

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**BAPTIST HEALTH NURSING AND
REHABILITATION CENTER, INC.**

and

**Cases 03-CA-153365
03-CA-160251**

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST**

Jessica Noto, Esq.,
for the General Counsel.
Sanjeeve DeSoyza and Robert Manfredo, Esqs.,
for the Respondent.
Magdalena Barbosa, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The central question in this case is whether an employer, during the period after a union is recognized but before a first contract or an interim grievance procedure is in place, has an obligation under the National Labor Relations Act to notify and bargain with the union before taking certain types of discretionary disciplinary action against employees. The General Counsel and the 1199 SEIU United Healthcare Workers East (the Union) argue that employers do have such an obligation based on the reasoning in the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012). Baptist Health Nursing and Rehabilitation Center, Inc. (Respondent or Baptist Health), on the other hand, argues that the *Alan Ritchey* decision is no longer good law because it was decided when the Board lacked a proper quorum (two of the Board members who participated in *Alan Ritchey* were serving under recess appointments that were later deemed invalid in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)). Thus, Respondent argues, the controlling case is *Fresno Bee*, 337 NLRB 1161 (2002), a case in which the Board adopted the judge's ruling that the employer had no obligation to notify the union and bargain before imposing discipline.

As explained below, I agree with Respondent that *Fresno Bee* is the controlling case on the issue presented here, and I accordingly recommend that the complaint in this case be dismissed.

STATEMENT OF THE CASE

This case was tried in Albany, New York on January 26–27, 2016. The Union filed the charge in Case 03–CA–153365 on June 2, 2015, and filed the charge in Case 03–CA–160251 on September 18, 2015.¹ The General Counsel issued a complaint in Case 03–CA 153365 on August 26, 2015, and issued a consolidated complaint covering both cases on October 23, 2015.

In the consolidated complaint, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by exercising its discretion and suspending and terminating two employees, without first notifying the Union and giving the Union an opportunity to bargain about the disciplinary decisions and the effects of those decisions. Respondent filed a timely answer (and a timely amended answer) denying the alleged violations in the consolidated complaint.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent (the Union did not submit a posttrial brief), I make the following

FINDINGS OF FACT³

I. JURISDICTION

Respondent, a corporation with an office and place of business in Scotia, New York, operates a nursing home. Respondent annually derives gross revenues in excess of \$100,000 and purchases and receives goods at its Scotia, New York facility that are valued in excess of \$5,000 and come directly from points outside the State of New York. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a healthcare institution within the meaning of Section 2(14) of the Act.

¹ All dates are in 2015, unless otherwise indicated.

² The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: page 278, l. 16: “nonhearers” should be “nonhearsay”; page 289, l. 2: “residence” should be “residents”; page 309, l. 7: “discluded” should be “excluded”; page 312, l. 16: “tense” should be “sense”; page 317, l. 19: “animus” should be “inadmissible”; page 325, l. 9: “charges” should be “charge nurse”; page 335, l. 3: “rejection” should be “objection”; page 362, l. 20: “evaluation” should be “allegation”; page 382, l. 11: “preparing for” should be “I will prepare and”; page 382, l. 21: “sum of” should be “settlement”; page 382, l. 24: “free” should be “for you”; and page 383, l. 3: “in a” should be “any.”

I also note that on January 26, 2016, a portion of the hearing recording was lost due to a digital malfunction. (See Tr. 13.) To address that issue, at my request, counsel for the General Counsel repeated her opening statement and recalled one witness. (Tr. 108–138.) Subsequently, on or about March 7, 2016, the court reporting service was able to recover the missing portion of the January 26 hearing. The recovered portion of the hearing can be found in a repaired transcript (hereafter referred to as the Supplemental Transcript (Supp. Tr.)) that consists of 31 pages.

³ Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

5

A. Background

On May 4, 2015, the Board certified the Union as the exclusive collective-bargaining representative for the following appropriate bargaining unit at Baptist Health:

10

All full-time, regular part-time, and per diem service and maintenance employees employed by Baptist Health at its Scotia, New York facility, including all CNAs, maintenance/security workers, porters, laundry aides/workers, housekeeping aides/workers, ward clerks, activity aides, floor helpers, restorative associates, restorative nurse aides, transport clerks/drivers and transport aides; but excluding transport coordinators, licensed practical nurses, guards, professional employees and supervisors as defined in the Act, and all other employees.

15

(GC Exh. 2; Tr. 29, 38–39.) The Union and Baptist Health began contract negotiations in June or July 2015, but at the time of trial had not yet agreed on an initial collective-bargaining agreement or an interim grievance or arbitration procedure. (Tr. 29, 115–116, 151, 269–270; Supp. Tr. 17.)

20

In the absence of an initial or interim agreement, Baptist Health has continued to apply the policies described in its employee handbook, including the policies concerning discipline and attendance. (Tr. 152–155; R. Exh. 3.) The disciplinary policy states, in pertinent part, as follows:

25

DISCIPLINARY PROCEDURE – While all employees are employees at will, whose employment may be terminated without notice, [Baptist Health] management attempts to work with individuals who have the potential to become productive employees. To achieve this objective, [Baptist Health] employs a progressive disciplinary procedure. There are types of behavior that will result in **immediate** termination. The list below is representative of this behavior but is not meant to be all inclusive:

30

...

Unexcused absences occurring more than once without prior call in (No call/No Show)

40

...

Leaving the property without following proper procedure

45

...

(R. Exh. 3, p. 3-2 (emphasis in original); see also Tr. 275-276.) The attendance policy states, in pertinent part, as follows:

5 **ATTENDANCE** – Because of the nature of the work at [Baptist Health], prompt and regular attendance is essential. If an employee is ill or going to be delayed in reporting to work, the employee must call in prior to the start of the shift. The Department Head/Supervisor will discuss the proper “call-in” procedure with the employee.

10 An employee who fails to call-in or report when scheduled is deemed a no call/no show. The penalty for a no call/no show is a written warning notice. Any employee who receives two no call/no shows within one year, is subject to disciplinary action including termination. Any call to your department later than **one hour** into the scheduled shift will be recorded as a no call/no show.

15 (R. Exh. 3, p. 2-2 (emphasis in original); see also Tr. 156-157, 292-293, 331-332, 374-375.) Baptist Health requests employees in its nursing department to call in two hours before their scheduled shift to report that they will be absent, but nonetheless (per the attendance policy) allows employees to call in as late as one hour into their shift before charging the employee with a no call/no show. (Tr. 155, 255, 292, 330-331, 374.)

20 The parties stipulate that Respondent previously has terminated employees for leaving the job without authorization, as well as for accruing two no call/no show absences within one year. (Tr. 194-195, 198-199, 206-207, 209, 235-236; see also R. Exhs. 8, 10 (example termination letters); GC Exh. 4 at pp. 5, 7 (same).)

25 *B. May/June 2015 – Carmel Sparks’ Administrative Suspension and Discharge*

30 On May 15, Carmel Sparks was working for Baptist Health as a certified nursing assistant, and was assigned to the day room. That evening, charge nurse Karen Comerford approached Sparks and instructed her to turn off the television and instead play soothing music to encourage the nursing home residents to begin calming down before bedtime. Sparks initially complied with Comerford’s request, but after a few minutes resumed playing the television. When Comerford returned to the day room and asked Sparks why the television was on again, a verbal confrontation between Comerford and Sparks arose. Sparks left the day room (leaving Comerford behind) and went to the office of Sherri Martone, who was the nursing supervisor on duty. When Sparks advised Martone that she (Sparks) did not feel comfortable returning to the day room, Martone responded that there was not another assignment available for Sparks. Sparks then left the facility without finishing her shift. (Tr. 47-50, 54, 157, 294-295, 315-319.)

