

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**ATLANTICARE MANAGEMENT LLC D/B/A  
PUTNAM RIDGE NURSING HOME**

**and**

**Case Nos.     02-CA-177329  
                  02-CA-193189  
                  02-CA-198370  
                  02-CA-206253  
                  02-CA-210245**

**1199 SEIU UNITED HEALTHCARE WORKERS EAST**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJD**

Dated at New York, New York  
This 29<sup>nd</sup> Day of March 2019.

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**I. STATEMENT OF THE CASE**

The Administrative Law Judge Benjamin Green (“ALJ”) accurately set forth the Statement of the Case in his decision dated December 12, 2018. Respondent obtained an extension to file exceptions from January 9 to February 22, 2019. Thereafter, Respondent timely filed 56 exceptions to the ALJ’s entire findings of facts and law. The Board granted Counsel for General Counsel’s extension of time request to file the answering brief and cross exceptions from March 8 to March 22, 2019. Thereafter, the Board granted the Charging Party’s extension of time request to file the answering brief and cross exceptions from March 22 to March 29, 2019. It is the General Counsel’s position that the Administrative Law Judge’s Decision and Recommended Order (“ALJD”) was correct as to matters of law and fact, except for issues to which the General Counsel filed cross exceptions, and that the Board should reject Respondent’s exceptions and adopt the ALJD with modifications argued in the cross exceptions brief.

**II. STATEMENT OF THE FACTS**

The facts have been completely and accurately set forth in the Administrative Law Judge’s Decision (“ALJD”) except on issues to which the General Counsel is filing cross exceptions, which includes the ALJ’s failure to find overall bad faith bargaining and award bargaining expenses to the Union.

### **III. ARGUMENT**

#### **A. The ALJ Correctly concluded that Catherine Thomas was terminated for unlawful reasons and ordered the proper remedy. (Exceptions 3, 4, 11-25, 51)**

##### **(1) The ALJ correctly decided that Catherine Thomas was unlawfully terminated.**

The ALJ's decision is fully supported by the record. He found there was protected concerted and union activity, and the Respondent had knowledge of it. Thomas was an active and open Union supporter in 2012. Although she was not present at the facility during the 2015 organizing campaign because she was working as a per diem CNA, she spoke up at a meeting in which Pottinger asked employees to give the Respondent "another chance," to which Thomas challenged Pottinger by indicating that the Respondent had already been given a chance in 2012. He found "specially targeted anti-union animus" based on the timing. Respondent denied her the opportunity to work on election day, even when the facility was short staffed, which suggests that it did not want a union supporter to vote. The record also shows Respondent's assertion of a per diem requirement was pretextual. Based on the record, the ALJ correctly found evidence of a prima facie case that Respondent effectively discharged Thomas by discontinuing her per diem shifts because of her union activities.<sup>1</sup>

##### **(2) Respondent's Exceptions are Without Merit**

At the outset, it is important to note that the evidence regarding Thomas' discharge was practically uncontested by Respondent. Respondent did not call its manager witnesses to the stand. Most importantly, it failed to comply with the General Counsel's subpoena to produce daily work schedules that would enlighten the judge regarding the availability of per diem work for Thomas,

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<sup>1</sup> ALJD 25:1 - 26:30.

whether other per diems worked holidays and weeks, and were or were not similarly treated. The managers were completely in the control of the Respondent's subpoenaed documents, which custodian of the record owner Greenberger readily admits, were accessible at a call's notice to the record keeping company.<sup>2</sup>

Contrary to Respondent's exceptions 3 and 17, the ALJ correctly credited corroborating hearsay testimony about staffing on December 4, 2015, the day of the Union Election. The record shows the only time that Thomas was ever told she was not needed was when she requested to work on the day of the election. She spoke to Ferrera, the scheduler, in person a couple of days before and asked to work on December 4, 2015. Ferrera told Thomas that the nursing home was fully staffed that day. However, when Thomas was there to vote on December 4, she went to some of the units and observed that the nursing home was not fully staffed. In fact, Thomas was told by her friends Maria Galoppe and Irena Gjuraj who work at the C Unit that they were short staffed - that each unit had only three CNAs. Thomas testified that fully staffed meant having four CNAs in each unit.<sup>3</sup>

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<sup>2</sup> Tr. 349-357; 370-374. Takes a few days to two weeks to for payroll company to respond with information Respondent asks for. See Tr. 354. Respondent could have whatever payroll information it needed from the payroll company to put in a spreadsheet. See Tr. 374.

<sup>3</sup> Tr. 100-103. Thomas' testimony about her out of court conversation with Maria Galope and Irena Gjuraj was properly admitted by the ALJ because Respondent failed to provide documents pursuant to paragraph 9 of Counsel for General Counsel's trial subpoena that sought the schedules of CNAs for the period December 2014 to the present. None was provided prior to the trial. On the second or third day of trial the only responsive daily schedule provided was for the month of January 2015. At some point before the last day of trial, some days in the month of January and February 2016 were provided. (See CP4 and CP6). No other months was provided. Daily schedules showed the actual number of CNAs working in each unit during a particular shift and specifically who they were. Without the subpoenaed schedules, and specifically the daily schedules, Counsel for the General Counsel was precluded from documentary evidence for the day of December 4, 2015 to ascertain whether the Employer was short staffed. Based on Respondent's failure to produce subpoenaed documents, hearsay testimony of witnesses should be admitted. See *Bannon Mills*, 146 NLRB 611, 614 n. 4, 633-634 (1964); and *American Art Industries*, 166 NLRB 943, 951-953 (1967), *affd.* in pertinent part 415 F.2d 1223, 1229-1230 (5th Cir. 1969) (permitting the General Counsel to present secondary evidence, including employee testimony, regarding the number of employees in the unit in lieu of employee payroll and other records that the respondent failed to produce). See also *Roofers Local 30 (Associated Builders and Contractors, Inc.)*, 227 NLRB 1444, 1449 (1977) (permitting the General Counsel to introduce secondary evidence, including hearsay testimony, regarding the identity of those who were present during and participated in the alleged incidents, in lieu of subpoenaed evidence not produced by respondent).

Contrary to Respondent's exception 4, ALJ correctly concluded that Thomas testified she asked once a month about her per diem status. The underlying record shows Thomas testified that she repeatedly contacted the Respondent in an attempt to get work as a per diem like she always had. Thomas testified as follows. She called Flood in December, after the union election, and Flood told her again that they have not had the meeting yet. Then in January 2016, Thomas stopped by Flood's office to follow up on the status of managers' meeting. Again, Flood told Thomas that they have not had the meeting. In about February or March 2016, Thomas left a voicemail message for Pottinger inquiring about whether the meeting with Flood had taken place about the per diem staff, and that she had been told she would not be scheduled until after Flood and Pottinger had this meeting. However, Pottinger never returned her call. Thereafter, Thomas stopped contacting the facility.<sup>4</sup>

Contrary to Respondent's assertion in exceptions 11, 12 and 13, the ALJ specifically recognized Thomas' outspoken union support during the Union's 2012 organizing drive and that she was not as active in 2015 because she was working as a per diem and was not present at the facility as often. Nevertheless, she spoke up at the one instance when she and her co-workers were pulled into a meeting with manager Pottinger where she asked for "another chance." In response, Thomas challenged her and said the Employer was already given a chance in 2012.<sup>5</sup> Therefore, the ALJ found undisputed evidence that Thomas engaged in protected union activity and that

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<sup>4</sup> Tr. 103-105, 125.

