however, did not reflect that they had direct communication with Ms. Atkins regarding her employment. Instead, Ms. Knight provided a synopsis of information she obtained from Valerie McKelvey, the Respondent's former Dietary Supervisor. Tr. 1421-1422.

The balance of Exception No. 28 references Ms. Nolen. None of the citations to the transcript are related to Ms. Nolen in any way.

The Respondent's Exceptions regarding Ms. Atkins ignore the facts of her termination, re-hire, and subsequent termination. Traci Atkins testified that she was hired at the facility during March, 2009 as a Dietary Aide. Tr. 718. Her immediate supervisor was Val McKelvey. Tr. 720. Atkins attended the meeting conducted by James Griffiths at the facility on June 30, 2010. Tr. 721. Atkins completed all paperwork distributed during the meeting at home on the evening of June 30, 2010. She returned it to McKelvey at the facility on July 1, 2010, her next scheduled work day. Tr. 723. Atkins testified that McKelvey then walked Atkins to the time clock area and explained the notice posted (GC Exh. 37), and told Atkins that if her name was not the list, she was no longer employed. Atkins' name did not appear on the list.

Atkins testified that she received a telephone call from Administrator Paul Andrella during the afternoon of July 1, 2010, notifying her that the new company no longer needed her services and that she would no longer be working there. Tr. 724.

Atkins also testified that McKelvey called her by telephone on July 6, 2010 and stated that Griffiths was going to allow McKelvey to have somebody come back to work.¹⁰ McKelvey offered a Dietary Aide position to Atkins on a full-time basis. Tr. 725. Atkins told McKelvey that she would have to let her other employer know and that she could not start back full-time until July 19, 2010. Atkins also discussed with McKelvey how she could help fill-in until that time. Accordingly, Atkins worked at the facility for one day, on July 7, 2010. She agreed to fill-in again on July 14, 2010. Tr. 725. In preparation for returning on a full-time basis, Atkins ordered new work uniforms and had her name badge picture taken. Tr. 725. She also completed numerous documents acknowledging certain JAG policies and receipt of the same, as well as applications for health insurance. Tr. 727 – 732; GC Exh. 62.

Atkins testified she then received a telephone call from Val McKelvey on July 13, 2010. Atkins testified that McKelvey told her that Griffiths had changed his mind about letting her come back, that there was a “long story behind it” that she could not discuss. According to Atkins, McKelvey said that maybe after things calmed down, she might get called back. Tr. 726 – 727; 745. Thus, after working one day at Galion Pointe, Atkins was again without a job. Tr. 727. Atkins testified that she did not resign her position (Tr. 727) or reject a subsequent offer of employment by JAG after July 13, 2010. Tr. 746 – 752.

The Respondent could have called Valerie McKelvey, the Respondent’s former Dietary Supervisor, if it truly believed it could rebut Ms. Atkins’ testimony, but elected not to do so.

¹⁰ Atkins testified that she received the employment offer from McKelvey on July 6, 2010, the same date the Union filed a Petition in Case No. 08-RC-17038 to represent the unit employees at Galion Pointe.

James Griffiths, who testified twice during the administrative hearing, also did not rebut Atkin's testimony. Accordingly, the ALJ did not err as asserted by the Respondent.

Respondent's Exceptions Nos. 12 and 26:

The Respondent asserts in Exception No. 12 that the ALJ erred by finding that Ms. Archer did not abandon her job on or about July 2, 2010 because Ms. Ronk's uncontradicted testimony showed that Ms. Archer left work before the end of her shift and that this abandonment materially influenced the decision to terminate Ms. Archer's employment. The Respondent, at Exception No. 26, asserts that "the ALJ erred in concluding that the AGC met his burden of proof, and that the Respondent did not prove its affirmative defense, as to the allegations made by the AGC regarding Ms. Archer, particularly since the AGC made no effort to produce her as a witness...; Ms. Archer disobeyed the subpoena issued by Respondent for her appearance at trial; and no evidence was adduced that linked Ms. Archer's termination to an intent to dissuade other employees from engaging in activity protected by the Act."

In support of Exception No. 12, the Respondent offered the testimony of Miriam Walters at Tr.1161 and Connie Knight at Tr. 1347, to support its contention that Ms. Archer's termination was materially influenced by her alleged job abandonment. Yet, Respondent offers no written discipline, no personnel file documents, no written record of any kind to establish whether Ms. Archer did in fact abandon her job.

Walters' testimony at Tr. 1161 makes no reference whatsoever to Archer or an instance of job abandonment. Knight's testimony at Tr. 1347 references an instance when Archer attended a mandatory meeting at the facility earlier in the day but called off sick for the remainder of her shift that afternoon or evening. No evidence of job abandonment was presented. No evidence was presented by the Respondent that Archer's call off (and they do admit that she

called off) was not legitimately prompted by an illness. Furthermore, no documentary evidence exists to establish that Archer was disciplined for calling off work or for the alleged job abandonment. The reason is simple. Archer did not abandon her job.

