

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

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent

and

Case 07-CA-155494

TAMIKA KELLEY, an Individual

Charging Party Kelley

and

Case 07-CA-160938

**COUNCIL 25, MICHIGAN AMERICAN
FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES (AFSCME), AFL-
CIO**

Charging Party AFSCME

and

Case 07-CA-174758

**INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS OF
AMERICA (SPFPA)**

Charging Party SPFPA

and

Case 07-CA-175342

**LOCAL 120, INTERNATIONAL UNION,
SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA
(SPFPA)**

Charging Party Local 120

Table of Contents

I. ISSUES	1
II. STATEMENT OF FACTS.....	3
A. Background	3
B. Employees’ protected concerted written complaints submitted to Respondent about their terms and conditions of employment.	5
C. Respondent’s interrogation of employees at the Calumet facility about their protected concerted activities and sympathies.	7
D. Employees Picket the Facility	9
E. Respondent’s surveillance of employees who engaged in the Picketing.	13
F. Respondent threatens its employees, creates the impression of surveillance and further interrogates employees.	14
G. Respondent Unlawfully suspends its employees Charging Party Kelley, Sherman Cochran, and Delaine Singleton-Green	18
H. Employees’ union activities.	20
I. Respondent’ s August 26, 2015 discharge of its employee Alfred Neely	22
J. Respondent’s September 22, 2015 discharge of its employee Lamont Simpson	25
K. Respondent issued disciplines to Charging Party Tamika Kelley.	28
L. Respondent eliminated the breaks between their scheduled and mandated shifts; and required contingent employees to work additional “mandated” shifts.	32
1. Elimination of Breaks	32
2. Mandation of Contingent Employees	33
3. Respondent’s discharge of its employee Quiana Jenkins	35
M. Respondent has failed and refused to furnish Charging Party SPFPA with requested relevant and necessary information	37
III. ARGUMENT	40
A. Respondent Unlawfully Threatened, Coercively Interrogated, Unlawfully Surveilled, and Created the Impression of Surveillance of its Employees	41
1. Complaint/Petition	41
2. Picketing	42

3.	Surveillance by Supervisor Fernandez	43
4.	Interrogation by Shift Supervisor Burton	44
5.	Threats and Impression of surveillance by Supervisor Dix.....	45
6.	Threats by Facility Manager Leroy Sherrod.....	46
7.	Interrogation by Facility Manager James Crawford.....	47
B.	Respondent Unlawfully Disciplined and Discharged Employees Because They Engaged in Protected Concerted and Union Activities	49
1.	The Legal Standard for Section 8(a)(1) and 8(a)(3) Discipline Violations.....	49
2.	July 7, 2015 suspensions of Sherman Cochran, Charging Party Kelley and Delaine Singleton-Green	51
3.	August 26, 2015 Discharge of Alfred Neely	53
4.	September 22, 2015 Discharge of Lamont Simpson	55
5.	September 24, 2015 and October 10, 2015 Disciplines issued to Charging Party Kelley	59
C.	Respondent’s Unlawful Unilateral Changes	62
1.	The March 2016 unilateral change eliminating breaks for employees between scheduled and mandated shifts	63
2.	The April 2016 unilateral change requiring mandated shifts for contingent employees.....	63
3.	The June 1, 2016 Discharge of Quiana Jenkins.....	64
D.	The March 29, 2016 and July 1, 2016 information requests and refusal to provide information	65
IV.	Seeking Reimbursement for Consequential Economic Harm	66
V.	CONCLUSION.....	73

Table of Authorities

<i>Adco Electric Incorporated</i> , 301 NLRB 1113, 1123 (1992)	51
<i>Advoserv of New Jersey, Inc.</i> , 363 NLRB No. 143 (Mar. 11, 2016).....	49
<i>Air Management Services, Inc.</i> , 352 NLRB No. 145, slip op. at 7 (2008)	41
<i>Aluf Plastics</i> , 314 NLRB 706, 708 (1994)	48
<i>Baddour, Inc.</i> , 303 NLRB 275 (1991)	48
<i>Banta Catalog Group</i> , 342 NLRB 1311 (2004).....	51
<i>Bay Metal Cabinets, Inc.</i> ,302 NLRB 152, 178-179 (1991).....	52
<i>Bestway Trucking, Inc.</i> , 310 NLRB 651, 671 (1993).....	48
<i>BRC Injected Rubber Products</i> , 311 NLRB 66, 66 n.3 (1993).....	70
<i>Bryant & Stratton Business Institute</i> , 321 NLRB 1007 (1996).....	65
<i>Carpenters Local 60 v. NLRB</i> , 365 U.S. 651, 655 (1961)	69
<i>Catherine H. Helm, The Practicality of Increasing the Use of Section 10(j) Injunctions</i> , 7 INDUS. REL. L.J. 599, 603 (1985).....	66
<i>Ciba-Geigy Pharmaceutical Division</i> , 264 NLRB 1013, 1016 (1982).....	65
<i>Coastal Insulation Corporation</i> , 354 NLRB No.70, 32 (2009)	51
<i>Columbus Mills Co.</i> , 303 NLRB 223, 232 (1991)	48
<i>Deena Artware, Inc.</i> , 112 NLRB 371, 374 (1955).....	70
<i>Durham School Services, L.P.</i> , 361 NLRB No 44 (Sept. 5, 2014)	48
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556, 563-568 and 567 n.17 (1978)	50
<i>Edwards Painting Inc.</i> , 364 NLRB No. 152 (Nov. 30, 2016)	48
<i>Electronic Data Systems Corp.</i> , 305 NLRB 219 (1991).....	51
<i>Electro-Voice, Inc.</i> , 320 NLRB 1094, 1095 (1996).....	65
<i>Emery Worldwide</i> , 309 NLRB 185, 186 (1992).....	41, 48
<i>F.W. Woolworth Co.</i> , 90 NLRB 289, 292-93 (1950)	68
<i>Fluor Daniel, Inc.</i> , 304 NLRB 970 (1991)	51
<i>Gerig's Dump Trucking</i> , 320 NLRB 1017, 1024 (1996).....	49
<i>Graves Trucking</i> , 246 NLRB 344, 345 n.8 (1979), <i>enforced as modified</i> , 692 F.2d 470 (7th Cir. 1982)	67
<i>Great Western 140 Produce</i> , 299 NLRB 1004 (1990).....	65
<i>Greater Oklahoma Packing Co. v. NLRB</i> , 790 F.3d 816, 825 (8th Cir. 2015).....	70
<i>Gulf States Mfg. V. NLRB</i> , 704 F.2d 1390, 1397 (5th Cir. 1983).....	63
<i>Hialeah Hospital</i> , 343 NLRB 341, 393 fn. 20 (2004).....	49
<i>Hoffman Fuel Co.</i> , 309 NLRB 327 (1992).....	48
<i>House of Good Samaritan Medical Facility</i> , 319 NLRB 392, 397, (1995).....	65
<i>Integrated Electrical Services Inc.</i> , 345 NLRB 1187, 1199 (2005).....	50, 53
<i>International Automated Machines</i> , 285 NLRB 1122, 123 (1987), <i>enfd.</i> 851 F.2d 720 (6th Cir. 1988)	49
<i>Intersystems Design and Technology Corp.</i> , 278 NLRB 759, 759 (1986)	63
<i>Isis Plumbing & Heating Co.</i> , 138 NLRB 716, 717 (1962)	68
<i>J.H. Rutter-Rex Mfg.</i> , 396 U.S. at 263.....	67
<i>Kentucky River Medical Facility</i> , 356 NLRB 6, 8- 9 (2010).....	68
<i>KFMB Stations</i> , 343 NLRB 748, 751 (2004)	51
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244, 253 (1994)	72
<i>Lee Brass Co.</i> , 316 NLRB 1122, 1122 n.4 (1995) (same), <i>enforced mem.</i> , 105 F.3d 671 (11th Cir. 1996)	72
<i>Limestone Apparel Corp.</i> , 255 NLRB 722, 722 (1981).....	51

<i>Medcare Associates, Inc.</i> , 330 NLRB 935, 940 (2000)	41
<i>Meyers Industries</i> , 268 NLRB 493, 497 (1984).....	50
<i>N.L.R.B. v. Agawam Food Mart, Inc.</i> , 386 F.2d 192 (1st Cir 1967).....	62
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	65
<i>NLRB v. J.H. Rutter-Rex Mfg. Co.</i> , 396 U.S. 258, 262-63 (1969)	67, 69
<i>NLRB v. Katz</i> , 369 U.S. 736, 743 (1962)	62
<i>NLRB v. Mackay Radio & Tel. Co.</i> , 304 U.S. 333, 348 (1938).....	68
<i>NLRB v. Seven-Up Bottling of Miami, Inc.</i> , 344 U.S. 344, 346 (1953)	68
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962).....	50
<i>Nortech Waste</i> , 336 NLRB 554, 554 n.2 (2001)	71, 72
<i>Operating Engineers Local 513 (Long Const.Co.)</i> , 145 NLRB 554 (1963)	67, 72
<i>Pacific Beach Hotel</i> , 361 NLRB No. 65, slip op. at 11 (2014).....	69, 71
<i>Pan American Electric</i> , 321 NLRB 473, 476 (1996)	53, 61
<i>Pappas v. Watson Wyatt & Co.</i> , 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007	72
<i>Performance Friction Corp.</i> , 335 NLRB 1117, 1126 (2001).....	41
<i>Peter Vitale Co.</i> , 310 NLRB 865, 874 (1993)	48
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177, 194 (1941)	67, 68, 69, 72
<i>Pilliod of Mississippi, Inc.</i> , 275 NLRB 799, 799 n.3 (1985).....	72
<i>Pirelli Cable Corp.</i> , 323 NLRB 1009 (1997)	65
<i>Prill v. NLRB</i> , 755 F.2d 941 (D.C. Cir. 1985)	50
<i>Priority One Service, Inc.</i> , 331 NLRB 1527, 1527 (2000)	62
<i>Proulx v. Citibank</i> , 681 F. Supp. 199, 205 (S.D.N.Y. 1988).....	72
<i>Radio Officers' Union of Commercial Telegraphers Union v. NLRB</i> , 347 U.S. 17, 54-55 (1954).....	67
<i>Roman Iron Works</i> , 292 NLRB 1292, 1294 (1989)	70
<i>Rossmore House</i> , 269 NLRB 1176, 1177 (1984)	41
<i>S & I Transportation, Inc.</i> , 311 NLRB 1388 (1993).....	62
<i>Service Employees Local 87 (Pacific Telephone)</i> , 279 NLRB 168 (1986)	72
<i>Seton Co.</i> , 332 NLRB 979 (2012)	48
<i>Shattuck Denn Mining Corp. v NLRB</i> , 362 F.2d 466, 470 (9 th Cir. 1966).....	53, 61
<i>SKD Jonesville Division L.P.</i> , 340 NLRB 101, 103 (2003)	50
<i>Somerville Mills</i> , 308 NLRB 425 (1992)	65
<i>Spectrum Juvenile Justice Services</i> , 364 NLRB No. 149 (Nov. 22 2016).....	66
<i>Technology Instrument Corporation</i> , 187 NLRB 830, 843 fn. 13 (1971).....	62
<i>Tortillas Don Chavas</i> , 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014)	67, 68, 70
<i>Treanor Moving & Storage Co.</i> , 311 NLRB 371, 386 (1993)	65
<i>T-West Sales and Service, Inc.</i> , 346 NLRB 118, 127 (2005).....	41
<i>Virginia Elec. & Power Co. v. NLRB</i> , 319 U.S. 533, 539 (1943).....	68
<i>Wal-Mart Stores</i> , 340 NLRB 220, 221 (2003).....	50
<i>Washington Nursing Home</i> , 321 NLRB 366, 375 (1996).....	53
<i>Wright Line</i> , 251 NLRB 1083, 1089 (1980)	50, 53, 55

**COUNSELS FOR THE GENERAL COUNSEL'S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

Counsels for the General Counsel Donna M. Nixon and Eric Cockrell respectfully submit this brief to Administrative Law Judge Thomas Randazzo, who heard this matter on March 27 - 30, 2017, in Detroit, Michigan.

I. ISSUES¹

The issues presented are²:

(1) Whether Charging Party SPFPA is the certified collective bargaining representative of the following collective bargaining Unit under Section 9(b) of the National Labor Relations Act?

All full time and regular part-time³ armed and unarmed security officers, including direct care and youth workers performing guard duties as defined in Section 9(b)(3) of the Act, employed by Respondent at its facilities located at 300 Glendale, and 1961 Lincoln, Highland Park, Michigan; but excluding all office clerical employees, professional employees and supervisors as defined by the Act.(Unit)

(2) Whether Respondent was aware of employee written complaints about terms and conditions of employment? (C 10(a))

(3) Whether Respondent was aware of employees picketing on July 6, 2015? (C 10(b))

(4) Whether on or about July 3, 2015, supervisor Damien Dix coercively interrogated employee Lamont Simpson about his involvement with the picketing? (C 11)

(5) Whether on or about July 5, 2015, supervisor Cornelius Burton coercively interrogated employee Lamont Simpson about his involvement with the picketing? (C 12)

¹ Throughout this brief the following references will be used:

Transcript: Tr (followed by page number), General Counsel Exhibit: GC (followed by exhibit number)
Respondent Exhibit: R (followed by exhibit number), Joint Exhibit: J (followed by exhibit number)
Complaint Paragraph: C (followed by paragraph number)

² Prior to trial, the parties reached a settlement for complaint allegation #9 related to rules. See J 8.

³ Part times employees are also known as contingent employees.