<sup>5</sup> Tr. 108-109.

Respondent was aware of it.<sup>6</sup> Just because Thomas was not disciplined in 2012 is not evidence that Thomas was not retaliated in 2015.<sup>7</sup>

Contrary to Respondent's assertion in exception 14, Thomas' response to Pottinger's request for another chance was protected activity as the whole discussion was about whether employees should or should not vote for the Union.

Contrary to Respondent's assertion in exception 15, 16, 17, and 18, and based on longstanding Board law, the ALJ correctly concluded that Respondent's assertion that (1) Thomas was not qualified as a per diem to work in December 2015 was pretextual; (2) it was appropriate to consider secondary hearsay evidence in light of Respondent's failure to produce probative subpoenaed documents;<sup>8</sup> and (3) Respondent's discharge of Thomas was motivated by anti-union animus.<sup>9</sup>

First, as found by the ALJ, the record does not support that Thomas was asked to work weekends and/or holiday and that she failed to do so. Furthermore, Respondent failed to produce subpoenaed documents, which the ALJ correctly noted, such as "daily schedules for 2015 which might have shown that she did not work certain weekends and holidays (even if there was no evidence that she declined such assignments). Those same daily schedules could also have shown whether per diem CNAs failed to work weekends/holidays and, like or unlike Thomas, continued to receive per diem work. Accordingly, it is appropriate to infer that Thomas did work weekends/holidays or even if she did not, she was treated disparately."<sup>10</sup> The ALJ further found,

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<sup>6</sup> ALJD 25:24-32.

<sup>7</sup> The record shows that in 2012, the workers withdrew their petition and gave Respondent a chance. Thereafter, Respondent gave two across the board wage increases in order to stay competitive.

<sup>8</sup> See Fn. 3 above.

<sup>9</sup> ALJD 25.

<sup>10</sup> ALJD 26:9-14.

as is supported by the record, “Respondent also preferred to use per diem staff than agency employees, but continued to use agency staff after it stopped assigning per diem shifts to Thomas. Further, Pottinger and Flood never had their meeting to address the alleged ‘problem’ of per diems failing to work weekends and holidays (suggesting that this was not actually a problem at all).”<sup>11</sup> Therefore, Respondent’s claim that the per diem requirement was the reason for letting Thomas go is pretextual. Pretextual reasons are evidence of animus.<sup>12</sup> The Board have long held other considerations as indications of animus, including the close timing between discovery of the employee’s protected activities and the discipline;<sup>13</sup> the existence of other unfair labor practices that demonstrate that the employer’s animus has led to unlawful actions;<sup>14</sup> or evidence that the employer’s asserted reason for the employee’s discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless.<sup>15</sup> Also, the Board may infer discriminatory motivation from either direct or circumstantial evidence and the record as a whole.<sup>16</sup> Indications

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<sup>11</sup> ALJD 26: 17-21.

<sup>12</sup> See, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014) ; *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966); *Cincinnati Truck Center*; 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6<sup>th</sup> Cir. 1997); *Pacific FM, Inc.*, 332 NLRB No. 67 (2000); *Fluor Daniel*, 311 NLRB 498 (1993); *Sunbelt Enterprises*, 285 NLRB 1153 (1987); *In re NACCO*, 331 NLRB No. 164 (2000).

<sup>13</sup> See, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card); *Bethlehem Temple Learning Center, Inc.*, 330 NLRB No. 166 (2000).

<sup>14</sup> See, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4<sup>th</sup> Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees).

<sup>15</sup> See fn. 10, above.

<sup>16</sup> *Tubular Corporation of America*, 337 NLRB No. 13 at slip op 1 (2001).

of discriminatory motive may include expressed hostility toward the protected activity<sup>17</sup> and abruptness of the adverse action.<sup>18</sup> Here, Thomas was not given work beginning the day she spoke up at the meeting a few days before the election. Abundant record also shows Thomas asked to be assigned work just as she had always done, but was told there was no work for her even when the facility was short staffed or was staffed with more expensive agency employees. Her discharge, along with the other unfair labor practices that include a reduction in wage increases less than a month after employees unionized, demonstrate Respondent's actions were motivated by animus.

Respondent's exception 23 is also without basis because Respondent did not produce evidence of internal discussions about per diem employee qualifications, and it did not produce any evidence to counter the General Counsel's evidence that Thomas had consistently worked as a per diem employee for two years until she spoke up for the Union. Therefore, it is within the ALJ's authority to draw a negative inference that Thomas was treated differently.

Contrary to Respondent's assertion in Exception 24, the record is devoid of evidence that other individuals were removed from Putnam Ridge staff for failing to maintain per diem status. This information was subpoenaed by the General Counsel but Respondent did not produce them.<sup>19</sup>

It is based on Respondent's unsupported assertions and willful commitment not to produce the subpoenaed daily work schedules that was easily producible,<sup>20</sup> that the ALJ concluded, "the evidence failed, in rather dramatic fashion, to show that the Respondent had any legitimate non-discriminatory reason for ceasing the assignment of per diem shifts to Thomas the day of the

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<sup>17</sup> *In Re Orland Park Motor Cars, Inc.*, 333 NLRB No. 127 (2001).

<sup>18</sup> *Dynabil Industries, Inc.*, 330 NLRB No. 47 (1999).

<sup>19</sup> Tr. 354-374.

<sup>20</sup> Tr. 374.

election and thereafter.” In so finding, the ALJ correctly concluded that there is no need to conduct a mix-motive analysis to determine if the Respondent would have discharged her regardless of her union activities because Respondent’s stated reasons for discharging Thomas are purely pretextual.<sup>21</sup>

Second, the ALJ cited well-established case law to support reliance of secondary hearsay and relied on Thomas’s hearsay testimony in finding that the facility was understaffed with CNAs on December 4, 2015.<sup>22</sup> The record shows “upon examination regarding the subpoenaed records, neither Greenberger nor Jasinski were able to explain why the Respondent failed to produce the daily schedules.”<sup>23</sup> Therefore, Respondent’s exception 22 is also without basis because it never put forth a legitimate business reason regarding Thomas no longer qualifying as a per diem employee, as discussed by the ALJ in the Respondent’s failure to produce subpoenaed daily schedules that were completely within its control.<sup>24</sup>

Lastly, contrary to Respondent’s exceptions 19, the record does not show that Thomas was at the facility once a week after she was discharged from her per diem position. Neither does the record show that the ALJ ignored that Thomas stopped requesting per diem work. Rather, the ALJ found that she repeatedly asked for work for two to three months to no avail before she stopped asking for work.<sup>25</sup>

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<sup>21</sup> ALJD 26:4-30.

<sup>22</sup> ALJD 7, fn. 6.

<sup>23</sup> ALJD 6:46 to 7:1-2.

<sup>24</sup> ALJD 26:9-14.

<sup>25</sup> ALJD 7:22-32 through 8:1-4.

Contrary to Respondent's exception 20, which claims Thomas was barely in the facility in 2015, yet she is the only employee claiming retaliation for union organizing or protected activity. The ALJ correctly found Thomas' outspoken support for the Union in 2012, and her continued outspoken support for the Union in 2015 when she was in the facility, and specifically when she was present at mandatory union meetings. There is no evidence that other employees in 2015 were as outspoken as Thomas.<sup>26</sup> Respondent cannot assert a fact not in evidence.

