

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| <b>HEALTHBRIDGE MANAGEMENT, LLC;<br/>107 OSBORNE STREET OPERATING<br/>COMPANY II, LLC D/B/A DANBURY HEALTH<br/>CARE CENTER; 710 LONG RIDGE ROAD<br/>OPERATING COMPANY II, LLC D/B/A LONG<br/>RIDGE OF STAMFORD; 240 CHURCH STREET<br/>OPERATING COMPANY II, LLC D/B/A<br/>NEWINGTON HEALTH CARE CENTER; 1 BURR<br/>ROAD OPERATING COMPANY II, LLC<br/>D/B/A WESTPORT HEALTH CARE CENTER;<br/>245 ORANGE AVENUE OPERATING COMPANY<br/>II, LLC D/B/A WEST RIVER HEALTH CARE CENTER;<br/>341 JORDAN LANE OPERATING COMPANY II,<br/>LLC D/B/A WETHERSFIELD HEALTH CARE CENTER</b> | <b>Case Nos.</b> | <b>34-CA-12715<br/>34-CA-12732<br/>34-CA-12765<br/>34-CA-12766<br/>34-CA-12767<br/>34-CA-12768<br/>34-CA-12769<br/>34-CA-12770<br/>34-CA-12771</b> |
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And

**NEW ENGLAND HEALTH CARE EMPLOYEES  
UNION, DISTRICT 1199, SEIU, AFL-CIO**

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**RESPONDENTS' BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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**Dated: September 26, 2012**

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## **I. INTRODUCTION**<sup>1</sup>

Respondents<sup>2</sup> HealthBridge Management, LLC (“HealthBridge”); 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (“Danbury”); 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford (“Long Ridge”); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (“Newington”); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (“Westport”); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (“West River”); and 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (“Wethersfield”)<sup>3</sup> submit this Brief in Support of their Exceptions to the August 1, 2012 Decision and Order issued by Administrative Law Judge Steven Fish (the “ALJ”) finding Respondents violated Section 8(a)(1) and (5) with respect to every count alleged in the Consolidated Complaint (the “Complaint”). For all the reasons set forth below, the ALJ’s findings of fact and conclusions of law are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to established Board law or policy. Accordingly, the ALJ’s Decision and Order should be reversed; Judgment should be entered in favor of Respondents on all counts; and the Complaint should be dismissed in its entirety.

## **II. STATEMENT OF THE CASE**

The Acting General Counsel (“AGC”) issued the Consolidated Complaint on March 21, 2011. (Ex. GC1). Respondents filed and served their Answers on April 4, 2011. (Ex. GC1). The AGC amended the Complaint on August 11, 2011, the first day of the hearing of this matter. (Ex. GC2). The ALJ conducted the hearing on August 11, 12, 30 and 31, September 1, and

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<sup>1</sup> The ALJ’s Decision is cited as “(ALJD \_\_\_)”;

the transcript is cited as “(Tr. Vol. \_\_\_ at \_\_\_)”;

hearing exhibits are cited as “(R1, GC1, etc.)”

<sup>2</sup> The ALJ erroneously stated that Care Realty, LLC was “effectively” removed as a Respondent. (ALJD 4:20-24). To the contrary, the ALJ expressly approved the AGC’s withdrawal of Care Realty, LLC and “Care One” as Respondents. (Tr. Vol. 8 at 1491:8 – 1494:10; Jt. Exs. 2 ¶ 10, 3 and 4; Order (Dec. 5, 2011)). Additionally, for this reason, “Care Realty, LLC a/k/a Care One” should have been/be removed as a named respondent from the case caption.

<sup>3</sup> The six individual operating companies (Danbury, Long Ridge, Newington, Westport, West River, and Wethersfield) are collectively referred to as “the Centers” or “Respondents” unless a specific Center or group of Centers is being discussed.

October 17, 18 and 19, 2011. The record closed by Order dated December 5, 2011. After receiving an extension, the parties filed post-hearing briefs on February 8, 2012. The ALJ issued his Decision and Order on August 1, 2012. The case was transferred to the Board by Order dated August 1, 2012. By Order dated August 14, 2012, Respondents obtained an extension of time to file Exceptions and a Supporting Brief until today, September 26, 2012.

### **III. QUESTIONS PRESENTED**

1) Whether the ALJ erred in finding Respondent HealthBridge managed the daily operations of the Centers? [Exception 2].

2) Whether the ALJ erred in finding that Respondents HealthBridge, Newington, Westport, and Long Ridge were joint employers with HSG during the period of the subcontracts with HSG? [Exceptions 1, 3-32, 39-76, 95-99, 106 and 107].

3) To preserve the issue for further review, whether the ALJ erred in relying upon *Executive Cleaning Services, Inc.*, 315 NLRB 227 (1994), which the Second Circuit Court of Appeals refused to enforce in *AT&T v. NLRB*, 67 F. 3d 446 (2nd Cir. 1995), and in any event whether the ALJ properly applied *Executive Cleaning Services* to the facts of this case? [Exception 97].

4) Whether the ALJ erred in making an adverse inference against Respondents and finding that if Respondents had testified “to explain the reasons for their decisions to subcontract the work to HSG in the first place, to cancel the subcontract in 2010 and/or to rehire the employees as new employees in May of 2010,” “their testimony would not be supportive of Respondents’ version of the events”? [Exceptions 71 and 99].

5) Whether the ALJ erred in finding that Respondents HealthBridge, Newington, Westport, and Long Ridge violated Section 8(a)(1) and (5) of the Act, even absent a joint employer finding between Respondents and HSG? [Exceptions 4-32, 77-81, 100, 106 and 107].

6) Whether the ALJ erred in finding that Respondents HealthBridge, Newington, Westport and Long Ridge violated Section 8(a)(1) and (5) of the Act when they re-hired housekeeping

and laundry employees after the termination of the subcontracts with HSG as new employees? [Exceptions 4-32, 39-81, 95-100 and 106].

7) Whether the ALJ erred in finding that Respondents HealthBridge and Westport violated Section 8(a)(1) and (5) of the Act by not re-hiring Myrna Harrison and Newton Daye after the termination of the subcontract with HSG? [Exceptions 4-32, 39-83, 95-100 and 107].

8) Whether the ALJ erred in finding that Respondents HealthBridge and Long Ridge violated Sections 8(a)(1) and (5) and 8(d) of the Act when Long Ridge temporarily laid off employees? [Exceptions 84 and 103].

9) Whether the ALJ erred in finding that Respondents HealthBridge and Long Ridge violated Section 8(a)(1) and (5) of the Act in responding to an information request from the Union? [Exceptions 85-87 and 102].

10) Whether the ALJ erred in finding that Respondents HealthBridge, Long Ridge, Wethersfield, Danbury, Newington, West River and Westport violated Section 8(a)(1) and (5) of the Act by not including lunch breaks in employees' daily "hours worked" for purposes of calculating overtime payments? [Exceptions 33, 34, 89, 90 and 105].

11) Whether the ALJ erred in finding that Respondents HealthBridge, Long Ridge, Wethersfield, Danbury, Newington, West River and Westport violated Section 8(a)(1) and (5) of the Act by following the unambiguous language in the CBAs for payment at the premium rate for hours worked on holidays by their employees? [Exception 88 and 105].

12) Whether the ALJ erred in finding that Respondents HealthBridge, Wethersfield and Danbury violated Section 8(a)(1) and (5) of the Act by their method of calculating eligibility for holiday pay, personal days, vacation days, sick days and uniform allowance? [Exceptions 35-38, 91-92 and 104].

13) Whether the ALJ erred in finding that Respondents HealthBridge and Westport violated Section 8(a)(1) of the Act by threatening to call the police? [Exceptions 93, 94 and 101].

14) Whether the ALJ's recommended remedies are supported by the evidence or are otherwise appropriate under the facts and controlling law? [Exceptions 108 and 109].

#### **IV. STANDARD OF REVIEW**

The Board reviews the ALJ's findings of fact *de novo*. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-45 (1950) ("in all cases which come before us for decision, we base our findings as to the facts upon a *de novo* review of the entire record"). While the Board generally affords some deference to credibility determinations based on the demeanor of the witnesses, even those determinations cannot be rubber-stamped. *Permaneer Corporation*, 214 NLRB 367, 369 (1974) (an ALJ "cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word 'demeanor'"). The Board must review the record in its entirety and determine whether the clear preponderance of all the relevant evidence supports the ALJ's credibility determinations. *Standard Dry Wall Products, Inc.*, 91 NLRB at 545. When it does not, those findings should be reversed. *Id.*

#### **V. SUMMARY OF EXCEPTIONS**

The ALJ erred as a matter of fact and law in finding that HSG and Respondents were joint employers during the period of the subcontracts. Also, many of the ALJ's underlying factual findings on this issue are either contrary to the record evidence or not supported by the weight of the evidence. Accordingly, all the ALJ's subsequent findings of a violation of the Act premised upon a joint employment relationship are erroneous.<sup>4</sup> Furthermore, Respondents did

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<sup>4</sup> The joint employment analysis is very fact-based. The ALJ's findings of fact and conclusions of law are not only contrary to the weight of the evidence in the record and established Board law and policy; but also are incomplete, inaccurate, and replete with inherent contradictions. For example, the ALJ early in his decision found "all unit employees" were "directly supervised by the account managers of HSG at each facility" from 2006 through early 2009. (ALJD 6:23-27). However, in fact, only the housekeeping and laundry employees fell under HSG's supervision. (Ex. J1 – Joint Stipulations ¶¶10, 16; Exs. GC80 and GC81; Tr. Vol. 6 at 907:13 – 911:18). Additionally, the ALJ found a conversation to which Suzanne Clark testified occurred in April 2010; however, she clearly testified it occurred on May 13 or 14, 2010. (ALJD 20:19-28, 59:21-25; Tr. Vol. 5 at 837:14-839:5). Finally, the ALJ inexplicably found that one Administrator made statements "in response to" activity that he correctly found occurred only after the statements were made. See Section VI.J., *infra*. The ALJ's superficial analysis and lack of attention to important details undermine his decision. Each of the foregoing examples, while not wholly dispositive of the case, demonstrates the ALJ's failure to carefully review and analyze the proof before him.

not violate the Act with respect to their application of the other provisions of the collective bargaining agreements (“CBA”) at issue. Respondents’ actions conform to the express and unambiguous terms of the applicable CBAs and the AGC did not prove violations of the Act.

## **VI. LAW AND ARGUMENT**

### **A. The Centers’ Operations and Relationship to HealthBridge**

Each individual Center operates a nursing home/long term care facility in the State of Connecticut that provides convalescent and skilled nursing care for the elderly and infirm. (Ex. J1 ¶¶1, 4; page 1 and Article 5 of Exs. GC3 – GC8). HealthBridge is a New Jersey limited liability corporation with its principal office in Fort Lee, New Jersey. (Ex. J1 – Joint Stipulations ¶1). Pursuant to Management Agreements with each Center, HealthBridge, at all material times, provided management services to these facilities. (Ex. J1 – Joint Stipulations ¶1; Ex. GC1(ccc) – HealthBridge Answer ¶6(a)). There is no evidence to support the ALJ’s finding that HealthBridge managed the “daily operations” of the Centers. (ALJD 4:13-14).<sup>5</sup>

New England Health Care Employees Union, District 1199, SEIU, AFL-CIO (“the Union”) is the collective bargaining representative for the service and maintenance employees at each Center (“Bargaining Unit”). (Ex. J1 – Joint Stipulations ¶11). The wages, hours, and terms and conditions of employment of the employees in each respective Bargaining Unit are governed by a separate CBA between the employing Center and the Union. (Exs. GC3 – GC8).

At all material times, HealthBridge was a joint employer with each Center of the employees in the Bargaining Unit at that Center. (Ex. J2 – Mid-Trial Stipulation ¶6).

### **B. Newington’s, Long Ridge’s, and Westport’s Relationship with HSG**

HealthCare Services Group, Inc. (“HSG”) is a Pennsylvania corporation with its principal office in Bensalem, Pennsylvania. (Ex. J1 ¶6). HSG provides housekeeping and laundry services to nursing homes in multiple states. (Ex. J1 ¶6; Tr. Vol. 7 at 1354:1-6). Some of

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<sup>5</sup> Similarly, there is no competent evidence to support the ALJ’s finding that Care Realty owns the properties on which the Centers are located. (ALJD 4:17-18).

HSG's clients are HealthBridge-managed facilities; most are not. (Tr. Vol. 6 at 919:25 – 920:10; Vol. 7 at 1151:11-16, 1275:18 – 1276:1, 1354:11-21, 1402:9-19). There is no evidence that HSG is anything other than a completely independent third-party company.

HSG has different contractual arrangements with its clients. Some arrangements are “supervisor-only,” under which HSG provides specified materials and supplies and assigns one of its own employees (an Account Manager) to the facility to serve as an on-site supervisor of the clients' employees. (Tr. Vol. 4 at 783:12 – 784:3; Tr. Vol. 6 at 909:6 – 911:1, 1026:14-17, 1045:10-12; Tr. Vol. 7 at 1392:11-16; Ex GC80). HSG also has “full-service” arrangements under which HSG provides linens and certain supplies and employs the on-site supervisor and all the housekeeping and laundry staff. (Tr. Vol. 4 at 783:12 – 784:3; Tr. Vol. 6 at 907:13 – 909:5; 911:3-18; 1025:16 – 1026:3; 1037:4-22; 1043:6-12, 1044:2-4; Tr. Vol. 7 at 1184:9-11; Ex. GC81). It is more common in the industry to have a full-service arrangement than to have a supervisor-only arrangement (Tr. Vol. 6 at 1044:17-24, 1045:25 – 1046:1), and HSG prefers to have full-service accounts. (Tr. Vol. 7 at 1199:1-4, 1203:25 – 1204:3).

