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11 UNITED STATES OF AMERICA
12 NATIONAL LABOR RELATIONS BOARD
13 REGION 20

14 SEIU, UNITED HEALTHCARE WORKERS –
15 WEST,

16 Charging Party/Union,

17 and

18 WINDSOR REDDING CARE CENTER,

19 Respondent/Employer.

Cases 20-CA-070465
20-CA-070964
20-CA-075426
20-CA-082287

**EXCEPTIONS AND BRIEF IN
SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

20 Charging Party hereby takes the following Exceptions to the Decision of the
21 Administrative Law Judge (ALJ):

22 Exception 1	23 Pg. 24 4:43-46	25 To the failure of the ALJ to recognize that the negotiations between 26 the Union and Employer were indeed difficult and time consuming as 27 a result of the Employer’s conduct during negotiations, which was driven by animus because of the fact that Windsor Redding is the only Windsor Health Care facility that was organized by the Union after it was acquired by Windsor. The record establishes that Respondent’s bargaining with the Union was difficult and time consuming. The ALJ’s statement that “there has been no charge filed with the Agency alleging surface bargaining on the part of the Respondent” is not relevant and does not disprove the contentious nature of the negotiations. The record establishes that after 18 months and approximately 20 bargaining sessions, two pickets, and employees placing signs on their cars, the parties agreed only to a 1-year contract for this facility in Redding, California. The record also establishes that the tentative agreement did not include resolution of the outstanding unfair labor practice charges that are at issue here.
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13</p> <p>Exception 2</p>	<p>4:6-16; 4:47-49</p>	<p>To the failure of the ALJ to address in detail the federal laws and state laws that Respondent relied upon to terminate the workers, and the ALJ’s failure to recognize that the purpose of those federal and state laws is to protect nursing home residents from <i>known or reasonably suspected</i> abuse, as opposed to be used by an employer for the purpose of terminating employees who did not engage in or did not reasonably suspect abuse.</p> <p>The record establishes that California Welfare and Institutions Code § 15630(b)(1) requires nursing home staff to report abuse or neglect that is actually “observed” (i.e., known abuse) or when the individual has “knowledge of an incident that reasonably appears to be physical abuse” or when the individual “reasonably suspects” abuse (i.e., reasonably suspected abuse). A failure to report known or reasonably suspected abuse is a crime pursuant to California Welfare and Institutions Code § 15610.30(g). The ALJ failed to recognize that the two alleged discriminatees have not been found guilty of any crime and that no agency of the State of California has found them guilty of any wrongdoing.</p> <p>The record also establishes that federal law requires nursing home staff to report any “reasonable suspicion” of crimes. 42 U.S.C. § 1320b-25(b)(1). The ALJ failed to recognize that the two alleged discriminatees have not been found guilty of any wrongdoing by any agency of the Federal government.</p>
<p>14 15 16 17 18 19 20</p> <p>Exception 3</p>	<p>4:32 – 5:13</p>	<p>To the failure of the ALJ to recognize that the Respondent’s own policies provide that it can terminate employees only for “willful abuse” of a resident, not for failure to suspect and/or report suspected abuse.</p> <p>The record establishes that the Respondent’s Abuse Prevention Manual provides that termination is the level of discipline only when the Respondent confirms after an investigation that the employee engaged in “willful abuse.” The record also establishes that the Respondent trains its employees on their obligation to prevent and report known <i>or</i> suspected abuse, but not that termination would be the level of discipline for failing to suspect and then failing to report unsuspected abuse.</p>
<p>21 22 23 24 25 26 27</p> <p>Exception 4</p>	<p>5:25-38; 16-6-16</p>	<p>To the failure of the ALJ to recognize that alleged discriminatee Denise Whitmire was terminated because of her Union activities.</p> <p>The record establishes that the Respondent’s managers and administrators were well aware of Whitmire’s Union activities, which included being a Union bargaining team member opposite to management during 18 months of difficult contract negotiations and participation in pickets.</p> <p>The record also establishes that Administrator Anne Guilles explicitly despised Whitmire because of her Union activities, as evidenced by Guilles’s instruction to a payroll clerk not to take smoking breaks with Whitmire because she “was part of the Union” and Guilles’s interference with Whitmire’s efforts to obtain a promotion to a supervisor position.</p> <p>Nonetheless, the ALJ inexplicably brushed these significant facts aside because, as stated below, the ALJ inappropriately substituted</p>