(6) Whether on or about July 6, 2015, Manager Melissa Fernandez unlawfully surveilled employees while they were picketing? (C 13)

(7) Whether on or about July 9, 2015, supervisor Damien Dix created the impression of surveillance in a conversation with employee Alfred Neely? (C 14 (a))

(8) Whether on or about July 9, 2015, supervisor Damien Dix threatened employee Alfred Neely with discipline because of his protected concerted activities? (C 14(b))

(9) Whether on or about July 9, 2015, supervisor Damien Dix threatened employee Lamont Simpson with discipline because of his protected concerted activities? (C 15(a))

(10) Whether on or about July 9, 2015, supervisor Damien Dix threatened employees Lamont Simpson and Alfred Neely with discipline because of their protected concerted activities? (C 15(b))

(11) Whether on or about July 7, 2015, supervisor Leroy Sherrod threatened employees Alfred Neely and James Marcus with discipline because of their protected concerted activities? (C 16(a))

(12) Whether on or about July 10, 2015, supervisor Leroy Sherrod threatened employees Alfred Neely and James Marcus with discharge because of their concerted activities? (C 16(b))

(13) Whether in early September 2015, supervisor James Crawford interrogated employee Ruth Crosby about her union sympathies and activities? (C 17)

(14) Whether on or about the end of March 2016, supervisor Leroy Sherrod informed employees that they could no longer take breaks between scheduled and mandated shifts because they voted to be represented by Charging Party SPFPA? (C 18)

(15) Whether on July 7, 2015, Respondent suspended its employees Charging Party Kelley, Sherman Cochran and Delaine Singleton-Green in retaliation for their concerted activities? (C 19(a))

(16) Whether Respondent unlawfully discharged employee Alfred Neely on August 26, 2015 in retaliation for his concerted activity? (C 19 (b)(1) and (c))

(17) Whether Respondent unlawfully discharged employee Lamont Simpson on September 22, 2015 in retaliation for his concerted activities? (C 19 (b)(2) and (c))

(18) Whether Respondent unlawfully disciplined employee Charging Party Kelley on September 24, 2015 and October 10, 2015, in retaliation for her protected concerted activities and because she assisted Charging Party AFSCME? (C 20)

(19) Whether about March 2016, Respondent eliminated breaks between scheduled and mandated shifts because employees assisted the Charging Party SPFPA and engaged in concerted activities **and/or** failed to notify Charging Party SPFPA prior to changing this policy or provide it with an opportunity to bargain over this mandatory subject of bargaining? (C 21(a), 22, 23 and 24)

(20) Whether about April 2016, Respondent required contingent employees to work additional mandated shifts because employees assisted the Charging Party SPFPA and engaged in concerted activities **and/or** failed to notify Charging Party SPFPA prior to changing this policy or provide it with an opportunity to bargain over this mandatory subject of bargaining? (C 21 (b), 22, 23 and 24)

(21) Whether Respondent, as a result of its mandatory change in policy about mandating overtime for contingent employees, discharged Quiana Jenkins, and possibly other employees on June 1, 2016, and other unknown dates? (C 25)

(22) Whether Respondent has failed and refused to respond to or provide relevant information which was requested by Charging Party SPFPA on about March 29, 2016 and July 1, 2016? (C 26, 27 and 28)

II. STATEMENT OF FACTS⁴

A. Background

Respondent operates two facilities located at 330 Glendale (Calumet facility), Highland Park, Michigan; and 1961 Lincoln (Lincoln facility), Highland Park, Michigan.(GC 1(mm), par 2; GC 1(oo), par. 2); Tr 68, 240). Respondent operates the facilities as maximum security treatment facilities for juvenile prisoners or residents, who have been adjudicated by the criminal justice system. (Tr 69-70, 240, 313). The two facilities are located adjacent to one another, about 50 to 80 yards apart. (Tr 68-69, 112, 355). Respondent's personnel consists of youth workers, security guards, teachers,

⁴ These are facts which the Counsel for the General Counsel urges should be credited.

therapists, support staff, secretaries, supervisors, managers and kitchen staff. (Tr 568-569, 683, 684-685).

Youth workers are unarmed and are responsible for the daily supervision and discipline of the residents who are incarcerated and housed inside individual detention rooms at the Calumet and Lincoln facilities. (Tr 70-71, 76, 241, 312-313, 315, 575).

Executive Director Melissa Fernandez runs the facilities and reports to Roger Swaninger, Chief Executive Officer and President of Spectrum Human Services, Respondent's parent company. (Tr 642, 657-658).

Respondent houses residents within compartments called pods, which generally contain living quarters, a control room, classroom, therapist office, and day room where they may engage in a number of activities, including communing with one another, viewing television, or playing board and video games. (Tr 71-75, 241, 313-314, 315, 316). youth workers can also escort residents to a gymnasium or activity room where they can play games or attend religious services. (Tr 75, 314). Respondent assigns a radio to each youth worker, supervisor, manager, and security officer in order to facilitate daily communication among staff while they are working in the pods. (Tr 576-578). The pod control room serves as an office and contains resident lockers, a small closet where cleaning supplies are stored, and paperwork pertaining to residents. (Tr 316-317). Some pods share the same control room. (Tr 317). Residents are not allowed inside the control room. (Tr 316). There is a direct line of sight of the residents from the control room. (Tr 316-317, 336).

B. Employees' protected concerted written complaints submitted to Respondent about their terms and conditions of employment.

In June and July 2015, morale among the youth workers was extremely low. (Tr 77). Two staff employees were killed in separate accidents away from the Calumet and Lincoln facilities. (Tr 77, 88, 114-115, 185, 248). Respondent also received mentally-ill residents from another facility that were more challenging than their usual residents. (Tr 77, 78, 79, 248, 249, 319). In turn, the youth workers did not receive additional training or an increase in pay. (Tr 114, 114-115, 124, 248, 385, 477). As a result, a resident assaulted a youth worker, who was working alone within a pod; a particular resident bit about 15 staff members; and there was emotional abuse by residents. (Tr 77-79, 104, 114-115, 124, 248, 249, 318, 319). Further, Respondent increased mandatory overtime, which policy is known as mandation. (Tr 77-79, 115, 150-151, 156, 185, 473, 509-510) This interfered with employees with kids and conflicted with employees who had other jobs. (Tr 153, 213, 224, 225, 226-227, 228).

Employees discussed their workplace concerns with one another. (Tr 115-116, 385-386, 474, 510). Employees also met with Respondent's management and explained the rationale for their low morale, but Respondent refused to resolve any of these issues. (Tr 79, 249-250, 319, 324, 386, 387).

On or about mid-June 2015, employees decided to draft petitions and submit them to Respondent. (Tr 79, 104-105, 510-511; GC 2). Youth worker Lamont Simpson, who worked primarily at the Calumet facility, drafted a petition regarding employees' complaints and concerns for Calumet employees about late June or early July 2015, and he submitted it to Respondent. (Tr 80, 105, 113-114, 172, 386-387, 458-459, 510; GC 2).

Before drafting the petition, Simpson spoke with youth workers Ralphael McQueen and Clarence Atwater about their shared workplace concerns. (Tr 116-117, 251, 509-510).

On July 2, 2015, about 5:30 a.m., Simpson concealed the petition by placing it inside his sleeve, and proceeded to the Calumet facility. (Tr 118, 125; GC 2). Security Supervisor Damien Dix, who was inside the security booth, provided Simpson access to the Calumet facility, and asked Simpson what he was doing. (Tr 118, 826; J 1). Simpson said that he needed to enter the administration building to do some tax paperwork. (Tr 118-119). Inside the mail room, Simpson made copies of the Calumet petition, (Tr 119, 511; GC 2) and put a copy of the petition into the individual mailbox belonging to a number of managers, including but not limited to, Executive Director Fernandez, Facility Manager Kirpheous Stewart, Calumet Shift Supervisor Stephen Johnson, Calumet Facility Manager Leroy Sherrod, Calumet Facility Manager Christopher Wilson, and Supervisor Donald Farrell. (Tr 119, 173, 174, 181-182, 320-321, 511-512, 596, 770; GC 2, J 1). Later that morning, inside the Calumet facility locker room, Simpson gave a copy of the Calumet petition to youth worker McQueen. (Tr 119, 510-511; GC 2). Simpson told McQueen that he put the Calumet petition inside the manager's mailboxes. (Tr 120). McQueen replied that he would provide the Calumet petition to Charging Party Tamika Kelley, who works at the Lincoln facility. (Tr 120, 251).

Charging Party Kelley copied and prepared a similar petition, which she distributed among employees at the Lincoln facility regarding employees' complaints and concerns. (Tr 187-188, 251-252; GC 7). A number of employees either reviewed or signed the Lincoln facility Petition. (Tr 186-188, 252, 475-476; GC 7). Charging Party

Kelley placed a copy of the Lincoln Center petition in each individual post office mailbox belonging to Respondent's managers and supervisors, including but not limited to, Executive Director Fernandez, Lincoln Center Director Oliver Cooper, Lincoln Shift Supervisor Kerwin Johnson, Shift Supervisor Prince Fullerton, Lincoln Shift Supervisor Michael Caston, Lincoln Facility Manager Marlon Bradford, and Manager George. (Tr 253-254, 295, 596-597; GC 7). Charging Party Kelley did not include the employees' signatures with the petition that she submitted to Respondent. (Tr 254; GC 7).

On July 2, 2015, by e-mail, Human Resources Administrator James Wiser forwarded a copy of the Calumet Petition to Fernandez and Vice President of Human Relations Donald Fields. (Tr 595-596, 598, 660-661, 701, 787; J 1; GC 2).

C. Respondent's interrogation of employees at the Calumet facility about their protected concerted activities and sympathies.

1. On July 3, 2015, Simpson was present in pod 3 when Calumet Security Supervisor Damien Dix entered and asked Simpson whether he knew anything about a the "letter" that was put inside of the mailboxes of upper management. (Tr 121, 125, 825-826; GC 2; J 1). Simpson replied that he knew nothing about the "letter." (Tr 121; GC 2). Dix said that the managers were having a meeting and the "letter" was being discussed; that whoever placed the "letter" in the mailboxes did not sign it; and that Facility Manager Kirpheous Stewart said, "they ain't going to do shit", that Stewart "balled the letter up", and "threw it away". (Tr 121, 174, 175; GC 2). No one else was present for this conversation. (Tr 121).

About 30 minutes later, Simpson received a phone call from youth worker McQueen while Simpson was present in the pod. (Tr 122). McQueen reiterated what Dix

said about the “letter” and that someone told McQueen about the “letter”. (Tr 122, 175; GC 2). Simpson invited McQueen to the pod. (Tr 122). When McQueen arrived, McQueen told Simpson that Stewart “balled up the letter”, and said that “they ain’t going to do shit”, and that Respondent did not take the letter seriously because it was unsigned. (Tr 122-123, 124; GC 2). At that time, Simpson told McQueen that they must take additional action to get Respondent’s attention, and they discussed picketing in protest. (Tr 123, 127). After work, Simpson and McQueen spoke by phone about a date to conduct the Protest Picket. (Tr 123, 127).

2. On or about July 4, 2015 or July 5, 2015, during the morning, at the Calumet facility, in the break room adjacent to the intake area, Simpson told Calumet Facility Manager Christopher Wilson and Calumet Shift Supervisor Johnson that employees drafted a Petition and requested that they provide it to the Director during Respondent’s Thursday meeting. (Tr 321-322; GC 2; J 1). Neely was present. (Tr 322). Johnson agreed. (Tr 322). Later that evening, after work, inside the pod 3 control room, Wilson told Neely and Simpson that Respondent is “not talking about shit with them”. (Tr 323-324). Also, Wilson said that Calumet Center Director Kirpheous Stewart is “not talking about shit” and all employees had better be at work. (Tr 767-768, 770; CG 2).

3. On July 5, 2015, about 10:00 p.m., Calumet Security Supervisor Cornelius Burton called Simpson at home. (Tr 125). Immediately, Burton asked whether Simpson was a part of the picket. (Tr 126). Simpson replied that he did not know what Burton was talking about. (Tr 125). Burton persisted by asking Simpson a second time about the picketing. (Tr 125). Simpson replied that he did not know what Burton was talking about.

(Tr 125). Burton said that the workplace was becoming “crazy” because employees were calling off work. (Tr 125). Simpson replied that the picketing had nothing to do with him. (Tr 125). Burton asked Simpson whether he would be present at work on July 6, and Simpson said yes. (Tr 125).

On July 5, 2015, for the midnight shift, beginning at 11:00 p.m., many employees called off from work before their scheduled shift on July 6 or stated that they were unable to work. (Tr 357). Calumet Facility Manager Steven Johnson attempted to field employees’ phone calls, and he spoke with a couple of employees. (Tr 354, 357-358). During the evening of July 5, Steven Johnson sent e-mails to “the director”, all of the Facility Managers, and supervisors, who were scheduled to begin work on July 5, at 6:00 a.m. (Tr 358-359).

On July 5, 2015, between about 11:00 p.m. and midnight, Simpson called Calumet Shift Supervisor Steven Johnson to call-off from work on July 6. (Tr 126). The procedure for calling-off work is for an employee to notify his or her supervisor by phone at least four hours before the beginning of the scheduled shift. (Tr 84), and as long as employees have accrued leave time, no discipline is issued. (Tr 84, 126-127, 388).

D. Employees Picket the Facility

As a result of Respondent’s decision to refuse to address the concerns raised by employees in both their Calumet and Lincoln petitions, employees decided, concertedly, to picket on July 6 and 7, 2015, on Glendale Street between Hamilton Street and Lincoln Street. (Tr 80-81, 122-125, 255, 256, 324-325, 511-512, 528-529; GC 2). On July 6,

2015, between about 5:15 a.m. and 5:45 a.m. Simpson and Raphael McQueen arrived at the Calumet facility. (Tr 127, 513-514).

Initially, about seven to 10 employees were present and that number increased to over 40 employees, as the day progressed. (Tr 82, 128, 129, 257, 326, 479-480, 521). The number of employees who participated in the picketing on July 6 fluctuated throughout the day. (Tr 128-129, 189, 325). Overall, the picketing began around 8:00 a.m. and ended about 5:00 p.m. (Tr 257).

On July 6, 2015, about 6:00 a.m., Calumet Facility Manager Christopher Wilson called Executive Director Fernandez to notify her as to the fact that a large number of employees had called-off from reporting to work. (Tr 598-599, 661, 686). Also, Fernandez called the Lincoln facility and confirmed 31 employees had, in fact, called-off from work. (Tr 599). In response, Fernandez, who lives about one hour distant from the Calumet and Lincoln facilities, dressed immediately, including the donning of her “Spectrum” polo-type shirt, and drove to work. (Tr 599-560). Fernandez left her residence between about 7:15 a.m. and 7:30 a.m. in order to reach Respondent’s premises so that she could immediately address the staffing crisis, which she considered to constitute an atypical operational occurrence. (Tr 600, 601-607, 661, 663).

During the shift-change, at 6:00 a.m. on July 6, 2015, in the intake area at the Calumet facility, Shift Supervisor Steven Johnson met with Calumet Facility Managers Leroy Sherrod and Christopher Wilson. (Tr 359-360). They discussed the large number of employee call-offs that have not been replaced and a plan to address that issue on the day shift. (Tr 360, 361-362, 483). Wilson replied that he would check, and Steven

Johnson volunteered to remain at work until a definitive plan of action is determined. (Tr 360).

