

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

**ATLANTICARE MANAGEMENT LLC
d/b/a PUTNAM RIDGE NURSING HOME**

and

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST**

**Cases: 02-CA-177329
02-CA-193189
02-CA-198370
02-CA-206253
02-CA-210245**

BRIEF IN SUPPORT OF EXCEPTIONS

David F. Jasinski, Esq.
JASINSKI, P.C.
60 Park Place, 8th floor
Newark, New Jersey 07102

T: 973-824-9700
F: 973-824-6061

Table of Contents

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 2

STATEMENT OF THE CASE..... 3

 I. The Parties. 3

 a. Respondent Putnam Ridge Nursing Home..... 3

 b. The Union..... 4

 II. The Union’s Organizing Campaigns..... 4

 III. Contract Negotiations..... 6

 c. The Parties Jointly Agreed The Initial Bargaining Sessions Would Address Terms and
 Conditions of Employment..... 6

 i. Initial Sessions Dealing with Economics. 9

 ii. The April 5, 2017 Bargaining Session..... 11

 iii. Continued Bargaining Sessions 12

 IV. Additional Information Requests 13

 V. Notices..... 15

 VI. Catherine Thomas 16

LEGAL ARGUMENT 17

 I. Putnam Ridge Did Not violate the Act by Giving Merit Increases. 17

 e. Respondent Did Not Have a Past Practice of Giving 2-2.5% Merit Increases. 17

 f. Respondent Properly Implemented Its Proposal Because the Union Rejected the
 Proposal and Demanded Status Quo. 20

 II. Catherine Thomas Was Not Unlawfully Terminated and There Was No Anti-Union
 Animus Directed at Her..... 23

 g. The ALJ Misconstrued the Facts..... 23

 h. Counsel for General Counsel Failed to Meet Its Burden of Proof..... 25

 III. Putnam Ridge Did Not Refuse to Meet the Union and the Parties Met at the Agreed-
 Upon Intervals. 28

 IV. Putnam Ridge Provided All Relevant Documents in Response to the Union’s
 Information Requests. 29

 V. The April 2016 Notice Posting Did Not Violate the Act and the ALJ Relied Upon an
 Outdated Standard to Hold That It Did. 33

CONCLUSION..... 36

CERTIFICATION OF SERVICE..... 37

Table of Authorities

Cases

| | |
|---|--------|
| <i>ACF Industries, LLC</i> , 347 NLRB 1040 (2006)..... | 30 |
| <i>Acme Die Casting v. NLRB</i> , 93 F.3d 854 (D.C. Cir. 1996) | 19 |
| <i>Adams Insulation Co.</i> , 219 NLRB 211 (1975)..... | 30 |
| <i>Alltel Kentucky, Inc.</i> , 326 NLRB 1350 (1998)..... | 22 |
| <i>Am. Packaging Corp.</i> , 311 NLRB 482 (1993)..... | 21, 22 |
| <i>Arc Bridges, Inc. v. NLRB</i> , 662 F.3d 1235 (D.C. Cir. 2011) | 18 |
| <i>Bohemia Inc.</i> , 272 NLRB 1128 (1984)..... | 29 |
| <i>Cincinnati Steel Castings Co.</i> , 86 NLRB 592 (1949)..... | 31 |
| <i>Clark County School District v. Breedon</i> , 532 U.S. 268 (2001) | 27 |
| <i>Columbus Products, Co.</i> , 259 NLRB 220 (1981)..... | 29 |
| <i>Dir., Office of Workers' Comp. Programs v. Greenwich Collieries</i> , 512 U.S. 267 (1994) | 25 |
| <i>Dixie Broadcasting Co.</i> , 150 NLRB 1054 (1965)..... | 23 |
| <i>Fla. Steel Corp. v. NLRB</i> , 587 F.2d 735 (5th Cir. 1979)..... | 28 |
| <i>Food Service Co.</i> , 202 NLRB 790 (1973)..... | 31 |
| <i>Green v. Franklin Nat. Bank of Minn.</i> , 459 F.3d 903 (8th Cir. 2006)..... | 27 |
| <i>Hyundai Am. Shipping Agency, Inc. & Sandra L. Mccullough</i> , 357 NLRB 860 (2011)..... | 34 |
| <i>Loudermill v. Best Pallet Co.</i> , 636 F.3d 312 (7th Cir. 2011)..... | 27 |
| <i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)..... | 34 |
| <i>Marathon Petroleum Co.</i> , 366 NLRB No. 125 (July 18, 2018) | 33 |
| <i>NLRB v. Hawkins Construction Co.</i> , 857 F.2d 1224 (8 th Cir. 1988), <i>denying enforcement to</i> 285 NLRB 1313 (1987)..... | 29 |

| | |
|---|--------|
| <i>NLRB v. Katz</i> , 367 U.S. 736 (1962) | 18 |
| <i>NLRB v. Robert S. Abbott Publishing Co.</i> , 331 F.2d 209 (7 th Cir. 1964)..... | 31 |
| <i>NLRB v. Stor-Rite Metal Products, Inc.</i> , 856 F.2d 957 (7th Cir. 1988)..... | 27 |
| <i>NLRB v. Wachter Construction</i> , 23 F.3d 1378, rev'g 311 NLRB 215 (1993);..... | 29, 30 |
| <i>Raytheon Network Centric Sys.</i> , 365 NLRB No. 161 (2017)..... | 18 |
| <i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999) | 25 |
| <i>San Diego Newspaper Guild v. NLRB</i> , 548 F.2d 863 (9 th Cir. 1977)..... | 29 |
| <i>Schaeff, Inc. v. NLRB</i> , 113 F.3d 264 (D.C. Cir. 1997) | 25 |
| <i>Sears, Roebuck & Co. v. NLRB</i> , 349 F.3d 493 (7th Cir. 2003)..... | 25 |
| <i>Southern California Gas Co.</i> , 342 NLRB 613 (2004)..... | 31 |
| <i>Stb Inv'rs, Ltd.</i> , 326 NLRB 1465 (1998)..... | 30 |
| <i>Stone Container Corp.</i> , 313 NLRB 336 (1993) | 22 |
| <i>The Boeing Co.</i> , 365 NLRB No. 154 (2017)..... | 33, 34 |
| <i>Tic-The Indus. Co. v. NLRB</i> , 126 F.3d 334 (D.C. Cir. 1997) | 25 |
| <i>Upmc, Upmc Presbyterian Shadyside</i> , 366 NLRB No. 142 (Aug. 6, 2018)..... | 34 |
| <i>Valley Special Needs Program, Inc.</i> , 314 NLRB 903 (1994)..... | 34 |
| <i>Wallace v. Sparks Health Sys.</i> , 415 F.3d 853 (8th Cir. 2005)..... | 27 |
| <i>White-Westinghouse Corp.</i> , 259 NLRB 220 (1981)..... | 32 |

PRELIMINARY STATEMENT

On December 18, 2018, Administrative Law Judge (ALJ) Benjamin W. Green, issued an opinion in which he dismissed a number of allegations in the Complaint against Respondent Putnam Ridge Nursing Home, including that Respondent engaged in bad faith surface bargaining and had an overly broad rule against harassment and spreading rumors. The ALJ also refused to issue the “extraordinary remedy” sought by Counsel for General Counsel.

Contrary to the soundly reasoned rejection of the Union’s allegations, the ALJ erroneously determined that Respondent violated the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 to 169, in several other minor instances. To come to this determination, the ALJ turned a blind eye to the evidence established at trial, the law governing the NLRA, the parties’ past practices, and improperly shifted the burden of proof to Respondent to fit square pegs into round holes to find violations.

The Complaint was narrowly drawn to allege alleged specific violations. The record evidence failed to demonstrate that Respondent committed any of the claims. Employees never felt threatened and openly discussed their union rights, terms and conditions of employment, and issues affecting work. Of all the workers involved in union activity and responsible for the organization and unionization, there was only one claim of unlawful termination—that of Catherine Thomas, who by all accounts, was not actively involved in the Union campaign, virtually was not around the Facility and readily admitted on direct examination that she was not terminated.

