

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of )  
 )  
WINGATE OF DUTCHESS, INC. )  
 )  
Employer, )  
 )  
and )  
 )  
1199 SEIU UNITED HEALTHCARE )  
WORKERS EAST, )  
 )  
Charging Party. )  

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Case 03-CA-140576  
03-CA-145659

**CHARGING PARTY'S BRIEF IN  
SUPPORT OF CROSS-EXCEPTIONS**

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Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for the Charging party submits this Brief in Support of Cross-Exceptions to the decision of the Administrative Law Judge ("ALJ"). Under separate cover, Charging Party has filed a Brief in Opposition to Respondent's Exceptions.

### **PRELIMINARY STATEMENT**

Charging Party's cross-exceptions concern the ALJ's dismissal of allegations with respect to two promises Respondent made and the ALJ's inference of knowledge with respect to benefits Respondent conferred shortly before employees filed a petition for representation. Although the ALJ found that all of the benefits Respondent conferred pre and post-petition were unlawfully motivated, both parties have excepted to the ALJ's finding that Respondent suspected, but did not know, employees were organizing by July 13. Respondent asserts, inaccurately, that the ALJ relied only on the fact that employees at a sister facility nearby, Wingate of Ulster (Ulster) had filed a petition for representation. In fact, such petition had been filed a month earlier and it prompted Respondent's corporate parent, Wingate Healthcare, Inc. ("Wingate"), to prepare legally defensible ways to interfere with anticipated organizing at its other two Hudson Valley facilities--by creating a paper trail of *possible* changes at a time when it could plausibly deny knowledge. Simultaneously, Respondent began canvassing and interrogating employees to determine whether they were in fact organizing. Respondent's agents admittedly raised the topic of unionization with employees and paid attention to "rumors" circulating about the facility. What they learned and when is clearly reflected in Wingate's sudden, and poorly explained, decisions in mid-July to improve benefits at Respondent's facility and Wingate of Beacon ("Beacon"), but not Ulster, its third Hudson Valley facility where the petition was filed.

Charging Party also excepts to the ALJ's conclusion that Respondent posted an attendance bonus on July 14. The evidence establishes that the attendance bonus memo is dated July 14, but Respondent's witness admitted that it was posted and included in employees' paychecks on July 18. Charging Party also excepts to the ALJ's finding that Respondent's mid-August survey of employees' interest in an In-House Child Care program was consistent with a past practice of conducting meetings in which employees were allowed to air their grievances. Finally, Charging Party excepts to the ALJ's finding that Respondent established a valid business justification for its August 22 announcement that it was considering reinstating a 401(k) match. Respondent's explanation for these promises must be considered in context with other promises and improvements Respondent made in response to organizing and with Respondent's campaign messaging about the benefits of direct dealing. They must also be considered in context with Respondent's discharge of Sandra Stewart three days in to the critical period. Before she was fired, Stewart was by far the most effective advocate for unionization on Respondent's property.

### **FACTS**

The facts to support Charging Party's exceptions are set forth fully in Charging Party's Brief In Opposition to Respondent's Exceptions. They are included here for convenience and are unchanged, except that facts relevant to the discharge of Sandra Stewart and Respondent's calls to the police alleging trespass have been deleted.

This case involves objectionable conduct and unfair labor practices committed by Wingate of Dutchess (herein "Respondent" or "Dutchess") between July and November 2014.<sup>1</sup> Respondent is one of 19 skilled nursing facilities owned by Wingate Healthcare Inc., (herein

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<sup>1</sup> Unless otherwise indicated, all dates herein are in 2014.

“Wingate”) three of which are located in the New York Hudson Valley: The three being Respondent, Wingate of Ulster (herein “Ulster”) and Wingate of Beacon (herein “Beacon”). Tr. 1100:3-5.<sup>2</sup> Wingate’s Vice President of Human Resources, Kim Ianiro testified that the corporate office looks at the Hudson Valley facilities as a group for purposes of compensation structure and it sets wage rates for these facilities based on regional comparisons. Tr. 1152.

Before 2014, Wingate was one of the only non-union operators of skilled nursing facilities in the Hudson Valley. Tr. 1181. VP Ianiro testified that for this reason Wingate was “under constant threats.” *Id.*

Respondent’s Employee Handbook states at page 11:

#### UNION-FREE POSITION

The Company is committed to the fair treatment of our valued employees. This commitment and dedication assures you that management makes every effort to provide a working environment that will make it unnecessary for employees to be represented by a union. We are committed to providing increasing opportunities for training and advancement, competitive wages and benefits, and fair treatment of all employees. In return, we hope all employees will engage us in full and open communications to resolve the problems that all of us, will experience from time to time.

R3.

Consistent with Respondent’s union-free position, Ianiro testified that Respondent was committed to getting “ahead of any concerns or issues before they blow up into something big.” Tr. 1105:21-1107:13.

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<sup>2</sup> The following abbreviations are used throughout the document: “ALJD” refers to the ALJ’s Decision and is cited with page and line number. “Tr.” refers to the transcript of the hearing in this matter. References to the Counsel for the General Counsel’s exhibits are referred to as “GC\_\_”, references to the Respondent’s exhibits are referred to as “R\_\_”, and references to the Charging Party’s exhibits are referred to as “CP\_\_”.

## 1. Respondent's Contemplation of Improved Benefits.

Months before the onset of organizing in this case, on February 1, Wingate implemented an adverse change: It changed its practice of paying employees on a weekly basis to a biweekly payroll. *See* R42. VP Ianiro testified that she learned quickly that the payroll change was received “extremely poorly” by the New York facilities and that the reaction “was not pleasant.” Tr. 729-730; 1108:18-24; 1995:3-7. Owner Scott Schuster also learned of employees’ dissatisfaction “fairly quickly after it occurred.” Tr. 1513:5-6. Employees collectively complained to Wingate management by phone, by voicing their complaints spontaneously to corporate managers, and by raising the subject in “round the clock” meetings at the facility. Tr. 1109:1-8. VP Ianiro testified that she also knew since February that the New York employees were dissatisfied with the status quo of 1% annual wage increases. Tr. 79.