At about 8:00 a.m., at the Calumet facility, within the intake area, Steven Johnson and Calumet Facility Manager Wilson, along with Supervisor Carter, met in order to prepare to distribute medication to the residents. (Tr 362). They discussed the lack of staffing to fully cover the Calumet facility and Steven Johnson continued to agree to remain at work beyond the scheduled end of his shift to assist in coverage. (Tr 363). Facility Manager Sherrod arrived in the intake area. (Tr 363). Carter announced that he saw vehicles parked in front of the building. (Tr 363, 365-366). There was discussion about the lack of staffing and it was decided to list all of the employees who called off and determine why they engaged in such conduct. (Tr 364). Johnson asked what are employees protesting about and suggested that somebody should go outside and determine their concerns. (Tr 363). In response, Sherrod said that it doesn't matter who called off; they're all going to get fired anyway. (Tr 364). Also, Sherrod said that he spoke with Director Kirpheous Stewart and that they are all going to get fired. (Tr 364). Johnson asked how is Respondent going to fire that many people. (Tr 365). Sherrod replied that "it don't matter; they're going to get fired anyway." (Tr 365).

At about 10:00 a.m., by radio, Johnson received a call from Calumet facility Director Kirpheous Stewart to report to Administration. (Tr 367, 770, 771). Johnson proceeded to Administration and in order to reach that location he took a shortcut through the security office. (Tr 367). On one of the many security monitors, Johnson observed both that an unidentified security officer had a camera directed on the front of the

Calumet facility; and that employees were holding up picket signs and walking back and forth. (Tr 368-369).

Between about 10:20 a.m. and 10:30 a.m., after exiting the security office, Johnson entered Administration where he met with Calumet Facility Director Stewart and Executive Director Fernandez. (Tr 370). Stewart asked Johnson about the employee call-offs, which personnel were present inside the Calumet facility, and which employees Johnson had contacted. (Tr 370). Fernandez congratulated Johnson on the red polo-style shirt that he was wearing and which displayed Respondent's logo. (Tr 370-371, 373-374, 686). After providing his report to Stewart, Johnson returned to the intake area to determine where Calumet Facility Manager Christopher Wilson had placed personnel who had arrived and to make phone calls in order to secure additional employee coverage. (Tr 371-372). While walking past the intake area, Manager Wilson asked Johnson what Stewart and Fernandez discussed. (Tr 372). Johnson said that they asked about staffing. (Tr 372). At that time, Wilson complimented Johnson on the red "Spectrum" shirt that Johnson was wearing. (Tr 373). Wilson said that Respondent told Johnson that the ones wearing the red shirt had something to do with the employees calling-off and not coming to work. (Tr 372-373).

Executive Director Fernandez testified that she did not leave work until about 10:00 p.m. (Tr 601-608).

During the two-days of picketing, employees carried and displayed a variety of picket signs. (Tr 82, 129-130, 189, 517-518; GC 4). Charging Party Kelley created the picket signs and brought them to the Calumet facility. (Tr 131, 176, 256-257, 301-302,

477-478; GC 4). Some employees switched off and carried different picket signs during the picketing. (Tr 257, 302, 516-517; GC 4). These signs identified the concerns which employees had attempted unsuccessfully to address with Respondent directly, including the lack of equal pay, along with employees' health and safety concerns because of their interaction with mentally-ill residents. (Tr 82, 129-131, 478-479; GC 4). Simpson testified that he carried every picket sign at some point on July 6, 2015. (Tr 130, 132; GC 4).

At about noon, Simpson visited a nearby Powerhouse Gym to use the bathroom. (Tr 134). While there, he ran into Randy Wimbley, a reporter for Fox 2 News. (Tr 134). Simpson told Wimbley about employees picketing at Respondent's facility, the fact that such activity was prompted by employees who have been unhappy about Respondent's unfair treatment, and Simpson requested Wimbley's assistance. (Tr 134-135). Shortly thereafter, Fox 2 News came to Respondent's facility and interviewed a spokesperson for the picketers. (Tr 136-137).

E. Respondent's surveillance of employees who engaged in the Picketing.

On June 6, 2015, by about 9:00 a.m., about 40 employees were in the process of participating in the picketing under the observation of Respondent, including but not limited to, Executive Director Fernandez, Calumet Facility Director Stewart, Manager Childs, Supervisor Donald Farrell, Supervisor Cornelius Burton, Supervisor Damien Dix, Manager Leroy Sherrod, Supervisor Steven Johnson, Supervisor Antonio Cottingham, Manager Yancy, and Manager Cunningham. (Tr 82, 132-133, 258, 303, 326, 481, 518).

Pickers testified that they saw a number Respondent's supervisors and managers arrive for work at the Calumet facility and at the rear area or sally port as they escorted

new residents inside of the facility. (Tr 82-83, 258, 303-304, 326, 328, 390, 481-482, 519).

Executive Director Fernandez approached the Calumet facility by driving her vehicle on Glendale, a street lined with residential properties, toward the Calumet Facility entrance. (Tr 555-556, 690-691; R 22). Fernandez arrived at the Calumet facility between about 8:30 a.m. and 10:00 a.m. (Tr 519). During the picketing, Fernandez was seen for about 10 minutes, as she wrote on a yellow pad of paper, and stared at the picketers. (Tr 328-329). In response, some employees attempted to obscure their faces by hiding behind parked vehicles. (Tr 328-329).

During the employees' picket on July 6, 2015, Security Supervisor Hionel Black either received a phone call from, or initiated a call to, Supervisor Donald Farrell in order to discuss employees' protest picketing. (Tr 429-430, 431, 449-450). Farrell told Black that both Fernandez and Kirpheous Stewart were in the security control room watching the picketers. (Tr 431, 450).

F. Respondent threatens its employees, creates the impression of surveillance and further interrogates employees.

1. On Thursday, July 9, 2015, at the Calumet Facility, Security Supervisor Hionel Black attended a regularly-scheduled weekly supervisor meeting for supervisors, managers, and directors. (Tr 417, 418, 421, 428, 434, 435, 436, 438, 652-653, 655, 656). The meeting included managers, supervisors, and directors for both the Calumet and Lincoln facilities. (Tr. 434-435). During the about one-hour meeting, Fernandez was present, along with Director of Operations Douglas Burke, Security Manager Keith Leslie, Lincoln Facility Manager James Crawford, Kirpheous Stewart, Lincoln Facility

Director Oliver Cooper, Calumet Facility Manager Leroy Sherrod, Calumet Facility Manager Christopher Wilson, Lincoln Shift Supervisor Kerwin Johnson, Manager Childs, and Supervisor Donald Ferrell. (415, 420-421, 424-425, 435, 436). Respondent discussed employees' call-offs from work, employees' picketing, and the effect of such activities on Respondent's operations. (Tr 422, 425). Respondent was aware as to the identity of the employees who participated in the picketing because they could be seen on the security cameras and most of the day-shift had called-off work. (Tr 428).

Fernandez spoke for about 10 to 15 minutes and told supervisors and managers that they must secure the names of all employees who attended the employees' picket. (Tr 423-424, 426, 436-437). Black understood from the meeting that he must write-down the names of employees who participated in the picketing because they would be terminated or that heads were going to roll. (Tr 424, 426, 428). Black was concerned because two of his security officers participated in the Protest Picket, and he did not want to divulge their names to Fernandez. (Tr 424).

During a subsequent weekly meeting of management and supervision, Director of Operations Burke told Black and other supervisors that they must watch what they say, employees must be very meticulous about their time and attendance, and there would be no "leeways". (Tr 426-427, 428). That is, if an employee violates a policy, Respondent must deal with or discipline that employee accordingly. (Tr 427).

On July 8, 2015, Respondent discharged Facility Manager Steven Johnson from its employment. (Tr 355, 356; J 1).

2. On July 9, 2015, in the break room, Calumet Security Supervisor Damien Dix told youth worker Alfred Neely that Dix was going around with Executive Director Fernandez throughout the building, including within the security control room, and using the cameras to zoom-in on employees as they engaged in the picketing on July 6. (Tr 330-331, 332; J 1). Dix said that Fernandez was looking at the individuals, and she was writing down each person's name. (Tr 331). In response to Neely's question, Dix said that Fernandez wrote down Neely's name and it was on her list. (Tr 331, 332). Dix said that Neely needed to watch his back. (Tr 332).

3. On July 9, 2015, within the intake office, at Calumet Facility, Calumet Facility Manager Leroy Sherrod told two employees, including youth worker Jamar Marcus, that employees messed up and they're going to get fired. (Tr 383, 390-391). Marcus replied that he did not mess up and took off from work. (Tr 391). Sherrod repeated that employees messed up, they're going to get fired, and employees did not have any representation. (Tr 391). Marcus nodded his head, smiled, and went to work in his assigned pod. (Tr 391).

4. Simpson was not scheduled to work on July 7 and July 8, 2015; he returned to work on July 9. (Tr 139). About 8:00 a.m., while at work at the Calumet facility, in his pod's control room, Supervisor Dix approached him as part of a daily walk through and said that upper-management, including Executive Director Fernandez, was "pissed" and "highly upset" about employees' picketing. (Tr 139, 140, 143; J 1). Dix said that Fernandez was inside the security booth while employees picketed. (Tr 139, 140-141). He said that Fernandez was using the security cameras to zoom-in on employees who

were engaged in the picketing and writing their names on a list. (Tr 139-142). Dix told Simpson that Fernandez had a hit list for everybody that was outside. (Tr 140). Dix told Simpson that he better be careful because she's gunning for whoever was outside and had something to do with the picketing. (Tr 140). Dix reiterated to Simpson that Fernandez was gunning for employees, that she created a hit list, and that she was "pissed". (Tr 140).

5. On July 10, 2015, in the control room at pod 6, as part of a regularly-scheduled daily debriefing or walk-through, Facility Manager Sherrod approached Marcus and Alfred Neely. (Tr 332-333, 391, 392). Sherrod told Neely and Marcus that they are all hit, they are on the list, and that employees are pretty much hit. (Tr 333-334, 391). Neither Neely nor Marcus had a verbal reply. (Tr 391-392).

About mid-August 2015⁵, during a regularly-scheduled Schedule C meeting for the purpose of addressing employees' concerns, Lincoln Supervisor Michael Caston and Facility Manager Crawford were present. (Tr 268). Manager Crawford asked employees whether they are going to try and organize the union, (Tr 267-269, 306) and whether they would attempt another rally. (Tr 269). Manager Crawford asked employees why they are going to organize a union, which is not good for employees because unions take employees' wages. (Tr 269, 306). He told employees that employees' jobs are not guaranteed if they joined a union. (Tr 269). Employees replied that they did not feel comfortable speaking with him about the matter. (Tr 488-489). An employee, also named Crawford (unrelated), said that employees are damned if they do and damned if they don't try to work with supervision and management, and suggested that employees

try the union. (Tr 269). Employee Crawford said that Caston and Manager Crawford would tell management and the divulging of such information would cost employees their jobs. (Tr 269-270). Manager Crawford asked Charging Party Kelley whether she was going to join the union. (Tr 270). Charging Party Kelley told Manager Crawford that she was not comfortable speaking to him because everything that is said and done by employees is held against them. (Tr 270). At that time, Charging Party Kelly requested to be excused from the meeting because she was feeling uncomfortable with the conversation. (Tr 270).

G. Respondent Unlawfully suspends its employees Charging Party Kelley, Sherman Cochran, and Delaine Singleton-Green

1. Charging Party Tamika Kelley and Delaine Singleton-Green

Charging Party Kelley's shift was scheduled to begin on July 6, at 6:00 a.m. (Tr 259). At 2:55 a.m., Kelley called Lincoln Shift Supervisor Clifford Judkins and told him that she would be absent from work because of personal reasons. (Tr 259-260). Kelly had personal leave time available. (Tr 260-261). Judkins said that Kelley is her favorite staff person and she must come to work. (Tr 260). Kelley reiterated that she would be absent because of personal reasons. (Tr 260). Judkins asked whether Kelley wanted him to memorialize the reason for her absence in writing. (Tr 260). Kelley said yes, and Judkins stated that he already had several call-offs. (Tr 260).

Charging Party Kelley participated in the picketing on July 6, and returned to work on July 7. (Tr 257, 261). Upon Kelley's arrival for work on 5:50 a.m., on July 7, 2015, Supervisor Judkins directed her both to the resident's visitation area and instructed her

⁵ Employee Ruth Crosby testified that this meeting occurred in July, shortly after the picketing. (Tr 487-488)

not to clock-in for work. (Tr 261). Also present were youth worker Delaine Singleton-Green, along with Supervisors Kerwin Johnson and Eugene George. (Tr 261-262; J 1). Johnson gave Kelley and Singleton Green a suspension pending investigation, dated July 7, 2015, based on their time and attendance. (Tr 262-263, 691; GC 11, GC 31). Kelley wrote on her discipline, "Attendance should have been reviewed upon delivering suspension papers". (Tr 263-264; GC 11). Kelley notified employees who were participating in the picketing on July 7, 2015 that Respondent gave her a disciplinary suspension pending investigation. (Tr 329, 691; GC 11; J 1).

Charging Party Kelley served the suspension on July 7, 2015. (TR 264-265) Later, George notified Charging Party Kelley that she would be paid for the date of her disciplinary suspension, (Tr 264-265, 306-307, GC 11), and Respondent paid her for her absence. (Tr 264-265, 308; GC 11). However, Respondent did not notify Kelley that the disciplinary suspension had been rescinded. (Tr 265, 308-309; GC 11).

2. Youth Worker Sherman Cochran

Youth worker Sherman Cochran, who was scheduled to work the midnight shift, which began at 10:00 p.m., on July 5, called off from work about 4:00 p.m., in order to participate in the picketing on July 6, 2015. (Tr 189-190, 193, 194, 195-196, 197, 198, 256). Cochran contacted Calumet Shift Supervisor Darryl Watson in order to call off from work because he had personal days available to use. (Tr 193, 197-198, J 1).

Cochran returned to work on July 7, 2015, at 10:00 p.m.. (Tr 191-192, 198). At that time, Lincoln Shift Supervisor Clifford Judkins told Cochran that he had been

suspended for time and attendance on July 6; and referred him to Lincoln Facility Director Oliver Cooper. (Tr 192, 198; J 1).

On July 8, 2015, Cochran contacted Cooper. (Tr 198). Cooper told Cochran to report to work on the evening of July 8, but Respondent did not inform him that the disciplinary suspension had been rescinded. (Tr 198-200).

