UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

WINGATE OF DUTCHESS, INC.	:	
	:	
	:	CASE NOS. 03-CA-140576
	:	03-CA-145659
and	:	
	:	
1199 SEIU UNITED HEALTHCARE WORKERS EAST	:	
	:	
	:	
	:	

RESPONDENT WINGATE OF DUTCHESS, INC.'S ANSWER TO GENERAL COUNSEL'S AND UNION'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent, Wingate of Dutchess, Inc. ("Wingate),[1] by and through its undersigned counsel, Duane Morris LLP, hereby files with the National Labor Relations Board ("Board" or "NLRB") its answer to the Cross-Exceptions to the recommended decision of Mark Carissimi, Administrative Law Judge ("ALJ"), dated November 16, 2015 ("Decision"), filed by the General Counsel ("GC") and 1199SEIU United Healthcare Workers East (the "Union").

PRELIMINARY STATEMENT

The ALJ's Decision is stunningly one-sided. The ALJ ruled in favor of the GC on nearly every issue, misapplying the law and making factual findings contrary to the clear preponderance of the relevant evidence. Despite the ALJ's clear bias in their favor, the GC and the Union filed Cross-Exceptions challenging the few issues where the ALJ ruled in favor of Wingate. As the ALJ made every inference he could against Wingate, there can be no question these few remaining issues were correctly decided. The GC's and the Union's Cross-Exceptions are completely meritless and should be rejected by the Board.

Under the GC's and the Union's interpretation of the National Labor Relations Act (the "Act"), as demonstrated by their Cross-Exceptions, Wingate could not make any changes to its workplace, or even consider modifications, once there was even the slightest possibility employees might be contemplating unionizing. The Union even attempts to push up the date by which it contends Wingate should have been constrained from making workplace changes, by assuming, without any evidentiary support, Wingate had actual knowledge of Union activity at its Dutchess facility as of July 13, 2014. Remarkably, the Union bases its argument solely on

[1] Wingate of Dutchess, Inc. is an independent and legally distinct entity which is wholly owned by Wingate Healthcare, Inc. For ease of reference, both entities will be referred to herein as "Wingate" or the "Company," although only Wingate of Dutchess, Inc. is the employer of the at-issue employees in this proceeding. Once identified, all individuals will be referred to by their last name.

(1) Union activity at Dutchess's sister facility 25 miles away in Ulster, and (2) alleged, **secret** discussions about unionization among Dutchess employees. There is no evidence (nor could there have been any) Wingate knew or suspected Union activity at Dutchess until the last days of July 2014, contrary to the Union's Cross-Exceptions and the ALJ's holding.

The GC and the Union go one step further than even the ALJ, contending routine employee benefit matters – such as discussing potential reinstatement of a Company-wide 401(k) match and continuing a dialogue from the prior year about in-house childcare – violate the Act. Wingate previously had a 401(k) match, which it had always intended to reinstate if and when financial circumstances allowed, and it discussed with employees the possibility of and their interest in in-house childcare prior to the Union's arrival at Dutchess in late-July 2014. There is no evidence such actions had anything to do with the Union because they did not.

The GC additionally attempts to constrain Wingate's permissible communications with its employees, by arguing Clayton Harbby "harassed" Sandra Stewart when he appropriately reiterated the previous instruction of the Director of Nursing Services, Ann Nelson, that Stewart refrain from soliciting union authorization cards during working time, and contending Diane McDonald "solicited grievances" from Georgeann Allen when she allegedly asked Allen if there was anything Allen wanted her to communicate to Scott Schuster. These allegations are not supported by the record, as the communications at issue were entirely consistent with Wingate's past practice of regularly and proactively soliciting employees' concerns and grievances and thus do not violate the Act.

Finally, the GC asks the Board to overturn nearly 80 years of Board precedent and find search-for-work and work-related expenses are independently recoverable as part of

compensatory damages. There is no reason to depart from the Board's precedent on this issue, and the GC provides insufficient justification to do so.

The GC's and the Union's Cross-Exceptions have no merit and should be rejected.

LEGAL ARGUMENT

I. Harbby Did Not Harass Stewart on July 29, 2014 (GC Cross-Exception 1)

The GC contends the ALJ should have found Wingate violated Section 8(a)(1) when Harbby allegedly told Stewart "she was being harassed because of her union activity" during a conversation on July 29, 2014. (GC Cross-Exception 1). However, not only is there no evidence Harbby ever told Stewart or even suggested to her that she should expect harassment for supporting the Union (Tr. 230-31, 2085), but the GC ignores the context in which this conversation occurred, which is critical to the analysis of this allegation.

