UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

SALEM HOSPITAL CORPORATION	)	
a/k/a	)	
THE MEMORIAL HOSPITAL	)	
OF SALEM COUNTY	)	
	)	
Respondent	)	
	)	
and	)	**CASE NO. 04-CA-097635**
	)	
	)	
HEALTH PROFESSIONALS AND ALLIED	)	
EMPLOYEES, AMERICAN FEDERATION	)	
OF TEACHERS (AFL-CIO)	)	
	)	
Charging Party	)	

TO: Gary W. Shinners
Executive Secretary
National Labor Relations Board

BRIEF IN REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF FILED IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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BRIEF IN REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF FILED IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW the undersigned Counsel for Respondent, pursuant to § 102.46[1] of the Board's Rules and Regulations, Series 8, as amended, and respectfully submits this Brief in Reply to General Counsel's Answering Brief Filed In Response To Respondent's Exceptions To The Decision Of The Administrative Law Judge.[2]

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[1] General Counsel had been granted an extension of time to December 13, 2003, to file his Answering Brief, though he ultimately filed it earlier, on December 9, 2013. Nonetheless, pursuant to § 102.46(h), the 14-day period to file this Brief in Reply began on December 13, 2013.

[2] References herein to the Administrative Law Judge will be designated as "ALJ," and references to his Decision will be designated as "ALJD," preceded by the page number and followed by the line numbers. Footnotes in the ALJD will be designated as "Fn." followed by the number. The Counsel for General Counsel will be referred to as either General Counsel or "GC." Respondent will also be referred to variously as "the Hospital" or "Employer." References to the transcript will be designated as "Tr. ___;" Respondent's exhibits as "R ___;" GC exhibits as "GC__;" and the Joint Exhibit as "Jt. 1," followed in each instance by the page or exhibit number. Respondent's Brief In Support will be referred to herein as "RBISE" followed, when necessary, by the page number.

I. OVERVIEW

Two-thirds of General Counsel's Answering Brief[3] is premised totally on the erroneous finding and conclusion that an expired February 1, 2003 policy (GC 6) serves as the basis for comparison with the alleged unlawfully implemented Dress and Appearance Policy of September 4, 2012.[4] (GC 9(a)) The GC perpetuates a flawed analysis which led the ALJ to arrive at factually unsupported, irrational and illogical conclusions that the 2003 policy was in effect, and provided the basis for comparison with the 9/4/12 Policy. Long-established Board precedent assesses the lawfulness of a change by measuring the extent to which the alleged change departs from existing terms and conditions. That measurement can only be accomplished accurately when the true and actual preexisting terms and conditions are identified and then applied to the alleged change. Both the ALJ and GC have erroneously relied upon the wrong policy as the basis for comparison.

Respondent submits that the dress, appearance and related disciplinary provisions which are to serve as the basis for comparison with the 9/4/12 Policy are those set forth identically in the four Employee Handbooks which have been issued to Hospital employees since April 2009.[5] It is further submitted that not only does a preponderance of the evidence, but the overwhelming weight of competent testimonial and documentary evidence, establishes that the correct and appropriate policy to serve as the basis for comparison with the 9/4/12 Policy are those within the Employee Handbooks; all of which have, and continue, to set forth the dress, appearance and disciplinary provisions utilizing the identical verbiage. All Hospital employees, at least annually, sign a document acknowledging that they not only received the Employee Handbook in effect at the time, but also that they agreed to read that handbook, and adhere to the policies therein. They also acknowledge that the Hospital retains the right to modify or withdraw any provisions therein at any time, with or without notice. (Tr. 94,153; See, e.g., R 1, p. 35) Accordingly, the same dress, appearance, and disciplinary policies had been in effect not only thirteen-plus months prior to the Union's filing of its May 19, 2010 petition, but also remained in effect before the September 2010 election, as well as the August 3, 2011 certification (currently

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[3] The General Counsel's Answering Brief will be referred to herein as "GCAB," followed by the page number, where necessary. The GCAB pages referenced include pp. 5-26 and 32-33.

[4] That policy shall be referred to herein as "the 9/4/12 Policy."