In exception 21, Respondent did not explain the relevance of Respondent's permitting Thomas to provide private services to a Putnam Ridge resident after December 4, 2015. The ALJ was aware of it and noted this fact in his ALJD.<sup>27</sup>

Based on the foregoing, contrary to Respondent's exception 25, the ALJ's decision was grounded in record evidence and case law to decide that Respondent discharged Thomas in violation of Sections 8(a)(1) and (3) of the Act. The ALJ also ordered the proper remedy, as described in the remedy section of his decision.<sup>28</sup>

**B. The ALJ correctly concluded that Respondent reduced the percentage of bargaining unit employees' annual pay raise without notice to or bargaining with the Union and in retaliation to their union activities. (Exceptions 1, 2, 26-37)**

**(1) The ALJ correctly concluded that Respondent reduced the percentage of bargaining unit employees' annual pay raise without notice to or bargaining with the Union.**

Contrary to Respondent's unsubstantiated assertions in its exceptions 27, 28, 29, 31, the record amply supported the ALJ's finding that Respondent had a long-standing past practice of

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<sup>26</sup> ALJD 25:4-32.

<sup>27</sup> ALJD 7:29-31.

<sup>28</sup> ALJD 36:31-45.

granting annual merit wage increases in accordance with a fixed formula. Respondent's own personnel records demonstrated this as well as abundance of employee testimony.<sup>29</sup> Respondent did not even deny it had a practice of granting the formulaic merit wage increases of "[a]ppraisal ratings of good, very good, and outstanding resulted in merit wage increases of 2%, 2.25%, and 2.5%, respectively."<sup>30</sup> Respondent cannot now raise exceptions when it blatantly failed to provide any evidence, witness testimony or otherwise, and when its own personnel files supported the ALJ's findings of fact.

Respondent also did not provide any legal support for its assertion in its exception 35 that the ALJ disregarded the Employee Handbook, which did not set forth a percentage or table for salary evaluation.<sup>31</sup> The evidence adduced at trial clearly showed that Respondent's longstanding past practice of a set percentage of wage increase based on an employees' evaluation rating filled the void that was left silent by the Employee Handbook. Further, it is worth noting that in a memo to *all employees* on January 15, 2013, Respondent specifically stated that it had "*instituted a policy* to review all of our employees on an annual basis and provide merit increases."<sup>32</sup> (Emphasis added) This contradicted Jasinski's representation in his letter dated September 16, 2016 to the Union stating that Respondent had no formal wage policy.<sup>33</sup>

Also contrary to Respondent's hollow assertions in its exceptions 30, 32, 33, and 34, the Respondent's own January 15, 2013, memorandum to its employees stated that it would continue

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<sup>29</sup> GC3, GC4, GC5, and GC14; Tr. 30-31, 33-35; 63-67; GC8(a)-(c), GC9(a)-(c), GC10(a)-(c), GC11(a)-(d), GC12(a)-(c); and JE21.

<sup>30</sup> ALJD 27: 37-38.

<sup>31</sup> See GC14 (bargaining unit employees performance evaluations and corresponding pay raise based on ratings from 2013 through 2018).

<sup>32</sup> JE38 (Respondent memo dated January 15, 2013 regarding wage and salary adjustments)

<sup>33</sup> JE21.

its annual review and merit increases and that “these increases were not enough,” and aimed to address the prior ownership’s failure to provide increases for three years.<sup>34</sup> Thereafter, evidence shows that CNAs and others received varying degrees of raises consistent with Respondent’s January 15, 2013 memorandum that explained it was “increasing [its] hire rates and providing an across-the-board increase reflecting the industry and the years of service its employees have given Putnam Ridge.”<sup>35</sup> Therefore, based on record, which included the performance evaluations of bargaining employees and employee testimonies, the ALJ was not confused but accurately concluded that the timing of the reduction of the merit increase (January 1, 2016) was implemented less than a month after the workers unionized (December 4, 2015).

Respondent gave no notice to or an opportunity to the Union to bargain about any changes to the percentage of annual pay raises. Joseph Chinaea, the VP of the nursing home division at the Union who was the union representative assigned to negotiate the first contract with Respondent, testified that the Union found out about the reduction to the merit wage increase from bargaining unit employees as they were getting their annual reviews and pay raises in 2016. Chinaea brought this to Respondent’s attention at bargaining on March 10, 2016.<sup>36</sup> Chinaea asked Respondent what was going on. Jasinski said he would look into it.<sup>37</sup> Prior to learning about the pay cut from employees, the Union received no oral or written communication from the Respondent about this

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<sup>34</sup> JE38.

<sup>35</sup> GC21.

<sup>36</sup> Although Chinaea did not specifically say which day, it is more likely than not that it happened at the parties’ first bargaining session on March 10, 2016, because the Union filed its first unfair labor practice charge on May 27, 2016, a few days before the parties’ second bargaining session. See GC1a.

<sup>37</sup> Tr. 161-162. Respondent produced no documents in response to paragraph 13 of General Counsel’s trial subpoena for “All documents showing communications with the Union regarding the change in the percentage of pay raise associated with performance ratings on employee evaluations for the period October 1, 2015 to the present.” Respondent admitted that there were none.

change. In response to the General Counsel's trial subpoena for any communication with the Union about the change in pay raise, Jasinski said there were none that exists besides the January 6, 2017 letter, which was more than a year after the change had been implemented.<sup>38</sup> It was fait accompli.

There is no dispute that Respondent never informed the Union about change in the percentage of annual pay raise that became effective on January 1, 2016. Then months later, in a letter dated January 6, 2017, Jasinski proposed to China to increase wages based on performance evaluations from zero to 1.75% - more than a year after it had already been implemented.<sup>39</sup> A few days later, at the January 10, 2017 bargaining session, the Union responded to Respondent's letter. China asked Jasinski to explain what Respondent was proposing. Jasinski read the letter to the Union. Then an employee on the negotiation committee, likely Denise Awrytis, said aloud that the range of increases had never been from zero to 1.75 percent, and that it had always been 2.00 to 2.50 percent, to which every employee in the negotiation committee nodded their heads in agreement. *In response, Greenberger admitted again that the raise has always been based on performance.*<sup>40</sup> Then China said the Union's position is to keep it the same. Union counsel Katy Hansen said there was a pending ULP charge about the Respondent's unilateral change related to the decrease in wage rates, and that consistent with other conversations about this at prior bargaining sessions, the Union was not going to agree with anything different than what had been the status quo prior to the unlawful unilateral change.<sup>41</sup>

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<sup>38</sup> Tr. 18, 431. (Greenberger testified that nothing exists in response to paragraph 13 of GC's trial subpoena besides the January 7, 2017 letter.)

<sup>39</sup> Tr. 158; JE31.

<sup>40</sup> Tr. 160.

<sup>41</sup> Tr. 159-160, 213, 310-312. Respondent claim that the Union did not offer a counterproposal misconstrues the facts. Hansen clearly articulated the Union's position, which was that the Respondent must restore the status quo.

After the unionizing drive, as the evidence demonstrated, Respondent reduced the percentage of wage increase for all bargaining unit employees. The ALJ's decision reflect that he fully considered this evidence.<sup>42</sup> Therefore, contrary to Respondent's assertion in exception 26, the ALJ correctly concluded that Respondent violated Sections 8(a)(1) and (5) of the Act by decreasing the annual percentage of pay raise from 2.5 % to 2.0%, to 1.75% to 0% without first giving notice or an opportunity to the Union to bargaining about it.