It is undisputed that beginning in the last week of July 2014, Stewart repeatedly and admittedly (Tr. 436) violated Wingate's Solicitation/Distribution policy by soliciting Union authorization cards during her work time and that of her co-workers, and in patient care areas, including the residents' dining room and in their rooms and bathrooms, which upset numerous employees to such an extent they complained to Nelson. (Tr. 1213-16, 1313-15, 1364-66, 1664-65, 1768-70, 1772-73, 1783-84; R Exs. 61, 67, 73, 74, 75).[2]

On or about July 29, 2014, upon receiving the first of these many complaints by Stewart's co-workers, Nelson approached Stewart to address the matter. (Tr. 1364-66, 1768). Specifically, Nelson informed Stewart someone had expressed concerns about Stewart soliciting

[2] As one of many examples of Stewart's inconsistent and untruthful testimony, Stewart first denied soliciting cards during working time, testifying she never solicited cards from employees unless both she and they were on break time, later qualified that she did not know if the employees she was soliciting were on break time, and finally admitting to soliciting in patient care areas, including the residents' dining room, residents' rooms, and residents' bathrooms, while still incredibly contending that patient care was not being provided at the time. (Tr. 432-36).

cards in patients' rooms and asked Stewart to refrain from such solicitation in patient care areas, reminding her that they were there, first and foremast, to take care of the residents. (Tr. 1769, 2085).

Consistent with her behavior toward her managers throughout this time period, Stewart's response to Nelson was inappropriately defensive and belligerent. She demanded to know why Nelson was "accusing" her, and claimed that Nelson had "no proof." (Tr. 1769-70). In response to this unprofessional outburst, Nelson told Stewart she meant no offense but was obligated to address the complaint that had been brought to her attention. (Tr. 1770). For Nelson, the primary concern was that the residents received appropriate care. (Id.). Significantly, the ALJ, as he should have, found Nelson acted entirely appropriately in directing Stewart and others not to solicit other employees to sign authorization cards during their working time or the working time of the employee being solicited. (ALJD p. 9-10, 13).

Later that day, Stewart, apparently upset Nelson had spoken to her about her inappropriate solicitation activity, complained to Harbby that Nelson was "harassing" or "threatening" her. (Tr. 230, 2085).[3] When Harbby inquired as to what kind of harassment

[3] Stewart's go-to mantra this and every other time Wingate had legitimate reason to address her violation of a legitimate workplace rule or policy, was that she as being "harassed" by her supervisors. Her unsupported allegation of harassment is directly refuted by the fact Wingate did not discipline Stewart for continuing to violate Wingate's Solicitation/Distribution policy after Nelson's directive on July 29, 2014, although it certainly could have, nor did it seriously discipline Stewart for any other misconduct until she ignored all rules and directives by calling out S.M., a 95 year-old incontinent and wheelchair-confined resident, for complaining to Wingate management that Stewart had failed to toilet him, leaving him in a urine-soaked diaper for an extended period of time. (Tr. 1302-03, 1327, 1338, 1351). Nelson, while investigating the toileting complaint, directed Stewart to refrain from discussing the complaint with S.M. (Tr. 469, 1880). Despite Nelson's directive, after learning of S.M.'s complaint, Stewart referred to S.M. as "the Great Reporter" or "News Reporter," which greatly upset and frightened him, leaving him more vulnerable than he already was. (Tr. 1689-91, 1833-34; R Exs. 11-d, 11-e, 11-g). After S.M. and his daughter, Joyce Galitello, complained about this retaliatory reference on October 3, Stewart was suspended pending investigation of the matter. (Tr. 1850).

Stewart meant, Stewart responded Nelson had told her she needed to stay focused on her work. (Tr. 2085). Harbby credibly testified that after Stewart approached him on July 29, 2014 and communicated her unfounded assertion that she was being "harassed" by Nelson, he responded by reiterating Nelson's previous instruction that Stewart focus on her work during her working time. (Id.).

Not surprisingly, given her propensity, well-established throughout this proceeding, to obfuscate, flip-flip, and lie on key issues, Stewart testified to a different version of this conversation with Harbby, claiming he said she was "putting [her]self out there," made note of her wearing yellow scrubs and a purple streak in her hair (which were the Union's colors), said she "need[ed] to go educate [her]self before [she] started this Union thing," and said he "want[ed] [her] to know what you guys are getting into." (Tr. 230-31). While even Stewart's distorted version of events belies the GC's allegation Harbby told Stewart "she was being harassed because of her union activity," her testimony on this issue warrants little, if any consideration, as her testimony that she was unaware her yellow scrubs and purple hair matched the Union's colors was incredible on its face and the evidence unequivocally establishes Stewart was not a credible witness generally as she lied on many penultimate issues.[4] The record is replete with inconsistent statements from Stewart, made throughout Wingate's investigations, the Board's investigation and trial (Tr. 485-90, 543-45,1868-76; R Exs. 11-b, 11-c, 62-a), and with contrary statements of her co-workers and others refuting her assertions, including the testimony of Maria Tardella, who credibly testified Stewart tried to coerce her into lying. (Tr. 1376-81).

