UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

VIA CENTER, INC.

and **Case 32-CA-094045**

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021

Angela Hollowell-Fuentes, Esq., for the General Counsel
David A. Leporiere, Esq., for the Respondent
Angela McGee, for the Respondent
Anne I. Yen, Esq., for the Charging Party
Rachele Savola, for the Charging Party

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge: Via Center, Inc. (the Respondent) is charged with making changes in mandatory terms and conditions of employment without first bargaining with Service Employees International Union Local 1021 (the Union), the exclusive representative of its instruction aides and teaching assistants. After a hearing in Oakland, California on June 13 and 14, 2013,[1] I find merit to the allegations.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel for the Acting General Counsel, counsel for the Charging Party, and counsel for the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Jurisdiction and Labor Organization Status

Respondent, a non-profit corporation, operates a private school in Berkeley, California for students with severe behavioral and cognitive disabilities. Respondent admits that it annually derives gross revenues available for operating expenses in excess of $1,000,000. Respondent admits that it annually purchases goods and materials valued in excess of $5000 directly from points outside the State of California. Further, Respondent admits and I find that it is an

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[1] The charge was filed by the Union on November 30, 2012. The Regional Director issued complaint and notice of hearing on February 26, 2013. The complaint was amended on May 30, 2013.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). Finally, Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. Collective-Bargaining Relationship

All parties agree that the Union is the exclusive bargaining agent of unit employees within the meaning of Section 9(b) and at all times since April 30, 2012,[3] the Union has been the exclusive collective-bargaining representative of unit employees within the meaning of Section 9(a). The unit is described as follows:

> All full-time, regular part-time, and on-call Instructional Aides, Teaching Assistants and Substitute Instructional Aides employed by the [Respondent] at its Berkeley, California facility; excluding all other employees, Teachers, Executive Directors, Office Managers, School Administrators, Speech Therapists, Occupational Therapists, managerial employees, guards, and supervisors as defined in the Act.

At the time of the hearing, the parties were engaged in bargaining for their first contract. School director Anka Vanden Bosch, school administrator Angela McGee, and office manager Staci Brewer are involved in bargaining on behalf of Respondent. The Union has been represented at various times by Union representative Rachele Savola, field representative Ben Sizemore, and Margaret Cunningham, Union consultant field representative. Union steward Zachary Stevens, instruction aide, also attends bargaining as do instructional aides Zachary Greer and Michael Walz.

III. Alleged Unilateral Changes

A. Art Director and Jobs Club Coordinator Positions

1. Art Director and Jobs Club Coordinator Positions were funded by WorkAbility Grant

It is undisputed that Respondent utilized funds it received from a State of California Department of Education WorkAbility Grant (WAG) to pay stipends for the art director and jobs club coordinator. The art director and jobs club coordinator positions require that those individuals devote 1 day per week in preparation of their programs. Thus, to maintain the one-to-one pupil/staff ratio, on the 1 day of preparation per week, the art director and jobs club coordinator's normal duties are performed by on-call or substitute instructional aides. It is undisputed that the money to pay these on-call or substitute instructional aides also comes from WAG. It is further undisputed that pay stubs of the art director and jobs club coordinator do not indicate that their stipends emanate from WAG funds.

a. Art Director Position and Stipend

Since 2010, instructional aide Zachary Greer held the position of art director. Greer's initial stipend of $50 per pay period was increased in 2011 to $60 per pay period. The position of art director also allowed Greer to devote 1 day per week in preparation for his art director

[3] All dates are in 2012 unless otherwise referenced.

duties. Shortly after Greer was made the art director, administrator Vanden Bosch told Greer that the stipend money was from WAG.

b. Jobs Club Coordinator Position and Stipend

Since 2009, instructional aide Mike Walz has held the position of jobs club coordinator for the jobs club program. Walz initially received a $50 per pay period stipend for his jobs club coordinator work. In 2010, the stipend was increased to $60 per pay period. Walz was also given 1 day per pay week to devote exclusively to preparation for the jobs club program. His regular duties on that 1 day per week were performed by an on-call or substitute instructional aide whose hours were funded by WAG.

In 2009, Walz and teacher Erin Thompson, a statutory supervisor, discussed the duties of his new position. Thompson told Walz that WAG provided funding to start up the jobs club but the club would eventually have to generate its own revenue to sustain itself. There is no evidence regarding this eventuality.

