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

KITSAP TENANT SUPPORT SERVICES, INC.

And

WASHINGTON FEDERATION OF STATE EMPLOYEES, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 28, AFL-CIO

Cases 19-CA-108144
19-CA-112388
19-CA-125239
19-CA-128656

*Richard Fiol, Esq.,* for the General Counsel.

*Gary E. Lofland, Esq. (Meyer, Fluegge & Tenney P.S.),*
for the Respondent Employer.

*Daniel Hutzenbiler, Esq. (Robblee Detwiler & Black PLLP),*
for the Charging Party Union.(*at trial and on brief)*

*Edward Earl Younglove, III, Esq. (Younglove & Coker, PLLC),*
for the Charging Party Union.(*counsel of record*)

## DECISION

### STATEMENT OF THE CASE

**ARIEL L. SOTOLONGO, Administrative Law Judge.** This case raises issues pertaining to the principles announced by the Board in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), where the Board held, for the first time, that an employer whose employees are represented by a union must bargain with the union before imposing discretionary discipline during the "interim period" between the union's certification (or recognition) and the parties' first collective-bargaining contract. *Alan Ritchey*, as well as numerous other Board decisions, was subsequently invalidated by the Supreme Court in its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), on the basis that Board members that were part the required quorum in those decisions had been unconstitutionally appointed by the President. Thus, *Alan Ritchey* and the other cases were not overruled by the Court on the basis that the Board had misinterpreted the Act, but were rather rendered null and void ab initio on constitutional grounds. This represents, as far as I am aware, an unprecedented scenario that presents a dilemma for Board administrative law judges on how to proceed when faced with *Alan Ritchey* issues, which is occurring with increasing frequency. Although it is clear that *Alan Ritchey*—where the Board in essence rejected (or at least modified) the existing doctrine regarding the collective-bargaining

obligations of the parties regarding discipline during the "interim period"—is not valid precedent, should administrative law judges proceed as if *Alan Ritchey* had never occurred and mechanically apply prior doctrine on such issues, or has the Board signaled a fundamental shift in policy that is likely to be reaffirmed and judges should accordingly read the proverbial "handwriting on the wall?" I believe, for the reasons discussed below, that the prudent course of action is to infer the latter, and to proceed accordingly.

I presided over this case in Seattle, Washington, on January 13-15, 2015, pursuant to a consolidated complaint issued by the Regional Director for Region 19, alleging that Kitsap Tenant Support Services, Inc. (Respondent or KTSS) had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to bargain with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO (the Union or the Charging Party) with regard to several issues, to wit: (1) the disciplining of five employees prior to imposing such discipline; (2) assigning bargaining unit work to nonbargaining unit employees; (3) changing the schedule and duties of a bargaining unit employee; (4) paying an annual holiday bonus to employees; and (5) failing to provide the Union with payroll records it requested.[1]

## Findings of Fact

### I. Jurisdiction and Labor Organization Status

Respondent admitted, and I find, that it is a Washington corporation, with an office and place of business in Bremerton, Washington, engaged in providing residential support services. During the 12-month period prior to November 26, 2014, as part of its business operations, it derived over $250,000 in gross revenues, and during the same time period it performed services worth in excess of $50,000 for the State of Washington, an entity directly engaged in interstate commerce. Accordingly, I find that at all times material, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Additionally, Respondent admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] In its answer to the complaint and its post-hearing brief, Respondent argues that the complaint was not validly issued inasmuch Regional Director Ronald K. Hooks was appointed by the Board when it lacked a proper quorum. This issue was disposed of by the Board in *Longshoremen ILWU Local 19 (Seattle Tunnels Partners)*, 361 NLRB No. 122, sip op. at 1 fn. 1 (2014), where the Board noted that Director Hooks was appointed in December 2011, at which time the Board had a valid quorum. Accordingly, I reject this argument.

## II. The Alleged Unfair Labor Practices

### *A. Background Facts*[2]

As briefly described above, Respondent is engaged in providing residential support services for physically, developmentally, and/or intellectually disabled individuals under contract with the Department of Social and Health Services (DSHS) for the State of Washington. In essence, its employees watch over, supervise, transport, and take care of individuals with various degrees of disabilities in their homes or apartments, although they do not provide medical services of any type.[3] Respondent has three components or programs, consisting of its Community Protection Division program (CPD); its Intensive Tenant Support program (ITS); and its Supported Living Light program (SLL). The CPD component is not part of, or germane to, the issues involved in the present case, since the employees in that component are in essence security guards and not part of the bargaining unit. Rather, the issues in the present case revolve around the employees in the ITS and SLL programs, which the Union has represented since March 2012, when it was certified as the collective-bargaining representative of a unit composed of employees in these two programs.[4] Bargaining unit employees who work in the ITS and SLL programs are referred to as "direct service staff" (DSS). Respondent's clients who are in the ITS program are individuals with significant disabilities, and require around the clock care and supervision by the staff. On the other hand, clients in the SLL program have milder disabilities and are more independent, requiring less supervision.[5]

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[2] The transcript, while generally accurate, contains a number of errors. The transcript should be corrected in the following manner: Page 9, line 24, the word "omit" should be "admit;" page 18, line 18, "turning" should be "charging;" page 189, line 16, "matriculating" should be "speculating;" page 238, line 3, "not" should be "now;" page 296, lines 5 and 6, "quite" should be "quit;" page 354, line 20, "Laminates" should be "Lemonidis;" page 377, line 3 "response to" should be "Respondent's;" page 384, line 21, "reactions" should be "your actions;" page 457, line 16, "laborer" should be "Allegra." There may be others, but these are the most prominent.

[3] One of the duties of staffers is to make sure that the clients take their prescribed medications, however.

[4] The bargaining unit represented by the Union is as follows:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SL Lite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

[5] These background facts are not in dispute, and were summarized by counsel during opening statements (Tr. 13-28). Henceforth, transcript pages will be referred to as "Tr." followed by the page number(s). General Counsel's exhibits will be referred to as "GC Exh.;" Respondent's exhibits will be referred to as "R. Exh.;" The Charging Party's exhibits will be "CP Exh.;" and joint exhibits will be referred to as Jt. Exh."

Respondent and the Union have been in collective-bargaining negotiations since 2012, but have not reached a collective-bargaining agreement as of the present.[6]

Alan Frey is Respondent's program manager, and as such is in charge of Respondent's day-to-day operations, including human resources, client intake, scheduling, crisis management, etc. About the only aspect of Respondent's operation that Frey is not directly involved in is its payroll, and the only person above him on the chain of command is Michael Closser, Respondent's CEO. (Tr. 35-36.) Frey provided the most testimony during the trial, having been called as an adverse witness (under Fed.R.Evid. 6(11)(c)) by the General Counsel as well as a witness by Respondent during the presentation of its case.

*B. The Disciplining of Five Employees*

The complaint alleges that Respondent disciplined five employees, Allegra Waldron, Kendrick Castillo, Tiana Taylor, Whitney Rolley, and Leslie Spires without first bargaining with the Union. Respondent does not dispute that it disciplined those employees, which it admits in its answer to the complaint, but disputes whether it did so without bargaining with the Union (in one instance, as discussed below), or disputes whether it has an obligation to bargain with the Union prior to imposing discipline.