[4] Wingate excepted to the ALJ's crediting of Stewart's testimony that Harbby said she was "putting [her]self out there" with the Union and that he wanted her to know "what she was getting into" constituted a threat of unspecified reprisals for engaging in union activity. (Exception #60).

For example, in connection with the October 3 retaliation complaint raised by S.M. and his family, Stewart first testified Angot was not in the room with her while she was shaving S.M., in direct contradiction to her statement to Nelson during the investigation. When shown her statement to Nelson, Stewart changed her testimony and said Angot was in the room with her, in direct contradiction to her sworn affidavit to the Board (which stated Angot was not with her), and when then shown her Board affidavit, Stewart changed her testimony yet again to say Angot was not with her. (Tr. 483, 486-90, 1851-52; R. Ex. 11-c).

Stewart's testimony was likewise impeached in connection with the S.M. toileting incident on September 20. Stewart repeatedly testified that when Nelson spoke to her about the toileting incident on September 23, Nelson told her not to speak to S.M. about the incident. (Tr. 469, 543). Yet in her sworn affidavit to the Board, Stewart specifically averred that Nelson had given her no such instruction. (Tr. 543-44). Similarly, although Stewart approached LPN Melinda Benedict on September 21, 2014 to provide justification for not toileting S.M. the prior day (Tr. 1306-07; R Ex. 9-a), she incredibly testified she had "no idea" about the complaint until Nelson told her about it days later. (Tr. 232-33, 237-38, 467-70).

A similar same story applies to Stewart's testimony attempting to justify her conduct in taking an unscheduled lunch break on September 26 that left her residents unattended. Upon being shown the Locust Grove unit assignment sheet for September 26, which was prepared early and only had three names on it, Stewart suddenly claimed to recall the unit was one CNA short that day, causing her to make a special three-way lunch coverage arrangement with the other two CNAs to cover her scheduled 12:30 lunch shift so she could take an early lunch at 11:15; but when she was then shown the final master scheduling evidencing that four CNAs were working on Locust Grove, she changed her story, conceding she left it to everyone else to

figure out when they would go to lunch because she "always" took the early lunch, contrary to her meal break records. (Tr. 451-43, 459-60; R. Exs. 16-c, 16-d).

In sum, these numerous inconsistencies illustrate Stewart's overall lack of credibility, yet even if Stewart could be believed on this particular issue (which her record of inconsistent and untruthful statements calls into grave doubt), there is no basis for finding that Harbby told Stewart she was being harassed because of her union activity when the "harassment" Stewart complained of was being legitimately directed by her managers to stop soliciting employees on their working time in patient care areas. Consequently, the GC's Cross-Exception as to the ALJ's failure to make a finding Wingate violated Section 8(a)(1) "by telling an employee that she was being harassed because of her union activity" is without merit and should be denied.

II. The ALJ Properly Dismissed the Allegations that Wingate Violated the Act by Announcing 401(k) Match

Both the GC and the Union except to the ALJ's finding that Wingate did not violate the Act when it announced that it was considering reinstating a form of employer match to its 401(k) program. (GC Cross-Exception #3; Union Cross-Exception #3-4). In so doing, they incredibly assert Wingate ultimately reinstated a match for all 19 of its facilities effective April 2015 for the sole purpose of hiding its "unlawful motive" of interfering with employee rights at the Dutchess facility.

As detailed below, the GC's and the Union's Cross-Exceptions are without merit and should be denied, as the discussion of a 401(k) employer match was a Company-wide one that commenced during the Summer of 2014, well before the Union filed its petition for election at Dutchess on October 1, 2014. This discussion pertained to an ERISA-governed plan covering *all 19 Wingate facilities*. In discussing potential reinstatement of an employer match, Wingate did not make any promises to employees, nor did Wingate make any changes to its 401(k) plan

before or during the critical period. That Wingate decided to reinstate a form of match in March 2015, months after the Union lost election at Dutchess, and for all of its employees Company-wide, belies the GC's and the Union's assertions that Wingate raised this issue for the purpose of interfering with the election.