Respondent provided the Union with virtually all of the relevant documentation it needed to bargain. The parties met on thirteen occasions (JE40), and repeatedly made proposals and counterproposals. In spite of allegations of anti-union animus and bad faith, Respondent steadily

increased its economic proposal at a far greater proportion than the Union. Respondent even attempted to continue to give increases following evaluations during the course of the negotiations, but was rebuffed in its efforts to discuss the increases with the Union; the Union refused and demanded the status quo. Instead, the Union filed frivolous ULP charges—all unfounded.

PROCEDURAL HISTORY

On December 22, 2017, the Regional Director issued a very narrow Amended Consolidated Complaint alleging that Respondent violated the Act and failed to meet with the Union between August 11, 2017 through early December 2017. The Complaint also alleged unlawful termination of Ms. Thomas and the unlawful posting of two notices, one in 2016 and one in 2017.

A five-day hearing was held on January 8, 9, 10, 19 and February 5, 2018 before the ALJ. On the fourth day of hearing, after all of its evidence was presented, and immediately prior to its announced close of General Counsel’s case, Counsel for General Counsel sought to amend the Complaint to suggest that Respondent proposed economic terms which are less favorable than the unit previously received and failed to explain the basis for its proposal. (GC21.) General Counsel also amended requested remedies. Over Respondent’s objection, the ALJ granted the amendment.

On December 18, 2018, the ALJ issued his opinion (“Decision”). He found that Respondent had *not* violated the Act by posting notices on April 2017 and had not engaged in bad faith bargaining. But the ALJ erroneously found that Respondent violated the Act by posting a notice in April 2016, changing the range for merit increases without meeting with the Union, finding documents were relevant and necessary for bargaining and failing to provide additional

documents, failing to meet from August 2017 to November 5, 2017, and by not utilizing Ms. Thomas as a per diem employee.

STATEMENT OF THE CASE

I. The Parties.

a. Respondent Putnam Ridge Nursing Home.

Putnam Ridge Nursing Home is a 160-bed long-term care facility located in Putnam, New York. It employs approximately 200 employees who provide healthcare services to its residents.

Putnam Ridge had an employee handbook that was revised in February 2015. The handbook sets forth the policies and procedures at the facility. (R1; Tr. 318.) Relevant portions are as follows:

i. DISCRIMINATION BASED HARASSMENT (Pg. 5)

In addition to sexual harassment, Putnam Ridge will not tolerate harassment which may be based on an individual's race . . . or any other basis which is prohibited by law.

Behavior, which would result in creating an intimidating, hostile, or offensive work environment or unreasonably interferes with an individual's work performance or has an adverse effect on an individual's work performance will not be tolerated. Violations of this policy will result in disciplinary action up to and including discharge.

Any Employee who believes that he or she has been subjected to discrimination based harassment, should immediately report the matter to their Supervisor, or Department Head, Human Resources or any member of management. Employees can be assured that there will be not retaliation for either filing a complaint or participating in an investigation of discrimination based harassment.

ii. EMPLOYMENT CLASSIFICATIONS (Pg.6)

Per Diem Employees:

Employees who are on-call and do not occupy a regularly scheduled staff position of at least 16 hours per week. Per Diem Employees will be called for coverage on an as-needed basis. To maintain Per Diem status, Employees must work a minimum of one week-end a month (if needed) and at least two major holidays a year. (One winter holiday and one several holiday.)

iii. SALARY ADMINISTRATION (Pg. 11)

A formal program of wage administration has been developed and is used by Putnam Ridge to maintain a fair and equitable relationship in the wages paid for the many types of work performed in the Facility. If Putnam Ridge's goal to maintain wage levels for its Employees that are competitive with those paid for similar work by other Employees in our community. The wage and salary program is reviewed on an annual basis.

iv. PERFORMANCE APPRAISALS (Pg. 11)

Your performance appraisal will be evaluated regularly as a tool to assist you in becoming a more valuable member of our team and to provide you with the feedback that you deserve. A written performance appraisal will be done upon completion of your introductory period and thereafter on an annual basis near your anniversary date. Your department head or supervisor will review the performance appraisal with you and will provide you with an opportunity to discuss any questions you may have regarding any aspect of your employment.

b. The Union.

The Union currently represents LPNs, CNAs, and traditional service and maintenance employees at Putnam Ridge.

II. The Union's Organizing Campaigns.

The Union made at least two open drives to organize the employees at Putnam Ridge. During its first attempt, on August 31, 2012, the Union filed an RC Petition to seek to represent

the CNAs. Putnam Ridge stipulated to the appropriateness of the unit and scheduled an election. (JE1; Tr. 573-74.) The Union engaged in an aggressive campaign to organize Respondent's CNAs. During this campaign, a number of employees were openly active in their support for the Union. Ms. Thomas was a full time CNA at the time (Tr. 122) and one of a group of ten to twenty employees who campaigned outside the facility (Tr. 118). Ms. Thomas admitted that she and others did not hide their support for the Union. They wore the color purple in support of the Union and campaigned on the driveway. (Tr. 121.) But prior to the election date, the Union withdrew its RC Petition. No ULP charges were filed against Respondent. (Tr. 576.) Neither Ms. Thomas nor any other employee was fired or disciplined for showing their support to the Union.

After the Union withdrew its initial RC Petition, Ms. Thomas, more than 16 months after Union campaign, in December 2013, without any objections from Respondent, requested to change her employment status from full time to per diem. (Tr. 98.) The request was granted. After becoming per diem, Ms. Thomas admitted she wasn't in the building all that much. (Tr. 108.) Ms. Thomas accepted another job and opted to return to school and reduced her available hours at Putnam Ridge. (Tr. 98, 123.)

On November 6, 2015, the Union filed a second RC Petition seeking to represent LPNs, CNAs, and traditional service and maintenance employees. (JE2.) Again, Respondent stipulated to an election. In the second Union campaign, Respondent presented a factual campaign appealing to the employees for their support. It was not, by any means, an anti-union campaign but a pro-facility campaign. Respondent had two leaflets and its campaign requested that the employees give the Administration a chance. (Tr. 108.) Ms. Thomas testified to attending one, spontaneous discussion, which lasted no more than twenty minutes with three other CNAs where

Rosie Pottinger, the Administrator, asked them to give her another chance. (Tr. 108.) Wendy McTighe testified to a separate five-minute conversation where Ms. Pottinger and Eric Greenberger said that they hoped she would do the right thing for the facility. (Tr. 64.) Eric Greenberger never threatened Ms. McTighe at the meeting. (Tr. 80.)

On December 14, 2015,¹ a majority of employees voted to be represented by 1199 SEIU. Again, no ULP charges were filed alleging unlawful misconduct by Respondent. (JE4.) No one was disciplined for supporting the Union.

III. Contract Negotiations.

c. The Parties Jointly Agreed The Initial Bargaining Sessions Would Address Terms and Conditions of Employment.

Within two months of the Union's certification, one month after the election, on January 6, 2016, the Union made a request for over thirty specific items. In some instances, the Union requested information dating back over three years.

On January 26, 2016, approximately three weeks after the request, Respondent provided an initial response to the Union's information request (Tr. 178.) Specifically, it provided Respondent's employee handbook, which sets forth the terms and conditions of employment, most current payroll roster, work schedules, total cost to Respondent for benefits provided in 2014 and 2015, annual and monthly cost of health insurance plans, and healthcare plans. (JE14.) As recognized by Union Vice President Joseph China, an experienced negotiator who served as Chief Spokesperson for the Union (Tr. 176, 186), the information provided allowed the Union to commence bargaining. As evidenced by their proposals and bargaining history, the Union was unencumbered and able to and did engage in meaningful bargaining with Respondent.

¹ The ALJ states that the election took place in December 2016. (Decision at 6.) As set forth in Legal Argument Section I, his error on dates is relevant to the ALJ's subsequent finding that the timing of Respondent's implementation of merit wages violated the act.