In support of Exceptions Nos. 12 and 26, the Respondent also cited to the testimony of Amanda Ronk. Tr. 1714-1715, 1717, 1719-1720. Amanda Ronk's notes (GC Exh. 28) are not fully consistent with her testimony with respect to the dates and the number of meetings she had with Archer, yet the notes are consistent with her testimony in one important respect: documentation of Archer's apparent "distraction" or interest in the Union. Specifically, Ronk's notes (GC Exh. 28) reflect that Ronk had one meeting with Archer prior to Archer's termination. The notes also reflect two of Ronk's own documented observations or comments of Archer's demeanor. Ronk's notes do not reflect multiple instances of Archer walking out of Ronk's office, Archer's job abandonment or refusal to engage in patient or resident care. Instead, Ronk's notes reference nebulous references to Archer's "bad attitude, negative body language and negative language."

Conveniently, Counsel for the Respondent did not highlight Ronk's testimony regarding Ms. Archer's alleged behavior in a resident's room, behavior Ronk admitted she did not observe herself. Tr. 1718, 1728. Not coincidentally, Archer was allegedly looking out the window while in the resident's room at the time of the Union rally on July 2, 2010. Tr. 1726-1728. Ronk's notes regarding Archer (GC Exh. 28) clearly referenced the Union. Ronk's notes memorializing the basis for Archer's termination showed intent on the part of the Respondent to dissuade such activity or sympathy for the Union.

Finally, the Respondent took exception to the fact that Ms. Archer was not called as a witness by the AGC and that she did not appear pursuant to Respondent's subpoena. Respondent

did not tender witness fees or mileage costs with subpoenas it attempted to serve upon the discriminatees, thus rendering service defective. Tr. 1057. Respondent also failed to seek enforcement of the subpoenas it attempted to serve, perhaps because of the service deficiency.¹¹ Accordingly, Respondent is entitled to no inference because Archer failed to testify. Regardless, the ALJ did not err with respect to his findings regarding the unlawful termination of Natalie Archer.

Respondent's Exceptions Nos. 13 and 27:

At Respondent's Exception No. 13, the Respondent asserts that the ALJ erred by finding that Diana Nolen's termination was for an illegal reason, not related to her documented mistreatment of a patient at Galion Pointe.

At Respondent's Exception No. 27, the Respondent asserts that the ALJ erred in concluding that the AGC met his burden of proof, and that the Respondent did not prove its affirmative defense, as to the allegation regarding Ms. Nolen.

In support of its Exceptions, the Respondent offers the cross-examination testimony of Diana Nolen at Tr. 1029, Miriam Walters at Tr. 1162-1164, Connie Knight at Tr. 1364 and Amanda Ronk at Tr. 1722-1725, as well as R. Exh. 21(k).

Diana Nolen denied partaking in any abuse of a resident / patient. Tr. 1029. Miriam Walters didn't even recall who Diana Nolen was during the unfair labor practice investigation of Nolen's termination. Tr. 332-333, 1130. Connie Knight testified that she was present while Nolen was notified of her termination, observed Nolen crying, but somehow arrived at the determination that Nolen was happy. Tr. 1364.

Amanda Ronk's testimony regarding the termination of Diana Nolen was best summarized by Judge Carter at ALJD P. 19-20, footnote 37.

¹¹ See also ALDJ P. 36, footnote 55.

Ronk initially testified in the Acting General Counsel's case-in-chief that Diana Nolen was terminated as a result of a resident complaint. Specifically, Ronk testified that a patient reported that he was in severe pain to Diana Nolen, who failed to report the patient's complaint to the nurse. Tr. 527. Ronk maintains that she interviewed the resident. Tr. 527. Ronk's redacted notes regarding her interview of the resident have been admitted into evidence as GC Exh. 25 (c-d) and the first two pages of R Exh. 21(k).

Although GC Exh. 25(b), the Respondent's correspondence regarding Nolen's change of employment status notification reads "involuntary termination, complaints from residents," Ronk testified that there was only one resident complaint that she was aware of that led to Nolen's termination. Tr. 530. Ronk testified that the resident with whom she spoke identified Nolen by name. Tr. 533. Ronk testified that the resident communicated to her that Nolen told the resident he was not in enough pain to have medication. Tr. 532. Ronk then testified that she made the determination to terminate Nolen based upon a "multitude of things." Tr. 533.

Ronk went on to testify that she notified the social worker of the alleged incident (Tr. 534), but that she did not know if the resident's claim was further investigated. Tr. 533. Ronk also testified that neither the social worker nor anyone else reported back to Ronk regarding the alleged actions of Nolen.