### Events In June: Ulster Petition, Email Seeking Regional Wage Rates

On June 3, the Administrator at Ulster,<sup>3</sup> a facility located 16 miles from Dutchess, sent an email and fax to VP Ianiro, Regional HR Manager Danuta Budzyna, Regional Operations Manager Edward Blake. R34A. In her email, the Ulster Administrator, Carolyn Kazden, stated that the CNAs at Ulster had conducted “their own salary research” and presented the results to the administration.<sup>4</sup> R34A. Kazden commented:

I think it is encouraging that they continue to reach out in an open way, but on the flip side, I think they are feeling the impact of the minimum raises we have been able to give. Our last regional wage salary was done in 2009 and we have not adjusted wages since that time.

I did ask Danuta to bring up the possibility of doing something like a **perfect attendance bonus**.

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<sup>3</sup> The Administrator is the highest level manager at the facility.

<sup>4</sup> Kazden was no longer employed at the time of the hearing. Tr. 1070:11, 18.

*Id.* (emphasis added). Kazden’s email reveals that as of June 3, she was not aware of any plan to increase wages at the New York facilities. It also reveals that Administrators do not have authority to approve attendance bonuses. Kazden’s email is the only document in the record that mentions the possibility of offering an attendance bonus in 2014.

VP Ianiro testified that when she received Kazden’s June 3 email, it was “very concerning for me.” Tr. 1158. Nonetheless, she denied being aware of any “organizing” at Ulster until June 12, when 1199 SEIU United Healthcare Workers East (the “Union” or “1199 SEIU”) filed a petition seeking to represent the CNAs and LPNs. GC5; Tr. 1162. Owner Scott Schuster also denied knowledge of any “organizing” at Ulster until the petition was filed. The record does not reflect when the organizing drive at Ulster began. The Dutchess Administrator, Clayton Harbby, told the Dutchess employees that Wingate had no knowledge of organizing at Ulster until “70 authorization cards had been signed.” Tr. 792:4-6.

According to Owner Scott Schuster, when he learned about the Ulster petition he assumed if there were concerns at Ulster then maybe there were concerns at all three New York facilities. Tr. 1458-59. Consequently, he and other high-level managers increased their presence and the frequency of round-the-clock meetings at all of the New York facilities with the goal of understanding employees’ concerns. *Id.*; Tr. 1191-92.

Also on June 12, at 5:52 p.m., Wingate’s Senior Vice President and Chief Financial Officer, Tamilyn Levin, sent an email to the NYSHFA, with the subject heading “CNA hourly rates,” wherein she requested “rate information for union and nonunion facilities in [New York] state.” R35. Levin’s email is the earliest documentary evidence Respondent was able to produce to establish its contemplation of wage increases for the New York facilities. *See* R43A; Tr. 1068:8-11.

Clayton Harbby, Respondent's Administrator, testified that he learned about the Ulster petition in "mid-June" from Regional Operations Manager Ed Blake who asked him to solicit volunteers at Dutchess to campaign against the Union at Ulster. Tr. 2056:2-6. Harbby testified that a "staff member" helped him identify employees who had previously worked at unionized facilities. Tr. 632:2-25; Tr. 2056:3-6; 2057:1-5. His ostensible purpose was to fulfill Blake's request that he solicit volunteers to speak at Ulster about why a union was "not necessary." Tr. 718:19-20; Tr. 686:3-5; Tr. 2056:21.

#### Events In July: Canvassing of Employees Sparks "Union" Organizing

Director of Nursing Ann Nelson, (herein "DON Nelson" or "Nelson") testified that Regional Operations Manager Blake advised her and Harbby some time before the July 24 Ulster election, to be on the lookout for trespassers at Dutchess and to call the police if they spotted any Union organizers. Tr. 1939: 14-25; Tr. 1940: 1-14. Prior to this, Wingate supervisors had never been assigned to watch for trespassers on Wingate's property. Tr. 1757: 24-25; Tr. 1758: 1-3; Tr. 1940: 15-20; Tr. 1942: 13-6; Tr. 2006: 15-21; Tr. 1604: 1-9; Tr. 1602: 18-21; Tr. 1620: 25; Tr. 1621: 1-8. Blake did not testify.

CNA Georgann Allen testified that in late June, early July, Administrator Harbby approached her individually about campaigning at Ulster. Tr. 636. Allen told Harbby she wasn't sure about campaigning against the Union because she herself had not received an annual raise, which had been due since her anniversary date in December (she had received her prerequisite annual review in February). Tr. 637:7; 684:16-18; 719:6-9. Harbby asked her to think about it and promised to look into her raise, saying it had probably been overlooked. Tr. 684:16-22. Harbby testified that he "initially" asked five employees to campaign against the Union at Ulster. Tr. 2057:2.

At a subsequent meeting between Harbby and Allen, a social worker and the recreation supervisor were also present. Tr. 636. The ALJ credited Allen's testimony that Harbby appeared to be reading from an email and said that whoever agreed to campaign at Ulster would be assisted by prompters. *Id.* Harbby offered to pay for her time and reimbursement for mileage. Tr. 637. She testified that she repeated her reservations about volunteering and disclosed that she *and other employees* shared the same concerns as the Ulster workers. Tr. 637. Specifically, Allen testified:

Well the people here at Wingate feels [sic] like they're in the same boat as the people at Ulster [. . .] Because I haven't received a raise. I haven't received –I can't afford the health insurance and these are all of the issues we're having here. And I kind of think that they're in the same boat as we are in Ulster. People feel that you're not a fair Administrator here. And I don't think that I can go and speak on behalf of Wingate.