		<p>his own judgment to conclude that Whitmire should have “reasonably suspected” abuse after seeing and discussing with her co-workers a Kleenex that she found on a table in a public lobby with various things scribbled on it.</p>
<p>Exception 5</p>	<p>5:44 – 6:5; 6:41 – 7:3; 17:17-19</p>	<p>To the failure of the ALJ to recognize that it was reasonable for Whitmire to refer to the scribble on the Kleenex as “chicken scratch” that was impossible for her to understand on her own.</p> <p>The record establishes that the Kleenex was crumbled up and had scribbling going in multiple directions, and Whitmire, a housekeeper, did not recognize the scribbling to be by or about any particular resident.</p> <p>The record also establishes that it was Certified Nursing Assistant Ron Rich who could make out “some” of the scribbling on the Kleenex, namely that it said “They put me here to take my house,” and he recognized the name on the Kleenex because it was written by one of the residents that he cared for, Resident A.</p> <p>The ALJ’s conclusion that Whitmire “was able to read [the Kleenex’s] contents, despite her initial testimony to the contrary,” is not supported by any facts in the record and is based on an incorrect inference that the ALJ apparently made from testimony by CNA Frances Marley. CNA Marley testified that Whitmire was able to read the Kleenex. Contrary to the ALJ’s understanding, CNA Marley’s testimony is in no way inconsistent with Whitmire’s testimony, because as the record establishes, Whitmire saw Marley <i>after</i> she had learned from CNA Ron Rich what “some” of the scribbling on the Kleenex said and that Resident A wrote it.</p>
<p>Exception 6</p>	<p>6:6 – 6:21</p>	<p>To the failure of the ALJ to recognize that a CNA told Whitmire that the Kleenex could be thrown away.</p> <p>Whitmire’s testimony in the record establishes, without rebuttal, that she showed the Kleenex to at least three CNAs in the lobby and was told by CNA Ron Rich, who has been a CNA for 44 years, that the Kleenex could be thrown in the trash. Rich himself testified, without rebuttal, that the Kleenex appeared to be nothing more than “child-like scribbling” and did not give rise to any suspicion of abuse.</p> <p>The ALJ’s rejection of Whitmire’s testimony about what CNA Ron Rich said to her is not supported by any evidence in the record and is based on an incorrect inference, specifically, the ALJ inferred incorrectly that Whitmire’s testimony was not true because CNA Ron Rich “did not testify that he described the Kleenex to Whitmire as trash, nor did he suggest that she throw it away.” The ALJ’s inference from what Ron Rich “did not testify” about is contrary to CNA Ron Rich’s actual testimony that Whitmire showed him the Kleenex in the lobby and that he recognized the scribble to be from Resident A who did so regularly, but he simply could not remember at the time of the hearing whether he gave any indication to Whitmire about what to do with the Kleenex.</p>
<p>Exception 7</p>	<p>6:23-30; 17:21-27</p>	<p>To the failure of the ALJ to recognize that the CNAs told Whitmire that Resident A had a condition of regularly scribbling things everywhere, including her bed sheets, and that her conduct had</p>