3. On July 7, 2015, picketing continued on the second day and began about 8:30 a.m. (Tr 83, 329). As a result of Respondent's issuing disciplinary suspensions pending investigation to employees on July 7, employees believed that they would be fired because of their participation in the ongoing picketing. (Tr 329-330; GC 11). As a result, picketing ended shortly after it began. Charging Party Kelley manifested employees' fear of Respondent retaliation by filing the original NLRB unfair labor practice charge in Case 07-CA-155494, on July 7, 2015. (Tr 329-330; 1(a)-1(c)). Also, on July 7, Respondent declined to speak with employees by suspending its procedure of debriefing them at the beginning of their shift. (Tr 330-331).

H. Employees' union activities.

Youth worker Clarence Atwater contacted Organizer Reno Y. Thompson of Charging Party AFSCME. (Tr 84-85, 86; GC 32). Shortly after the picket on July 6, 2015, Atwater notified Thompson about employees' concerns as to their terms and conditions of employment. (Tr 85). Atwater and Charging Party Tamika Kelley met with Thompson. (Tr 266, 270).

Simpson participated in the organizing campaign by distributing union or green cards to several employees. (Tr 144-145). Marcus also distributed a number of green

cards to employees on behalf of Charging Party AFSCME. (Tr 393). Charging Party Kelley distributed union authorization cards to employees. (Tr 265-266). Atwater gathered union authorization cards from a number of employees over a two and half-week period. (Tr 85).

A few days into the organizing drive, Simpson observed that a union avoidance pamphlet had been posted on the bulletin board inside the locker room at the Calumet facility. (Tr 146-147; GC 3). Respondent contracted with an unidentified outside company to speak with employees and management as to the pros and cons of employees joining a union. (Tr 693-694, 800-802). Simpson observed that the top sheet of the pamphlet was entitled, "THE ADVANTAGES OF BEING UNION-FREE". (Tr 147, 149; GC 3). Charging Party Kelley observed anti-avoidance materials posted in the women's locker room, control room, and on a bulletin board. (Tr 266, 305-306).

On August 7, 2015, Charging Party AFSCME filed a representation petition with Region 7, the Detroit Office of the National Labor Relations Board. (Tr 704; GC 32). Charging Party AFSCME sought to represent a unit including "Youth Specialists, Cooking Staff, Maintenance, Laundry, Security Transport, Custodian". (GC 32). Subsequently, Organizer Reno Thompson notified Atwater that Charging Party AFSCME would not be able to represent Respondent's employees on the grounds that the youth workers are considered to be security officers. (Tr 85-87).

Atwater contacted Dwayne Phillips, Organizer for Charging Party SPFPA, which union conducted an organizing drive. (Tr 87-88). Atwater and Charging Party Kelley

distributed union authorization cards to employees on behalf of Charging Party SPFPA. (Tr 271).

On February 11, 2016, Charging Party SPFPA filed the representation petition in National Labor Relations Board Case 07-RC-169521. The Board held the representation election on March 3, 2016 among all full-time armed and unarmed security officers, including direct care and youth workers. (Tr 706; J 4). A majority of the Unit voted in favor of Charging Party SPFPA (also referred to as Union). (J 4). Region 7 issued both a Decision and Certification of Representative on March 24, 2016; and an “ERRATUM CORRECTED CERTIFICATION OF REPRESENTATIVE”. (J 4, j 2).

I. Respondent’s August 26, 2015 discharge of its employee Alfred Neely

Respondent hired Neely in January 2011 as a youth worker. (Tr 311, 312). Neely worked at both the Calumet and Lincoln facilities with the majority of his work time devoted to the Calumet facility. (Tr 312).

On August 19, 2015, in the classroom, Neely participated in a game with the residents and a teacher named Mrs. Spratt. (Tr 334). A resident asked Neely for a sweater, which is kept in the pod’s control room. (Tr 335). Neely referred the resident to youth worker Jamar Marcus, who was closer to the pod’s control room. (Tr 335, 393-394). Marcus agreed to secure a sweater for the resident from the control room. (Tr 335-336, 394).

Marcus went into the control room and contacted his mother, by telephone, to inform her that their family had suffered another death. (Tr 394). Shortly thereafter, Executive Director Fernandez and operations Manager Keith Leslie entered the control

room and saw Marcus on the telephone. (Tr 394, 630-631, 803). Marcus then obtained the resident's sweater, and returned to the pod where Neely was present with the residents.(Tr 394) He was followed by Executive Director Fernandez and Manager Leslie. (Tr 336-337). Neely called his supervisor, Brigiette Richard, to request a "28" or break. (Tr 337, 338). Richard told Neely that she was not available and would come by later to relieve him. (Tr 337, 338). Supervisor Dix told Fernandez that Neely had just requested a break and said that he wanted to speak with Fernandez. (Tr 633). Fernandez stated that she did not want to speak to Neely right now and that Neely must remain in the pod. (Tr 633).

At approximately 2:00 p.m., which was at the end of their shift, both Neely and Marcus were called to the office. Supervisor Sherrod told Neely that he was being suspended pending an investigation. (Tr 339; GC 23). When Neely asked the reason for the disciplinary suspension, Sherrod told him that he must write a statement explaining why Marcus was on the telephone. (Tr 339). Neely replied that he did not know that Marcus was on the telephone and that Marcus told him that he (Marcus) was going to secure a sweater for a resident. (Tr 339-340). Neely did not understand why he was both required to write a statement and disciplined because of Marcus' conduct. (Tr 340). Both Neely and Marcus prepared statements, as directed by Respondent. (Tr 340) Respondent's discipline issued to both Neely and Marcus stated that they violated Rule 4137 regarding staff to resident ratio requirement and Rule 4127 regarding youth supervision. (Tr 397-398; GC 23, 27).

On August 19, 2015, Neely met with Vice President and Human Resources and Training Director Donald Fields. (Tr 348). Fields said he did not understand how Neely did anything wrong. (Tr 348). Fields told Neely that in the future he should notify his supervisor and tell Marcus not to use the phone. (Tr 348). Fields said he would send an e-mail to Fernandez because Neely did nothing wrong. (Tr 348-349). Neely showed Fields a statement that he was required to prepare for Respondent. (Tr 349; GC 22).

On or about August 29, 2015, Human Resources Administrator James Wisner contacted Neely by phone (Tr 42 J 1). Wisner informed him that he was being terminated. (Tr 342). Neely replied by asking why he was terminated for conduct that Respondent attributed to Marcus. (Tr 342). Wisner said that Fernandez, along with Fields, and CEO Roger Swaninger came to the decision to terminate Neely's employment. (Tr 342-345,642, 786-787; GC 1).

Subsequently, Neely attempted to reach Fields by phone, but there was no response. (Tr 349). Respondent provided Neely with a letter, dated August 26, 2015, informing Neely of his discharge from employment. (Tr 349-350; GC 24). Marcus was also discharged at the same time as Neely.

On September 16, 2015, the State of Michigan Unemployment Insurance Agency issued a Notice of Determination stating that Respondent did not present evidence during Neely's unemployment compensation proceeding to establish that he engaged in misconduct on the grounds that Respondent had not issued prior warnings to Neely. (Tr 698-700; GC 75).

J. Respondent's September 22, 2015 discharge of its employee Lamont Simpson

Respondent hired Lamont Simpson in June 2011. (Tr 112). In October 2014, Simpson began working his second job as a part-time employee at Motor City Casino (casino), in Detroit, Michigan (Tr 151-152, 176). Simpson worked at the casino primarily on weekends. (Tr 150); concurrently, he worked about 24 to 32 hours weekly (Tr 177) at Respondent. During 2014, Respondent mandated Simpson to work overtime. (Tr 152). A conflict arose in Simpson's scheduling because Respondent would mandate him on the same days that he was scheduled to work at the casino or if he had to pick-up his daughter from daycare. (Tr 152-153, 164). To resolve the scheduling conflict, Simpson was required to secure a replacement employee to work his shift, or Respondent's supervisors told Simpson that if he bought their lunch, he would be removed from the mandation list. (Tr 152-153, 155). Initially, Manager Leroy Sherrod told Simpson that if he purchased a corned beef sandwich for Sherrod from the local Bread Basket Restaurant, Simpson would be excused from mandation. (Tr 153). About late 2014 or early 2015, Sherrod told Simpson that he (Sherrod) would no longer accommodate the scheduling of Simpson's second job because Respondent was short-staffed. (Tr 155, 156). Simpson did not believe Sherrod's assertion because Simpson knew of contingent employees who wanted to voluntarily work more hours, but they were unable to secure the additional hours. (Tr 156).

In order to accommodate Respondent's mandated scheduling, Simpson worked mandated shifts on his weekly scheduled off-days of Mondays or Tuesdays so that he would not be scheduled to work weekends. (Tr 160). During the week of August 10,

2015, Simpson asked Supervisor Emanuel Carter⁶ whether it would be possible for Simpson to provide his casino work schedule so that he would not be mandated to work on the scheduled dates. (Tr 159, 160; GC 5). Carter said that he would see what he could do. (Tr 159). Simpson also told Manager Childs that while he did not mind being mandated, he requested that such mandation not conflict with his casino work schedule. (Tr 159-160, 161; GC 5). In response, Childs requested that Simpson forward his casino schedule to him by text message or e-mail. (Tr 160). Childs said that he would see what he could do for Simpson. (Tr 160-161). Childs did not provide any further response to Simpson's request to be accommodated on his schedule. (Tr 161).

About early September 2015, Respondent told Simpson to take a break because he was required to work a mandated shift. (Tr 164-165). Simpson replied that he had to pick-up his child and told Respondent that he was unable to work a mandated shift. (Tr 164-165).

On September 18, 2015, about 1:45 p.m., about 15 minutes before the scheduled end of his shift, Supervisor Richard called Simpson while he was working. (Tr 165-166; GC 6). Richards said that Simpson was going to be needed to work a second shift. (Tr 166). Simpson replied that he could not work the extra shift because he had to pick-up his daughter and work his casino job. (Tr 166). About five minutes later, Manager Sherrod called Simpson and said that he must stay in order to work a mandated shift. (Tr 166). Simpson said that he could not stay and had already told Supervisor Richard. (Tr 166).

⁶ At trial, Respondent's Counsel Sheryl Laughren stated that Emanuel Carter is no longer employed by Respondent, but he was a supervisor at all material times. (Tr 162). Counsel Laughren also stated that during the time in question, Manager Childs was a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act. (Tr 162).

Less than five minutes later, Supervisor Donald Farrell announced over the radio that Simpson, along with other employees would be mandated after taking their breaks. (Tr 166).

Richard called Simpson, and Simpson requested to secure a replacement to work in his place. (Tr 167). Richards agreed, but reiterated that Simpson must stay. (Tr 167). Simpson was unsuccessful in locating a replacement to work the mandated shift. (Tr 167). About 2:00 p.m., Supervisor Farrell announced over the radio the names of the employees who had been mandated to work the next shift. (Tr 167). At 2:15 p.m., Simpson punched out at the end of his scheduled shift. (Tr 167). As he was turning in his assigned radio, Richard asked Simpson whether he was going to take a break, and he said no. (Tr 167). Simpson replied that he was unable to stay to work a mandated shift. (Tr 167). Subsequently, Simpson picked up his daughter, dropped her off at home, and went to work his scheduled shift at the casino, which began at 4:00 p.m. (Tr 167). About 5:30 p.m., during a break, Simpson retrieved a voice message on his phone from Manager Cottingham. (Tr 167). Cottingham's message stated that Simpson was suspended pending investigation, and Simpson was directed not to report to work for his next scheduled shift on September 20, 2015. (Tr 168).

On or about September 21, 2015, Human Resource Administrator Wiser called Simpson by phone (Tr 168, 169; J 1) and stated that Respondent had discharged Simpson for abandoning his post. (Tr 168; J 1). Simpson asked whether he could grieve his discharge action, and Wiser said no because both Fernandez and Operations Director Douglas Burke signed the discipline. (Tr 168-169; J 1). During the week of September

21, 2015, Simpson received a letter of termination from Respondent by mail. (Tr 112, 169-170; GC 6).

K. Respondent issued disciplines to Charging Party Tamika Kelley.

On September 18, 2015, in writing, Manager James Crawford and Supervisor Kerwin Johnson notified Charging Party Kelley that she would be transferred from Schedule C to Schedule A. (Tr 271-272; GC 12). Supervisor Caston delivered the written notice of the transfer to Charging Party Kelley. (Tr 272; GC 12). Caston initiated the conversation in the gymnasium; he told Charging Party Kelley that her transfer from Schedule C to A would become effective within two days. (Tr 272). The transfer had the effect of changing Charging Party Kelley's weekly off-days from Tuesdays and Wednesdays to Sundays and Mondays. (Tr 272). Charging Party Kelley told Caston that the notice of schedule change was too short because she had already scheduled personal and mandatory court appointments. (Tr 272). Charging Party Kelley requested to speak with Manager Crawford, whom Caston reported to. (Tr 272).

On September 19, 2015, Charging Party Kelley met with Manager Crawford, Supervisor Prince Fullerton, and Supervisor Caston. (Tr 273-274; J 1). Charging Party Kelley said that the schedule change was short notice and she had no time to change her prior scheduled appointments. (Tr 274). Fullerton said that the schedule change would take place whether she signed her notice of schedule change or not. (Tr. 274; GC 12).

About three hours later, Fullerton, Caston, and Crawford, along with Supervisor Moore, approached Charging Party Kelley and gave her a written performance

evaluation. (Tr 275; GC 13). Fullerton asked Charging Party Kelley to review the document, discuss any concerns, and sign it. (Tr 275; GC 13). Kelley reviewed the performance evaluation and challenged the entire document as being untrue. (Tr 276; GC 13). Charging Party Kelley asked why she is still employed by Respondent if her performance is considered to be so poor. (Tr 276). Fullerton replied that the purpose of the evaluation was to correct her performance. (Tr 276). Charging Party Kelley countered that the evaluation was biased and prompted by her standing up for herself. (Tr 276). Charging Party Kelley stated that she would be filing a grievance. (Tr 276).

On September 19, 2015, Charging Party Kelley wrote a letter to Lincoln Facility Director Oliver Cooper for the purpose of grieving her performance evaluation. (Tr 279, 300; GC 14). She submitted her grievance to Cooper by placing it in his mailbox at Lincoln Facility. (Tr 279; GC 14). Kelley also hand-delivered a letter to Respondent's Human Resources Department in order to document her concerns about the performance evaluation. (Tr 279-281; GC 15). (Tr 281; GC 15).