Tr. 637:4-13. The ALJ credited Allen's account that Harbby replied, "Well Georgann, I'm going to tell you we don't need a Union and a Union will not get in here." Tr. 637:15-16. Respondent did not call the social worker or recreation supervisor as witnesses.

Based on the record as a whole, the ALJ found that the first meeting between Harbby and CNA Allen took place between June 30 and July 3, and the second meeting took place the week beginning Monday, July 7.<sup>5</sup>

Meanwhile, CNA Sandra Stewart testified that one or two weeks before the Ulster election (*i.e.*, the week of July 7, 2014), Harbby convened a meeting at the nurse's station on the Locust Grove Unit. Tr. 211. The ALJ credited Stewart's account that Harbby explained there

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<sup>5</sup> In doing so, the ALJ discredited Harbby's claim that he did not meet with Allen until "probably around mid-July." Tr. 2056. Allen was clear in her testimony that she met with Harbby twice, about a week apart, and that the first meeting took place in late June or early July. Tr. 718:19-20; 636:1-5. Such testimony is consistent with Harbby's account that he was asked to solicit volunteers in mid-June. Allen also testified that in both meetings she complained that her raise was overdue. Paychecks were bi-weekly and after she complained the second time, she received a retroactive paycheck dated July 18, for the period June 29 to July 12. GC33; Tr. 686. Dutchess LPN Heather Lucas testified that she campaigned at Dutchess on Friday, July 18. Tr. 1282-83.

was union activity at Ulster and he “doesn’t want it in his facility.” Tr. 202:19-21. According to Stewart, Harbby conducted similar meetings on other units that day. Tr. 203. Harbby never denied these meetings. He testified that he noticed Stewart dyed her hair purple “earlier in July.” Tr. 1984. 1199 SEIU’s colors are yellow and purple.

Stewart testified that after the meeting with Harbby, she gathered with Allen and several co-workers. Tr. 203:2-3. Stewart pointed out that employees’ concerns at Dutchess – lack of job security, shortchanged pay checks, unaffordable health insurance, management ignoring employees’ concerns, *see* Tr. 204:14-18 – were the same as at Ulster. Tr. 203-204. Stewart testified that Allen suggested they could seek representation by 1199 SEIU. Tr. 204:24-205:2. Allen’s testimony corroborates the timing and substance of this gathering, which she testified took place after her second meeting with Harbby—*i.e.* the week of July 7. Tr. 638-39.

The following day, during a break, Stewart “Googled” 1199 SEIU and left a message in Allen’s presence. Tr. 205:4-17; Tr. 639:20-23. Lori Massara, an organizer with 1199 SEIU, returned Stewart’s call a day later. Tr. 205:18-206:2. She asked Stewart to gather a list of signatures from other employees who were also interested in representation. Tr. 206:10-23. Stewart promptly collected 35 signatures on a paper she called the “party list,” which she faxed to Massara. Tr. 206:25; 207:1-7; 208:9-23.<sup>6</sup> Thereafter, she arranged a meeting with Massara

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<sup>6</sup> In its Brief in Support of Exceptions, at 20, Respondent asserts that Stewart defiantly flouted its non-solicitation policy. However, witnesses recounted numerous instances in which employees and supervisors alike had openly solicited co-workers to purchase cookies, Avon products, and other items inside the facility without reprimand. Tr. 5: 666, 11-25; Tr. 5: 667-671; Tr. 5: 848, 1-3. DON Nelson was able to recall only one instance in which the policy was enforced--against a family member, not an employee, who distributed religious literature from a patient’s room. Tr. 12: 1940, 21-25; Tr. 12: 1941, 1-5.

for July 25, the day after the Ulster election.<sup>7</sup> Based on this testimony, the evidence establishes that Stewart began collecting signatures on or about July 10.<sup>8</sup>

CNA Allen testified that on the Monday following her second meeting with Harbby, she was asked by DON Nelson whether she intended to campaign against Ulster. She repeated to Nelson she would not campaign because she felt the Dutchess employees were in the same boat. Later that morning she conveyed to Harbby that she would not go to Ulster. The ALJ's finding that these conversations took place on Monday July 14 was supported by the record.<sup>9</sup> Charging Party excepts to the ALJ's finding that Respondent merely suspected organizing on July 13. By July 13, Stewart's solicitation activities were clearly underway and Respondent had conducted sufficient surveillance and interrogations from which an inference of knowledge can reasonably be drawn.

#### July 18 Efforts to Nip Organizing in the Bud

Friday, July 18, was an eventful day:

On July 18 DON Nelson distributed a memo in employees' paychecks stating, "**In an effort to show our appreciation to our loyal staff** we will be awarding all nursing staff

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<sup>7</sup> Massara recalled speaking to Stewart the day before the Ulster election, on July 22. Tr. 49.

<sup>8</sup> Respondent misrepresents that "Stewart testified that it was not until after the July round-the-clock meeting, which the ALJ notes himself took place on July 23, 2014 (ALJD p.7), that she first gathered with a few other employees to discuss what the Union was about. Tr. 201-203" Respondent's Br. at 61. In fact, Stewart never referred to the meeting with Harbby as a "round-the-clock meeting" and when asked to specify when in July the meeting was, she testified that it was around a week or two before the election at Ulster. She knew this because they wanted her co-worker to go over to Ulster to talk to people about it. Tr. 211. Notably, Stewart's name is not on Respondent's sign-in sheet for the July 23 round-the-clock meeting. GC44-WING806.

<sup>9</sup> Nelson admitted she asked CNA Allen about volunteering to campaign at Ulster, but claimed it was because she was under the impression that Allen had agreed to do so and she wanted to know when Allen was going. She acknowledged that this conversation took place before the Ulster election on July 24. Tr. 1883-86.

employees with perfect attendance from July 18, 2014 to September 18, 2014 a \$100 bonus.” (GC19) (emphasis in original). Tr. 1934-36.<sup>10</sup>

On July 18 CNA Allen received a retroactive raise covering the period June 29 to July 12. *See* GC33.

