UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEALTHBRIDGE MANAGMENT, LLC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD, and NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU, AFL-CIO,	CASE NOS. 34-CA-073303 34-CA-080215

RESPONDENTS' ANSWERING BRIEF IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

New England Health Care Employees Union, District 1199 SEIU, AFL-CIO ("Union") filed unfair labor practice charges in Case Nos. 34-CA-073303 and 34-CA-080215. The Regional Director issued the Complaint[1] in Case No. 34-CA-073303 on April 30, 2012, as part of a Consolidated Complaint with other unfair labor practice charges. That Complaint was further amended in a Second Amended Consolidated Complaint on July 6, 2012. On August 2, 2012, Case No. 34-CA-073303 was severed from the Second Amended Consolidated Complaint, and a separate Complaint was issued.[2] (GCX-1(e)).[3] An Order Consolidating Case No. 34-CA-080215 with Case No. 34-CA-073303 was issued on September 28, 2012, as part of the Amended Consolidated Complaint ("Complaint"), and trial was set for December 11, 2012. (GCX-1(s)). The listed respondents timely filed Answers to all Complaints. (GCX-1). On October 25, 2012, the Regional Director issued an Order Rescheduling Hearing, rescheduling the trial to an undetermined date. (GCX-1(y)). On March 12, 2013, the

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[1] The Complaint is invalid because it was issued under the authority of the Acting General Counsel, who was not validly appointed under the Federal Vacancies Reform Act. *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 U.S. Dist. LEXIS 114320, at *4 (W.D. Wash. 2013).

[2] The Order Severing Cases in Case Nos. 34-CA-070823, 072875, 073303, 075226, and 083335 that was issued by the Regional Director on August 2, 2012, was not included in the formal documents introduced by Counsel for the General Counsel at the outset of the hearing. (GCX-1; Tr. Vol. IV at 664:24–665:14). Respondents filed a Post-Trial Motion to Add the Exhibit to the Record, and by letter dated August 14, 2013, the Administrative Law Judge took official notice of the aforesaid Order Severing Cases, subject to any objection by Counsel for the General Counsel in her Post-Trial Brief. In her Post-Trial Brief to the Administrative Law Judge, Counsel for the General Counsel did not object.

[3] General Counsel's Exhibits and Respondents' Exhibits will be designated, respectively, as GCX and RX. Citations to the trial transcript will be made as (Tr. Vol. __ at ____), and the ALJ's decision, JD (NY)-51-13, is cited as (ALJD at ___).

trial was rescheduled for June 25, 2013, and was held from that date through June 28, 2013, before Administrative Law Judge Raymond P. Green (the "ALJ"). (GCX-1(aa)).

On July 25, 2013, Respondent HealthBridge Management, LLC ("HealthBridge") and Respondent 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford ("Long Ridge" or "Center") (collectively "Respondents") filed two post-trial motions: Post-Trial Motion to Add Exhibit to Record (discussed above in footnote 2) and Post-Trial Motion to Implement Terms of Joint Stipulation ("Motion to Implement") (collectively "Post-Trial Motions"). Pursuant to Respondents' Motion to Implement, the ALJ implemented the parties' joint stipulation and removed Care Realty, LLC and Care One, LLC as respondents and from the caption of the case. (ALJD at 1). Timely Post-Trial Briefs were filed by the parties with the ALJ.[4]

On November 1, 2013, the ALJ issued his Decision and Order ("Decision") finding that Long Ridge discharged employee Tyrone Williams ("Williams") because of his conduct on January 7, 2013, and not for any reason that violated the Act. (ALJD at 8:38–8:41). Respondents timely filed their Exceptions and Supporting Brief ("Exceptions") to a portion of the ALJ's Decision on December 10, 2013. Following the grant of an extension of time, Counsel for the General Counsel ("GC") timely filed her Cross Exceptions to the Decision of the Administrative Law Judge ("Cross Exceptions") on January 6, 2014. The GC did not file an Answering Brief to Respondents'

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[4] Volumes III and IV of the transcript erroneously state that John Doran appeared on behalf of Respondents. In addition, Attorney Dunlap's name is incorrect in various places and in various different ways. Her proper name is Nicole Bermel Dunlap. The court reporter also erroneously interchanged Attorney Dunlap and Attorney Howlett's comments in various places in the transcript. (Tr. Vol. III at 490:7–490:10; Vol. IV at 606:12–606:23).

Exceptions. Pursuant to the Board's granting Respondents' Request for Extension of Time to File Answering Brief, Respondents submit to the Board this Answering Brief in Opposition to the GC's Cross Exceptions ("Answering Brief").

II. FACTS

The Complaint alleges that Long Ridge terminated Williams on January 27, 2012,[5] because of his activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act. (Complaint at ¶¶ 10–11). At trial, however, GC did not argue that Williams was discharged for *his* Union activities, and no proof was submitted that Williams engaged in any Union activities (other than core membership). (ALJD at 3:35–3:36). To the contrary, GC argued that because Patrick Atkinson ("Atkinson"), a Union delegate, involved himself in the Center's investigation of Williams's conduct, the Center punished Williams more severely. (Tr. Vol. I at 14:23–15:6). At trial, GC conceded that Williams's conduct on January 7 warranted disciplinary action but argued that discharge was inappropriate. (ALJD at 2:4–2:6, 4:42–4:43; Tr. Vol. I at 14:4–14:10, 14:23–15:1).

A. Long Ridge Terminated Williams Because He Engaged In Unprofessional And Inappropriate Conduct, Including Inappropriate Interaction With A Supervisor And Derogatory Verbal Conduct, In Violation Of The Center's Professional Conduct/Courtesy And Workplace Violence Policies.

On Saturday, January 7, Williams was working as the third floor housekeeper. (ALJD 3:44; Tr. Vol. II at 373:9–373:16, 375:12–375:14). On that date, Kathleen Treacy ("Treacy"), the Director of Social Services at Long Ridge, was discharging a long-term patient from the third floor and was also manager on duty for the Center. (Tr. Vol. III at 442:14–443:4, 446:4–446:19). Treacy began working regularly with the long-term

[5] Unless otherwise indicated, all dates refer to those in 2012.

patients on the third floor only three months earlier, in October 2011, and she neither knew, nor had spoken previously to, Williams. (Tr. Vol. II at 394:20–395:2; Tr. Vol. III at 443:5–444:445:8). Nevertheless, on January 7, Williams acted unprofessionally and inappropriately toward Treacy because she did not know that he was the third floor housekeeper.

1. When Manager on Duty Treacy Did Not Recognize Williams, He Acted In An Unprofessional And Inappropriate Manner.

The events surrounding Williams's termination are largely undisputed. Treacy testified that on January 7, she saw a roach on the third floor nurse's station, called several times for housekeeping, and never received a response from Williams, the third floor housekeeper. (ALJD at 3:43–3:44; Tr. Vol. III at 449:3–450:6, 454:13–454:14; GCX-9 at 3). Treacy explained that the first time she paged housekeeping, the second floor housekeeper told her to specifically page the third floor housekeeper. (Tr. Vol. III at 450:6–450:16; GCX-9 at 3). The second time she paged housekeeping, she saw Williams[6] standing behind people in the middle of the hallway near the nurse's station, looking angry and refusing to make eye contact with Treacy. (Tr. Vol. III at 452:10–453:21, 473:21–474:17; GCX-9 at 3). At that time, Williams did not identify himself as housekeeping, say anything to her, or otherwise respond to her page for housekeeping. (Tr. Vol. III at 454:9–454:15). When Treacy paged for housekeeping a third time, she saw Williams 50 to 60 feet away, leaning against the wall on one of the patient corridors with his arms crossed, looking angry, and staring her down. (Tr. Vol. III at 455:5–455:15, 456:3–456:7; GCX-9 at 3).