Approximately two months after the Certification of Election, on March 10, 2016, the parties conducted their first face-to-face negotiation session. (Tr. 186.) This introductory meeting was attended by a substantial number of employee representatives from each department including Chinaea, who served as the Union's Chief Spokesperson, David Jasinski, who served as Respondent's Chief Spokesperson, and Mr. Greenberger who represented Respondent. At this initial meeting, the parties discussed and established ground rules for the negotiations. (JE18.) For instance, as this was the initial collective bargaining agreement, the parties agreed that non-economic items (terms and conditions) would be discussed first. (Tr. 184, 253, 513-14, 590; JE18) The parties also agreed to share the cost of the hotel room with each side alternating payment for the conference room. (Tr. 189.) The Union brought a large contingent of employees, children of employees, and outsiders making it unwieldy.

The parties agreed that the next negotiations would be set in thirty to ninety days. (JE18) Mr. Chinaea kept notes of this initial session and he recorded that the parties further agreed that the next negotiations would be set in thirty to ninety days. (JE18) On June 1, 2016, within the ninety days established by Mr. Chinaea, the parties held its second bargaining session. At this session, consistent with the ground rules, the parties discussed their respective proposals regarding terms and conditions and modified its proposals. The sessions were initially scheduled for 1:00 p.m., but the Union subsequently requested that future negotiation sessions start at 4:00 p.m. to accommodate employee schedules. (Tr. 187-89.) Respondent agreed.

At the June 1st meeting, the Union deviated from its initial agreement and presented a complete contract proposal containing terms and conditions, as well as a full economic proposal. (GC22; Tr. 189.) Mr. Chinaea testified that the Union proposed a complete contract submitted to Respondent as part of its proposal. (Tr. 193) More specifically, the Union proposed a number of

economic proposals, including a 6% wage increase in each year of the contract and increases in the Union's economic proposals would dramatically increase the labor costs. The Union literally proposed participation in every Union fund and dramatic increases in every Union benefits, increase current minimum hire rates to \$15.00 for CNAs and all other service and maintenance job classifications, \$30.00 minimum hire rate for LPNs, longevity pay, shift differentials, participation in and contributions fully paid by Respondent to various funds including SEIU Health Fund Benefits, SEIU pension fund, paid time off provisions, paid holidays, and paid sick days, and vacation pay. (Tr. 189-90, 193.) Nothing prevented the Union from making this complete economic proposal. (Tr. 194.) As discussed herein, the Union's proposals amounted to more than 70% increase in labor costs each year of their proposed three-year contract. (JE9.)

Consistent with the parties' agreed ground rules for negotiations, Respondent submitted its proposal addressing terms and conditions only. (GC23.) In it, Respondent proposed Union Security Clause, Dues Check-Off Clause, Union Visitation, Seniority Provisions, Grievance and Arbitration Provision and Management Rights. (GC23.) All provisions which form the framework for a collective bargaining agreement. All showing good faith on the part of Respondent. Economic items were not provided since the parties agreed to discuss and attempt to resolve terms and conditions prior to the discussion of economics.

On June 23rd, August 23rd, and September 20, 2016, the parties met and reviewed non-economic items. (Tr. 506) On September 16, 2016, prior to the next scheduled bargaining session, Respondent sent a notice to the Union reminding the Union Respondent forwarded its proposal on terms and conditions more than two months earlier and had not received the Union's response. (JE22.) Both parties made movement on a number of terms and conditions, including the probationary period, seniority, and grievance and arbitration provisions.

In October of 2016, Union counsel Katherine Hansen, Esq. became involved in the negotiations. (Tr. 474.) On October 7, 2016, Respondent captured what it believed were tentative agreements on specific terms and conditions. (GC25.) Respondent listed a number of provisions where it believed a tentative agreement was reached. In a letter dated October 13, 2016, the Union responded stating it did not agree with Respondent's accountings of the tentative agreements (Tr. 475.)

d. Bargaining Sessions Shifted to Economic Items -- at the Union's Requests.

i. Initial Sessions Dealing with Economics.

At the October 2016 bargaining session, with Ms. Hansen's attendance, the Union unilaterally changed the negotiation ground rules and decided that the parties shift negotiations to economics and put aside the outstanding contractual terms and conditions. Respondent's counsel expressed that the non-economic items had not been resolved; notwithstanding, in a spirit of compromise and good faith, Respondent agreed to commence negotiating economics. From the Fall of 2016 to December 21, 2017, the parties focused, as per the Union's request, exclusively on economics. (Tr. 203-04.) At the October 26, 2016 session, Respondent again expressed that what the Union was seeking would amount to over 70% increase in labor costs. (Tr. 514, 607) The Union had all relevant information necessary to make economic proposals or modifying its economic proposals.

Faced with the excessive demands of the Union's full contract proposal, at the November 28, 2016 bargaining session, Respondent offered a full economic proposal. It included increases to minimum hire rates of \$1.50 per hour to \$13.00 per hour for CNAs plus regular increases over the term of the contracts amounting to 4%. In addition, Respondent proposed a continuation of the same health insurance plan, paid sick days, holidays, and vacation. (GC26) Respondent

made a proposal with respect to paid time off, wages, and a no frills rate based on specific jobs classification from \$2.50 for LPNs to \$1.25 for Dietary, Housekeeping, and Office Personnel. (Tr. 322.)

In response, the Union made what amounts to inconsequential movement from its original proposal from 6% to 5.75% in the third additional year of the contract. (Tr. 477, 607.) All other economic provisions remained unchanged in the Union's proposal; this included no change to minimum hire rate of \$15.00 for CNAs and service and maintenance employees and participants in every Union Fund. (Tr. 6070.)

The parties continued to meet on a regular basis within the thirty to ninety days frame work established in the Union's initial notes. The next bargaining sessions were January 10 and February 7, 2017. (Tr. 483, 486.) Prior to the January session, Respondent sent a letter proposing a zero to 1.75% increase based on merit for employees in 2017. (JE31; Tr. 212, 611.) The Union's response to Respondent's proposal was short and emphatic: "We are not going to agree in reducing this. We're going to keep it the same." (Tr. 160, 612.) Over the years, merit pay varied from a high of 3% and other years there was no, zero, increase. The handbook did not provide any specific and surely no guarantee of any wage increases or specific ranges. Indeed, the Union recognized and admitted the handbook does not guarantee any increases. (Tr. 612-13.)

After the Union rejected Respondent's proposal for interim merit increases and refused any further discussions, it never asked to return to Respondent's proposal about wage increases. Ms. Hansen had a past practice of responding to proposals in writing, but to this proposal she

never did. Faced with the Union's silence coupled with its response of rejection across the table, Respondent implemented its proposal.²

With regard to the remaining issues, however, several counter proposals were made by each side. The Union decreased its wage proposal to 5.5% in each year of the contract; however, it maintained its proposal to dramatically increase minimums for certain service and maintain classifications by as much as \$5.00 per hour. (Tr. 487.) Each side improved its counterproposal. (Tr. 487-88.) The parties engaged in give and take, modifying their positions. Improving the wage increases it proposed at various bargaining sessions. (Tr. 207.) Ms. Hansen captured the "positive spirit" of the negotiations when she admitted the Union modified its wage and benefit proposal and Respondent improved its proposal. (Tr. 321-3.)

ii. The April 5, 2017 Bargaining Session

This session started like every other session; the Union was late. (JE7.) In an attempt to jump-start this session, Respondent made a counter proposal. There was a continuing discussion with regards to the Union's proposal and the excessive costs attached to it. (JE7; Tr. 206-07, 490.) The Union asked for a recess to meet with its committee to which Respondent agreed. (Tr. 615.) After a caucus of over 45 minutes, which amounted to smoke break (JE7), Mr. Greenberger had to leave the bargaining session for a personal commitment. Nevertheless, Mr. Jasinski remained to continue the bargaining session. (Tr. 616.) The Union expressed that they were insulted Mr. Greenberger left. When Mr. Jasinski, Respondent's Chief Spokesperson, said

² In two separate parts of the opinion, the ALJ states that the merit wage changes were implemented in January 2016 instead of January 2017, though in a separate section the ALJ correctly notes that the wage increase occurred in January 2017. (*Compare* Decision p .7 , 29 n. 23 with p. 15.) As set forth in Legal Argument Section I, this mistake is relevant to the ALJ's subsequent finding that the timing of Respondent's implementation of merit wages violated the act and fails to recognize the willingness of the Respondent to meet and flat rejection by the Union to consider any counter-proposal.

he was prepared to continue to negotiate and was here to negotiate, one of the employees at the session called him a “fucking schmuck.” (Tr. 617.) Mr. Jasinski reasonably responded that he was “not going to sit here and listen to that.” (Tr. 617.) He folded up his negotiation binder and said, “no one should have to sit here for that.” As he walked out, the same employee again, said “you fucking schmuck.” (Tr. 617.) Mr. Jasinski documented in detail what occurred at that session in a letter to Mr. Chinaea. (JE7.)

iii. Continued Bargaining Sessions

Throughout negotiations, the Union’s proposed contract demands received excessive and presented a major obstacle for Respondent to reach an agreement. The Union never presented any guidance about what was a priority. The lofty expectations of the Union placed Respondent in an untenable position. Specifically, Respondent costing of the Union’s contract demands accounted to over 70% increase. (JE9.) Respondent itemized the costs in a memo to Union’s counsel dated April 18, 2017. (JE9.)