On July 18 at 2:49 p.m., Payroll Manager Helen Thomas informed VP Ianiro via email that ADP would need 7-10 business days to change pay periods from bi-weekly to weekly. Tr. 1164:1-7; R43. On Saturday July 19, at 9:20 a.m., VP Ianiro responded, “Great let’s figure out the soonest we can pull this off. Thanks!!” R36 and R43.<sup>11</sup>

On July 18 at 7:45 p.m., VP Ianiro emailed Thomas and Judith Lima saying, “I am hoping that you will be able to help me on Monday do an analysis on providing pay increases for Dutchesd [sic] and Beacon. I’m looking at providing an increase to the CNA’s the LPNs, RNs and adjusting the per diem rate.” R36. Lima responded on July 21 with the cost of hourly increases of \$.25, \$.50, and \$.75 at Dutchess and Beacon (omitting Ulster). R36-1.

#### July 23 Anti-Union Meeting, Announcement of Weekly Paychecks

On Wednesday, July 23, Administrator Harbby and DON Nelson held mandatory meetings with at least 28 Dutchess employees, including Channel Kelly and Belinda Newkirk.

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<sup>10</sup> The Charging Party excepts to the ALJ’s finding that the attendance bonus memo was posted on July 14. ALJD at 24; lines 7-8. Although the memo is dated July 14, DON Nelson testified that it was posted and included in employees’ paychecks simultaneously. Paychecks were distributed on July 18. *See* GC-33 (Georgann Allen’s paystub); Tr. 1935-1936. As stated in the memo, the bonus required employees to have perfect attendance starting on July 18. Witnesses who testified that the memo was posted on July 14 relied on the flyer date, GC14. In fact, no witness had a clear recollection of events in “mid-July,” including DON Nelson who testified that she requested approval for the bonus from Harbby “in June” and received approval in “mid-July.” Tr. 1935. As noted above, Harbby did not have authority to approve an attendance bonus. Such request would have had to go through corporate. Respondent produced no documentary evidence to support DON Nelson’s testimony or otherwise establish when the decision was made to approve an attendance bonus. Notably Respondent’s sister facility, Beacon, offered the same \$100 bonus, but the period covered was July 30 to September 30. R24. Wingate did produce proof that it had occasionally in years past and at other facilities announced an attendance bonus in anticipation of low staffing. No such announcements were made mid-summer, however, and none mentioned employees’ “loyalty” as DON Nelson’s memo did in this case. R22, R23, R24.

<sup>11</sup> It is undisputed that Respondent made the decision to change back to a weekly payroll on July 18. Tr. 28.

Tr. 792, Tr. 201. *See also* GC44 (sign-in sheet for meetings held on July 23, 2014). Harbby testified that he held these meetings because “[t]here was a lot of scuttlebutt throughout the facility, a lot of rumors. I felt that it was necessary to convey the facts of what was going on at Ulster. It’s a very small region. Ulster is only 15 to 18 miles from our facility, so I thought the staff needed to know what was going on from me.” Tr. 2061.

It is undisputed that Harbby raised the subject of unionization at these round-the-clock meetings. R44. The ALJ credited Newkirk’s testimony that Harbby told gathered employees that the Ulster Administrator was caught unaware of the union campaign there until after 70 authorization cards had been signed. Tr. 792:4-6. Newkirk also testified that Harbby said “he’ll be dam [sic] if he sees a union come into his facility to tell him what to do with his employees.” Tr. 836:23-25; *see also* Tr. 792:8-9. She recalled that Harbby said “he told his wife that he would stay at the hotel and sleep day and night to make sure that there was no Union coming into his facility.” Tr. 837:1-3; Tr. 837:10. Such statement echoed his earlier comment to CNA Allen that “he would sleep in his building day and night before he would let anyone come in and take over his house.” Tr. 690:1-3. Harbby denied these comments and claimed that he simply stated he “did not think [the Union] was a good fit for us at Dutchess.” Tr. 2062:25.

Finally, there is also no dispute that employee Channel Kelly spoke in favor of the union at the July 23 meeting. Tr. 876-878; 880; *see also* Respondent’s Brief in Support of Exceptions at 13 (noting Kelly’s open union support, but neglecting to mention that Kelly was fired for violating Respondent’s alleged no-solicitation policy on July 26).<sup>12</sup>

There is also no dispute that Harbby announced in the same meeting that Respondent would be changing back to a weekly payroll effective August 8. Tr. 2065-2066; *see also* R44

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<sup>12</sup> Incredibly, Respondent’s witnesses denied any knowledge of any organizing activities even after this meeting.

(Harbby's "Round the Clock" Meeting agenda dated July 23). Thus, Harbby linked Respondent's anti-union position to the benefit he announced on July 23.

On July 24, the Union won the Ulster election. GC6.

July 25 Employees Meet with "Union" Organizer

On July 25, 2014, Stewart, Allen and Union organizer Massara met at a Wendy's in Fishkill. Tr. 211:19; Tr. 641:21-25. Massara gave Stewart and Allen approximately 60 union authorization cards to give to fellow workers who were interested in applying for membership with 1199 SEIU. Tr. 212; 642-643. Also on that date, Stewart and Allen signed authorization cards in Massara's presence. Tr. 123:3-6, 22-25; 125:2-16; 643:6-14.

The record establishes that beginning July 25, Stewart, Allen, Kelly and Newkirk, distributed union cards at work and that Respondent knew immediately of their activities. Tr. 1965:13.