2. Respondent was notified in June 2011 that it would not receive WorkAbility Grant funding for the 2012-2013 school year

In June 2011, Respondent was notified by the California Department of Education that beginning with school year 2012-13, WAG would no longer be awarded to Respondent or to any other nonpublic school (NPS). Over the 2011 summer, school director Anke Vanden Bosch spoke with school administrator Angela McGee and office manager Staci Brewer about the significant impact of the loss of WAG funding. However, based on e-mails from other NPS, Vanden Bosch found out that there was still a chance that NPS would receive the WAG funds.

3. Management Discussions about Alternative Sources of Funding

McGee recalled generally that management discussions were that “we would no longer have those funds to provide those supplemental programs.” McGee recalled weekly if not daily discussions with Vanden Bosch and Brewer about solutions to fund the programs without the WAG funding. At some point, Respondent’s board of directors was consulted about the probable loss of WAG funding and decided to look into fund raising options. The staff was also very enthusiastic about fund raising.

In the fall of 2011, according to Vanden Bosch, she told teachers Erin Thompson and Rene Carranza, also a statutory supervisor, that if WAG was not funded in 2012-2013, Respondent “would have to stop the positions as well as the stipends paid to staff.”

Head teacher Rene Carranza recalled hearing in June 2011 the upsetting news about discontinuance of WAG. He recalled numerous conversations about how to continue providing the arts and jobs club services and other WAG-funded services such as café Kiki and café Via without the grant. He had a vague recollection of ongoing discussions with unspecified members of management in 2011 and early 2012 as follows:

Q What were those discussions?
A Those discussions were looking for solutions to how we could offer these services without having an instructional assistant out of the schedule one day a week. That was kind of the main challenge that we saw is how were we going to provide these services without having the money to pay for someone to make an instructional assistant free to run these groups.

Q Were there any discussions as to whether or not Mr. [Walz] and Mr. Greer would continue to be paid a stipend if [WAG] wasn't available?
A Yeah, I believe there was.
Q And what were those discussions?
A The discussion were that all – basically, everything that we had been accustomed to paying for out of [WAG] funds, were no longer going to pay for.

4. Staff Meeting regarding loss of WorkAbility Grant

Vanden Bosch and McGee recalled meetings throughout the 2011-2012 school year with all staff including instructional aides and teaching assistants discussing the loss of WAG funds. Vanden Bosch testified that on an unspecified date she is sure she told the staff that "the positions related to [WAG] would have to stop."

McGee recalled a particular meeting in February 2012 with the entire staff:

Q And what was said to the staff about the impact of the loss of the WorkAbility Grant?
A That we were not going to be getting it again. And as much as we hoped we could try and find other sources, as of right now, it's going to be ending in June of 2012.
Q And did you say anything as to what the impact would be of the WorkAbility Grant ending in June of 2012?
A Yes, we said that job clubs, Café Via, Café Kiki and the art program would be – we wouldn't have those anymore.

Carranza could not recall what was said at the meeting, He stated, "I remember the general position that I think the administration had at that period, which was the grant is not going to be available to us. The programs are done." Carranza did not recall any mention of employee pay or stipends during this meeting. He testified that about 3 weeks before the hearing, McGee told him she reviewed notes of the February meeting. She related that the minutes reflected that the cessation of WAG was discussed at the February meeting. He did not remember her telling him anything about stipends listed in the notes. These notes were not produced at the hearing.

Brewer testified that she could not remember whether the loss of stipends and time out-of-schedule was discussed at the February meeting. She opined that she imagined it would have been discussed but this falls short of evidence that the matter was discussed. Within a few minutes of not being able to recall whether stipends and time out-of-schedule were discussed at the meeting, Brewer testified that perhaps Thompson or maybe someone else stated that the jobs club coordinator and art director positions would be ending.

Both Walz and Greer recalled this meeting. Greer testified that Carranza told employees that Respondent might be losing WAG funding. Walz recalled being told Respondent was appealing loss of the funds and would wait for final word on the appeal before making any decisions. Neither of them heard any remarks about loss of their stipends or out-of-schedule days. Teacher's assistant Francisco (Frankie) Pantojas-Jimènez also recalled that Carranza stated that WAG might be ending but did not discuss loss of the programs or stipends. After the meeting, Greer spoke to director Vanden Bosch. He told her he was worried about his position and wanted clarification. Vanden Bosch replied, "there's always been an art program at Via Center and . . . there always would be."