All three cases cited by the Respondent in its exceptions brief supports the ALJ's finding in this case. In *American Packing Co.*,<sup>43</sup> the employer was proposing to do something different with employee compensation before implementation. Here, Respondent proposed to bargain about a change to compensation *after* implementation. Analogous to the union's position in *American Packing*, here, the Union asked Respondent to maintain the status quo. Similarly, in *Stone Container Corp.*,<sup>44</sup> the Board found the company satisfied its bargaining obligation because the union was informed in advance of its decision not to grant wage increases. Here, Respondent reduced employees' annual wage increase for one year before telling the Union it wanted to bargain about the change. Likewise, in *Alltel Kentucky, Inc.*,<sup>45</sup> the employer advised the union that no wage increase would be forthcoming in advance of the implementation.

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<sup>42</sup> ALJD 27:37-22.

<sup>43</sup> 311 NLRB 482 (1993).

<sup>44</sup> 313 NLRB 336 (1993).

<sup>45</sup> 326 NLRB 1350 (1998).

**(2) The ALJ correctly decided that Respondent reduced the percentage of bargaining unit employees' annual pay raise in retaliation to their union activities, and Respondent's exceptions are without merit.**

Respondent's exceptions 36 and 37 are not based on any facts as there was no evidence that Respondent proposed a wage increase in 2016 so the ALJ could not have, and he did not, conclude a wage increase proposal was motivated by anti-union animus. Rather, as discussed above, Respondent proposed a wage increase in January 2017 – a year after it was implemented. the ALJ's decision found the evidence such as contemporaneous unfair labor practices that included the discharge of Thomas, as well as timing of the employees' vote for the Union on December 4, 2015, and Respondent's reduction of the annual percentage of employees' merit wage increase, sufficiently established a prima facie case that Respondent reduced employees' annual merit pay raises because they elected the Union as their bargaining representative. The record supports, as the ALJ so found, Respondent admits that it had no plans to reduce employee compensation until employees elected the Union as their bargaining representative.<sup>46</sup> Respondent offered no explanation for changing the percentage of its merit pay increases shortly after employees voted for union representation. Therefore, the ALJ correctly found Respondent violated Sections 8(a)(1) and (3) by reducing its formula for providing annual merit wage increases.<sup>47</sup>

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<sup>46</sup> ALJD 6:8-10; 29:10-11; Tr. 674-675.

<sup>47</sup> ALJD 30: 2-11.

**C. The ALJ correctly concluded that Respondent violated Sections 8(a)(1) of the Act by posting the April 15, 2016 memorandum. (Exceptions 8-10)**

The Supreme Court has long held that “[n]o restriction may be placed on the employees’ right to discuss self-organization among themselves unless the employer could demonstrate that a restriction is necessary to maintain production or discipline.”<sup>48</sup> The Board’s precedents continue to follow this long recognized right of employees to communicate in the workplace, which includes the right to discuss with each other hours, wages and other work place terms and conditions of employment.<sup>49</sup> As such, the Board has held that, “[a]n employer violates Section 8(a)(1) of the Act when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.”<sup>50</sup> Where this is the case, maintenance of the rule may be deemed unlawful even absent any evidence of enforcement.<sup>51</sup>

Here, on April 15, 2016, after employees voted for union representation, Respondent posted a rule that said, “Union business should not be conducted on Putnam Ridge property or during work hours.”<sup>52</sup> It is undisputed that this rule was posted prominently by the time clock where everyone punches in to work everyday, and in the employee dining room. The record establishes that prior to this April 15, 2016 memo, there was no restrictions on the topics that employees could discuss.<sup>53</sup> However, a month after bargaining began, Respondent issued this

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<sup>48</sup> *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956) (citing *Republic Aviation*, 324 U.S. 793 (1945)).

<sup>49</sup> *Parexel Int'l., LLC*, 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996).

<sup>50</sup> *Hyundai America Shipping Agency*, 357 NLRB 860, 861 (2011), enfd. in relevant part, 805 F.3d 309 (D.C. Cir. 2015); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

<sup>51</sup> *Lafayette Park Hotel*, above at 825.

<sup>52</sup> JE5.

<sup>53</sup> Tr. 44-46, 71, 287.

memo to specifically prohibit “union business.” Timing of Respondent’s conduct can be evidence of animus, as discussed above.

Furthermore, this rule is unlawful on its face and the ALJ correctly found this rule does not implicate the Board’s recent decision in *The Boeing Company*, 365 NLRB No. 154 (2017). The Board has long held that rules barring protected activities during “working hours” are presumptively invalid because “that term connotes periods from the beginning to the end of work shifts, period that include the employees’ own time,” which is non-working time.<sup>54</sup>

The Board has also long held that rules that ban solicitation in working areas during non-working time to be invalid.<sup>55</sup> Here, Respondent’s rule broadly bans solicitation on “Putnam Ridge property.” Employees could most definitely understand the rule to ban solicitation in work areas during non-work time because the rule actually bans solicitation in work areas and “during working hours,” which, as discussed, includes non-working time. Therefore, this rule is impermissibly over broad and violates Section 8(a)(1). Respondent’s contention that its solicitation rule in its employee handbook somehow made lawful the promulgation of the April 15, 2016 rule is unpersuasive because there the ban was during working time and in resident care areas. The ALJ correctly concluded the rule ran afoul of longstanding Board policies and violated Section 8(a)(1) of the Act.<sup>56</sup>

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<sup>54</sup> *Our Way Inc.*, 268 NLRB 394 (1983).

<sup>55</sup> *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295 (2011).

<sup>56</sup> ALJD 22:28-45.

**D. The ALJ correctly concluded that Respondent failed to provide presumptively relevant information to the Union, and he was within his authority to order the production of said documents.<sup>57</sup> (Exceptions 5, 38-43, 45-46, 52)**

Pursuant to Section 8(a)(5) of the Act, an employer has the statutory obligation to provide on request, relevant information that a union needs for the proper performance of its duties as collective-bargaining representative.<sup>58</sup> The Board has also held that an employer's unreasonable delay in furnishing information "is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all."<sup>59</sup> Delays that are unaccompanied by a legitimate excuse are generally unlawful.<sup>60</sup> The Board evaluates the reasonableness of an employer's delay in supplying information based on the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information.<sup>61</sup>

Where a union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and a respondent must provide the information. In such instances, the employer has the burden of rebutting that presumption and establishing lack of relevance.<sup>62</sup> With respect to such information, the union is not required to show the precise relevance of the requested information to particular bargaining unit issues.<sup>63</sup> Where the requested

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<sup>57</sup> Note that Respondent did not except to the ALJ's conclusion that Respondent violated Sections 8(a)(5) and (1) of the Act by being delayed in providing relevant information. ALJD 32:1-3.

<sup>58</sup> *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

<sup>59</sup> *Woodland Clinic*, 331 NLRB 735, 736 (2000) citing *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

<sup>60</sup> See, e.g., *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part, 432 F.3d 69 (1st Cir. 2005) (3-month delay); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (2-month delay); *Woodland Clinic*, supra at 737 (7-week delay).

<sup>61</sup> *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in part and remanded 394 F.3d 233 (4th Cir. 2005); *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

<sup>62</sup> *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *AK Steel Corp.*, 324 NLRB 173, 183 (1997).