CNA Kelly was fired on July 26.<sup>13</sup>

August: Employee Survey, Promises of Wage Increase, 401(k) Match, and Child Care

It is undisputed that in late July/early August, Administrator Harbby distributed a survey to employees at Dutchess and Beacon, but not Ulster. Tr. 1174, 1176. "Attention Staff: We want to know . . . What are your top 3 concerns? 1. \_\_\_\_ 2. \_\_\_\_ 3. \_\_\_\_ You can drop your note at the front desk." R37. Employee responses included, among other things, pay rate, staffing, health benefits, and 401(k). R39.

On Friday August 8, Respondent began distributing weekly paychecks. Also on August 8, off-duty employees and non-employee union organizers began conducting organizing

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<sup>13</sup> Respondent's attorney acknowledged in her opening statement that Kelly was fired for solicitation of union cards. Tr. 40:5-12. She was eventually reinstated in settlement of an unfair labor practice charge filed on her behalf, but not until a week before the Dutchess election. Tr. 880

activities on a lot adjacent to Respondent's property during employees' shift changes. Tr. 64: 13-20, p. 65, 15; Tr. 185: 4-9, Tr. 253: 17-25. As discussed below, Respondent's managers surveilled employees, called the police, and sought to obstruct these activities.

On Monday August 11, Administrator Harbby received two emails from Ed Blake, Regional Operations Manager. R38, R39. The first, sent at 9:11 p.m., stated, "Scott would like the employee survey summary tomorrow morning." R39. The second, sent at 9:26 p.m., stated "Scott would like the wage comparison he requested by tomorrow as we need to make a decision about what to do regarding this issue." R38. Harbby compiled the survey results and sent them at 9:30 a.m. on August 12. R39. They reflected an overwhelming dissatisfaction among employees with wages and other forms of compensation. R39; Tr. 1174:6-9. He provided wage comparisons for Lutheran Care Center, an 1199 SEIU facility, at 2:21 p.m. on August 12. R38.

VP Ianiro testified that Schuster made the decision to offer the 2% increase on August 12. Tr. 1063:12-17. Only employees who were not on a performance improvement plan would be eligible for the increase. Also on August 12, Respondent disciplined Sandra Stewart for attendance infractions dating back to April. *See* CP14. VP Ianiro claimed that Wingate's senior executives had been discussing the "possibility" of a wage increase for the New York facilities since May, but Respondent offered no proof of such discussions. Tr. 1063:22-1064:17; Tr. 1066:9-14. Respondent also offered no evidentiary support for VP Ianiro's claim that Wingate constantly analyzes employee pay rates to ensure they are competitive. Tr. 1540:4-7.

In mid-August, Respondent posted a flyer asking, "If we have an 'In-House Child Care' program, would staff use it?" GC18.

The Union obtained cards from a majority of employees on or about August 15. *See* Attachment A (summary of GC 22-1 through GC 22-98); *see generally* Tr. 271-371 (each exhibit

identified on Tr. 100, 327). Stewart singlehandedly collected 56 of the 96 cards signed during the campaign. *Id.* See GC22-2 through 22-40, and GC22-42 through 22-56 (cards solicited by Stewart).

On August 22, Respondent distributed a letter from owner Scott Schuster stating, “As a result of the many meetings and conversations we have had over the past several weeks, one issue that has repeatedly come up in conversation is concerns about annual wage adjustments and the fact that the 1% pay increases over the past few years have resulted in a “compression” of our hourly rates particularly for longer tenured employees. We are making the necessary changes immediately to our wage rates effective September 1<sup>st</sup> as follows: A one-time wage increase **in addition to** the 1% annual increase now in effect. . . . Employees hired prior 1/1/2014 will receive 2%.” GC17; Tr. 1062:17-10. Schuster thanked “each and every one of you for having taken the time to meet with me, Kim [Ianiro], Danuta [Budzyna] and your leadership teams, and for sharing your honest comments and suggestions.” *Id.* (emphasis added). Schuster’s letter made no attempt to communicate that the increase was independent of employees’ ongoing union organizing campaign. Nor did Schuster attribute the increase to Respondent’s financial successes. Rather, he advised employees, “We believe that this one-time additional wage increase adjustment of 2% will effectively bring our hourly rates into a more competitive level when compared with other facilities in our markets and, . . . is an important step in addressing concerns raised by a number of you. . . .” *Id.*

It is undisputed that the 2% wage increase was instituted only at Dutchess and Beacon. Tr. 1061:3-8. VP Ianiro explained that although Wingate’s executives typically treated the compensation of all New York employees “the same,” Tr. 1152:5-7, employees at Ulster were not given the 2% increase because the company was “in a status quo situation” following the

Union's victory. Tr. 1064:13-17; 1164:8-11. As mentioned, a June 3 email from Ulster Administrator Kazden noted that the last regional wage adjustment for facilities in the New York region was in 2009, and wages had not been adjusted since that time. R43A. VP Ianiro agreed this was true notwithstanding employee complaints about wages dating to February 2014. Tr. 1542:2-13; 1543:15-1544:1. It is undisputed that employees had never received a wage increase that did not correspond to their annual performance review. Tr. 1061:18-25.

Schuster's August 22 letter also promised to "evaluate other key concerns and issues raised including Health Insurance and the 401(k) plan." GC17. He suggested that Respondent was considering paying a health insurance stipend to cover cost of insurance on the state and/or federal health exchanges, or the cost of federal penalties if employees wanted to opt out of buying coverage, as a way of "creat[ing] a more flexible and financially beneficial health insurance option for everyone in 2015." GC17. Lastly, Schuster promised to "investigat[e] a plan to bring back a match to employee 401(k) contributions" (which had been suspended since 2009). GC17; Tr. 1117. (In March 2015, for the first time in six years, Respondent offered a maximum match of \$100 per employee per year. R49.) Respondent offered no evidence that it had considered improving these benefits before August 22.

September: Wage Increase and Attendance Bonus Distributed, 401(k) Match Reminder

From September 1 through the November 12 election, bargaining unit employees received weekly paychecks that included their 2% wage increase.