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[6] When Treacy first saw Williams, she did not know his name, but she later learned it by looking at his ID badge. (Tr. Vol. III at 459:2–459:12).

At that time, Treacy did not know who Williams was, so as she walked down the patient corridor, she stated that she did not know where housekeeping was. (ALJD at 3:44–3:46; Tr. Vol. III at 456:18–456:20; 459:2–459:12). Williams came out from one of the patient rooms, hanging on the door frame, and called in a loud voice, like a drill sergeant, "Did you call housekeeping? I want to know did you call housekeeping? Answer me! I asked you a question! Did you call housekeeping? Do you know who I am? Do you know who I am? Answer me! You looked directly at me and you didn't know who I was?"[7] (ALJD at 3:46–3:47; Tr. Vol. III at 456:21–458:7; GCX-9 at 3). Treacy apologized and told Williams she thought he was a nurse. (ALJD at 3:47; Tr. Vol. III at 458:9–458:17). However, Williams continued repeating "Do you know who I am?" until Treacy explained that there was a patient being discharged and that the family needed his help loading the bags. (ALJD at 3:47–3:48; Tr. Vol. III at 459:19–460:16). Williams, walking backwards toward the patient's family, and in their presence, loudly and in a "horrible tone" told Treacy "I'm housekeeping, get that straight sweetheart." (ALJD at 3:48–3:49; Tr. Vol. III at 457:10–457:13, 460:16–461:24, 476:19–477:5; GCX-9 at 3).

Unrelated third-party witnesses confirmed that Williams's tone, demeanor, and actions toward Treacy were unprofessional and inappropriate. (ALJD at 4:33–4:34). Two employees from Daniel Care, a licensed home agency for the elderly, were with the patient being discharged that day and witnessed Williams's behavior toward Treacy. (GCX-9 at 4–5; Tr. Vol. III at 478:12–479:9, 480:20–485:1). Erica Chiluisa ("Chiluisa"),

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[7] After the events occurred, Treacy submitted a statement documenting what happened. The phrases Treacy put in quotation marks in her statement were exactly what Williams told her. (Tr. Vol. III at 466:24–467:6; GCX-9 at 3).

a supervisor at Daniel Care, testified that Williams[8] acted inappropriately. (Tr. Vol. III at 478:12–479:9, 480:20–485:1; GCX-9 at 4). According to Chiluisa, Treacy called housekeeping several times without any response. (Tr. Vol. III at 479:22–480:5; GCX-9 at 4). Chiluisa also witnessed Williams's attitude toward Treacy when Treacy commented that she did not know where housekeeping was. (Tr. Vol. III at 480:15–481:2; GCX-9 at 4). Chiluisa heard Williams tell Treacy that he was right there and how could she not see him, and she heard Treacy apologize and say she thought Williams was a nurse, not housekeeping. (Tr. Vol. III at 480:15–481:2, 481:4–481:6; GCX-9 at 4). Chiluisa testified that although Treacy continued to apologize to Williams, his response to Treacy was rude and disrespectful, and his tone was loud and angry. (Tr. Vol. III 481:6–481:15; GCX-9 at 4). At the end of the exchange, Williams told Treacy "Now you know, sweetheart," which Chiluisa perceived as very disrespectful and bordered on sexual harassment. (Tr. Vol. III at 481:16–481:19, 483:21–483:24, 488:5–488:11; GCX-9 at 4). All of this occurred in front of Chiluisa, the aide from Daniel Care, and the patient's family. (Tr. Vol. III at 481:25–482:1). Chiluisa could see that the incident with Williams upset and embarrassed Treacy to the point that Treacy was holding back tears and wanted to cry. (Tr. Vol. III at 483:25–484:2).

Williams's own testimony generally confirms that he was upset with Treacy and acted inappropriately toward her. Consistent with Treacy's testimony, Williams admitted that he did not respond to the first page for housekeeping. (Tr. Vol. II at 374:9–16, 376:5–376:24, 386:16–387:13; GCX-9 at 6). He testified that Treacy paged a second

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[8] Chiluisa testified that she did not recall hearing Williams's name, but in her written statement, she identified him as "Tyson" (GCX-9 at 4). It is undisputed that the events Chiluisa witnessed on January 7 were between Treacy and Williams.

time, specifically for third floor housekeeping, and that he went to the nurse's station. (Tr. Vol. II at 376:25–377:7; GCX-9 at 6). Rather than notifying someone at the nurse's station of his presence, Williams simply resumed his cleaning duties. (Tr. Vol. II at 376:25–377:11; GCX-9 at 6). When Williams heard Treacy say that she had called for housekeeping but no one responded, he admittedly reacted by telling her that was not true, and that he had come to the nurse's station, but no one was there. (Tr. Vol. II at 377:13–377:22, 393:23–394:4; GCX-9 at 6). Williams also testified that when Treacy told him she did not realize he was housekeeping, he argued with her, "How would you not know if I'm housekeeping, if I'm pushing a yellow cart with the housekeeping equipment and you know that you and you've seen me in the building, how would you not know I'm housekeeping." (Tr. Vol. II at 377:23–378:9, 394:10–394:15; GCX-9 at 6).

In due course, Treacy, the two Daniel Care employees, and the patient's family left the building to assist the patient with her departure, and Williams helped the family carry the patient's bags. (ALJD at 3:49; Tr. Vol. II at 395:22–396:17; Vol. III at 461:8–461:22; GCX-9 at 4). While outside, Chiluisa confirmed that Williams's tone and demeanor were unprofessional and inappropriate when she told Treacy that she could not believe the way Williams had spoken to Treacy. (Tr. Vol. III at 462:15–462:20). Because she was the manager on duty for the Center that day, Treacy told Williams that she needed to speak to him, and Williams followed her into the building, through its glass entry doors. (ALJD 3:50; Tr. Vol. III at 462:20–463:2, 484:3–484:9). As they entered, Treacy could see in the reflection Williams walking behind her and putting his arms straight up in the air and pushing downward. (ALJD 3:50–3:52; Tr. Vol. III at 463:3–463:11, 463:13–464:6). Treacy perceived that Williams was pushing downward

like he was going to slam dunk a basketball into her head, but he did not touch her. (ALJD 3:50–3:52; Tr. Vol. III at 463:3–463:11, 463:13–464:6). Chiluisa saw Williams put his hands in the air with his wrist turned in as he followed Treacy into the building, mocking Treacy behind her back. (ALJD 3:52–4:1; Tr. Vol. III at 484:10–485:1). Williams testified that he entered the building behind Treacy but did not recall if he made any hand gestures while doing so. (Tr. Vol. II at 406:18–406:25). Thus, Treacy's and Chiluisa's testimony regarding Williams's conduct stands unrebutted and undisputed.