40 Sparks worked her next two shifts at Baptist Health without incident. However, on May 20, Sparks decided to speak to director of human resources Jonathan “Pete” Steffan about the May 15 incident. After learning that some of the staff on duty had given statements that contradicted Sparks’ assertion that Comerford was the aggressor when the two had a confrontation on May 15 in the day room, Steffan placed Sparks on unpaid administrative leave
45 (hereafter referred to as an administrative suspension) to allow time for him to investigate the

May 15 incident.⁴ Sparks missed five scheduled shifts during her administrative suspension. (Tr. 52, 54-57, 64, 68-69, 160, 178-180, 241-243; see also R. Exh. 4.)

5 After reviewing assorted employee statements (some of which Martone obtained on May 15 from employees who were on duty) and speaking to certain employees, Steffan concluded that Sparks was the aggressor in the May 15 confrontation with Comerford, and did not credit Sparks' report that Comerford was the aggressor and put her hands in Sparks' face. Steffan also concluded that Sparks should be terminated because she abandoned her assignment in the day room and left the facility without following the proper procedure, and without good cause. 10 Accordingly, on or about June 3, Steffan informed Sparks that Baptist Health was terminating her employment due to job abandonment. (Tr. 47, 49-51, 64-66, 159-166, 169-170, 175-178, 180-181, 183-184, 187-192, 232-233, 235, 239, 243-246, 273-274, 276-277, 280-282, 287-289, 295-296, 298-299, 314; R. Exh. 6; see also GC Exh. 5 (written statement that Sparks gave to Martone);⁵ R. Exh. 4 (written statements that Steffan reviewed and considered as part of his 15 investigation).)

Baptist Health did not notify or seek to bargain with the Union before it administratively suspended Sparks, or before it terminated Sparks' employment. Although the Union later learned of those employment decisions, there is no evidence that the Union subsequently asked 20 Baptist Health to bargain about those employment decisions or their effects. (Tr. 40-41, 58, 63, 66-67, 117-119, 131, 200-201, 216, 246, 269, 271; Supp. Tr. 19-20.)

C. May/June 2015 – the Union's Request for Information about Disciplines

25 On May 22, the Union sent an information request to Respondent that cited the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012), and stated as follows:

30 It has come to the Union's attention that there have been a number of suspensions and terminations that have taken place at the facility. At this time the Union is requesting that the Employer make available a list of all members that have been disciplined since May 4, 2015. This list should include the following:

1. Name of Employee;
2. Classification;
- 35 3. Shift;
4. Disciplinary Notice;
5. All supporting documents regarding notice.

⁴ Baptist Health personnel called Sparks in to work on May 25 because her name appeared on the schedule for the day. After Sparks worked for a half hour, Baptist Health personnel determined that Sparks was on the schedule in error (she was still administratively suspended) and directed Sparks to return home. (Tr. 58-60; GC Exh. 6.)

⁵ Sparks and Martone disagree about whether Martone filled out the "problem" section of Sparks' statement before or after Sparks wrote her statement. (Tr. 50-51, 296-297, 321-322.) That dispute in the record is not material to my analysis.

In order for the Union to properly prepare for these cases to present remedy to the Employer, we would like to be in receipt of this inclusive list no later than Wednesday, May 27, 2015.

5 (GC Exh. 3; see also Tr. 15, 121-123, 126; Supp. Tr. 22-25.)

On June 1, Respondent (through counsel) replied as follows to the Union's May 22 request for information:

10 . . . [Baptist Health] objects to the [Union's] request on the grounds that it is vague and ambiguous and seeks information that is neither relevant nor necessary. Subject to and without waiver of the foregoing objections, Baptist responds as follows: the following employees have been disciplined and/or terminated by Baptist since May 4, 2015:

- 15 1. [D. D.], CNA, full time, night shift
 a. Terminated, effective May 6, 2015, due to multiple no-call/no-show absences . . .
2. [D. W.-Y.], CNA, part time, evening shift
 a. Terminated, effective May 12, 2015, due to multiple no-call/no-show absences . . .
- 20 3. [E. N.], CNA, per diem, day shift
 a. Verbal warning, dated May 24, 2015, for failure to comply with resident care requirements . . .