When pressed regarding her previous sworn testimony regarding her investigation of Nolen's actions, Ronk ultimately testified that the only investigation of Nolen's alleged interaction with the resident consisted of Ronk interviewing the resident / patient on her own. Ronk testified that she just believed the resident without further investigation of Nolen or the alleged incident. Tr. 533 – 535, 1730.

On May 16, 2012, Ronk testified during the Respondent's case-in-chief. Ronk testified that her opinion of Diana Nolen during April and May of 2010 was that she always showed up for work, that she was great with the families, that she was a good STNA and that she took really good care of the residents. Tr. 1721.

Ronk testified that her opinion of Diana Nolen changed as of July 2nd or 3rd, 2010. Tr. 1721 - 1722. Ronk testified that she tried to speak to Nolen but that she would not respond. Ronk testified she kind of just let it go and hoped the situation would get better. Tr. 1722.

Ronk testified that instead of the situation with Nolen improving, she learned of a resident complaint regarding Diana Nolen, but could not recall how she learned of the resident complaint or who informed her of the resident complaint. Tr. 1722 – 1723. Ronk testified that after she interviewed the resident, she consulted with Paul Andrella, facility Administrator, and that “we ended up terminating her.” Tr. 1723. Andrella did not corroborate Ronk. Tr. 240-241.

Amanda Ronk admitted that she did not even know if the resident's claim that resulted in Diana Nolen's termination was investigated Tr. 1730. By failing to question Nolen concerning whether she had engaged in misconduct, or allowing her to defend herself by explaining what had occurred, Respondent failed to conduct a meaningful investigation of the purported misconduct for which it was firing her. That lends added support to an inference of unlawful motivation. It shows that Respondent was not truly interested in whether misconduct had actually occurred. Relco Locomotives, Inc., 358 NLRB No. 37, slip op. at 14. Therefore, for the reasons noted by the ALJ and accompanying citations to the transcript, the testimony of Amanda Ronk does not establish a valid basis for terminating Nolen.

Respondent's Exception No. 14:

The Respondent asserts that the ALJ erred by finding that additional employees were hired at Galion Pointe between July-September 2010 as a result of “many” JAG Healthcare employees being returned to their original facilities.

James Griffiths testified to this point at Tr. 1621-1623. He confirmed that hiring took place at the facility during July through September, 2010 due in part to the fact that JAG employees from other facilities were not needed on a long range, while some stayed at Galion Pointe. See also GC Exh. 23.

Respondent’s Exceptions Nos. 15 and 23:

The Respondent asserts at Exception No. 15 that the ALJ erred in finding that former Village Care bargaining unit members not hired on or about July 1, 2010 were not offered work thereafter for reasons other than their qualifications based on personal knowledge and personnel records. The Respondent also asserts, at Exception No. 23, that the ALJ incorrectly found that, assuming evidence that the Respondent attempted to depress the number of Galion Pointe workers hired from the former Village Care bargaining unit (which Respondent denies), that the Respondent did not meet its burden of proof showing that it would not have hired the former Village Care bargaining unit members not previously offered work for legitimate, non-discriminatory bases. It argues that the finding conflicts with the uncontradicted evidence adduced regarding Respondent’s staffing model and practices, and the business-judgment rationally exercised by Respondent as how to best meet its staffing needs.

The record testimony and documentary evidence strongly supports the ALJ’s findings. According to the Respondent’s August 20, 2010 Position Statement submitted to the Region during the investigation of the charges, JAG “decided to staff the facility with a combination of its own employees from its other facilities in Ohio and former Continium (Village Care)

employees.” GC Exh. PST 1, P. 3. The Position Statement went on to explain the staffing process as follows:

Due to the accelerated timeline necessitated by Continium’s rapid and abrupt exit, JAG conducted no interviews with Continium applicants. Hiring decisions were made after consulting with Continium management and reviewing applicant personnel files. In all cases, we understand hiring decisions were based upon legitimate nondiscriminatory reasons, such as whether the applicant had been disciplined, received a negative evaluation, or had performance issues. More applicants were not hired because of the existing resident census level and the staffing plan for the facility that Jag utilized.¹²

At Page 6 of GC Exh. PST 1, Respondent’s proffered reason for not hiring the alleged discriminatees states that “the alleged discriminatees were not hired because there were no available positions for them.”

According to the Respondent’s October 18, 2010 Position Statement submitted to the Region, further explanation regarding the staffing of the facility was presented. Specifically, at GC Exh. PST 2, P. 2, the staffing process was described in greater detail as follows:

All hiring decisions were primarily made by Miriam Walters, JAG’s Vice President of Operations and the present Galion Pointe Administrator, and Doug Walters, JAG’s Director of Plant Operations. Ms. Walters asked Amanda Ronk, Continium’s Director of Nursing for her opinion regarding a number of Continium’s employees, and Ms. Walters also reviewed a substantial number of Continium employee personnel files and related items. Mr. Walters also spoke with various Continium supervisors, including Alvin Claypool, the Director of Maintenance, Laundry and Transportation.