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		<p>been documented in her care plan, which led to Whitmire’s reasonable belief that the Kleenex could be thrown out.</p> <p>The ALJ failed to adequately address this un rebutted testimony in the record, discarding it simply on the basis that “the CNAs do not supervise the housekeepers.”</p> <p>The ALJ missed the point that Whitmire’s conversations with the CNAs about the Kleenex and Resident A informed her in order to make the decision, as a mandatory reporter, whether reasonably suspected abuse needed to be reported. It is clear from the record that based on the information she obtained from the CNAs who cared for Resident A, Whitmire had no “reasonable suspicion” of abuse and that is why she had nothing to report.</p>
Exception 8	6:23-35	<p>To the ALJ’s failure to order the Respondent to produce the care plan in response to the General Counsel’s subpoena, as the care plan was relevant to the question of whether Residents A’s scribbling on things was a documented condition, which would have made the Kleenex less likely to raise a “reasonable suspicion” of abuse.</p>
Exception 9	7:7-8; 17:4-10	<p>The ALJ’s failure to recognize that it was reasonable for Whitmire to conclude that she could throw away the Kleenex because she did not <i>reasonably suspect</i> abuse after speaking to her co-workers, including three CNAs who cared for the resident and also did not suspect abuse.</p> <p>The record establishes that Whitmire brought the Kleenex to the attention of three CNAs and another housekeeper and threw it out after talking and learning more about it from the CNAs, namely that it could be thrown away because Resident A’s condition of regularly scribbling such things had been documented in the resident’s care plan.</p> <p>Thus, it was error for the ALJ to conclude, without any support in the record, that “her decision to discard the note was simply based on Whitmire’s conclusion that it was trash, not worth saving or bringing to the attention of management.” It is clear that the ALJ improperly substituted his own judgment about what Whitmire, who is the mandated reporter, should have “reasonably suspected” about the scribble on the Kleenex. Although the Kleenex was not introduced into the record and was actually seen only by Whitmire and her four-co-workers, none who suspected abuse, the ALJ inexplicably concluded that Whitmire should have concluded that the Kleenex was a “cry for help.”</p>
Exception 10	7:10-19	<p>To the ALJ’s failure to recognize that the state and federal regulations, as well as the Respondent’s own policies, require an employee to report only abuse that is <i>known</i> or <i>reasonably suspected</i> by the employee, rather than the abuse that management, or the ALJ, suspected after the fact and without looking at the Kleenex.</p> <p>The record establishes that it is the “mandated reporter” who has an obligation to report abuse that either: (1) is actually “observed,” (2) of which she has “knowledge,” or (3) which she reasonably suspects” (i.e., known or reasonably suspected abuse). There is</p>

		nothing in the record to support the ALJ's apparent conclusion that based on the Kleenex and her conversation with the three CNAs, Whitmire knew or reasonably suspected that Resident A was being or could be abused.
Exception 11	7:21-28	<p>To the ALJ's failure to recognize that Whitmire told Housekeeping/Maintenance Supervisor Clayton Campbell about the contents of the Kleenex and that she had thrown it out immediately upon his questioning of her.</p> <p>The record establishes that Whitmire was forthcoming about the Kleenex the same day, which is consistent with the fact that Whitmire reasonably believed that the Kleenex was not something that she was required to report.</p>
Exception 12	9:41 - 10:5; 13:8-46; 18:23-50	<p>To the failure of the ALJ to recognize that alleged discriminatee Angelia Rowland was terminated because of her Union activities.</p> <p>The record establishes that the Respondent's managers and administrators were well aware of Rowland's Union activities, which included being one of only two Shop Stewards in the facility, being a Union bargaining team member opposite to management during 18 months of difficult contract negotiations, participation in two pickets, and maintaining pro-Union signs in her car.</p> <p>The record also establishes that Administrator Anne Guilles not only had animus toward the Union members in general, but she explicitly despised Rowland because of her Union activities, especially the pro-Union signs in Rowland's car, and as evidenced by Guilles own admission to Rowland that "This is all about the Union."</p> <p>Nonetheless, the ALJ inexplicably brushed these significant facts aside because, as stated below, the ALJ rejected exculpatory evidence because of his personal dislike of a witness.</p>
Exception 13	10:7-43; 19:25-39	<p>To the ALJ's failure to accept the testimony of long-term employee Angelia Rowland that Resident B was, as usual, combative and screamed obscenities when they arrived at the doctor's office.</p> <p>The record establishes that Resident B regularly had outbursts of swearing and making threats, that Rowland regularly cared for resident B, that the bus driver did not hear or see Rowland swear at Resident B, that Resident B's daughter arrived at the doctor's appointment and no one raised any claims that Rowland swore at Resident B, and that Rowland was well-liked and supported by Resident B's family.</p> <p>Thus, the weight of the evidences strongly militates against the failure to accept Rowland's testimony, especially when the ALJ acknowledged, like anyone who would meet Rowland, that he "would not suspect her of losing her temper and of screaming a harsh threat against a patient under her care."</p>
Exception 14	12:4-15; 19:41 – 20:9; 20:31-47	To the ALJ's failure to recognize the testimony of Rowland and others who regularly cared for Resident B over the testimony of the staff from the doctor's office who are not familiar with Resident B's outbursts.