On September 22, Respondent paid eligible employees a \$100 attendance bonus. CP11-2.

On September 26, Respondent made a Financial Planner available to assist employees with 401(k) enrollment at Dutchess and Beacon. CP25, R 48. A flyer announcing the time and

place of such meeting to employees of Wingate and Beacon stated, “**Don’t forget . . .** Wingate has begun evaluating our **401(k) plan** and how to get more people involved. . . . So we are investigating a plan to bring back a **match to employee 401(k) contributions**. We will be looking to include that as part of our annual budgeting process for 2015 . . . but **the first step is with you!**” CP25, R48 (emphasis in originals). Although VP Ianiro testified that “similar” flyers announced enrollment opportunities at other facilities, Respondent offered no proof similar reminders were given to employees at any other Wingate facilities.

#### October Representation Petition and Re-Issuance of Schuster Letter

The Union filed a petition seeking to represent the Dutchess employees on October 1, 2014. GC2.

According to Respondent’s timeline of the Dutchess anti-union campaign, the first flyer distributed in response to the petition was an October 4 re-issue of Schuster’s letter announcing the 2% wage increase and promising to consider bringing back the 401(k) match. GC42.

#### Respondent’s 25<sup>th</sup> Hour Anti-Union Speech

On November 10, one day before the Dutchess election, Respondent’s owner and highest level managers gave a 25<sup>th</sup> hour captive-audience speech to employees. Tr. 1467, Tr. 1505-06. Their talking points, which are part of the record, clearly and unequivocally linked the benefits employees had seen implemented since July to Respondent’s desire that they reject unionization. Schuster’s comments began:

Over the last months I have had a chance to get to know the NY employees better and thanks to feedback, we have begun to more fully understand issues. All we ask for now is the opportunity to work with you to address these issues.

**We began that process back in August - we gave an additional 2% pay raise to a vast majority of employees, switched to weekly payroll, created "Team Meetings" to give you a voice on issue that impact you,**

**committed to evaluating health care and retirement plans**, and made progress on addressing some of the operational issues that you raised.

And continued:

We don't have the opportunity to work with staff at Ulster on their issues because they have hired the union to do that, with little success.

**The work environment hasn't improved at Ulster, in fact it's gotten worse. Talk to the employees at Ulster, they will tell you ...the union didn't live up to their campaign promises.**

CP21 (emphasis added).

## ARGUMENT

### **1. The Record Supports an Inference of Actual Knowledge By July 13.**

The date of Respondent's knowledge is material to the ALJ's finding that Respondent's posting of an attendance bonus memo and its announcement of a planned change to weekly paychecks was reasonably calculated to interfere with employees' organizing. The ALJ inferred that Respondent suspected, but did not know, organizing was taking place by July 13. Charging Party excepts to such finding because the ALJ should have inferred actual knowledge on that date. (Exception No. 2)

While touting its "open-door" policies and asserting its right to stay one step ahead of the union, Respondent and each of its agents denied knowledge of any "union organizing" at Dutchess before July 25 (when employees began distributing union authorization cards). Respondent similarly asserts in its brief that it could not possibly have known about organizing at Dutchess until after Administrator Harbby and DON Nelson conducted round-the-clock meetings on July 23. Respondent claims that it was not until July 23 "that most employees even became aware there was union activity at Wingate's Ulster facility." Respondent's Brief In Support of Exceptions at 63. Based on this claim, Respondent urges reversal of the ALJ's

finding that during the week of July 7, employees discussed organizing among themselves and called the union. Respondent's Brief does not acknowledge Stewart's collection of 35 signatures after such call.

Respondent contends that the ALJ made "unsupported assertions that since a petition was filed on June 12, 2014 at Wingate's Ulster facility, it can be inferred that by June 13, 2014, Wingate suspected union activity was being conducted at the Dutchess facility." Respondent's Brief In Support of Exceptions at 59. However, the ALJ did not infer Respondent's knowledge on June 13. He found that "by July 13, the Respondent obviously knew that there was a union campaign being conducted at the Ulster facility and also knew that some of the Dutchess employees were sympathetic to that effort." ALJD 26, lines 9-12. Based on that finding, the ALJ inferred that on July 13 Respondent *suspected*, but did not know for certain, that union activity was going on at the Dutchess facility. ALJD 26, lines 12-14.

In fact, it would have been reasonable for the ALJ to infer that Respondent *suspected* that union activity was being conducted at the Dutchess facility on *June* 13, as Respondent mistakenly argues. Respondent's owner, Scott Schuster, testified that after he received word of the Ulster petition on June 12, "I had just assumed that if there were concerns in Ulster maybe there were concerns in other facilities because we operate as a team of facilities in a region." Tr. 1458-59.

Respondent's Administrator at Dutchess, Clayton Harbby, testified that he was instructed to solicit volunteers to campaign at Ulster in June and that he complied with those instructions by combing personnel files to determine which employees had previously worked in unionized facilities. It is certainly reasonable to infer that that is not all he did to ascertain whether "there were concerns" at Dutchess. Schuster and Ianiro both testified that they increased the frequency

of their visits to and meetings with employees at Dutchess beginning in June, along with Danuta Budzyna. Tr. 1458-1459, Tr. 1191-1192.

Harbby acknowledged that after canvassing possible volunteers to campaign at Ulster, he reconvened with them before a date was set. Tr. 2058:4. He testified that he was aware there were “lots of rumors” about the campaign at Ulster. Tr. 2061: 5-9. At Harbby’s request, Heather Lucas, an LPN at Dutchess, campaigned at Ulster on July 18. Tr. 1281-1282. Although Harbby denied telling CNA Georgann Allen he would not allow a union in his facility, he acknowledged that she raised concerns about campaigning at Ulster. The ALJ credited Allen’s testimony that she explained to Harbby that she *and others* felt they were in the same boat as the employees at Ulster. ALJD 6, fn.12.