25 I am unclear as to your reference regarding *Alan Ritchey* and to a "remedy" to be presented to Baptist. The *Alan Ritchey* decision . . . was invalidated by the U.S. Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Thus, pursuant to current Board precedent, Baptist has no obligation to provide the Union with notice and an opportunity to bargain prior to the imposition of discretionary suspension and termination disciplines.

30 (GC Exh. 4; see also Tr. 123-125, 127; Supp. Tr. 25-26.)

D. June to August 2015 – Yadira Lambert's Administrative Suspension and Discharge

35 On June 1, Yadira Lambert was working for Baptist Health as a certified nursing assistant when nursing supervisor Laura Shinn called an unscheduled staff meeting. During the meeting, Shinn decided that Lambert was not paying attention, and sent Lambert home for alleged insubordination. Baptist Health administratively suspended Lambert until interim director of nursing Cynthia Lyden finished investigating the matter and determined on June 19 that Lambert
 40 could return to work because the allegations against Lambert could not be substantiated.⁶ Lambert returned to work on June 20. (Tr. 34, 73-77, 99-100, 201-203, 246-248, 252-254; Supp. Tr. 5; GC Exhs. 10, 11 (p. 10).)

⁶ If Baptist Health administratively suspends an employee to allow time to investigate alleged employee misconduct, Baptist Health does not subsequently compensate the employee for missed work time if the employee is vindicated in the misconduct investigation. (Tr. 270-271.)

On July 31, Lambert called Baptist Health to report that she would miss her scheduled shift that day because her car was not working and she did not have another way to get to work. Baptist Health staffing coordinator Kerri DeMasi accordingly noted that Lambert would be absent for the day.⁷ However, when Lambert added that she would also be absent on August 1 and 2 due to car trouble, DeMasi responded that Lambert would need to call in again about those shifts. (Tr. 82-83, 104-106, 329, 345, 352-353.)

Lambert next called Baptist Health on August 1. In that call, Lambert advised nursing supervisor Martone that she (Lambert) would have to miss her shift that day and on August 2 due to continuing car trouble. Martone noted that Lambert would be absent on August 1. As for Lambert's request to be taken off the schedule for August 2, Martone maintains that she advised Lambert to call in again on August 2 if she would not be able to get to work that day, but Lambert maintains that Martone agreed to remove her from the schedule for that day as well. (Tr. 83-85, 104, 106-107, 300, 310, 313, 326-327.)

Since she continued to have car trouble, Lambert did not come to work on August 2 as scheduled. Lambert, however, did not call in again to report that she would be absent on August 2. Baptist Health therefore charged Lambert with a no call/no show. (Tr. 90-91, 104, 106, 313; see also Tr. 260-261 (noting that although Baptist Health's attendance policy does not speak to the issue, Baptist Health usually requires employees to call in each day that they will be absent).)

On August 3, DeMasi reviewed Lambert's attendance record and determined that Lambert had two no call/no shows within the same year – one on April 26,⁸ and one on August 2. Based on Baptist Health's attendance policy, DeMasi prepared a termination letter for the director of nursing to sign. Director of nursing Melanie Williams signed the termination letter, thereby terminating Lambert's employment at Baptist Health effective August 3. (Tr. 78, 82, 92-93, 96, 203-205, 261-262, 272-273, 333, 335-341, 375-378, 380-381; R. Exhs. 9, 16, 17; see also GC Exh. 8.)

⁷ When she was on duty, DeMasi served as the primary contact person at Baptist Health regarding employee scheduling (when DeMasi was off duty, calls would go to the nursing supervisor on duty). Although DeMasi did not assign employees to their units at Baptist Health at the time of hire, DeMasi issued all biweekly schedules for nonsupervisory employees and was the person who fielded employee calls about scheduling changes and attendance issues (such as arriving late or missing a shift). (Tr. 78-81, 91, 96-98, 155-156, 329-331, 346-347, 349, 369.)