The number of initial offers of employment was based mainly on the initial patient census at the facility and its distressed financial nature...with respect to former Continium employees, JAG looked particularly for those employees who had good evaluations, few disciplinary actions, and low absenteeism. Ms. Walters asked Ronk which employees were the best workers, which ones would be the best team members going forward, and which employees had personality conflicts that might prevent them from working well with the new, smaller, and more productive staff.

¹² The Position Statement, (GC Exh. PST 1 at P. 3), also specifically noted that not all former Continium employees submitted applications for employment with JAG.

After reviewing personnel files and taking into account Ronk's opinions and other information gathered that day, JAG initially made the decision to hire 37 Continium employees at around 7:30 p.m. on June 30, 2010...

The Position Statement went on to specifically address why certain former Continium bargaining unit employees were not hired by JAG. GC Exh. PST 2, P. 3. A lengthy paragraph explaining alleged performance and attendance deficiencies of a number of bargaining-unit employees followed, as well as whether each named employee had actually submitted a job application. GC Exh. PST 2, P. 3. This lengthy explanation is at odds with the reason stated at GC Exh. 1, P. 6; specifically, that there were no available positions for the alleged discriminatees.

Testimony of James Griffiths Regarding Staffing

When questioned at hearing regarding the staffing process, James Griffiths described a very different picture than that portrayed in Respondent's Position Statements. Griffiths initially explained his involvement as "peripheral" (Tr. 137), but later called it a "collaborative process" during which time he met with department heads to gain their input on staffing. Tr. 155 – 156. Specifically, Griffiths testified that he met and consulted with Paul Andrella, Amanda Ronk and Al Claypool, and that the judgment of those department heads was a "key component" of the staffing process. Tr. 158. Griffiths even went so far as to state that each department head was to state to him their preferences as to who should be hired. Tr. 160.

Griffiths first claimed that limited interviews were conducted with former Village Care employee applicants. When confronted with and asked about the statement in GC Exh. PST 1 that no interviews were conducted, Griffiths stated "both" accounts were accurate. Tr. 1638. Griffiths ultimately testified that he did not review any personnel files after first claiming he did. Tr. 163 – 164. He also said whether an individual smoked was "a consideration," but admitted

he would have had no basis by which to know if an individual was a smoker. Tr. 165. Griffiths testified that it was possible that employees who did not complete or submit applications could have been employed at the facility by JAG as of July 1, 2010. Tr. 162 – 163, 184, 189. In fact, he testified that “anything’s possible.” Tr. 184.

Testimony of Miriam Walters Regarding Staffing

Miriam Walters testified that she reviewed personnel files with Connie Knight, not Amanda Ronk, at the facility on June 30, 2010. Tr. 258 – 259. Later, she testified that she did not recall looking at all personnel files (Tr. 268 – 269), and relied heavily on the comments of Amanda Ronk, when deciding who to offer employment. Tr. 269.

Walters testified that she spoke with Griffiths and Doug Walters about who the best clinicians were on staff at the facility. Tr. 262. She also claimed that she spoke with Paul Andrella about the staff. Tr. 264. Walters testified that the ultimate decisions regarding staffing were made by James Griffiths. Tr. 265. She changed her testimony some weeks later, however, stating that Griffiths was not the ultimate decision maker. Tr. 1158 – 1159.

Miriam Walters testified that she used a listing (Tr. 262) and later recalled seeing a document similar to GC Exh. 56 when making staffing decisions at the facility on June 30, 2010. Tr. 330. She would later identify R Exh. 18 as the document she used and made notes on during the staffing process. The document in question clearly identified the bargaining unit employees, as they were identified by the letter “u” next to their names. Tr. 1107 – 1113, 1233 – 1234, 1244 – 1248.

Miriam Walters also kept additional written notes during the staffing process. Tr. 298 – 309; GC Exh. 19 and 20. Walters admitted to writing the comments next to the names of the employees that appeared on GC Exh. 19. Next to the name Kayla Schramek, Walters wrote

“good, union is stupid.” Next to the name Melody, Walters wrote “good – said union was falling apart before we took over.” Significantly, STNA’s Kayla Schramek and Melody Stratton were hired by JAG as of July 1, 2010. Tr. 303; GC Exh. 21.

