

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

KANKAKEE COUNTY TRAINING CENTER FOR
THE DISABLED, INC.

and

Cases 25-CA-166729
25-CA-166765
25-CA-166785
25-CA-168799
25-CA-168802

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES (AFSCME),
COUNCIL 31, AFL-CIO

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted by:

Raifael Williams

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Comes now Counsel for the General Counsel and respectfully submits to the Board this Answering Brief to the Exceptions to the Decision of the Administrative Law Judge filed by Kankakee County Training Center for the Disabled, Inc., hereinafter referred to as the Respondent. Counsel for the General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge's Decision in the instant cases, which issued on September 14, 2016, be affirmed except as modified by Counsel for the General Counsel's exceptions, which were filed on October 24, 2016.

I. STATEMENT OF THE CASE

On July 19 and 20, 2016, a hearing was held before Administrative Law Judge Joel Biblowitz regarding the instant cases. On September 7, 2016, the parties filed post-hearing briefs. On September 14, 2016, the Judge issued his decision. In his decision, the Judge correctly found that the Respondent violated Sections 8(a)(1) and (5) of the Act by utilizing

temporary employees to perform bargaining work without giving prior notice to the American Federation of State, County, and Municipal Employees (AFSCME), Council 31, AFLCIO, hereinafter referred to as the Union, and affording the Union an opportunity to bargain (Decision, page 13, lines 9-27). The Judge also correctly found that the Respondent violated Sections 8(a)(1) and (5) of the Act by failing to provide the Union with relevant and necessary information concerning the suspension and discharge of its Employee Priscilla Williams (Decision, page 11, line 49 – page 12, line 15).

On October 24, 2016, the Counsel for the General Counsel filed exceptions to some of the Judge's findings and conclusions in his decision. Specifically, the Counsel for the General excepted to the Judge's findings and conclusions that the Respondent did not violate the Act by prohibiting its employees from talking about the Union during working time while permitting its employees to talk about other non-work related subjects (Decision, page 11, lines 34-37), by suspending and discharging its Employee Williams because she engaged in Union and protected concerted activities (Decision, page 11, lines 37-44), and by outsourcing bargaining unit work in the Respondent's Information Technology (IT) Department without giving prior notice to the Union and without affording the Union the opportunity to bargain with the Respondent (Decision, page 12, line 17 – page 13, line 7). Additionally, the Counsel for the General Counsel excepted to the Judge's failure to provide for an appropriate remedy and Notice provision regarding the violations of the Act noted above.

II. STATEMENT OF THE FACTS

A. Background

Respondent is a corporation with offices and places of business in Bradley, Kankakee, and Bourbonnais, Illinois and is engaged in the business of providing residential and non-residential care and training for developmentally disabled individuals, clients or consumers. Some of the clients live in Community Integrated Living Arrangements (CILAs), which are houses operated by the Respondent. Other clients live in other facilities around the Respondent's facility. The Respondent's direct support personnel (DSPs) work with these clients at the Respondent's two training facilities and the CILAs. Respondent's casual laborers and production employees work on a production line assembling automotive parts and other products for companies. These casual laborers and production employees also prepare work for the clients to perform. These casual laborers and production employees perform work that the clients are not able to do. (TR 11-12, 14-17, 47, 140-142).

Diana Graham is the Chief Executive Officer (CEO). She has held that position since July 1, 2016. Prior to July 1, 2016, Graham served as Vice President (TR 10). Julie Galeaz is the Human Resources Director (TR 19). Beverly Flowers is the Production Manager (TR 20).

B. Union's Organizing Campaign

Starting in the Fall of 2014, the Union began its organizing campaign at the Respondent's facility. During the Union's organizing campaign, Employee Williams engaged in activities in support of the Union. On December 29, 2014, an election was held among Respondent's employees to determine if they wanted to be represented by the Union. A majority of the Respondent's employees voted in favor of being represented by the Union (TR 89). On

January 7, 2015, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees (GC Ex 1(q)). After the Union was certified, Williams served as Chief Union steward. As part of her duties as Chief Union Steward, Williams received copies of employees' disciplinary notices and represented employees during pre-disciplinary meetings (TR 92, 161). Pre-disciplinary meetings are meetings conducted by the Respondent concerning the alleged discipline of employees. During these meetings, the employees accused of alleged misconduct are given the opportunity to explain their version of events (TR 29).