5. Elimination of Art Director and Jobs Club Coordinator Stipends and Day Out-of-Schedule

By letters of June 11, 2012, Greer and Walz were informed that they no longer held the positions of Art Director and Jobs Club Coordinator, respectively, and would no longer receive the stipend. The three-sentence letters were identical and stated,

> This letter is to inform you that as per June 30, 2012, your position as [Art Director/Jobs Club Coordinator] has been eliminated and the stipend you receive for this position will end. As you are aware, this position was part of the Workability Grant that will end June 30, 2012. Thank you for your efforts.

In July 2012, Respondent modified Greer and Walz's work schedules to eliminate the work days which had previously been set aside for them to prepare for and conduct their respective programs. In fact, though, both Greer and Walz continue to operate their respective programs yet they no longer receive stipends or time for preparation.

6. Union's Protest regarding Art Director and Jobs Club Coordinator

At a bargaining session a day or two after the elimination of the positions, stipends, and the out-of-schedule day for Walz and Greer, the Union protested the change as a unilateral change. Respondent told the Union that the stipends were dependent on WAG being renewed. Respondent said it was no longer receiving those funds and would not bargain about this matter. The record does not reflect any assertion by Respondent at this meeting that the decision to eliminate positions, stipends, and out-of-schedules days for Walz and Greer had been made prior to the Union's certification. In fact, as far as the record reflects, Respondent did not assert that its decision to eliminate the stipends and out-of-schedule days was made prior to the Union's certification until this hearing.

7. Timing of the Decision to Eliminate the Positions and Stipends

Respondent contends that the decision to discontinue the positions, stipends, and out-of-schedule days was made prior to the Union's certification on April 30. There is, however, a factual credibility conflict regarding the timing of this decision. As is set forth in full below, I find that the record as a whole fails to show that the decision was made prior to the Union's certification.

I find the testimony of instructional aides Greer and Walz credible based on their demeanors, inherent probabilities, and corroboration. Their testimony is that they were told at the February meeting that WAG funding might be lost but Respondent was waiting for final word before making any decisions and their further testimony that jobs and stipends were not discussed. Their testimony is supported by the testimony of teacher's assistant Jimenez that he was told by Carranza that WAG funding was ending but Carranza did not mention that the programs or stipends would end. Further, the June 30 letters to Greer and Walz do not mention any prior notice that this action would be taken if WAG funds were lost. Significantly, I also note that when the Union protested these changes at the bargaining table, Respondent did not raise this defense that the decision was made prior to the Union's certification. Finally, I credit Greer's testimony that when he asked for clarification about his art director position in February, Vanden Bosch told him that Respondent would always have an art program. These three witnesses, although a bit nervous, relayed the facts with clarity, directness, and certainty. Thus, based on

their demeanor and the inherent consistency of their testimony with the letters of June 30, I credit them.

Further, I specifically discredit the testimony of Vanden Bosch, McGee, Baxter, and Carranza for the following reasons: First, I draw an adverse inference regarding the lack of evidence about where the authority to terminate the positions and stipends resided and what action was taken on other WAG-funded projects. Second, I draw an adverse inference based on failure to produce minutes of the February staff meeting, Third, I find the evidence presented by Vanden Bosch, McGee, Baxter and Carranza vague and lacking in specificity.

The lack of evidence regarding exactly where the authority to discontinue the positions and stipends resides is troubling. Thus, the record is silent as to whether Board involvement would typically be required to discontinue the positions and stipends. The potential discontinuance of WAG funding was certainly discussed among Vanden Bosch, McGee, Baxter, and teachers Carranza and Thompson[4] but they also took the matter of alternative funding to the Board of Directors.