⁸ Lambert questioned the validity of the April 26 no call/no show, asserting that in May 2015, De Masi verified on the computer that Lambert worked on April 26, and thus promised to correct the "report" indicating that Lambert was absent. (Tr. 93-94; compare Tr. 341, 356-357 (De Masi did not remember whether she spoke to Lambert about the April 26 no call/no show, but asserted that if such a discussion had occurred, she would have entered the correction on Lambert's attendance card, R. Exh. 16).) Notably, there is no evidence that Baptist Health issued Lambert a written warning notice based on the April 26 no call/no show, even though Baptist Health's attendance policy calls for a written warning notice under those circumstances. (See R. Exh. 3 (p. 2-2); Tr. 257-258.) The evidentiary record also shows that Baptist Health charged (and paid) Lambert for sick leave on April 26, though DeMasi testified this was standard practice for no call/no shows, in part because the time and attendance system did not allow Baptist Health the option of recording missed shifts as no call/no shows. (Tr. 268, 342-344, 353-354; GC Exh. 11 (p. 8).)

Baptist Health did not notify or seek to bargain with the Union before it administratively suspended Lambert, or before it terminated Lambert's employment. Although the Union later learned of those employment decisions, there is no evidence that the Union subsequently asked Baptist Health to bargain about those employment decisions or their effects. (Tr. 25-26, 34-37, 40-41, 77-78, 91-92, 119-121, 131, 206, 216-217, 269, 271-272, 378; Supp. Tr. 20-22.)

DISCUSSION AND ANALYSIS

A. WITNESS CREDIBILITY

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13-14 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14. To the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision.

B. DID RESPONDENT VIOLATE SECTION 8(A)(5) AND (1) OF THE ACT WHEN IT ADMINISTRATIVELY SUSPENDED AND DISCHARGED LAMBERT AND SPARKS?

The General Counsel's sole allegation in the complaint is that Respondent violated Section 8(a)(5) and (1) of the Act by exercising its discretion and suspending and terminating employees Lambert and Sparks in 2015, without first notifying the Union and giving the Union an opportunity to bargain about the disciplinary decisions and the effects of those decisions.

As the findings of fact indicate, the parties presented evidence in this case on a number of issues, including: whether Baptist Health exercised discretion when it administratively suspended Lambert and Sparks; whether the decision to administratively suspend an employee qualifies as a disciplinary suspension; and whether Baptist Health exercised discretion when it terminated Lambert and Sparks. I need not resolve those issues here, because as I explain below, the General Counsel's complaint fails on legal grounds.

The complaint allegation in this case is based on the Board's reasoning in *Alan Ritchey*, 359 NLRB No. 40 (2012). In *Alan Ritchey*, "a three-member panel of the Board (Chairman Pearce and then-Members Griffin and Block) held, inter alia, that during the period after a union is recognized but before a first contract or an interim grievance procedure is in place, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion, or discharge." *Adams & Associates, Inc.*, 2015 WL 3759560, Case 20-CA-130613, slip op. at 25 (June 16, 2015) (Cracraft, J.) (discussing *Alan Ritchey*, 359 NLRB No. 40, slip op. at 1-2, 8-10). In reaching its decision, the Board in *Alan*

Ritchey overruled any contrary aspects of the decision in *Fresno Bee*, 337 NLRB 1161 (2002), a case in which the Board, without comment, adopted the judge’s ruling that the employer had no obligation to notify the union and bargain before imposing discipline. *Alan Ritchey*, 359 NLRB No. 40, slip op. at 6–7 (discussing *Fresno Bee* and stating that the judge’s rationale was demonstrably incorrect). However, since the Board recognized “that it had never before clearly and adequately explained that the duty to bargain over discretionary changes in terms and conditions of employment included discipline such as suspension, demotion, or discharge, the Board applied its decision [in *Alan Ritchey*] prospectively only.” *Adams & Associates, Inc.*, Case 20–CA–130613, slip op. at 25; see also *Alan Ritchey*, 359 NLRB No. 40, slip op. at 11 (explaining that the Board would apply its reasoning prospectively only, because retroactive application “could well catch many employers by surprise and, moreover, expose them to significant financial liability”).