The parties met on July 13, 2017 and August 7, 2017. As of the end of the August 2017 session, Respondent continued to improve its economic offer and proposed a 6% increase over the 5% five-year agreement. (Tr. 495.) The CNA minimum rate was also raised to \$13.50 per hour (a 3% increase from its previous proposal) and Respondent continued to offer a No-Frills Rate that would raise the hire rate for CNAs to \$15.50 per hour. (Tr. 495.) At each session, the parties continued an improvement from their previous positions. As acknowledged by Ms. Hansen, Respondent expressed its position that everything was open and that this was negotiations; in other words, everything was negotiable. (Tr. 535.)

Thereafter, the parties did not meet for several months during the Jewish holidays, which Mr. Greenberger is observant, and following a horrific car crash in which Mr. Jasinski was the

victim. (Tr. 213.) On November 5, 2017, Mr. Jasinski was struck at full force by a drunk driver with a blood alcohol level of .24, which was three times over the legal limit. (Tr. 621.) Mr. Jasinski was admitted to University Hospital's ICU for five days, having four cracked ribs, a fractured pelvic bone, and lacerated spleen. (Tr. 621) He was heavily medicated for several weeks, on two crutches for over two months, and could not drive for several months. (Tr. 622.) The Union was well aware of Mr. Jasinski's serious injuries and agreed to the adjournment of this trial on *one condition*, as stated by Ms. Hansen:

We understand that you will be requesting an adjournment of the Putnam Ridge trial until January 8. Given the circumstances, the Union will not oppose. However in return, the Union expects that the Employer will agree to a bargaining date between now and the end of the year. (JE36.)

In light of Ms. Hansen's demands, the parties met on December 21, 2017. Mr. Jasinski was driven to the session by his son. (Tr. 214, 622.) At that time, the Union proposed and Respondent agreed to a meeting to review health plan and consider various options including the participation in the Unions healthcare plan. The Union suggested a subcommittee to which Respondent agreed. (Tr. 214-15.)

IV. Additional Information Requests

Since the Union was unwilling or refused to significantly modify its proposals, it embarked on a calculated strategy of diversion and requesting additional information that was not relevant and most importantly as evidenced by its actions did not prevent the Union from continuing to negotiate a collective bargaining agreement. On April 19, 2016, the Union requested unit schedules of staffing levels per shift/per unit. (JE19.) Respondent provided this information to the Union.

On August 5, 2016, the Union made another request seeking the following information:

1. Any and all documents setting forth wage increase policies from January 1, 2011 to the present, including all revisions or modifications of such policies; and
2. Any and all documents setting forth policies for requesting personal or vacation leave from January 1, 2011 to the present, including all revisions or modifications of such policies.

Although Respondent had already provided much of this information, which was contained in the Employee handbook as well as payroll records previously provided to the Union (JE14), Respondent responded on September 16, 2016 (JE21).

On October 13, 2016, the Union continued its tactics and requested more information. (JE23.) On December 13, 2016, Respondent provided information reflecting employee increases from October 1, 2011 through 2015, listing names, job titles, rates of pay, wage increases, hire, and termination. In addition, gross amount paid for health insurance was provided for years 2014, 2015, and 2016. Overtime hours worked for 2014 and 2015 were also provided. (JE25.) On December 16, 2016, the 2014 cost report was provided to the Union. (JE27.)

On April 3, 2017, Respondent, in confirming April 5, 2017 bargaining session, confirmed the production of extensive amount of relevant information that it provided, and requested that the Union detail any other information it needs. (JE28.) On April 5, 2017, the Union again asked for information which was previously provided to the Union, including gross payroll for bargaining unit employees. (*See* JE14.) Nevertheless, on April 25, 2017, Respondent again provided payroll information and identifying for the Union the per diem designation. (JE30.)

The parties continued to meet within the Union's guidelines regarding the schedules of representatives from both sides as well as months where holidays and religious obligations made scheduling more difficult. As the chart below demonstrates, the parties met on a regular basis and the Union never objected scheduling of negotiations until the final 90 days of 2017, when Jasinski was seriously injured.

| Meeting | Follow Up Meeting | Days Between |
|--------------------|-------------------------------|---------------------|
| March 10, 2016 | June 1, 2016 | 83 days |
| June 1, 2016 | June 30, 2016 | 29 days |
| June 30, 2016 | August 23, 2016 | 54 days |
| August 23, 2016 | September 20, 2016 | 28 days |
| September 20, 2016 | October 26, 2016 | 36 days |
| October 26, 2016 | November 28, 2016 | 33 days |
| November 28, 2016 | January 10, 2017 | 43 days |
| January 10, 2017 | February 7, 2017 | 28 days |
| February 7, 2017 | May 5, 2017 | 87 days |
| June 5, 2017 | July 13, 2017 | 69 days |
| July 13, 2017 | August 7, 2017 | 25 days |
| August 7, 2017 | November 5, 2017 ³ | 90 days |

(JE40.)

V. Notices

On April 15, 2016, Respondent posted a notice reminding employees that Union business should not be conducted on Putnam Ridge’s time during working hours. (JE5.) Nonetheless, employees openly discussed the Union in the facility. For instance, Lorraine O’Connor admitted employees talk about the Union in the breakroom. (Tr. 57-81.) Up to January 2018, employees openly discussed the Union in the breakrooms. (Tr. 84.) Employees approached Ms. McTighe

³ The ALJ used November 5, 2017, the date of Mr. Jasinski’s serious auto accident as the timeframe for analysis.

after each meeting and discuss the Union. (Tr. 86.) Employees have never been disciplined for speaking about the Union. (Tr. 60, 86.)

On April 7, 2017, Administration posted a notice confirming its non-harassment policy in the facility. (JE6.) This policy existed before the Union organizing drive and is contained in the employee handbook. (R1.) The policy makes no reference to the Union. (Tr. 89-90.) Respondent reinforces its policy by regularly conducting in-service training attended by the employees. (Tr. J2, 88.) The purpose of these in-service training sessions by an outside vendor is to prevent harassment in the workplace. (Tr. 52.)

VI. Catherine Thomas

When Ms. Thomas moved out of the area with her family in December 2013, she secured another full time job as a CNA at another healthcare facility. At that time, she made a written request to continue to work per diem. (Tr. 98.) She put the request in writing that she wanted to go per diem to put the facility on notice. (Tr. 127.) Respondent, in 2014, agreed to continue to employ Ms. Thomas as per diem without any loss of pay. Respondent's handbook also set forth the requirements to maintain per diem status. Ms. Thomas worked one day a week; however, there were times when she did not work because she had taken an extra shift at her full-time job (Tr. 123.) She had two days off from her other job and she would work one of those days with Respondent. (Tr. 98.)

In February of 2014 until 2017, while off-duty, Ms. Thomas worked private duty for a resident at Putnam Ridge. (Tr. 110-11.) The Director of Nursing (DON) had granted permission for Ms. Thomas to take out this resident privately. (Tr. 111.)

In January 2015, Ms. Thomas commenced studies in pursuit of a degree and reduced her availability to work at Putnam Ridge to one day every other week. (Tr. 98.) When she worked

one day every other week the schedule varied. (Tr. 98.) She would call the scheduler and tell her what day she had free. (Tr. 98-99.) The amount of advance notice she would give the scheduler varied from a day to a week. (Tr. 99.) She would sometimes call, sometimes text, or sometimes just tell a co-worker to tell the scheduler (Tr. 99.) Ms. Thomas testified that it was possible that there were times she did not work every other week with Respondent. (Tr.123.)