A. Wingate Lawfully and Properly Discussed the Possibility of Reinstating a 401(k) Match Before the Critical Period and with No Improper Motive

Wingate has had a Company-wide 401(k) plan for years. (Tr. 1116). Prior to the fall of 2009, the terms of Wingate's 401(k) plan had long provided for a matching component, at the employer's discretion, and calculated at 20% of employees' first 3% of deferrals with no maximum. (Tr. 1117). On September 11, 2009, then Vice President of Human Resources, Elissa O'Brien, issued a memorandum to all Wingate 401(k) participants explaining that due to Massachusetts Medicaid cuts and Wingate's objective of minimizing layoffs, Wingate was suspending the 401(k) match effective after the September 25, 2009 pay period, but hoped to reinstate the match in the future. (R Ex. 45).

The possibility of re-instating the 401(k) match was something about which employees frequently inquired and for which they expressed a desire. (Tr. 1119). As Company finances improved in 2014, Schuster began to consider reinstating a form of the 401(k) match on a Company-wide basis for calendar year 2015, provided the financial outlook of the Company continued to support it. (Id.). As such, and *as part of Wingate's regular quarterly 401(k) meeting process, the prospect of bringing back the match was raised with the staff at all of Wingate's facilities beginning in late July 2014*. (Tr. 1119). Thereafter, on August 22, 2014, Schuster issued a letter to "Team Wingate" wherein he communicated Wingate's decision to begin evaluating the 401(k) plan, employee participation, and how to get more people involved as participants. (GC Ex. 17). The letter further stated Wingate was investigating a plan to

reinstate an employer match to employee 401(k) contributions and that this consideration would be included as a part of the annual budgeting process for 2015. (GC Ex. 17; Tr. 1472). Thereafter, meetings were held around late September 2014 at all of Wingate's facilities in both Massachusetts and New York. (Tr. 1120; R. Ex. 48; CP Ex. 25). Wingate did not make any changes to its 401(k) plan or implement a matching component at any point prior to the election that took place at Dutchess on November 12, 2014, nor did Wingate ever make any promises about what would occur with respect to the 401(k) plan at any point in 2014. (Tr. 1472). No match went into effect until 2015. (R Ex. 49).

On March 20, 2015, Schuster sent a memorandum to *all* Wingate employees, in both New York and Massachusetts, informing them that effective April 1, 2015, Wingate was reinstating its employer 401(k) matching program, with a match calculation remaining at 20% of the employee's first 3% of annual contributions to the Plan, but capped at $100.00 per employee. The memorandum also advised of other Company-wide plan changes to the 401(k) plan, *i.e.*, shortening the eligibility period and enrollment period for the 401(k). (R Ex. 49).

As clearly demonstrated by this history, the Union was never a motivating factor behind Wingate's desire to re-implement a 401(k) match. As expressed in the September 11, 2009 memorandum to all Wingate employees, Wingate's desire was *always* to reinstate the match at a future date. (R Ex. 45). Wingate *communicated the possibility of reinstituting a 401(k) employer match to all of its facilities during regular quarterly meetings* that began well before the critical period of the petition being filed, and consistent with its ongoing practice of regularly and openly discussing employees' concerns. (Tr. 1120; ALJD, p. 46). Under *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), such discussion does not constitute an unfair labor practice ("ULP").

The fact that the discussions about re-implementing a 401(k) match and the actual re-implementation of the match in March 2015, took place on a Company-wide basis at all of Wingate's facilities, not just Dutchess and not only its New York facilities, belies any improper motive. See, e.g., *Network Ambulance*, 329 NLRB 1 (1999) (determining that new benefit was implemented for lawful purpose, even though granted during critical period, where benefits package was offered to all employees on a company-wide basis, and where the employer had a past practice of announcing and implementing new benefits at beginning of fiscal year). The Union's contention that Wingate reinstated the match at all of its facilities as a mere ruse to "mask its unlawful motive" (Union Cross-Exceptions Br. at 25) is not only illogical, but also illustrates a fundamental misunderstanding of 401(k) plans. Indeed, in order to comply with ERISA Wingate was *required* to re-implement the match on a Company-wide basis pursuant to the terms of its plan, or it would have had to amend its plan to allow for differences among locations – it could not just selectively allow the match at one facility and not another. See 29 U.S.C. § 401(a)(1)(D) (requiring ERISA plan fiduciary to act in accordance with the plan documents). Moreover, that Wingate would incur the administrative burden and cost of reinstating a match at all of its 19 facilities in March of 2015, for the purpose of interfering with employee rights at Dutchess – months after the Union lost election at Dutchess in November 2014 – is utterly nonsensical.

III. Wingate Had No Knowledge of Union Activity Until July 25, 2014 at the Earliest (Union Cross-Exception 2)

Contrary to the Union's contention, the record does not support an inference of actual knowledge of union organizing activity by Wingate as of July 13, 2014, nor does it support the ALJ's conclusion Wingate suspected union activity was being conducted at Dutchess as of July

13, 2014.[5] The only conclusion supported by the record is Wingate had no knowledge (specific or otherwise) of any union activity at Dutchess until the last few days of July 2014.