<sup>63</sup> *AK Steel*, supra; *A-Plus Roofing*, 295 NLRB 467, 470 (1989).

information pertains to employees or matters outside the bargaining unit, a union has the burden of demonstrating the relevance of such information.<sup>64</sup>

The standard for relevancy in either situation is the same: “a liberal discovery type standard.”<sup>65</sup> The information sought need not be dispositive of the issues between the parties but must have some bearing on it,<sup>66</sup> or it must be shown that it would be of use to the union in carrying out its statutory duties and responsibilities.<sup>67</sup> Thus, where a union is obligated to establish relevance, it need only demonstrate a reasonable belief, based upon objective facts, that the requested information is relevant.<sup>68</sup> In fact, the requested information need only be “of use” or has a mere probability of relevancy to the union in fulfilling its statutory duties.<sup>69</sup> Even absent a showing of probable relevance, an employer is obligated to furnish the requested information “where the circumstances put the employer on notice of a relevant purpose which the union has not spelled out.”<sup>70</sup>

### **(1) Respondent Failed to Provide Presumptively Relevant Information**

Promptly, just three weeks after the Union was certified and before bargaining began, the Union requested information relevant and necessary for it to formulate bargaining proposals. The

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<sup>64</sup> *Dodger Theatrical Holdings*, 347 NLRB 953, 967 (2006).

<sup>65</sup> *Acme Industrial*, *supra* at 437.

<sup>66</sup> *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991).

<sup>67</sup> *Wisconsin Bell Co.*, 346 NLRB 62, 64 (2005).

<sup>68</sup> *Disneyland Park*, 350 NLRB 1256, 1258 (2007)

<sup>69</sup> *Bentley-Jost Electric Corp.*, 283 NLRB 564, 567 (1987); *Acme Industrial*, *supra* at 437.

<sup>70</sup> *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011)(quoting *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000), *enfd. sub nom. KLB Industries, Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012).

information requested in the January 6, 2016 and April 19, 2016 letters, were presumptively relevant information, with the exception of agency employee information and Medicaid cost reports, because they concern the terms and conditions of employment of bargaining unit employees.

The record establishes that Respondent did not dispute their relevancy. In all the written communications between the parties, Respondent's chief negotiator, Jasinski, never said the requested documents were irrelevant or otherwise not producible. Neither did Respondent claim that at bargaining. Rather, Jasinski had always said at bargaining that he did not have them with him at bargaining but that they would be produced.<sup>71</sup> Therefore, the ALJ correctly determined Respondent violated Section 8(a)(5) by failing to do so, as discussed in detail below.<sup>72</sup>

#### **(a) Employment Information**

The Union requested employment information of bargaining unit employees, including the job duties (paragraph 1 of January 6 letter) and specific employment details such as date and amount of all wage increases and bonuses (paragraph 2(d) of January 6 letter), overtime hours worked (paragraph 2(f) of January 6 letter), and financial incentive received for opting out of employer-paid health insurance (paragraph 2(i) of January 6 letter) (also known as "no frills"). They are presumptively relevant information and Respondent is obligated to produce them.<sup>73</sup>

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<sup>71</sup> Tr. 156-157, 308-309.

<sup>72</sup> ALJD 31:4-10; 31:46 through 32:1-5.

<sup>73</sup> Information regarding employee overtime, and in particular, overtime information worked by individual employees has been found to be presumptively relevant. *U.S. Information Services*, 341 NLRB 988 (2004) (citing *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434, 436 (1988) (total hours and overtime hours worked "by each unit employee" is presumptively relevant)).

**(b) Payroll Information**

The Union requested gross annual payroll (paragraph 3 of January 6 letter) and payroll roster (paragraph 6 of January 6 letter).<sup>74</sup> They are presumptively relevant information and Respondent is obligated to produce them.

The record also establishes that information related to payroll details sought by the Union were readily producible. When Greenberger took the stand as the custodian of the record, he testified that he called Respondent's payroll company, Absolut Facilities Management, for payroll information related to Catherine Thomas on the day he testified and such was produced *on the same day*. Therefore, when the Union asked for gross annual payroll for the years 2014 and 2015 (paragraph 3 of January 6 letter) as well as payroll roster for each bargaining unit employee (paragraph 6 of January 6 letter), it could be produced quickly.

Respondent cannot be rewarded by game-playing with its selective production of information in summary spreadsheets in response to the Union's request for payroll information. In paragraphs 3 and 6 of the Union's January 6, 2016 information request, the Union asked for documents "showing or reflecting" gross annual payroll and for payroll roster for bargaining unit employees, respectively. China had said at bargaining what it needed in payroll information, which is the dollar amount each bargaining unit employee earned and hours worked so the Union could compute the cost to Respondent.<sup>75</sup> In order to compute the cost to the Respondent, it is obvious that the information would have to contain the name and title of the employee, the number of hours that employee worked and earned in each of the years the Union had requested so that the Union can ascertain what minimum pay and increases to propose for each of the classifications, as

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<sup>74</sup> JE12 (Union's January 6, 2016 letter requesting information)

<sup>75</sup> Tr. 256, 259, 265-267.

well as other terms and conditions of employment. China testified that the gross amount in payroll Respondent paid for the year 2014 and 2015, which was produced on December 13, 2016, 11 months after it was requested, was not complete.<sup>76</sup> In that same production, Respondent had produced two spreadsheets: one with *gross wages* for each employee, entitled “Putnam Gross Wages 2016”; and another with the general “*standard hours per week*” for each employee, entitled “Putnam Ridge Employee Increases from 10-1-2011.”<sup>77</sup> However, Respondent would not provide a spreadsheet that would contain both wages earned by an employee and the number of hours actually worked by that employee. None of the spreadsheets containing employee hours actually provided the actual hours they worked. Yet, it was at the Respondent’s fingertips because, as Greenberger had testified, Respondent just had to tell its payroll company the information it needed in a spreadsheet and it could be produced shortly thereafter.<sup>78</sup> Respondent is not privileged to provide whatever payroll summaries it wishes because the Union is entitled to production of payroll records for each bargaining unit employee and not relegated to summaries of the employer’s choice.<sup>79</sup> By so doing, Respondent did not meet its obligation to provide the requested information that the Board had recognized that Respondent must produce.<sup>80</sup>

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<sup>76</sup> Tr. 150; JE25 (December 13, 2016 letter with documents from Jasinski to China)

<sup>77</sup> JE25

<sup>78</sup> Tr. 349-357; 370-374. Takes a few days to two weeks to for payroll company to respond with information Respondent asks for. See Tr. 354. Respondent could have whatever payroll information it needed from the payroll company to put in a spreadsheet. See Tr. 374.

<sup>79</sup> See *McGuire Steel Erection, Inc. & Steel Enterprises, Inc.*, 324 NLRB 221, 223-224 (1997) (employer unlawfully refused to provide additional payroll records on the grounds that it already provided the union with other types of payroll records); *National Grid USA Service Co., Inc.*, 348 NLRB 1235 (2006) (union was entitled to copies of invoices containing base line information, not just unverified summaries made by employer); *Merchant Fast Motor Line*, 324 NLRB 563 (1997) (union was not required to accept an employer’s declaration as to profitability or summary financial information provided by the employer); *McQuire Steel Erection, Inc.*, 324 NLRB 221 (1997) (summaries of payroll records deemed not sufficient to meet a respondent’s statutory obligation).