		<p>The record establishes that the staff from the doctor’s office, as the ALJ put it, “genuinely believed that they heard Rowland scream at Resident B,” but the record also establishes, without rebuttal, that Resident B regularly screamed obscenities and threats. The record also establishes that none of the staff from the doctor’s office saw Rowland speak the alleged harsh words.</p> <p>Thus, the “genuine belief” of the doctor’s office staff should have been at least doubtful to any objective investigator, especially Respondent’s managers who were familiar with Resident B’s outbursts of statements just like the one Rowland is accused of saying in the doctor’s office. Based on the record, it is more likely than not that the office staff was simply mistaken in their genuine belief that it was Rowland who screamed. There is not substantial evidence in the record for the ALJ’s finding that Respondent met its burden that Rowland verbally abused Resident B.</p>
Exception 15	12:17-30; 14:28-40; 20:11-29	<p>To the failure of the ALJ to accept van driver Lewis Johnson’s un rebutted testimony at the hearing simply because the ALJ did not like that Johnson was “curt” and “disinterested” when Respondent’s manager tried to interview him about Resident B’s outburst in the doctor’s office.</p> <p>The record establishes that when first contacted by Gilles in person about the incident the van driver said clearly that “he did not see anything and that nothing happened.” The record also establishes that Gilles contacted Johnson a second time by phone and he sent her a message back saying that “Resident B screamed the entire time he was with her.”</p> <p>It is reversible error for the ALJ to ignore Johnson’s un rebutted testimony, which was also corroborated by Respondent’s own witness Gilles, simply because the ALJ did not personally like that Johnson was “curt” to Gilles.</p>
Exception 16	22:34-38; 23:3-10	<p>To the failure of the ALJ to take the time to review and fully comprehend exhibits in the record, including but not limited to, Respondent Exh. No. 35 and G.C. Exh.. 6, which show that prior to the worker’s decision to vote for Union representation Respondent had a policy of granting merit wage increases of usually 3% to a majority of employees on anniversary dates.</p> <p>The testimony of Jim Philliou in the record regarding G.C. Exh. 6 makes it very clear that in 2011 the majority of employees received a 3% wage increase, no one received less than a 2% wage increase, and some received more than 3%.</p>
Exception 17	23:23-38	<p>To the failure of the ALJ to recognize that Respondent gave shifting reasons for its failure to grant the annual merit increase to bargaining unit members on their anniversary dates.</p> <p>The record establishes that on the one hand Respondent claimed that there was no “past practice of granting three percent merit increases” but on the other hand claimed at the same time that it did not have to bargain with the Union because it “was not deviating from its past practice” of granting increases that “were in part dependent upon Medi-Cal and Medicare funds being received.”</p>