Further, the record is strangely silent about how other WAG-funded programs were discontinued. The WAG funds were about $36,000 per year. The art and jobs club portion of that funding was about $2000 per year. Other WAG-funded projects, e.g., administrative duties of the teachers, Friday lunches, café Via, café Kiki, and neighborhood beautification[5] may or may not have been discontinued but there is nothing in the record to indicate if they were or were not and, if they were, when this was done and who exercised the authority to do this. Were the decisions for the other projects made at the same time? Was the Board involved in these decisions?[6] All of these unanswered questions warrant an adverse inference that were this evidence presented it would not support a finding that the final decision on the arts and jobs club positions and stipends was made by Vanden Bosch and McGee alone prior to April 30, when the Union was certified.

Second, teacher Carranza was told by administrator McGee 3 weeks before the hearing that she had reviewed notes of the February staff meeting and these notes reflected that WAG cessation was discussed. Carranza did not remember McGee telling him anything about stipends being listed in the notes. Apparently, then, according to what Carranza was told, the notes agreed with the testimony of Walz, Greer, and Jimenez. The notes were not produced following Carranza's revelation that McGee had consulted notes and related their contents to him. I draw an adverse inference that if the notes were produced, they would indicate only that cessation of WAG funding was discussed but not that a decision had been made to discontinue the arts and jobs club stipends or day out-of-schedule.[7]

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[4] Thompson did not testify in this proceeding.

[5] This is not an exhaustive list of the programs funded by WAG. These programs are mentioned in the original grant application, the only complete document produced regarding WAG, as well as the testimony of Carranza, who served as WAG administrator.

[6] Although I find this lack of evidence troubling, the fact that there is no paper trail regarding the decisions does not warrant any concern in that the totality of the record establishes that Respondent did not utilize written memoranda on a regular basis.

[7] In general, an adverse inference may be drawn when a party fails to explain why it did not produce a document relied on by its witnesses. See, e.g., *Advocate South Suburban Hospital v. NLRB,* 468 F.3d 1038¸1048 and fn. 8 (7th Cir. 2006); *Parksite Group,* 354 NLRB 801, 805 (2009).

Finally, I find the testimony of Vanden Bosch, McGee, Baxter and Carranza vague, sometimes conflicting, and inadequate to support a finding that the decision was made prior to April 30 when the Union was certified. Vanden Bosch testified that in 2011 and into 2012 she told management and the staff that the impact of loss of WAG funding would be that "the positions related to [WAG] would have to stop." Her testimony sometimes qualified the loss of positions to "if" WAG funding was lost. In any event, she did not know when she made the statement or to whom. This lack of specificity as well as qualification of the statement does not support a finding that a final decision was made prior to April 30 when the Union was certified. Moreover, this testimony is in direct contradiction to Vanden Bosch's earlier testimony that she held out hope that the WAG funding would not cease and that she was actively involved with other nonprofit institutions in making this happen. Further, Vanden Bosch's testimony is controverted by the credited testimony of Greer: that Vanden Bosch told him when he asked for clarification of his art director position after the February meeting, Vanden Bosch told him that there would always be an art program. Thus, Vanden Bosch's testimony is vague and conflicting and entitled to little weight even if credited.

McGee's testimony comes no closer to showing that a decision had been made prior to April 2012. McGee stated that from June 2011 and into 2012, she and Vanden Bosch talked about other ways to make up the money they would lose if WAG funds were not received. McGee testified that "we," supposedly meaning she or Vanden Bosch, told the staff in February that it looked as if Respondent would lose WAG funds as of June 2012. When further prompted by counsel regarding whether she told the staff anything about the impact of this loss, McGee added that "we" [she or Vanden Bosch] told the staff that Respondent would not have jobs club or the art program anymore. Given that McGee was present throughout the hearing as Respondent's designated representative under the sequestration rule and therefore was aware that the timing of the decision was crucial to Respondent's defense, her failure to volunteer this testimony without prompting is significant.[8] I find the testimony that the staff was informed in February 2012 that the jobs club and art program would have to end is entitled to no weight due to the leading nature of the question coupled with the knowledge of the witness regarding the importance of the issue.

I credit Baxter's initial testimony that she could not remember whether the loss of stipends and time out-of-schedule was discussed at the February staff meeting. However, I do not credit her sudden restoration of memory that perhaps Thompson or maybe someone else stated that the jobs club coordinator and art director positions would be ending. As she made this statement, it was obvious from her demeanor that she was reaching beyond the limits of actual memory to a stream of logic that allowed her to assume that if something should have been discussed, it probably was discussed. The uncertainty in her tone of voice did not have the hallmarks of an honest and sincere recollection. No specific words, no specific speakers, no flash of recovering a recollection were displayed. Thus, although the testimony, even if credible, is categorical and would be entitled to little weight, I specifically discredit it as unworthy of belief based on the witness' demeanor.