In 2006, Newington, Long Ridge, and Westport entered into service contracts with HSG for HSG to provide certain services, including linens, laundry chemicals, supervision and management to each respective facility's housekeeping and laundry departments. (Ex. J1 – Joint Stipulations ¶¶10, 16; Ex. GC80; Tr. Vol. 6 at 907:13 – 909:5). Initially, HSG had “supervisor-only” contracts with these facilities. (Tr. Vol. 1 at 99:22 – 100:1; Tr. Vol. 6 at 1046:19 – 1047:6; Tr. Vol. 7 at 1183:2-7). As discussed in more detail below, in February 2009, Newington, Long Ridge, and Westport entered into full-service contracts with HSG. (See, e.g., Tr. Vol. 7 at 1211:18 – 1213:1). Thereafter, in May 2010, **HSG** terminated those contracts (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25), and these Centers have had supervisor-only arrangements with HSG since then.

**C. The Centers did not Violate the Act by Hiring the Former HSG Employees as New Employees**

**1. The CBAs do not require the Centers to re-hire former employees with seniority and other benefits intact upon the termination of a subcontract**

The subcontracting provisions in the Newington, Westport, and Long Ridge CBAs (Exs. GC3, GC4, and GC6, respectively) are identical. (Ex. J1 – Joint Stipulations ¶12). Those provisions state: “No bargaining unit work shall be subcontracted unless the subcontractor agrees in advance to retain the Employees and recognize all their rights, including seniority, under this Agreement.” (Article 9F. of Exs. GC3, GC4, and GC6). As correctly found by the ALJ, on February 15, 2009, these Centers subcontracted their entire housekeeping and laundry departments to HSG. (ALJD 6:32-34).

It is undisputed that HSG agreed in advance to hire all the housekeeping and laundry employees at each of these Centers, hired all those employees with all their rights under the CBAs, and remitted Union dues during the period of the subcontracts. (Tr. Vol. 3 at 394:5-14; Tr. Vol. 4 at 787:13-16, 790:3-5; Tr. Vol. 6 at 993:15-21, 1001:17-22, 1002:4-12, 1072:20 – 1073:9, 1075:4-14, 1135:17-22; Tr. Vol. 7 at 1199:5-24, 1213:2-8, 1214:6-18, 1410:16-21; Exs. GC14, GC50, and GC51). HSG expressly agreed with the Union “to all terms and conditions negotiated and agreed to between Local 1199 and [each] Center.” (Exs. GC14(b), GC50(b), and GC51(b)). The parties stipulated that HSG applied the CBAs to its employees assigned to these Centers during the period of the subcontracts. (February 15, 2009 to May 17, 2010). (Ex. J2 – Joint Stipulations ¶17; *see also* Tr. Vol. 6 at 994:6-9; Tr. Vol. 7 at 1190:16 – 1191:14, 1304:5-9, 1390:19-23, 1404:15 – 1405:3). Contrary to the ALJ’s findings, Respondents did not “impose” or “require” or “instruct” that HSG apply the terms and conditions of the CBAs to its employees. Rather, Respondents and the Union negotiated **subcontracting clauses in the CBAs that required** a subcontractor to retain the employees and recognize their rights under that CBA. This is a subtle, but important distinction. Under the ALJ’s erroneous reasoning,

every CBA containing such a subcontracting provision, by itself, would create a joint employment relationship. As set forth fully below, this simply is not the law.

These Centers terminated the department staffs after they entered into the subcontracts. The ALJ erroneously found that the Centers did not terminate them or inform them of their terminations. (ALJD 8:12-14, 57:34-37). These findings are contrary to the ALJ's statement during the hearing that housekeeping and laundry employees were terminated by the Center and hired by HSG. (Tr. Vol. 6 at 1004:4-5). Further, these findings are contradictory to the ALJ's repeated statements that during the period of the subcontracts, the housekeeping and laundry employees were "HSG employees" or "employed by HSG." See, e.g., ALJD 8:45, 10:29, 55:23-24, 55:36. They also contradict the ALJ's finding that Administrator Coleman told employees after the subcontract ended that "they were all going to be **hired again** by ... Westport." (ALJD 24:31-32) (emphasis added).

The preponderance of evidence shows that Respondents' employees were terminated by the Centers, that they knew they had been terminated, and that they were then employed by HSG. See Ex. GC26 – "Myrna Harrison ... was terminated on 2/15/2009"; Tr. Vol. 1 at 101:21-102:7 – HSG notified Newington housekeeping and laundry employees that HSG, the subcontractor, was the new employer; Tr. Vol. 1 at 103:16-104:3 – Newington employees knew HSG was their employer; Tr. Vol. 1 at 185:19-24 – Westport employees knew they worked for HSG from February 2009 through May 17, 2010; Tr. Vol. 1 at 207:11-18 – Harrison admits that she was terminated by the Center on February 15, 2009; Tr. Vol. 2 at 280:24-281:8 – Newington employees knew they were employees of HSG; Tr. Vol. 3 at 390:5-11 – Westport employees knew they were employed by HSG; Tr. Vol. 3 at 426:21-25 – Long Ridge employee Anthony Lecky was told HSG was a subcontractor and that was the reason for his move to HSG; Tr. Vol. 3 at 463:6-10 – Long Ridge housekeeping and laundry employees knew they went to work for

HSG in February 2009. Furthermore, as set forth in detail in the next subsection, HSG had the employees fill out new hire and other new employee documentation.<sup>6</sup>

The Centers and HSG operated under the full-service contracts until May 2010. At that time, HSG believed that Respondents owed HSG money and **HSG** terminated the full-service contracts for this reason. (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25). There is no evidence to support the ALJ's finding that **Respondents** terminated the contracts. Indeed, the only evidence shows otherwise. This erroneous finding serves as the foundation for the further erroneous conclusion that Respondents intended the subcontracts to be temporary.

On May 17, 2010, HSG notified its housekeeping and laundry employees at these Centers that they were terminated as HSG employees. (Exs. GC17, GC27, GC38; Tr. Vol. 1 at 71:2-23, 188:11 – 189:1, 221:7-13, 222:23 – 223:11; Tr. Vol. 3 at 377:3 – 378:2, 437:7 – 438:2, 457:25 – 458:3, 470:2-10; Tr. Vol. 6 at 964:13 – 965:2, 990:2-3; Tr. Vol. 7 at 1151:24 – 1152:6, 1179:4-15, 1276:7-13, 1296:9 – 1298:2, 1359:2-7, 1373:20 – 1374:10). As of that moment, they were not employed by HSG or any of the Centers. Moreover, HSG, not the Centers, terminated both the “full-service” contracts and its employees without notice to the Union. Accordingly, HSG, not the Centers, took actions that required bargaining with the Union. Union official Suzanne Clark admitted, however, that the Union did not pursue HSG for these violations. (Tr. Vol. 1 at 116:23 – 117:14; Tr. Vol. 8 at 1461:8 – 1465:7; Ex. R32).

Once HSG terminated its employees, the Centers had to hire staff to perform the functions HSG no longer performed, and they did so. The CBAs contained bargained-for provisions governing the wages, hours and terms and conditions for new hires, with which Newington, Long Ridge, and Westport complied when they offered employment to and hired the

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<sup>6</sup> The ALJ's finding that HSG did not require the housekeeping and laundry staff to complete employment applications is immaterial (and contrary to the record evidence). (ALJD 8:14-15; Tr. Vol. 6 at 1001:12-16, 1002:13-18; Tr. Vol. 7 at 1183:18-25, 1214:7-24). The CBAs, as set forth above, required HSG to “retain” all the employees. Also contrary to the ALJ's finding, HSG did conduct background checks and verify Social Security numbers. (ALJD 8:14-16; Tr. Vol. 6 at 1002:1-4 – criminal records checks; Ex. R9, Tr. Vol. 6 at 924:1-17, 952:2-953:20, 1039:1-15, 1074:2-22, 1096:8-1099:21 – Social Security verification checks; see *also* ALJD 17:15-34).

former HSG employees. Those provisions include the following: employees generally must be hired at the minimum wage rates set by the CBAs, “[a]ll newly hired regular full-time Employees of the Center who are covered by this Agreement, **whether or not previously employed by the Center** . . . shall be deemed probationary Employees,” seniority does not commence until “successful completion of the probationary period and shall be retroactive to the Employee’s most recent date of hire,” and, generally, benefits do not begin until after the completion of the probationary period. (Articles 8A., 9B., 11D. of Exs. GC3, GC4, and GC6; see, e.g., Articles 15 and 16 of Exs. GC3, GC4, and GC6) (emphasis added). The CBAs, therefore, did not require the Centers to re-hire former employees with their seniority and other benefits intact upon HSG’s termination of the subcontracts. As discussed more fully below, the ALJ’s finding that Respondents had an obligation to bargain with the Union over the re-hiring of the housekeeping and laundry staff and their terms and conditions of employment ignores the express, unambiguous language of the CBAs. Respondents already bargained with the Union over the terms and conditions for employees who were “previously employed by the Center.” With respect to this issue, therefore, these Centers followed the requirements of the CBAs in every way and did not violate the Act.<sup>7</sup>

***2. Respondents were not joint employers with HSG during the period of the subcontracts***

Unable to identify any language in the CBAs that mandates the result he reached, the ALJ tied Respondents to **HSG’s duty** to comply with the CBAs by finding that each of the Centers was a “joint employer” with HSG between February 15, 2009, and May 17, 2010.

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<sup>7</sup> Paragraphs 14-19 of the Complaint, when read together, appear to allege that the Centers violated the “Successorship” provisions of the CBAs in May 2010. The Successorship Article applies “[i]f the Center decides to sell or transfer any of its operations.” (See, e.g., Ex. GC3, Art. 37). The Centers did not sell or transfer any of its operations in May 2010 and this CBA provision simply does not apply.

(ALJD 54).<sup>8</sup> As demonstrated below, the evidence and applicable Board precedents do not support this finding. Rather, the evidence demonstrates just the opposite.

Initially, as admitted by Union representative Clark and stipulated to by the parties, HSG assumed and applied the terms of the respective CBAs to its employees working at Long Ridge, Newington and Westport between February 15, 2009, and May 17, 2010. The CBAs, therefore, **not the Centers** determined “the terms and conditions” of employment during this period.

The following critical facts **with respect to the time period between February 15, 2009, and May 17, 2010, the time of the subcontracts**, are undisputed:

- HSG employed the on-site Account Managers, including current Account Managers William Owusu, William Parkmond, and Tom Glaser. (Ex. J1 ¶¶10; Tr. Vol. 3 at 425:9-17, 426:1-9, 461:10-16; Tr. Vol. 4 at 728:17 – 729:11, 788:2-4, 8-10; Tr. Vol. 6 at 918:20 – 919:14, 1006:6-7; Tr. Vol. 7 at 1149:17-18, 1150:2-7, 1274:20 – 1275:11, 1355:7-11).
- The HSG on-site Account Managers had no employment relationship with the Center to which they were assigned. (Tr. Vol. 6 at 919:10-11).
- The HSG on-site Account Managers reported to District Managers. (Tr. Vol. 4 at 788:4-6; Tr. Vol. 6 at 926:4-7; Tr. Vol. 7 at 1150:22-23, 1355:2-9).
- HSG employed the District Managers – Mike Crane, Chris Ricci, and Rich Dunn. (Tr. Vol. 3 at 462:16-22; Tr. Vol. 4 at 788:8-23; Tr. Vol. 6 at 926:6-9; Tr. Vol. 7 at 1150:24-25, 1353:3-4, 20-21).
- The HSG District Managers had no employment relationship with the Centers they oversaw or with HealthBridge. (Tr. Vol. 6 at 926:10-12; Tr. Vol. 7 at 1353:14-19).
- HSG District Managers reported to a Regional Manager. (Tr. Vol. 4 at 788:6-7, 789:4-11; Tr. Vol. 5 at 834:11-16; Tr. Vol. 7 at 1355:12-16).
- HSG employed the Regional Managers, including Stu Fishberg. (Tr. Vol. 4 at 788:13-14, 789:4-6; Tr. Vol. 5 at 834:11-16; Tr. Vol. 7 at 1178:2-5, 1359:12-13).
- Newington, Long Ridge, and Westport terminated the employees in their respective housekeeping and laundry departments on or about February 15, 2009. (See, e.g.,

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<sup>8</sup> The fact that HSG’s supervisors may have been agents of the Centers and HealthBridge with respect to **the Centers’ housekeeping and laundry employees prior to** February 15, 2009, and after May 17, 2010 (Tr. Vol. 8 at 1494:20 – 1495:2, 1495:12 – 1496:20), is neither relevant nor determinative as to whether the Centers and HealthBridge were joint employers **of HSG’s employees** between February 15, 2009, and May 17, 2010. (Tr. Vol. 8 at 1495:3-7, 1496:3-6). As Counsel for the AGC acknowledged, February 15, 2009, to May 17, 2010, is the “critical 15 month period.” (Tr. Vol. 8 at 1496:3-5).

Ex. GC26 (“Myrna Harrison ... was terminated on 2/15/2009); Tr. Vol. 3 at 390:5-11; Tr. Vol. 6 at 1004:4-5 – employees were terminated by Center and hired by HSG).

- On February 15, 2009, HSG hired the Centers’ former housekeeping and laundry employees at Newington, Long Ridge, and Westport. (Tr. Vol. 1 at 220:9-11; Tr. Vol. 2 at 280:24 – 281:8; Tr. Vol. 3 at 390:5-11; Tr. Vol. 4 at 784:5-13, 786:5-13; Tr. Vol. 6 at 920:11-18; Tr. Vol. 7 at 1151:17-23, 1357:9-15; Exs. GC14, 50, and 51; see *also* Tr. Vol. 1 at 102:5-7 – the subcontractor, HSG, was the new employer; Tr. Vol. 6 at 1004:4-5 – employees were terminated by Center and hired by HSG).

- HSG was a subcontractor at the three Centers with which it entered into full-service contracts. (Tr. Vol. 1 at 102:4; Tr. Vol. 3 at 425:9-17, 426:21 – 427:1; Tr. Vol. 4 at 782:21-24; Tr. Vol. 6 at 993:15-17).

- The employees filled out new hire paperwork for HSG in February 2009. (Tr. Vol. 3 at 390:12 – 391:6; Tr. Vol. 6 at 923:6-18, 924:1-19, 925:21 – 926:3, 1074:2-22; Tr. Vol. 7 at 1154:12 – 1155:4, 1156:24 – 1157:10, 1214:20 – 1215:5, 1357:19-25).