[5] The Employee Handbooks were received in the record as follows: R 1, April 2009; GC 11, June 2009; R 2, July 29, 2010; and R 3, April 30, 2012.

being challenged). It is further submitted that an appropriate dispassionate comparison of the 9/4/12 Policy's provisions with the dress, appearance and disciplinary policies within the Employee Handbooks, compel but one conclusion: the 9/4/12 Policy represents no substantial, significant or material differences from those within the handbook policies which preceded it.

Accordingly, this Reply Brief primarily focuses on how and why the ALJ authored a seemingly results-oriented decision which:

1) disregarded overwhelming evidence establishing that the Employee Handbooks and the policies set forth therein had been in effect since April 2009 and up to implementation of the 9/4/12 Policy which, in turn, cleared the way for the ALJ to focus and rely upon the inoperative 2003 policy as the basis for comparison;

2) avoided the necessary detailed analysis of the 9/4/12 Policy *vis-a-vis* the Employee Handbook policies;

3) afforded the ALJ the opportunity to engage in a simple analysis involving comparison of the inoperative 2003 policy with that of September 4, 2012;

4) avoided the need to address significant issues posed by the Employee Handbook policies' predating the filing of the petition, the election, and the certification; and

5) avoided the need to address issues posed by the reality that the 9/4/12 Policy could accomplish its beneficial objectives only by inclusion of, and application to, both non-unit and unit employees. In so doing, the ALJ avoided any consideration that the Hospital would, by his Decision, be precluded from implementing any such policy unless and until either agreement or a lawful impasse were reached with the Union. Thus, the Union could hold hostage, to its negotiations' vagaries, implementation of any policy that must necessarily include both unit and non-unit employees. Further, unit employees would necessarily be afforded preference over non-unit employees as to various aspects of any appearance and apparel since the Union would control not only the existence of any policy, but also the terms thereof.

II. THE ALJ'S FLAWED FACTUAL ANALYSIS, EMBRACED BY THE GENERAL COUNSEL, HAS RESULTED IN PREJUDICIAL ERROR

The GC endorses the ALJ's flawed analysis, which results in an erroneous and prejudicial conclusion that 2003 policy remained in effect up to the implementation of the 9/4/12 Policy. Whether by design, effect, or otherwise, the ALJ employed two specious methods to avoid reliance on the Employee Handbook provisions as the basis for comparison with the alleged unlawful 9/4/12 Policy.

Initially, the ALJ simply "blows off" the handbook policies by asserting that the manner in which the Hospital's policies are formulated "is irrelevant to the issues here." (2 ALJD, Fn.4) By this factually unsupported and unexplained edict, the ALJ simply whisks away the need to

examine crucial evidence establishing the distinctions between corporate "template" policies, Employee Handbook policies, and locally-established policies. The GC, not unexpectedly, countenances this distorted decisional process. (GCAB pp.17, Fn.26) Yet, an understanding of the distinctions between the various policies is crucial to ascertain which policies were in effect, and provide the basis for comparison with, the 9/4/12 Policy. (See RBISE, pp.13-21) His inexplicable disregard of undisputed, highly relevant and material evidence then allowed the ALJ to consider only the 2003 dress and appearance policy as the basis for comparison.

A second decisional tactic used to accomplish the same purpose involves the ALJ's misleading, unfounded (albeit clever) attempt to cast the supposed applicability of the 2003 policy as a matter of credibility. Again, not unexpectedly, the GC pounces upon and then hides behind *Standard Drywall* [6] to justify the ALJ's reliance on the 2003 policy. (GCAB, p.17, 1st full par. and Fn.25) Like the ALJ, GC fails and refuses to accept the obvious conclusion that the testimony of Tracy McAllister itself in no way establishes that the 2003 policy continued beyond April 2009. McAllister's own testimony establishes that she referred to the 2003 policy only in 2003 when she encountered an issue as to the piercing of her nose. (Tr. 68-70) Further, the ALJ simply disregarded her disclosures on cross-examination that she had received, signed for and read the four subsequently-issued Employee Handbooks containing the applicable dress, appearance and disciplinary policies which had been issued to her since April 2009. (Tr. 94-98) Accordingly, as set forth in Exceptions Nos. 17(a)(b) and (c) and 31, and as explained within RBISE (pp. 19-21), there was no need or rational basis for the ALJ to even mention that her testimony was "unrefuted." There is nothing in McAllister's testimony to support any reliance by the ALJ on the 2003 policy[7] as a basis for comparison with the 9/4/12 Policy.