Immediately afterward, in an administrative area off of the front lobby, Treacy spoke to Williams about his conduct, telling him that she was the manager on duty that day, that his behavior was inappropriate and disrespectful, and that he could not behave that way toward her or anyone else in the facility. (Tr. Vol. III at 464:7–464:25). Williams responded by arguing with Treacy, again in a hostile, drill-sergeant tone, that Tracy did not know who he was and did not know his name. (Tr. Vol. III at 465:1–465:7). As he was speaking, Williams moved closer and closer to Treacy until he was in her physical space. (Tr. Vol. III at 465:5–465:8). Treacy repeated herself and ended the conversation; she did not tell Williams she saw his hand gestures reflected in the glass entry doors because she was afraid that the situation would escalate even further. (Tr. Vol. III at 465:17–466:4). Williams never apologized to Treacy. (Tr. Vol. III at 465:15–465:16). Williams admitted meeting with Treacy in the lobby area but did not recall what was said during his conversation with her, so Treacy's testimony about what occurred is undisputed. (Tr. Vol. II at 407:5–407:23).

2. The Center Properly Investigated Williams's January 7 Interactions with Treacy.

After her conversation with Williams, Treacy immediately reported the incident to the Director of Nursing Services and to William Owusu ("Owusu"), the Director of Housekeeping and Williams's supervisor, neither of whom were in the building that day. (ALJD at 4:1–4:2; Tr. Vol. III at 467:7–468:2). On January 8, Treacy told Administrator Polly Schnell ("Schnell") everything that had happened with Williams the previous day. (ALJD at 4:1–4:2; Tr. Vol. III at 468:11–469:20). Treacy also wrote a statement documenting Williams's conduct and solicited written statements from the two Daniel Care employees describing what they saw and heard. (ALJD at 4:1–4:4, 4:32–4:33; Tr. Vol. III at 466:5–466:19, 470:7–471:9, 485:2–486:7; GCX-9 at 3–5).

That week, Schnell met with and solicited a statement from Williams. Williams testified that on Monday, January 9, Owusu told him that Treacy complained to Owusu and Schnell that Williams had been rude and disrespectful to her and that Schnell wanted to see him about it. (Tr. Vol. II at 396:18–398:11). Williams did not contact Schnell that day, as Owusu had requested, and was not scheduled to work again until Friday, January 13. (Tr. Vol. II at 372:21–372:24, 385:4–385:14, 398:12–398:15, 401:20–401:22). Williams met with Schnell on Tuesday, January 10, only after Schnell told Tequila Watts ("Watts"), Williams's live-in paramour, that Schnell needed to meet with Williams. (Tr. Vol. II at 314:14–314:19, 398:16–398:22, 399:10–399:11, 422:4–422:7).

Williams, Schnell, Owusu, Owusu's supervisor, and Watts, as Williams's representative, were present at the January 10 meeting. (ALJD 4:7–4:8; Tr. Vol. II at 398:23–399:2, 400:21–401:3, 421:23–422:3). Williams testified that Schnell explained

to him and Watts what Treacy stated Williams had done, including that he yelled at her. (ALJD at 4:6–4:7; Tr. Vol. II at 399:15–399:20, 422:8–422:13,). In response, Williams told Schnell about the numerous pages for housekeeping, his interactions with Treacy, and that he did not yell at Treacy. (ALJD 4:8; Tr. Vol. II at 399:21–400:19, 422:8–422:13). At the end of the meeting, Schnell asked Williams to write a statement about what he had just said; Williams told Schnell it would not be a problem to write a statement. (ALJD 4:8–4:9; Tr. Vol. II at 401:7–401:17, 402:20–402:23).

Despite attending the meeting with Schnell on January 10 and hearing all that was said there, including Williams's comment that a statement would not be a problem, Watts went with Atkinson to Schnell's office on January 12 to ask Schnell why Williams needed to write a statement. (ALJD 4:12–4:13; Tr. Vol. II at 311:15–312:23, 313:4–313:7, 314:2–314:5, 316:17–316:24). Watts testified that she told Atkinson that she and Williams had met with Schnell on January 10 but did not tell Atkinson the details of that meeting.[9] (ALJD 4:9–4:10; Tr. Vol. II at 423:7–423:9, 424:6–424:10). Watts testified

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[9] In his decision, the ALJ found that when he met with Schnell "Williams denied the accusations completely and he was asked to provide a statement as to what took place on that date. [Tequila] Watts later went to the shop steward Atkinson (who was not present at the facility) and told him about the meeting." (ALJD at 4:8–4:10). GC excepts to this factual finding. (Cross Exceptions No. 2 at p. 2). However, it was undisputed that during the January 10 meeting with Schnell, Williams denied the accusations and Schnell asked him to provide a statement. (Tr. Vol. II at 399:21–400:19, 422:8–422:13). Moreover, Watts's testimony, as quoted below, clearly establishes Watts told Atkinson about the January 10 meeting:

> Q. So when you contacted Mr. Atkinson, you told him that you were at this meeting on Tuesday, January 10, right?
> A. Right.
> Q. And you told him what the meeting was about?
> A. Right.

that when she and Atkinson went to Schnell's office, Atkinson asked Schnell why she wanted a statement from Williams, and Schnell stated that she was doing an investigation between Williams and a manager. (Tr. Vol. II at 412:1–412:8). According to Watts, Schnell said that Williams was not being *accused* of anything,[10] and Atkinson then questioned why Williams needed to write a statement. (Tr. Vol. II at 412:9–412:12). Watts testified that, at that point, Schnell stated that she was done with the meeting and that she was not going to tell Watts *again*,[11] then opened the door and told

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> Q. And you told him that [Schnell] asked Mr. Williams to write a statement about what Ms. Treacy was saying and what he was saying?
> A. Right.
> Q. Okay, so you told Mr. Atkinson all that?
> A. Uh-huh
> . . .
> Q. So your answer is yes?
> A. Well basically I just went to [Atkinson] and told [Atkinson] that [Schnell] wanted a statement from [Williams].
> Q. Right, but you told Mr. Atkinson about this meeting on Tuesday, January 10?
> A. I mentioned it to him, but I didn't go into detail.

(Tr. Vol. II at 422:14–423:9). Atkinson did not dispute or contradict Watts's testimony because he did not testify at all about whether Watts told him she and Williams met with Schnell on January 10. (Tr. Vol. II at 260:8–261:9).

[10] Atkinson testified that Schnell said: "Tyrone didn't do anything wrong." Given the ALJ's findings on this conversation, it is apparent that he credited Watts's testimony over Atkinson's. (*See* ALJD at 4:12–4:14).

[11] In his Decision, the ALJ found that "On January 12, Atkinson and Watts went to see Schnell and asked Schnell to tell them what Williams was being accused of. Schnell responded that he knew perfectly well what it was about; that she was fed up with him and that he should leave her office." (ALJD at 4:12–4:14). GC excepts to this factual finding and argues that the ALJ's finding is "sheer speculation." (Cross Exceptions No. 3 at p. 2). The ALJ's finding, however, is clearly supported by Watts's testimony at trial that when Atkinson asked Schnell why Williams needed to write a statement the following conversation ensued:

> Q. Okay. And what was said and by whom in that meeting?

Atkinson and Watts to leave her office. (ALJD at 4:13–4:14; Tr. Vol. II at 412:15–412:18).