- HSG did not give this new hire paperwork or copies thereof to the Centers or HealthBridge. (Tr. 6 at 923:19-22, 924:10-17; Tr. Vol. 7 at 1155:5-7, 1358:9-11, 1370:14 – 1371:8).

- Neither HealthBridge nor the Centers were involved with the new hire paperwork for HSG. (Tr. Vol. 7 at 1157:11-14, 1358:6-8).

- Employees filled out applications for and enrolled in HSG’s insurance plans. (Tr. Vol. 3 at 390:12 – 391:6; Tr. Vol. 6 at 924:18 – 925:20, 1004:20-24; Tr. Vol. 7 at 1157:21 – 1160:3).

- After becoming employed by HSG, the employees received new insurance cards. (Tr. Vol. 3 at 390:12 – 391:6).

- After becoming employed by HSG, the employees received their paychecks from HSG. (Tr. Vol. 3 at 426:13-16; Tr. Vol. 4 at 783:25 – 784:3).

- In February 2009, HSG created and thereafter maintained its own separate personnel files on the HSG housekeeping and laundry employees assigned to the Newington, Long Ridge, and Westport facilities. (Tr. Vol. 6 at 921:10-15, 922:16 – 923:1, 972:9-14, 1112:13-21; Tr. Vol. 7 at 1152:14-23, 1277:4-10, 1358:12-17; Exs. R6, R13, and R17).

- Neither HealthBridge nor any of these three Centers were involved in the creation or maintenance of the HSG personnel files. (Tr. Vol. 6 at 921:16-21, 921:24-922:2; Tr. Vol. 7 at 1152:24 – 1153:10, 1277:13-18, 1358:18 – 1359:1).<sup>9</sup>

- The HSG personnel files were kept locked in the HSG Account Manager’s office. (Tr. Vol. 6 at 921:22-23; Vol. 7 at 1153:4-5, 1163:19-21, 1277:11-21, 1358:21-22).

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<sup>9</sup> On February 15, 2009, Long Ridge made its personnel files on these employees available to HSG so HSG would have ready access to basic information such as addresses, telephone numbers, etc. HSG did not use these files for any other purpose. (Tr. Vol. 7 at 1405:18 – 1407:21).

- The Centers did not put documents into HSG’s personnel files (Tr. Vol. 6 at 922:3-5; Vol. 7 at 1153:11-13, 1277:19-21), or give HSG documents to put into HSG’s personnel files. (Tr. Vol. 7 at 1321:7-15, 1323:13-17).<sup>10</sup>
- HSG retained its personnel files after terminating the HSG housekeeping and laundry employees assigned to the Newington, Long Ridge, and Westport facilities and did not give them to the Centers or HealthBridge. (Tr. Vol. 6 at 922:6-8; Tr. Vol. 7 at 1153:14-16, 1277:22 – 1278:2, 1399:19-24).
- Prior to February 15, 2009, HSG did not maintain personnel files on the housekeeping and laundry employees, as they were employed by the Centers. Any discipline issued by the on-site Account Manager prior to February 15, 2009, went into the Center’s personnel file for the employee. (Tr. Vol. 6 at 968:10-25, 969:11-15, 1064:1 – 1065:4, 1112:13-24).
- Prior to February 15, 2009, the housekeeping and laundry employees at Newington, Long Ridge, and Westport punched in and out using their respective Center’s time clock. (Tr. Vol. 6 at 1078:3-13).
- Once HSG became a “full-service” contractor, HSG installed its own, separate time clock. After that, the HSG housekeeping and laundry employees assigned to the Newington, Long Ridge, and Westport facilities used a separate HSG card-punch time clock and did not use the Center’s finger print recognition time clock. (ALJD 11:23-25, 27-28; Tr. Vol. 1 at 109:12-21; Tr. Vol. 3 at 392:23 – 393:3, 465:25 – 466:2; Tr. Vol. 6 at 932:6-8, 1004:20-22, 1078:5-7; Tr. Vol. 7 at 1164:24 – 1165:4, 1287:16-21).
- When the HSG time clock malfunctioned, someone from HSG, not the Centers or HealthBridge, fixed it. (Tr. Vol. 6 at 937:7-24).
- Staffing in the housekeeping and laundry department was determined by HSG during the term of the subcontracts. (Tr. Vol. 7 at 1377:6-21).
- The HSG on-site Account Manager kept up with the hours worked by the HSG housekeeping and laundry employees assigned to the Newington, Long Ridge, and Westport facilities; completed and calculated the information for the HSG Payroll Confirmation Sheets from the employees’ HSG timecards; and sent that information to HSG’s corporate payroll department which processed the paychecks through HSG’s payroll system. (Tr. Vol. 6 at 931:12 – 932:5, 932:9 – 936:6, 959:25 – 960:7; Tr. Vol. 7 at 1164:6-23, 1165:7 – 1166:5, 1174:3-18, 1194:2-13, 1212:24 – 1213:1, 1286:19 – 1287:15, 1287:24 – 1289:13, 1360:5 – 1363:11, 1365:20 – 1366:11; Exs. R7, R14, R18, R20, and R21).
- Prior to February 15, 2009, the HSG Account Manager did not process the payroll or calculate the hours worked for the housekeeping and laundry employees. Prior to that date, that function was performed by the Centers. Even though the on-site HSG Account Manager supervised the housekeeping and laundry employees, he did not see their time cards

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<sup>10</sup> Sometimes the **employees** asked HSG to put documents in the HSG personnel files. (Tr. Vol. 7 at 1322:10 – 1323:2). The ALJ’s finding, therefore, that no explanation was given for why other documents were in these HSG files is contrary to the record evidence. Moreover, the fact that the HSG supervisor did not quiz employees on why **the employee** wanted a document in their file is not material. The employee’s actions do not create joint employment.

or have to approve their time. (ALJD 11:23-25, 27-28; Tr. Vol. 6 at 980:20 – 981:4, 1077:17-25, 1078:14 – 24).

- Neither the Centers' payroll benefits coordinator nor anyone else with the Centers assisted or helped complete the HSG Payroll Confirmation Sheets or the processing of the HSG housekeeping and laundry employees' payroll. (ALJD 11:23-25, 27-28; Tr. Vol. 6 at 933:3-5; Tr. Vol. 7 at 1164:11-13, 1193:22 – 1194:1, 1286:24 – 1287:1, 1289:14-16, 1358:9-11, 1361:4-7).

- When the HSG on-site Account Manager went on vacation, the HSG District Manager, not anyone with the Centers, completed the HSG Payroll Confirmation Sheets and sent it to HSG's corporate office. (ALJD 11:23-25, 27-28; Tr. Vol. 6 at 936:15 – 937:6).

- HSG paid the HSG housekeeping and laundry employees assigned to the Newington, Long Ridge, and Westport facilities with HSG payroll checks. (ALJD 11:23-25, 27-28; Tr. Vol. 6 at 926:20 – 927:19, 1077:14-16; Ex. R6(o) pp. 2-3).

- When employed by the Centers, the employees had direct deposit. Direct deposit was not available while they were employed by HSG. (ALJD 11:23-25, 27-28; Tr. Vol. 1 at 111:23 – 112:6; Tr. Vol. 3 at 393:7-8).

- When issues arose about the amount of proper tax deductions from HSG employee checks, HSG investigated and handled the issue without assistance or consultation from the Centers' Administrators or HealthBridge. (ALJD 11:23-25, 27-28; Tr. Vol. 7 at 1362:10 – 1363:4).

- HSG paid for the cost of the employees' life and disability insurance. (Tr. Vol. 7 at 1159:12-18).

- Because of differences in plans, employees were initially paying more for co-pays for doctor visits and prescriptions under the HSG health insurance plan than they had been paying when employed by Newington, Long Ridge, and Westport. HSG paid the difference to the employees. (ALJD 56:42-46; Tr. Vol. 1 at 105:10 – 106:7; Tr. Vol. 6 at 935:20 – 936:14, 1101:4-12).

- Union delegate Sue Simone took these insurance benefit problems to HSG for resolution, and did not take them to the Centers' management. (Tr. Vol. 1 at 106:11-17).

- HSG insurance plans are administered by HSG employees, not employees of the Center or HealthBridge. (Tr. Vol. 7 at 1371:9 – 1372:23, Ex. R17(H)).

- When HSG employees needed leave, they were granted leave by HSG, not the Centers. (Tr. Vol. 1 at 187:12 – 188:10).

- When HSG employees went out on long-term disability ("LTD"), their LTD benefits were provided through HSG's disability insurance coverage, not the Centers'. (Tr. Vol. 1 at 187:12 – 188:10).

- HSG kept track of the housekeeping and laundry employees' leave accruals and other benefits. (Tr. Vol. 6 at 934:13-935:19; Tr. Vol. 7 at 1167:9-12, 1289:14-18, 1363:12-22).

- HSG keep track of the accruals for employees assigned to Westport on HSG forms and no one from the Center filled out these forms. (Tr. Vol. 7 at 1168:5-23, 1169:17 – 1170:14, 1172:2-13; Ex. R15).
- HSG processed the employees' FMLA leave requests. (Tr. Vol. 7 at 1160:22 – 1161:25, 1225:1-13).
- Neither HealthBridge nor the Centers had any input into, involvement with, or approval of the leave process. (Tr. Vol. 7 at 1162:1-9).
- Union delegate Simone admits that during the time she was employed by HSG, HSG's on-site supervisor gave her daily job assignments and work instructions, "actually gave housekeeping workers directions about how or what to clean and what our assignments were," and "did all the floor assignments on his own" – meaning that he did not have to check with anyone else. (Tr. Vol. 1 at 115:1-3, 115:19 – 116:9).
- Union delegate Debbie Baldwin ("Baldwin") admits that during the term of the subcontract, the HSG on-site Account Manager gave employees their work assignments. (Tr. Vol. 3 at 389:8-15).
- New hires into the housekeeping and laundry departments at the three Centers during this period (between February 15, 2009, and May 17, 2010) were hired by HSG without input from the Centers' Administrators or anyone at the Centers. (Tr. Vol. 7 at 1225:14 – 1227:18).
- HSG processed workers' compensation claims through HSG's workers' compensation insurance carrier. (Tr. Vol. 7 at 1155:8 – 1156:16).
- Neither HealthBridge nor the Centers were involved in processing workers' compensation claims for HSG's employees. (Tr. Vol. 7 at 1156:17-23).
- HSG had its own procedure for processing grievances under the CBAs. (Tr. Vol. 6 at 943:18-21; Tr. Vol. 7 at 1177:20 – 1178:5, 1367:2-22).
- Step 1 of HSG's grievance procedure was the on-site HSG Account Manager; Step 2 was the HSG District Manager for the facility; and, Step 3 was the HSG Regional Manager for the facility. (Tr. Vol. 6 at 950:9 – 951:8, 970:24-25, 975:1-9).
- The people at the levels of HSG's grievance procedure were different from the people in the Centers' grievance procedure. Only HSG officials were involved. For example, Step 2 of HSG's procedure was the HSG District Manager, whereas Step 2 of the Center's procedure was the Administrator. (ALJD 56:50 – 57:1; Tr. Vol. 6 at 1081:2-13, 1085:3-8).
- The HSG grievance procedure was explained to the Union delegates. (Tr. Vol. 6 at 951:9-14; Ex. R11, p. 2).
- HSG told the Union that grievances concerning HSG's housekeeping and laundry employees should be addressed to HSG, not the Centers' Administrators, as of February 15, 2009. (Tr. Vol. 6 at 957:22 – 958:8, 1108:15-25; Ex. R11, p.2).

- The Administrator at Newington told the Union that grievances concerning HSG's housekeeping and laundry employees were "for HSG to deal with now." (Tr. Vol. 6 at 1039:24 – 1040:6).
- To the extent Union delegates submitted grievances concerning HSG's housekeeping and laundry employees to the Administrator, the Union delegates were not following the correct process they were told to follow. (Tr. Vol. 6 at 951:15-21, 958:3-19, 1094:15-23).
- At Newington, the Administrator did not process grievances concerning HSG's housekeeping and laundry employees. When received, she turned them over to the proper person with HSG. (Tr. at Vol. 6 at 951:22 – 952:1, 954:2-13, 1040:3-6, 18-24).
- The only discussion an HSG on-site Account Manager had with a Center's Administrator about grievances concerning HSG housekeeping and laundry employees was the fact that the Union kept filing the grievances with the Center instead of with HSG. (Tr. Vol. 6 at 1041:21-25).
- HSG on-site Account Managers did not discuss the substance of grievances concerning an HSG housekeeping and laundry employee with the Centers' Administrators. (Tr. Vol. 6 at 1037:23 – 1041:25, 1098:9-12, 1103:18-22, 1107:12-15, 1112:8-12).
- HSG on-site Account Managers did not discuss specific employee performance issues with the Administrator. (Tr. Vol. 7 at 1188:7-15).
- The Administrator at Newington was not involved in resolving grievances concerning HSG's housekeeping and laundry employees. (Tr. Vol. 6 at 975:10-18).
- The HSG on-site Account Manager responded to the grievances on behalf of HSG. (Tr. Vol. 6 at 952:19-23, 954:23 – 955:5, 958:12-14, 959:18-22).
- HSG on-site Account Managers resolved grievances in consultation with HSG corporate officials and based upon the provisions of the CBA and HSG policies. (Tr. Vol. 6 at 953:4-20, 955:6 – 956:9, 959:25 – 960:7, 1098:9 – 1099:7, 1103:5-17, 1112:8-12; Exs. R9-12).
- Neither the Centers' Administrators nor anyone with HealthBridge had any involvement in resolving grievances concerning HSG's housekeeping and laundry employees. (Tr. Vol. 6 at 953:1-3, 956:10-13, 958:9-11, 960:8-11).
- HSG did not give the Center or HealthBridge copies of HSG responses to grievances in the normal course of business. (Tr. Vol. 6 at 960:12-15).
- Discipline of HSG's housekeeping and laundry employees was administered by HSG. (Tr. Vol. 6 at 1035:2-11; Tr. Vol. 7 at 1372:20 – 1373:19; Ex. R17(H)).
- During the term of the subcontracts, HSG's employees were not acting under the direction of the Centers' Administrators, nor did they report to the Centers' Administrators. (Tr. Vol. 3 at 392:9-22; Tr. Vol. 7 at 1205:9-16).

