

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

**WINGATE OF DUTCHESS, INC.**

**and**

**Cases 03-CA-140576  
03-CA-145659**

**1199 SEIU UNITED HEALTH CARE  
WORKERS EAST**

**GENERAL COUNSEL'S REPLY BRIEF**

**I. INTRODUCTION**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Reply Brief in the above-captioned cases. It is respectfully submitted that in all respects, other than what has been excepted to by the General Counsel, the findings of Administrative Law Judge Mark Carissimi (ALJ), dated November 16, 2015, are appropriate, proper, and fully supported by the credible record evidence.

**II. ARGUMENT**

**A. Administrator Harbby told Stewart she was being harassed because of her union activity on July 29, 2014. (Exception 1).**

In Amended Consolidated Complaint paragraph VI(g), the General Counsel alleged that Respondent's Administrator Clayton Harbby, on "[a]bout a date within six months of the filing of the charge, the specific date being presently unknown to the General Counsel, but within the knowledge of Respondent, told an employee that she was being harassed because of her union

activity.” (GC Exh. 1[o]).<sup>1</sup> The ALJ apparently inadvertently failed to address this allegation. Respondent, in its Answering Brief, does not claim that the ALJ in fact dismissed the allegation or deny that he failed to make a ruling on it. (R’s Brief at 3-5).

Paragraph VI(g) of the Amended Consolidated Complaint is closely related to, yet distinct, from paragraph VI(e) of the Amended Consolidated Complaint, which the ALJ found merit to, and which alleges that Harbby on “[a]bout July 29, 2014, confronted an employee and suggested that she should expect harassment because she put herself out there by supporting the Union.” (GC Exh. 1[o]). Regarding paragraph VI(g), although the identity of the employee and precise date are not identified in this allegation, it was ascertained at hearing that the employee is Sandra Stewart and that the date was about July 29, 2014. (Tr. 229-231). The conversation occurred while Stewart was in a patient’s room making the bed. (Tr. 230). Stewart complained about Director of Nursing Ann Nelson’s comments to her earlier in the day and Harbby responded with, “you’re the one putting yourself out there,” “look at what you’re wearing,” and “what’s up with that hair.” (Tr. 230-231). In the context of this conversation and the earlier conversation between Stewart and Nelson, Harbby’s comments conveyed the message that Stewart had been harassed because of her union activities and that she should expect such harassment to continue in the future. The ALJ found that Harbby’s statements violated Section 8(a)(1) of the Act as alleged in paragraph VI(e) of the Amended Consolidated Complaint and should have reached the same conclusion regarding paragraph VI(g), but failed to explicitly identify the allegation. (ALJD at 13-14). Respondent’s argument that Stewart’s account of the incident is unreliable should be dismissed as the ALJ noted throughout his Decision why he

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<sup>1</sup> Throughout this brief the following references will be used: (ALJD at \_\_) for the Administrative Law Judge Decision; (R’s Brief at \_\_) for Respondent’s Answering Brief; (GC Exh. \_\_) for the General Counsel’s Exhibits; (R Exh. \_\_) for Respondent’s Exhibits; and (Tr. \_\_) for transcript pages.

found Stewart to be a credible witness. (R's Brief at 5-7). Thus, Respondent violated Section 8(a)(1) of the Act by telling Sandra Stewart that she was being harassed because of her union activity.

**B. Unit Manager McDonald solicited grievances from employee Allen in about early September 2014. (Exception 2).**

In Amended Consolidated Complaint paragraph VI(i), the General Counsel alleged that "Respondent, by Diane McDonald, about late August or early September, 2014, solicited employee grievances." (GC Exh. 1[o], 51; Tr. 1083). This allegation was added to the Amended Consolidated Complaint by an amendment at the hearing and acknowledged by the ALJ in his Decision. (GC Exh. 51; Tr. 701-702, 1083; ALJD at 2 n. 3). The ALJ apparently inadvertently failed to make a ruling regarding this allegation although it was litigated. Respondent, in its Answering Brief, does not claim that the ALJ dismissed the allegation or deny the General Counsel's exception that he failed to make a ruling on the allegation. (R's Brief at 17).