Contrary to the ALJ and GC, the evidence to rely upon as the basis for comparison with the 9/4/12 Policy implicates no issue of credibility. Rather, this is a matter of the comparative **competency** of the witnesses testifying to the policies. The ALJ, by the two means discussed above, relieved himself of the need to address the testimony of Patricia Scherle, the Hospital's Chief Nursing Officer and Chief Privacy Officer as to the operative policies. Logically, who could provide the more competent testimony as to the applicable policies: Scherle, who is responsible for implementation and enforcement of the policies, or employee McAllister, a GC

[6] 91 NLRB 544 (1950)

[7] The GCAB is correct in that Respondent inadvertently referred to the ALJD's reference as 5 ALJD 20-21, Fn.22, though the proper reference is shown in Respondent's Exception 18 as 4 ALJD 16-19 and Fn. 12.

and Union-provided witness, who could speak only of the 2003 dress/appearance policy based only on her referring to that policy during the year 2003? The GC's defense of the ALJ's highly-flawed reasoning, findings and conclusions is understandable. Thus, it became apparent at the outset of the hearing that neither the Union nor the witnesses for GC (and Union), were prepared to confront the Employee Handbooks' policies – either because they were previously unaware of their existence, or were simply disregarded.

The competent evidence, therefore, compels reversal of the ALJ's finding and conclusion that the 2003 policy was in effect up to implementation of the 9/4/12 Policy. The truth, as amply confirmed by the evidence, is that the 2003 policy became ineffective and inoperative upon issuance of the April 2009 Employee Handbook and the policies therein. Accordingly the ALJ's reliance upon reliance upon the ("old" and "past") 2003 policy as the basis for comparison with the 9/4/12 Policy is erroneous and without record support. Further, by their erroneous selection of the 2003 policy as the basis for comparison, the ALJ and the GC made no effort to compare the 9/4/12 Policy with the relevant provisions in the Employee Handbooks. Had that task been undertaken (as did Respondent), they would have arrived at the correct conclusion that there was no appreciable change between the Employee Handbook provisions and those contained in the 9/4/12 Policy. (See RBISE, pp. 22-29.)

Further, the commentary of both the ALJ and GC as to the 9/4/12 policy's recitation of discipline and the asserted more stringent enforcement therein, are totally "off base" and "miss the boat." Again, both the ALJ and GC have erroneously relied on the 2003 policy as the basis for comparison, simply neglecting the provisions concerning discipline within the Employee Handbooks *vis-a-vis* the 9/4/12 Policy. (See RBISE pp.21,28-29, and 40-41.)

III. THE GENERAL COUNSEL MERELY PERPETUATES THE ALJ'S MISDIRECTED AND ERRONEOUS ANALYSIS OF THE IMPACT OF THE 9/4/12 POLICY

The GC's commentary on the supposed adverse impact of the 9/4 12 Policy is based not only on the erroneous comparison with the 2003 Policy, but is also inherently contradictory and/or fails to square with the facts. For example:

- The GC argues that the 9/4/12 Policy, which applies to both unit and non-unit employees, has only an "incidental impact on non-unit employees,"[8] while concurrently arguing that the impact on unit employees is substantial, significant, and material.

- Though asserting that the Hospital's willingness to provide all affected employees three sets of blue scrubs was a benefit, GC concurrently contends that Hospital-provided apparel was ill-fitting, uncomfortable, cheap, and stifles RNs' creativity and individuality. (GCAB, p. 11,12 and 19; and FN.27) SOME BENEFIT!!?