With respect to GC Exh. 20, Walters admitted to writing the calculation that appears toward the bottom of the document. Tr. 308 – 309. Walters testified that JAG could have gotten by with hiring 14 of the former Village Care bargaining unit employees, but she thought they ultimately hired 15. Tr. 1155. Later, she testified that the number could have been as many as 16 (Tr. 1286), a number consistent with the testimony of Griffiths (Tr. 197).

Testimony of Department Heads Regarding Staffing

Despite the Respondent’s asserted explanations of its hiring process contained in GC Exh. PST 1 and GC Exh. PST 2, and the inconsistent testimony of James Griffiths and Miriam Walters regarding the same, JAG’s own managerial and supervisory employees (who were all retained from Village Care) testified that they were not involved in the decision making process or even consulted for their recommendations regarding hiring. Specifically, Administrator Paul Andrella denied any involvement in the hiring process. He denied participating in any interviews, denied reviewing any personnel files and denied reviewing any applications for employment. Tr. 232. In fact, Andrella also testified that he observed JAG CFO David Cooley physically remove completed job applications from the facility. Tr. 230 – 232.

Administrative Assistant Trula Fortney testified that she was not involved in any way with the decisions regarding staffing of the facility on June 30 or July 1, 2010. She testified that she was not asked for her opinion regarding Village Care employees and that she had no role in determining which names appeared on the list (GC Exh. 37) posted at the facility. Fortney testified that July 1, 2010 was the first day she learned that not all of the former Village Care

employees were going to be employed at the facility going forward. Tr. 351. Fortney also testified at the hearing that she still did not know, as of the date of her testimony, how the determinations were made regarding staffing. Tr. 352.

Trula Fortney also testified about employee Brenda Peterman. She described Peterman as a very good employee (Tr. 356), as opposed to the characterizations of Peterman that appear in JAG's October 18, 2010 Position Statement. GC Exh. PST 2, P. 3.

LPN / Head Charge Nurse Rhonda Davey testified that she was not involved in any way with the decisions regarding staffing of the facility on June 30 or July 1, 2010. She testified that she was not asked for her opinion regarding Village Care employees and that she had no role in determining which names appeared on the list (GC Exh. 37) posted at the facility. Tr. 401. Davey testified that June 30, 2010 was the first day she learned that not all of the former Village Care employees were going to be employed at the facility going forward.¹³ Davey also testified at the hearing that she still did not know, as of the date of her testimony, how the determinations were made regarding staffing. Tr. 402.

Rhonda Davey also testified that Brenda Peterman did excellent work and that she (Davey) could not recall any instances of absenteeism associated with Peterman. Tr. 404-405.

Maintenance, Housekeeping and Laundry Director Al Claypool similarly denied all involvement with decisions regarding staffing of the facility. Claypool specifically testified that he was not asked for his opinion regarding Village Care employees, never made any recommendations and was never told about the selection process. Tr. 421. He testified that he first learned that not all of the Village Care employees were going to be employed at the facility when Paul Andrella called him the evening of June 30, 2010 and asked him for Mary

¹³ Davey testified that she learned this after she received phone calls from former employees Jaime Knightlinger and Tara Knopsnyder. Tr. 399.

Siegenthal's phone number. Ultimately, Andrella asked Claypool to call Siegenthal to terminate her. Claypool testified that he was "floored" by the request, but did so anyway and did not ask Andrella for an explanation. Tr. 419 – 420.

Claypool's testimony regarding the job performance of the three employees terminated from his department was very complimentary. Claypool considered Mary Siegenthal the best of all three let go and agreed that she could be classified as a "model employee." Tr. 422. Claypool characterized Sharon Brady's work as very good and he had nothing negative to say about her job performance. Tr. 441. Claypool also could not recall any instances of absenteeism being a problem for employee Sandy Nolen. Tr. 441.

Claypool had far more negative things to say about the employees who were retained in his department. Specifically, he testified that he was "floored" that employee Kristi Adkins was retained. Tr. 435 – 436; GC Exh. 40. Adkins was eventually terminated not long after JAG took over the facility. Tr. 444 – 446. Heather Bair was also retained, despite numerous instances of documented attendance issues and negative comments on her evaluations. Tr. 440 – 441; GC Exh. 41, 42.

Human Resource / Payroll Manager Connie Knight testified that she did nothing more than pull files for Walters. Tr. 1319. Director of Nursing Amanda Ronk testified that she provided her opinion of the job performance and attendance of the employees at the facility without the benefit of looking at the personnel files. Tr. 518 – 519. Ronk stated that she did this strictly from her own recollection and observation of the employees, despite only having been the Director of Nursing for a few months. Tr. 520. Ronk testified that she did not see Walters consult any personnel files or other documents other than an employee roster when making decisions regarding staffing the facility. Tr. 519.