Respondent argues that there was nothing out of the ordinary about Unit Manager Diane McDonald's questioning of employee Georgann Allen in her office and that McDonald did not deviate from Respondent's past practice of soliciting grievances. (R's Brief at 17). However, this particular incident was unique, and unlawful, because Respondent had not produced evidence that bringing concerns directly to Scott Schuster, President of all 19 Wingate facilities, was ever part of its past practice. As Respondent likely has thousands of employees across 19 facilities, it is unlikely that President Schuster responds one-on-one to employee concerns on a regular basis as this would be impractical and the incident with Allen must be viewed as exceptional. (Tr. 701-705).

Accordingly, Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances, as alleged in paragraph VI(i) of the Amended Consolidated Complaint.

**C. Respondent implicitly promised employees the benefit of a 401(k) match on August 22, 2014. (Exception 3).**

In Amended Consolidated Complaint paragraph XII(a), the General Counsel alleged that on “[a]bout August 22, 2014, Respondent, in a memo to employees implicitly promised employees the benefit of a 401(k) match.” (GC Exh. 1[o]). The ALJ dismissed this allegation and stated:

To find that the Respondent’s notification that it was considering reinstating the 401(k) match at the Dutchess facility violated Section 8(a)(1) would require a conclusion that Wingate made an announcement at all of its facilities in order to interfere with employee rights at the Dutchess facility. [...] The fact that the Respondent later implemented the employer match program at all of its facilities, with the attendant costs associated with that action, long after the election was held at the Dutchess facility, also supports the fact that it was a lawful business decision.

(ALJD at 37).

The ALJ’s reasoning is flawed and the allegation should be upheld. Respondent made the implicit promise of the 401(k) match by means of a memorandum from President Scott Schuster distributed to employees on August 22, 2014. (GC Exh. 17). In regards to the 401(k) match the memorandum stated:

We have also begun evaluating our *401(k) plan* and who is participating and how to get more people involved. We agree that having some retirement savings for everyone is important. 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.

(GC Exh. 17).

The same memorandum also contained the announcement of the two-percent wage increase which the ALJ found to be unlawful. (ALJD at 35-36). Like the wage increase, this implied promise to provide employees with the benefit of 401(k) matching contributions was announced in the middle of the union organizing campaign, and the timing implies a violation of

Section 8(a)(1) of the Act. Respondent had previously provided matching 401(k) contributions, but ceased doing so in 2009 due to a financial downturn. (Tr. 1117). Despite what Respondent attributes to the restored financial health of the company, the timing of its announcement, after a four-year hiatus, implies an anti-union motive. Moreover, the matching contribution that was eventually offered in 2015 amounted to a maximum of \$100.00 per employee per year, a token expense, even when spread across all 19 of Respondent's facilities in New York and Massachusetts. (Tr. 1118). Furthermore, Respondent provided no evidence of its allegedly poor financial health from 2010 to 2014, which would supposedly show the granting and withdrawing of the 401(k) match as its financial fortunes changed. Therefore, Respondent's announcement of matching 401(k) contributions in the middle of the Union's organizing campaign should only be viewed as an implied promise made to interfere with employees' support for the Union, in violation of Section 8(a)(1) of the Act. *See Capitol EMI Music*, 311 NLRB 997, 997 n. 4 (1993); *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002); *County Window Cleaning Co.*, 328 NLRB 190 (1999) (employer's statement, inter alia, that "he was looking insurance for the employees" constituted an implied promise of benefits); *Lutheran Retirement Village*, 315 NLRB 103 (1994) (employer's announcement during the union campaign that it was looking into getting a pension plan constituted an implied promise of benefit).