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[8] After answering a non-leading question about what was said at the meeting, McGee was asked whether anything was said about the impact of discontinuance of WAG funds. McGee then testified that the staff was told that jobs club, art program, and café Via and café Kiki would not exist anymore. Such leading impairs the probative value of the testimony. See, e.g., *Greyston Bakery,* 327 NLRB 433, 440 fn. 13 (1999); *H.C. Thomson,* 230 NLRB 808, 809 fn. 2 (1977).

Finally, Carranza's testimony fails to establish that a final decision had been made prior to April 30. Carranza testified that he was told by McGee about three weeks before this hearing that cessation of WAG was discussed at a February staff meeting. He did not recall that McGee mentioned the elimination of the stipends or positions as part of the minutes. Significantly, the notes were not produced. Carranza's testimony that he remembered the general position of management being that the programs "were done" is without foundation regarding date, the substance of particular conversations, and who made such a statement. Moreover, his description of the February meeting discussion is vague and difficult to understand as an announcement that the positions and stipends were ending: "basically, everything that we had been accustomed to paying for out of [WAG] funds, were no longer going to pay for." Rather, his statement is more consistent with Vanden Bosch's qualified statements.

Thus, based on the record as a whole, I find that there is no credible evidence that Respondent made the decision to eliminate the arts program job and stipend and the jobs club coordinator position and stipend prior to April 30. And, in fact, all witnesses agree that the programs were not eliminated. Only the stipends and day-out-of schedule were eliminated. Greer and Walz continue to perform their duties but without stipends and without a day set aside each week for preparation.

B. Calming Area Rope

1. Use of the Rope

At times,[9] students at the center engage in violent and aggressive behavior requiring intervention. All staff is Crisis Prevention and Intervention (CPI) trained in methods to neutralize aggression and how to manage the safe physical movement of students who become aggressive.

When aggressive behavior occurs, the staff (including aides, teaching assistants, instructors, and teachers) works together as a team to deescalate the aggression. If the aggression is not deescalated quickly, the student is removed from the classroom to the outdoor calming area.[10] For escort to the calming area, typically two staffers, one on each side of the student, walk while supporting the student and a third staffer leads them to clear a path and prevent injury to others. During 2011 and 2012, instructional aide Michael Walz, teacher assistant Francisco (Frankie) Pantojas-Jimènez, classroom B teacher Rene Carranza, instructional aide Zack Stevens, and instructional aide Zachary Greer routinely participated in removing aggressive students from the classroom. At the same time that these aides and teachers are engaged in escort, Erin Thompson, classroom A teacher, reassigns students affected by absence of any aides or teachers participating in the escort to other teachers, instructional aides, or members of management in order to retain the one-to-one ratio.

The calming area, located in the outdoor recreation area, is fenced in and closed off by a gate which is secured by a U-shaped latch which when vertical allows entry and when horizontal

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[9] The parties disagree about the frequency of these events. I find this disagreement immaterial.

[10] Until September 2012, there was just one designated calming area. Beginning on September 4, 2012, a second calming area was utilized. However, there is no specific example of its use or the use of ropes to secure the new area's latch. Thus, unless otherwise mentioned, this factual narrative relates to the original calming area only.

effectively closes the gate. The gate opens inward – into the calming area. No lock is ever placed on the gate. However, because the latch is within reach of the student in need of calming, the staff must hold the latch closed from outside of the calming area. Staff were sometimes injured holding the gate closed. Accordingly, the staff began using a rope or a belt wrapped around the latch to protect themselves from scratching, hitting, or biting and to support themselves as they leaned back to secure the gate with their body weight. At least one staff member remains outside the gate to counsel the student until the student can rejoin the classroom.