On Friday, January 13, his next scheduled work day, Williams gave Schnell his statement dated January 12 ("January 12 Statement"). (ALJD 4:17–4:19, 4:24–4:25; Tr. Vol. II at 380:8–380:25). Later that day, Schnell met with Williams, Watts, and Union delegate Ria Pemberton ("Pemberton")[12] and suspended Williams pending

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> A. So basically [Atkinson], you know, said to [Schnell], it came to my attention that you wanted a statement from [Williams]. She said to [Atkinson], yes. So [Atkinson] wanted to know why does [Williams] need to write a statement? [Schnell] said that she's just simply doing an investigation between [Williams] and the manager So then he wanted to know what was [Williams] being accused of. [Schnell] said [Williams]'s not being accused of anything. So if he's not being accused – [Atkinson] said if he's not being accused of anything, why does [Williams] need to write a statement? So at that point, she got upset and was like, you know what [Atkinson]? I'm done. Right? Then she gets up, but [Atkinson] said to her, but [Schnell], I just want to know what [Williams] is being accused of. She said, know what? I'm done. And she said, ***don't make me tell you again***, you haven't seen me yet. ***She went to the door, opened the door and yelled, get out.***

(Tr. Vol. 2 at 411:21–412:18). Watts's testimony was corroborated by her written statement to the Union in support of a grievance that Atkinson filed about the incident. (GCX-17 at 3). Thus, GC's own witness testified that Schnell told Watts and Atkinson "don't make me tell you again." Combined with Williams's and Watts's testimony that Schnell had told them two days earlier precisely what the allegations were, this statement supports the ALJ's finding that Schnell told Watts that she knew perfectly well what the allegations were against Williams. (Tr. Vol. II at 399:15–401:17; 421:23–422:13)

[12] Although Pemberton testified at trial regarding Atkinson's termination pursuant to a subpoena from Respondents, she was not called by GC regarding Williams and thus did not offer any proof of what occurred in Schnell's office on January 13.

investigation.[13] (ALJD 4:25–4:26; Tr. Vol. II at 379:22–380:2, 402:25–405:5, 413:10–413:19; GCX-8 at 2). Williams testified that Schnell originally gave him a suspension notice for "insubordination," but when Pemberton asked how Williams was insubordinate, Schnell asked Williams, Pemberton, and Watts to step into the hallway so she could call Ed Remillard ("Remillard"), the Regional Human Resources Director for HealthBridge. (Tr. Vol. I at 44:4–44:7; Tr. Vol. II at 381:17–382:4, 413:21–414:6, 414:7–414:25). When they returned, Schnell presented Williams with a more detailed suspension notice that stated that Williams was being suspended for "inappropriate interaction with a supervisor." (ALJD at 4:26–4:27; Tr. Vol. II 383:10–383:13, 415:1–415:3; GCX-9 at 2). At Schnell's request, Williams subsequently submitted a second statement, dated January 16 ("January 16 Statement"). (ALJD 4:30; Tr. Vol. II at 405:25–406:4; GCX-9 at 6).

While the investigation was ongoing, Remillard and Larry Condon ("Condon"), HealthBridge's Regional Director of Operations for Connecticut, reviewed Williams's January 12 and January 16 Statements, and the statements of Treacy, Chiluisa, and Amina Mamah-Trawill (the other Daniel Care employee). (Tr. Vol. I at 154:10–154:16; Tr. Vol. IV at 593:3–593:9, 594:9–594:11, 594:15–594:17, 595:20–596:16; GCX-9 at 1, 3–7). Based on the statements alone, Remillard and Condon believed that Williams's actions on January 7 warranted termination. (ALJD 4:39–4:40; Tr. Vol. I at 161:11–

[13] In the Cross Exceptions, GC states that "[Williams was not issued any discipline, or a 'suspension pending investigation' which is Respondent[s'] normal practice any time an incident that could possible lead to termination is at issue." (Cross Exceptions at 3). This statement is clearly false and misrepresents the facts as the undisputed testimony was that Schnell suspended Williams pending an investigation on January 13. (*See* citations noted above). Moreover, the notice of suspension pending investigation that Schnell provided to Williams on that date was submitted as GCX-8 at 2.

163:18; Tr. Vol. IV at 596:22–597:4). After he reviewed the statements, Condon discussed the matter with Schnell. She had not decided yet whether to terminate Williams, and Condon suggested that Schnell call the nurse from Daniel Care to get a third-party's perspective. (Tr. Vol. IV at 596:15–597:10; 642:17–643:3). Subsequently, Schnell called Chiluisa, and Chiluisa told Schnell everything that had happened, including how Williams's conduct upset Treacy, and the comments made to Chiluisa by the patient's family member that the conduct was disrespectful and rude, that the family member could not believe that this was the type of people Long Ridge hired, and that if he were younger, the family member would have "beaten [Williams's] ass." (Tr. Vol. III at 486:8–489:2). When Schnell then asked Chiluisa what discipline she would administer in that situation, Chiluisa responded that given Williams's *continued* disrespect, she would terminate him if she were his supervisor. (Tr. Vol. III at 489:1–489:15).

Schnell subsequently called Condon and told him that, after speaking with Chiluisa, it was clear to her that Williams's conduct was inappropriate and that he should be terminated. (Tr. Vol. IV at 598:12–598:14; 643:4–643:9). Condon again agreed that termination was warranted. (Tr. Vol. IV at 598:16–598:17). Remillard also agreed with Schnell's decision to terminate Williams. (Tr. Vol. I at 161:11–163:18).

3. Long Ridge Terminated Williams For His Unprofessional And Inappropriate Behavior On January 7, Which Violated The Center's Professional Conduct/Courtesy And Workplace Violence Policies.

On January 27, Williams was terminated for his "unprofessional and inappropriate conduct, including, but not necessarily limited to, [his] inappropriate interaction with a supervisor including derogatory verbal actions." (ALJD at 4:36; RX-1;

Tr. Vol. IV at 596:25–597:4, 598:21–598:25, 654:15–654:19). Williams's conduct was in violation of both the Professional Conduct/Courtesy Policy and the Workplace Violence Policy. (Tr. Vol. 1 at 111:22–112:4, 113:22–114:2, 161:11–163:14; Tr. Vol. IV at 654:25–655:5; GCX-11; GCX-12). The Professional Conduct/Courtesy Policy specifically provides that the following behaviors are unacceptable and may result in disciplinary action, up to and including termination:

> • Talking loudly, yelling or screaming on [Long Ridge] property whether or not residents are present. . . .
>
> • Rudeness or disrespect to another employee, resident or visitor. . . .
>
> • Causing, creating or participating in the disruption of any kind during work hours or on [Long Ridge] property. . . .
>
> • Insubordination, including but not limited to, failure or refusal to obey the orders or instructions of a supervisor or member of management, or the use of abusive or threatening language toward a supervisor, member of management or a resident.

(GCX-11 at 173). Similarly, the Workplace Violence Policy lists the following specific examples of conduct that are considered threats or acts of violence:

> • Threatening physical or aggressive contact toward another person. . .
>
> • Veiled threats of physical harm or like intimidation.

(GCX-12 at 248). Williams's conduct violated both of these policies. (Tr. Vol. 1 at 161:11–163:14; Tr. Vol. IV at 654:25–655:5; GCX-11; GCX-12).