According to Ms. Thomas, she was told by the DON in December of 2015 that a lot of the per diems were not meeting their per diem requirements and that she and Ms. Pottinger were going to have a meeting regarding it. (Tr. 104.) In January of 2016, when Ms. Thomas was at the facility on private-duty, she stopped by to see the DON and was told the meeting had not occurred yet. The last time Ms. Thompson ever contacted anyone at Putnam Ridge to ask about per diem work was February or March of 2016 when she left a message for Ms. Pottinger asking the status of the meeting. Ms. Thomas did not put anything in writing asking why she was not being given per diem hours. (Tr. 125.)

Since 2011, Respondent has consistently maintained its policy setting forth the requirements for per diem employees (as set forth above), where twenty-three CNAs, including Ms. Thomas, were removed from the per diem ranks due to their failure to comply with the policy. There was no evidence that Ms. Thomas was singled out or targeted or treated any different from the other per diems. (JE25.) It is undisputed that she was not terminated but rather removed herself from the ranks according to policy.

LEGAL ARGUMENT

I. Putnam Ridge Did Not violate the Act by Giving Merit Increases.

e. Respondent Did Not Have a Past Practice of Giving 2-2.5% Merit Increases.

It is well established that where an employer does not change existing conditions or alter the status quo, it does not violate the NLRA. *Raytheon Network Centric Sys.*, 365 NLRB No.

161, slip op. at 7 (2017) (citing *NLRB v. Katz*, 367 U.S. 736 (1962)). “An established past practice can become part of the status quo. Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the *employer simply followed a well-established past practice.*” *Ibid.* Regardless of the circumstances under which a past practice was developed, “an employer’s past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.” *Id.* at 16.

In determining whether the employer has made a unilateral change or instead is following a past practice, the inquiry is whether the employer made “a substantial departure from past practice” that “materially varied in kind or degree from what had been customary in the past.” *Raytheon*, slip op. at *8–9. In *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011), the employer “granted no wage increases in . . . three of the five years immediately preceding the 2007 wage decision at issue.” The D.C. Circuit questioned “[h]ow then could the Board derive any established pattern or practice of the company granting annual wage increases.” It held the NLRB erred in not basing its findings on the record as a whole, because if it had done so, “it could not possibly have concluded that annual across-the-board wage increases were an established condition of employment.” *Ibid.* According to the court:

To disregard other evidence by stating while two consecutive years of wage increases might be enough to establish a term of employment when that span constitutes 100 percent of the record evidence, it will not suffice when the employer's history dates back further. As statisticians know, a sample must be representative for inferences drawn from it to be valid. And we know that one way to reduce errors is to increase the size of the sample. In determining whether an established practice existed at Arc Bridges, the Board was not free to discount evidence contradicting the practice. *Id.* at 1240.

The same Circuit Court has also expressed doubt as to whether an employer who retains total discretion to deny raises would be in violation of section 8(a)(1) and (5) if it chose to discontinue raises during collective bargaining. *See Acme Die Casting v. NLRB*, 93 F.3d 854, 857 (D.C. Cir. 1996).

Here, the ALJ erred in concluding that Respondent had a past practice of granting 2% to 2.5% merit increases. The record is clear that in 2007, 2008, 2009, and 2010 there were no merit raises. (JE38.) In January 2013, the Respondent voluntarily and based upon its sole discretion gave an across the board increase ranging from \$.050 to \$1.00 per hour to all employees. In conjunction with the arbitrary and discretionary increases, the policy and personnel manual had no formal structure for merit increases. The amount of Respondent's increases have always been discretionary, and as set forth below, the only operating document, the employee handbook, specifically does not codify a set percentage or amount but instead refers to evaluations and salary adjustments: "Putnam Ridge's goal to maintain wage levels for its Employees that are competitive with those paid for similar work by other Employees in our community. The wage and salary program is reviewed on an annual basis."

The employee handbook served as the document that sets forth Respondent's policies and procedures. Ms. Hansen utilized it to become familiar with the policies and procedures prior to her introduction into the contract negotiations. Upon review, Ms. Hansen found (what Mr. China admitted) that Putnam Ridge did not have a formal wage policy. Mr. China recognized that Respondent's employee handbook did not provide any guaranteed wage increases. On September 16, 2016, Respondent responded to the Union that there is no formal wage policy at the facility. (JE21.) Employees admitted that they had received a zero increase for a number of years. In 2013, employees were informed that they would receive a general increase ranging

from \$.50 to \$1.00 based on market conditions. Employees received this increase. (JE25.) In the Fall of 2015, employees received another wage adjustment based on market conditions. (JE25.)

The ALJ disregarded the history of parties, including years without increases, years with sizable increases, and years with nominal increases by focusing solely upon the Union's position that the merit increases were between 2% and 2.5% exclusively, to come to the erroneous conclusion that the NLRA was violated. The ALJ even quotes and relies upon a letter from the employer stating: "We instituted a policy to review all of our employees on an annual basis and provide merit increases. We realized that these increases were not enough and failed to address the decisions of the prior ownership in not to provide increases for three (3) years." It is impossible to review the memo in which Respondent states it determines the amount of the increases, great or small, and then declare that 2.5% increases are set in stone.

f. Respondent Properly Implemented Its Proposal Because the Union Rejected the Proposal and Demanded Status Quo.

On January 5, 2017, Respondent proposed merit wage increases between 0 and 1.75% for 2017 for employees based on a number of factors including overall work performance for the previous year. (JE31.) Respondent opened this proposal for discussion with the Union even though Respondent should have been permitted to determine the percentage of increase, Respondent still notified the Union of its proposal and sought input as is evident from the January 5, 2017 Letter. (JE31.) The letter to the Petitioner clearly states: "[W]e are willing to meet and confer regarding these potential increases."

Although the parties discussed Respondent's January 6th letter at the start of the January 10, 2017 bargaining session, the Union never submitted a counter proposal. Instead, Ms. Hansen simply stated that the Union would never agree to Respondent's proposal. The Union had no further comment on this issue and the parties returned to traditional negotiations.

The Union never asked to return to Respondent's proposal for wage increases for 2017. It is also significant that the Union failed to respond to Respondent's proposal in writing because it was Ms. Hansen's past practice to do so. Faced with the Union's silence coupled with its response of rejection across the table, the parties were at an impasse. Respondent properly implemented its proposal.

This situation was previously addressed by the Board in *Am. Packaging Corp.*, 311 NLRB 482 (1993). In *American Packing Co.*, this Board found that the respondent did not violate Section 8(a)(5), (3), and (1) by withholding the 1990 fiscal year-end bonus from the employees and that it did not violate Section 8(a)(5) and (1) in bargaining with respect to the bonuses. American Packing had for many years prior to the certification of the Union paid its employees a fiscal year-end bonus based on production. *Id.* at 482-84. American Packing realized during the course of negotiating the initial agreement that the time the bonus was customarily paid was approaching. *Id.* at 482. American Packing suggested that the bonus be deferred. *Ibid.* The union rejected that offer stating the bonus was earned and should be paid using the past formula. *Ibid.* After American Packing stated there was no set formula, the union stated the handbook should be followed. *Ibid.* The union rejected all other attempts to bargain over the bonus. *Ibid.* American Packing then determined there would be no bonus for union and non-union employees. *Id.* at 482-83. The ALJ determined that American Packing did not violate the Act. *Id.* at 483. This Board concurred stating:

We agree with the judge's finding that the Respondent did not violate the Act in failing to pay a year-end bonus for 1990. The foregoing establishes that the amount of the bonus was discretionary and that in insisting that the bonus be paid according to the "formula" or method used in the past, the Union waived the right to bargain about any other method of determining the amount of the bonus. Further, however suspicious the fact may be that the Respondent arrived at a zero

figure in calculating the amount of the bonus when it had never done so prior to the employees' selection of the Union, the credited testimony establishes that the Respondent followed procedures used in the past and legitimately determined that no year-end bonus was earned for 1990. *Ibid.*

Likewise, In *Stone Container Corp.*, 313 NLRB 336 (1993), the Board addressed the union's ULP charge where the employer, having given wage increases of 3-6% in each of the preceding five years, denied an increase to employees at a plant where it was engaged in negotiations with a newly certified union. *Id.* at 340. Seven days before the increase was customarily paid, the employer told the union that it would not grant increases that year. *Ibid.* The NLRB found that the company had "satisfied its bargaining obligation" by informing the union in advance of its decision, reasoning that "wage increases here were annually occurring events, and thus bargaining over the amount could not await an impasse in overall negotiations." *Id.* at 336.