- During the term of the subcontracts, the Centers' Administrators did not discipline HSG employees or direct that discipline be taken against them. (Tr. Vol. 7 at 1207:6-17, 1373:1-19; Ex. R17(H)).
- If an HSG employee violated a policy of the Center, the Center's Administrator referred it to the HSG on-site Account Manager. (Tr. Vol. 6 at 1027: 19 – 1028:1-2).
- If a room needed to be set up or cleaned, or some housekeeping duty for which HSG was responsible did not get done, the Center's Administrator would tell HSG, not a housekeeping and laundry employee, that the work or task did not get done, and then HSG would, in turn, discuss the issue with the appropriate HSG housekeeping and laundry employee. (Tr. Vol. 6 at 1007:8-18, 1069:7-23).
- HSG employees did not have to follow directives from the managers and supervisors of other departments at the facility. (Tr. Vol. 6 at 1027:24-25, 1028:3-8).
- HSG Account Managers evaluated the housekeeping and laundry employees for HSG while the employees were employed by HSG (Tr. Vol. 7 at 1278:18 – 1279:16) and at the direction of HSG. (Tr. Vol. 7 at 1285:4-12, 1327:4-17).
- No one from HealthBridge or the Centers participated in the evaluation of HSG's employees. (Tr. Vol. 7 at 1279:17-20).
- When the HSG Account Manager was out sick or on vacation, the HSG District Manager, not someone from the Center, completed the employee evaluations. (Tr. Vol. 7 at 1350:2-20).
- HSG did not give copies of the employee evaluations to anyone at the Centers or HealthBridge. (Tr. Vol. 7 at 1279:24 – 1280:1).
- If an HSG housekeeping and laundry employee "called off" before the HSG Account Manager arrived (or after he left), whoever answered the phone would forward the information to the HSG on-site supervisor to find a replacement. (Tr. Vol. 1 at 169:5-23).
- HSG never had responsibility to provide gloves to the housekeeping and laundry staff. (Tr. Vol. 7 at 1296:5-8, 1376:21-25).
- Employees outside the housekeeping and laundry department (Center employees) did not attend in-service training conducted by HSG for its housekeeping and laundry employees. (Tr. Vol. 6 at 962:18 – 963:7).
- HSG did not fill any open HSG positions in housekeeping and laundry with employees from other departments at the facilities. (Tr. Vol. 6 at 1139:24 – 1140:4).
- There is no evidence that the full service contracts entered into with HSG in February 2009 were intended to be anything other than permanent arrangements.
- HSG decided to terminate the full-service contracts because the Centers owed it money and had not paid it all the money they owed since HSG hired the housekeeping and laundry employees. (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25).

- There is no evidence that either HealthBridge or any of the three Centers (Newington, Long Ridge, or Westport) was the party that terminated the “full-service” contracts with HSG or directed that those decisions be made.

- On May 17, 2010, **HSG** notified its housekeeping and laundry employees at Newington, Long Ridge, and Westport that they were terminated as HSG employees. (Exs. GC17, GC27, GC38; Tr. Vol. 1 at 71:2-23, 188:11 – 189:1, 221:7-13, 222:23 – 223:11; Tr. Vol. 3 at 377:3 – 378:2, 437:7 – 438:2, 457:25 – 458:3, 470:2-10; Tr. Vol. 6 at 964:13 – 965:2, 990:2-3; Tr. Vol. 7 at 1151:24 – 1152:6, 1179:4-15, 1276:7-13, 1296:9 – 1298:2, 1359:2-7, 1373:20 – 1374:10).

- The termination letters given to HSG’s housekeeping and laundry employees on or about May 17, 2010, were obtained from HSG and were on HSG letterhead. (Exs. GC17 and GC27; Tr. Vol. 6 at 964:24 – 965:2, 987:4-6, 988:14-16; Tr. Vol. 7 at 1296:15 – 1297:1, 1373:24 – 1374:4, 1375:6-8).

- Since HSG terminated its housekeeping and laundry employees, and the Centers hired them in May 2010, the HSG on-site Account Manager has directed those employees to the Center’s Administrator or a Center supervisor on issues such as more hours or more staff, issues which the Account Manager previously handled during the subcontracts. (Tr. Vol. 3 at 404:6 – 405:8, 410:21 – 411:9)

- Following their terminations, HSG paid the employees for their accrued but unused leave time. The Centers did not pay them for that unused time. (Tr. Vol. 1 at 112:16 – 117:6).

- The HSG on-site Account Managers did not meet with representatives of HealthBridge before handing out the termination letters. (Tr. Vol. 6 at 965:3-9, 966:3-9).

- No one from the Centers or HealthBridge participated in or attended the termination meetings held by HSG on May 17, 2010. (Tr. Vol. 1 at 210:21 – 211:6, Tr. Vol. 6 at 965:3-9; Tr. Vol. 7 at 1179:17-19, 1297:2-4, 1375:2-5).<sup>11</sup>

- No one from HSG participated in the meetings, interviews, or hiring process conducted by HealthBridge and/or Newington, Long Ridge, or Westport on May 17, 2010. (Tr. Vol. 1 at 210:21 – 211:6, Tr. Vol. 6 at 965:10-17, 990:8-12, 1012:14-20; Tr. Vol. 7 at 1179:20-23, 1192:11-22, 1297:5-13, 1374:24 – 1375:1). See *also* Tr. Vol. 1 at 72:2 – 73:12 (met with Center officials about application), 75:4-13 (Newington Administrator told them what hourly rate and terms of employment would be); Tr. Vol. 3 at 438:10 – 439:4 – HSG district manager Crane left after handing out termination letters).

- Offer letters in May 2010 came from the Center’s Administrator, not HSG. (Ex. GC19; Tr. Vol. 1 at 76:11-24).

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<sup>11</sup> Newton Daye initially testified that the Administrator was in the meeting on May 17, 2010, when HSG Account Manager Tom Glaser and another gentleman gave him the termination letter from HSG. (Tr. Vol. 1 at 176:2-15). On cross-examination, however, Daye admitted that Glaser’s boss, Chris (Ricci) from HSG, initially told him that he would no longer be employed with HSG and that he then went into a separate meeting, with the Administrator and another gentleman **whom he did not know**, during which he was told to fill out an application. (Tr. Vol. 1 at 188:11 – 190:3).

- Following HSG's termination of its housekeeping and laundry employees in May 2010, the Union filed a grievance **with HSG** over the employees' terminations and HSG's failure to pay out all accrued, but unused, leave time. The Union **did not pursue the termination claims**, but dealt extensively with HSG directly on resolution of the payout claim. (Tr. Vol. 1 at 116:23 – 117:14; Tr. Vol. 8 at 1461:8 – 1465:7; Ex. R32).

- The time clock I.D. code the employees used after they were hired by the Centers in May 2010 is different than the code they used when previously employed by the Center in January 2009. (Tr. Vol. 1 at 111:3-22).

“An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees.” *Southern California Gas Co.*, 302 NLRB 456, 461 (1991). To establish that two or more employers are joint employers, “entities must share or co-determine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.” *Horizons Youth Services, LLC*, 2009 NLRB LEXIS 251 (2009). The Board's decisions further require that the putative joint employer's control over these matters be “direct and immediate.” See, e.g., *TLI, Inc.*, 271 NLRB 798, 798-99 (1984), *enf'd* 772 F.2d 894 (3d Cir. 1985). In determining immediate control, the factors that must be weighed include whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process. See, e.g., *Airborne Freight Co.*, 338 NLRB 597, 605-06 (2002). See also *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442-43 (2d Cir. 2011); *NLRB v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994). Evidence and examples of two companies working together that are “nothing more than natural cooperation between a contractor and its subcontractor” fail to establish joint employer status. 38 F.3d at 95. Occasionally giving direct orders is insufficient, as is establishing

standards of quality, cleanliness, safety and health for the facility in which the contractor's employees work. *AT&T v. NLRB*, 67 F.3d 446, 442-43 (2d Cir. 1995).

Applying these factors, Respondents were not joint employers during the period of the subcontract. The weight of the evidence shows nothing more than examples of the natural cooperation between a contractor and its subcontractor. There was no evidence that Respondents had "direct and immediate" control of HSG's employees or that they hired, fired, supervised, or disciplined HSG's employees. Indeed, the undisputed evidence shows that they did not. The ALJ incorrectly concluded that the subcontract was "little more than a payroll transfer" (ALJD 57:3-6), imparting an unfounded significance to the term "payroll transfer" (as used in correspondence from HSG not Respondents). The ALJ does not cite to any Board law finding that use of the term "payroll transfer" when a company subcontracts work to another entity creates a joint employment situation. In fact, as set forth above, the transfer of payroll is one factor that weighs **against** finding joint employment. Finally, the fact that HSG and Respondents' CBAs each had a three-step grievance process is not, as found by the ALJ (ALJD 54:23-28), evidence of joint employment. To the contrary, as the ALJ also acknowledged, during the subcontract period the grievance channels for HSG's employees changed so that only HSG officials were involved. (ALJD 56:50 – 51:7).

As summarized in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122-23 (3d Cir. 1982), the basis for a finding of joint employer status is that "one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." "[C]ontract terms, by themselves, do not establish direct and immediate control over the terms and conditions of employment" to establish joint employer status. *Summit Express, Inc.*, 350 NLRB 592, 592 n.3 (2007). Contrary to this precedent, the

ALJ erroneously found that because the pre-existing CBAs at Long Ridge, Newington and Westport applied to HSG's employees during the subcontract period, HSG and these Centers co-determined the essential terms and conditions of employment. (ALJD 54:17-29). As a matter of law, this fact does not create joint employment. Moreover, as explained above, Article 9F of the CBAs required that HSG, as a subcontractor, agree "in advance to retain the Employees and recognize all their rights, including seniority, under [the CBAs]." (Exs. GC3, GC4, and GC6). Therefore, contrary to the ALJ's repeated findings (*see, e.g.,* ALJD 8:16-19, 11:19-21, 54:20, 28-29), the CBAs, not Respondents, required HSG, as the subcontractor, to continue the employment of the department staffs and determined their essential terms and conditions. (Tr. Vol. 1 at 57:16-18; Tr. Vol. 4 at 787:13-16; Tr. Vol. 6 at 1135:17-22). Finally, Respondents did not unilaterally determine the initial terms and conditions. Rather, those terms were negotiated with the Union.

In *Summit Express*, the first employer's existing CBA determined the employees' initial terms and conditions with the contractor. Nevertheless, the Board held,<sup>12</sup> "[e]ach case that finds joint employer status, however, relies on **continuing elements of supervision and control of labor relations, not an initial establishment of terms and conditions of employment** that simply continue what has gone on before." 350 NLRB at 617 (emphasis added). The Board also held that the General Counsel has the burden of proving that instructions by Company #1's supervisor to an employee of Company #2 were obeyed by the employee **without action** by others at Company #2, but had not done so. *Id.* at 592. Furthermore, the Board held that the General Counsel had "shown no day-to-day supervision of, or control of other ongoing aspects of employment of [the company's] employees by [the other company's officials]." *Id.* at 617. In the present case, the AGC did not meet these burdens either. While the record contains testimony that the Administrator of a Center could ask that a spill be cleaned up or that another

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<sup>12</sup> The Board affirmed the ALJ's finding of no joint employer status "for the reasons set forth in his decision." 350 NLRB at 592.

housekeeping activity be performed, it is undisputed that the Administrator would make that request to the on-site HSG supervisor who would then direct an HSG housekeeping and laundry employee to perform the task. Accordingly, these facts do not establish the requisite direct and immediate control of HSG's employees by Center Administrators and managers necessary for a joint employer relationship.

The ALJ attempted to distinguish *Summit Express* in the following ways: 1) by stating that the contractor in that case “presumably was free to change the terms of employment if it so chose at any future time” (ALJD 55:8-9) – this “presumption,” however, is not supported by the facts set forth in *Summit Express* (see 350 NLRB at 615, 617-18); 2) by citing to an agreement in that case that the contractor and the alleged joint employer would negotiate any “subsequent adjustments of wages” (ALJD 55:8-11) – this is actually a higher degree of control than exists in the present case and so actually supports Respondents’ position; and 3) citing the conclusion in that case that there is “no case that indicates that the ability to reject employees, or a procedure of co-determination of future wages, without more, suffices to establish a joint employer relationship” (ALJD 55:15-20 citing 350 NLRB at 618) – again, this conclusion actually supports Respondents’ position. As demonstrated, the ALJ’s misdirected attempts to distinguish *Summit Express* actually reinforce the inescapable conclusion that no joint employment can be found in the present case.

Any supervision of HSG's employees by a Center Administrator must be more than “limited and routine” in nature. *AM Prop. Holding Corp.*, 350 NLRB 998, 1001 (2007), *enf'd in relevant part by SEIU Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011). In that case, AM Holding Corporation (“AM”) owned an office building and contracted with Planned Building Services, Inc. (“PBS”) to provide maintenance services for the building. The Board reversed the ALJ’s determination of joint employer status and held that “evidence of supervision which is ‘limited and routine’ in nature does not support a joint employer finding. The Board generally has found supervision to be limited and routine where a supervisor’s instructions consist

primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.” *Id.* at 1001 (citations omitted). Also in *AM Prop. Holding*, AM employed Henry as a night porter. At some point, Henry became an employee of PBS, and his duties were to prepare the supplies for the PBS cleaning crew and check to make sure that their work had been done. A few months later, Henry returned to AM’s employment and continued the same duties. The ALJ found that Henry’s continued supervision of the PBS employees, after returning to AM, created a joint employer relationship between AM and PBS. The Board disagreed, finding that “Henry distributed keys and cleaning supplies to PBS employees at the start of the shift, prepared and signed employee time cards, and ensured that employees did their work properly. If the work was not done properly, he asked them to do it over. There was no evidence, however, that Henry or AM trained PBS employees or instructed them how to perform their tasks.” *Id.* Likewise, the Board rejected the ALJ’s conclusion that “the occasional assignment of work by AM officials to ... a PBS day matron was evidence of a joint employer relationship.” *Id.* The record showed that AM officials sometimes asked the PBS day matron to redo work that was not done properly or to perform tasks that were not part of her regular duties, such as cleaning a floor that recently had been rented. *Id.* The Board found that this “oversight” of the PBS day matron by AM also was limited and routine and, therefore, not indicative of joint employer status. *Id.*

Here, there is no evidence that any Center supervisor trained HSG’s employees while they were employed by HSG, told HSG’s employees how to do their work or instructed them how to perform their tasks, or more than occasionally asked an HSG employee to help perform some task (such as to help move a heavy object). Since the evidence does not establish that the Administrators’ actions with respect to HSG’s employees were anything more than “limited and routine” as defined in *AM Prop Holding*, there can be no joint employer finding.