Thus, the evidence shows that on September 16, 2013, Respondent issued Allegra Waldron a disciplinary letter placing her on unpaid administrative leave (GC Exh. 3). The letter states, and Frey testified, that the principal or precipitating reason for this discipline was Waldron's failure to write client "narratives."[7] The letter also mentions prior written warnings for failure to write narratives, as well as a prior problem having to do with a client's medication. Frey admitted, however, that this disciplinary action was not mandated, but instead was based on discretion he exercised in deciding to discipline Waldron. Among the factors he considered in choosing to exercise this discretion was Waldron's attitude and response when confronted with her alleged conduct, as well as prior warnings (Tr. 57; 365-366; R. Exhs. 24; 25). Frey testified that before issuing Waldron the letter described above, he notified Union Representative Sarah Clifthorne in person of his intentions to place Waldron on leave. Clifthorne told Frey that she wanted to meet the following Monday, September 16, to discuss this matter.[8] On Monday, September 16, the planned meeting between Frey and Clifthorne (or other union representatives) was canceled, because Waldron had apparently been involved in an accident and was not available to attend. Frey testified that he then phoned Waldron and informed her of his decision

[6] I take judicial notice of the fact that on June 4, 2014, Administrative Law Judge Jay R. Pollack issued a decision (JD(SF)-22-14) in a case involving eight separate charges, finding, inter alia, that Respondent KTSS had engaged in bad-faith bargaining in violation of Sec. 8(a)(5) and(1) of the Act by delaying and postponing numerous bargaining meetings and otherwise engaging in dilatory tactics. He also recommended dismissal of various other allegations of the complaint. The decision is currently pending before the Board on exceptions.

[7] According to Frey, among the duties required of DSS workers is to keep a written log, which they call "narratives," in which regular entries are made describing clients' progress in achieving goals or describing any problems. Narratives, according to Frey, should be done at minimum once per week, and are required by the supervising State of Washington Agency, DSHS, which periodically audits the narratives, which could "spell trouble" for Respondent if not performed (Tr. 271-273; 365-368).

[8] Frey and Clifthorne were at the time attending an NLRB hearing before Judge Pollack in the prior cases(s), and conferred during one of the breaks. Clifthorne confirmed Frey's testimony in this regard (Tr. 132).

to place her on leave pending further investigation, and sent Waldron the letter dated September 16, informing her of her being placed on leave of absence (GC Exh. 3). Frey met with union representatives on or about September 28, and informed them that he had decided to terminate Waldron. According to Frey, the union representatives asked him to "lay off" rather than discharge Waldron, who had already apparently filed for unemployment benefits. Frey declined, stating that it would not be legal to label her termination as a "lay off" in order for Waldron to collect unemployment. Frey discharged Waldron later that day, September 28 (apparently by phone), confirmed by letter dated October 1, 2013 (Tr. 57-58, 369-371, 460-464; R. Exh. 23). I found Frey to be a straightforward and credible witness, and note that his testimony was not contradicted by any other testimony or documentary evidence. I therefore credit his testimony, not only with regard to the events surrounding Waldron, but on all other matters he testified to.

Frey additionally testified that in September 2013, he received reports that Kendrick Castillo, a DSS staffer in the ITS program was sleeping during his shift, conduct which Frey testified endangers the significantly disabled clients in the ITS program, which need around the clock supervision. Frey phoned Castillo on September 20. 2013, to inquire about the matter, and testified that the phone call did "not go well," with Castillo turning hostile and combative with Frey. On September 24, 2013, Frey sent Castillo a letter notifying him that he was being placed on administrative leave, noting prior warnings he had received (Tr. 59-60, 375-376, 486-487; GC Exh. 33; R. Exh. 26 [same exhibit]). Frey admitted that he did not notify the Union prior to taking this action (Tr. 60-61). A few days later, Frey decided to discharge Castillo, and notified him via letter dated September 27, 2013. Prior to sending Castillo the discharge letter, Frey met with union representatives, who wanted Respondent to place Castillo on "lay off" status rather than being terminated—apparently so he could collect unemployment—but Respondent declined (R. Exh.32). As in the case of Waldron—and as discussed below, as in all cases of disciplinary action at issue in the present case—Frey admitted that he exercised discretion in deciding what type of discipline to impose (Tr. 60).

On February 28, 2014, Frey had a phone conversation with ITS staffer Tiana Taylor regarding her missing work and refusing to work weekends, and later on the same day notified Taylor via letter that he was placing her on administrative leave without pay pending further investigation. On or about March 11, 2014, Frey terminated Taylor. Frey admitted that he exercised discretion in deciding to discipline Taylor and that he did not notify or bargain with the Union prior to imposing discipline (Tr. 61-64, 465-468,; GC Exh. 39).[9]

On March 24, 2014, Frey, via email, notified the Union that he had placed ITS staffer Whitney Rolley on an unpaid leave of absence because she had failed to obtain her food handler's health card as well as her tuberculosis (TB) test, as required by State of Washington regulations in order to be employed in her capacity. Frey testified that he had verbally warned Rolley a few days before that she had until March 24 to obtain the food handler's card and TB test, and that she has failed to comply with that directive. Frey admitted that he exercised discretion in deciding to discipline Rolley, and that he did not notify the Union of her suspension

[9] The second page appears to be missing from GC Exh. 39, the February 28, 2014 memo to Taylor placing her on administrative leave.

(via the email) until after he had imposed the discipline, although he did so shortly afterwards. (Tr. 66-68, 330-336; GC Exh. 44.)[10]

In early May 2014, it came to Frey's attention that ITS staffer Leslie Spires, who works at a home with a client with significant mental disabilities, had allegedly used a client's EBT card to make several separate purchases for her own use.[11] According to Frey, like physical abuse, such conduct is considered to be "financial exploitation" and is extremely serious, and must be immediately reported to the Complaint Resolutions Unit (CRU), which is part of the DSHS of the State of Washington. Spires had apparently been recorded by video surveillance cameras at a retail store making such purchases. Frey confronted Spires about this conduct during a meeting with her on May 7, 2014, and at first she stated that she had made these purchases by mistake, but finally admitted doing so intentionally when confronted with evidence of repeated purchases. He informed her that he was placing her on immediate leave of absence pending further investigation. Frey then phoned Union Attorney Andy Lukes about his decision to suspend Spires, informing him that he had to report this matter to CRU, and according to Frey Lukes did not object. Frey sent a confirming email to Lukes on the following day (Tr. 68-70, 73-77, 311-315, 403-405; R. Exhs. 8; 9)

On May 13, 2014, Frey spoke with Lukes on the phone and informed him of his intention to terminate Spires. On May 14, 2014, by letter, Frey discharged Spires. The May 14 letter details Spires conduct, including her admission that she had misused the client's EBT card to make personal purchases (Tr. 323-324, 404-405; R. Exh. 10). After an investigation, the State of Washington's DSHS concluded that Spires had engaged in financial exploitation of a vulnerable adult, and banned Spires from working with such individuals in the future (R. Exh. 11).

### *C. The Change of Schedule Regarding Mary Sanders*

Mary Sanders has worked as a DSS "caregiver" (her words) at Respondent's ITS program for about 7 years.[12] She had always worked the evening shift from 3 to 11 p.m., until June 2013, when she was switched to the "day" shift from 7 a.m. to 3 p.m. How and why this switch came about is the subject of a dispute between the parties. According to Sanders, sometime in June 2013 she went to KTSS's office to pick up clients' checks when she was asked by two women in the office, whom she identified as Mieke (last name unknown) and Kathy Grice, whether she would like to switch to working the day shift. Sanders said that she would like to, because she was getting tired of working the evening shift. Sanders added that she did

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[10] Frey's March 24 email to the Union advises that he had given Rolley a deadline of Friday, March 28, to obtain the food handler's card and TB test or face termination. After her suspension, Frey and the Union exchanged emails and phone calls, and Rolley finally complied with the ultimatum at the "11th hour," on March 28, according to Frey (Tr. 336-338; R. Exhs. 14; 15). Respondent also introduced a copy of Washington's regulations regarding food handler cards and TB tests ( R. Exh. 16), and also a copy of the orientation package advising new employees that they must obtain those in order to work for Respondent (R. Exh. 16).