C. The Suspension and Discharge of Employee Priscilla Williams

On November 13, 2015, Employee Williams left work at 4:15 P.M. and went to the parking lot with Employees Erika Ayala, Annette Roberts, and Carolyn Lawrence. Williams saw Employee Alyssa Royster and asked Royster if she had said that Williams had said that Flowers could not fire anyone. Royster said no. While Williams was talking to Royster, Employee Tony Viveros walked towards Williams. Williams and Viveros engaged in a dispute regarding whether the employees had a Union (TR 162-168, 177-179).

On November 14, 2015, Employee Williams received three emails from Human Resources Manager Galeaz dated November 13, 2015: (1) Notice of Suspension from Work; (2) Notice of Disciplinary Meeting; and (3) Proposed Disciplinary Action. The Notice of Suspension from Work stated that Williams was suspended immediately without pay pending a pre-disciplinary meeting on November 18, 2015. The Notice of Disciplinary Meeting stated that pending a pre-disciplinary meeting was going to be held on November 18, 2015. The Proposed Disciplinary Action stated that Williams was being discharge based upon an occurrence on November 13, 2015. The Proposed Disciplinary Action also stated that it was reported that Williams approached another employee and called him names, cursed at him and threatened him

in violation of Respondent's gross misconduct policies: threatening, intimidating, or assaulting an employee/use of foul, vulgar language. The Proposed Disciplinary Action further stated that, as a result of the foregoing, a decision has been made to discharge Williams (TR 170; GC Ex 3).

On November 16, 2015, Union Staff Representative Dexter sent an email to CEO Graham requesting to bargain over the decision, impact, and effects of the Respondent's decision to discharge Employee Williams. The email also requested that the Respondent retract Williams' discipline and cease and desist such actions until such time as the Respondent and the Union have met and bargained to a mutually satisfactory resolution of the issue. The email further requested information concerning Williams' discipline: all employees/persons involved in the alleged incident; all witnesses that the Respondent will be interviewing; the Union stewards who will be present during Respondent's interview of the alleged incident; the names, job titles, and last known address of all persons with knowledge of relevant facts concerning the matter; the date of hire of all persons who are alleged to have been involved in the incident; a copy of each of the affected employee's evaluation and personnel files; the dates of interviews that are to be conducted and the Union official/stewards who will be attending the interviews of witnesses relating to the alleged incident; documentation concerning all the affected employee's prior discipline, if any; copies of all written or otherwise recorded statements made to the Respondent concerning the matter; copies of all investigatory reports concerning the matter; copies of all rules, regulations, laws, or standards which the employee is alleged to have violated in the matter; copies of all records of any pre-disciplinary meetings which were held concerning the matter; a complete and concise statement of the charges which were issued concerning this matter; copies of any documents which the Employer considered as support for this disciplinary

action; and copies of any and all documents and a list of witnesses that the Respondent relied on to issue the discipline (TR 101-107; GC Ex 7).

On November 17, 2015, CEO Graham sent an email to Union Staff Representative Dexter stating that the pre-disciplinary meeting was scheduled for November 18, 2015, at 3:30 P.M. The email also stated that Graham would give Dexter copies of employee statements and policies violated on November 18, 2015. Also, on November 17, 2015, Dexter sent an email to Graham advising her that the Respondent's position to discipline an employee off-the-clock was just one of the many issues that the Union was challenging. The email also stated that it was an unfair labor practice for the Respondent to unilaterally change its policies. The email further requested that the Respondent rescind Employee Williams' discipline and reinstate her (Resp. Ex 1).

On November 18, 2015, Employee Williams' pre-disciplinary meeting was held at the Respondent's facility. Present were Williams, Union Staff Representative Dexter, Employee/Union Steward Margo Smith, Human Resources Director Galeaz, and Production Manager Flowers. During the meeting, Galeaz and Flowers gave Williams, Dexter, and Smith a copy of the policies that the Respondent relied upon to discipline Williams and copies of employee statements from Employees Viveros, Theresa Burley, Alyssa Royster, Murphy, April Gaines, Erika Ayala, and Flowers (GC Ex 3). In response, Williams gave Galeaz copies of employee statements from Employee Gaines, Employee LeMoris Burtis, and Employee Ayala (GC Ex 4). Galeaz told Dexter that she wanted to make copies of the employee statements that Williams had given her. Galeaz and Flowers left the meeting. About three minutes later, Galeaz and Flowers returned to the meeting. Upon their return, Galeaz and Flowers told Williams that she was discharged. Dexter told Galeaz that he had made a demand to bargain. Galeaz told

Dexter that the meeting was over (TR 109-111, 170-172, 199, 244-247). No other information was provided to the Union.