Long Ridge has terminated several other employees who, like Williams, engaged in unprofessional and inappropriate conduct. Latifia Wright ("Wright") was terminated on September 20, 2010, for "unprofessional and inappropriate conduct including, but not

necessarily limited to, [her] improper interaction with a co-worker and a resident and the disrespectful attitude [she] exhibited toward them." (ALJD at 5:19; GCX-8 at 40). Wright first was rude to residents who complained about their food, and then she argued with the nurse rectifying the problem in front of residents at the nurse's station. (ALJD at 5:19–5:20; GCX-8 at 34–41). On October 19, 2010, Willie Dickerson ("Dickerson") was terminated for "unprofessional and inappropriate conduct, including, but not necessarily limited to, [his] threatening physical and verbal actions toward[] another staff person and [his] use of vulgar, profane and derogatory language." (ALJD 5:10–5:16; GCX-14 at 23). Another employee reported that Dickerson's body motions were aggressive and that he made verbal threats toward him. (GCX-14 at 1–3, 17). Two employees, Sylvia Taylor ("Taylor") and Iris Brown ("Brown") were terminated on February 4, 2011, for their "unprofessional and inappropriate conduct, including, but not necessarily limited to, [their] threatening physical and verbal actions toward[] another staff person and [their] use of vulgar profane and derogatory language" after they engaged in an at-work argument that was loud, involved poking fingers at each other's chests, and was witnessed by other employees and residents. (ALJD 5:4–5:8; GCX-8 at 5–30, 32). Like Williams, these comparable employees were terminated because they engaged in conduct that violated Long Ridge's Policies on Professional Conduct/Courtesy and Workplace Violence.

Long Ridge did not terminate Williams because he was a Union member, because the Union and/or Atkinson became involved in the investigation process, or for any other reason proscribed by the Act, and there is no evidence of any reason for his termination other than his January 7 conduct. (ALJD at 8:38–8:41; Tr. Vol. IV at 599:1–

599:8, 600:19–600:22). While Condon was the Administrator at Long Ridge from December 2010 through June 2011, he was involved in numerous grievances at the Step 2 level, virtually all of which were brought and presented by delegates, including Atkinson. (Tr. Vol. IV at 593:10–593:15, 599:9–599:18, 600:4–600:10). During that time, employees regularly sought the assistance of Union delegates if they had an issue or were disciplined, and no employee ever was disciplined or discharged for doing so. (Tr. Vol. II at 303:14–303:22; Tr. Vol. IV at 599:20–600:3). Moreover, Atkinson admitted that he met with Schnell "a lot" in the two years prior to his termination (Tr. Vol. II at 301:13–301:16), and GC presented no evidence that employees on whose behalf Atkinson (or any other delegate) had spoken were disciplined more severely or discharged because of Atkinson's or the Union's involvement.

4. When the Union Grieved Williams's Termination, It Never Alleged That Williams Was Terminated Because Of Atkinson's Or The Union's Involvement In The Investigation.

The Union grieved Williams's termination. (Tr. Vol. I at 165:5–165:13; Tr. Vol. IV at 600:23–601:2; RX-2). During the grievance process, the Union alleged that Williams was terminated without just cause. (Tr. Vol. I at 168:4–168:14; Tr. Vol. IV at 600:23–602:22; RX-3). Neither the Union nor Williams ever asserted that Williams was terminated because the Union and/or Atkinson became involved in the investigation of the January 7 events. (Tr. Vol. I at 168:11–169:3; Tr. Vol. IV at 602:23–603:4; RX-3; RX-4). Furthermore, at the Step 3 grievance meeting, the Union complained that Schnell sought statements from third party witnesses and not employees, but when Remillard asked Williams to identify any other person from whom Long Ridge should

have solicited a statement, Williams responded that he could not. (Tr. Vol. I at 168:11–168:23; RX-4).

III. ARGUMENT

A. The ALJ Properly Found That Under Wright Line, Williams Was Discharged Lawfully.

It is undisputed that the stated reason for Williams's discharge was his "unprofessional and inappropriate conduct, including, but not necessarily limited to, [his] inappropriate interaction with a supervisor including derogatory verbal actions." (RX-1). Because GC introduced no evidence at trial to contravene that stated reason, it is clear that such termination was lawful absent evidence of unlawful motivation.

Alleged violations of Section 8(a)(1) and (3) involving questions of employer motivation must be analyzed under the burden-shifting doctrine articulated in *Wright Line*, 251 NLRB 1083, 1087 (1980). Under *Wright Line*, GC bears the initial burden of proving by a preponderance of the evidence, for each alleged violation of Section 8(a)(1) and (3), that: (1) the employee as to whom the alleged violation was committed engaged in conduct protected by Section 7 of the Act; (2) the employer knew of the employee's protected conduct; (3) the employer took an adverse employment action against the employee; and (4) the protected conduct was a motivating factor in the decision to take the adverse action. *Wright Line*, 251 NLRB at 1087.

Regarding the fourth factor, to determine whether an inference of unlawful motivation can be drawn, the Board examines such factors as: (1) inconsistencies between the proffered reasons for discipline and other actions of the employer; (2) disparate treatment of certain employees compared to other employees with similar

work records or offenses; (3) deviations from past practice; and (4) proximity in time of the discipline to the Union activity. *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1184 (2004). If GC's proof is insufficient to establish each of the *Wright Line* elements, the inquiry is over. *Wright Line*, 251 NLRB at 1087. However, if GC establishes each element, the employer still may avoid liability by proving by a preponderance of the evidence that it would have taken the same action regardless of the employee's protected conduct.

In evaluating the proof offered by the employer, the Board may not second guess the employer's business decisions. *Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816 (1993) ("the Board does not substitute its own business judgment for that of the employer"). Thus, the question is not whether the Board would have made the same decision under similar circumstances. *Id.* Rather, the appropriate inquiry is whether the non-discriminatory reasons proffered by the employer, more likely than not, would have compelled the employer's decision, notwithstanding any protected conduct. *DTG Operations, Inc.*, 357 NLRB No. 6 (2011); *Ryder Distribution Resources, Inc.*, 311 NLRB at 816–17. In circumstances where employers have obtained evidence of misconduct, they need not prove that the accused employee committed the alleged offenses. "Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Neptco, Inc.*, 346 NLRB No. 6, slip op. at 2 (2005). Indeed, the employer needs only to prove its defense by a preponderance of the evidence. Notwithstanding the employer's opportunity to establish its defense, the ultimate burden of proving discrimination remains with GC at all times. *Wright Line*, 251 NLRB at 1088 n. 11.

In his Decision, the ALJ found the following:

> In my opinion, the assertion that the Respondent decided to overly punish Williams because of Atkinson's meeting with Schnell is simply too far-fetched. Anything is possible, but I view this theory as being so unlikely that it cannot, in my opinion, give rise to a prima facie case. Although a bit more possible, the idea that the Respondent, which clearly had a good cause to discipline Williams, decided to discharge him because of its over-all animus demonstrated by other cases involving other facilities,[14] is also a very thin reed.

(ALJD at 8:11–8:16). Because the ALJ correctly found that GC did not establish either that Williams engaged in protected conduct with Atkinson or that protected conduct, if any, was a motivating factor in the decision to take the adverse action, the Board should affirm the ALJ's Decision that GC did not establish a prima facie case of discrimination. Alternatively, the Board should find that Long Ridge would have terminated Williams regardless of any alleged protected activity.

1. The ALJ Properly Found That Williams Never Engaged In Any Union Or Protected Activity with Atkinson.

While it is true that Atkinson purportedly went to see Schnell on Williams's behalf, there was no evidence that Williams himself ever spoke to Atkinson or sought his assistance in Schnell's investigation. *Wright Line* requires both that *the employee as to whom the alleged violation was committed has engaged in conduct* protected by Section 7 of the Act and that the employer *knew* of the employee's protected conduct. 251 NLRB at 1087. To the contrary, the record is clear that Watts, Williams's paramour, acted unilaterally by soliciting Atkinson to become involved after Schnell asked Williams

[14] Respondents excepted to the ALJ's consideration of "background" information in the form of several Board and ALJ decisions that he speculated to involve Respondents and/or affiliated companies because no such information was put in the record. (*See* Brief in Support of Exceptions at 16–17).

for a statement. (Tr. Vol. II at 410:21–411:2) (Watts testified that after the January 10 meeting, "*I* wanted to get [Atkinson] involved," so "*I* went to Atkinson and told him [Schnell] wanted a statement from [Williams]" (emphasis added).). Further, it was Watts, not Williams, who accompanied Atkinson to Schnell's office on January 12, and Watts is still employed at Long Ridge. (Tr. Vol. II at 409:6–409:13, 411:17–412:2).