Stewart testified that Harbby also held small-group meetings about two weeks before the July 24 Ulster election, *i.e.* the week of July 7. She testified that after she participated in such a meeting she and other employees, including CNA Allen, discussed their interest in organizing. CNA Allen agreed that this gathering took place after her second meeting with Harbby, in which she refused to campaign at Ulster. Stewart and Allen corroborated each other’s testimony that Stewart spoke with a union representative a day or two later during a break and that Stewart was told to collect signatures. Stewart testified that she collected 35 signatures.

On this record, the ALJ should have inferred *actual* knowledge by July 13.<sup>14</sup>

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<sup>14</sup> It is not mere coincidence that on July 18, Respondent issued a retroactive raise to Allen, included the announcement of an attendance bonus in employees’ paychecks, inquired about how quickly Respondent could change back to a weekly payroll, and planned to review the cost of possible wage increases. See pages 12-13 above.

## **2. The Record Supports a Finding that Respondent Posted the Attendance Bonus Memo On July 18.**

The posting date of the attendance bonus memo is material only to Respondent's exception to the ALJ's finding that such posting was reasonably calculated to interfere with employees' organizing.

The ALJ found that Respondent posted the attendance bonus memo on July 14. ALJD at 24; lines 7-8. (Exception No. 1) In fact, the record supports a finding that the attendance bonus memo was posted on July 18—a date by which there can be no dispute that Respondent knew of organizing activity taking place on its property. Although the memo is dated July 14, DON Nelson testified that it was posted and included in employees' paychecks simultaneously. Tr. 1935-1936. Paychecks were distributed on July 18. *See* GC-33 (Georgann Allen's paystub). As stated in the memo, the bonus required employees to have perfect attendance starting on July 18. Witnesses who testified that the memo was posted on July 14 relied on the flyer date, GC14. In fact, no witness had a clear recollection of events in "mid-July," including DON Nelson who testified that she requested approval for the bonus from Harbby "in June" and received approval in "mid-July." Tr. 1935. As noted above, Harbby did not have authority to approve an attendance bonus. Such request would have had to go through corporate. Respondent produced no documentary evidence to support DON Nelson's testimony or otherwise establish when the decision was made to approve an attendance bonus. Notably, Respondent's sister facility, Beacon, offered the same \$100 bonus, but the period covered was July 30 to September 30. R24. Wingate did produce proof that it had occasionally in years past and at other facilities announced an attendance bonus in anticipation of low staffing. No such announcements were made mid-summer, however, and none mentioned employees' "loyalty" as DON Nelson's memo did in this case. R22, R23, R24.

### **3. The Record Supports an Inference of Unlawful Motive Based on the Timing of Wingate’s Decisions to Improve Compensation and Benefits for the Dutchess Employees.**

Based on his finding that Wingate suspected organizing activity at its Dutchess facility by July 13 and Respondent’s admission that it knew of such organizing by July 25, the ALJ applied a presumption of unlawful motive to the timing of various benefits Respondent promised and conferred from July through September, including the two at issue here: the In-House Child Care survey and the 401(k) match promise. (Exception Nos. 3 and 5) *Latino Express, Inc.*, 361 NLRB No. 137 (2014) (“Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.”); *see also ManorCare Health Services–Easton*, 356 NLRB No. 39, slip op. at 21 (2010), *enfd.* 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted).

Charging Party’s Brief in Opposition to Exceptions addresses Respondent’s explanation for the timing of the benefits it conferred. Respondent’s explanations for the timing of its In-House Child Care survey and 401(k) match promise are addressed below. They must not be considered in isolation however. They must be considered in the context of Respondent’s solicitation of grievances and conferral of benefits throughout its anti-union campaign. In summary, Respondent:

- Announced an attendance bonus at Dutchess in “mid-July” and at Beacon on July 30. GC 14, R 24; Tr. 1935-36.
- Announced a change to weekly paychecks at Dutchess on July 23. Tr. 2065-2066; *see also* R44 (Harbby’s “Round the Clock” Meeting agenda dated July 23).

- Surveyed employees for their top 3 concerns in late July to mid-August at Dutchess and Beacon, but not Ulster. Tr. 1174; R 37; R 39. (Top responses from Dutchess employees were wages and 401(k)/pension. R 37, R 39.)
- Surveyed the Dutchess employees about their interest in In-House Child-Care in mid-August. GC 18.
- Announced a 2% wage increase and possible reinstatement of 401(k) match on August 22 at Dutchess and Beacon, but not Ulster. Tr. 1179; GC 17.
- Implemented the 2% increase at Dutchess and Beacon on September 1, but not Ulster. GC17; Tr. 1064:13-17; 1164:8-11.
- Reminded employees of the possible reinstatement of a 401(k) match with September 26<sup>th</sup> visit from financial planner at Dutchess and Beacon. CP 25, R 48.
- Re-Issued the August 22 letter on October 4 (three days after the petition). GC 42.
- Announced a 401(k) match capped at \$100 per employee per year on March 20, 2015, for all employees *except* those subject to collective bargaining. R 49.

**4. Charging Party Excepts to the ALJ’s Dismissal of the Allegation that Respondent Unlawfully Canvassed Employees About Their Interest In a Child Care Program.**

There is no dispute that by mid-August, when Respondent posted a flyer asking, “If we have an ‘In-House Child Care’ program, would staff use it?,” the Union had won the election at Ulster and Respondent knew employees were organizing at Dutchess. Nonetheless, the ALJ dismissed the allegation that this flyer constituted an implicit promise to provide in-house child care. ALJD at 29. (Exception No. 3) The ALJ reasoned that because Respondent had a history of soliciting grievances at round-the-clock meetings, its continuation of such practice during the

organizing drive did not carry with it any implied promise. ALJD at 28. The ALJ found that asking employees whether they have an interest in in-house day care is not materially different than asking the same question at a regularly scheduled meeting where it invites employee questions or concerns. ALJD at 29, 4-5.