In *Capitol EMI Music*, the employer announced to employees a wage increase, an improved holiday schedule, and additional break periods shortly after it learned of union organizing activity. 311 NLRB at 1010-1011. The union claimed the announcement was to blunt momentum for its campaign and the employer claimed it was simply to clear up confusion about when such benefits would be offered. 311 NLRB at 1011-1012. The Board found for the union and explained:

The law on this point is clear, to promise or grant benefits to employees in order to dissuade them from supporting a union violates Section 8(a)(1) of the Act. *See, e.g., Mack's Supermarkets*, 288 NLRB 1082 at 1099 (1988). The announcement and/or grant of wages or other benefits increases is legally permissible if it can be shown that an employer was following its past practice regarding such increases or that the increases were planned and settled upon before the advent of union activity.

311 NLRB at 1012.

In *Capitol EMI Music* the employer's unlawful announcement came after the employer was aware of organizing activity, but before the demand for bargaining and filing of petition by the union. 311 NLRB at 1003-1004, 1012.

Here, Respondent argues that the announcement on August 22 that it was evaluating a return of its 401(k) matching is not an unfair labor practice because: (1) it did not announce it during the critical period after the petition was filed on October 1, 2014; (2) Respondent had announced in 2009 when it discontinued the 401(k) match that it wanted to eventually bring the match back; and (3) the announcement and then implementation of the 401(k) in March 2015 occurred at all of Respondent's facilities.

First, there is no requirement that the announcement of a benefit occur during the critical period after the filing of a petition in order for there to be a violation. Respondent confuses a Section 8(a)(1) unfair labor practice charge regarding the announcement of a benefit, which can occur at any time, with a post-election objection regarding such an announcement, which can only occur during the critical period leading up the election. *Capital EMI Music* demonstrates that the Board can nevertheless find the announcement of a benefit outside the critical period to be unlawful. 311 NLRB at 1012.

Second, the fact that Respondent announced in 2009 that, "[w]e hope that the match can be reinstated at a future date," does not support Respondent's argument. (R Exh. 45; Tr. 1118). It

defies logic and the reasoning behind banning grants of benefits to dissuade unionization, if employers could simply immunize themselves indefinitely against such allegations by making vague statements that they hope to one day increase wages, offer a pension plan, or as here, provide a 401(k) match. Respondent's argument that it had always planned on bringing back the 401(k) plan also misses the point because the General Counsel has not alleged the actual re-implementation of the 401(k) match, as happened in March 2015, to be unlawful. (R Exh. 49; Tr. 1125). Rather, General Counsel has alleged that the *timing* of the *announcement* is an unlawful promise of benefits. There is no evidence that Respondent's announcement in 2009 withdrawing the benefit included assurances to employees that there would be ongoing discussions about restoring the match or any intention of regularly revisiting the issue while keeping employees informed. Respondent asserts simply that when it discontinued the 401(k) match it announced that it hoped to reinstate it in the future. Respondent did not however show that its reinstatement was established or settled upon before the union activity at its facilities in Ulster or Dutchess. Rather Respondent stated that it was merely *investigating* bringing it back. *See Capital EMI Music, supra*. Respondent did not answer the question of why now or why during the Union campaign.

Third, Respondent also suggests that it would be nearly inconceivable that it would be willing to absorb the cost of implementing a 401(k) match across all of its 19 facilities merely to deter unionization at the Dutchess facility. In dismissing the allegation, the ALJ appears to have relied primarily upon this argument, but the allegation should not be so lightly dismissed. Neither *Greenbriar Valley Hospital*, 265 NLRB 1056 (1982), nor the other caselaw relied upon by the ALJ or Respondent, indicates the scope of a benefit in proportion to union activity, such as whether it affected one, two, or 20 locations, to be a dispositive element. The ALJ's implication