[11] An EDB card is like a debit card issued to disabled individuals by the Government, where food stamp funds, welfare payments, and other such benefits are deposited.

[12] Sanders described her duties as a "caregiver" were to make sure the clients at the home she worked in had food, took their medicines, were dressed properly, to take them to activities, do their laundry, and make sure they were safe. (Tr. 148.)

not, however, want to assume "head of household" (HOH) responsibilities.[13] (Tr. 147-149, 151-152, 175.)

Frey, on the other hand, testified that Sanders requested to be moved to the day shift, if such schedule became available, claiming that she was "getting to old" to work the evening shift. According to Frey, the scheduler informed Sanders that the HOH in her home had quit with little notice and that the day shift was therefore available (Tr.295-296).

On June 24, Sanders began working on the day shift. About a week later, she complained to Frey that she was not getting extra pay ($2 per hour) for the additional duties she was performing, which Sanders believed—or alleged—were the duties of HOHs. These additional duties, according to Sanders, were ordering medicines (from a pharmacy) and picking them up, calling doctors to make appointments and transporting clients to such appointments, shopping for food, and managing household money. Frey testified that he showed Sanders a copy of Respondent's manual listing the duties of DSS staffers, which included the duties Sanders was now complaining about, and explained that other (day shift) DSS staffers perform such duties on a regular basis. He said Sanders appeared satisfied with his explanation at the time. About 3 weeks after she started working on the day shift, Respondent appointed Ramon Tudela as HOH in Sanders' household, and he took over most of these "additional" duties that Sanders had been performing (Tr. 159-169, 216-217, 296-297, 300-302). For the reasons discussed below, I find Frey's testimony about these events more reliable and credible than Sanders'.

During cross-examination, Sanders was shown a copy of Respondent's 2011 "Program and Personnel Policy and Procedure Manual" (the manual) (GC Exh. 2), which lists the duties and responsibilities of *all* DSS staffers (which includes HOHs). This list includes all the duties that Sanders alleged were the sole responsibility of HOHs.[14] Sanders was adamant these duties had been changed from those listed in the original manual that was in place when she was first hired. (Tr. 188-189.) Sanders' recollection—and thus her credibility—was undermined by the introduction of Respondent's prior 2006 manual, signed by Sanders when she was hired, which listed the exact same duties of DSS staffers as reflected in the 2011 version (R. Exh. 6). I note that Sanders' testimony was scattered and often not directly responsive to the questions posed, and indeed I had to strike portions of her testimony because she often veered significantly from the topic at hand. While I believe that Sanders did not intentionally mislead, and sincerely believed that the duties that she inherited when she switched to the day shift were the sole responsibility of HOHs, the facts show her to be wrong and her testimony thus unreliable. Sanders, who had always worked in the evening shift, apparently had little if any knowledge of what duties "regular" DDS workers performed during the day shift. For example, making

[13] HOHs are part of the bargaining unit (see fn. 3, above), who are paid $2 per hour more than regular DSS workers because of additional responsibilities, such as "supervising" (which Frey defined as directing and advising) other DSS workers and being the liaison or "point of contact" with management. (Tr. 94, 298, 397-398.) At the time, there was no HOH at Sander's house, because that person had either been fired or quit.

[14] The listed duties are: personnel safety; community resources; health and personal hygiene; communication/basic literacy; skills; food/nutrition; home management; shopping; money management and budgeting; behavior and interpersonal relationships; transportation; leisure time; establishing a residence; maintain records and prepare reports; perform other duties as required by the program administrator or program supervisor. (GC Exh. 2, p. 10.) There are no separate duties listed for HOHs. (Tr. 298.)

appointments with and taking clients to doctors is something that only occurs during the day shift, for the simple reason that doctors' offices are closed during most of the evening shift, and the same holds true for ordering medications. Thus, the evidence shows Sanders was *not* assigned new duties or duties that were the sole responsibility of HOHs, because the record shows that other day-shift DDS staffers, besides HOHs, also perform these same duties, as indicated by Respondent's manual. Simply put, the duties of *all* DDS workers (which, again, includes HOHs), are clearly spelled out in the manual, which trumps the unreliable testimony of Sanders, an employee who had never worked the dayshift and thus was not the best witness to testify about what day-shift DDS workers did.

During Sanders' testimony, the General Counsel asked her about statements that had allegedly been made to her by Gloria Davenport, an individual not alleged in the complaint (or admitted by Respondent) as a supervisor or agent of Respondent, regarding Sanders' allegedly assuming "HOH duties" in her new shift. I sustained Respondent's hearsay objection, and the General Counsel then moved to amend the complaint to allege Davenport as a §2(11) supervisor or §2(13) agent of Respondent. Since at the time it was not clear whether Davenport's supervisory or agency status had been established, I reserved ruling on the motion to amend and did not allow the testimony, but allowed the General Counsel to make an offer of proof. The General Counsel made an offer of proof that if Sanders was allowed to testify about this matter, she would have testified that Davenport had told her that Respondent was "doing away" with the position of HOH, and that she was there to train her to perform HOH duties (Tr. 156). Under Section 102.17 of the Board's Rules and Regulations, judges are allowed wide discretion to determine whether to allow or deny motions to amend complaints. Among the factors to be evaluated in making such determination are: (1) whether there was surprise or lack of notice; (2) whether there was a valid excuse for delay in moving to amend; and (3) whether the matter was fully litigated. See *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015), and cases cited therein. Applying the above criteria, I do not find it proper, under the circumstances, to allow the complaint to be amended at the trial stage in order to permit the General Counsel to "slip in" Davenport's alleged comments. First, this testimony was a complete surprise to Respondent, who was never given any notice that Davenport would be alleged as a supervisor or agent or that her comments would be offered into evidence. On the other hand, I find it reasonable to infer that this evidence came as *no* surprise to the General Counsel, who presumably met or conferred with Sanders before the trial and therefore must have known in advance about Davenport's comments to her.[15] Thus, there appears to be no valid or reasonable justification for not amending the complaint before the trial, or at minimum, for not notifying Respondent about the General Counsel's intentions to do so during trial. Finally, this

[15] The testimony about Davenport was not accidently or unexpectedly uttered by Sanders, who rather was *specifically* asked by the General Counsel about Davenport's comments. Indeed, the argument that Respondent was planning all along to "do away" with HOHs appears to be an integral part of the General Counsel's theory of a violation, as alleged in par. 6(b) of the complaint, and a recurring theme at that. In that regard I note the General Counsel had alleged in the prior case before Judge Pollack that such proposal by Respondent (to exclude HOHs from the bargaining or to eliminate the position) was unlawful, an allegation that Judge Pollack found to have no merit. The General Counsel argued on the record in the present case, *prior* to Sanders' testimony, that such intent supported its theory that Respondent had planned all along to do away with HOHs and assign their duties to regular staffers such as Sanders. (Tr. 116-120, 128; GC Exhs. 72; 73.) Since this theory appears to be such prominent part of the General Counsel's case, it is therefore the more inexplicable that the allegations regarding Davenport were omitted from the complaint in the first place.