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1		There is substantial documentary evidence in the record that a majority of employees were granted merit increases on their anniversaries for many years, including in 2009, and no evidence that Medi-Cal and Medicare reimbursement affected the increases. It is noted that it is public knowledge that during the 2009 cash crisis the State of California issued IOUs to facilities that receive funds from the Medi-Cal program in order to head off a budget short fall that was far worse than the 2011 budget crisis.	
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6	Exception 18	22:40-51	To the failure of the ALJ to recognize that the vague reference in Respondent's Employee Handbook that wage increases depend on "many factors" did not provide any support for Respondent's claim that the past practice was to tie wage increases in part to receipt of "Medi-Cal and Medicare" funds. There is no documentary evidence in the record to support any claim that the wage increases of about 3% that were granted to a majority of employees prior to the certification of the Union, including in 2009, were frozen or suspended because of Medi-Cal and Medicare funds not being received by Respondent, despite the public knowledge that Medi-Cal funds were delayed in 2009 when the State of California issued IOUs.
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12	Exception 19	25:6-12	To the failure of the ALJ to recognize that the parties agreed at the bargaining table that the retroactive wage increases to January 1, 2012 provided for under the parties' first collective bargaining agreement did not settle the portion of the Union's pending unfair labor practice charge seeking the increases for the period of June 2011 through December 31, 2011. The record establishes that the CBA remedied the wage increase violation only retroactive to January 1, 2012, but there was no agreement by the parties to settle the portion of the ULP covering the wage increases that should have been granted from June 2011 through December 31, 2011. The record contains testimony from Jim Philliou, the Union's lead negotiator, without rebuttal, that at the bargaining table the parties explicitly agreed to a increase of 1% to 3% retroactive only to January 2012 but that the Union would not withdraw the unfair labor practice charge covering the larger period. Philliou testified that in contrast the parties agreed as part of the new contract that the Union would withdraw the Union's unfair labor practice over the unilateral implementation of an employee handbook.
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23	Exception 20	26:1 – 28:49	To the failure of the ALJ to recognize that Respondent unlawfully failed and refused to engage in pre-disciplinary bargaining with the Union with regard to the terminations of Whitmire and Rowland. The record establishes that at a bargaining session in April 2011 the Union's lead negotiator Philliou made a clear blanket demand for pre-disciplinary bargaining, and the Union repeated its demand several times thereafter, and nonetheless Respondent failed to bargain prior to issuing discipline to Whitmire and Rowland.
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	Exception 21	29:4 – 31:18	To the failure of the ALJ to recognize that Respondent unlawfully failed and refused to engage in post-disciplinary bargaining with

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		<p>the Union with regard to the terminations of Whitmire and Rowland following the Union’s filing of unfair labor practice charges protesting their terminations.</p> <p>The record establishes that prior to the terminations of Whitmire and Rowland the Union had made it clear to Respondent more than once that it wanted to bargain about discipline of its members and nonetheless Respondent issued discipline to Whitmire and Rowland without bargaining with the Union and continued to fail to bargain with the Union after the Union filed the unfair labor practice charges over their terminations which alleged a violation of sections 8(a)(3) and (5) of the Act.</p>
Exception 22	31:20 – 32:10	To the failure of the ALJ to require that Respondent post, read, and mail a notice of the above unfair labor practices to employees who were employed from the onset of the unfair labor practices until the present.

For the above reasons, these exceptions should be granted and the decision of the ALJ modified as appropriate.

Dated: February 25, 2013

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: MANUEL A. BOIGUES
Attorneys for Charging Party,
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WEST

130585/704999

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed
3 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
4 at whose direction the service was made. I am over the age of eighteen years and not a party to
5 the within action.

6 On February 25, 2013, I served the following documents in the manner described below:

7 **EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF**
8 **THE ADMINISTRATIVE LAW JUDGE**

9 (BY U.S. MAIL) I am personally and readily familiar with the business practice of
10 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
11 mailing with the United States Parcel Service, and I caused such envelope(s) with
12 postage thereon fully prepaid to be placed in the United States Postal Service at
13 Alameda, California.

14 On the following part(ies) in this action:

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21 I declare under penalty of perjury under the laws of the United States of America that the
22 foregoing is true and correct. Executed on February 25, 2013, at Alameda, California.

23 /s/ J. L. Aranda
24 J. L. ARANDA