- Moreover, the GC neglects to mention that the record is devoid of any evidence that the unit and non-unit employees covered by the alleged new policy were required or forced to accept the Hospital-provided scrubs. Rather, the evidence reflects that the three sets of scrubs were made available to employees if they wanted them or they could opt to buy their own – as done, and will continue to be done, by GC witness McAllister both before the and after the 9/4/12 Policy. (Tr.75-76, 92)

Both the ALJ and GC argue, erroneously, that the financial impact of the 9/4/12 Policy must consider costs of any accumulated inventories of RNs' scrubs. Obviously, such backward-looking methodology is the only monetary-related means that either could advance inasmuch as there is no, and will be no, future adverse impact on employees attributable to the policy. Thus, all affected unit and non-unit employees will continue to pay for their own scrubs in the future, just as they had done prior to the alleged changed 9/4/12 policy. (GCAB, pp.11-12; 5 ALJD 11,21-23; Tr.75,83-84,106) It is submitted that the ALJ's and GC's focus on such pre-change factors is erroneous. Board cases involving required expenditures by employees have viewed the adverse impact from a forward-looking perspective. (See, e.g., *Laurel-Baye Healthcare*, 352 NRLB 179 (2008), and *Crittenton Hospital*, 342 NLRB 686 (2004)). In cases where an employer's unilateral action has resulted in elimination or modification of benefits derived from pre-existing policies, the Board has likewise considered the financial impact of the change or modification from the perspective of the change's ongoing and future costs to all unit employees. (See *Gratiot Community Hospital*, 312 NLRB 175 (1993); and *Hospital Pavia Perea* 352 NLRB 418 (2008))[9]

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[8] GCAB, p. 24, Fn.36.

[9] Perhaps a hypothetical, closer to home for some, would be helpful in recognizing the logical void in the positions of the ALJ and GC. Assume that a private law firm has 15 partners, 15 paralegals, plus 50 very-recently-unionized associates, who currently have no collective bargaining agreement. Prior to and after unionization of the associates, the firm's executive committee allowed all partners, paralegals and associates to wear "business casual"

Respondent submits that evidence as to past accumulated inventories of scrubs and their value is simply not relevant:

- The Hospital has, before and after the alleged new policy, required only that unit and non-unit employees possess one set of laundered scrubs, i.e., the one set to be worn by the employee on each shift worked.

- There is no evidence that Respondent has required any RNs to possess a pre-determined number of scrubs or any inventory of scrubs. That has not changed whether the employees possessed one set or two hundred sets of scrubs prior to the 9/4/12 Policy.

- Moreover, apart from the testimony of but two of 120 unit RNs, there is no evidence that any RNs possess any particular number of scrubs.

Both the ALJ and GC have chosen to disregard the obvious fact that the financial effect of the 9/4/12 Policy on unit RNs has been miniscule. The evidence presented by the GC, itself, establishes this. Thus, GC witness Patricia Thomas testified that she possessed 200 sets of scrubs at the time the 9/4/12 Policy was implemented. However, she bought the scrub tops and scrub bottoms separately at a per item cost ranging from $9.00 to $30.00. In other words, she purchased 400 separate items. At $9.00 per item, she would have spent $3,600.00. At $30.00 per item, she would have spent $12,000 on her sets of scrubs, not to mention the dollars she spent on coordinating shoes, socks and accessories. On the other hand, it is noted that at the time of the change, Thomas possessed three pair of blue scrub pants, but no blue scrub tops. The cost of her purchasing three scrub tops to match the blue scrub pants would range from $27.00 (3 x $9.00) to no more than $90.00 (3 x $30.00). Moreover, the record shows that she could purchase three matching full sets of blue scrubs for as little as $39.00 to $42.00. (Tr.194 ll.3-4) Further, while the ALJ And GC bemoan that Thomas' 200 sets of scrubs would languish, unused, in a closet or in drawers after September 4, 2012, it is noted that if Thomas wore one set of her scrubs