In 2014, the Supreme Court held that the recess appointments of three Board Members (including Members Richard Griffin, Jr. and Sharon Block) were invalid. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). As a result, several Board decisions, including the Board’s decision in *Alan Ritchey*, ceased to be binding Board precedent because the Board issued the decisions when it lacked a valid quorum. The General Counsel nevertheless asserts that I should follow the Board’s reasoning in *Alan Ritchey*. Respondent, meanwhile, asserts that the Board’s decision in *Fresno Bee* controls because *Alan Ritchey* is no longer valid precedent, and thus the decision in *Fresno Bee* remains good law.

I find that Respondent has the better argument. Although the Supreme Court issued its decision in *Noel Canning* on June 26, 2014, the Board has not since issued another decision to adopt or reaffirm the principles set forth in *Alan Ritchey*.⁹ Perhaps such a decision is forthcoming, or perhaps not, but until the Board acts, *Fresno Bee* remains good law.¹⁰ And, even if the Board were to issue a decision reaffirming its reasoning in *Alan Ritchey*, it seems unlikely that the Board would apply such a decision retroactively to employers (such as Respondent here) that decided to rely on *Fresno Bee* after *Alan Ritchey* ceased to be binding precedent, given that the Board in *Alan Ritchey* applied its decision prospectively to avoid catching employers by surprise. See *Lifeway Foods, Inc.*, 2015 WL 9301369, Case 13–CA–146689, slip op. at 20–21 (Dec. 21, 2015) (Carissimi, J.); *Ready Mix USA, LLC*, 2015 WL 5440337, Case 10–CA–140059, slip op. at 31–33 (Sept. 15, 2015) (Goldman, J.); *High Flying Foods*, 2015 WL 2395895, Case 21–CA–135596, slip op. at 32 (May 19, 2015) (Muhl, J.); *McKesson Corp.*, 2014 WL 5682510, Case 12–CA–094552, slip op. at 33 (Nov. 4, 2014) (Locke, J.); see also *Adams & Associates, Inc.*, Case 20–CA–130613, slip op. at 26 (observing that since three of the discharges in question occurred when the Board’s decision in *Alan Ritchey* could not be relied upon due to the Supreme

⁹ The Board’s decision in *Alan Ritchey* was not appealed, and thus case was not pending when the Supreme Court issued its decision in *Noel Canning*.

¹⁰ I have considered the General Counsel’s argument that other Board decisions support a finding that an employer violates Section 8(a)(5) and (1) of the Act “when it fails to bargain with a newly certified union over the imposition of discretionary discipline.” (GC Posttrial Br. at 23 (collecting cases).) It suffices to observe that, at most, the General Counsel’s argument that other Board decisions conflict with *Fresno Bee* merely begs the question about the extent of an employer’s duty (if any) to notify and bargain with a union before imposing discipline under the circumstances presented here. That is a question for the Board to resolve if it chooses.

Court's decision in *Noel Canning*, "it would work an injustice to require [the employer] to adhere to *Alan Ritchey*"). For these reasons, I will apply *Fresno Bee* to this case.

I find that under *Fresno Bee*, Respondent did not have a duty to notify and bargain with the Union before administratively suspending Lambert and Sparks in 2015, or before discharging Lambert and Sparks in 2015.¹¹ Accordingly, I recommend that the complaint in this case be dismissed in its entirety.

CONCLUSIONS OF LAW

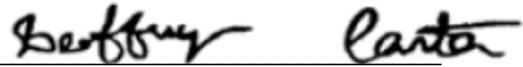
The General Counsel has failed to prove that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Union before suspending and discharging Yadira Lambert and Carmel Sparks between May 20 and August 3, 2015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 11, 2016



Geoffrey Carter
Administrative Law Judge

¹¹ This finding stands even if I assume, arguendo, that Respondent exercised discretion when it decided to take these actions regarding Lambert and Sparks.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.