issue was not fully litigated—Davenport's alleged comments were not addressed during the remainder of the trial, and it is not clear if Davenport would have been available to testify on such short notice. Indeed, in their post-hearing briefs the General Counsel and the Union treat Davenport's alleged comments as if they were an admitted or undisputed fact, and Respondent does not even mention such proffered testimony in its brief. To permit this amendment under these circumstances would disregard due process and prejudice Respondent. Accordingly, and for the above reasons, I deny the General Counsel's motion to amend the complaint, and reject the proffered testimony.[16]

*D. Bargaining Unit Work Performed by Managers and Office Personnel*

It is undisputed that in or about June 2013, Respondent had managers and other office or administrative personnel perform approximately 80 hours' worth of work normally performed by bargaining unit workers in the "Supportive Living Light" (SLL) program. This fact was admitted by Respondent's counsel (and admitted agent), Gary Lofland, during his opening statements at the commencement of the trial. In his opening statements, Lofland conceded that Respondent had assigned the work in question to individuals not in the bargaining unit, as alleged in paragraph 6(d) of the complaint, but only for a limited time and for exigent reasons. (Tr. 21-22, 27-28.) The General Counsel did not introduce any evidence in support of this allegation, which Respondent had denied in its answer to the complaint, during its case-in-chief, other than the contents of a document (GC Exh. 74), as described below. After the General Counsel rested, Respondent made a motion to dismiss this allegation of the complaint. (Tr. 238-239.) I demurred, not certain at the time whether there was sufficient evidence in the record in support of such allegation. The parties did not address this issue in their post-hearing briefs, despite my request that they do so. The motion still stands, however, since I demurred my ruling, so I will now address this issue.

First, I note that statements made by counsel can be deemed to be an admission by their clients. See, e.g., *Packaging Techniques, Inc.*, 317 NLRB 1252 (1995), citing *U.S. v. Blood*, 806 F2d 1218, 1221 (4th Cir. 1986). Thus, it appears that Respondent's counsel did in fact admit the conduct alleged in paragraph 6(d) of the complaint during opening arguments, as the General Counsel suggested at the time in his response to the motion to dismiss. (Tr. 243.) It is also notable, however, that while Lofland admitted during his opening remarks that the above conduct had taken place, he did *not* admit that Respondent had failed to notify or bargain with the Union about this issue. Nothing was said about this. During its case-in-chief, the General Counsel did not introduce any evidence, through testimony or otherwise, establishing that Respondent had not bargained with the Union with regard to the bargaining unit work being

[16] I note that Frey had earlier admitted that Davenport, a "Household Manager" in charge of training, was a "supervisor," although it's not clear that this would suffice to meet the 2(11) definition, and he further explained her role (as a trainer) later in the record (Tr. 96; 402-403). Even if I were to permit the amendment of the complaint, and accept the proffer of proof, however, I would conclude that Davenport's alleged comments did not reflect the true facts of Respondent's position. First, Davenport's alleged comments about what constituted HOH duties are directly contradicted by Respondent's manual, which clearly lists the alleged "HOH duties" as being the responsibility of *all* DSS workers. Second, the fact that Respondent hired a new HOH for Sanders' house 3 weeks later completely undermines the theory that Sanders' alleged "new" duties was part of Respondent's plan to do away with HOHs.

performed by others, as alleged in paragraph 6(k) of the complaint.[17] The Union, likewise, did not introduce any evidence concerning this allegation during the General Counsel's case-in-chief. Accordingly, although the conduct alleged in paragraph 6(d) of the complaint was admitted by counsel, the General Counsel failed during its case-in-chief to establish a crucial and necessary element of its burden, as alleged in paragraph 6(k)—that Respondent had failed to notify or bargain with the Union about such conduct.[18] Accordingly, I conclude that the General Counsel failed in its burden of proof as to this allegation, and grant Respondent's motion to dismiss paragraphs 6(d) (and, sub silentio, 6(k) of the complaint, as it applies to par. 6(d)), as well as paragraphs 8 and 9 of the complaint as they relate to the conduct alleged in paragraphs 6(d) and (k).[19]

*E. The 2012 Holiday Bonuses*

It is undisputed that on or about December 5, 2012, Respondent paid bargaining unit employees a holiday bonus, as it had done on previous holidays before the Union was certified as collective-bargaining representative in early 2012. As in prior years, the amount of the 2012 holiday bonus varied according to the employee's length of service, with more senior employees receiving larger bonuses than newer employees. Frey testified that it was within Respondent's discretion whether to give a bonus, and well as determining the amount of such bonuses. (Tr. 77-84, 86-94; Jt. Exh. 1; GC Exh. 66.)

Union Representative Sarah Clifthorne, who was the chief negotiator for the Union in collective bargaining with Respondent, testified that she first heard about the December 2012 bonus from a unit employee sometime in January 2013. At that time, Clifthorne wrote a letter to Respondent's counsel (Lofland), inquiring about the 2012 holiday bonus. On or about February 14, 2013, Lofland responded to Clifthorne's letter, confirming the fact that a bonus had been given to employees in December 2012.[20] There is no evidence that Respondent notified or bargained with the Union about the bonus. (Tr. 111-113, 135-136.)

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[17] The General Counsel called Frey as an adverse witness, and also called Union Representative Clifthorne as a witness. Neither was asked nor otherwise testified about this matter.

[18] In an exchange of emails between Lofland and Union Representative Sarah Clifthorne, introduced during the General Counsel's case-in-chief as GC Exh. 74; Tr. 131, which date from June to October 2013, the Union requests information regarding the work performed by nonbargaining unit individuals earlier in the year, and Lofland's response provides information detailing the dates and circumstances regarding such work. While the information provided by Lofland in this email also constitutes an admission that such work was performed by individuals not in the bargaining unit, it does *not* constitute an admission that Respondent did not give notice or bargain with the Union about such work. While the questions raised by the Union in these emails imply or insinuate the latter, the General Counsel bears the burden of proof in this matter, and such burden must be met directly by the preponderance of the evidence, not by implication or insinuation.

[19] Frey, later in the proceedings during Respondent's presentation of its case, confirmed Lofland's admission that Respondent had engaged in the conduct alleged, and admitted during cross-examination that Respondent had indeed failed to notify or bargain with the Union. (Tr. 281-282, 391-392.) This was too late, since such evidence was never introduced during the General Counsel's case-in-chief, and therefore I strike such testimony. As Lofland correctly argued when he made his motion to dismiss, when I demurred my ruling Respondent was placed in the awkward position of having to refute something that had not been established by the General Counsel during its case. Accordingly, Respondent was prejudiced, and due process requires that I rule accordingly.

[20] Neither Clifthorne's letter to Lofland, nor Lofland's response, were introduced in evidence.

*F. The Union's Request for Information*

It is undisputed that on June 5, 2013, the Union sent a letter to Lofland describing its view about what had occurred during collective-bargaining negotiations between them (GC. Exh. 68). While Respondent generally disputes much of what the letter asserts, it is undisputed that in the letter the Union request that Respondent provide it with certain information. The request for information reads as follows:

> *Given the Employer's inability to pay for our proposal*, the Union requests all KTSS financial data and/ or records for calendar years 2011, 2012 and 2013 to date This request includes, but is not limited to, annual audited financial statements, audit reports, payroll records, annual budgets, profit and loss reports for each month in calendar years 2011, 2012, 2013, records identifying all sources of state funding, including projected state funding for the second half of 2013 and 2014, if available, as well as all records that demonstrate the financial solvency of KTSS in 2013 and 2014. [GC Exh. 68, p. 3. Emphasis added.]