here, as he suggests by citing *Greenbriar Valley Hospital*, is that granting the benefit at all 19 facilities harms Respondent more than it harms the union and thus Respondent would not have used it as a tactic to chill unionization. However, when given a closer look, the actual cost, or harm, to Respondent of offering the 401(k) match across all 19 facilities is a maximum of \$100.00 per employee per year. (Tr. 1118). But again, the General Counsel is alleging only the announcement of possibly reintroducing the 401(k) match as being the unfair labor practice. The act of announcing the possible 401(k) match is a way for Respondent to make a promise of benefit while enduring no cost to itself. The act of announcing it, which Respondent need not have followed through on, only cost Respondent the time it takes to send an e-mail, speak at a meeting, or put a flyer on a bulletin board. (GC Exh. 17). Even on this point Respondent's evidence was minimal. Vice President of Human Resources Kim Ianiro testified that she spoke to local management about restoring the 401(k) match company-wide and identified a flyer from Respondent's Beacon, New York facility about the 401(k), but Respondent did not provide any direct evidence that the benefit was in fact announced to employees at all 19 facilities. (R Exh. 48; Tr. 1120-1122).

In support of its argument Respondent relies on *Network Ambulance*, 329 NLRB 1, 1 (1999), where the Board found the employer had not committed a violation by announcing new holidays during a critical period. However, the difference between *Network Ambulance* and the instant matter is that there the employer was instructed to announce the benefit by its corporate parent and there was no evidence that management at the corporate parent held anti-union animus or was involved in the election. 329 NLRB at 2. Here however, President Schuster himself was found to have directly committed violations of the Act and thus no level of

management is sufficiently removed from the unlawful behavior to render the benefit permissible as was the case in *Network Ambulance*.

Additionally, given the multitude of unfair labor practices that the ALJ found that Respondent committed, the idea that Respondent would be willing to endure painful financial burdens to chill unionization is not so implausible. Thus, the General Counsel respectfully requests that the Board reverse the ALJ's dismissal of this allegation and find that Respondent violated Section 8(a)(1) of the Act by implicitly promising employees the benefit of a 401(k) match, as alleged in paragraph XII(a) of the Amended Consolidated Complaint.

**D. Stewart should receive search-for-work expenses. (Exception 4).**

The Board should award to Stewart the search-for-work and work-related expenses she has incurred as a result of her unlawful termination for all of the reasons asserted in the General Counsel's Brief in Support of Cross-Exceptions. Just because a practice has been long-standing, such as not awarding such expenses, is not alone a reason to uphold such a practice. Also, contrary to Respondent's claim, it is unlikely Stewart would receive a windfall by receiving such expenses as they are likely comparatively small to the backpay she would receive.

**E. A remedy must be ordered for the announcement of the unlawful wage increase. (Exception 5).**

The ALJ did order a remedy for Respondent's unlawful implementation of a wage increase, which was implemented on September 1, 2014, but failed to order a distinct remedy for the unlawful announcement of that wage increase, which was announced on August 22, 2014. The General Counsel pled both the announcement and the implementation of the wage increase as violations in paragraph XV(c) of the Amended Consolidated Complaint. (GC Exh. 1[o]). The ALJ found the announcement to be a violation unto itself, but inadvertently failed to order a corresponding remedy. (ALJD at 36:5-7, 71:19-72:21).

### **III. CONCLUSION**

For all the reasons set forth above and in its Brief in Support of Cross-Exceptions dated February 5, 2016, General Counsel respectfully requests that the Board grant the General Counsel's Cross-Exceptions to the Decision of the ALJ and issue an appropriate order that Respondent be found to have committed the additional violations of Section 8(a)(1) of the Act, as discussed above. General Counsel further requests that the Board issue an order otherwise affirming and adopting the Decision and Recommendations of the ALJ.

**DATED** at Albany, New York, this 11th day of March, 2016.

Respectfully submitted,

*/s/ John J. Grunert*

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