Ronk later denied any role in providing any recommendations on who to hire or who not to hire to Walters. Tr. 525. Ronk also testified that Walters did not ask for her opinion as to which employees should stay or should go. Tr. 526. Ronk's testimony regarding her perception of the job performance and recollection of employees' attendance differed significantly from the Respondent's proffered reasons for not hiring the employees contained in GC Exh. PST 2. Tr. 543 – 551.

Impact of Job Applications and Interviews Upon Staffing Decisions

The documentary evidence supports a conclusion that the job applications were not considered as a factor in determining staffing levels. Miriam Walters testified that she did not recall looking at job applications when making staffing decisions. Tr. 268 – 269. Paul Andrella testified that he observed David Cooley physically take the applications off the premises. Tr. 230 – 232. James Griffiths testified that it was possible that JAG hired employees as of July 1, 2010 who had not completed applications. The documentary evidence also suggests that hiring occurred without regard to who completed and submitted an application before midnight, July 1, 2010. Specifically, employees Bair, Blair, Dowell, Huff, Schramek and Stratton were all hired as of July 1, 2010 despite submitting applications after that date.¹⁴ See GC Exhs. 42, 43, 45, 47, 49(a) and 50(a).

Despite Griffiths' initial claims that some limited interviewing was conducted, no evidence was introduced to establish that JAG conducted any interviews at the facility prior to midnight on July 1, 2010. Ronk did testify, nevertheless, and the documents show that she interviewed and in some cases hired applicants in the days and weeks that followed July 1, 2010 (Tr. 561 – 583; GC Exh. 29). Interestingly, only a few of the applications of the former Village

¹⁴ Stratton's JAG Healthcare application appears to be dated June 9, 2010, clearly before JAG distributed the applications. Huff's application is not dated at all.

Care employees were reviewed and none were selected for interview during that same timeframe. Tr. 583 – 593; GC Exh. 30.

Job Performance of Village Care Employees

Miriam Walters testified that attendance was “absolutely” a consideration when deciding who to hire. Tr. 287. Yet, when confronted with the attendance and disciplinary record of Cathy Dean (GC Exh. 36 and 44) as compared with the personnel file documents for Brenda Peterman (GC 61), Walters defended hiring Dean, and not Peterman, because Peterman had allegedly had a single no call, no show. Tr. 285 – 297, 1255 - 1256. Walters initially testified, however, that she did not recall Peterman’s personnel file. Tr. 285.

Miriam Walters’ notes regarding the basis for not hiring former Village Care employees simply do not support her testimony or any of the proffered reasons for JAG not hiring the former bargaining unit employees. Tr. 1248 – 1263.

Amanda Ronk also testified extensively regarding her opinions and observations of the alleged discriminatees’ job performance and attendance, albeit without the benefit of actually consulting the personnel files. Tr. 518 – 519, 543 – 561; GC Exh. 26 and 27.

In short, the Respondent has failed to present a coherent explanation of its hiring process. The only reasonable conclusion is that the Respondent’s staffing decisions were pretextual and designed to suppress the number of former bargaining unit employees retained or hired at Galion Pointe.

Respondent’s Exception No. 16:

The respondent asserts that the ALJ erred by finding that Ms. Walters’ August 27, 2010 notes evidence union animus because they simply record what the applicant said and there is no evidence correlating a notation of “good” with any remark about the union. Respondent cites the

example that two “good” remarks are attributed to applicants who made no remark about the Union.

Miriam Walters testified that she used a listing (Tr. 262) and later recalled seeing a document similar to GC Exh. 56 when making staffing decisions at the facility on June 30, 2010. Tr. 330. She would later identify R Exh. 18 as the document she used and made notes on during the staffing process. The document in question clearly identified the bargaining unit employees, as they were identified by the letter “u” next to their names. Tr. 1107 – 1113, 1233 – 1234, 1244 – 1248.

Miriam Walters also kept additional written notes during the staffing process. Tr. 298 – 309; GC Exh. 19 and 20. Walters admitted to writing the comments next to the names of the employees that appeared on GC Exh. 19. Next to the name Kayla Schramek, Walters wrote “good, union is stupid.” Next to the name Melody, Walters wrote “good – said union was falling apart before we took over.” Significantly, STNA’s Kayla Schramek and Melody Stratton were hired by JAG as of July 1, 2010. Tr. 303; GC Exh. 21. The only logical conclusion is that the use of the word “good” was Walters’ shorthand to designate an employee believed to be anti-Union.

With respect to GC Exh. 20, Walters admitted to writing the calculation that appears toward the bottom of the document. Tr. 308 – 309.

Walters’ actions, viewed in light of the fact that the Respondent did not contact and hire additional former bargaining unit employees despite their qualifications that were comparable or surpassed those the Respondent did hire, demonstrate Union animus and intent on the part of the Respondent to discriminate with respect to its staffing and hiring practices. U.S. Marine Corporation, 293 NLRB 669, 671 (1989).