Walz recalled that while cleaning a shed on the property in 2010, he found a climbing rope and decided to hang it on the gate of the calming area. The parties disagree about whether a practice evolved of leaving the rope hanging on the gate after escorting the becalmed student back to join the general population. Aides and teaching assistants testified that this practice was firmly established in 2010. Their testimony consistently was that when the calming area was not in use, a rope was left hanging on the gate. Aides and assistants consistently testified that from 2010 through September 2012, a rope was left on the gate. These aides and assistants also testified that Carranza, who assisted in escorts on numerous occasions, observed that the rope was left hanging on the gate.

Administrator McGee, although agreeing that a rope was used to secure the latch during the calming process, testified there was no practice of leaving the rope on the gate after the aggressive incident subsided. Classroom B teacher Carranza, who frequently participated in escorts, testified on behalf of Respondent regarding the art director and jobs club coordinator issue but was not asked about the use of a rope or about leaving a rope on the gate.

Although administrator McGee testified in general that the staff had been told not to affix a rope or other permanent instrument to hold a student in place, her further testimony did not support this general assertion:

> Q And has the specific policy . . . of not affixing a rope or other permanent thing to hold a student in place been discussed?
>
> A I'd say the last time it was specifically communicated to staff was when Karen did her training . . . [in] March 2012. . . . She just went over the California Code of Regulations [Section 3052] requirements against . . . restraint and seclusions, what's considered restraint and seclusion.

It requires a leap of logic to infer from the phrase "restraint and seclusions" the instruction: "don't leave a rope on the gate." There is no support in the record for such an inference. Thus, I find that the staff had not been told prior to September 7 that they could not leave the rope on the gate in these training sessions. Moreover, when McGee was asked what the biggest issue was regarding leaving the rope on the gate, she testified that the outside area is generally used for student recreation and maintaining a rope on the pole constitutes intimidation. McGee agreed that she has taken part in calming escorts and held a rope around the latch to secure it. On 3 or 4 occasions, when she has returned to the calming area after the intervention, a rope had been left hanging from the gate and she has removed it.

In August 2012, an additional calming area was constructed. When employees arrived to start the fall term on September 4, they observed a rope hanging on the new calming area door.

Administrator McGee and Office Manager Brewer[11] did not see a rope on the new calming area door until September 7. They claimed there were no plans for ropes to be hung from the new calming area door. However, employees believed an eye bolt on the exterior of the new door was specifically intended for attachment of a rope. Members of management testified the eye bolt was not part of the specifications for construction of the new calming area door and they did not know why the eye bolt was there.

2. Removal of Ropes

While locking up on Friday, September 7, office manager Staci Brewer testified that from her position at the top of the steps by the back door, she looked down toward the new calming area and saw three ropes hanging from the gates. Brewer testified that when she saw the ropes hanging on the gates, she thought of how bad it looks to see ropes hanging there knowing that parents, police, and other school districts visit the facility. She reported this fact to teacher Erin Thompson and then called administrator McGee because she did not think there should be ropes hanging from the gate. She asked McGee what she should do about the three ropes and McGee told her to remove the ropes. After these consultations, Brewer removed the ropes.

As mentioned above, McGee testified that she has observed ropes left hanging on the gates from time to time and over the years and removed them because, in her view, under California's education code, the school may not leave anything permanently on gates. Her understanding, based on state inspections, was that the school could not have doors or fences that would lock. McGee's position is that Respondent has never allowed ropes to be permanently affixed to the gates although she admittedly is rarely in the vicinity of the calming area.

In any event, initially after removal of the ropes on September 7, escorts were not allowed to use ropes at all. The escorts encountered difficulty retaining aggressive students in the calming area. At one point, a falconer glove was provided to escorts but it was not flexible enough to retain the latch in place. Within a matter of weeks, McGee was called down to see what the escorts were experiencing. She approved use of ropes after this consultation but said the ropes could not be left hanging on the gates. Under this practice, employees have to locate the rope as they escort the student to the calming area. Sometimes they find the rope in the pantry (which may be locked) and sometimes in a bush in the back area.

3. The Union's Response

The Union was given no notice prior to removal of the ropes. By e-mail of September 7, the Union protested removal of the ropes stating, "any change in procedure or policy, especially one as important as dealing safely with violent behavior, cannot be made unilaterally by management. . . . If you want to change the procedure, you need to negotiate with us. . . ." No response was received.