It is likewise undisputed that Respondent refused to provide the above-described information (which it admits in its answer to the complaint), in essence arguing that it had never pleaded an inability to pay the proposed wages and benefits, and thus that it was not obligated to provide the requested financial records. (Tr. 108-110, 138; R. Exh. 1.) The General Counsel avers that the only portion of the above-described information requested by the Union which is the subject of the complaint is the request for *payroll records*, and nothing else.

**Discussion and Analysis**

I. The *Alan Ritchie* Issue Regarding five Disciplined Employees

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Union prior to imposing discipline on employees Allegra Waldron, Kendrick Castillo, Tiana Taylor, Whitney Rolley, and Leslie Spires. It is undisputed—indeed admitted by Respondent—that it exercised discretion in deciding whether to impose discipline and in deciding the type of discipline imposed.

As briefly discussed in the opening paragraph of this decision, whether this conduct by Respondent violated the Act depends entirely on whether the Board re-affirms the principles it announced in *Alan Ritchey*, which was invalidated by the Supreme Court in *Noel Canning* on constitutional grounds. Prior to *Alan Ritchey*, the Board had never held that employers had to bargain with unions prior to imposing discretionary discipline during the "interim period" after certification but before a first contract. Indeed, the Board had adopted a decision of an administrative law judge holding that there was no such pre-imposition duty to bargain over discretionary discipline during this period. See *Fresno Bee*, 337 NLRB 1161 (2002). In *Alan Ritchey*, the Board rejected the *Fresno Bee* rationale, explaining that its longstanding doctrine that employers must bargain with the collective-bargaining representative of its employees prior to discretionary changes in the status quo regarding terms and conditions of employment, a mandatory subject of bargaining. The Board explained that even if the employer's overall disciplinary policy or process had not changed, the discretionary application of such discipline in individual cases was fundamentally different from other unilateral changes in terms and

conditions of employment, which might only require impact bargaining. Employers are thus obligated to pre-imposition bargaining, the Board stated, in cases were the disciplinary actions have an inevitable and immediate impact on employees' tenure, status, or earnings—such as suspension, demotion or discharge. The Board reasoned that to hold otherwise could undermine employee support for a newly certified union, who would be seen as impotent in the face of "business as usual" unilateral conduct by the employer.

The Board further explained how this new doctrine would be practically applied, stating that although employers would be required to bargain with the union prior to imposing status-changing discipline, such bargaining would *not* be required to reach impasse before the employer could impose the planned discipline. Assuming that the employer complied with its pre-imposition bargaining obligation and then proceeded to impose discipline, it was still obligated to continue post-imposition bargaining to resolution or impasse. Moreover, the Board explained that there could be exceptions to such pre-imposition bargaining obligation, such as in exigent circumstances where immediate discipline was necessary.[21] Finally, the Board held that because precedent was not clear on this issue (or in the case of post *Fresno Bee* conduct, permitted by existing doctrine), it would only apply the pre-imposition bargaining obligation *prospectively*, considering the significant potential financial liability that employers could face.

Although *Alan Ritchie* is not a valid precedent in light of its invalidation by *Noel Canning*, I find its reasoning persuasive, and more importantly, I believe it is reasonable to assume its principles will be re-affirmed by the Board in the near future. Accordingly, I will apply its reasoning to the issues in the present case.[22] The evidence clearly shows that with the possible exception in the case of Waldron, Respondent did not notify or bargain with the Union prior to imposing status-changing discipline (leave without pay and/or termination) on the employees in question. Even in the case of Waldron, however, while Frey notified the Union prior to imposing leave without pay and actually scheduled a bargaining meeting with the Union, he still went ahead and suspended Waldron, and eventually discharged her, before any meeting took place. Accordingly, applying the *Alan Ritchie* reasoning to the instant case, Respondent violated Section 8(a)(5) and (1) of the Act by suspending and/or terminating employees Waldron, Castillo, Taylor, and Rolley without first bargaining with the Union. As discussed below, I conclude Respondent had exigent reasons to discharge Spires without first bargaining with the Union, and therefore I find no violation with regard to that employee.

Respondent argues that *Alan Ritchie* is not valid precedent and that in any event it was wrongly decided, even if its principles are re-affirmed by the Board. Respondent is correct as to the first argument, but I have already explained my basis for accepting its ruling. As to the argument that *Alan Ritchie* was wrongly decided, if the Board re-affirms its principles, as

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[21] The Board defined "exigent" circumstances as those where the employer has a "reasonable, good-faith belief that that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." *Alan Ritchie*, supra., slip op. at 9. The Board further clarified that the scope of such exigent circumstances would be best defined going forward, on a case-by-case basis, but would certainly include instances where the employer had a good-faith belief that the employee has engaged in unlawful conduct, exposed the employer to potential legal liability, or was a threat to health, safety, or security.

[22] Needless to say, if the Board does not re-affirm *Alan Ritchie* and instead were to return to the holding it affirmed sub silentio in *Fresno Bee*, this conclusion would be moot.

I suspect it will, then I would be bound by such decision, and it is up to Respondent to take that issue before the appropriate circuit court. If the Board opts not to re-affirm *Alan Ritchie*, it will reverse my findings, and Respondent would prevail on this issue. Given the unprecedented circumstances raised by *Noel Canning*, my ruling either way would be a gamble. I have decided to place the "chips," so to speak, on the course of action I reasonably suspect the Board will ultimately adopt.

Respondent also argues that the disciplinary actions against all five employees in question were for "exigent" reasons, falling within the exception discussed by the Board in *Alan Ritchie*, thus exempting Respondent from having to bargain with the Union prior to imposing discipline. Except for the case of Spires, I disagree with Respondent. With regard to Spires, as discussed in the facts section, she was caught using the EDB cards without the permission or consent of the significantly disabled clients she was in charge of care taking (and protecting), using the cards for her own benefit—conduct which she admitted. Plainly speaking, although her conduct was labeled "financial exploitation," this conduct arguably amounts to nothing less than theft, which is not only unlawful but reprehensible when considering the helplessness of those she victimized. Spires exposed Respondent to legal and financial liability, and was ultimately barred by the State of Washington from working in the field. Respondent had to remove such employee forthwith under the circumstances before she could do further harm, circumstances that were clearly exigent under the Board's definition and any reasonable definition of such term. I therefore conclude that Respondent did not violate the Act when it failed to bargaining with the Union before suspending and discharging Spires.[23] Under existing Board doctrine Respondent still has an obligation to bargain with the Union regarding the disciplining of Spires *after* such discipline was imposed, but there are no allegations in the present case that Respondent has refused to do so.