The fact that a payroll coordinator at one of the three Centers may have maintained the benefit spreadsheet used by HSG on that Center’s computer system likewise is insufficient to

establish joint employer status. It is undisputed that the spreadsheet was started by the coordinator while the Center employed the housekeeping and laundry staff and that, after they became employed by HSG, the HSG on-site supervisor, not the coordinator, input certain data into the spreadsheet. See, e.g., *Bonita Nurseries Inc.*, 326 NLRB 1164, 1167 (1998) (evidence that single employee performed some payroll and accounting tasks for one employer while employed as a controller for another employer insufficient to establish joint employer relationship where employee did not **meaningfully** affect matters relating to the employment relationship between the other employer and its employees).

The facts in this case also are similar to *Southern California Gas Co.*, 302 NLRB 456 (1991). Southern California Gas Company (“SG”) directly employed janitors at its five-building corporate headquarters prior to 1970. From 1970 through 1988, it contracted for janitorial services in those buildings with a series of third-party janitorial companies. With each change in contractors, the bargaining unit employees assigned to the facilities remained and went to work for the succeeding contractor. American Building Maintenance Co. (“ABM”) was awarded the contract in 1977, lost it, and then regained it in 1982. In 1987, SG unilaterally terminated the contract with ABM, and ABM, in turn, terminated its janitor-employees assigned to the SG facilities. The General Counsel’s complaint alleged, *inter alia*, that SG was the joint employer with ABM of ABM’s janitorial employees. The ALJ disagreed and the Board adopted the ALJ’s decision. Like HSG in this case, ABM provided its own day-shift and night-shift on-site supervisors (or foremen) at the facilities. These on-site supervisors provided work direction, monitored the work performed, distributed work assignments, prepared the janitors’ payroll, and sent that payroll to ABM. The ABM janitors obtained assignments from the ABM on-site supervisors and looked to them as their supervisors. ABM paid the janitors on the basis of payroll information provided to it by its on-site supervisors. The ALJ found that while an ABM supervisor might show weekly payroll to an SG official, it was for the purpose of customer service and ensuring that there would be no misunderstanding about the bill, not for approval by

SG. The ALJ also found that it was the general practice for SG officials to give requests, general assignments, and complaints to the ABM on-site supervisor who then ensured that the requested work was performed. On perhaps two occasions, ABM terminated a janitor on the basis of information reported to it by an SG official, but there was no evidence that SG took any action other than to report the issues involved to ABM for ABM to handle. The ALJ rejected the General Counsel's argument that SG directed changes in janitorial staffing levels merely by negotiating cost savings in its contract and leaving ABM to decide where and how to make cuts. Finally, the ALJ held that the ABM on-site supervisor's customer service communications with SG officials to ensure that ABM's work was being done to SG's satisfaction did not constitute SG supervision over the ABM on-site supervisors. *Southern California Gas* is nearly on all fours with the facts of the present case and dictates that no joint employment can be found here.

On the other hand, the facts of the present case stand in stark contrast to those cases in which the Board found joint employment, such as *Aldworth Co., Inc.*, 338 NLRB 137 (2002). In that case, Dunkin' Donuts owned a warehouse in New Jersey from which food products were transported to retail outlets in the area. Dunkin' Donuts leased truck drivers, helpers, and warehouse personnel from Aldworth to perform these duties. The Board found that Dunkin' Donuts was a joint employer of these employees with Aldworth because Dunkin' Donuts' supervisors, managers, and officials were involved in the hiring process of Aldworth's drivers; determined whether Aldworth's employees could take earned time off and when their disciplinary suspensions would be served; adjusted schedules of Aldworth employees; assigned Aldworth helpers to Aldworth drivers; assigned Aldworth drivers to equipment; routinely consulted with Aldworth in the hiring and termination of Aldworth's warehouse workers; personally fired one Aldworth employee; interviewed an Aldworth driver for the position of Aldworth field supervisor, informed him of his promotion, and two years later told him that the Dunkin' Donuts Board of Directors had eliminated the field supervisor position at Aldworth and that he would be returning to work as a driver with Aldworth, and the employee returned to work

as a driver without any personal consultation with Aldworth's managers. The instant case does not present any facts similar to those discussed sufficient to establish that the Centers or HealthBridge are a joint employer with HSG of HSG's housekeeping and laundry employees during the time period between February 15, 2009, and May 17, 2010.

### **3. The ALJ employed a flawed legal analysis**

The ALJ presented the joint employer test as "which of the two employers or both control in the capacity of labor, the labor relations of a given group of workers." (ALJD 54:10-12). This statement of the test is woefully incomplete. As set forth above, the Board has identified multiple factors to be considered in determining whether joint employment exists. See discussion and cases cited at Section VI.C.2, *supra*. In this case, the ALJ failed to consider properly, if at all, any of these factors, much less even mention them in his decision.<sup>13</sup>

The ALJ also erred in his selective reliance on only portions of the joint employment test discussed in *G. Heileman Brewing Co.*, 290 NLRB 991 (1988), as referenced in *Summit Express*. The ALJ found it was "significant" that the judge in *Summit Express* distinguished *Heileman Brewing*, but the ALJ failed to acknowledge that the present case also is distinguishable from *Heileman Brewing* for similar reasons. The ALJ cited to the following discussion of *Heileman Brewing* in *Summit Express*: "Lowery (the contractor) supplied employees to Heileman, but Heileman negotiated with the Union for almost all of the terms and conditions of employment of the Lowery employees, the Lowery employees retained their seniority with Heileman while they were supposedly Lowery employees." (ALJD 55:11-15, citing 350 NLRB at 618). The ALJ failed to recite or consider the end of this same sentence, which states: "and, as the administrative law judge found at 290 NLRB 999: 'In practice, only the Company [Heileman] exercised meaningful supervision over the day-to-day work of the

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<sup>13</sup> The ALJ seemed to ignore or minimize these multiple factors and dismiss the utility of such analysis simply by finding that the employees were directly supervised by HSG personnel before and after the period of the subcontracts. (ALJD 55:33 – 56:4).

employees.” *Id.* at 618. The ALJ also neglected to include the analysis of how the *Summit Express* judge distinguished that case from *Heileman Brewing*, which was:

Here, under the June 1 agreement, Great Lakes could determine the “minimum qualifications” of referred employees, and subsequent adjustments of wages of the SG Construction employees are to be co-determined by negotiations between SG Construction and Great Lakes (Catrambone), but the General Counsel has shown no day-to-day supervision of, or control of other ongoing aspects of the employment of, SG Construction’s employees by Catrambone.

*Id.*

The present case similarly can be distinguished from *Heileman Brewing*. Respondents tangentially had an impact on the subcontracted employees’ wages and other terms and conditions set by the CBAs, in the sense that they were in the CBAs during those employees’ employment with Respondents and continued during their employment by HSG pursuant to the subcontracting clauses. However, the AGC did not show any day-to-day supervision of, or control of other ongoing aspects of the employment of, HSG’s employees by Respondents. Accordingly, the ALJ erred in relying upon *Heileman Brewing* in reaching his conclusion that there was a joint employer relationship between Respondents and HSG.

To preserve the issue for further review, Respondents also submit the ALJ erred in relying upon *Executive Cleaning Services, Inc.*, 315 NLRB 227 (1994), because the Second Circuit Court of Appeals refused to enforce that decision in *AT&T v. NLRB*, 67 F. 3d 446 (2nd Cir. 1995). (ALJD 54:35-60:9). Further, it is unclear to what degree the ALJ relied on this opinion, as he found the “facts in *Executive Cleaning* are distinguishable from the facts here.” (ALJD 55:41) because “the labor rates for the HSG housekeeping and laundry were negotiated by Respondents and the Union and imposed upon HSG.” (ALJD 55:49-50). Presumably, the ALJ was arguing that had the facts been as the judge in *Executive Cleaning* erroneously found (that AT&T negotiated labor rates with the union for the contractor’s employees), then the reasoning of the Board’s decision finding joint employment under those facts in *Executive Cleaning* would apply in this case, and the Second Circuit’s decision could be ignored. See

*Executive Cleaning Services, Inc.*, 315 NLRB at 235. However, the Second Circuit found participation in the collective bargaining process alone was not sufficient to establish the necessary control for joint employment status. *AT&T*, 67 F.3d at 451. Additionally, Respondents here did not negotiate any labor rates for HSG housekeeping and laundry employees (or any other terms or conditions for HSG employees as found by the ALJ (ALJD 55:22-24)). Instead, Respondents negotiated labor rates for their own employees. The fact that those labor rates were continued with HSG employees by virtue of the subcontracting clause in the CBAs does not mean that Respondents negotiated for the labor rates of HSG employees. Therefore, *Executive Cleaning* has no application to this case.

**4. The evidence relied upon by the AGC and ALJ does not establish joint employment**

The AGC proffered a number of highly fact-specific situations as proof of joint employment during the period of the subcontracts. The ALJ agreed with some of these and erroneously found that they established joint employment. A review of this evidence, however, demonstrates that the ALJ's findings with respect to these facts are not supported by the record.

**a. joint study meetings**

At joint study meetings, often called labor/management meetings, the Union and each Center tried to resolve broad, on-going issues in the building without having to file grievances. (Tr. Vol. 4 at 779:17-24). Union delegates employed by HSG, such as Eva Fal at Newington, Simone at Newington, and Lecky at Westport, continued to attend joint study meetings with the Centers' Administrators during the period of the HSG subcontracts. (Tr. Vol. 1 at 82:3-25; Vol. 2 at 258:11 – 259:13). This, however, does not establish a joint employer relationship. These meetings involved **everyone represented by the Union** in the building. (Tr. Vol. 3 at 532:18 – 534:5). As Simone, Fal and Lecky admitted, even though one employee was the nominal delegate for the housekeeping and laundry staff, all the delegates in the building represented all employees in the building who were represented by the Union, including those in other

departments who were not employed by HSG. (Tr. Vol. 1 at 68:5-12, 85:17-18; Tr. Vol. 2 at 282:15 – 283:1; Vol. 3 at 428:13 – 429:7).

***b. in-service training***

During the time HSG employed the housekeeping and laundry staff at Newington, the Center conducted two in-service training sessions on infection control. The in-services were conducted by a Staff Development Nurse in the context of an operational nursing home. (Tr. Vol. 1 at 86:17 – 87:17). Everyone in the facility, including CNAs, nurses, and HSG employees, attended them. (Tr. Vol. 1 at 87:18 – 88:3). These in-services were about infection control, which was applicable to everyone in the building, and were not training for the housekeeping and laundry staff on how to perform their housekeeping and laundry jobs. (Tr. Vol. 1 at 67:5-12, 113:7 – 114:12).

***c. benefit accrual issues***

Issues arose between the Union and HSG about the amount of leave time the housekeeping and laundry employees carried with them to HSG and accrued while working for HSG. Because HSG assumed the CBAs at Newington, Long Ridge, and Westport on February 15, 2009, it accepted the liability for time accrued before February 15. The employees' accrued hours during the remainder of the year (while employed by HSG) were based on their accruals prior to February 15 (while employed by the Centers). HSG used figures provided by the Centers and HealthBridge for the amount of time the employees had accrued up until February 15. To investigate and correct any accrual deficiencies, therefore, HSG had to consult with the Centers and HealthBridge to determine if HSG's starting accrual numbers were correct.<sup>14</sup> In the course of that investigation, it was determined that some of the starting numbers provided to HSG by the Centers and HealthBridge were incorrect. (Tr. Vol. 1 at 112:7-15; Tr. Vol. 4 at

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<sup>14</sup> For example, Lecky testified that when he turned his vacation request in to HSG, the HSG on-site Account Manager had to go see the Center's payroll person "to resolve that vacation time." (Tr. Vol. 3 at 515:4 – 516:1). This was not an "approval" process, but merely a clerical validation process given the known differences in carry-over numbers between the two companies.

792:19 – 793:16, 794:9-22; Tr. Vol. 5 at 836:15-837:20; Tr. Vol. 6 at 976:11-15, 1034:12 – 1035:1, 1113:15-21, 1115:7-8; Vol. 7 at 1171:8-16, 1200:19 – 1201:7, 1201:18 – 1202:9, 1218:8 – 1221:8, 1251:18-24; Ex. R23). The fact that the Centers and HealthBridge were a necessary source of information for HSG’s attempted resolution of this matter clearly does not establish that HSG and the Centers co-determined or co-administered employment benefits for the housekeeping and laundry employees while they were employed by HSG, or that they were joint employers during that period.

In a related situation, prior to February 15, 2009, Newington’s Payroll Benefits Coordinator created and maintained an excel spreadsheet, on the Center’s computer system, to calculate and keep track of leave and benefit accruals for all Union represented employees, including the housekeeping and laundry employees. When Newington terminated and HSG hired the housekeeping and laundry employees on February 15, 2009, the Payroll Benefits Coordinator provided access to the spreadsheet to the HSG on-site Account Manager. The HSG on-site Account Manager used the existing spreadsheet as a matter of convenience and began making the entries for the HSG housekeeping and laundry employees, not the Payroll Benefits Coordinator. (Tr. Vol. 6 at 1033:24 – 1034:11, 1114:10-11; Vol. 7 at 1167:13-15). The HSG on-site Account Managers assigned to Long Ridge and Westport did not have access to those Centers’ computer systems and did not use any spreadsheets created by those Centers. (Tr. Vol. 7 at 1168:24 – 1169:3). Rather, they used their own handwritten HSG forms. (Ex. R15; Tr. Vol. 7 at 1168:5-20, 1169:17 – 1170:14, 1172:2-13). The Newington Payroll Benefit Coordinator’s incidental and minimal assistance to the HSG on-site Account Manager does not establish a joint employer relationship between HSG and Newington, and certainly creates no such relationship between HSG and the other two Centers or HealthBridge.