Charging Party disagrees. Although Respondent's witnesses attested to a long history of open communications and round-the-clock meetings, their characterization of such meetings established only that Respondent has provided opportunities for employees to air grievances and for Respondent to announce changes. Their testimony established no history whereby Respondent proposed *specific* benefits for consideration by employees. Moreover, Respondent's witnesses acknowledged that the frequency of round-the-clock meetings increased and they were more well-attended by Wingate's owner and top officers during the anti-union campaign. Tr. 1459-1462, 1470-1471 (Owner Schuster); Tr. 1105-1107 (VP of HR Ianiro); Tr. 2060 (Administrator Harbby); Tr. 1888-1893, 1996-1997, 2002 (DON Nelson).

The burden was on Respondent to establish that the mid-August timing of its Child Care survey was not calculated to interfere with employees' decision whether to support the organizing effort. Inasmuch as Respondent's specific proposal of a new benefit constituted a significant deviation from its alleged practice of soliciting grievances in round-the-clock meetings, its posting clearly conveyed an implicit promise. *See Heartland-Hampton of Bay City*, JD-45-13, at 12-13 (July 18, 2013) (ALJ Olivero, M.) (employer's solicitation of grievances outside of its usual forum and in the presence of an official from the corporate office warranted a conclusion that the employer had deviated from its practice in an effort to dissuade employees from unionizing.) The fact that Respondent never made good on its promise adds further support

for the conclusion that the purpose of the Child Care flyer was to dissuade employees from organizing.

Based on the foregoing, the Charging Party's exception to the ALJ's dismissal of Complaint Paragraph XII(b) should be sustained.

**5. Charging Party Excepts to the ALJ's Dismissal of the Allegation that Respondent Unlawfully Promised to Consider a 401(k) Match and "Include that as part of our annual budgeting process for 2015."**

In the July/August survey referenced above, Respondent learned that two top concerns of employees were wages and retirement benefits, 401(k). R 37, R 39. In Schuster's August 22 letter announcing a 2% wage increase, he also promised to "investigat[e] a plan to bring back a match to employee 401(k) contributions" (which had been suspended since 2009). GC 17. The letter was distributed shortly after the Union achieved majority status but before it filed a petition for representation. In the letter, Schuster thanked "each and every one of you for having taken the time to meet with me, Kim [Ianiro], Danuta [Budzyna] and your leadership teams, and for sharing your honest comments and suggestions." GC 17. Notably, Schuster did not attribute the wage increase or the possibility of a 401(k) match to Respondent's financial successes. Nor did he attempt to advise employees that such benefits were independent of employees' ongoing union organizing campaign. Rather, Schuster advised employees, "We believe that this one-time additional wage increase adjustment of 2% will effectively bring our hourly rates into a more competitive level when compared with other facilities in our markets and, . . . is an important step in addressing concerns raised by a number of you. . . ." *Id.*

Respondent re-distributed the August 22 letter on October 4, three days after the Dutchess petition for representation was filed. In September, Respondent reminded employees

of its 401(k) promise in a flyer announcing a visit from a financial planner. CP 25 (“the first step is with you!”). Finally, in its 25th hour captive-audience speech, Respondent referenced its “commitment” to evaluating its retirement plan. CP 21. Thus, Respondent itself drew multiple connections between the organizing drive and its consideration of possibly bringing back a 401(k) match. Respondent offered no evidence, other than self-serving testimony, that it had previously considered bringing back the 401(k) match.

Nonetheless, the ALJ dismissed Complaint Paragraph XII(a) based on two considerations. Charging Party excepts to the ALJ’s findings and conclusions. (Exception Nos. 4 and 5). First, the ALJ found that Respondent announced that it was considering bringing back a match to 401(k) contributions at all of its facilities in late September. ALJD at 36, lines 39-43; ALJD at 37, lines 13-16. The sole basis for such finding was VP Ianiro’s self-serving testimony and Respondent’s Exhibit 48. Tr. 1124. R 48 consisted of a flyer distributed at Beacon only which mirrors the language of the flyer that was distributed at Dutchess. CP 25. Given that the ALJ discredited Respondent’s claims of new-found profitability and he discredited similar broad assertions made by VP Ianiro, his decision fails to explain on what basis he accepted her unsubstantiated claims regarding the 401(k) match. Second, the ALJ relied on the fact that on March 20, 2015, Respondent offered employees at all of its facilities a maximum match of \$100 per employee per year. R 49; ALJD 37 at 21-29. The ALJ reasoned that Respondent would not have announced a benefit at all of its facilities in order to interfere with employee rights at Dutchess. The ALJ failed to consider the possibility, however, that Respondent announced a relatively cheap benefit at all of its facilities in order to mask its unlawful motive and avoid a finding by the NLRB that it interfered with employee rights at Dutchess. The Complaint in this matter issued on March 31, 2015.

For the foregoing reasons, Charging Party's exception to the ALJ's dismissal of Complaint Paragraph XII(a) should be sustained.

**CONCLUSION**

For the reasons set forth above, Charging Party respectfully requests that the Board grant the Charging Party's cross-exceptions to the decision of the ALJ.

Dated: New York, New York  
February 10, 2016

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

This is to certify that I have served a true and correct copy of the CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS in Case No. 03-CA-140576, 03-CA-145659 via electronic filing through the National Labor Relations Board's website, [www.NLRB.gov](http://www.NLRB.gov), upon:

Rhonda P. Ley, Regional Director  
National Labor Relations Board, Region 3  
Leo W. O'Brien Federal Building  
Clinton Ave and N. Pearl Street, Room 342  
Albany, NY 12207-2350

The CHARGING PARTY'S BRIEF IN OPPOSITION IN SUPPORT OF CROSS EXCEPTIONS was also served, via electronic mail, upon counsel of record for the Charging Party as follows:

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