The same exigent circumstances did not exist, in my opinion, with regard to the disciplinary action taken against the four other employees. With regard to Waldron, Respondent suspended and shortly thereafter discharged her because of multiple and cumulative reasons, as testified by Frey (Tr. 57-58), including her refusal to write narratives and her overall "defiant" attitude in her conversations with Frey. Nothing in those circumstances, however, justified immediate action without first bargaining with the Union. Even though the State agency, DSHS, periodically audits narratives, there is no evidence that such audit was eminent or that immediate removal of Waldron for such reasons was necessary. As discussed earlier, although Frey notified and actually scheduled a bargaining meeting with the Union prior to placing her on administrative leave, Frey suspended and then discharged her prior to such meeting ever taking place. The *Alan Ritchie* doctrine requires not only notification, but bargaining with the Union

[23] The General Counsel argues that other employees in the past who had been accused of client abuse (either physical or financial) were not disciplined in a similar (harsh) manner, and therefore such discipline was not "exigent." The immediate and simple response to such argument is that unlike other incidents in the past, where employees had only been *accused* of such conduct—and were eventually cleared—Spires admitted her conduct, which was caught on video. Moreover, as the Board explained in *Alan Ritchie*, whether circumstances are exigent will be defined, going forward, on a case-by-case basis, which suggests that each case stands or falls on its own merits, regardless of whether similar conduct in the past required "exigent" imposition of discipline at the time. Thus, the General Counsel's attempt to use a "disparate treatment" analysis, as in cases where discipline for union or protected activity is alleged and pretext is an issue, is neither proper under the circumstances nor warranted by the dicta in *Alan Ritchie*.

prior to imposition of discipline.[24] In that regard, I note that in *Alan Ritchie* the Board explained that the parties need not bargain to impasse prior to the employer imposing discipline. Presumably, this means that one bargaining session might suffice for the employer to meet its obligations under this doctrine, assuming such bargaining is in good faith. The burden would thus appear to be minimal, under the circumstances.[25]

Likewise, I find no exigent circumstances with regard to the discipline of Castillo. Respondent placed Castillo on (unpaid) administrative leave, and discharged him soon thereafter, for multiple and cumulative reasons, which included, as with Waldron, his defiant attitude in his conversations with Frey. One of the reasons for his discipline was that he was falling asleep on the job during his "graveyard" shift while taking care of significantly disabled clients, something that apparently had happened on other occasions. The question is not whether his conduct may have justified serious discipline, however, but whether the circumstances were "exigent," thus freeing Respondent from having to notify and bargain with the Union prior to imposing discipline. I conclude they were not.

The same holds true for the discipline of Taylor and Rolley. Taylor was placed on unpaid administrative leave and discharged soon thereafter because she has missed work on several occasions (with little notice) and informed Frey she would not work weekends. Rolley was placed on unpaid administrative leave because she had failed to obtain her State-required food handlers' card and TB testing, after she had been warned that her failure to do so could result in suspension or termination. Again, at issue before me is not whether the disciplinary action against Taylor and Rolley was justified, but whether there were exigent circumstances that permitted Respondent to take disciplinary action against them prior to bargaining with the Union. I conclude there is nothing in the record that supports a finding that exigent circumstances existed.

Accordingly, I conclude that Respondent violated Section 8(a)(5) & (1) of the Act by imposing discipline on Waldron, Castillo, Taylor, and Rolley without first bargaining with the Union.

Having found that Respondent, pursuant to the doctrine announced in *Alan Ritchie*, has violated the Act by failing to notify and bargain with the Union prior to imposing discipline, I believe it proper to express some concerns regarding issues that this doctrine is likely to raise,

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[24] The meeting that had been scheduled between Respondent and the Union, which was to take place about 3 days after Frey notified Clifthorne about his intentions with regard to Waldron, was canceled because Waldron could not attend the meeting. It is not clear which party canceled the meeting, but even assuming that it was the Union, such cancellation did not provide Respondent with carte blanche or exigent reason to proceed with discipline. As the Board explained, the purpose of the advance notice is to give the union an opportunity to for a "meaningful discussion" of the issues, an opportunity that might not exist in the employee in question cannot participate in the discussion or provide information to the union.

[25] Whether one bargaining session might suffice to relieve employers of their pre-imposition bargaining obligation is one of the issues I believe the Board will have to directly address. The General Counsel has taken an assertive—some employers might argue aggressive—posture in *Alan Ritchie* type cases, and it would not be surprising if it takes the position that one bargaining session will not suffice. As discussed below, there are a number of other similar issues raised by *Alan Ritchie* that are certain to rise, which will ultimately need to be clarified by the Board.

issues that are beginning to surface in cases already in the "pipeline" to the Board. In an *Alan Ritchie* scenario, employers and unions may find themselves in terra incognita in the sense that unlike under the vast majority of collective-bargaining agreements, employers' disciplinary system—at least discipline that involves status change—is essentially paralyzed until the parties have engaged in some pre-imposition bargaining. Under the vast majority of collective-bargaining agreements, employers are free to impose even the harshest of discipline—discharge—without first bargaining with the union, but must usually submit to the grievance-arbitration procedure after such discipline is imposed, which might ultimately result in modifying or rescinding such discipline. In *Alan Ritchie*, the Board expresses its belief that in many cases, pre-imposition bargaining will lead to quick resolutions and better results. Regardless of whether such prediction may prove to be accurate or overly optimistic, the silent underlying assumption appears to be that the parties will be eager—and available—to meet and bargain in very short order, if not immediately. Such assumption may be true in the case of employers, who want to see their disciplinary decisions carried out. Unions, on the other hand, may not be as eager, finding themselves in the unusually advantageous position (as compared to the typical collective-bargaining agreement) of having the employer's disciplinary system frozen in place while bargaining awaits.[26] In the meantime, according to the Board's policy, employees who would have been discharged or suspended without pay, even for "good cause," must be kept on the payroll in order to maintain the status quo. While this may be a minimal burden for large employers or those with generous assets, it may not be so for small employers with more limited means, who may not be able to replace employees as needed. As discussed above in footnote 25, it is unclear how many bargaining sessions it may take, short of an impasse that is not required, to satisfy the pre-imposition duty to bargain in good faith, adding to the uncertainty created by this new policy—a rich breeding ground for litigation.[27] If, as the Board argues, the intent of the policy is to prevent the specter of impotency from being cast on a newly-certified union, it can be argued that the same goal may be achieved as effectively, but without the underlying cost and

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[26] Indeed, the evidence thus far, in this case as well as in others, appears to indicate that both employers and unions are often not available to meet and bargain is short order, given the unpredictable and unscheduled nature of discipline, and their busy schedules.

[27] This new policy appears to be creating uncertainty regarding the elements of proof, and the corresponding burdens, necessary to establish a violation or a proper defense. As discussed above in fn. 23, for example, the GC in this case subpoenaed and sought to introduce voluminous evidence from Respondent regarding past disciplinary actions, in an attempt to establish that no "exigent" circumstances existed in the present disciplinary actions by showing disparate treatment in actions past—a theory that I find is not applicable in these circumstances, as discussed above. Even more significantly, the General Counsel, by arguing in its post-hearing brief that the *Alan Ritchie* doctrine and remedies should be applied retroactively--as the General Counsel is doing in numerous other cases--appears to advocate for a "strict liability" theory of violations in cases involving failure to engage in pre-imposition bargaining. In other words, if an employer discharges or suspends an employee without first bargaining with the union, for example, that employee must be re-instated and awarded back pay, regardless of how justified the discharge may have been in the first place. This argument appears to run afoul of the language in Sec. 10(c), which explicitly prohibits the Board from issuing any orders requiring the reinstatement of employees suspended or discharged for "good cause," or from awarding such employees back pay. Thus, a fundamental question exists as to whether the Board has the authority to grant such "strict liability" remedy in these circumstances, particularly since there is no evidence or allegations that these employees were disciplined for engaging in union or protected activity—which is the exclusive domain of the Board. Accordingly, whether the employees in the present case or in other similar *Alan Ritchie* scenarios were disciplined for "good cause" would not appear to be something the Board arguably has the authority—or expertise—to adjudicate, since it is not the Board's function to act as a "super arbitrator" regarding the validity of discipline that does not involve union or protected activity. These types of issues raise serious questions that will hopefully be soon addressed by the Board.

uncertainty, by requiring the employer to bargain after the imposition of discipline, with a required notice about such bargaining being sent to the entire bargaining unit. After all, it cannot be said that a disciplinary action—by nature recurrent yet unpredictable—taken against a single employee, or even several employees as in the present case, can have the same "union-impotency" impact of a unilateral change affecting the entire bargaining unit, such as a change in the wages, hours, and other unit wide working conditions.