<sup>80</sup> General Counsel had alleged the “payroll roster” requested by the Union were delayed in being provided. According to the documents produced to the Union and China’s testimony, the production was also incomplete. But, as discussed

### (c) Benefits Information

The Union requested summary plan descriptions showing all fringe benefits (paragraph 5 of January 6 letter); total cost for each of the benefits: health, dental, vision, life insurance and pension/retirement (paragraph 10 of January 6 letter); and health insurance information (paragraph 17 (b) through (k) of January 6 letter). The Union was entitled to the requested information concerning the costs of health insurance to Putnam Ridge and covered employees in order to analyze them and to compare the cost of its plans to the Respondent's current plan in an effort to achieve the Union's bargaining objective of "putting together a proposal that could work for both parties."<sup>81</sup> Although Respondent provide gross insurance costs on December 13, 2016, the Union specifically asked for "the total cost for *each* of the following ... health, dental, vision, life insurance and pension and retirement" for calendar years 2014 and 2015. What Respondent provided was not what the Union requested and the information that was provided was not helpful. Because Respondent neither objected to their relevance nor said they will not be produced, Respondent is obligated to provide this presumptively relevant information in the form that the Union requested – a breakdown of the costs not a sum total of all of them, which is pretty apparent on its face.

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later, the information is so stale at this time that there is no difference how the GC will plead this in the Complaint – not provided or delayed.

<sup>81</sup> *One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237 (2010) (union was entitled to health insurance plan information).

#### **(d) Work Schedules**

The Union requested work schedules for nursing unit and non-nursing unit bargaining unit employees (paragraph 7 and 8 of January 6 letter) and “unit schedules of staffing levels – per shift/per unit for the past (4) four months (April 19, 2016 letter).

Work schedules, as it relates to bargaining unit employees, is presumptively relevant.<sup>82</sup> The record establishes that Respondent did not produce the work schedules that the Union had requested, which were daily work schedules that showed who worked and where that employee worked on that particular day. The fact that Respondent could and did produce, in a spreadsheet, a “master schedule” that showed generally who works and when that person is expected to work does not excuse its obligation to produce the information expected to be contained in a daily schedule showing what actually happened rather than what generally is expected to happen. The Union is entitled to production of schedules of work actually performed by employees and is not relegated to the monthly work schedules.<sup>83</sup>

The Union modified its request of schedules from more than two years (“from January 1, 2014 through the present”) in its January 6, 2016 letter, to just “the past four months” in its April 19, 2016 letter, presumably because master schedules were produced and limiting the volume of the document request would better the Union’s chance of getting the requested documents. Nonetheless, Respondent still has not produced all of those daily schedules. Even at trial, in response to the trial subpoenas, Respondent only produced the months of January and February 2016. This is conduct indicative of a recalcitrant determination not to produce readily available information.

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<sup>82</sup> *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008).

<sup>83</sup> See cases cited in footnote 79.

**(e) Ratio of Certified Nursing Assistants to Residents Information**

The Union requested the ratio of certified nursing assistants to residents (paragraph 9 of January 6 letter). Ratio of staff to patients is presumptively relevant information as it seeks to ascertain the work load of bargaining unit employees. Respondent never denied its relevance and must produce them.<sup>84</sup>

**(2) Respondent Delayed in Providing Presumptively Relevant Information**

The duty to timely furnish requested information is defined in terms of a reasonable good-faith effort to respond to the request “as promptly as circumstances allow.”<sup>85</sup> In evaluating the promptness of an employer’s response, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information.<sup>86</sup> Since “information concerning terms and conditions of employment is presumably relevant,” it must be “provided within a reasonable time, or, if not provided, accompanied by a timely explanation.”<sup>87</sup> Even a relatively short delay of two or three weeks may be held unreasonable.<sup>88</sup>

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<sup>84</sup> *Beverly California Corporation*, 326 NLRB 153 (1998), order enforced in part, vacated in part, 227 F.3d 817 (7<sup>th</sup> Cir. 2000) (staff to patient ratio presumptively relevant information and must be produced).

<sup>85</sup> *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). See also *Woodland Clinic*, 331 NLRB 735, 737 (2000).

<sup>86</sup> *West Penn Power Co.*, 339 NLRB 585, 587 (2003), citing *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4<sup>th</sup> Cir. 2005).

<sup>87</sup> *In Re W. Penn Power Co.*, supra at 597(citing *FMC Corp.*, 290 NLRB 483, 489 (1988)).

<sup>88</sup> See, e.g., *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995), enfd. 89 F.3d 692 (10<sup>th</sup> Cir. 1996) (two week delay unreasonable under the circumstances because the information sought was simple, close at hand, and easily assembled); *Aeolian Corp.*, 247 NLRB 1231, 1244 (1980) (three week delay unreasonable under the circumstances).

The Complaint alleges Respondent was delayed in providing information in paragraphs 2(d), 2(f), 5, 6, 7, 8 and 17(a) of the Union's January 6 letter.<sup>89</sup> While the record shows Respondent provided some information about three weeks after it received the Union's January 6, 2016 information request, what was provided were incomplete and much of the requested information have not been provided. The record clearly shows Respondent either did not produce the requested information or partially produced it 11 months after the request, on December 13, 14, and 20, 2016. Between January 26 and December 13, 2016 Respondent did not produce responsive information despite the Union's repeated oral and written requests.<sup>90</sup>

The record establishes that the requested information, while extensive, was neither complex, difficult, nor unavailable. Some of the information that were provided were provided more than 11 months after the Union had requested them, making them stale and substantially unreliable to understand the work situation of the bargaining unit and the cost of operation to Respondent. The Board had found two to three weeks to be unlawful.<sup>91</sup> In the instant case, Respondent's production well exceeded what the Board had found to be untimely production of requested information relevant and necessary for bargaining. Under the circumstance, an updated request and production is unquestionably necessary.

Respondent offered no reason for its delay in providing the information requested by the Union. Rather, the record shows Jasinski repeatedly told the Union that the information would be produced but kept failing to do so. Given the availability of the requested information, as explained by owner Greenberger, Respondent's delay in providing the relevant information the Union had

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<sup>89</sup> The Amended Consolidated Complaint also alleged paragraphs 6, 7 and 8 as being delayed in providing. CGC had made a motion in this brief to further amend the amended Consolidated Complaint to alleged these paragraphs as a failure to produce to conform to the evidence at trial.

<sup>90</sup> Tr. 156-157, 308-309; JE17, JE23, and JE29.

<sup>91</sup> See footnote 176.

requested on December 13, 14 and 20, 2016, was unreasonable in violation of Section 8(a)(5) of the Act.

Most significantly, the record demonstrates Respondent knew what needed to be produced. It is represented by Jasinski, a veteran contract negotiator at bargaining and an admitted 2(13) agent of the Respondent, who testified that he had for many years and currently still represents many nursing homes in negotiating new and successor contracts. In fact, the employees of many of the nursing homes he represents are also represented by Charging Party Union. Therefore, Jasinsky is neither new to the industry nor to this Union. The Union had asked for the same information in negotiations with Jasinski at other nursing homes. And Jasinsky had litigated on the non-compliance with the Union's information request by these nursing homes concerning these same types of documents, as had been alleged in this case, multiple times in the past 10 years.

In *Bristol Manor Health Care Center*, the Board granted the Acting General Counsel's motion for default judgment based on Respondent's non-compliance with a settlement agreement to produce, among other things, payroll records and work schedules.

In *Castle Hill Health Care Center*, the Board found the employer failed to provide or untimely provided, among other things, overtime hours and work schedules, identification of no frills employees, the employer's monthly premium cost to provide employee insurance, and documents showing employer's use of agency employees.

In *Alaris Health at Harborview*, the ALJ found the employer violated the Act by not providing information until three months after the union's initial information request, and five weeks after the Union's supplemental request; and failed to provide daily work schedules and health insurance information.