III. ARGUMENT

A. The Judge Correctly Concluded That the Respondent Violated Sections 8(A)(1) And (5) of The Act By Failing to Provide the Union With Relevant and Necessary Information.

In its exceptions, the Respondent argues that the Judge incorrectly found that the personnel files, evaluations, and past discipline of Employee Williams and all bargaining unit employees would have been relevant to the Union in attempting to establish disparate treatment of Williams at the November 19, 2016 meeting. The Respondent also argues that the Judge incorrectly concluded that the Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to provide the Union with all of the information requested pursuant to the Union's November 16, 2016 information request, including personnel files, evaluations, and past discipline of Employee Williams and all bargaining unit employees.

Despite the Respondent's assertions, the Judge correctly concluded that the personnel files, evaluations, and past discipline of Employee Williams and all bargaining unit employees would have been relevant in attempting to establish disparate treatment of Williams at the November 19, 2016 meeting and the Respondent's refusal to provide the Union with this information violated Sections 8(a)(1) and (5) of the Act (Decision, page 12, lines 13-15). In support of his conclusion, the Judge found that, after receiving the Union's November 16, 2016 information request, the Respondent gave the Union a copy of employee statements that it had received as well as the Respondent's rules and regulations, but not the other information requested by the Union (Decision, page 11, line 49 – page 12, line 3). Also, in support of his conclusion, the

Judge cited Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979), in which the Board held that Section 8(a)(5) of the Act requires an employer to furnish the Union representing its employees with information that is relevant to the union in the performance of its bargaining responsibilities and information about terms and conditions of employment of bargaining unit members is presumptively relevant and must be produced. Furthermore, in support of his conclusion, the Judge cited Associated General Contractors of California, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980), in which the Board held that it is well established that an employer must provide a union with requested information if there is a possibility that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative (Decision, page 12, lines 3-15).

Additionally, record evidence demonstrates that, if the Respondent had provided the Union with the personnel files, evaluations, and past discipline of Employee Williams and all bargaining unit employees, such documentation would have in fact demonstrated that the Respondent had treated Williams disparately by suspending and discharge her. Employee Murphy testified that, on October 19, 2012, she and Employee Kanesha Jones got into a conflict at the time clock when Jones tried to cut in front of Murphy. Murphy threatened to beat Jones' ass. Jones threatened to beat Murphy's ass. Murphy testified that there were clients and employees present at the time. Instead of being terminated, Murphy received a written warning. The written warning indicated that Murphy had also slapped Jones' hand away when Jones attempted to use the clock before her (TR 227-229; GC Ex 8). Record evidence also demonstrates that, on February 6, 2014, Employee Diamond Jordan received a two-day suspension because she engaged in an altercation with another Employee Taylor Hines. Specifically, Jordan told Hines that she wanted to choke Hines. Hines was given a written

warning. The written warning stated that the Respondent could not tolerate any staff having words with other staff in front of consumers. Thus, record evidence demonstrates that other employees have received lesser punishment for using profane and language and threatening employees than Williams (GC Ex 9). Therefore, it is clear that the Union's request for the personnel files, evaluations, and past discipline of Employee Williams and all bargaining unit employees was clearly relevant and necessary in helping it defend Williams concerning her discipline and fulfill its statutory duties and responsibilities as the employees' exclusive bargaining representative .