No evidence was presented or adduced by any party at the hearing, nor was any such evidence cited to by the ALJ, that Wingate had any knowledge of Union activity at Dutchess, prior to the last few days of July 2014. The evidence established there was no union activity openly taking place at the Dutchess facility prior to Stewart's solicitation of authorization cards, which she testified began after she signed her card on July 25, 2014. (Tr. 496).

However, in an effort to try to establish Wingate's unlawful motive behind the change in payroll frequency and the institution of the attendance bonus, the Union continues to conflate union activity at Wingate's Ulster facility with knowledge of purported union activity at Dutchess.

The Union goes so far as arguing it would have been reasonable for the ALJ "to infer" Wingate "suspected" union activity was being conducted at Dutchess as far back as June 13, just one day after the Union filed the petition at the Ulster facility! (Union Cross-Exceptions Br. at 18). In support of this assertion, the Union cites testimony by Schuster elicited in response to being asked what involvement he had in connection with the Union's campaign at the *Ulster facility*. The Union also relies on Harbby's testimony he was instructed in mid-June to see if any

[5] Wingate's reference in its Exceptions Brief to June 13, 2014 (rather than July 13, as set forth at page 26 of the Decision) as the date the ALJ found it could be inferred Wingate suspected union activity at the Dutchess facility is an understandable typographical error, given the ALJ's reference to knowledge on July 13 directly followed his reference to Wingate having knowledge of Union activity at Ulster after the petition was filed there on June 12. Regardless, there is no evidence at all Wingate had any knowledge of organizing at Dutchess by June 13 or July 13, and it did not. The inference Wingate suspected union activity was going on at the Dutchess facility is improper and unreasonable at any date before there was evidence Wingate either observed or was informed of such activity, which did not occur until the very end of July 2014. Knowledge of organizing at Ulster, a separate facility 25 miles away from Dutchess, is not evidence of actual organizing or management's knowledge of organizing at Dutchess.

staff at Dutchess would voluntarily speak at Ulster, yet conveniently omits his explicit testimony he was unaware of any union activity at Dutchess at the time he asked employees to speak in mid-July. (Tr. 2056).

To further support the argument Wingate was aware of union activity at Dutchess in mid-July, the Union cites to Harbby's testimony about "reconvening" with the individuals he asked to speak at Ulster and his testimony he was aware there were rumors throughout the facility about the campaign at Ulster. (Union Cross-Exceptions Br. at 19). To be clear, Harbby testified he did not ask employees at Dutchess if they would be willing to speak at Ulster until mid-July. (Tr. 2056). He then testified he had a second conversation with those employees before they spoke at Ulster, during which conversation Allen told him she was not going to participate. (Tr. 2058). Harbby's testimony there were rumors throughout the facility was elicited in response to a question regarding the Dutchess employees' knowledge of the Ulster campaign, which is why he held the July 23, 2014 round-the-clock meeting and why he discussed the Ulster organizing drive at that meeting. (Tr. 2060-61). None of Harbby's testimony indicates he was aware or even suspected union activity at Dutchess in mid-July.

The Union again makes reference to the conversation Allen allegedly had with Harbby the week of July 7, where she claimed to have told him people at Dutchess felt they were "in the same boat" as those at Ulster. Harbby denied Allen ever made such a statement and, contrary to the Union's claim, never acknowledged Allen raised concerns about campaigning at Ulster. (Union Cross-Exceptions Br. at 19). Instead, Harbby testified Allen told him she did not want to speak at Ulster because "her friends at Ulster told her to keep her Black-ass out of it." (Tr. 2058). Regardless, even if Allen did tell Harbby she and others felt they were in the same boat as the employees at Ulster, it is a huge and unsustainable leap to conclude such a statement

provided Harbby with *knowledge* of union organizing at Dutchess. The law requires more than supposition and innuendo in establishing an employer's actual knowledge of union activity for purposes of establishing a violation of Section 8(a)(1) of the Act. See, e.g., *Meijer, Inc. v. NLRB*, 463 F.3d 534 (6th Cir. 2006) (vacating portion of Board's order and finding, contrary to Board's position, knowledge of protected activity is "essential and requisite element of a 8(a)(1) violation" and the test must have a subjective element).

Indeed, the only evidence introduced at trial of any union organizing taking place at Dutchess before the very end of July was informal employee discussions about interest in the Union and Stewart's alleged efforts to have employees sign a list she claimed she faxed to the Union showing there would be interest in a union at Dutchess. On the first point, the Union refers to an informal discussion that allegedly took place between Stewart, Allen and two other employees on the week of July 7. The Union contends it was shortly after this meeting Stewart and Allen contacted Massara about their interest in the Union, even though Massara testified Stewart and Allen did not contact her until July 22, 2014. (Tr. 49). Regardless of the date of the alleged employee conversation, there was no testimony by anyone that any manager or supervisor of Wingate was aware of it and, in fact, they were not.