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[11] Office manager Brewer is present in the back area every Friday to monitor trash pickup and lock up for the weekend. The trash pickup area abuts the calming area but it is unclear that the calming area gate can be viewed from the trash pickup area. Brewer testified that until September 7 she had never seen a rope hanging from a gate. This testimony is given little weight as Brewer's testimony makes clear that she is seldom in the backyard and, when present, it is unclear that she is able to see the calming area door.

On or about September 10, instructional aides Stevens and Walz met with administrator McGee in her office. In his capacity as Union steward, Stevens asked McGee if she knew the rope had been removed. McGee stated that she had removed the rope and she did not know it had been there previously. Discussion about various education guidelines and their applicability to the rope situation were discussed. Administrator McGee became angry when Stevens asked for a specific code section that prohibited leaving a rope on the gate and told Stevens and Walz to leave.

The Union brought up the removal of the ropes at the next bargaining session, around September 11, terming it a change in a safety procedure and stating that it was an item that required bargaining before a change could be made. McGee asserted that Respondent had no practice regarding the ropes and did not want a rope on the gate. By letter of October 1, the Union requested information regarding unilateral removal of the ropes used by staff to protect their hands while holding shut safety gates. No response was received.

4. A Practice Existed of Leaving the Rope Hanging from the Door

The parties disagree about whether a rope was routinely left hanging from the gate of the calming area after the student was removed from the area. This is a factual dispute which must be resolved based on credibility. I find that an adverse inference must be drawn regarding failure to call teacher Carranza regarding this issue. Thus, I find that if he had been called to testify on this issue, his testimony would have been that a rope was customarily left hanging on the gate. Further, I find that the testimony of McGee and Baxter is entitled to little weight because they did not have opportunity to observe the gate on a regular basis. Finally, I credit the testimony of Walz, Greer, Stevens, and Pantojas that the rope was routinely left hanging after the student was returned to the classroom.

ANALYSIS

Absent good faith impasse or waiver, failure to negotiate about changes concerning mandatory subjects of bargaining is typically considered a per se refusal to bargain in violation of the Act. *NLRB v. Katz,* 369 U.S. 736, 742-743 (1962). Elimination of jobs is a mandatory subject of bargaining. *Holmes & Narver,* 309 NLRB 146, 146-148 (1992)(decision to combine jobs, reassign work, and layoff employees mandatory subject bargaining). Similarly, there can be no doubt that stipends, i.e., wages, are a mandatory subject of bargaining based on the very language of the Act.[12] I have found that Respondent had not made the decision to discontinue these positions and the stipends and days out-of-schedule prior to April 30. In fact, there were was no announcement of a final decision until the June 6 letters were sent. Thereafter, it is undisputed that Respondent refused to bargain. Thus, I find Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the positions, stipends, and days out-of-schedule without bargaining.

Further, I find that leaving a rope tied to the calming area gate is a past practice akin to a safety procedure. Since 2010, a rope has customarily been left hanging on the calming area gate for all to see and for immediate utilization when the calming area is needed to deescalate a student's aggressive behavior. Thus, the evidence establishes that the custom is a "past

[12] Sec. 8(d) requires, inter alia, that the parties meet and "confer in good faith with respect to wages, hours, and other terms and conditions of employment." See also, *Ironton Publications,* 321 NLRB 1048 (1996)(unilateral wage increase violated Act).

practice," i.e., a practice that has occurred with regularity and frequency for an extended period of time with a reasonable expectation that it would continue. See *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 349, 353 (2003), enfd. 112 Fed.Appx. 65 (D.C. Cir. 2004).

The placement of the rope on the gate facilitates expeditious, safe securing of the calming area gate without injury to the student or staff. As such, this past practice constitutes a safety procedure and is a mandatory subject of bargaining. See, e.g., *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1984), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 106 S.Ct. 3274 (1986)(employer must bargain about health and safety issues as a term and condition of employment); *J.P. Stevens & Co.,* 239 NLRB 738, 743 fn. 6 (1978), enf. In relevant part 623 F.2d 322 (4th Cir. 1980), cert. denied 101 S.Ct. 856 (1981)(type respirator is safety concern constituting mandatory subject bargaining). Respondent unilaterally removed the ropes on September 7 and told employees they could no longer be used in the calming area. About three weeks later, Respondent restored the use of ropes but not the practice of leaving the rope on the gate. Respondent refused to bargain about this issue and thus violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