On September 21, 2015, about 9:30 a.m., Charging Party Kelley contacted Lincoln Facility Manager Bradford by phone. (Tr 282; J 1) She told Bradford that she would not come to work on September 22 and 23 because of prior scheduled personal appointments. (Tr 282) Charging Party Kelley told Bradford that she had already met with Crawford, Caston, and Fullerton about her concerns. (Tr 282; J 1). Bradford said that Charging Party Kelley should call back after 10:00 a.m. and speak with Supervisor Judkins. (Tr 282; J 1). Charging Party Kelley said no because she was informing Bradford of her call-

offs from work. (Tr 283). Charging Party Kelley did not work on either September 22 or 23. (Tr 283).

Charging Party Kelley arrived for work on September 24, 2015, and about three hours after the beginning of her shift, Supervisor Kerwin Johnson notified her that she was suspended because of no-call/no-shows or her not calling-off from work on September 22 and 23. (Tr 284). Charging Party Kelley told Johnson about her prior meetings with Respondent and that she spoke with Manager Bradford. (Tr 284). Johnson told Charging Party Kelley that he was not aware of her circumstances. (Tr 284). At that time, Johnson gave Charging Party Kelley a written reprimand stating that she failed to call-off or that she was tardy reporting to work. (Tr 284, 285, 286; GC 16). Charging Party Kelley replied that she would file a grievance. (Tr 284).

Later, during the same shift, Johnson gave Kelley a written corrective action plan stating that she called-off from work one or more times in a consecutive pay period. (Tr 284-285, 286; GC 17). Respondent did not inform Charging Party Kelley that her disciplinary suspension had changed. (Tr 291-293; GC 16, GC 17, GC 18).

Subsequently, Human Resources Generalist Mira Cronk contacted Charging Party Kelley and told her that a meeting had been scheduled on October 1, 2015. (Tr 286; J 1). On October 1, Charging Party Kelley met with Human Resources Administrator Wisner, Cronk, Crawford, Cooper, and Bradford, who joined the meeting about 20 minutes after it began. (Tr 286; J 1). Wisner invited Charging Party Kelley to state her concerns, and she said that she had prior scheduled court appointments on her scheduled work dates and a four-day vacation, along with coaching her daughter's cheerleading team, which all

conflicted with her new schedule. (Tr 287). Wisner told Charging Party Kelley that she was required to call-off on for each day. (Tr 287). She replied that she previously met with Respondent, that she had called-off work with Bradford on September 21, and Respondent was aware of her prior scheduled appointments. (Tr 287).

Charging Party Kelley also noted her performance evaluation, which she said she considered to be personal, biased, and untrue. (Tr 287). Cooper stated that the reason Kelley's evaluation was so low was because she interviewed for a supervisor position, and that Kelley was unfamiliar with the material. (Tr 287). Kelley asked Crawford whether he believed that her evaluation was true. (Tr 287). In response, Crawford put his head down. (Tr 287). Charging Party Kelley told Cronk that she wanted to meet with Executive Director Fernandez because the meeting was going nowhere. (Tr 288). Cronk said that she would contact Fernandez to schedule a meeting. (Tr 290). After the meeting, Charging Party Kelley was not returned to Schedule C, but Respondent reimbursed her by submitting her personal leave for September 22 and 23. (Tr 288-289). Respondent did not tell Charging Party Kelley that the discipline she had been issued was rescinded. (Tr 289). Previously, Charging Party Kelley gave Supervisor Johnson documentation of her scheduled court appointment and doctor's note for her daughter. (Tr 289; GC 20-21). The Re-Request for Hearing of a Motion Notice of Hearing Proof of Service stated that her court appointment was scheduled for 8:30 a.m. on September 23. (Tr 289; GC 20). The doctor's note for Kelley's daughter states that Kelley attended the appointment with her doctor on September 22, 2015. (Tr 289; GC 21).

On October 2, 2015, after a lack of success in scheduling a meeting with Fernandez, Kelley hand-delivered a letter to Fernandez's mailbox in Lincoln. (Tr 288, 290-291; GC 19).

L. Respondent eliminated the breaks between their scheduled and mandated shifts; and required contingent employees to work additional "mandated" shifts.

1. Elimination of Breaks

Before the March 3, 2016, representation election, Respondent afforded employees the opportunity to take a break of about 30 minutes to one hour between the end of the scheduled shift and the beginning of their mandated shift. (Tr 94-95; 219, 378-379; 442-443; 464; 489). Before the representation election, a manager or supervisor called employees over their assigned radios to inform them that they could take their breaks. (Tr 95, 97, 464-465, 501).

After the representation vote in March 2016, Respondent at both its Calumet and Lincoln facilities eliminated the breaks between scheduled and mandated shifts. (Tr 106-107, 219, 465, 501). After the election, Respondent required employees to immediately report directly to their assigned pod. (Tr 219, 465).

About mid-March 2016, between 2:00 p.m. and 2:30 p.m., Calumet Facility Manager Leroy Sherrod announced to employees over the company radios that they could no longer take breaks between their scheduled and mandated shifts. (Tr 98-101, 220, 219, 378-379, 464-465). Youth worker Jenkins was in pod's control room when she heard the announcement. (Tr 220).

About a couple of weeks later, youth workers Quina Jenkins and Danielle Boatwright were walking to the time clock in order to punch out, when they encountered Supervisor Sherrod. (Tr 221, 462-463, 465). They asked Sherrod why employees were no longer allowed to take a break in order to get food or anything else. (Tr 221, 465). Sherrod replied by saying that employees voted the Union in and, as a result, Respondent would have to follow the rules and no one can take breaks. (Tr 221). On the same date, Boatwright asked Manager Childs why employees no longer received breaks, and he replied that he did not know why. (Tr 466). Around this same time, youth worker Kalaundra Hall called over the radio to request a break. (Tr 502). In response, Sherrod told Hall to report to her pod for work. (Tr 502). Subsequently, during a head count of residents, Hall asked Sherrod for a break. (Tr 502-503). In response, Sherrod told Hall to standby, but ultimately, on multiple occasions, Respondent gave Hall only a five to 10-minute break during her mandated shifts. (Tr 503).

2. Mandation of Contingent Employees

After the Union was certified as the representative of the employees, Respondent began calling the names of contingent employee to work mandated shifts. (Tr 91). Beginning about April 2016, Respondent announced that contingent employees were being mandated. (Tr 93, 222, 462-463). Respondent had not previously mandated contingent employees. (Tr 222, 379-380; 462-463).

Respondent hired youth worker Quiana Jenkins on August 10, 2015 as a contingent part-time employee at the Calumet facility. At the time of her hire, Jenkins chose a contingent part-time status because she has children and was unable to work

Saturdays and Sundays. (Tr 212-213). Respondent hired Jenkins for a schedule of Monday through Friday, from 6:00 a.m. to 2:30 p.m. (Tr 213, 229). Within a couple of weeks of her hire, Respondent told Jenkins that as a contingent employee, she had the ability to create her own schedule and choose the days that she would be available to work. (Tr 214-215). At the time she was hired, supervisors Dillard, Cottingham, and Sherrod told her that Respondent does not mandate contingent workers, and they are allowed to stay beyond the end of their shifts only if they volunteer to do so. (Tr 215-216, 217). They said that contingent employees had the option to decline to stay and work beyond the end of their shifts without penalty. (Tr 215, 217-218). Jenkins weekly number of hours worked ranged from 32 to 40 hours because, on occasion, she volunteered to work additional hours in response to Respondent's requests for overtime. (Tr 213-214, 217-218).

Respondent hired youth worker Danielle Boatwright in August 2014 as a full-time employee at the Calumet facility. (Tr 453-454, 456). Respondent told Boatwright that she would be called to work to fill-in for absent employees as required. (Tr. 455). Subsequently, Boatwright worked about 40 to 50 hours weekly and some overtime (Tr 455). About February 2015, Boatwright converted to contingent status (Tr 454-455, 456-457) because she was unable to work overtime and she did not desire to be mandated. (Tr 456). At the time of Boatwright's conversion to contingent status, Calumet Facility Manager Sherrod, Calumet Facility Director Stewart and Manager Childs told her that she would not be mandated to work overtime. (Tr 457-458).

After the election, Respondent mandated Boatwright as a contingent employee. (Tr 467-469). Manager Sherrod told Boatwright and one other unidentified employee that all employees are now mandated, including contingent employees. (Tr 462-463). Boatwright told Sherrod that she did not sign up for mandation. (Tr 463). Subsequently, Boatwright met with Director Stewart in his office. (Tr 463-464). Boatwright asked why contingents were now being mandated, she did not sign up for mandation, and that is why she converted from full-time to contingent status. (Tr 464). Stewart replied that everybody is now being mandated. (Tr 464). Boatwright also spoke with Managers Childs and Cunningham, who also told her that everybody is now being mandated. (Tr 464).

3. Respondent's discharge of its employee Quiana Jenkins

Respondent usually communicates to employees whether they will be mandated to employees each morning. (Tr 91-93). About mid-April 2016, between 8:00 a.m. and 9:00 a.m., contingent employee Quiana Jenkins heard that her name was called over the radio for mandation. (Tr 222). Jenkins immediately visited the office of Calumet Shift Supervisor Larry Edwards. (Tr 222). Jenkins asked how Respondent can mandate contingent worker. (Tr 222). Edwards replied that all contingent workers can now be mandated. (Tr 222-223). Edwards stated that Manager Sherrod spoke with all contingent workers about the policy change. (Tr. 223). Contingent employees, including but not limited to Jenkins, who had not been mandated previously, began approaching Clarence Atwater to complain because they considered him as employees' contact to Charging Party SPFPA. (Tr 93-94, 108-109). In response, Atwater told employees that since

Charging Party SPFPA won the election, there should be no change to Respondent's policies unless mutually agreed-upon by both Charging Party SPFPA and Respondent. (Tr 93).

On April 29, 2016, Jenkins heard her name called over the radio for mandation. (Tr 223). In response, Jenkins called Supervisor Edwards. (Tr 223-224). Jenkins told Edwards that she could not stay for mandation because she had to pick up her children. (Tr 224). Edwards replied that Jenkins might be terminated for abandoning her shift. (Tr 224). Jenkins worked that mandated shift by making other arrangement.

Around early May 2016, Jenkins heard her name called over the radio for mandation. (Tr 225). In response, Jenkins called Supervisor Brown, and she explained that she could not stay because she had to pick up her children. (Tr 225). Brown replied that Jenkins was abandoning her shift. (Tr 225).

About May 10, 2016, Supervisor Edwards and Manager Sharp gave Jenkins a write up on Respondent's stated grounds that she abandoned her shift. (Tr 226; GC 8).

On May 27, 2016, Jenkins heard her name called over the radio for mandation. (Tr 226-227). Jenkins called Supervisor Dillard and told him that she could not stay because she had to pick up her children. (Tr 226-228).

On May 30, 2016, about 6:00 a.m., Jenkins inquired about her assignment for the upcoming shift, and Manager Sherrod told her not to clock in and to return at 10:00 a.m. in order to meet with Respondent's Human Resources Department. (Tr 228-229). Jenkins returned at 10:00 a.m., and met with Human Resources Administrator Wisner. (Tr 229-230). Wisner stated that he was not aware of Jenkins' situation, and she replied that

she did not stay for mandation on May 27. (Tr 230). Wiser asked Jenkins whether this incident constituted the second occasion that she did not stay for mandation. (Tr 230). Jenkins said yes; Wiser replied that her conduct is possibly grounds for her termination, and she should not report for work and await Wiser's call. (Tr 230). Wiser said he would have to contact Executive Director Fernandez . (Tr 231; J 1). On the same day, about 4:00 p.m., Wiser called Jenkins and notified her that her employment was terminated and that Respondent would send written notice to her by mail. (Tr 231-232; GC 9, 10).

Respondent eliminated employees' breaks between scheduled and mandated shifts, and required contingent employees to work "mandated" shifts, without prior notice to Charging Party SPFPA, and without affording Charging Party SPFPA an opportunity to bargain with Respondent over the decisions or the effects of the decision. (Tr 38-41, 62-63; 219); GC 1(mm) par. 21, 23, 24).

M. Respondent has failed and refused to furnish Charging Party SPFPA with requested relevant and necessary information

On March 29, 2016, the office of Charging Party SPFPA International President David L. Hickey sent a certified letter to Respondent's Executive Director Melissa Fernandez, including a courtesy copy e-mailed to Mark Crawford, Vice President of Region 1 of Charging Party SPFPA. (Tr 22, 27-30; J 1, J 5). The letter included a demand for Respondent to meet and bargain with Charging Party SPFPA. (Tr 30-31; J 5).

Charging Party SPFPA requested, in writing, the following information concerning the Unit. (Tr 30-31; J 5):

1. Names, seniority, rank, hourly wages, mailing address and phone for all Unit employees.

2. Contract information including GSA or Delegated Solicitation Number, anniversary date, and copy of wage determination of any contracts for work performed by Unit employees
3. Organizational chart, employee handbook, worksite operating procedures including description of posts and hours of operation.
4. Benefits packages, summaries of plan description for health and welfare funds and/or 401(k) plans, and a summary of benefits and coverage that apply to Unit employees.

Please forward the requested information to our Region 1 Vice President, Mark Crawford at 25510 Kelly Road, Roseville, MI 48066 or email; mcrawford@spfpa.org

By certified letter, Charging Party SPFPA's Organizing Secretary Jamie Eichbright sent the same letter of March 29, 2016, to Fernandez on the same date. (Tr 28-29; J 5). The United States Postal Service delivered the March 29, 2016, bargaining demand letter/request for information letter to Fernandez on March 31, 2016. (Tr 28; J 5).

Charging Party SPFPA requested the information, so as to negotiate an initial collective bargaining agreement on behalf of the Unit. (Tr 30-31; J 5). Respondent did not respond to either Charging Party SPFPA's request to bargain or request for information. Respondent did not provide any explanation for the failure to furnish the requested information. (Tr 31-32). Respondent did not request that Charging Party SPFPA either narrow or clarify the information request portion of the March 29th letter (Tr 31-32 ; J 5). Respondent did not provide Charging Party SPFPA with an explanation for the failure to provide meeting dates as a prelude to commence negotiations for an initial collective-bargaining agreement. (Tr 32)⁷.

⁷ Respondent appealed the certification of results of the election, which was denied by the Board. (J 3) Case 07-CA-180451, is a failure to bargain case which proceeded to the Board. A Decision issued in that case on November 22, 2016, in which the Board held that Respondent unlawfully failed to bargain with Charging Party SPFPA and ordered bargaining. (J 7) That decision was appealed to the Circuit court and is pending.