***d. HSG Account Managers' attendance at management meetings***

The HSG Account Managers attended management meetings conducted by the Centers' Administrators because the housekeeping and laundry department was part of the facilities' operations. The Administrators did not give instruction or directives to HSG housekeeping and laundry employees at these meetings. Rather, the HSG on-site Account Managers obtained information from the Centers necessary for HSG (or any vendor) to perform its duties and services in the building, such as new admissions, patient transfers, and discharges, all of which related to resident room cleaning and laundry responsibilities. (Tr. Vol. 6 at 1029:6-25, 1035:18 – 1037:3). By providing this information to HSG's on-site Account Managers, the Centers in no way co-administered or co-determined the employment of HSG's housekeeping and laundry employees, or made HSG and the Centers joint employers of those employees.

***e. grievances***

The ALJ erroneously found that the Centers adjusted grievances related to HSG employees. An examination of the undisputed evidence, however, shows that this is not true.

***i. grievances filed before and after the subcontracts and/or involving other departments***

Many of the grievances proffered by the AGC were filed prior to the subcontract period. (One in 2006 – Tr. Vol. 2 305:17 – 311:9, 315:5-16, 316:3-18; one in 2008 – Exs. GC14(b), GC15, Tr. Vol. 1 at 102:14-23, 136:18 – 140:3, 157:22 – 158:2, 161:12 – 162:25, 163:3-11, 170:1 – 171:22).<sup>15</sup> Others were filed after the subcontract period. (One in 2010 – Tr. Vol. 3 at 564:18 – 565:18, 567:23 – 568:22, 570:9-20; one in 2011 – Tr. Vol. 3 at 418:1 – 420:21, 421:14-24, 422:12-14). Some even involved positions in the maintenance department which admittedly did not involve HSG. (Exs. GC14(b), GC15, Tr. Vol. 1 at 102:14-23, 136:18 – 140:3, 157:22 –

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<sup>15</sup> Eva Fal, a Union delegate at Newington, also identified a grievance for housekeeping employee Terry Seracina, but could not recall if it occurred during the subcontract. She admitted, however, that it was resolved directly with the HSG Account Manager, not the Center's Administrator. (Tr. Vol. 2 at 281:21 – 282:6, 291:1 – 299:22, 302:20 – 303:1, 323:6-21).

158:2, 161:12 – 162:25, 163:3-11, 170:1 – 171:22; Ex. GC16,<sup>16</sup> Tr. Vol. 1 at 102:24 – 103:15; Tr. Vol. 3 at 418:1 – 420:21, 421:14-24, 422:12-14). All of these grievances, therefore, are irrelevant to the issue of joint employment of the housekeeping and laundry staff during the subcontract period.

## ii. Anthony Lecky's grievances

Lecky, a Union delegate at Long Ridge, filed a grievance on September 17, 2009, against HSG. (Ex. GC37; Tr. Vol. 3 at 434:2-3, 464:14-23, 504:2-13). Lecky and another Union delegate, Patrick Atkinson ("Atkinson"), gave the grievance to the Center's Administrator. The Administrator did not take any action then, but said she would get back to them. (Tr. Vol. 3 at 430:24 – 432:4, 493:21-23, 501:23-24, 502:6-7). The Administrator did not say anything one way or the other about the merits of the grievance. (Tr. Vol. 3 at 598:12-25).<sup>17</sup> The grievance purported to be a class action about management changing employees' punch time. (Ex. 37 ("Grievant(s) Name: Class Action;" "Job Title: All;" "Statement of Grievance: Management changes employees punch time including (A. Lecky)"); Tr. Vol. 3 at 429:1 – 431:9, 503:23 – 504:22, 544:14 – 545:24, 572:3 – 573:12). Lecky and Atkinson testified that the grievance related **to the building as a whole** and "all employees in the bargaining unit," including employees in other departments that were not employed by HSG. (Tr. Vol. 3 at 504:6-22, 572:3 – 573:12). To the extent the grievance related to departments other than housekeeping and laundry, the Center's Administrator, not HSG, was the correct person to handle this grievance. The ALJ's finding, therefore, that the Center's Administrator had a role in processing or determining this grievance **on behalf of HSG** is contrary to the evidence.

As the issue affected Lecky personally, HSG was the proper entity to handle the grievance, and the only entity to handle the grievance. Lecky stayed after his shift to attend a grievance with the Administrator, but he remained punched in on the HSG time clock. HSG did

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<sup>16</sup> The actual grievance document was not offered by the AGC and is not in evidence.

<sup>17</sup> Atkinson admits that no one from HSG was at this meeting. (Tr. Vol. 3 at 599:16 – 600:2).

not pay him for that additional time. (Tr. Vol. 3 at 429:7-18, 484:13-19, 488:12-14, 521:13 – 525:5, 533:18 – 534:5, 592:8 – 593:4). Lecky, like other Union delegates who represented housekeeping and laundry employees, represented all the Union-represented employees in the building, including those in other departments who were not employed by HSG. (Tr. Vol. 3 at 428:13 – 429:7, 518:21 – 519:4). Lecky raised this issue directly with HSG Account Manager William Owusu (“Owusu”), who in turned discussed the issue with HSG District Manager Michael Crane (“Crane”).<sup>18</sup> **It is undisputed that neither discussed the issue with the Center’s Administrator or HealthBridge.** Owusu and Crane both told Lecky that HSG would not pay him for the time he stayed over his shift. HSG determined that the meetings Lecky attended dealt **with non-HSG business and non-HSG employees and for that reason** Lecky should not have remained punched in on HSG’s time clock. HSG determined, therefore, that **it** did not owe him for the time attending those meetings and did not pay him for attending. (Tr. Vol. 7 at 1294:11 – 1295:23, 1364:23 – 1365:4, 1368:2 – 1369:2, 1378:12 – 1379:1). Atkinson admitted he spoke directly with HSG District Manager Crane, who told him that HSG was not going to pay Lecky for the time attending meetings that did not involve HSG employees. (Tr. Vol. 3 at 545:1-10). Atkinson further admitted that the Center’s Administrator never responded to the issue on behalf of HSG. (Tr. Vol. 3 at 545:19-21). The ALJ’s findings that Respondents told HSG not to pay Lecky and that the Center’s Administrator co-determined the processing of this grievance are clearly wrong and directly contrary to the evidence.

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<sup>18</sup> Atkinson testified that he also discussed the issue with Owusu, who told him that “Chris in corporate” told him not to pay Lecky. (Tr. Vol. 3 at 540:1-8, 594:19-22). Although he first testified that Owusu said “Chris” was from HealthBridge, upon further questioning Atkinson admitted that he did not know if Owusu actually used the word “HealthBridge.” He only knew that Owusu said “Chris.” (Tr. Vol. 3 at 595:2-10). Atkinson further admitted that he never talked to “Chris” and did not know who “Chris” was (Tr. Vol. 3 at 589:2-6) and that all his information about “Chris” came from Owusu. (Tr. Vol. 3 at 589:7-9). Owusu testified credibly that he did not get any directive from anyone with the Center or HealthBridge not to pay Lecky, but that his instruction came from his boss, HSG District Manager Crane. As the ALJ acknowledged, the record reflects that there is a “Chris” - Chris Ricci – who is a corporate employee of HSG. (ALJD 15:17-20; see, e.g., Ex R24; Tr. Vol. 5 at 834:11-16).

Lecky also had a vacation issue while employed by HSG. He requested vacation at a particular time, but HSG refused his request and stated that he needed to request another time period. (Tr. Vol. 3 at 526:22 – 530:17). Lecky then asked the Center’s Administrator about the issue, and she responded there had been “a changeover” (Tr. Vol. 3 at 530:7-8), that she “didn’t [have] responsibility for it” (Tr. Vol. 3 at 527:4), and that he “must go back to [his] supervisor.” (Tr. Vol. 3 at 523:16-17). Clearly, Long Ridge did not co-determine Lecky’s grievances.

### **iii. Franz Petion’s grievance**

Franz Petion (“Petion”) worked in the housekeeping and laundry department at Westport. In January or February, 2009, he learned that Westport was going to cut back on hours in April. (Tr. Vol. 4 at 733:19 – 734:2, 734:23 – 735:3). At about that time, a shift in the dietary department with hours that Petion wanted was posted for bid. (Tr. Vol. 4 at 732:13-15). On February 12, 2009, prior to the effective date of the HSG contract and while still a Westport employee, Petion submitted a written request to Westport’s Kitchen Supervisor, Dale Simmons (“Simmons”), to transfer into dietary. (Ex. GC32; Tr. Vol. 4 at 732:21-25, 733:3-14, 734:7-9, 735:4-15, 737:14-19, 738:3-6, 745:6-10). Simmons did not award Petion the position. (Tr. Vol. 4 at 732:15, 738:13-17). Petion told the Westport Administrator that he had the seniority to get the position, but she told him someone else was getting it. (Tr. Vol. 4 at 738:19-21). On February 25, 2009, Petion filed a written grievance against Westport. (Ex. GC33(a); Tr. Vol. 4 at 738:22-25, 739:2-9, 742:16-21). Simmons denied the grievance at Step 1. (Tr. Vol. 4 at 743:20-24). Petion met with the Administrator at Step 2, but she also denied the grievance. (Tr. Vol. 4 at 742:1-3, 742:22 – 743:5). Petion admits that no one from HSG was in the Step 2 meeting. (Tr. Vol. 4 at 742:6-12). Thereafter, Ed Remillard, Regional Human Resources Manager for HealthBridge (“Remillard”), conducted a Step 3 meeting on April 21, 2009. (Tr. Vol. 4 at 747:18-23; Ex. GC34(c)). Remillard found that Petion did have the seniority and should have gotten the position. (Tr. Vol. 4 at 748:19 – 749:22; Ex. GC35). Petion left HSG and began working in the Westport dietary department in May 2009. (Tr. Vol. 4 at 750:7-9).

Petion continued working in housekeeping and laundry after submitting his February 12, 2009 bid and while his grievance was pending, becoming employed by HSG on February 15, 2009. (Tr. Vol. 4 at 729:16 – 730:4, 738:13-17, 742:2-5, 787:13-16; Ex. GC51(a)). Petion was grieving, however, a lost bid for a position **in dietary**, a department with which HSG had no involvement. Moreover, Petion's bid was submitted on February 12, 2009, while he **still was employed by Westport and before he became employed by HSG**. For these reasons, Westport was the entity that had to process this grievance. If it had not done so, it would have violated the CBA with the Union. The fact that Petion was employed by HSG at the time his grievance was granted is irrelevant. The result would have been the same if he had gone to work for another employer. It does not create a joint employer relationship between Westport and HSG, and there is no law to the contrary.

The record also contains no evidence to support the ALJ's finding that Westport counted Petion's seniority during his employment with HSG in awarding him the position in dietary. The evidence shows that the Union argued the position was given to a less senior employee who was employed on June 21, 2007; Petion had been "employed with Westport Health Care Center since June 23, 1998;" he "held the position of Dietary Aide during the period of June 1998 through 2004;" and he had "greater seniority within that classification." (Tr. Vol. 4 at 735:16 – 736:9, 748:19 – 749:22; Exs. GC34(c) and GC35). Westport agreed, finding Petion "possessed greater seniority and experience" than the employee who received the position. (Tr. Vol. 4 at 735:16 – 736:9, 748:19 – 749:22; Exs. GC34(c) and GC35). The Union did not mention Petion's seniority while at HSG in arguing the grievance and Westport did not make any mention of it when awarding him the position in dietary. Moreover, Petion's seniority at HSG would have been irrelevant because Petion was not employed by HSG at the time he applied for the dietary position and it was his seniority **at the time he applied** that was at issue. Not counting his employment with HSG, Petion had four years' seniority as a Dietary Aide over the

employee who initially received the position. The processing and resolution of Petion's grievance, therefore, has no bearing on the joint employer analysis.

#### **iv. Claudette Parks-Hill's grievance**

The ALJ also relied upon the grievance of Claudette Parks-Hill ("Parks-Hill"). Parks-Hill worked for Long Ridge as a housekeeping and laundry employee and as a per diem CNA. In February 2009, she became an HSG housekeeping and laundry employee, but she continued working as a CNA. (Tr. Vol. 3 578:15 – 580:14, 615:24 – 616:1, 618:18-21). In the Spring of 2009, HSG had a layoff and Parks-Hill lost all of her scheduled hours in housekeeping and laundry but remained as a per diem housekeeper. Her position with Long Ridge as a per diem CNA was not affected by HSG's actions, and she allegedly "bumped" into a part-time CNA position with set hours in the nursing department. (Tr. Vol. 3 at 546:13 – 548:12, 581:1-17, 583:14 – 584:20, 604:21-25, 620:11-22, 638:8-22).

In the Fall of 2009, Long Ridge had a layoff in the nursing department, and Parks-Hill asked to bump into a position with regular hours in the housekeeping and laundry department. (Tr. Vol. 3 at 548:13-25, 585:10 – 586:2). At that time, Parks-Hill was still working for HSG as a per diem employee in the housekeeping and laundry department. (Tr. Vol. 3 at 647: 20 – 648:4, 649:22 – 650:2). The Center's Administrator told Parks-Hill that she could not use her Center "seniority" to "bump" into a regular position at HSG, a different employer. (Tr. Vol. 3 at 549:1-4, 585:19-21). Atkinson admitted that he did not talk to HSG District Manager Crane about this issue because "Mike [Crane] has nothing to do with" the nursing department. (Tr. Vol. 3 at 606:20 – 607:1). Rather than establish a joint employer relationship between the Center and HSG, this situation demonstrates just the opposite and the ALJ's factual findings to the contrary are not supported by the record.