In *Harbor View Health Care Center*, 2010 WL 836558 (2010); *Palisade Nursing Center*, 2010 WL 2180789 (2010); *Bristol Manor Health Care Center*, 2010 WL 587338 (2010), the ALJ found the employers violated the Act by failing to provide and delayed in providing, among other things, overtime hours worked by *each* employee on a quarterly basis, identification of no-frills employees, work schedules, health insurance premium information, and use of agency employees.

The Union had requested the same information in this case as in the cases cited above. This history shows Respondent knew what the Union was requesting and the reasons for their relevance to bargaining, as well as its obligation to provide them in the form requested by the Union. They also show a pattern of willful disregard to comply with the law. The facts here enunciate the same conduct of delayed and incomplete production of relevant information requested by the Union in a timely manner that would allow bargaining to be fruitful.

This history and the record demonstrate Respondent knew the relevance of the requested information in paragraphs 2(d), 2(f), 5, 6, 7, 8 and 17(a) of the Union's January 6, 2016 letter, delayed in providing them by providing them more than 11 months after they were requested,<sup>92</sup> and those documents that were produced showed they were incomplete. Moreover, Respondent did not even offer an explanation for its delay in providing them, in violation of the Act.

### **(3) Respondent Failed to Produce Relevant Agency Employee Information**

The Board has held that non-unit information for which relevance must be demonstrated, the General Counsel must present evidence either that the union demonstrated the relevance of the non-unit information or that the relevance of the information should have been apparent to the respondent under the circumstances.<sup>93</sup> The Union's explanation of relevance "must be made with

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<sup>92</sup> See JE25, JE26, JE26a and JE27 (letters from Jasinski to China with documents)

<sup>93</sup> *Disneyland Park*, 350 NLRB 1256, 1258 (2007).

some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information.”<sup>94</sup> As for agency employee information, the Board has consistently found them relevant to a union’s representational function.<sup>95</sup>

In its January 6, 2016 information request, the Union requested, in paragraph 12, information on agency employees. Agency employees are nonunit employees who perform bargaining unit work on a temporary basis. Specifically, in paragraph 12, the Union requested the names of the agency employees, number of hours worked, rate(s) billed and job title for each agency employee provided to the Respondent from January 1, 2014 until the present.

The record establishes the Union told Respondent the relevance of its request for agency-use information. At bargaining meetings on July 13 and on August 7, 2017, there were discussions about agency use information. At the July 13 bargaining meeting, employee negotiators, the union’s chief negotiator Chinaea, and union counsel Hansen asked Jasinski and owner Greenberger about how much agency employees were being used and how much the Respondent was paying them. They explained that it would be a better use of Respondent’s money to pay for more full-time and part-time bargaining unit employees who are committed to the facility. Chinaea explained that the agency information would allow the Union to calculate how much Respondent could be paying more full-time employees. Hansen further explained that if the Respondent used the funds it paid agency employees and paid its unit staff more, the Respondent’s workforce would be more

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<sup>94</sup> Id. 350 NLRB at 1258 fn. 5.

<sup>95</sup> *Depository Trust*, 300 NLRB No 82 (1990)(wages and benefits of temporary employees); *United Graphics*, 281 NLRB 463 (1986)(names, addresses, wages, and fringe benefits of temporary workers performing same tasks as unit employees are relevant); *Aga Gas*, 307 NLRB 1327, fn 2 (1992)(Employer obligated to provide requested names, addresses, and dates of hire of non-unit employees where union’s need for the information in order to police its collective-bargaining agreement was self-evident and also had been explained); *Jaggars-Chiles-Stoval*, 249 NLRB 697 (1980)(union entitled to earnings information on assistant foremen and foremen who may, under the contract, perform unit work, “which of course would result in the loss of unit work for other employees.”).

stable and it may be more cost effective. In response, the record shows Jasinski said the agency information would be provided.

At the August 7, 2017 session, Hansen asked if Respondent had any documents with them and to produce the still outstanding information. Then Hansen, as well as bargaining unit committee members, specifically informed Respondent attorney Jasinski that the Union requested agency information because the Respondent was using agency employees to staff the facility. The bargaining unit committee members explained that during one of the weekends between July 13 and August 7, the facility was basically staffed by agency employees. Hansen also told Jasinski that the Union needed the agency information in order to prepare a financial proposal that may be acceptable to the Respondent.

Then by email on September 11, 2017, Hansen reiterated the Union's information request and specifically explained its need for agency information. Hansen explained that Respondent appears to be using agency employees to perform bargaining unit work so the Union needed to see the impact of agency use on the bargaining unit and the amount of money Respondent was willing to pay them. The Union received no response.

The record shows that the Union has met its burden of proving that the agency information is relevant and necessary for it to perform its representation functions. As the Union explained to Jasinski and Greenberger, the requested financial information related to the use of agency employees would assist the Union in shaping its financial proposals and in monitoring the Respondent's use of non-unit employees to perform unit work. Moreover, the relevance of such information should have been apparent to Respondent, and the record shows Respondent has never contended that these documents were not relevant. Although the Respondent agreed to provide the

information, it has not. Accordingly, the ALJ was correct to find Respondent failed to provide the requested agency information is a violation of Section 8(a)(5).<sup>96</sup>

**E. Respondent's Exception 44 asserts a plainly untrue fact that "[t]he ALJ incorrectly disregarded the fact that the Union did not make comprehensive noneconomic and economic proposals."**

The ALJ found the Union actually gave the Employer a fully negotiated contract as a sample standard contract in the industry – the League of Voluntary Hospitals and Homes of New York.<sup>97</sup> That contract contained both economics and non-economics. Then, as the ALJ noted, on September 12, 2016, the Union emailed Respondent a comprehensive proposal with economics and non-economic provisions.<sup>98</sup> This proposal was tailored to the Respondent.<sup>99</sup>

The Union's proposal had wage minimums for all classifications, across-the-board wage increase of 6% each year of the three-year contract, longevity pay per week that was dependent on the years of service (\$1 per week with 4 to 8 years of service; \$2 for 9 to 10 years; and \$3 for more than 10 years), 10 holidays plus 3 personal days, vacation pay, sick days, health benefits, pension benefits, and other "mini" funds.<sup>100</sup> The Union's proposal, though tailored to the Respondent, had minimums that were commensurate with minimums earned by employees with the same

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<sup>96</sup> ALJD: 31:20-29. Note that in *Mommouth Care Center v. NLRB*, 672 F.3d 1085 (2012), the Third Circuit affirmed the Board's finding that Respondent violated the Act by failing to provide agency usage information to the union, as well as by refusing to meet at reasonable times with the union. The union in that case was 1199SEIU, the same union in this instant case. The attorney who represented the employer in that case was Jasinski, the same attorney representing the Respondent here.

<sup>97</sup> ALJD 11: 12-19; See also Tr. 255 and 507.

<sup>98</sup> ALJD 12:7-12; Tr. 531; GC24.

<sup>99</sup> GC24; Tr. 319-320, 465-468.

<sup>100</sup> Tr. 512, 515-519.

classification in hospitals and homes that were parties to the League contract. For example, Certified Nursing Assistants (CNAs) or Nursing attendants, housekeeping workers, and dietary aides were paid \$654.62 per week as of October 2014, which translates to \$16.36 per hour. The Union had proposed \$15.00 for CNAs, housekeepers, and dietary aides.<sup>101</sup> Therefore, Respondent's exception 44 is without merit.