On the second point, the Union makes reference to a list of 35 signatures collected by Stewart during the following week, which she allegedly faxed to Massara. There was no testimony or evidence any manager or supervisor was aware of this list. Indeed, neither the Union nor the GC produced this list at trial, to the extent it even existed. Presumably if it did exist, either Stewart or the Union, or both, would have had a copy to produce.[6] Further, even

[6] Stewart testified she no longer had the list and did not know where it was (Tr. 207) and it was not offered into evidence, nor produced in response to Wingate's subpoena duces tecum which sought all documents related to the Union's organizing efforts at Dutchess.

assuming, *arguendo*, it did exist, Stewart's testimony regarding her method of obtaining signatures for this list and her method of transmitting the list to Massara illustrates she went above and beyond to ensure Wingate management *would not know* what she was doing. Specifically, Stewart testified she wrote at the top of the paper "a party list" (Tr. 208), in case it got displaced and got back to management, and when she showed the paper to employees to sign she folded over the part of the paper that said "a party list." (Tr. 209). She also testified she faxed it to the Union from Office Depot at a mall. (Tr. 207). Given the aforementioned, it is implausible to conclude Wingate was aware of Stewart's organizing efforts prior to RN Maylath complaining to Nelson about her solicitation of an authorization card during the last few days of July (Tr. 1768), especially given the lengths she went to conceal them.

In sum, the Union's assertion that the record supports an inference of actual knowledge by July 13 is without merit.[7] It cannot logically be concluded Wingate knew or even suspected any union activity at Dutchess until the last few days in July, at the very earliest.

IV. Wingate Did Not Unlawfully Solicit Employee Interest in In-House Childcare (Union Cross-Exception 3)

The Union contends Wingate unlawfully canvassed employees about their interest in a child care program when it posted a flyer asking, "If we have an 'In-House Child Care' program, would staff use it?" The ALJ properly concluded the flyer, to which approximately 35 employees responded, was "not materially different than asking the employees the same question

[7] The Union's allegation that the issuance of retroactive pay to Allen on July 18 supports its contention Wingate had actual knowledge about union activity at Dutchess on July 13 is baseless. There were no charges brought by the GC or the Union regarding the issuance of retroactive pay. No such charges could have plausibly been brought as it is clear, according to Allen's own testimony, she received the retroactive pay solely because she told Harbby she had not received her raise from the year before and he simply corrected the error. (Tr. 684).

at one of the Respondent's regularly scheduled meetings in which it invites questions or concerns regarding working conditions." (ALJD p. 29).

Evidence presented at the hearing unequivocally shows Wingate does in fact have a longstanding policy and practice of regularly soliciting employee concerns and grievances, through its open-door communication policy, including routine round-the-clock meetings and other forms of communication. (Tr. 1105-07, 1456-57, 1888-92). The flyer regarding in-house childcare is simply another example of Wingate's inviting employees to share their feedback. The Union refers to in-house childcare as a new benefit first proposed in mid-August 2014, but the record establishes Harbby pursued the possibility of in-house childcare and inquired employees about their interest in such a benefit for over a year before the flyer was posted. (Tr. 406-07, 2073-75, 2077-78; R Ex. 55).

A long line of Board and court cases have held an employer with an established practice of soliciting and resolving employee grievances may continue that practice during an organizing campaign. *Johnson Techns, Inc.*, 345 NLRB 762, 764 (2005) ("It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign"); *TNT Logistics North Am., Inc.*, 345 NLRB 290 (2005) (no violation during ongoing union organizing campaign where employer had a past practice of soliciting grievances through an "open door" policy); *Wal-Mart Stores, Inc.*, 339 NLRB 1187, 1187 (2003) ("An employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign"); *Wal-Mart Stores, Inc.*, 340 NLRB 637, 640 (2003) ("It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar type policy may continue such a policy during a union's organizational campaign."); *Curwood, Inc.*, 339 NLRB

1137 (2003), affd. in part, vacated in part 397 F.3d 548 (7th Cir. 2005) (employer's continued practice of allowing employee questions did not violate the Act); see also *MacDonald Mach. Co.*, 335 NLRB 319 (2001).