Also, the Board has held that an employer is obligated to furnish the union with information that is relevant for the purpose of policing and enforcing the provisions of a collective-bargaining agreement, processing grievances, and evaluating a party's claims made during contract negotiations. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); Washington Beef, Inc., 328 NLRB 612, 617-618 (1999); American Signature, Inc., 334 NLRB 880, 885 (2001). An employer's duty to furnish information stems from the underlying statutory obligation imposed on employers under Section 8(a)(5) of the Act to bargain in good faith with respect to mandatory subjects of bargaining. Cowles Communications, Inc., 172 NLRB 1909 (1968). An employer's duty, however, does not arise until the union makes a request for information. Boston Herald-Traveler Corp., 102 NLRB 627, enfd. 210 F.2d 134 (1st Cir. 1954). The Board has held that a request for information need not be made in writing and the request for information need not be repeated. A. W. Schlesinger Geriatric Center, 304 NLRB 296, 297, n.7 (1991); Bundy Corp., 292 NLRB 671, 672 (1989); LaGuardia Hospital, 260 NLRB 1455 (1982).

The Supreme Court has held that the relevance standard for information requested by a union as a liberal "discovery-type" standard. NLRB v. Acme, supra. However, the Board has

long held that information pertaining to the bargaining unit is presumptively relevant and no additional showing of relevance is required. Ohio Power Co., 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Presumptively relevant information includes bargaining unit employees' names and addresses, seniority dates, rates of pay, job classifications, insurance and other benefit plans, the number of paid holidays in effect, vacation rights, pension and severance plans, etc. Dyncorp/Dynair Services, 322 NLRB 602 (1996), enfd. 121 F.3d 698 (4th Cir. 1997). Thus, in affirming the Administrative Law Judge's conclusions, the Board held that, where requested information pertains to the discipline of a bargaining unit employee, the requested information is presumptively relevant, and the employer has the burden of proving the lack of relevance. The Grand Rapids Press, 331 NLRB 296 (2000). Therefore, the Union's request for disciplinary information relating to bargaining unit employee Williams, including the personnel files of Williams and other bargaining unit employees, the disciplinary records of all employees involved in the incident, and other requested information is presumptively relevant. Since the Union's information request is presumptively relevant, the Judge correctly concluded that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the requested information to the Union.

In its exceptions, the Respondent also asserts that the Illinois Personnel Records Review Act provides that an employer, upon an employee's request, which the employer may require to be in writing, may permit the employee to inspect personnel documents. The Respondent also asserts that the Illinois Personnel Records Review Act provides that an employee may designate in writing a representative of the employee's union, collective bargaining unit, or other representative to inspect the employee's personnel records. The Respondent further contends that there is no evidence demonstrating that any bargaining unit employee requested to review

personnel records or requested that a Union representative be permitted to review said documentation. Despite the Respondent's assertions and contentions, there is no evidence demonstrating that the Respondent ever requested that the Union obtain employee consent. Also, the National Labor Relations Act does not require employees to make oral or written requests to employers in order to review personnel records. Under the National Labor Relations Act, union representatives are entitled to review and/or receive relevant and necessary information from an employer, including the personnel records of bargaining unit employees, upon request and, in most cases, bargaining unit employees' consent is not required prior to review and/or receipt of said documentation. Furthermore, the Illinois Personnel Records Review Act is a state law and is not applicable to a Board proceeding. Additionally, to the extent that the Illinois Personnel Records Review Act conflicts with the National Labor Relations Act, the National Labor Relations Act preempts the Illinois Personnel Records Review Act since the National Labor Relations Act is federal law. San Diego Trades Council v. Garmon, 359 U.S. 236 (1959).

IV. CONCLUSION

For the above-stated reasons, the Counsel for the General Counsel respectfully requests that the Respondent's exceptions be denied in their entirety and that the Administrative Law Judge's Decision be affirmed and his recommended order adopted except as modified by Counsel for the General Counsel's exceptions to the Decision of the Administrative Law Judge.

DATED at Indianapolis, Indiana, this 18th day of November, 2016.

Respectfully submitted,

/s/ Raifael Williams

Raifael Williams
Counsel for the General Counsel
National Labor Relations Board
Region Twenty-Five
Room 238, Minton-Capehart Federal
Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204
Phone: (202) 702-2344
Fax: (317) 226-5103
E-mail: raifael.williams@nlrb.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was filed with the Executive Secretary electronically and was electronically served upon the following persons on this 18th day of November 2016:

Electronic Submission

Melissa Auerbach
Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich
8 South Michigan Avenue, 19th Floor
Chicago, IL 60603

Steve Mills, Attorney
206 South Sixth Street
Springfield, IL 62701

/s/ Raifael Williams _____
Raifael Williams
Counsel for General Counsel
National Labor Relations Board
Region Twenty-Five