By unilaterally eliminating the positions, stipends, and days out-of-schedule of art director and jobs club coordinator and unilaterally discontinuing its past safety practice of allowing a rope to be used to secure the latch on the calming area gates and of leaving a rope on the calming area gates, Respondent has failed and refused to bargain collectively and in good faith with the Union, the exclusive collective-bargaining representative of its employees in a unit appropriate for collective bargaining. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by unilaterally eliminating the positions of art director and jobs club coordinator along with stipends and the day out-of-rotation attendant to those positions and by unilaterally discontinuing the practice of using a rope to secure the latch of the calming area gate and of leaving a rope tied to the calming area gate, I shall order the Respondent, on request, to restore the terms and conditions of employment in effect before the Respondent's unlawful changes, and to make unit employees Walz and Greer whole for any loss of earnings and other benefits attributable to its unlawful conduct, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Further, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Walz and Greer for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012). Additionally, I will order that the customary notice be posted and published in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[13]

ORDER

The Respondent, Via Center, Inc., Berkeley, California, its officers, agents, successors, and assigns, shall cease and desist from failing and refusing to bargain with Service Employees International Union Local 1021 by unilaterally eliminating the positions, stipends, and day out-of-rotation of art director and jobs club coordinator and unilaterally discontinuing its past safety practice of allowing a rope to be used to secure the latch on the calming area gates and by leaving a rope on the calming area gates or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act:

(1) Rescind the unilateral elimination of the positions, stipends, and day out-of-rotation of the art director and the jobs club coordinator.

(2) Rescind the unilateral elimination of use of a rope to secure the latch on the calming area gates and the past practice of affixing a rope on the calming area gates.

(3) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time, regular part-time, and on-call Instructional Aides, Teaching Assistants and Substitute Instructional Aides employed by the [Respondent] at its Berkeley, California facility; excluding all other employees, Teachers, Executive Directors, Office Managers, School Administrators, Speech Therapists, Occupational Therapists, managerial employees, guards, and supervisors as defined in the Act.

(4) Within 14 days from the date of this Order, offer Zachary Greer his former position of art director and Mike Walz his former position of jobs club coordinator and make them whole for any loss of earnings and other benefits suffered as a result of unilateral elimination of their positions as set forth in the remedy section of this decision.

(5) Compensate Greer and Walz for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(6) Within 14 days from the date of this Order, remove from its files any references to the unilateral changes in Walz' and Greer's' positions and notify them in writing that this has been done.

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

(8) Within 14 days after service by the Region, post at its facility in Berkeley, California, copies of the notice on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative. These notices shall be maintained by the Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.[14] In addition to physical positing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 2012.

(9) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 13, 2013

Mary Cracraft

Mary Miller Cracraft
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post, mail, and abide by this notice.

WE WILL NOT fail and refuse to bargain with Service Employees International Union Local 1021 by unilaterally eliminating the positions, stipends, and day out-of-rotation of art director and jobs club coordinator, and unilaterally discontinuing our past safety practice of allowing a rope to be used to secure the latch on the calming area gates and by leaving a rope on the calming area gates.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time, regular part-time, and on-call Instructional Aides, Teaching Assistants and Substitute Instructional Aides employed by the [Respondent] at its Berkeley, California facility; excluding all other employees, Teachers, Executive Directors, Office Managers, School Administrators, Speech Therapists, Occupational Therapists, managerial employees, guards, and supervisors as defined in the Act.

WE WILL rescind the unilateral elimination of the positions, stipends, and day out-of-rotation of the art director and the jobs club coordinator.

WE WILL rescind the unilateral elimination of use of a rope to secure the latch on the calming area gates and the past practice of affixing a rope on the calming area gates.

WE WILL offer Zachary Greer his former position of art director and Mike Walz his former position of jobs club coordinator and make them whole for any loss of earnings and other benefits suffered as a result of unilateral elimination of their positions.

WE WILL compensate Greer and Walz for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee

VIA CENTER, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

1301 Clay Street, Federal Building, Room 300N

Oakland, California 94612-5211

Hours: 8:30 a.m. to 5 p.m.

510-637-3300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3270.