I trust that these questions and issues will be addressed by the Board as it sorts out the ramifications of *Alan Ritchie*—if the Board chooses to re-affirm such policy.

II. Respondent's Failure to Bargain Regarding Mary Sanders' Schedule and Duties

As discussed in the facts section, I have concluded that Respondent did *not* assign HOH duties to Mary Sanders, but found that the additional duties that she had to perform as a day-shift DSS worker were normally performed by all day-shift workers, including HOHs. Accordingly, I recommend dismissal of paragraph 6(b) of the complaint.

The complaint also alleges, in paragraph 6(c), that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding the change of work schedule of Sanders. For the following reasons, I conclude such allegation lacks merit.

First, the language of paragraph 6(c) of the complaint is explicit in alleging that the purpose of changing Sanders' schedule was to have her perform HOH duties, as part of Respondent's alleged ploy to get rid of HOHs altogether. As I have discussed in the facts section, the evidence does not support the General Counsel's theory, and indeed Respondent hired a new DSS worker to serve as HOH for Sanders' house about 3 weeks after she started working in the day shift. Thus, the theory behind the alleged motivation of Respondent is not supported by the facts. Nonetheless, the General Counsel appears to argue (both on the record and in its post-hearing brief) that regardless of motivation, Respondent was obligated to bargain with the Union about reassigning Sanders from the evening shift to the dayshift. I disagree.

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act when it makes unilateral decisions or changes during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Mandatory subjects of bargaining include those delineated in Section 9(a) as "rates of pay, wages, hours of employment, or other condition of employment" and in Section 8(d) as "wages, hours, and other terms and conditions of employment." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). An employer's duty to bargain only arises, however, if the changes are material, substantial, and significant ones affecting terms and conditions of employment. *Palm Beach Metro Transportation, LCC*, 357 NLRB No. 26, slip op. at 4 (2011); *Millard Processing Services*, 310 NLRB 421, 425 (1993). There appears to be no clear demarcation line in determining what constitutes "material, substantial and significant" changes. Rather, the Board examines whether allowing the unilateral change undermines the union's status as collective-bargaining representative or is otherwise destructive of the bargaining process. *LM Waste Service Corp.*, 360 NLRB No. 105, slip op. at 11 (2014) (and cases cited therein).

Applying the above tests, I first note that Sanders *requested* such change, and that the change was thus voluntary.[28] Secondly, Sanders' transfer to the day shift did not increase or decrease the number of hours worked, or the amount that Sanders was paid. Moreover, changing shifts did not involve *any* change in the duties assigned to and typically performed by DSS workers, at least those who work in the day shift. Sanders' *perception* of having additional duties was the result of her lack of familiarity with the duties normally performed by all DSS dayshift workers, some duties which are sometimes, but not exclusively, performed by HOHs.

I conclude that by granting Sanders' request to be transferred to working on the day shift, Respondent did not make a material, substantial, or significant change in the wages, hours, or working conditions of Sanders, let alone the rest of the bargaining unit, nor made a change that would reasonably have a tendency to undermine the Union. Plainly speaking, this change was de minimis, and one that would likely not have been the subject of a charge, or an allegation in the complaint, but for the misguided belief of the General Counsel and the Union that this minor change was part of a larger ploy to have regular DSS workers perform work allegedly "belonging" to HOHs—a theory unsupported by the evidence.

I also note that the cases cited by the General Counsel and the Union are inapposite, involving more significant and material changes to working conditions that were unrequested, unwelcome, and detrimental to the bargaining unit and the union. For example, in *Carpenters Local 1031*, 321 NLRB 30, 32 (1996), the employer added half an hour to an employees' shift, an increase of worktime which was unrequested and unwelcome; in *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993), the employer changed the work working hours for an entire department, and eliminated various positions or reduced their hours; in *San Antonio Portland Cement Co.*, 277 NLRB 338 (1985), the employer changed the job classifications and substantially reduced the employees' wages; in *Bay State Gas Co.*, 253 NLRB 538, 539 (1980), the employer eliminated a bargaining unit position. In *Bundy Corp.*, 292 NLRB 671 (1989), cited by the Union, the employer added significantly and more complex duties to bargaining unit employees, duties that had been performed by salaried employees, and were far from their normal scope of their work.

In sum, in these cases the unilateral changes made by the employer were far more significant in scope and in their impact, and were all an unwelcome surprise. In Sanders' case, she requested the change in shift, and the surprise on her part was due to her lack of understanding of what day-shift DSS workers routinely did.

In view of the above, I conclude that Respondent did not make a significant or material change in Sanders' working conditions, and was not obligated to bargain with the Union with regard to her transfer to the day shift.

[28] As discussed in the facts section, I made the credibility resolution that Sanders had asked for the change. Even if I were to conclude that Sanders did not ask for the change but was rather asked if she wanted the change of shifts (as testified by Sanders), it is clear that the change happened voluntarily—Sanders was not ordered or forced to change her schedule.

## III. The 2012 Holiday Bonus

As discussed in the facts section, on or about December 5, 2012, Respondent granted its bargaining unit employees a holiday bonus, as it had done in holidays past. Respondent admitted that it exercised discretion in deciding whether to give the bonus, as well as the amount. The evidence also shows Respondent did not notify or bargain with the Union regarding the bonus. The Union first learned about the bonus in January 2013 from an employee, which prompted the Union to inquire Respondent about it. On or about February 14, 2013, Respondent acknowledged to the Union that it had indeed granted such bonus in December 2012.[29]

It is well settled that employers must negotiate with the collective-bargaining representative of its employees concerning discretionary changes in wages, hours, or working conditions, which are mandatory subjects of bargaining. *Oneida Knitting Mills, Inc.*, 205 NLRB 500 (1973). Thus, there can be no question that Respondent was obligated to notify and bargain with the Union about the December 2012 bonus, even if it had a past practice of giving such bonuses. Accordingly, I conclude that its failure to do so violated Section 8(a)(5) and (1) of the Act.

## IV. The Union's Request for Information

It is undisputed that in June 2013 the Union made an information request of Respondent, requesting information regarding Respondent's financial status. The General Counsel alleges that the Union was entitled to and should have been provided with a single item out of the entire request. It is also undisputed that Respondent refused to provide any of the records requested.

It is notable that the General Counsel did not allege a violation as to Respondent's refusal to provide any of the information requested *except* for payroll records, which helps frame the issue before me. Presumably, the General Counsel thus agreed with Respondent's defense for its refusal to provide all the other items in the information request, which had to do with Respondent's financial status. Respondent's defense, in essence, is that the Union's information request was solely based on the erroneous premise that Respondent pleaded an inability to pay the proposed wages and benefits during collective-bargaining negotiations, and hence the Union is not entitled to the requested financial data. In refusing to provide even the payroll records, Respondent avers that the Union's entire request, as reflected in the Union's June 5, 2013 information request, is based and premised on Respondent's inability to pay the Union's proposal. This is a reasonable reading of the Union's letter, which contains the following phrase: "Given the Employer's inability to pay for our proposal. . . . .," and then lists the requested list of items described in the facts section, which includes payroll records. (GC Exh. 68, p. 3.)