In *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998), the union objected that it was not given notice or the ability to negotiate the annual COLA adjustments being discontinued. Alltel, while not specifically informing the union that the increase would be discontinued, apprised the union during negotiations for the parties' initial collective bargaining agreement that no wage increases would be forthcoming. *Id.* at 1350. The Board rejected the union's allegations of violations of the Act, specifically finding "that during negotiations it articulated to the Union that no wage increases would be forthcoming and this served as sufficient advance notice that it intended to discontinue the annual cost-of-living wage increase normally given in December and January. It was then incumbent on the Union to request to negotiate the discontinuance of the annual cost-of-living wage increase. The evidence shows that this did not occur." *Id.* at 1356.

The ALJ ignored these prior rulings of the NLRB to find violations of the Act. Case law required a finding that the Union waived its right to bargain by refusing to discuss Respondent's

proposal for merit increases; that Respondent was not required to wait for impasse of the entire negotiation before implementation; and that Respondent satisfied its bargaining obligation by providing notice to the Union.

As a final matter, the ALJ erred in deciding that the changes to merit pay violated the NLRA because of the timing of the changes. This decision appears to be based on the mistaken finding that the merit pay changes occurred one month after the election of the Union. (Decision at 29.) As previously footnoted, the ALJ made an inadvertent error and confused the dates of both the election and Respondent's implementation of merit pay. Respondent did not implement the change a month after the election as suggested in the opinion, but over a year later when the Union failed to provide a counter proposal. The ALJ's application of *Dixie Broadcasting Co.*, 150 NLRB 1054, 1076 (1965) and reliance on the timing of the action is, therefore, erroneous.

II. Catherine Thomas Was Not Unlawfully Terminated and There Was No Anti-Union Animus Directed at Her.

g. The ALJ Misconstrued the Facts.

Once again, the employee handbook provided guidance on the policies in the facility. It specifically established minimum requirements to maintain full-time, part-time, and per diem status.

Ms. Thomas started as a full-time CNA until she moved out of the area and requested change of her employment status from full-time to per diem. Ms. Thomas opted to accept another full-time job closer to her new home. (Tr. 98.) Putnam Ridge essentially became her second job. In December 2013, as a per diem, she worked one day a week. When she chose to return to school, she made herself less available for additional hours at her second job with Respondent.

Putnam Ridge accepted Ms. Thomas's desire to decrease her hours, yet continued to employ her as a per diem CNA at the same rate she earned as a full time employee, \$14.68. By her own admission, Ms. Thomas worked less and less hours. She admitted that there were times she did not work for a number of weeks. Instead, she opted to go to school and engage in private-duty work.

Under Respondent's policy, per diems were *required* to commit to one weekend per month. Failure to meet the standard resulted in termination, which had been consistently enforced. Since 2011, Putnam Ridge has consistently maintained its policy where twenty-three CNAs, (JE25), including Ms. Thomas, were removed from the per diem ranks because of failure to comply with policies. There was no evidence that Ms. Thomas was singled out or targeted or treated any different from the other per diems. Indeed, Ms. Thomas admitted that she has not been terminated by Putnam Ridge. (Tr. 96.)

The ALJ erred in concluding that Ms. Thomas was unlawfully discharged. Ms. Thomas herself testified that she was never let go and never discharged. (Tr. 96-97.) Contrarily, the undisputed facts show it was Ms. Thomas who stopped requesting per diem work from Respondent. Ms. Thomas testified that she went from working full time, dropping to per diem averaging one day every other week, although she could not say she worked consistently every other week. (Tr. 123.) Ms. Thomas testified that the practice was for Ms. Thomas to call in and see if there was work available for her. (Tr. 98.) Ms. Thomas was always the person to initiate contact with the facility to see if work was available. (Tr. 99.) Ms. Thomas stated she stopped calling to see if there was per diem work in February or March 2016. (Tr. 125.) Ms. Thomas also testified that she was very active in the prior attempt at unionization in 2012 and never had any adverse action taken against her.

Ms. Thomas' status and remained in limbo and has admittedly made no attempt to return to her per diem status as other employees have done. The last time Ms. Thomas ever contacted anyone at Putnam Ridge to ask about per diem work was February or March of 2016. Ms. Thomas did not put anything in writing asking why she was not being given per diem hours, nor her willingness to work. (Tr. 125.) Indeed, her new job coupled with her additional studies make her availability understandably limited.

In spite of all these facts, the ALJ nevertheless concluded that Ms. Thomas was discharged. Even after Ms. Thomas admitted she had been very active in the prior unionization attempt (Tr. 106), no disciplinary or retaliatory action was taken against her in the first Union organizing attempt. During the second Union organizing drive, Ms. Thomas, by her own admission, was rarely in the facility. Furthermore, Ms. Thomas, a per diem who was not meeting the per diem requirements, is the only employee who is claiming any retaliatory action was taken against her.

h. Counsel for General Counsel Failed to Meet Its Burden of Proof.

To establish its prima facie case, Counsel for General Counsel was required to show that Ms. Thomas engaged in protected activity, Respondent knew about it, and Respondent acted because of antiunion animus. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 503 (7th Cir. 2003). Counsel for General Counsel's burden is one of persuasion, while Respondent was required to provide rebuttal evidence under the preponderance of evidence standard. *Tic-The Indus. Co. v. NLRB*, 126 F.3d 334, 337 (D.C. Cir. 1997); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). The ultimate burden of persuasion remains with Counsel for General Counsel. *Schaeff, Inc. v. NLRB*, 113 F.3d 264, 267 n.5 (D.C. Cir. 1997) (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994)).

Here, the ALJ mistakenly found that Thomas's protected activity was **one conversation** Ms. Thomas had with Pottinger in which Ms. Thomas responded to Pottinger's request for a "chance" on behalf of Respondent that Respondent was given a chance in 2012 (referring to the prior attempt at unionizing). Based upon this single verbal exchange in which no substantive discussion over the terms and conditions of employment were discussed, the ALJ determined that the Union had met the burden of proof that the employee engaged in protected activity in 2015, as well as in 2012. The ALJ made this determination without any legal citation that a single vague conversation met the standard of protected activity and in spite of there being no evidence of any retaliation for Thomas's 2012 union activities.

The ALJ then jumped into the second stage of the analysis finding anti-union animus because Ms. Thomas was not scheduled for a per diem shift on the day of the election. The ALJ made this conclusion even though Ms. Thomas testified that the conversation with Pottinger took place a couple of days before the election. (Tr. 97.) Furthermore, Ms. Thomas testified that the same day as the conversation with Pottinger, she spoke to Lita, who told Ms. Thomas they were fully staffed on election day. (Tr. 100.) The Union offered no proof that Pottinger had communicated with Lita about Ms. Thomas's conversation or had in any way instructed Lita not to provide Ms. Thomas with work. The ALJ then accepted two levels of hearsay to determine that the facility was understaffed on the day of the election to bolster the Union's otherwise unsubstantiated position.

Although Ms. Thomas testified that her practice was to call Lita seeking per diem days approximately every two weeks, she made only three subsequent inquiries regarding per diem work to the DON. (Tr. 103-104.) Ms. Thomas never followed up in writing or continued to ask about work even though she was still working in Putnam Ridge for a private client-with

Respondent's permission-about once a week. Lastly, Ms. Thomas failed to meet Respondent's per diem weekend requirements.