About mid-April 2016, sometime during the morning, Charging Party Vice President Mark Crawford attempted to reach Fernandez by phone. (Tr 35). An unidentified person at Respondent's offices answered, Crawford identified himself and requested to speak with Fernandez. (Tr 35). At that time, Crawford was told that Fernandez was not available, requested that his call be returned, and left his return phone number. (Tr 35-36). Respondent did not return Crawford's phone message. (Tr 36).

By letter dated July 1, 2016, Crawford submitted a second identical demand to Respondent for the purpose of requesting that Respondent meet and bargain/request for information by United States mail (Tr 32-34; J 6). Respondent did not respond to Charging Party SPFPA's second request to meet and bargain/request for information. (Tr 36).

On or about July 7, 2016, by phone, during the morning, Crawford attempted to reach Fernandez by phone, but his call was put on hold for a time. (Tr 37). When the unidentified person who answered the phone returned, Crawford was told that Fernandez was busy. (Tr 37). In response, Crawford requested to leave a message, and he provided his name and return phone number. (Tr 37). However, Crawford did not receive a return phone call from Respondent. (Tr 37). Respondent admits having received Charging Party SPFPA's written information requests of March 29, 2016 and June 1, 2016. (Tr 44-45; J 5, J 6;(GC 1(oo), par. 26)). Respondent further admits that it has refused to provide Charging Party SPFPA with the requested information that is the subject of the same March 29 and July 1, 2016, letters. (Tr 45-46; GC 1(oo), par. 28).

On or about July 11, 13, and 19, 2016, Terrance Worthen, Charging Party Local 120 President, left messages for Fernandez by phone in order to schedule a meeting time to commence negotiations for an initial collective-bargaining agreement. (Tr 52-54, 58). Fernandez did not return Worthen's message. (Tr 55, 59).

On July 19, 2016, Worthen attempted to reach Respondent Legal Counsel Sheryl Laughren and left a message, including his name and phone number. (Tr 57). Worthen requested a return phone call. (Tr 57). Laughren returned Worthen's message on or about July 21 or 22, 2016. (Tr 57). Worthen missed the call by a few seconds and immediately called Laughren. (Tr 57-58). Worthen reached Laughren by phone, identified himself, stated that he had attempted to reach Fernandez, and was looking for assistance in reaching Fernandez for the purpose of commencing contract negotiations. (Tr 58). Laughren replied that she would consult with her client and call Worthen within a couple of days, (Tr 58). Subsequently, Laughren neither attempted to contact nor make actual contact with Worthen. (Tr 58-59). No other Respondent representative contacted Worthen. (Tr 59).

About late November 2016, and on or about March 15, 2017, Worthen again attempted to reach Fernandez by phone at Respondent's Offices. (Tr 61-62). He was told that Fernandez was not available. (Tr 62). Worthen left a voicemail message for Fernandez. (Tr 62). Respondent did not subsequently contact either Crawford or Worthen. (Tr 36, 64)

III. ARGUMENT

A. Respondent Unlawfully Threatened, Coercively Interrogated, Unlawfully Surveilled, and Created the Impression of Surveillance of its Employees

In deciding whether a remark is threatening, in violation of Section 8(a)(1) of the Act, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Air Management Services, Inc.*, 352 NLRB 1280, 1286 (2008); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000).

In determining whether an interrogation is unlawful, the Board looks at: (1) the background of union activity and animus, (2) the nature of the information sought; (3) the identity of the questioner; (4) whether the questioner provides the employee with a valid purpose for the interrogation, and (5) whether the employee was assured that no reprisals would be taken as a result of the questioning. *T-West Sales and Service, Inc.*, 346 NLRB 118, 127 (2005); *Performance Friction Corp.*, 335 NLRB 1117, 1126 (2001).

1. Complaint/Petition

The evidence is clear that in late June/early July 2015, several employees led by Lamont Simpson and Tamika Kelley circulated petitions among employees with complaints about an increase in mandation for regular employees, lack of training to work with new residents who are more aggressive, low wages and lack of wage increase. Simpson testified that he discussed writing the petition with employees Clarence Atwater and Raphael McQueen. He then placed the first copy of the petition in Respondent's mailboxes in the Calumet facility on July 2, 2015. He testified that he gave a copy of the

petition to McQueen to give to Charging Party Kelley. Kelley testified that she received the petition from McQueen, copied it, and placed it in marked supervisor and manager's mailboxes in the Lincoln facility on July 3, 2015. She testified that after she put the petition in the mailboxes, she distributed the flyer to employees who signed it. Employee Alfred Neely testified that he and Simpson met with supervisors Stephen Johnson and Christopher Wilson on or about July 4 or 5, 2015, and gave them copy of Simpson's petition. Employee Jamar Marcus testified that Wilson told him that managers threw the petition in the garbage. Although Respondent implied at trial that some supervisors or managers did not see the petitions, in its Answer, Respondent admits that it received the petition. Further, there is no reason to believe that they were not received given that these are mailboxes are provided by Respondent.

2. Picketing

Simpson also testified that after he learned that Respondent rejected the employee's offer to address their concerns, he organized a picket for July 6, 2015. He testified that he contacted other employees, arrived early to scout out the location and then began picketing. He said that he picketed from 8:00 am to 2:00 pm and about 30-40 employees picketed. He stated that on a break, he ran into Randy Wimbley of Fox News television station. He informed Wimbley about the picketing. Later, a news truck came and filmed the picket, which aired on the news that night. Simpson stated that he carried various signs and walked along with other employees in front of the Calumet facility. Simpson testified that he saw various supervisors enter and leave the facility. He testified that he saw supervisors Devin Farrell Cornelius Burton, Leroy Sherrod, Antonio

Cottingham and Fernandez arrive for work. He said that security supervisor Dix came out of the facility to let in Fernandez when she arrived.

Charging Party Tamika Kelley testified that she arrived at the picket line around 7:00a.m., with poster board signs that she created. She distributed the signs to employees and began to picket. Employee Clarence Atwater testified that he joined the picketing on July 6, 2015, around 8:30 a.m. Atwater testified that he saw Manager Childs and supervisor Farrell walking though the sally part, which is the gated transfer area in the front of the building. Employee Sherman Cochran testified that he joined the picket line at 9:30 a.m. Atwater also testified that he picketed for a couple of hours on July 7, 2015.

3. Surveillance by Supervisor Fernandez

Employee Neely testified that he arrived at the picket line between 8:15 and 8:30 a.m. on July 6, 2015. He said that he picketed until around 3:30 or 4:00 p.m. Neely testified that he saw several supervisors while he was picketing. He saw Executive Director Fernandez, Stewart, Burton, Cottingham, and Dix either coming to work or leaving work that morning. He noted that as the door to the Calumet facility opened, he saw Fernandez in the waiting area of the Calumet facility as if she were coming out, with a yellow pad in her hand writing something on it. He testified that she was looking at the picketers/protesters.

Fernandez denied this activity. Incredulously, Fernandez denied that she knew anything about the picket. She testified that when she arrived at 8:30 a.m., no one was picketing, no vehicles were outside and then she went and stayed in a room on the other side of the building and had no idea as to why so many of her employees on the shift

were not at work. Her testimony was not only incredulous it is literally unbelievable. It belies logic that the Executive Director would be in an office addressing the fact that so many staff members called off work and not one of her supervisors or managers would tell her that these employees were picketing outside. Further, the testimony of both former supervisors Black and Steven Johnson contradict her testimony. As well, many of the picketers saw Fernandez enter the facility as they were picketing.

Finally, most of the threats and impression of surveillance conversations all relate to Fernandez either surveilling during the picketing or collecting names after the fact. Her nonchalance attitude during her testimony, implying that she did not care or had no concern over the picketing is without credibility. Although Neely was the only employee who saw her surveilling employees, his testimony is supported by the totality of the facts and supports a finding that Fernandez was surveilling employees in violation of Section 8(a)(1).

4. Interrogation by Shift Supervisor Burton

Simpson testified that supervisor Cornelius Burton contacted him by telephone on July 5, 2015, the night before the picket. Burton asked him if he was a part of the upcoming rally. Burton said that people were calling off work for the next morning and he wanted to know if Simpson was a part of it. Simpson denied that he was. Burton did not testify to refute this statement. Under the above factors, Burton's questioning of Simpson constituted unlawful interrogation as defined by the Act. The protected concerted activity was at a nascent stage, and employees were not yet openly organizing a Union. Burton was questioning Simpson to solicit information from him as to his

involvement in the protected concerted activity. Burton was a mid-level supervisor and there was no reason for Burton to call Simpson to ask about his involvement. If he was seeking to ask if Burton was going to be off the next day, he could have asked him just that. Instead, he asked Simpson about his involvement in the protected concerted activity. Finally, Simpson was not assured that he would be free from reprisal. This questioning is clearly an unlawful interrogation in violation of Section 8(a)(1) of the Act.

5. Threats and Impression of surveillance by Supervisor Dix

Simpson testified that security supervisor Damien Dix approached him on July 9, 2015, while he was working. He testified that it was around 8:00 a.m. Simpson testified that he was in the control room for his pod. Simpson testified that Dix said that upper management, more importantly, Ms. Fernandez was “pissed” about them having that rally outside. Dix said that Fernandez was inside the security booth control room while employees were picketing, and had the security personnel using the camera and zooming in on the people who were outside. Dix told him that she was taking down names and Simpson better be careful because she was gunning for whoever was outside and whoever had something to do with the rally. Dix told Simpson that she had a hit list and that she was pissed. Simpson also testified that he has seen these security cameras in use where they can zoom in on people in the parking lot and even zoom in on details like a face or body parts. Dix denied making this statement.

Neely also testified that on July 9, 2015, when he returned to work after the picket, Supervisor Dix told him that during the picket he was with Manager Fernandez and she was in the security booth control room and they were using the cameras to zoom in on

employees who were picketing. Neely said that Fernandez was writing down names, including his, and creating a list. Dix then told Neely to watch his back. Dix denied making this statement.

Former Security Supervisor Hionel Black testified that the cameras are positioned outside the exterior of the building and are focused on the gates and fences. However, some of the cameras can be moved to look at the details outside the facility. Black also testified that after the rally, he attended a meeting with various supervisors, including Fernandez and that Fernandez wanted everybody's name that picketed. His interpretation of Fernandez's comments was that anyone who was picketing would be terminated. Black's testimony confirms that indeed Fernandez was surveilling employees and lends credence to the testimony of Neely and Simpson that Dix told them about the list of names collected by Fernandez. These statements are threats and give the impression of surveillance in violation of Section 8(a)(1) of the Act.

6. Threats by Facility Manager Leroy Sherrod

Employee Marcus testified that on July 9, supervisor Sherrod approached him and another unknown employee while they were in the intake room and that Sherrod said that they were going to get fired and they didn't even have representation. Sherrod did not testify to refute this statement.

Neely testified that on July 10, 2015, Sherrod came to his pod and talked to him and employee Jamar Marcus for their daily briefing. During this briefing, Sherrod told them that they were on the list and they were hit, i.e., in trouble. Marcus corroborated this conversation. He testified that Sherrod told them they were hit and they were going

to get rid of them. Sherrod did not testify to refute this statement. These statements are again threats of unnamed discipline in violation of Section 8(a)(1) of the Act.

7. Interrogation by Facility Manager James Crawford

Employees Ruth Cosby and Charging Party Kelley both testified that they met with manager James Crawford and supervisor Caston, either in July or August. Crosby testified that they attended a meeting with other employees and the supervisors in the multipurpose room in the Lincoln facility. Crawford asked what they thought about the Union coming into the facility. They responded that they did not feel comfortable talking about the Union with him. Charging Party Kelley testified that Crawford asked if they were going to try to organize the Union. Crawford asked them why they were going to organize the Union, stated that the Union wasn't good for them, the Union would take their wages and their jobs weren't guaranteed if they joined the Union. Charging Party Kelley stated that employee Lisa Crawford (unrelated) said that they are damned if they do, and damned if they don't. Lisa Crawford said that they exhausted all of their options trying to work with supervisors and managers. Lisa Crawford asked, "why not try the union?" Charging Party Kelley testified that she told them that they (Crawford and Caston) were just going to report back to management and it could cost them their jobs. Charging Party Kelley testified that James Crawford asked if she was going to join the union and she replied that she wasn't comfortable speaking with him because everything they say and do is held against them. Manager Crawford did not testify to refute these statements.

This corroborated and un rebutted testimony was about being interrogated after the picketing and at the beginning of the Union campaign. Crawford asked the employees directly about their interest in organizing a Union. He had no valid reason for asking these questions, other than to know who was involved. He surely did not assure them that no reprisals would result, even after they expressed concern. Under the totality of the circumstances, the questioning was coercive in violation of Section 8(a)(1) of the Act.

In the instant case, the record overwhelmingly reflects that Respondent violated Section 8(a)(1) of the Act on several occasions. It is clear that once employees filed complaints/petition with the Respondent and engaged in picketing, Respondent, 1) through its agents Damien Dix and Leroy Sherrod threatened employees with discipline and discharge, *Seton Co.*, 332 NLRB 979 (2012); *Aluf Plastics*, 314 NLRB 706, 708 (1994); *Columbus Mills Co.*, 303 NLRB 223, 232 (1991); *Baddour, Inc.*, 303 NLRB 275 (1991) (A threat of job loss for participation in protected concerted activity is a classic violation of Section 8(a)(1)); and *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993); 2) through its agents Damien Dix, Cornelius Burton and James Crawford coercively interrogated employees, *Edwards Painting Inc.*, 364 NLRB No. 152 (Nov. 30, 2016) citing *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Hoffman Fuel Co.*, 309 NLRB 327 (1992); 3) through its agents Melissa Fernandez surveilled its employees, *Durham School Services, L.P.*, 361 NLRB No 44 (Sept. 5, 2014); and 4) through its agents Damien Dix created the impression of surveillance, *Durham School Services, L.P.*, 361 NLRB No 44 (Sept. 5, 2014); *Peter Vitale Co.*, 310 NLRB 865, 874 (1993), all serious and varied unfair labor practices in violation of Section 8(a)(1) of the Act. As well, from

the evidence it is clear that Respondent, upon the direction of Executive Director Fernandez, collected names of the protesters with the intent of disciplining and discharging them at some later date.