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attire in the firm's office Monday – Friday. Over the past month, however, several clients and certain judges have made disapproving comments as to the informal apparel being worn by associates, paralegals and even by some partners. Accordingly, the firm's executive committee today announced that in order to present a more professional personal appearance in and out of the office, and to present a more professional office environment to clients, all associates, partners and paralegals will, starting two weeks from today, be required to wear a navy blue, pin-striped two-piece suit. (Females can wear a navy blue pin-striped skirt or pants.) The firm has agreed to reimburse all partners, associates and paralegals for the cost of two, two-piece navy blue pin-striped suits. Apart from the issue concerning the extent and the lawfulness of the change, what is the relevance or logical nexus to a male associate's having previously purchased, and worn 12 different colored blazers and a dozen different colored dress pants to the office? Likewise, what is the relevance of any associate's having previously purchased and worn to the office only one two-piece navy blue pin-striped suit?

one day every 200 work days, that one set of scrubs, could thereafter languish, unused, in her closet or drawers for the next 199 work days.[10]

IV. GENERAL COUNSEL, LIKE THE ALJ, FAILS TO ADDRESS RAMIFICATIONS OF THE SHORT-SIGHTED DECISION

The ALJ and GC have focused on, and simply dismissed, the Hospital's invoking the legal concepts of management rights, management discretion and prerogatives. Thus, the ALJ asserts that such concepts, "ignore the fact that uniforms required and workplace appearance are mandatory subjects of bargaining." (7 ALJD 37-39; GCAB pp.25-26)

However, Respondent does not dispute that legal maxim. **Rather, Respondent's point is that where, as here, the exercise of management rights, discretion and prerogatives result in an insignificant, insubstantial and immaterial change, that change is not subject to bargaining.** As set forth in RBISE, the Board has long recognized that the exercise of both management discretion and management prerogatives are appropriate and relevant considerations in evaluating the legality of a change. (RBISE 32,36-39,41-42) By relying on the inoperative 2003 policy, and by failing to examine the Employee Handbook provisions as to dress, appearance and discipline, the ALJ's resultant findings and conclusions are deeply flawed and highly prejudicial to Respondent. Additionally, the ALJ's and GC's complete rejection and disregard of the concepts of management rights, discretion and prerogatives, permits both to avoid coming to grips with the ramifications of the Decision. As set forth in detail in RBISE (pp. 44-46), those ramifications include, among others, the following:

1) precluding implementation of a hospital-wide policy which serves to benefit the Hospital's patients, visitors, staff, and the community, simply by ignoring those interests;

2) ignoring the reality that any such policy's effectiveness and benefits can only be achieved by inclusion of both unit and non-unit employees;

3) holding implementation of a policy such as the 9/4/12 Policy (which must necessarily include both unit and non-unit employees) hostage to the vagaries of the Union during negotiations;

[10] This does not account for the permutations and commutations of Thomas mixing various scrub tops and bottoms.

4) creating precedent whereby unionized health institutions are precluded from instituting hospital-wide policies which directly benefit patients, their families, visitors, staff and the community they serve. Further, under the Patient Protection and Affordable Care Act[11], such individuals will now include those, who for the first time, have access to healthcare and healthcare institutions, and, foreseeably, will require much-needed assistance in navigating the healthcare institution's departments and personnel they are destined to encounter;

5) granting preference to unit over non-unit employees, since unit employees would dictate the terms and conditions of the Hospital-wide policy; and

6) conveying the message, nationwide, that the Board holds that the interests of a labor organization and its unit RNs, whose highest duty is to patients, have been elevated to a plane higher than that of the patients whom they have pledged to serve. [12]

V. RESPONSE TO REQUEST FOR INFORMATION

As to the GC's commentary on the Union's request for information, Respondent adheres to its observations on pp. 45-47 of the RBISE. In a related vein, however, Respondent notes that Section 10(b) does not preclude consideration of pre-10(b) events and developments, nor does 10(b) preclude consideration and analysis of facts which help interpret and cast light on events within the 10(b) period. Here, to hide behind 10(b) as a device to avoid full consideration of all relevant facts and circumstances is to place one's head in the sand.

The ALJ and GC both claim that the 9/4/12 Policy was a momentous, substantial, and significant change. Both bemoan speculative effects such as a stifling of RN's individuality and creativity, supposed deflation of morale, and creation of an unpleasant work environment. Yet, both the ALJ and GC fail to consider the undisputed evidence that the Union itself was complacent, lackadaisical, and dilatory in challenging this alleged earth-shaking and incomprehensively onerous change. Such intellectual escapism, avoidance, disregard of facts and context, is highly disturbing and should not be countenanced.