Respondent's Exception No. 17:

The Respondent asserts that the ALJ erred by finding that the reason for Ms. Haney not receiving a job offer to work at Galion Pointe following her interview in early October, 2010 was illegal, or based on anything other than Ms. Walters' concerns regarding Ms. Haney.

Wanda Haney testified that she was contacted and interviewed by Miriam Walters during October, 2010 regarding a possible dietary / cook position. Haney testified that Walters questioned whether Haney would be willing to work in a non-Union environment, further evidence of the Respondent's anti-Union sentiment. Tr. 872 – 874, 886 – 887.

While the ALJ did not credit Haney's testimony over Walters' testimony regarding the alleged interview question about Haney's willingness to work in a non-union environment, the ALJ correctly noted the deficiencies in Walters' proffered reasons for not selecting Haney for a Dietary Aide position. See ALJD P. 23, footnote 42. The ALJ's subsequent conclusion that Haney, as well as other former bargaining unit employees, were discriminated against by the Respondent is consistent with Board precedent as Respondent's false statements clearly reflected an unlawful ulterior motive. Planned Building Services, 347 NLRB 670, 674 (2006), citing Love's Barbecue Restaurant No. 62, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom, Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981).

Respondent's Exception No. 21:

The Respondent asserts that the ALJ misconstrues the holding of Kessel Food Markets, 287 NLRB 426 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied, 493 U.S. 820 (1989). The Respondent offered no other basis for its Exception.

Accordingly, Counsel for the AGC respectfully submits that the ALJ correctly interpreted and applied the decision in Kessel Food Markets. See ALJD P. 26, L. 30-31, P. 27, L. 1-21, and P. 30, L. 33-36.

Respondent's Exception No. 22:

The Respondent asserts that the ALJ incorrectly found “substantial evidence of union animus.” Respondent also asserts that James Griffiths’ June 30, 2010 remarks regarding union representation were not illegal; that Ms. Walters’ use of the employee roster on June 30, 2010 was not illegal;¹⁵ that Ms. Walters did not attempt to depress the number of employees hired from the former Village Care bargaining unit;¹⁶ that Ms. Ronk did not record who attended the Union press conference;¹⁷ Ms. Walters’ August 2010 notes were not illegal;¹⁸ and that the only evidence regarding hiring decisions made for Galion Pointe between July 2, 2010 and October 31, 2010 were based on legitimate, non-discriminatory bases.¹⁹

The record of this case is replete with evidence of Respondent’s Union animus. Regarding the June 30, 2010 meeting conducted by James Griffiths, former employee Julianne Barnhart testified that Griffiths announced that he owned 13 homes and that none of them were Union, that none of them would be Union and that he did not want any Union solicitation or material or any kind of solicitation on his premises. Tr. 617. Barnhart also forthrightly answered a question from Judge Carter about what she heard someone say regarding notification to the charge nurse if the Union Representative or Delegate arrived at the facility. In response to the question as to who made the statement, Barnhart testified “Mr. Griffin.” When asked when and what statement was made, Barnhart testified “That was during the meeting. And he – he

¹⁵ Please refer to the response to Respondent’s Exception No. 5, above.

¹⁶ Please refer to the response to Respondent’s Exception No. 6, above.

¹⁷ Please refer to the response to Respondent’s Exception No. 10, above.

¹⁸ Please refer to the response to Respondent’s Exception No. 16, above.

¹⁹ Please refer to the response to Respondent’s Exception No. 15, above.

stated that – uh, he looked right at the head charge nurse and he said to her, “head charge nurse, listen to me, at 12:01 if any union person comes onto this premises I want you to call the police and have them arrested.” Tr. 642. See also R. Exh. 4.

Former employee Martha Bishop was cross-examined extensively regarding her testimony on the topic of the June 30, 2010 meeting. Specifically, when asked about what she recalled about the first part of the meeting, Ms. Bishop responded “well, the first part of the meeting he (Griffiths) came right and said we will never have a union in this place. I remember that distinctly. And I don’t have it in any of my other places. That was his exact words.” Tr. 910 - 911.

Former employee Traci Atkins testified that Griffiths stated at the meeting that his facilities were never Union, would never go union and will never be union. And he also stated that if we ever saw the Union Rep. on the premises after July 1st we were to let someone know and they were to call the police and have them removed from the premises.” Tr. 722.

For the Respondent to assert that the ALJ incorrectly found “substantial evidence of union animus” on the part of the Respondent is tantamount to asking the Board to ignore the entire record of the administrative hearing.