The Union incorrectly argues Wingate "significantly" deviated from its regular practice because the flyer proposed a specific benefit for considerations by employees. The in-house childcare flyer was no different than Wingate's past practice of listening to – and indeed, affirmatively seeking – employees' concerns and grievances, which is lawful under the Act. See, e.g., *Kingsboro Med. Grp.*, 270 NLRB 962, 963 (1984) (finding no violation of the Act where GC failed to present evidence establishing respondent's letter to employees 10 days after start of organizing campaign, which stated respondent would, as before, "always remain ready to listen to your suggestions and grievances," inaccurately reflected its past practice of listening to employees' suggestions and grievances); *Longview Fibre Paper and Packaging, Inc.*, 2011 NLRB LEXIS 70 (Meyerson, G., ALJ) (Mar. 9, 2011) (adopting ALJ finding employer did not violate Section 8(a)(1) by soliciting grievances from employees and promising to remedy them where it had a history of soliciting employee suggestions, concerns, complaints and positive comments, and of resolving complaints when possible, including through the use of detail surveys of employee attitude, concerns, and suggested changes).

Further, it is not the solicitation of grievances itself that is problematic under the Act; rather, the key issue is whether there has been a promise of benefits, express or implied, in order to influence a union campaign. See, e.g., *MacDonald Mach. Co.*, 335 NLRB at 320. As found by the ALJ, the flyer did not make any promise – express or implied – employees. (ALJD p. 29). Incredibly, the Union asserts Wingate "never made good on its promise" which "adds further support for the conclusion that the purpose of the Child Care flyer was to dissuade employees

from organizing." (Union Cross-Exceptions Br. at 23-24). This is an absurd and bad faith argument, as the Union knows as well as anyone that if Wingate subsequently implemented an in-house childcare program, the Union would jump on the opportunity to file another unfair labor practice charge alleging an additional violation of the Act.

V. McDonald Did Not Unlawfully Solicit Employee Grievances (GC Cross-Exception 2)

The GC contends Wingate unlawfully solicited grievances, based on an alleged conversation between McDonald and Allen in late August or early September, during which McDonald purportedly asked Allen whether there was anything she would like McDonald to communicate to Schuster.

Assuming, *arguendo*, this conversation even took place, it is entirely consistent with Wingate's past practice of regularly and proactively soliciting employees' concerns and grievances. As established above, there is a long line of Board cases holding an employer with an established practice of soliciting and resolving employee grievances may continue that practice during an organizational campaign. The GC failed to submit any evidence establishing the alleged conversation between McDonald and Allen deviates from Wingate's past practice of soliciting employee concerns. The fact McDonald had this alleged conversation with Allen one-on-one is inconsequential. It is clear from Allen's testimony McDonald called her into her office to ask her questions about a resident. (Tr. 704). It was only after Allen answered McDonald's questions about the resident that McDonald even inquired, allegedly, about her concerns. (Id.). Further, there was no evidence, nor does the GC allege, McDonald made any promises to Allen during the conversation. In sum, there was nothing out of the ordinary about the conversation. McDonald's inquiry, if she even made such an inquiry, is consistent with Wingate's past policy and practice of soliciting employees' grievances.

VI. Wingate's Attendance Bonus Was Announced on July 14, 2014, Before Wingate Knew of Union Activity at Dutchess (Union Cross-Exception 1)

As correctly noted by the ALJ, it "is undisputed that on July 14, 2014, the Respondent posted at the Dutchess facility a memo from Nelson to the nursing staff (GC Ex. 19)" announcing the perfect attendance bonus, which took place from July 18, 2014 through September 18, 2014. (ALJD p. 24). Wingate's July 14 announcement pre-dates any knowledge or suspicion of any union organizing activity at Dutchess. The Union attempts to push back the date the attendance bonus was posted to July 18 in an effort to make the argument Wingate had knowledge of Union activity more plausible.[8] In support of this contention, the Union argues that even though the memo is dated July 14, Nelson testified it was posted and included in employee's paychecks simultaneously and since paychecks were distributed on July 18, the bonus was posted on July 18. (Union Cross-Exceptions Br. at 20). This assertion completely misconstrues Nelson's testimony. When asked how she distributed the memo, Nelson said "through paychecks, *and* I believe posted it." (Tr. 1939) (emphasis added). Hence, Nelson never testified the memo was not posted when dated on July 14, 2014.

Nelson further testified the purpose of the July 14 memo was "to inform staff, to encourage them to come to work and not call out." (Tr. 1937). As acknowledged by the Union, the perfect attendance bonus started on July 18. It would make no sense whatsoever to inform staff of a perfect attendance bonus on the day that it began, as employees would have no notice or incentive not to call out that day. If an employee did not know about the attendance bonus the morning of July 18 and called out that day, she would not be eligible for the bonus, completely defeating its purpose. The Union's argument is wholly without merit and is illogical on its face.