There is no evidence in the record to support the ALJ's finding that in the Spring of 2009, the Center permitted Parks-Hill to bump into a part-time nursing position with set hours on the basis of her seniority with HSG. **While Parks-Hill was employed with HSG, she**

**simultaneously held a per diem position as a CNA with Long Ridge.** While there was testimony that the Administrator at Long Ridge stated Parks-Hill could “bump” in the nursing department (Tr. Vol. 3 at 590:2-591:3, 609:15-610:12, 622:2-14, 640:9-14), there is no evidence in the record that the reason Long Ridge allowed Parks-Hill to “bump” was her seniority at HSG combined with her seniority at Long Ridge. Parks-Hill had continuous seniority in the nursing department, independent of her employment with HSG. Therefore, Parks-Hill’s “bumping” is not proof of co-determination of working conditions.<sup>19</sup>

***f. the employees’ perception***

In further support of his erroneous conclusion that a joint employer relationship existed between Respondents and HSG, the ALJ discussed the changes between Respondents’ employment of the housekeeping and laundry employees and HSG’s employment of those individuals during the subcontracting time period. The ALJ incorrectly concluded that those changes in the employment conditions of the employees “were minor and insubstantial.” (ALJD 57:3-6). The ALJ improperly relied upon the changes in employment from the employees’ perspective (see, e.g., ALJD 11:23-25, 56:6-8), rather than the actual changes in employment, in reaching this conclusion. Board precedent does not focus on the perception or perspective of employees in determining whether there were “continuing elements of supervision and control of ongoing aspects of employment.” *Summit Express, Inc.*, 350 NLRB at 617-18.

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<sup>19</sup> The ALJ also made much of the fact that an HSG employee handwrote Parks-Hill’s hours with HSG on a document she received in the Fall of 2009 when laid off as a CNA from Respondent Long Ridge while also working for HSG. (ALJD 13:36 – 14:10). However, even the ALJ posited the HSG employee only did so to assist Parks-Hill in filing for unemployment. (ALJD 14:5-6). The ALJ also suggested someone should have informed Parks-Hill she was not being laid off from HSG at that time. (ALJD 14:13-15). However, the documents Parks-Hill received clearly state Long Ridge was laying off nursing positions and that Parks-Hill was being laid off as a CNA from Long Ridge. Parks-Hill admitted nothing she received said she was being laid off by HSG, and HSG did not send her anything about being laid off at that time. Additionally, unemployment cleared up any confusion by telling Parks-Hill that she was not being laid off from HSG. Accordingly, there was nothing to justify Parks-Hill’s confusion about whether she was being laid off from HSG. (Exs. GC48(a) – “Status: CNA 8 hrs”, 48(b) – “Long Ridge of Stamford finds it necessary to lay off nursing positions. Unfortunately, your position is affected by this reduction in force.” and 48(c) – “Job Title: Nursing CNA”; Tr. Vol. 3 at 628:21-23, 632:14-16, 650:18-25, 651:24-25, 652:8 – 653:10, 653:15-22, 655:5, 655:13-23, 656:17 – 657:1). Moreover, Parks-Hill’s confusion or state of mind does not determine or create joint employment.

**g. duration of the subcontracts**

The ALJ also speculated that Respondents only intended for the subcontracts with HSG to be temporary. (ALJD 59). There is no evidence to support that speculation. Indeed, the evidence only supports the contrary conclusion – that the full service HSG contracts were not intended to be anything other than permanent arrangements. Whether an HSG or Center employee said that the department staff was going back to, or would be re-hired by, the Centers does not establish or evidence joint employment. At best, it indicates that someone thought there could be an issue with the contracts' status or that they might end, both of which would up being accurate because HSG terminated the contracts due to a money dispute. Furthermore, setting aside the many other erroneous findings of fact on which the ALJ based this conjecture, the more important point is that neither the duration nor the intended duration of the subcontracts is a factor in the analysis of determining whether Respondents and HSG shared or co-determined matters governing the essential terms and conditions of the housekeeping and laundry employees' employment during the subcontracts. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982).

Also, there is nothing in the record to support the ALJ's finding that Westport Administrator Coleman told Petion in April 2009 that his pay would be cut to \$12.80 per hour when he was awarded the position in dietary because Westport was contemplating hiring back the housekeeping and laundry employees and that is what their rate as new employees would have been. (ALJD 12:49-51, 59:8-18). Petion, nor any other witness, testified that Coleman gave him a reason for the rate. (Tr. Vol. 4 at 752:4).

Additionally, as argued above, the hearsay testimony of Simone and Lecky about conversations with HSG employees who allegedly made statements about employees going back to Respondents should not be credited because the HSG employees credibly denied making any such statements. Similarly, Clark's testimony that on May 13 or 14, the Thursday or Friday before the termination of the subcontract on May 17, 2010, Ricci told her about the

possibility of employees being transferred back to Westport, does not bind Westport or show any intent of Respondents that the subcontracts be only temporary. (ALJD 59:20-25; Tr. Vol. 5 at 837:14-839:5). Further, any alleged statements made by HSG employees that they thought the subcontracts were going to end do not demonstrate that Respondents had the same intent. That obviously was true because it was HSG, not Respondents who canceled the contracts. (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25).

***h. record evidence of the reason for the subcontracts' termination precluded an adverse inference***

Finally, the ALJ erred in drawing an adverse inference about the reason for the end of the subcontracts because Respondents did not offer proof on this issue. (ALJD 59:43 – 60:2). Union delegate Baldwin testified without contradiction that HSG Account Manager Glaser told her that HSG terminated the full-service contracts because Respondents owed it money. (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25). The ALJ's finding that Glaser denied giving this reason to Baldwin is not supported by the record. (ALJD 33:16-17, 49; Tr. Vol. 7 at 1180:22-25). Glaser only denied telling Baldwin that HSG "sold" the employees back to the Centers. (Tr. Vol. 7 at 1180:22-25). He did not deny stating that Respondents owed HSG money. No credibility determination is at issue. The ALJ simply got the facts wrong. Evidence of the reason was in the record. Therefore, it was unnecessary for Respondents to offer cumulative evidence, and the ALJ had no basis upon which to draw an adverse inference.

***i. Respondents did not have a past practice of transferring its subcontractors' employees back to the Centers with full benefits and seniority***

On the basis of a single event that occurred more than six years before the events at issue, the AGC argued that Respondents had a binding past practice of subcontracting employees and then re-hiring or taking them back with their full seniority and benefits intact. To establish such a past practice, facts showing that one or more of **Respondents** subcontracted

employees to a third party and then took those employees back with their seniority and benefits intact was required. There are no such facts in the present case.

Prior to 2003, Sunbridge operated nursing homes at the six facilities involved and the Union represented the employees at these facilities. In 2003, Haven Health purchased the facilities from Sunbridge and agreed to hire all Union represented employees at the facilities and recognize their seniority and current rates of pay. (Ex. GC72; Tr. Vol. 4 at 678:20-27). Thereafter, on or about August 2, 2003, Haven Health subcontracted the housekeeping and laundry functions at those facilities to Lighthouse Medical. From approximately August 2, 2003, to late November or early December, 2003, Lighthouse Medical employed the housekeeping and laundry employees at these facilities. (Ex. J2 ¶ 7(a)); Tr. Vol. 1 at 49:1-5, 50:23-51:4; Tr. Vol. 2 at 265:12-13, 266:1 – 267:19). It is undisputed that Lighthouse Medical was a subcontractor of Haven Health. (Tr. Vol. 1 at 49:4-5). Union delegate Fal testified that **Lighthouse had nothing to do with HealthBridge**. (Tr. Vol. 2 at 267:15-19). In December, 2003, HealthBridge assumed the CBAs between Haven Health and the Union for the facilities and hired all Union represented employees, including the Lighthouse Medical employees, as non-probationary employees with their original nursing home seniority, wages, and benefits intact. (Ex. J1 ¶ 14; Ex. J2 ¶¶ 7(a)-(b); Ex. GC71). Thus, Haven Health subcontracted employees to Lighthouse Medical, and then HealthBridge replaced Haven Health and hired both Haven Health's and Lighthouse Medical's employees. These facts, therefore, do not establish any type of past practice by the Centers or HealthBridge regarding **their** treatment of employees they previously subcontracted.

***5. The ALJ erred in finding that Respondents were not free to re-hire the housekeeping and laundry employees as new employees***

Because the ALJ erred in finding that the Centers were joint employers with HSG during the period of the subcontracts, he likewise erred in finding that they violated the Act by hiring the terminated HSG employees at new hire wages and benefits (ALJD 60:11-29), and without

notifying or bargaining with the Union (ALJD 60:34-38). As demonstrated above, Respondents were not joint employers and fully complied with the terms of the CBAs. Furthermore, they had no past practice of re-hiring employees they subcontracted with seniority and benefits intact.

**D. The ALJ's Alternative Finding that Respondents Violated Sections 8(a)(1) and 8(a)(5) Even Absent a Joint Employer Finding Is Erroneous**

The ALJ found that even absent joint employment, there existed “an obligation to bargain with the Union about the terms of their ‘re-employment’ with or ‘rehire’” because they were not new employees (ALJD 60:41-44) and that the employees’ situation was “more akin to a layoff.” (ALJD 60:47). These findings are wrong and as a matter of fact and law. No layoff occurred. It is undisputed that Westport contracted out the department, properly notified the Union of the subcontract, and that HSG complied with the CBAs subcontracting provision and retained all the department employees. Likewise, the ALJ's finding that the Union did not waive its rights to bargain about the terms and conditions of the employees whom the Centers hired after they were terminated by HSG is contrary to the evidence. (ALJD 60:48-52). The parties already bargained over the rights of newly hired employees who previously had been employed, such as the employees at issue. The CBAs contain wage rates and benefit provisions that apply to new hires; provisions the Union previously negotiated. (Article 9F. of Exs. GC3, GC4, and GC6). Specifically, Article 8, Probationary Employees, expressly provides, “All newly hired regular full-time Employees of the Center who are covered by this Agreement, **whether or not previously employed by the Center** . . . shall be deemed probationary Employees . . .” (Article 8A. of Exs. GC3, GC4, and GC6) (emphasis added). The CBAs, however, do not require the Centers to return former employees terminated by a contractor with their wages and seniority intact. Indeed, such a requirement conflicts with express provisions of the CBAs.

Accordingly, the ALJ erred in relying upon *Provena St. Joseph*, 350 NLRB 808, 815 (2007). In *Provena St. Joseph*, the employer unilaterally implemented an incentive policy. The Board found there was “no express provision in the contract regarding incentive pay” and there

was “no evidence that incentive pay was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the issue.” *Id.* The Board found that “[i]n the absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining, the Respondent was not authorized to act unilaterally on this undisputedly mandatory subject of bargaining.” *Id.* Here, the CBAs contained bargained for provisions regarding 1.) subcontracting, and 2.) wages and benefits of new hires previously employed. Accordingly, there is no reason to address the issue of waiver.

**E. The ALJ Erred in Finding Respondent Westport Violated the Act When it Did Not Hire Myrna Harrison and Newton Daye in 2010**

Westport employed Harrison and Daye. Westport terminated their employment on February 15, 2009, along with all the employees in its housekeeping and laundry department, when it entered into the full-service contract with HSG. (See, e.g., GC26 – letter from Westport stating “Myrna Harrison ... was terminated on 2/15/2009”). HSG then hired Harrison and Daye. (Ex. GC26; Tr. Vol. 1 at 185:19-24, 207:11-18, 208:21-23). In May 2010, HSG terminated the full-service contract and terminated all its employees assigned to Westport, including Harrison and Daye. The ALJ found that Westport violated the Act by not hiring or re-hiring Harrison and Daye after HSG terminated them because Westport was a joint employer with HSG and therefore either had an obligation to retain them employ them or it violated the contractual just cause provision in refusing to rehire them. (ALJD 61:5-24). However, as shown above, Westport was not a joint employer with HSG and had no obligation to re-hire Harrison or Daye or offer them employment after they were terminated by HSG.

**F. The ALJ Erred in Finding a Violation of the Act with Respect to the February/March 2010 Layoff at Long Ridge**

The ALJ erroneously found that Long Ridge violated the Act by instituting a layoff in February/March 2010 without the 45-day notice required by the CBA. (ALJD 61:28-38). In February 2010, Long Ridge management met with Clark and asked if the Union would waive the 45-day notice provision for layoffs. The Union declined, but within a few days, the Center began

to reduce hours and implement a layoff, primarily of CNA's. (Tr. Vol. 5 at 813:10 – 814:25, 815:24 – 816:1, 816:25 – 819:7). The Union filed a grievance and it is undisputed that Long Ridge rescinded the layoff. As the result of a Step 3 grievance meeting, Regional Human Resources Manager Remillard committed to making all affected employees whole for lost hours and accrued leave used to replace the lost hours. (Ex GC60(e); Tr. Vol. 5 at 823:4-7; Tr. Vol. 8 at 1456:25 – 1457:14). Following the resolution, Administrator Vincent Klimas ("Klimas") and Clark met several times and exchanged spreadsheets reflecting each party's position on amounts owed to each affected employee and other related information. Long Ridge then paid the employees what it thought it owed to make them whole. The Union still contends, however, that Long Ridge's calculations are incorrect and that more money is owed. (Tr. Vol. 5 at 823:18 – 831:17; Tr. Vol. 8 at 1430:13 – 1431:2, 1435:18 – 1454:25, 1467:16 – 1470:14, 1471:13 – 1477:15; Ex. GC60; Exs. R23, R27-31). Whether any additional amounts are owed is the only matter remaining in dispute regarding this issue. (Tr. Vol. 8 at 1471:13 – 1477:15).