Respondent’s Exception No. 24:

The Respondent asserts that the ALJ erred by holding that, as a result of the antecedent finding that Respondent attempted to avoid recognizing the Union by depressing the hiring of former members of Village Care bargaining unit (which Respondent denies), Respondent discriminated against all 21 of the “discriminatees” alleged by the AGC at trial...because this is not a correct statement of the law. The Respondent, in support of its Exception, cites to Capital

Cleaning Contractors v. NLRB, 147 F.3d 999 (D.C. Cir. 1998); and Kessel Food Markets, 868 F.2d 881 (6th Cir. 1989).

Notably, the Respondent does not cite to the record or any documents in evidence in support of its Exception. Nor does Respondent explain exactly how the ALJ misstated the law. The current state of the law in this area speaks for itself.

Furthermore, the ALJ appropriately addressed any arguable incongruence regarding his findings that the Respondent hired enough former Village Care bargaining unit members to trigger a bargaining obligation while simultaneously discriminating against former bargaining unit members when it made its hiring decisions. ALDJ P. 32, footnote 52.

Respondent's Exception No. 25:

The Respondent asserts that the ALJ erred in finding that Mr. Griffiths' "one stray remark" allegedly made on June 30, 2010 (regarding an instruction to telephone the police in case of a Union visit) and Ms. Ronk's write-up of Ms. Archer on July 2, 2010 for expressing her desire to subordinate her duty to care for her patients in favor of joining her friends gathered across the street transformed Respondent's otherwise legal policy regarding solicitation and distribution to an illegal policy because no evidence was adduced showing that either action was prompted by the intent to interfere with Section 7 rights, or resulted in that outcome.

Respondent cites no testimony or documentary evidence in support of its Exception. Instead, we look to the words used by Mr. Griffiths at the June 30, 2010 meeting. Specifically, Julianne Barnhart testified that Griffiths, at the June 30 meeting, announced that he did not want any Union solicitation or material or any kind of solicitation on his premises. Tr. 617. Julianne Barnhart (Tr. 642), Diana Nolen (Tr. 1015), Traci Atkins (Tr. 722), Mary Siegenthal (Tr. 835 – 836) and Wanda Haney (Tr. 861 – 862) all testified that Griffiths stated that the police were to be

called if the Union showed up at the facility once JAG assumed operational control. Griffiths' statement, stray remark or otherwise, could reasonably be interpreted to restrict Section 7 rights.

A rule which is presumptively valid may violate the Act if it is applied in a discriminatory fashion. Opryland Hotel, 323 NLRB 723 (1997); Reno Hilton Resorts, 320 NLRB 197 (1995); Emergency One, Inc., 306 NLRB 800 (1992). Furthermore, an employer that maintains a valid no-solicitation rule must uniformly enforce the rule. JAG may not enforce it sporadically only in response to union activities, and it may not single out union activities for enforcement of its rule. Willamette Industries, 306 NLRB 1010 fn. 2 (1992).

Amanda Ronk admitted to inquiring about Natalie Archer's discussions with another employee. Specifically, she asked Archer if she was talking about the Union and the rally being conducted outside the facility. Tr. 536-537, 539. Ronk also asked Archer if she wanted to remain at Galion Pointe. Tr. 539. Ronk's notes regarding her counseling of Archer reflect as much. See GC Exh. 28. No evidence was presented at hearing to establish if the other unidentified employee was similarly counseled for talking about the Union, allegedly in front of residents. Accordingly, the Respondent, by Amanda Ronk, violated the Act by promulgating and coercively enforcing a work rule prohibiting discussions about the Union.

Respondent's Exception No. 29:

Lastly, the Respondent asserts that "the ALJ misapplies the law as to his recommended 'make whole' remedies for the alleged 21 discriminatees, particularly under the circumstances of this case." In support of its Exception, the Respondent raises the applicant status of former Villager Care bargaining unit employees and matters more appropriately addressed in the compliance phase of a case, such as backpay and mitigation issues.

Regarding the applicant status of former Village Care bargaining unit employees, the ALJ correctly found that the Respondent's staffing of Galion Pointe was not predicated on completed job applications, as James Griffiths set no firm deadline for their return. ALJD P. 12, L. 6-8, ALJD FOF Sec. II (H) at P. 20-23, and ALDJ P. 31, footnote 51.

The ALJ's recommended Remedy and Order are appropriate under the Board's Rules and Regulations, Section 102.45, as well as Board law. It is well settled that the Board has "broad discretionary" authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969). In cases where an employer is found to unlawfully refuse to hire employees, reinstatement and backpay are appropriate remedies. Planned Building Services, Inc., 347 NLRB 670, 674 (2006). Where, as here, employee(s) are unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent acts (or discovery of the same) which would have resulted in a lawful discharge. United Rentals, Inc., 350 NLRB 951, 971 (2007).

Dated at Cleveland, Ohio this 25th day of September, 2012.

Respectfully submitted,

/s/ Gregory M. Gleine

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served electronically on September 25, 2012 to the following:

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