Because there was no evidence that Williams ever engaged in protected conduct with Atkinson, GC cannot prove that Williams's discharge was "motivated" by such non-existent conduct, as she alleges. Accordingly, GC's reliance on *Fresh and Greens of Washington*, 359 NLRB No. 145 (2012), is misplaced because that case involved a discharged employee who directly enlisted a union representative to voice his complaints about schedule changes to the store manager, which is not the case here. For all of these reasons, the ALJ's finding that Williams "did not engage in any union or protected concerted activity" was correct. (ALJD at 7:39).

2. The ALJ Properly Found That Any Alleged Protected Conduct Was Not A Motivating Factor In The Decision To Terminate Williams.

In her Cross Exceptions, GC makes several arguments in attempting to establish that any protected conduct engaged in by Williams was a motivating factor in the decision to terminate him. GC's arguments, however, fail for several reasons. First, none of the comments allegedly attributed to Schnell infer unlawful motive. Second, there was no deviation from any established past practice[15] that would raise an

[15] In the Cross Exceptions, GC incorrectly states that this issue relates to Respondents' affirmative defense and that the burden of persuasion, therefore, shifts to Respondents. This is wrong. As part of her prima facie case, GC must prove the fourth factor of the *Wright Line* analysis, that the protected conduct was a motivating factor in the decision to take the adverse action. 251 NLRB at 1087. Comments allegedly made by Schnell

inference of unlawful motivation. GC's argument regarding past practice is based on multiple faulty premises. Notably, GC totally neglected the language of the applicable expired CBA that prohibited Long Ridge from considering prior discipline that was more than one year old in any future discipline. Because she ignored that language, and the language in the Professional Conduct/Courtesy Policy, GC came to the faulty conclusion that "the only two record examples of discharges for first offenses were for violations of the Workplace Violence Policy." (Cross Exceptions at 11). GC then relied on that faulty premise (again ignoring the CBA provisions regarding the limited use of prior discipline) to improperly distinguish Williams's termination from that of comparable employees. Nevertheless, as explained fully below, GC's arguments are unpersuasive.

a. Schnell's Alleged Comments Do Not Infer Unlawful Motivation.

GC solicited testimony from Watts that Schnell commented that Williams's conduct was "not a big deal," that Williams was not being "accused" of anything, and that Williams did not do anything "wrong." (Tr. Vol. II at 262:13–262:20, 412:3–412:10, 423:17–423:21). In her Cross Exceptions, GC argues that Schnell's comments belittled the seriousness of the accusations against Williams prior to Atkinson's involvement. (Cross Exceptions at 3, 5, 7). However, Watts's testimony that Schnell made those statements is not credible for several reasons. First, Watts is the mother of Williams's

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and Long Ridge's past practices were solicited by GC at trial as evidence of unlawful motivation, and in her Post-Trial Brief to the ALJ, GC argued that Respondents' failure to utilize progressive discipline established the requisite animus to prove her *prima facie* case. (GC's Post-Trial Brief to ALJ at 32–33). Thus, GC retains the burden of proof to show that any alleged change to past practice infers unlawful motivation. As explained below, GC grossly misstates the evidence in the record. Such misstatement of the record does not, by any means, prematurely shift the burden of persuasion to Respondents on the final element of GC's prima facie case.

children and is in an ongoing personal relationship with Williams, with whom she lives. (Tr. Vol. II at 314:14–314:19, 399:10–399:11). Second, Williams testified that Schnell had his supervisor explain to him that Treacy had accused Williams of rude and disrespectful conduct and that Williams needed to meet with Schnell on Monday, January 9. (Tr. Vol. II at 396:18–398:11). According to Williams, when he failed to contact Schnell, she had Watts contact him the next day to tell him she (Schnell) needed to speak to him immediately, even though he was not scheduled to work at the Center. (Tr. Vol. II at 314:14–314:19, 372:21–372:24, 385:4–385:14, 398:12–398:22, 399:10–399:11, 401:20–401:22, 422:4–422:7). Schnell's urgency to discuss Treacy's accusations with Williams, and then having the meeting with Williams, Watts, Owusu, and Owusu's supervisor to discuss those accusations, all of which Williams described in his testimony, belie Watts's claim that Schnell told her that there were no accusations against Williams, or that the accusations were "not a big deal" or were not serious. (Tr. Vol. II at 398:23–399:2, 400:21–401:3, 421:23–422:3). Finally, Long Ridge often obtained statements from employees who simply witnessed events, including two from Watts during the Dickerson investigation. (GCX-8 at 11–21, 26–29, 35–39; GCX-14 at 1–5, 8–11, 18–22; GCX-18 at 4–5). Knowing from experience what a "fact" witness was, Watts understood that what Schnell told her and Williams in the January 10 meeting was obviously an "accusation" made by Treacy against Williams that was serious and caused her to take it upon herself to involve Atkinson, directly contradicting her claim that Schnell made the alleged statements. (Tr. Vol. II at 431:5–432:1).

GC solicited testimony from Atkinson and Watts that Schnell became frustrated with them when they came to her office on January 12 to ask why Williams needed to

submit a statement. (ALJD at 4:13–4:14; Tr. Vol. II at 261:6–263:4, 411:21–412:18). Schnell's frustration that day is not evidence of unlawful motivation toward Williams (or Atkinson).[16] Rather, her frustration was a natural reaction to the fact that just two days earlier, Schnell had had an in-depth meeting with Williams and Watts, during which she explained the allegations Treacy had made against Williams and asked him to submit a statement regarding those allegations. Now, here was Watts, with Atkinson, asking Schnell why she asked Williams to give a statement. Both Williams and Watts admitted that Schnell explained to them what Treacy accused Williams of doing (Tr. Vol. II at 399:15–399:20, 422:8–422:13), yet Atkinson and Watts went to Schnell's office, unannounced and feigning ignorance of the circumstances of Williams being asked to submit a statement.[17] No wonder Schnell was frustrated with them.

Finally, GC solicited testimony from Ancy Destin ("Destin"), a Union organizer. Destin first testified that he called Schnell on January 12 regarding her meeting earlier that day with Atkinson and Watts, and that she allegedly told him (Destin) that "because [Williams] got [Atkinson] involved, it's out of my hand[s]. Corporate now—is now

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[16] Atkinson testified that Schnell also told him that she could not give him any information without talking to Remillard. (Tr. Vol. II at 317:10–317:16). Watts did not testify that Schnell made any such comment, and Watts did not record such in the statement she submitted in support of a Union grievance. (GCX-17 at 3). Especially in light of Williams's testimony that Schnell met with him two days earlier and explained what Treacy accused him of doing, Atkinson's testimony regarding this alleged statement by Schnell is not credible.