The ALJ, to find anti-union animus disregarded all of the following undisputed evidence:

1. Ms. Thomas was never disciplined for her 2012 union activity;
2. Ms. Thomas was given raises and paid at her final rate for per diem work;
3. Respondent permitted Ms. Thomas to be privately employed within the facility, which lasted until the resident became too ill and discontinued employing her in 2017;
4. None of the other participants in the conference with Ms. Thomas and Pottinger have alleged to have been retaliated against; and
5. Ms. Thomas no longer met the requirements for per diem status and was eventually removed with over 21 other per diems from the list.

In rejecting a similar retaliation claim, *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 965 (7th Cir. 1988), the Court asked: “[I]f Stor-Rite acted with retaliatory intent, then why did it delay the full impact of its retaliation until months [after the protected conduct]?” Courts have repeatedly held that “timing alone is insufficient to show a pretextual motive.” *Green v. Franklin Nat. Bank of Minn.*, 459 F.3d 903, 916 (8th Cir. 2006). The reason is well-established: “Suspicious timing may be just that -- suspicious -- and a suspicion is not enough to [give rise to an inference of causation].” *Loudermill v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011). Unless the time period is “very close,” typically no more than a few days, an assertion of “suspicious timing” fails. *Id.* at 314-315; *Wallace v. Sparks Health Sys.*, 415 F.3d 853, 859 (8th Cir. 2005) (citing *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001)).

In this case, the ALJ would have to believe that Respondent laid in wait from 2012 until 2016 to extract revenge on Ms. Thomas for her union activities in 2012. Even then, Ms. Thomas, who had literally no involvement in the union campaign in 2015, because she was rarely in the

Facility, was singled out for retribution. Not only is there no evidence of anti-union animus, the theory is completely incredible. The only explanation for this determination by the ALJ would be reliance on the impermissible theory that general opposition to unionization is the equivalent of anti-union animus in a “discharge” case, which is prohibited. “An unlawful motivation in the discharge of an employee cannot be based solely on the general bias or anti-union attitude of the employer, whether proved or conceded, but must be established by other facts in each individual case.” *Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 744 (5th Cir. 1979).

III. Putnam Ridge Did Not Refuse to Meet the Union and the Parties Met at the Agreed-Upon Intervals.

In finding that Respondent violated the Act by not meeting with the Union from August 1, 2017 to November 5, 2017, the ALJ completely overlooked the parties’ pattern and practice of meetings and scheduling. As set forth above, the parties had an agreement and established practice of scheduling meetings up to ninety days apart. Indeed, there were times in the parties’ bargaining history where there were similar gaps in time between meetings: 83 days from March 10, 2016 to June 1, 2016; and 87 days from February 7, 2017 to May 5, 2017.

As to the reason for the delay from August 1, 2017 to November 5, 2017, Mr. Jasinski explained there were numerous Jewish Holidays during that time frame, which complicates the schedule for not only the specific days the holidays fall on, but for days surrounding the holidays as well. For example in 2017, the following Jewish Holidays were observed: Rosh Hashanah on September 21st-22nd; Yom Kippur on September 30th; Sukkot on October 5th-11th; Shmini Atzeret on October 12th; Simchat Torah on October 13th. Work that could not be completed during the holidays gets pushed to the remaining available days in the week or month. Additionally, Mr. Jasinski indicated that both he and China had busy calendars where it was often difficult to get

matching availability. There is no evidence refuting these facts. Instead of relying upon them, the ALJ disregarded the undisputed evidence in determining Respondent violated the NLRA.

IV. Putnam Ridge Provided All Relevant Documents in Response to the Union's Information Requests.

An Employer's obligation to furnish information to a union extends only so far as to enable the union to understand and intelligently discuss issues raised in bargaining and properly perform its duties. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 866 (9th Cir. 1977). The standard is whether there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities." *Bohemia Inc.*, 272 NLRB 1128, 1129 (1984). "If the information requested has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be a ULP. *San Diego Newspaper Guild*, *above* at 867; *see Columbus Products, Co.*, 259 NLRB 220, 223 (1981) (holding union had all of the information it needed for grievance hearing without forcing Employer to disclose additional information it had requested).

When a union's information request concerns data about employees or operations other than those represented by the union, or data on financial, sales, and other information, the union bears the burden of establishing the relevance of such information. *Bohemia*, *above* at 1129. "[T]he showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union. . . . To hold otherwise would be to give the union unlimited access to any and all data which the Employer has." *San Diego Newspaper Guild*, *above* at 868; *see also NLRB v. Wachter Construction*, 23 F.3d 1378, *rev'g* 311 NLRB 215 (1993); *NLRB v. Hawkins Construction Co.*, 857 F.2d 1224 (8th Cir. 1988), *denying enforcement to* 285 NLRB 1313 (1987).

To that end, an employer does not commit a ULP if the union fails to explain the reasons for a request that appears to be irrelevant to the Employer. *Adams Insulation Co.*, 219 NLRB 211, 214 (1975) (holding Employer not required to furnish information absent “a specific request accompanied by the reasons and basis upon which such request was founded”); *see also Stb Inv’rs, Ltd.*, 326 NLRB 1465, 1467 (1998) (dismissing claim against employer because “[t]he Union did not specify in its request why it wanted the Medicare and Medicaid cost and reimbursement information, and neither the complaint nor the motion for summary judgment explain why the Respondent had an obligation to provide the information”), *dismissing review*, 1999 WL 1215775 (D.C. Cir. 1999).

Furthermore, an employer also does not commit an unfair labor practice if it refuses to produce information requested in bad faith. In *Wachter Construction*, for instance, the Eighth Circuit held that the union acted in bad faith with purposes to harass the Employer when it asked for information about jobs the employer intended to subcontract. The true intent of the request was to force the Employer to do business only with union subcontractors. *Id.* at 1387-1388. Because the union contract did not require the employer to use union subcontractors, the union’s request was improper. *Ibid.*

The Ninth Circuit used *Wachter Construction* as an opportunity to “remind the Board” that employers are not responsible for producing all information requested by unions. *Id.* at 1388. To that end, the Board has held that an employer need not respond to information requests that are “purely tactical” or “submitted solely for purposes of delay.” *ACF Industries, LLC*, 347 NLRB 1040, 1042-1043 (2006) (holding union’s request for detailed information about employee census information, COBRA rates, insurance coverage and claims, and employee contributions was solely for purposes of delay); *cf. Southern California Gas Co.*, 342 NLRB 613

(2004) (holding Employer need not respond to union's request for information that relates to safety complaint filed with governmental agency).

Moreover, an employer is not obligated to furnish requested information in the exact form requested by the union. *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949). Rather, “[i]t is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining.” *Ibid.* (holding employer may orally furnish information to union, even if union requested information be providing in a “written list”). In a similar vein, a union cannot succeed on a ULP claim when the union itself failed to accept the information presented. In *NLRB v. Robert S. Abbott Publishing Co.*, 331 F.2d 209, 209-210 (7th Cir. 1964), the union alleged that the Employer failed to substantiate its claimed inability to grant its employees wage increases. The Employer offered the union the same means the Employer itself had of reviewing its finances. *Id.* at 212. The union rejected these avenues of investigation, which “raise[ed] some doubt as to the sincerity of the demands themselves” and beg the question “of whether the demands by the union were for information or to publicize, embarrass or humiliate the Employer, to the jeopardy of its credit standing and public prestige.” *Ibid.*

Finally, when the union requests records in general terms, as a matter of necessity the Employer must make the initial selection of records to be produced. *Food Service Co.*, 202 NLRB 790, 805 (1973) (“It seems to be perfectly clear that where, as here, the request for access to company records is made in general terms, the company, of necessity, must make the initial selection of the books and records to be produced for inspection. . . Undeniably, the Union is not entitled to rummage through the Company's records to determine for itself which ones should be made available to it for inspection.”).

The NLRB examines an employer's obligation to supply information on a case-by-case basis, the rule is not per se, and in each case the Board must determine whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation on the other party to produce it. *White-Westinghouse Corp.*, 259 NLRB 220 (1981). Here, Respondent provided voluminous documentation to the Union including:

1. The employee handbook (JE14);
2. Payroll roster (JE14);
3. Work schedules (JE14);
4. Total cost to Employer for benefits provided in 2014 and 2015 (JE14);
5. Annual and monthly cost of health insurance plans (JE14);
6. Healthcare plans (JE14);
7. Employee increases from October 1, 2011 through 2015 listing names, job titles, rates of pay, wage increases, hire, and termination (JE25);
8. Gross amount paid for health insurance was provided for years 2014, 2015 and 2016 (JE25);
9. Overtime hours worked for 2014 and 2015 (JE25);
10. 2014 cost report (JE27); and
11. Payroll information and identifying for the Union the per diem designation (JE30).