It is also probative that Respondent did not call Burton, Sherrod or Crawford to testify so as to deny or refute that the illegal conduct that occurred. Such failure should lead to an adverse inference that they would have testified adversely to Respondent if they had been called to testify. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (Mar. 11, 2016), *Hialeah Hospital*, 343 NLRB 341, 393 fn. 20 (2004); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996); *International Automated Machines*, 285 NLRB 1122, 123 (1987), *enfd.* 851 F.2d 720 (6th Cir. 1988). As well, Dix's general denials were vague and unbelievable. In fact, Dix's testimony that supervisor or managers were unconcerned about picketing outside the building or that so many employees had called off work for that particular shift, belies belief, and his testimony in support of Respondent should not be credited.

B. Respondent Unlawfully Disciplined and Discharged Employees Because They Engaged in Protected Concerted and Union Activities

1. The Legal Standard for Section 8(a)(1) and 8(a)(3) Discipline Violations

Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act implements the guarantees of Section 7 by prohibiting adverse actions against employees for engaging in concerted activity that is protected by Section

7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003).

The Supreme Court has indicated that the statutory phrase "mutual aid or protection" should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-568 and 567 n.17 (1978). Thus, concerted actions of employees are protected under Section 7 if they might reasonably be expected to affect terms or conditions of employment. *Meyers Industries*, 268 NLRB 493, 497 (1984) ("*Meyers I*"), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), reaffirmed on remand, (1986) ("*Meyers II*"), affirmed sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Accord *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984).

In order to establish that an employee was terminated in retaliation for his protected concerted and/or union activities, the General Counsel must present enough evidence to support an inference that the employee's protected concerted or union activities were a motivating factor in the Respondent's decision to terminate his employment. *Wright Line*, 251 NLRB 1083, 1089 (1980). In order to establish a prima facie case, the General Counsel must demonstrate the following: (1) the employee was engaged in protected concerted and/or union activity; (2) the employer had knowledge of that activity and (3) the employer had anti-union animus. *Integrated Electrical Services Inc.*, 345 NLRB 1187, 1199 (2005); *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). The burden then shifts to the employer to show that it would have taken the same action even if the employee had not been engaged in union activity. *Wright Line*, supra, at 1089;

Integrated Electrical Services Inc., supra, at 1187, fn 5; *KFMB Stations*, 343 NLRB 748, 751 (2004). The General Counsel's prima facie case is not rebutted when a respondent's reason for its actions is shown to be false or non-existent. *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981). An employer's motive may be inferred from the total circumstances provided and from the record as a whole. *Coastal Insulation Corporation*, 354 NLRB No.70, 32 (2009); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Evidence of suspicious timing, failure to adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support inferences of discriminatory motivation. *Coastal Insulation Corporation*, supra; *Adco Electric Incorporated*, 301 NLRB 1113, 1123 (1992); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Banta Catalog Group*, 342 NLRB 1311 (2004).

2. July 7, 2015 suspensions of Sherman Cochran, Charging Party Kelley and Delaine Singleton-Green

It is undisputed that on July 7, 2015, the day after the first day of picketing, Respondent suspended its employees when they returned to work. There was no reason for the suspension. The employees had called off work appropriately and in a timely manner and had the time available to call off. Yet, Respondent suspended them for no apparent reason. Fernandez testified that it is the usual policy to suspend employees who call off appropriately with time available. However, she presented no evidence of this contention, and she wouldn't because such a contention would be too costly for any employer. In effect, Respondent would suspend employees who call off, and then pay

them not only for their time off, but for the unnecessary suspension. A party's failure to offer documentation in support of witness testimony warrants an inference that the documentation would not support the party's position. *Bay Metal Cabinets, Inc.*, 302 NLRB 152, 178-179 (1991).

In its position statement during the investigation which Fernandez read aloud at trial, Respondent stated that the three employees were suspended because it was believed they were taking sick leave fraudulently when they were observed picketing. (Tr 664-666). Given that they didn't call in sick, there was no evidence of them using sick leave or engaging in any fraud. Thus, they were suspended because they were observed picketing, and took off from work to do so.

Kelley testified that she had called in before and this was the first time she was suspended for calling off work when she had the time available and followed the procedure.

Respondent argued that it cured the suspension by rescinding it and paying the employees for the loss time. However, while there is evidence that they paid the employees for the suspended day in question, there is no evidence that they informed the employees that the suspensions were rescinded. Alleged letters were never sent, one was sent to the wrong employee and no effort was made either during the course of the investigation or prior to the investigation to cure the alleged "mistake." Further and more importantly, there was testimony from other employees that the second day of picketing that began July 7, 2015, was called off due to information that employees were suspended for picketing on the first day. Thus, the damage was already done. Section 7 rights were denied.

Applying *Wright Line*, the employees called off work and lawfully picketed on July 6, 2016. Respondent knew that these employees picketed, assumed that they called in sick and intended to use that pretext to discipline them for the asserted fraud. However, no fraud was committed and the Respondent jumped to the wrong conclusion so as to punish the picketers. No rational reason was given for this decision or the rush to discipline. These suspensions are a clear violation of the Act.

An inference of animus and discriminatory motive may be derived from examining all the circumstances of a case, including suspicious timing, a false justification given for a discipline, and the failure to adequately investigate alleged misconduct. *Integrated Electrical Services*, supra at 1199; *Washington Nursing Home*, 321 NLRB 366, 375 (1996). Providing a false justification for a discipline supports an inference that Respondent has another motive for its actions that it wants to conceal. *Pan American Electric*, 321 NLRB 473, 476 (1996); *Shattuck Denn Mining Corp. v NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

3. August 26, 2015 Discharge of Alfred Neely

Neely, a seasoned employee, was discharged on August 26, 2015, a month after the employees served a petition and complaint on Respondent and picketed in front of the Calumet facility. After the picketing, Neely was warned by two supervisors that his picketing would lead to his discharge. Supervisor Dix told Neely that he was seen picketing by Dix and Executive Director Fernandez, and she had his name on a list. Security Supervisor Black confirmed that a list did indeed exist. Neely also testified that supervisor Sherrod told him and employee Marcus that they were on the list and were in

trouble. Sherrod told Neely and Marcus that Respondent was going to get rid of them. Again, this testimony was not rebutted and as such an adverse inference should be drawn against Respondent as to this issue.

On August 19, 2015, Neely, Marcus and a teacher named Ms. Spratt were in pod 6 working with approximately 11 residents. Neely testified that one of the residents asked for a sweater, so Marcus, who was close to the door, left the classroom to get a sweater from the pod 6's control room. Both Neely and Charging Party Kelley testified that it is normal for a youth worker to enter the control room to retrieve items for the residents, which is where all such items are stored. However, once in the control room, Marcus made a phone call from the control room and was observed by Fernandez and Manager Leslie, as they toured the facility. No evidence was presented that Neely knew or had reason to know that Marcus was making a phone call. Neely and Spratt were working with the residents and unaware of Marcus's activities.

Later on August 19, 2015, both Neely and Marcus were suspended pending investigation and discharged on August 26, 2015. They were both suspended and discharged for letting the ratio of resident to staff drop below the allowable figure. According to Respondent's policy (GC 25), the staff ratio is to be 1 staff member to every 10 residents. In this case, there were three staff members in the classroom, youth workers Neely and Marcus, and teacher Spratt. During trial, Respondent tried to present the theory that teachers are not trained and not considered staff members, but the evidence was clear that teachers are trained in the same manner as youth workers and are considered staff members.

However, even if Spratt was not considered in the ratio numbers, the evidence presented shows that it is common practice for staff members to obtain items for the residents from the pod's control room. It was Neely's understanding that Marcus was going to the control room to get a sweater for the resident. Neely did not know that Marcus was going to make a phone call, and did not learn about the phone call until much later.

Applying *Wright Line*, Neely engaged in picketing on July 6, 2015. In the week following the picketing, several employees were warned that Fernandez had a list of employees who picketed and intended to discharge those employees. Neely was told by both Supervisors Dix and Sherrod that his name was on this list and he better watch out because Fernandez was going to discharge the people who picketed. On August 19, 2015, Neely was suspended because of the actions of co-worker Marcus, and later discharged on August 26. There is no evidence that Neely was aware of Marcus's wrong-doing or aided in his conduct. Respondent was looking for a reason to discharge Neely, and jumped at the chance to rely on this incident. Viewing the totality of the circumstance, it is clear that Neely's discharge was pretextual and in fact was retaliation for his protected concerted activities in violation of Section 8(a)(1) of the Act.

4. September 22, 2015 Discharge of Lamont Simpson

Simpson, another seasoned employee, was discharged on September 22, 2015, a month after the petition and picket and the Union campaign with AFSCME began. Simpson was the lead organizer of both the petition and picket. He drafted the petition which was later copied by Charging Party Kelley. He delivered the concerted petition

about working conditions to all supervisors and managers who had mailboxes in the Calumet facility. Security Supervisor Dix observed Simpson enter the building, and although he possibly didn't see Simpson place the petition in the mailboxes, Dix knew that someone did and could easily surmise that it was Simpson. In fact, Dix interrogated Simpson about his involvement with the petition later. Simpson hand delivered the petition to Supervisors Steven Johnson and Christopher Wilson, who later told Simpson that management threw the petition in the trash. Simpson also organized the picketing, contacted employees, contacted the Fox 2 news reporter Randy Wimbley and marshaled employees to participate in the picket. He was first on the scene and carried various placards complaining about working conditions during the rally.

Simpson also became involved in the Union activity. He passed out Union authorization cards for Local Charging Party AFSCME to other employees.

Simpson was unlawfully interrogated about his possible involvement in the picketing on July 5, 2015, the night before the picket by Supervisor Burton. After the picketing, Simpson was threatened by Supervisor Dix and told that Fernandez had used the camera in the security control booth to zoom in on the picketers. Dix informed Simpson that Fernandez had a hit list, was taking down names and he should watch out.

Simpson was assertedly discharged because he failed to work a mandated shift, which Respondent knew conflicted with his other job as a security guard at Motor City Casino. Simpson testified that he had been working at Motor City Casino since October 2014. He testified that whenever he was mandated to work he would work to resolve the problem with his supervisor. Sherrod and other supervisors asked him to buy their lunch,

he provided his schedule to supervisors ahead of time, or would get permission to find coverage by another employee. Simpson testified that he was able to work out these conflicts with his schedule. In 2015, Sherrod told him that he could no longer take lunches to adjust his schedule.

Simpson testified that in mid-August 2015, he again sought to ensure that Respondent increase in mandation did not conflict with his schedule at the casino or his responsibilities at home. To that end, he had a conversation with former supervisor Emanuel Carter about his schedule and with Manager Lorenzo Childs. Simpson gave both of them a copy of his casino schedule, and expressed that he was willing to work mandation on any day other than when he was scheduled at the casino.

When Simpson learned that he was mandated on Friday, September 18, 2015, he spoke to supervisor Richard and Manager Sherrod. He explained that he had to pick up his daughter at daycare and was scheduled to work at the casino. Both told him that he had to work. He requested to find a substitute and for some other accommodation. Both told him that he had to work.

Subsequently, Simpson picked up his daughter, dropped her off at home, and went to work his scheduled shift at the casino, which began at 4:00 p.m. (Tr 167). About 5:30 p.m., during a break, Simpson retrieved a voice message on his phone from Manager Cottingham, which stated that Simpson was suspended pending investigation, and Simpson was directed not to report to work for his next scheduled shift on September 20, 2015. (Tr 167-168).

Simpson was discharged on September 21, 2015, by Human Resource Administrator Wisner who called Simpson by phone (Tr 168, 169; J 1). He was denied the opportunity to grieve his discharge through Respondent's internal process. During the week of September 21, 2015, Simpson received a letter of termination from Respondent by mail. (Tr 112, 169-170; GC 6).

Simpson had received a suspension for missing mandation on May 7, 2015. Other employees who missed mandation more than once were not discharged. Employee Jason Pritchard was disciplined for missing mandation on May 24, 2016, and had an earlier occasion of missing mandation on May 11, 2016, he was not discharged. (GC 49; Tr 734-735). Marshawn Mackie was suspended on December 3, 2015 for missing mandation, and he had two prior occasions of missing mandation on September 7, 2015 and September 24, 2015, he was not discharged. (GC 37; TR 235-236). Both Pritchard and Mackie also had other attendance infractions, and were not discharged. Simpson was discharged because he missed mandation on September 18. Unlike these other employees, there was no mention of the May 7 incident on his discipline, so he was suspended for just the September incident. Darnesha Coy received a written warning on June 28, 2016 (GC 61) for refusing mandation and was just suspended for her second offense on October 21, 2016. (GC 70). Additionally, other employees received lesser discipline for a first offense of refusing mandation, Danielle Boatwright received a written reprimand on June 22, 2016 for abandoning her mandatory shift (GC 57), LaTonya Hewitt also received a written warning on June 25, 2016 for refusing mandation (GC 59), as did Phillip Thomas on June 28, 2016 (GC 62), Nicole Ndjebo on October 15,

2016; (GC 69), and Damon Singleton on November 16, 2016. (GC 71). Brandon Dunn refused mandation, was insubordinate, and used abusive language, and was only suspended (GC 63). Clearly Simpson was treated in a disparate manner and/or Respondent was enforcing its rules in a manner to allow no leeway so as to discharge the lead activist of the employees' protected concerted activities.

5. September 24, 2015 and October 10, 2015 Disciplines issued to Charging Party Kelley

Charging Party Kelley was one of the key organizers of the employees' protected concerted activities. She wrote the petition that was circulated in the Lincoln facility and put it in the mailboxes of Respondent's supervisors and managers. Charging Party Kelley helped to organize the picketing and created all of the signs that employees carried. She brought the signs in her automobile and everyone obtained them from there, which no doubt was viewed by Respondent who was, according to supervisor Black, zooming in on picketers. After Charging Party Kelley was disciplined on July 7, 2015, for a clearly pretextual and unlawful reason, she filed NLRB Case 07-CA-155494 on July 7, 2015, and amended it on August 28, 2015, on behalf of herself and other employees.

Charging Party Kelley was also involved in the organizing for both Charging Party AFSCME and Charging Party SPFPA. She passed out union authorization cards and met with the Unions and employees. There is no dispute that she was one of the key activists.

Charging Party Kelley's schedule was suddenly changed on September 18. Her days off were changed from Tuesdays and Wednesdays to Sundays and Mondays, effective on September 20. When Charging Party Kelley protested the change, she was

suddenly given a poor appraisal. Charging Party Kelley then met with Manager Crawford, Supervisor Fullerton, and Manager Caston. She sent letters of complaint to Managers Oliver and Fernandez. In all, she complained about the fact that she had appointments scheduled for Tuesday, September 22 and Wednesday September 23, which she was unable to change. Charging Party Kelley informed them that she had arranged her schedule to take care of personal business on her off days, which they have not changed without minimal notice. They were unconcerned about her issues. Charging Party Kelley informed them that she would take off on September 22 and 23.