[17] Watts incredibly testified at trial that she did not know what the January 10 meeting was about. (Tr. Vol. 423:24–426:3). Notably, there was *no* testimony that between January 12 and January 16 Schnell gave Williams additional information regarding the accusations. Nevertheless, on January 16, Williams provided Schnell with a statement that reflected his clear comprehension of the accusations Treacy made against him. (GCX-9 at 6).

involved and it's not my decision to pretty much terminate." (Tr. Vol. II at 345:21–346:10). That Schnell would make a statement regarding termination before Williams had been suspended pending investigation is ludicrous. As detailed by Remillard, Chiluisa, and Condon in their respective, undisputed testimony, Schnell made the decision to discharge Williams; she made that decision only after talking to Chiluisa, which did not occur until approximately two weeks after this alleged January 12 call;[18] and Condon and Remillard then concurred with Schnell's decision. (Tr. Vol. I at 161:8; Tr. Vol. III at 486:11–489:15; Tr. Vol. IV at 596:15–597:6, 598:12–598:25, 626:4–626:9). Destin further testified that Condon made a comment at the Step 2 meeting in March that he (Condon) would refer the Union's concerns to "corporate." (Tr. Vol. II at 341:20–341:25, 347:24–348:14). Condon testified that he did not have a conversation with Destin at the Step 2 grievance meeting and specifically denied telling Destin that he (Condon) would refer the Union's concerns to "corporate." (Tr. Vol. IV at 603:5–603:11). That Condon, HealthBridge's Regional Director of Operations at the time, would make the statement attributed to him by Destin, who knew Condon and HealthBridge to be "corporate," is as ludicrous as the statement Destin attributed to Schnell. (Tr. Vol. I at 161:8; Tr. Vol. IV at 593:1–593:7, 598:12–598:25, 603:12–603:16, 626:4–626:9). The ALJ properly ignored Destin's testimony because it was not relevant to any issue that was in dispute and was entirely incredible.

[18] Destin was completely confused regarding when Williams was suspended and discharged, testifying, for example, that he "assumed" Williams was terminated on January 13, before Williams provided his January 16 Statement. (Tr. Vol. II at 368:15–369:6).

b. Long Ridge Complied With Its Own Policies When It Disciplined Williams.

The majority of GC's exceptions pertain to the ALJ's failure to make findings regarding Long Ridge's Professional Conduct/Courtesy Policy and Work Place Violence Policy. (Cross Exceptions Nos. 5–11 at 7–15). Like many of her other exceptions, GC simply ignores inconvenient facts and bases her argument on multiple faulty premises. First, GC ignores that Williams's conduct was in violation of both the Professional Conduct/Courtesy Policy and the Workplace Violence Policy. (Tr. Vol. 1 at 111:22–112:4, 113:22–114:2, 161:11–163:14; Tr. Vol. IV at 654:25–655:5; GCX-11; GCX-12). Despite testimony from Remillard that Long Ridge relied on both the Professional Conduct/Courtesy Policy and the Workplace Violence Policy to terminate Williams, GC argues that Williams's conduct did not violate the Workplace Violence Policy because the "workplace violence box was not checked on his *suspension* form and there was no reference to any violence or threat of violence." (Cross Exceptions at n.6) (emphasis added). GC's argument ignores most of Treacy's testimony and the Workplace Violence Policy, itself, which defines threats or acts of violence to include "threatening physical or aggressive contact toward another person" and "veiled threats of physical harm or like intimidation." (GCX-12 at 248).

Second, Long Ridge's Professional Conduct/Courtesy Policy does not require that a warning be issued before an employee can be terminated for conduct that violates the Policy. Thus, the Professional Conduct/Courtesy Policy expressly lists items that "***reflect the types of behaviors that*** are unacceptable and ***may result in disciplinary action, up to and including suspension*** (with or without pay) ***and/or termination of employment.***" (GCX-11 at 173) (emphasis added). This language

eviscerates GC's assertion that because it discusses progressive discipline, the Professional Conduct/Courtesy Policy *requires* Long Ridge to issue progressive discipline and prohibits immediate termination. Long Ridge's past practice also confirms that progressive discipline is not required before an employee who violated the Professional Conduct/ Courtesy Policy can be terminated. Two of the employees that Respondents allege were comparable to Williams (Wright[19] and Dickerson[20]) violated the Professional Conduct/Courtesy Policy and, like Williams, were immediately terminated. GC ignores these employees because they had previously received discipline. However, the applicable provisions of the CBA prohibited Long Ridge from using or considering that prior discipline when it made the decisions to terminate those employees because, in the case of each employee, the prior discipline occurred more than a year before the incidents giving rise to Wright's and Dickerson's terminations, making their prior discipline irrelevant to the respective termination decisions.[21]

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[19] Wright was terminated for "unprofessional and inappropriate conduct including but not necessarily limited to, [her] improper interaction with a co-worker and a resident and the disrespectful attitude [she] exhibited toward them." (ALJD at 5:19; GCX-8 at 40).

[20] Dickerson was terminated for "unprofessional and inappropriate conduct, including, but not necessarily limited to, [his] threatening physical and verbal actions towards another staff person and [his] vulgar, profane and derogatory language." (ALJD at 5:10–5:16; GCX-14 at 23).

[21] The use of such discipline would have violated the terms of the CBA and would have been arbitrated by the Union at the time. (Tr. Vol. II at 352:4–354:3). Specifically, Article 26, subsection C of the CBA prohibits the use of "material from any source other than the personnel file . . . to be used as the basis for any personnel matter which reflects negatively on an Employee record," and Article 25, subsection F provides that "[a] record of disciplinary action shall be removed from an Employee's personnel file twelve (12) months after it was issued," assuming that there was no further disciplinary action and that the discipline was not for patient abuse. (GCX-6 at Art. 25, § F, Art. 26, §C). There is no assertion that either Wright or Dickerson's prior discipline was for patient abuse. Moreover, there was no evidence that any prior discipline was used or considered when Dickerson and/or Wright were terminated. GC ignores this fact entirely

c. Employees Who Engaged In Conduct Similar To Williams Also Were Terminated.

GC's attempted distinction between violations of the Professional Conduct/Courtesy Policy and the Workplace Violence Policy is entirely irrelevant. In the first place, GC is not empowered to decide by fiat that conduct violates one policy but not another in the face of undisputed testimony and proof that it violates both policies. Moreover, the real question is whether there was any disparate treatment of certain employees compared to other employees with similar work records or offenses, and the answer to that question is a resounding "NO." Thus, the ALJ correctly compared Williams's conduct to that of the comparators without making any distinction as to which policy Williams's conduct violated.

To create an inference of unlawful motivation using comparators, GC must show disparate treatment between an alleged discriminatee and other employees with similar work records or offenses.[22] *Robert Orr/Sysco Food Services, LLC*, 343 NLRB at 1184. Here, the disciplinary records of Taylor, Brown, Wright, and Dickerson show the opposite. Thus, under the leadership of Schnell, Condon, and others, Long Ridge had a consistent history of discharging employees who, like Williams, were yelling or engaging in otherwise disruptive or threatening behavior. Like Williams, Wright, Dickerson,[23] Taylor, and Brown acted in an aggressive manner, engaging in threatening verbal and

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in her Cross Exceptions and relies upon Wright and Dickerson's prior conduct. (Cross Exceptions at 11–12, 14).

[22] To the extent GC argues that Taylor, Brown, Wright, and Dickerson were not comparable employees, the proof shows only that dissimilar employees were treated the same (all fired), not that employees with *similar* offenses were treated differently.

[23] As explained in Section III.2.b and footnote 22 above, neither Wright nor Dickerson's prior discipline was considered when the decisions were made to terminate them.

physical actions. Williams unleashed his verbally aggressive and threatening conduct in front of residents and their families against a supervisor, Treacy, thereby engaging in even more egregious behavior than the other discharged employees.