While the Union objected to the format and organization of the information provided, it was provided with a significant amount of documentation. The Union was able to make a comprehensive economic proposal touching on a variety of items based upon the information it received. Furthermore, at no point in the negotiations did Respondent take the position that the Union's proposal was unaffordable; rather, Respondent's position was that the Union's economic proposal was unrealistic. The cost was easily calculated to be an increase of 70% based upon an 18% across the board raise. It would increase the minimum starting salary to \$15.00 per hour, which even legislative efforts have recognized the impact of and as a result have gradually implemented the change over a number of years. It would add pension costs, increases in paid time off, and increases in health and welfare benefits. The clear purpose in the rough calculation

of the 70% increase was to illustrate the outrageous nature of the demand, not to invite the Union to completely open up Respondent's books and justify access to information that is irrelevant.

Furthermore, much is devoted in the ALJ's decision to information requests about use of agency workforce. In support of his decision, the ALJ cited to *Marathon Petroleum Co.*, 366 NLRB No. 125 (July 18, 2018); however, the ALJ also found that Respondent should have provided information regarding the use of agents even though the case acknowledges that "information requested pertaining to subcontracting agreements, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance." The ALJ had also previously recognized that Respondent was not inclined to use agency employees and would prefer using its own employees, so agency employees were not an issue.

The information the Union sought was irrelevant and need not be provided to the Union for the Union to effectively bargain. The continued requests were nothing more than a fishing expedition to gain access to financial information the Union was not entitled to or alternatively dissatisfaction with the way the information was presented.

V. The April 2016 Notice Posting Did Not Violate the Act and the ALJ Relied Upon an Outdated Standard to Hold That It Did.

An employer violates the NLRA *only* when it maintains workplace rules or policies that reasonably tend to chill employees in the exercise of their rights. *See The Boeing Co.*, 365 NLRB No. 154 (2017). When evaluating a facially neutral workplace rule that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the NLRB will evaluate two things: "the nature and extent of the potential impact on NLRA rights"; and the "legitimate justifications associated with the rule." *Boeing*, slip op. at *4.

Rather than rely upon *Boeing*, the ALJ improperly relied upon *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which *Boeing* overruled in part, to hold that the April 2016 memo violated the NLRA. As an initial matter, the ALJ erred in holding that the April 2016 memo was invalid under *Lutheran* because it explicitly restricted Union activity. That is incorrect. The April 2016 memo was explicitly limited to an employee's own working time during work hours: it limited the conduct of union business only "while on Putnam Ridge's time" and "during work hours." So this case is readily distinguishable from *Upmc, Upmc Presbyterian Shadyside*, 366 NLRB No. 142 (Aug. 6, 2018), where the rule prohibited "off-duty employees who are permissibly on the Respondents' property from engaging in Section 7 activity." It's distinguishable from *Valley Special Needs Program, Inc.*, 314 NLRB 903, 913 (1994) for the same reason: the direction in that case precluded employees from engaging in union activity during their own time. Respondent's April 2016 memo did no such thing.

Furthermore, *Hyundai Am. Shipping Agency, Inc. & Sandra L. Mccullough*, 357 NLRB 860, 873 (2011), is inapplicable because it relies upon the "reasonably construe" standard in *Lutheran* that the NLRB explicitly overruled in *Boeing*. In other words, the NLRB found the policy overbroad under the outdated standard. A proper evaluation under *Boeing* proves that under the proper standard, the April 2016 notice was lawful because it did not prohibit or interfere with the exercise of NLRA rights. Both the maintenance *and* application of the memo is lawful.

To be sure, in February 2015, prior to the Union's second attempt at organizing the employees, Putnam Ridge revised its employee handbook. It continued its policies addressing solicitation and harassment, its specific definition of employees, hours for each classification,

wage policy, and evaluations. As is appropriate, Respondent reinforced its policies with in-service training sessions attended by the employees.

Respondent continued to comply with these policies when it posted the April 2016 notice. That notice, in addition to the April 2017 notice that the ALJ properly found was lawful, simply reminded the employees of Respondent's policies and expectations. There was no obligation to meet with the Union to discuss the policies and practices, which existed prior to the Union. The notices were innocuous, as evidenced had no impact on the employees. The April 2016 memo in particular dealt with what is expected of employees at work. (JE5.) The employee handbook already addressed this situation. In accordance with the plain language of the April 2016 notice, employee free time remains their time. Ms. O'Connor and Ms. McTighe admitted that they discussed the Union in the facility and no one was ever disciplined. Not a single witness testified that he or she felt inhibited or that there was any chilling effect as a result of the April 2016 notice. Employees, including Ms. Thomas, also engaged in demonstrations outside the facility with no one being disciplined.

Accordingly, the ALJ erred when it held Respondent violated Section 8(a)(1) of the NLRA by posting the April 2016 notice.

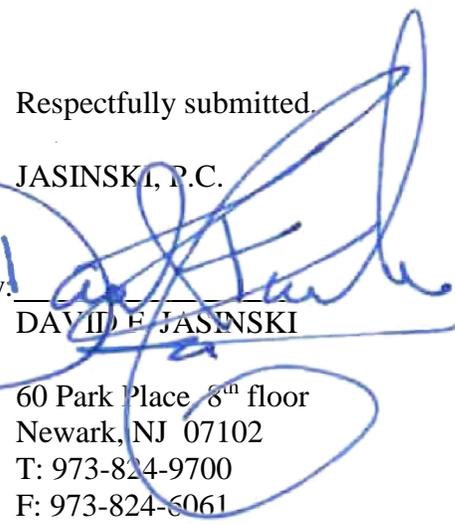
CONCLUSION

For the foregoing reasons, Respondent respectfully urges the NLRB to reject the decision of the ALJ holding Respondent violated the NLRA and to dismiss all of the allegations in the Complaint.

Dated: February 22, 2019

Respectfully submitted,

JASINSKI, P.C.

By: 

DAVID E. JASINSKI

60 Park Place 8th floor
Newark, NJ 07102
T: 973-824-9700
F: 973-824-6061

Attorneys for Respondent

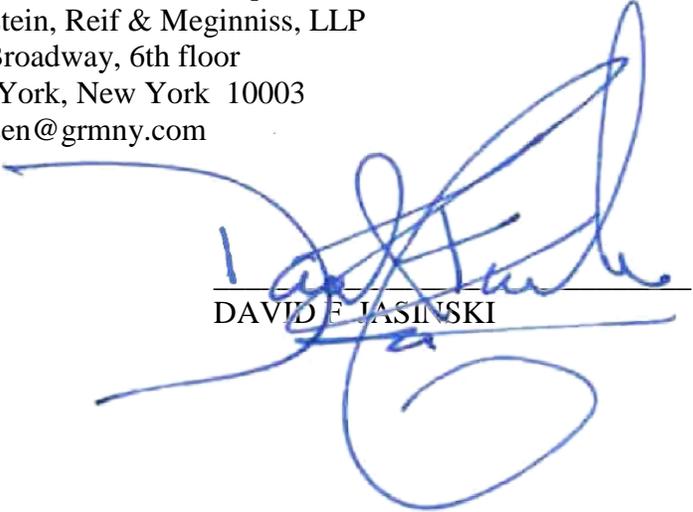
CERTIFICATION OF SERVICE

The undersigned certifies that on February 22, 2019, he caused a true and accurate copy of the foregoing brief and accompanying exceptions to be served upon the following individuals via electronic mail.

Joane Si Ian Wong, Esq.
National Labor Relations Board, Region 2
26 Federal Plaza, Suite 3614
New York, NY 10278-0104
Joane.Wong@nlrb.gov

Katherine H. Hansen, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th floor
New York, New York 10003
khansen@grmny.com

Dated: February 22, 2019



DAVID F. JASIŃSKI