[29] Respondent argues that this allegation should be barred by Sec. 10(b) of the Act because the charge alleging this conduct (Case 19-CA-108144) was not filed until June 26, 2013, more than 6 months after the bonus was granted. I reject this argument, since the Union did not have actual or constructive notice of the bonus until at least January 2013, less than 6 months prior to the filing of the charge, when an employee first reported it, or perhaps not until February 14, 2013, when Responded admitted it. *Castle Hill Health Care Center,* 355 NLRB No. 196, slip op. at 36-37 (2010), and cases cited therein. To hold otherwise would permit Respondent to profit from its failure to notify the Union about the bonus in the first place. I would note that the Union most likely learned in January 2013 about the bonus by sheer accident, since receiving a bonus is not something employees would normally complain about.

Nonetheless, the General Counsel argues that in *National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 3 (2011), the Board held that even when inability to pay is not at issue, the employer may still have to provide information that may be of a financial nature, such as data that can reflect on its competitiveness, and that an information request in that context "is not an all-or-nothing or nothing proposition." The General Counsel, in its post-hearing brief, goes on to add: ". . . [W]hile the instant matter is not an inability to pay case, the Union is entitled to some financial information; in this case, that which it requested."[30]

The fundamental flaw in this argument is that unlike in *National Extrusion,* where the information request was narrowly tailored to request financial data reflecting on the competiveness of the employer—who had claimed not poverty but an inability to compete—the Union in this case requested financial information precisely and solely intended to rebut Respondent's professed inability to pay—something which the General Counsel concedes Respondent did not claim. The Union, as reflected in the plain reading of its letter to Respondent, thus "bet the farm" on its assumption that Respondent had pleaded poverty, an assumption that the facts do not support. A single item in the Union's information request cannot be considered in isolation or divorced from the context in which it was presented to Respondent, as reflected in the Union's June 2013 letter. By pleading that Respondent violated the Act by not providing the Union with "payroll records," the General Counsel has surgically removed or cherry-picked a single item from a much larger invalid information request in an attempt to divorce it from the context in which it was made. I find this to be an improper contortion of the record and thus overreaching, and *National Extrusion* to be inapposite under these circumstances.

Further evidence that the Union's information request was solely made in the context of its erroneous assumption that Respondent had pleaded poverty is the fact that its request for payroll records is not limited to those involving bargaining unit members, but is rather generic—"payroll records." The Union is of course entitled to payroll records regarding the bargaining unit, which are presumably relevant and must be provided upon request. *Castle Hill Health Care Center,* supra; *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). The Union, however, did not tailor its request to the bargaining unit, but rather requested all payroll records, which presumably include those records of employees not in the bargaining unit, including supervisors and managers. The Union is *not* presumably entitled to payroll records of those not in the bargaining unit, absent a showing of relevance, such as where the employer has pleaded poverty, or at least an inability to compete, which is not the case here. Such showing of the relevance of these records has not been made. In that regard, I note that the Union made its information request in June 2013, more than 15 months after it had been certified, and more than a year into collective-bargaining negotiations. It is thus safe to presume that the Union, by that time, had long requested and been provided with the payroll records pertaining to the bargaining unit. If all the Union wanted was an *update* of bargaining unit payroll records, it could have easily made such clarification and this matter would likely not be before me. The Union never made such clarification, of course, because that was *not* what it was seeking; rather, as the record

[30] It is not clear what the General Counsel means by "*that* which it requested," since what the Union requested, as discussed below, was information reflecting on Respondent's inability to pay, the vast majority of which was not alleged in the complaint. Thus, this argument, on its face, appears contradictory.

clearly shows, it was seeking financial records, including *all* payroll records, because it believed Respondent had pled poverty.[31]

In this context, for the General Counsel to argue that Respondent violated the Act because of its refusal to provide a single item of a much larger and presumably invalid—or irrelevant—information request, is unsupported by the facts or the legal theories it advances. Under the circumstances, I conclude that Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to provide the information requested, as alleged in paragraphs 7 and 8 of the complaint.

## Conclusions of Law

1. Kitsap Tenant Support Services, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, and continues to be, the exclusive collective-bargaining representative for the purposes of collective bargaining within the meaning of Section 9(a) of the Act of the employees employed by Respondent in the following unit:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SL Lite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

4. By failing to provide the Union with notice or an opportunity to bargain concerning the discretionary disciplinary action taken with regard to employees Allegra Waldron, Kendrick Castillo, Tiana Taylor, and Whitney Rolley, and by failing to provide the Union with notice or an opportunity to bargain concerning the granting of the 2012 holiday bonus to bargaining unit employees, which were mandatory subjects of bargaining, Respondent violated Section 8(a)(5) and (1) of the Act.

[31] In its post-hearing brief, the Union argues that Respondent often made the point, during negotiations and in communications, that the Union did not understand the nature of Respondent's operations, and hence was making unreasonable proposals. Its information request, it argues, was thus in keeping with trying to understand Respondent's business and its counterproposals, as prompted by Respondent. The flaw in this argument is that it is contradicted by the very language of its June 2013 letter, which specifically premises its information request on the alleged pleading of poverty by Respondent.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not otherwise violate the Act as alleged in the consolidated complaint.

**Remedy**

The appropriate remedy for the 8(a)(5) and (1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, Respondent will be required to bargain with the Union with respect to the disciplinary action taken with respect to employees Allegra Waldron, Kendrick Castillo, Tiana Taylor, and Whitney Rolley, and will further be required to bargain with the Union with respect to the granting of the 2012 holiday bonus to bargaining unit employees. I decline the General Counsel's request to recommend any additional remedies (such as reinstatement and/or backpay) with regard to the disciplined employees, as the Board in its invalidated *Alan Ritchey* decision applied its holding only prospectively, for the reasons expressed in that decision. Additionally, Respondent will be required to post a notice to employees assuring them that it will not violate their rights in this or any other related matter in the future. Finally, as Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[32]

ORDER

Respondent, Kitsap Tenant Support Services, Inc., Bremerton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO regarding the disciplinary action taken with respect to employees Allegra Waldron, Kendrick Castillo, Tiana Taylor, and Whitney Rolley.

(b) Failing to bargain with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO regarding the 2012 holiday bonus granted to bargaining unit employees.

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

(c) Failing to bargain with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO regarding changes in the wages, hours, or working conditions of our bargaining unit employees, including taking disciplinary action, without first notifying the Union and giving it an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO regarding the disciplinary action taken with respect to employees Allegra Waldron, Kendrick Castillo, Tiana Taylor, and Whitney Rolley.

(b) Bargain with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO regarding the 2012 holiday bonus granted to bargaining unit employees.

(c) Within 14 days after service by the Region, post at all its facility in Bremerton, Washington, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. July 28, 2015

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

Ariel L. Sotolongo
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

In recognition of these rights, we hereby notify employees that:

WE WILL NOT refuse to bargain in good faith with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO (the Union) regarding the disciplinary action taken with respect to employees Allegra Waldron, Kendrick Castillo, Tiana Taylor, and Whitney Rolley.

WE WILL NOT refuse to bargain with the Union regarding the granting of the 2012 holiday bonus to bargaining unit employees.

WE WILL NOT implement any changes in the wages, hours, or working conditions of our bargaining unit employees, including taking disciplinary action, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

WE WILL, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit concerning terms and conditions of employment:

All full-time and regular part-time employees working for us as Direct Service Staff (DSS) or Head of Households (HOHs) in our Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in our Supported Living Lite Program (SL Lite Programs), including such programs in our d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and condition of employment, including taking disciplinary action against employees in the above-described bargaining unit, notify and, on request, bargain with the Union regarding these changes.

KITSAP TENANT SUPPORT SERVICES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

915 2nd Avenue, Federal Building, Room 2948
Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-108144 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.