In an apparent attempt to show disparate treatment,[24] GC submitted two compilations of records at trial (GCX-18 and GCX-19) that describe discipline received by six employees: Yvelon Sauveur ("Sauveur"), Dickerson, Evelyn Rosiclair ("Rosiclair"), Monica Gayle ("Gayle"), Jen Baker ("Baker'), and Erik Michel ("Michel"). However, these documents do not show that Sauveur, Dickerson, Gayle, Rosiclair, Baker, or Michel were disciplined for offenses similar to Williams's offense. Thus, Sauveur and Baker were disciplined for refusing to complete a task. (ALJD at 5:30–5:32, 5:41–5:43; GCX-19 at 1–2, 8; Tr. Vol. II at 276:1–277:6, 286:4–287:10). Gayle was disciplined for undescribed "inappropriate professional conduct." (ALJD at 5:34–5:36; GCX-19 at 3; Tr. Vol. II at 277:13–277:25). Dickerson was suspended in June 2009[25] for leaving work prior to the end of his shift, and Rosiclair's grievance form simply alleges that she received "unfair" discipline. (GCX-18; GCX-19 at 5; Tr. Vol. II at 282:14–283:14). A One-on-One Education was given to Michel on November 3, 2008, for telling the Administrator "Don't start with me," but there was no indication that this was said in a hostile or threatening tone. (ALJD at 5:38–5:39; GCX-19 at 6; Tr. Vol. II at 283:21–285:24). Accordingly, there is no evidence that any of these employees

[24] GC makes no mention of the discipline noted in GCX-18 and 19 in her Cross Exceptions and, thus, she has abandoned this argument on appeal to the Board.

[25] This was Dickerson's earlier discipline that was not considered when he was terminated in October 2010.

engaged in inappropriate interactions or derogatory verbal actions toward a supervisor, the conduct for which Williams was terminated.

d. Long Ridge Properly Investigated Williams's Conduct. [26]

At trial, GC questioned the methods employed by Long Ridge during its investigation of the Williams incident, specifically whether Williams could be investigated before being placed on suspension, and whether statements from third-party vendor employees and supervisors could be used. Dispatching those arguments, the ALJ found that Respondents' investigation "was more than adequate especially since Williams, in his initial response, chose to be evasive and claimed that he didn't know what he was being accused of despite being told a few days earlier." (ALJD at 8:28–8:31). Although the Centers try to obtain statements from suspended employees on the date they are suspended, Remillard testified that that was not always possible because the Centers' Administrators conducted the investigations. (Tr. Vol. I at 71:11–71:14, 79:4–80:1). For example, during the investigation into the incident between Dickerson and Sauveur that occurred on September 17, 2010, Long Ridge solicited statements from Sauveur, Watts, Pemberton, Rita Fluerancy, and Marie Phitron on September 17, but Dickerson and Sauveur were not suspended until September 21, 2010. (GCX-14 at 2, 5, 8–11, 13–14). Schnell's decision, therefore, to suspend Williams when he returned to work on Friday, January 13, rather than while he was not scheduled, was not a

[26] GC has also abandoned this argument on appeal to the Board because it was not raised in the Cross Exceptions.

deviation from established past practice at all, much less one that created an inference of unlawful motivation.[27]

During the grievance process, the Union questioned Long Ridge's solicitation of and reliance on statements from Daniel Care employees and supervisors, and at trial, GC questioned Condon's advice to Schnell to contact "the Daniel Care nurse" (Chiluisa) directly. Any argument that it is inappropriate to solicit information from witnesses to an employee's misconduct because those witnesses are not Center employees or residents is simply absurd. As Condon testified, he suggested that Schnell speak to Chiluisa, not Owusu, because Chiluisa witnessed the events, and Williams was terminated for his conduct on January 7, not for his general housekeeping abilities.[28] (Tr. Vol. IV at 646:3–637:2).

3. Long Ridge Would Have Terminated Williams Regardless Of Any Alleged Protected Activity.

As explained above, Williams did not engage in any protected conduct that was a motivating factor in his termination. Regardless, Long Ridge would have taken the same action against Williams even if he had engaged in protected conduct. GC asserts that Williams was punished more severely because Atkinson became involved in the investigation of the January 7 incident with Treacy. Notwithstanding the fact that Williams never involved Atkinson in anything, it is undisputed that at Long Ridge, the Union is involved in virtually all investigations and decisions regarding employee

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[27] In addition, because Williams did not supply his January 12 Statement until he returned to work on January 13, it was logical to suspend him on that date. (Tr. Vol. II at 380:8–380:25).

[28] It is undisputed that Owusu was not present in the Center on January 7. (Tr. Vol. II at 373:9–373:18).

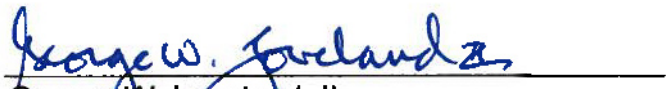
discipline, and there is absolutely no proof that any employee was disciplined more severely for involving the Union. Thus, Condon testified that while he was the Administrator at Long Ridge, he was involved in many grievances at the Step 2 level that were brought by delegates, including Atkinson. (Tr. Vol. IV at 593:10–593:15, 599:9–599:18). During that time, employees regularly sought the assistance of Union delegates if they had an issue or were disciplined, and no one was disciplined for doing so. (Tr. Vol. IV at 599:20–600:3). It was also a common occurrence for delegates, like Atkinson, Pemberton, and Anthony Lecky, to present grievances, and Atkinson admitted he met with Schnell "a lot" in the two years prior to his termination. (Tr. Vol. II at 301:13–301:16; Tr. Vol. IV at 600:4–600:10). In light of the undisputed facts that the Union always was involved and that no employee ever was disciplined for getting the Union involved, it is obvious that the Union's involvement with Williams did not cause him to suffer a harsher fate. To the contrary, as detailed above, Williams's verbally abusive and threatening behavior toward Treacy, in and of itself, was sufficient to cause, would have caused, and did cause his termination, regardless of any alleged protected activity or Union involvement in the investigation.

The record establishes that Long Ridge terminated Williams, as it did other employees, because he engaged in unprofessional and inappropriate conduct, including his inappropriate interaction with a supervisor and derogatory verbal conduct. Williams's conduct violated the Center's Professional Conduct/Courtesy and Workplace Violence Policies, and there is no credible and/or factual evidence that Long Ridge had an unlawful motive when it terminated Williams. Accordingly, GC has failed to carry her burden under *Wright Line*, and the discharge was lawful.

IV. CONCLUSION

For all of the reasons set forth above, the ALJ's determination that Respondents did not violate Sections 8(a)(1) and (3) of the Act by terminating Williams is supported by the evidence and should be affirmed by the Board.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of Respondents' Answering Brief in Opposition to Counsel for the General Counsel's Cross Exceptions to the Decision of the Administrative Law Judge were served in the manner set forth below:

Gary Shinners, Executive Secretary National Labor Relations Board 1099 14th St. N.W. Washington, D.C. 20570-0001	E-filing
JoAnne Howlett Counsel for the Acting General Counsel NLRB-Region 1 Causeway Street, 6th Floor Boston, MA 02222-1072	E-mail
Suzanne Clark, Vice President New England Health Care Employees Union, District 1199, SEIU Huyshope Avenue, 1st Floor Hartford, CT 06106	Overnight Delivery

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