Klimas made good faith efforts to supply Clark with the information the Union requested regarding employees affected by the layoff. (Exs. GC60(a), (c), (d), (f) and (g), (h), R27, R28, R30, R31 at 1-15, 24-26; Tr. Vol. 5 at 823:18 – 831:17; Tr. Vol. 8 at 1435:18 – 1437:7, 1445:11 – 1446:1, 1448:22 – 1451:13, 1452:21 – 1453:20, 1467:16 – 1470:14, 1471:13 – 1477:15). Klimas is no longer employed by Long Ridge, and Clark admitted that she never brought the alleged pay disparities or the need for further documentation to Remillard's attention, even though he handled the resolution of the grievance at Step 3. (Tr. Vol. 3 at 536:16-20; Tr. Vol. 8 at 1457:24 – 1460:5). The Union admittedly never made the person who committed to make the employees whole, and could remedy any outstanding pay issues, aware of those issues. Any alleged delay in providing the information requested by the Union was justified by Klimas' continuing good faith efforts to provide the requested information, Long Ridge's payroll person going on vacation, and Clark's failure to bring the remaining issues about the information requests to Remillard's attention after Klimas left Long Ridge. (Exs. GC60(e); Tr. Vol. 5 at

823:18 – 831:17 – Klimas provided information, Clark asked for additional information, Klimas told her the payroll person was on vacation, Klimas continued to provide information, Clark still believed she did not have everything requested; Tr. Vol. 3 at 536:16-20, Tr. Vol. 8 at 1457:2-14, 1457:24 – 1458:18, 1459:22 – 1460:5 – Clark never brought the alleged pay disparities or the need for further documentation to Remillard’s attention after Klimas was gone). For the forgoing reasons, the ALJ erred in finding that Long Ridge violated the Act regarding the alleged layoff and in responding to the Union’s information request.

**G. The ALJ Erred in Finding Respondents’ Discontinuance of Time and a Half for Overtime for Part-Time and Per Diem Employees Violated the Act**

The ALJ erred in finding Respondents’ ceasing payment of holiday pay to some part-time and per diem employees in late 2009 violated the Act. (ALJD 63:36-39). Respondents’ actions were authorized by the CBAs. Under Article 14, only part-time employees who work an average of at least 20 hours per week are entitled to holiday pay. (Article 14I. of Exs. GC3 – 8; Ex. GC55(a), 56(a) and 58). Article 15, Holiday Provisions, provides only non-probationary full-time or part-time employees who work 20 or more hours a week are “entitled to holiday pay at their regular straight time hourly rate (prorated for eligible part-time Employees).” (Article 15A. of Exs. GC3 – 8; Ex. GC55(a), 56(a) and 58). Additionally, “[i]n the event an Employee is required to work on any of the holidays . . . she/he shall be paid at the rate of one and one-half times his/her regular rate of pay for all hours worked on such holiday, and shall in addition receive an extra day’s pay at her/his regular rate . . .” (Article 15B. of Exs. GC3 – 8; Ex. GC55(a), 56(a) and 58). Under the clear and unambiguous language of the CBAs, therefore, part-time employees working less than 20 hours per week and per diem employees are not eligible for holiday pay of any kind. Also, pursuant to the CBAs, management has the right to “determine and modify the operational measures and means; and to carry out the normal functions of management.” (Article 5 of Exs. GC3 – 8; Ex. GC55(a), 56(a) and 58).

Established “Board precedent prohibits the use of parol [or extrinsic] evidence to vary the unambiguous terms of a collective bargaining agreement ... [and it is] not only unnecessary but irrelevant.” *Quality Building Contractors, Inc.*, 342 NLRB 429, 430 (2004). Moreover, the Board has ruled that an employer “could lawfully have unilaterally and without notice taken [action] on the ground that the prior practice of 24 years ... was inconsistent with the ... contract admittedly in effect during the period when this practice was followed.” *Newspaper Printing Company*, 221 NLRB 811, 822 (1975).<sup>20</sup> Accordingly, to the extent Respondents previously did not follow the clear language of the CBAs, they were entitled under Board law to change their practice to conform with that language.

**H. The ALJ Erred in Finding Respondents Violated the Act When They Stopped Including Employees’ Meal Periods as Hours Worked for Purposes of Determining Overtime Eligibility**

The ALJ erred in finding Respondents violated the Act by adhering to the CBAs’ language regarding the calculation of overtime. Article 14A. grants unit employees “a paid lunch period of one-half (1/2) hour.” (See, e.g., Ex, GC3 – Art. 14). Article 14E. states specifically: “Employees who at management’s request, work in excess of eight (8) hours per day shall receive one and one-half (1½) times their regular straight time hourly rate for hours actually worked in excess of eight (8) hours per day or forty hours per week in any one work week.” (See, e.g., Ex, GC3 – Art. 14). Webster’s Dictionary defines “work” as “exertion or effort directed to accomplish something; labor; toil; something on which exertion or labor is expended; a task or undertaking; a productive or operative activity.” Likewise, Black’s Law Dictionary (5<sup>th</sup> Edition) defines “work” as: “To exert oneself for a purpose; to put forth effort for the attainment of an object; to be engaged in the performance of a task, duty, or the like. The term covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement.”

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<sup>20</sup> In *Newspaper Printing Company*, the Board adopted the ALJ’s decision and recommended order.

In the instant case, employees on their lunch break, although paid, are by definition on “break.” They are not exerting, laboring, toiling, or putting forth effort for the attainment of those objects for which they are employed. Union delegate Fal admitted that during a normal eight (8) hour shift, during which she takes a meal period and all her breaks, she “actually worked” only seven (7) hours. (Tr. Vol. 2 at 273:1-18). Therefore, the employees’ one-half hour lunch period properly is excluded from “hours actually worked” for purposes of determining if, or how much, overtime compensation is owed pursuant to the express language of Article 14E.<sup>21</sup>

As set forth above, an employer may unilaterally take action to bring its practices in line with the unambiguous terms of a collective bargaining agreement and extrinsic evidence cannot be used to vary those terms. *Quality Building Contractors, Inc.*, 342 NLRB at 430; *Newspaper Printing Company*, 221 NLRB at 822. Accordingly, to the extent Respondents previously included paid lunch periods in determining whether overtime was owed, which was contrary to the plain and unambiguous language of the CBAs, they were entitled under Board law to unilaterally and without notice stop that inclusion in 2010 to conform with the express language of Article 14E. The ALJ’s finding with regard to the Union’s lack of a waiver is irrelevant in light of the express contractual provisions regarding overtime. *Cf. Provena St. Joseph, supra*. Finally, the ALJ’s position that the language is ambiguous **because** Respondents applied it differently in the past is specious, circular, unsupported by Board law, and impermissibly based on evidence other than the plain language of the contract. (ALJD 64:9-12).

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<sup>21</sup> Connecticut Gen. Stat. § 31-51ii(a) requires employers to permit employees working seven and one-half (7½) or more consecutive hours to have a thirty (30) consecutive minute meal period. The statute does not require meal periods to be paid. For purposes of computing overtime under state law, Connecticut Gen. Stat. § 31-76b(2)(A) provides that “time allowed for meals shall be excluded” from the definition of “hours worked.” Likewise, under the federal Fair Labor Standards Act, “[b]ona fide meal periods are not worktime.” 29 CFR § 785.19(a).

**I. The ALJ Erred in Finding Changes in Benefits Eligibility at Respondents Wethersfield and Danbury Violated the Act**

Respondents Wethersfield and Danbury were within their rights as set forth in the management rights section of the CBAs to the extent they changed any eligibility requirements for benefits at those Centers. (Art. 5 of Exs. GC5 and 7). Moreover, Remillard did not refuse to meet on grievances about these issues but informed the Union he would not meet until it properly filed the grievances. (ALJD 52:25-26; Exs. 68(A) and GC69(A)).

**J. The ALJ Erred in Finding that Comments of the Westport Administrator about Calling the Police Violated the Act**

The ALJ erred in finding that the Administrator of Westport threatened to call the police “in response to employees’ protected conduct of discussion [sic] how to react to Respondents’ requirement . . . to file new job applications for hire as new employees [including that they should consult with the Union before deciding whether to comply]” in violation of the Act. (ALJD 65:36-39). This finding is illogical based on the ALJ’s own findings that the “threat” was made prior to the employees engaging in any protected conduct. The ALJ found that Coleman, Westport’s Administrator, told employees just terminated by HSG that they needed to complete new applications for employment with the Center; that they would have to leave the building if they did not fill out applications; and that if they were not filling out applications, but remained on the property, they were trespassing, and she would call the police. (ALJD 24:30-35). The ALJ further found that the employees then left the building and began discussing what to do and attempted to call the Union. (ALJD 24:35-36). *See also* Tr. Vol. 1 at 195:1-7, 197:1-5, 200:15 – 201:21, 205:13-20, 213:18-25, 214:12 – 216:2, 216:7 – 217:1. Subsequently, Coleman simply “repeated her previous comment to Harrison,” but not in response to Harrison saying anything about the Union. (ALJD 24:33-42). Coleman did not repeat the threat after Harrison found out the Union had been contacted and Harrison returned to the building to fill out a job application. (ALJD 24:44-46). Accordingly, Coleman’s statement made **before** any protected activity

occurred could not have been made **in response to** that subsequent activity and could not have violated the Act.

**K. The Weight of the Evidence Does Not Support the ALJ's Credibility Determinations**

The ALJ made numerous credibility determinations that are not supported by, and in some cases are in direct conflict with, the weight of evidence, particularly testimony given by HSG employees. HSG employees Crane, Glaser, Owusu, and Parkmond all testified clearly and credibly. They are independent, disinterested, third-party witnesses. Their employer, HSG, is not a party to this proceeding. There is no evidence of any motive that these witnesses had to lie. Indeed, the record shows that **HSG** terminated the contracts because the Centers and HealthBridge owed it money.<sup>22</sup> Accordingly, any motive these witnesses might have to be less than truthful would tend to be against the Centers and HealthBridge.

The ALJ erred in crediting Clark's hearsay testimony that Crane, HSG's District Manager for Long Ridge, and Owusu, HSG's Account Manager at Long Ridge, stated HealthBridge had control over whether HSG hired more employees. (ALJD 19:38-20:14). Crane clearly and credibly denied ever making a statement to that effect. (Tr. Vol. 7 at 1377:1-5). Additionally, Crane testified about the staffing process with HSG, which did not involve HealthBridge. (Tr. Vol. 7 at 1377:6-21). Glaser, HSG's Account Manager at Westport, also testified about the staffing process at Westport, in which HealthBridge did not play a part. (Tr. Vol. 7 at 1225:14 – 1227:18). Therefore, the ALJ should not have credited Clark's hearsay testimony over the direct testimony of these disinterested witnesses.

Further, despite the fact that Parkmond, HSG's Account Manager at Newington, and Crane clearly and credibly denied making statements about HSG employees "going back" to the employment of Respondents, the ALJ erroneously credited the testimony of Simone, that

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<sup>22</sup> There is no evidence to support the ALJ's finding that Respondents terminated the full-service contracts with HSG. (ALJD 59:43-45). Indeed, the only evidence in the record is to the contrary – HSG terminated the contracts. (Tr. Vol. 1 at 221:25 – 222:12, 228:10 – 229:3; Tr. Vol. 3 at 382:2-25).

Parkmond made such statements beginning sometime after March 2009, and the testimony of Lecky, that Crane made a similar statement in early 2010. (ALJD 20:30-51; Tr. Vol. 6 at 963:22-25, 964:7-12; Tr. Vol. 7 at 1369:17-19). The ALJ should not have considered Simone's or Lecky's testimony because their testimony was inadmissible hearsay. Simone's testimony about what Parkmond, an HSG employee, allegedly told her is hearsay pursuant to Rule 801 of the Federal Rules of Evidence, not subject to an exception under Rule 803, and Respondents objected to the testimony on that basis at the trial. (ALJD 20:30-39, 48-51; Tr. Vol. 1 at 152:8-154:1). Lecky's testimony is also hearsay not subject to an exception under Rule 803.

Additionally, the ALJ erred in finding that the testimony of Simone and Lecky corroborated the testimony of Clark about Ricci's, HSG's District Manager for Westport, comments to her. (ALJD 20:49-51). Clark testified that on May 13 or 14, the Thursday or Friday before the termination of the subcontract on May 17, 2010, Ricci told her about the possibility of employees being transferred back to Westport. (Tr. Vol. 5 at 837:14-839:5).<sup>23</sup> Clark's testimony is both inadmissible hearsay and not corroborative of Simone's or Lecky's testimony based on the timing of Clark's alleged conversation with Ricci. Ricci's alleged statement about an event which was scheduled to take place on the following Monday in May 2010 is completely differently from the alleged speculation of Parkmond in 2009 or of Crane in early 2010 that at some point in time the subcontracts might end. Accordingly, the testimony of Parkmond and Crane should be credited over the hearsay testimony of Simone and Lecky.

Further, the ALJ should not have credited Lecky's hearsay testimony that Crane allegedly stated "that it was Long Ridge's decision and that HSG didn't fire the employees and [that] Long Ridge decided to 'take it over,' the same way that HSG 'took it over' from them." (ALJD 33:4-10). Crane clearly and credibly denied telling any employee that it was the Center

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<sup>23</sup> The ALJ also erred in finding that this conversation took place in April 2010, which is contrary to Clark's testimony that it occurred in May. (ALJD 20:19-28, 59:21-25).

and not HSG that terminated them in May 2010, or that the May 2010 termination letter really came from the Center and not HSG. (Tr. Vol. 7 at 1369:20 – 1370:1).

Finally, the ALJ erred in crediting Baldwin’s hearsay testimony that Ricci and Glaser stated “we sold you all back over to them.” (ALJD 33:17-18, 49). Glaser clearly and credibly denied telling anyone that HSG “sold back” the employees to HealthBridge or any words to that effect. (Tr. Vol. 7 at 1180:22-25).

In light of the foregoing, the ALJ’s credibility determinations should not be “rubber stamped,” and should instead be dismissed, as these findings are not supported by the weight of the evidence. Instead, the testimony of Crane, Glaser and Parkmond should be credited.

**VII. CONCLUSION**

Based on the foregoing, the ALJ’s findings of fact and conclusions of law are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to established Board law or policy. Accordingly, the ALJ’s Decision and Order should be reversed; Judgment should be entered in favor of Respondents on all counts; and the Complaint should be dismissed in its entirety.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that copies of the foregoing pleading were served on

September 26, 2012, in the manner set forth below:

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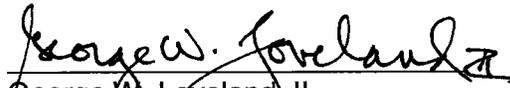
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