On September 21, Charging Party Kelley called off for September 22 and 23, by calling Lincoln Facility Manager Bradford.

On September 24, 2015, when Charging Party Kelley returned to work, she was informed by Respondent that she would be suspended for no call/no show, even though she had the time available and had called ahead of time. The discipline (GC 16) indicated that it was a written warning for “failing to call off or reported to work late for her scheduled shifts on 9-22-15 and 9-23-15.” Later that day, Charging Party Kelley was issued another discipline which stated that she received the earlier discipline because “she called off 1 or more times in consecutive pay periods.” (GC 17). However, Respondent provided another discipline to the NLRB during the course of the investigation of this case, dated October 8, 2015, which states that she was issued a counseling for September 22 and 23, 2015, for “calling off her shifts for the following two days.” (9/22, 9/23). (Tr 293, GC 18).

Looking at what she was told and what she received, it is unclear what Respondent was disciplining her for. Charging Party Kelley was suspended and/or given a written warning for not calling in. Then, after someone realized that she had called in, she was given a written warning for calling off more than one day in a pay period. Then her discipline was secretly changed to a counseling for calling off on 9/22 and 9/23. These are distinctly different offenses and discipline results. Respondent's attendance policy states that employees are allowed to call in three hours prior to their shift, and, if they have the time, they will not be disciplined. Charging Party Kelley informed various supervisors that she would be off on September 22 and 23, because they changed her schedule with such short notice. She also called in more than three hours ahead of time and had the time available. At trial, Respondent argued that Charging Party Kelley did not call off for both September 22 and 23. If that were Respondent's reason for disciplining her then why did it say she was a no show for both days, or that she took off more than one day in a pay period, or that she failed to call off on September 22. Respondent's shifting reasons support an inference that its stated reason for the discipline is false. *Rogers Electric, Inc.*, 346 NLRB 508, 518 (2006); *Philo Lumber Company, Inc.*, 236 NLRB 647, 650 (1978). Providing a false justification for a discipline supports an inference that Respondent has another motive for its actions that it wants to conceal. *Pan American Electric*, 321 NLRB 473, 476 (1996); *Shattuck Denn Mining Corp. v NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Respondent moved quickly to discipline the people it believed were the key supporters of the Union and/or the organizers of the protected concerted activity.

Charging Party Kelley was the first and last of this group to suffer this retaliation. Again, this is a clear violation of Section 8(a)(1) and (3).

C. Respondent's Unlawful Unilateral Changes

It is well established that an employer commits an unfair labor practice when it makes a unilateral change in a mandatory subject of bargaining such as wages, hours or benefits and fails to bargain with the bargaining representative. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) As explained by the Board,

A unilateral change not only violates the plain requirement that the parties bargain over wages, hours and other terms and conditions, but also injures the process of collective bargaining itself. (citation omitted) It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. (citation omitted) This is so because unilateral action by an employer detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless. (citations omitted)

Priority One Service, Inc., 331 NLRB 1527, 1527 (2000).

The Board has held that where an employer notifies employees of a unilateral change prior to notifying the union, this may be evidence of overall bad-faith bargaining. *Technology Instrument Corporation*, 187 NLRB 830, 843 fn. 13 (1971) citing *N.L.R.B. v. Agawam Food Mart, Inc.*, 386 F.2d 192 (1st Cir 1967). In *S & I Transportation, Inc.*, 311 NLRB 1388 (1993), the Board held similar factors, such as notifying employees directly of a unilateral change and demonstrating a fixed position to implement the changes as announced, as indicative of a *fait accompli*, and thus evidence of an unlawful unilateral change. "An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or

proposals.” *Intersystems Design and Technology Corp.*, 278 NLRB 759, 759 (1986) citing *Gulf States Mfg. V. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

1. The March 2016 unilateral change eliminating breaks for employees between scheduled and mandated shifts

Prior to the March 3, 2016, representation election, Respondent provided employees with the opportunity to take a 30-minute to one-hour break between their regular and mandated shift. Employees testified that this was standard practice. However, after the election, Respondent stopped this practice. About mid-March, Manager Sherrod announced over the company radio that the practice of breaks was over. When employees Jenkins and Boatwright questioned Sherrod a few weeks later, he informed them that the employees voted the Union in and this was the result. This statement is a violation of Section 8(a)(1). On another day, Manager Childs also acknowledged that the policy had changed in answer to Boatwright’s question when he stated that he didn’t know why the policy had changed.

Respondent began to implement this rule shortly thereafter. It never notified Charging Party SPFPA of this change nor did it attempt to bargain over this change. Instead, Respondent implemented the change in policy directly with employees as a *fait accompli*, even blaming the Union for the loss of benefit. Respondent has continued to contest that that Charging Party SPFPA is the exclusive representative of the employees, so its actions are consistent with that mindset; however, it fails to bargain at its peril.

2. The April 2016 unilateral change requiring mandated shifts for contingent employees

Prior to the election, Respondent did not require mandatory overtime (mandation) for contingent employees. Employees such as Hall and Jenkins testified that they became contingent employees so that they could better control their schedules due to childcare or other concerns. However, in April 2016, after the election, Respondent changed this policy and began to mandate contingent employees. Employees Boatwright and Jenkins testified that they learned of the change over the company provided radio, and then they spoke to various supervisors and managers about the change. They were informed that a change was made, but given no reason for the change. Respondent did not notify Charging Party SPFPA about this change or provide it with an opportunity to bargain the decision and/or the effects of the change. Instead, Respondent implemented the change directly with employees as a *fait accompli*.

3. The June 1, 2016 Discharge of Quiana Jenkins

The first casualty of that change was Ms. Jenkins. She was hired as a contingent employee in August 2015. Also, Jenkins had never been required to work a mandatory shift until Mid-April. She testified that she was able to work one or two mandated dates, but was unable to find someone to pick-up her children from school on two occasions in May 2016. As a result, she was discharged under this newly implemented policy. This discharge is a violation of Section 8(a)(5) as it is a direct result of the unlawful change in policy.

Section 8(d) of the Act requires that parties bargain in good faith regarding mandatory terms and conditions of employment. An employer's attendance policy has long been held to be mandatory subject of bargaining. *Pirelli Cable Corp.*, 323 NLRB

1009 (1997); *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996); *Treanor Moving & Storage Co.*, 311 NLRB 371, 386 (1993); *Great Western 140 Produce*, 299 NLRB 1004 (1990); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1016 (1982). Thus, Respondent had a duty to provide Charging Party SPFPA with prior notice and a meaningful opportunity to bargain before implementing any changes to its policies.

D. The March 29, 2016 and July 1, 2016 information requests and refusal to provide information

In its role as collective bargaining representative, a union is entitled under the Act to such information as may be relevant to it in the performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The Board applies a liberal discovery standard when determining whether requested information is relevant. *Id.* When information “has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party.” *House of Good Samaritan Medical Facility*, 319 NLRB 392, 397, (1995) citing *Somerville Mills*, 308 NLRB 425 (1992).

It is uncontested that Charging Party SPFPA sent certified letters to Respondent on March 29, 2016, and again on July 1, 2016, and made numerous follow-up telephone calls requesting information and to begin bargaining for an initial collective bargaining agreement. The information that Charging Party SPFPA requested such as names and hourly wages of employees, organization chart and employee handbook is all relevant information necessary for Charging Party SPFPA to negotiate an initial contract. *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996). In its Answer to the complaint,

(GC 1(oo)), Respondent admits that it received the information requests and that it failed to provide the requested information to Charging Party SPFPA. Respondent contests the results of the election, but does so at its peril. The Regional Director certified the results of the election, and the Board declined to review that decision as it raised no substantial issues warranting review. (J 3). Respondent further failed to bargain in Case 07-CA-180451, which decision issued by the Board on November 22, 2016, holding that their actions were unlawful. *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (Nov. 22 2016).

The information that Charging Party SPFPA requested was relevant to its duty to represent the employees of the Unit as their exclusive representative. Respondent provided no defense to this allegation other than its determination that the election was not conducted properly. Therefore, Respondent's failure to provide the relevant requested information is unlawful under section 8(a)(5) of the Act.

IV. Seeking Reimbursement for Consequential Economic Harm

In order to fully remedy the unfair labor practices set forth above, the General Counsel seeks an order requiring that the employees be made whole, including, but not limited to, payment for consequential economic harm they incurred as a result of the Respondent's unlawful conduct.

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. See *Catherine H. Helm, The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all

economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, ***Graves Trucking***, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); ***Operating Engineers Local 513 (Long Const.Co.)***, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." ***Tortillas Don Chavas***, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing ***NLRB v. J.H. Rutter-Rex Mfg.Co.***, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g.*, ***Radio Officers' Union of Commercial Telegraphers Union v. NLRB***, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." ***Phelps Dodge Corp. v. NLRB***, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of

making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Facility*, 356 NLRB 6, 8- 9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is

to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); see *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.⁸

Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the

⁸ However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).⁹

Modifying the Board’s make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board’s established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board’s “broad discretion”); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber

⁹ Economic harm also encompasses “costs” such as losing a security clearance, certification, or professional license, affecting an employee’s ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. See *Phelps Dodge Corp. v. NLRB*, 313 U.S.

at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.¹⁰ In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving “pain and suffering” damages that were inherently “speculative” and “nonspecific.” *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee’s consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).¹¹

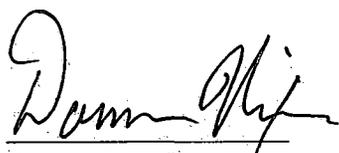
¹⁰ This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

¹¹ The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. See *Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); see also *Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

V. CONCLUSION

Based on the above and the record as a whole, Counsels for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent violated Sections 8(a)(1), (3) and (5) of the Act as alleged in the Consolidated Complaint and recommend the appropriate order to remedy, as noted in the attached addendum, the violations.

Respectfully submitted this 13th day of July 2017.



Donna M. Nixon



Eric Cockrell

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**ADDENDUM TO COUNSEL FOR THE GENERAL
COUNSEL'S TRIAL BRIEF**

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

International Union, Security, Police and Fire Professionals of America (SPFPA) (Union) is the employees' exclusive collective bargaining representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit (Unit):

All full time and regular part-time armed and unarmed security officers, including direct care and youth workers performing guard duties as defined in Section 9(b)(3) of the Act, employed by us at our facilities located at 300 Glendale and 1961 Lincoln, Highland Park, Michigan; but excluding all office clerical employees, professional employees and supervisors as defined by the Act.

YOU HAVE THE RIGHT to freely bring issues and complaints to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT maintain or enforce overly broad rules or policies in our employee handbook.

WE WILL NOT watch you or make it appear to you that we are watching out for your union and other protected concerted activities with other employees regarding your wages, hours, and working conditions.

WE WILL NOT ask you about your sympathies and/or activities with other employees regarding your wages, hours, and working conditions.

WE WILL NOT ask you about your union membership or support for or assistance to any labor organization.

WE WILL NOT threaten you with discipline including discharge if you engage in activities with other employees regarding your wages, hours, and working conditions.

WE WILL NOT write-up and counsel you because of your union membership or support or activities and because you exercise your right to bring issues and complaints to us on behalf of yourselves and other employees.

WE WILL NOT suspend you pending investigation because you exercise your right to bring issues and complaints to us on behalf of yourselves and other employees.

WE WILL NOT discipline or fire you because you exercise your right to bring issues and complaints to us on behalf of themselves and other employees.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its role as your exclusive collective bargaining representative.

WE WILL NOT refuse to meet and bargain in good faith with your Union any proposed changes in wages, hours and working conditions before putting such changes into effect.

WE WILL NOT upon request, refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our Unit employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL NOT discriminate against you because of your union membership, sympathies or activities.

WE WILL remove from our files all references to the suspensions pending investigation issued to Sherman Cochran, Tamika Kelley, and Delaine Singleton-Green. **WE WILL** notify them in writing that this has been done and that the suspensions pending investigation will not be used against them in any way.

WE WILL remove from our files and records all references to the September 24, 2015 write-up and counseling, and the October 10, 2015 write-up issued to Tamika Kelley.

WE WILL notify her in writing that this has been done and that the write-up and counseling will not be used against her in any way.

WE WILL offer Alfred Neely, Lamont Simpson, Quiana Jenkins, and all other contingent employees who we suspended or fired for failing to comply with our mandation requirements immediate and full reinstatement to their former jobs, without preconditions or prejudice to their seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Alfred Neely, Lamont Simpson Quiana Jenkins, and all other contingent employees who we suspended or fired for failing to comply with our mandation requirements for the wages and other benefits lost, including reasonable consequential damages and for search-for-work and work-related expenses that they incurred because

we fired them, regardless of whether they received interim earnings in excess of these expenses.

WE WILL remove from our files all references to the discharges of Alfred Neely, Lamont Simpson, Quiana Jenkins, and all other contingent employees who we disciplined for failing to comply with our mandation requirements. and **WE WILL** notify them individually in writing that this has been done and that the discharges will not be used against him in any way.

WE WILL rescind the policy of mandating contingent employees and reinstate employee breaks between the scheduled and mandated shifts.

WE WILL provide the Union with the following information that it requested on March 29 and July 1, 2016:

5. Names, seniority, rank, hourly wages, mailing address and phone for our Unit employees.
6. Contract information including GSA or Delegated Solicitation Number, anniversary date, and copy of wage determination of any contracts for work performed by our Unit employees
7. Our organizational chart, employee handbook, worksite operating procedures including description of posts and hours of operation.
8. Benefits packages, summaries of plan description for health and welfare funds and/or 401(k) plans, and a summary of benefits and coverage that apply to our Unit employees.

WE WILL recognize and upon request, meet and bargain collectively and in good faith with Charging Party SPFPA as the exclusive collective-bargaining representative of the Unit.

WE WILL, as part of the remedy for our unfair labor practices referenced in the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which issued on August 31, 2016, upon request, bargain collectively and in good faith with Charging Party SPFPA as the recognized bargaining representative in the appropriate Unit, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962).

Spectrum Juvenile Services, Inc., an affiliate of
Spectrum Human Services, Inc.

(Respondent)

Dated _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below.

You may also obtain information from the Board's website: www.nlr.gov.

477 Michigan Avenue, Room 300, Patrick V. McNamara Federal Building, Detroit, Michigan 48226. Telephone (313) 226-3200, or Compliance Officer

Hours of Operation: 8:15 a.m. to 4:45 p.m.