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[11] Pub. L. No. 111-148, 124 Stat. 119 (2010)

[12] In addition, Respondent submits that the rationale set forth in the dissent of Member Hayes in *Virginia Mason Hospital*, 358 NLRB No. 64 (2012), is also applicable to this matter. The 9/4/12 Policy not only goes to protecting the core purposes of the Hospital, but also meets the standards set forth in *Peerless Publications*, 283 NLRB 334 (1987), thereby overcoming a presumption that the 9/4/12 Policy is a mandatory subject of bargaining. Respondent further maintains that the *Virginia Mason* decision cited immediately above was wrongly decided as it limited the core purpose rationale to the printing industry.

VI. PROCEDURE-RELATED MATTERS

- Ironically, the GC accuses Respondent of shifting defenses by its filing of an Amended Answer four days prior to the hearing which posed additional affirmative defenses. (GCAB p. 25, Fn.37, p. 29, Fn.40) In the process, GC overlooks and disregards the following:
    - Section 102.23 of the Board's Rules and Regulations provides that an answer may be amended at any time prior to the opening of the hearing.
    - GC made three amendments at the beginning of the hearing, including one based on Respondent's observations that a certain allegation made no sense. (Tr.11-13)
    - There is no inconsistency between Respondent's First Amended Answer of April 4, 2013 and the additional Affirmative Defenses placed in the June 7, 2013 Answer.
    - GC voiced no objection at the hearing to Respondent's June 7, 2013 Answer.
    - The reason for Respondent's Answer being filed on June 7 was that the fact on that date the Chief Administrative Law Judge on that date denied Respondent's Motion to Postpone Hearing Indefinitely, which had been filed by Respondent the day before. Had Respondent's Motion been granted, there would have been no need to file its amended answer until a later time, prior to a rescheduled hearing.
- It is likewise hard to fathom how and why the GC could assert that Respondent had not "specifically urged" the issue of the AGC's authority to proceed in this matter. (GCAB 31) Thus, the issue was specifically posed by Respondent:
    - in its Third and Fourth Affirmative Defenses;
    - in its Brief to the ALJ;
    - in its Exception No. 57, as well as on pp. 47-49 of RBISE.
- Similarly, GC's assertion that issue of the certification's validity is "immaterial," simply cannot be squared with the allegations that he himself necessarily set forth in the Complaint, pp. 5(a) and 5(b).
- While the GC stoops to nimble semantic games with Respondent's contentions as to the separable and discrete nature of the unilateral change aspects of the case, it is obvious that a prerequisite to a finding of any violation, including the information request aspects of

the case, is a valid certification. And a valid certification must necessarily be predicated upon the decision of a number of lawfully appointed Members sufficient to constitute a lawful quorum. That did not occur in cases involving the Hospital.

CONCLUSION

For reasons set forth in Respondent's Exceptions, in its RBISE, and in a Brief in Reply to GCAB, it is respectfully submitted that the Complaint be dismissed and that the ALJ's Decision and related Order must be vacated.

Dated: Brentwood, Tennessee
December 27, 2013

Respectfully submitted,

By: /s/ _____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE MICHAEL ROSAS

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HEALTH PROFESSIONALS AND ALLIED	)	
EMPLOYEES, AMERICAN FEDERATION	)	
OF TEACHERS (AFL-CIO)	)	
	)	
Charging Party	)	

CERTIFICATE OF SERVICE OF
BRIEF IN REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF FILED IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Undersigned, John Jay Matchulat, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, that the "Brief in Reply to GC's Answering Brief Filed In Response To Respondent's Exceptions To The Decision Of The Administrative Law Judge" was e-filed on December 27, 2013, through the website of the National Labor Relations Board (www.nlrb.gov).

The Undersigned does hereby further certify that, on December 27, 2013, a copy of "Brief in Reply to GC's Answering Brief Filed In Response To Respondent's Exceptions To The Decision Of The Administrative Law Judge" was served upon the Charging Party by e-mail, as follows:

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December 27, 2013

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