[8] In any event, it does not matter whether the attendance bonus was announced on July 14 or July 18, as Wingate did not have any knowledge or suspect any union activity at Dutchess until the last few days in July.

VII. The Board Should Uphold Its Nearly 80-Year Precedent That Search-For-Work and Work-Related Expenses Are Not Independently Recoverable (GC Cross-Exception 4)

Despite conceding it would be a reversal of long-standing Board precedent, the GC excepts to the ALJ's holding denying Stewart reimbursement for search-for-work and work-related expenses regardless of whether she received interim earnings. Since 1938, the Board has consistently held such expenses can only be used as an offset to interim earnings instead of being independently recoverable. See *D.L Baker, Inc.*, 351 NLRB 515, 537 (2007); *Deanna Artwave, Inc.*, 112 NLRB 371, 374 (1955), enfd. 228 F.2d 871 (6th Cir. 1955); *West Texas Utilities Co.*, 109 NLRB 936, 939 fn. 3 (1954); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). The Board's holding is sensible because a reinstated employee would receive a windfall if she could recover these expenses regardless of whether she obtained interim employment when she did not have to incur any work expenses (such as commuting or tolls) for the job she receives back pay for as she ordinarily would. While the GC argues the current Board rule punishes discharged employees "who secure employment at a lower rate than interim expenses," it is hard to envision any scenario where this possibly could be the case and it would make no sense for the discharged employee to retain such a job. Why would any person work at a job where their expenses exceed their income?

The GC's reliance on decisions from the Equal Employment Opportunity Commission and the United States Department of Labor is misplaced because the Act does not broadly provide for "damages" like the statutes these agencies govern. Under Section 10(c) of the Act, the Board may only award reinstatement and/or back pay as a remedy for unlawfully discharged employees. 29 U.S.C. §160(c). In contrast, Title VII of the Civil Rights Act allows for the recovery of punitive damages and compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary

losses…" 42 U.S.C. §1981a(b). Similarly, the Fair Labor Standards Act allows for the recovery of "legal or equitable relief as may be appropriate," which besides reinstatement and back pay, can include liquidated damages and attorneys' fees. 29 U.S.C. §216(b).

The GC fails to identify any persuasive reason to depart from the Board's current rule, and thus this exception should be rejected.

VIII. The ALJ Ordered a Remedy For His Incorrect Finding That Wingate Violated the Act When it Implemented the 2% Wage Increase (GC Cross-Exception 5)

Contrary to the GC's Cross-Exception, the ALJ did order a remedy for his incorrect finding that Wingate violated the Act by implementing the 2% wage increase. The ALJ found Wingate violated Sections 8(a)(3) and (a)(1) of the Act when it granted the wage increase. (ALJD p. 72, lines 32-33). In his Remedy section, the ALJ held "[h]aving found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom…" and expressly references "[g]ranting employees a wage increase." (ALJD p. 73, 17-19, p. 76 at (q)). There is no merit to this exception.

IX. The Board Should Disregard Any Reference by the Union to Channel Kelly "Termination"

The Union impermissibly and egregiously uses its Cross-Exceptions to introduce evidence not in the record regarding Channel Kelly ("Kelly"), referring to a prior ULP charge that was settled and not at issue in this case. The ALJ specifically directed Union counsel that questions regarding Kelly's departure could only be asked as background for the GC's allegation Wingate told employees in August 2014 there would be no Union solicitation or distribution in the building. (Tr. 693, 696-97). After Union counsel disobeyed the ALJ's order, Wingate objected on the record and the ALJ specifically stated "I will certainly make no conclusions on the basis of an apparent settlement that I know nothing about…But I certainly will assess the testimony of the witness without regard to any charges that may have been filed or how the

matter involving her break in employment was resolved." (Tr. 879-81). Based on the ALJ's holdings at hearing, Wingate did not (and could not) present any evidence regarding the Kelly settlement. In bad faith, the Union now tries to use the Kelly settlement as a de facto hallmark violation and evidence of Union animus in its desperation to obtain a *Gissel* bargaining order. The Board should give the Kelly settlement no evidentiary value in deciding this case.[9]

CONCLUSION

For all the reasons set forth herein, Wingate respectfully requests the Board dismiss the GC's and the Union's Cross-Exceptions.

Respectfully submitted,

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Dated: New York, New York
February 29, 2016

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[9] If Wingate would have been allowed to present testimony on this issue, it would have shown Kelly solicited cards on working time and in patient care areas, in clear violation of Wingate's Solicitation/Distribution policy.

CERTIFICATE OF SERVICE

This is to certify that on February 29, 2016, I electronically filed the foregoing document with the National Labor Relations Board pursuant to the NLRB E-Filing System and have also served a copy of this document to the individuals listed below in the manner specified therein:

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