**F. The ALJ correctly concluded that Respondent failed to meet to bargain from August 11, 2017 through November 5, 2017. (Exceptions 47-50)**

Section 8(d) of the Act requires an employer to meet at reasonable times with the collective-bargaining representative of its employees and an employer who fails to meet at reasonable times with the collective-bargaining representative of its employees violates Section 8(a)(5) and (1) of the Act.<sup>102</sup> Here, the overwhelming evidence shows that the Respondent failed to fulfill its obligation to meet at reasonable times with the Union from August 11 until early December 2017 and has therefore violated Section 8(a)(5) and (1) of the Act.<sup>103</sup>

The evidence establishes that from August 11, 2017 until November 17, 2017, the Respondent ignored the Union's written requests to schedule new bargaining dates. In emails and letters, dated from August 11 through November 17, 2017, the Union repeatedly requested bargaining and proposed dates to meet. The Respondent failed to respond to any of these requests or to propose any alternative dates for bargaining. Moreover, the Respondent never gave any reason for not responding to the Union's proposed dates from August 11 through November 17,

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<sup>101</sup> See GC22 and GC24.

<sup>102</sup> *Barclay Caterers*, 308 NLRB 1025, 1035 (1992).

<sup>103</sup> In *Mommouth Care Center v. NLRB*, 672 F.3d 1085 (2012) (failure and refusal to meet at reasonable times with the Union to bargain a violation). The union in that case was 1199SEIU, the same union in this instant case. The attorney who represented the employer in that case was Jasinski, the same attorney representing the Respondent here.

2017.<sup>104</sup> This is a blatant case of an employer refusing to meet at reasonable times and bargain with the collective-bargaining representative of its employees.<sup>105</sup>

Even though the Respondent met with the Union on December 21, 2017, the evidence shows that the Respondent violated the Act by failing to meet at reasonable times for the purposes of collective-bargaining for approximately a 3-month period from September (the Union's August 11<sup>th</sup> letter proposed September dates) until early December 2017 (when the Respondent finally proposed Dec 21). The Board had consistently found months of delay in meeting to bargain violate the duty to meet at reasonable times for the purposes of collective bargaining.<sup>106</sup> In the instant case, Respondent's conduct clearly frustrated the negotiation process and is a violation of the Act. Therefore, the ALJ correctly found, after taking into consideration of Respondent counsel's unavailability between November 4 and December 21, 2017 due to a car injury, that Respondent violated Section 8(a)(5) of the Act by failing to meet with the Union at reasonable times between August 11 and November 4, 2017.<sup>107</sup>

#### **G. The ALJ correctly extended the certification year for 12 months. (Exception 53)**

The certification year provides a newly-certified union with "a reasonable period in which it can be given a fair chance to succeed."<sup>108</sup> An employer's bad-faith bargaining after certification

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<sup>104</sup> Respondent responded to the Union after an unfair labor practice charge with Case No. 02-CA-210245 was filed on November 20, 2017, alleging Respondent failed and refused to meet to bargain for an initial contract.

<sup>105</sup> *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995); see also *Regency Service-Carts, Inc.*, 345 NLRB 671, 672 (2005).

<sup>106</sup> See *Freuhauf Trailer Servs*, 335 NLRB 393 (2001)(employer violated its "duty to meet at reasonable times by meeting with the Union only once in the 7 month period between the Respondent's grant of recognition and its withdrawal of recognition on November 7;" *Barclay Caterers*, 308 NLRB 1025 (1992) (a total of a five month delay between sessions that covered a nine month period). Over a nine-month period, the parties in *Barclays Caterers* met four times for 8 hours. The Employer caused a delay that totaled 5 months in between these sessions.

<sup>107</sup> ALJD 32: 7-39.

<sup>108</sup> *Centr-O-Cast*, 100 NLRB 1507, 1508 (1952) (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)).

takes “from the union...the period when unions are generally at their greatest strength – the one-year period immediately following union certification.”<sup>109</sup> Therefore, when unlawful bargaining has disrupted the bargaining relationship, parties need a reasonable period of time to resume their relationship.<sup>110</sup>

It is well established that where an employer’s unfair labor practices delay good-faith bargaining during that period, the Board may extend the certification year.<sup>111</sup> The Board has found that when an employer has refused to bargain with the elected bargaining representative during part or all of the year immediately following the certification, that it has “taken from the Union” the opportunity to bargain during “the period when Unions are generally at their greatest strength.”<sup>112</sup> In considering whether and for how long to extend the certification year, the Board considers “the nature of the violations; the number, extent, and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations.”<sup>113</sup> The measures taken by the Board to assure at least a year of good-faith bargaining include an extension of the certification year.

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<sup>109</sup> *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962).

<sup>110</sup> *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1007 n.5, 1045-1046 (1996), *enfd.* 140 F.3d 169 (2<sup>nd</sup> Cir. 1998).

<sup>111</sup> *Mar-Jac Poultry Co.*, 136 NLRB at 786-787.

<sup>112</sup> *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), *enfd.* 939 F.2d 402 (6th Cir. 1991).

<sup>113</sup> *American Medical Response*, 346 NLRB 1004, 1005-1006 (2006) (extending certification year 3 months when limited record does not show reason for initial 10-month delay in bargaining following certification); *Metta Electric*, 338 NLRB 1059, 1065 (2003), *enfd.* in relevant part 360 F.3d 904, 912-913 (8th Cir. 2004) (extending certification year for 12 months); *Northwest Graphics*, 342 NLRB 1288, 1289-1290 (2004) (extending certification year for 12 months), *enfd. mem.* 156 Fed. Appx. 331 (D.C. Cir. 2005); *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996) (extending certification year 6 months after employer refused to supply information requested).

As discussed above, the ALJ correctly found Respondent (1) refused to meet at reasonable times with the Union for more than three months; (2) failed and refused to provide and delayed in providing information (another words, continuously produced incomplete information); (3) terminated a union supporter Catherine Thomas immediately after the Union was voted in; and (4) reduced employee's annual wage increase within a month after the Union was voted in. In summary, the Respondent here engaged in a series of dilatory tactics that disrupted the bargaining process, including delayed in scheduling bargaining dates, repeatedly promised to produce requested information but failed to do so, delayed in providing documents to the Union about a year after the Union was certified, abruptly ended a bargaining session on April 5, 2017, delayed in responding to the Union's request for future bargaining dates, and completely refused to meet with the Union after August 7, 2017 until an unfair labor practice charge was filed.<sup>114</sup> As a result, since the Union's initial bargaining request on January 6, 2016 through the present, the parties met only 13 times while actually bargained about 10 times.<sup>115</sup> The Respondent's tactics have ensured that no meaningful bargaining could take place and have deprived the Union of the opportunity to reach agreement on a contract during the certification year. The Board had deemed a 12-month extension of the certification year appropriate where the Respondent's entire conduct also included unilateral change in wages immediately after its employees voted for representation and conduct

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<sup>114</sup> Charging Party Union filed Case No. 02-CA-210245 on November 20, 2017, alleging Respondent failed and refused to meet to bargain for an initial contract.

<sup>115</sup> The parties did not bargain on March 10, 2016 (meet and greet), on January 10, 2017 (Respondent refused to offer a counterproposal but discussed Respondent's proposed increase in the percentage of annual pay raise that was already implemented.), and on April 5, 2017 (Owner Greenberger left abruptly before the Union came back from caucus to present its counteroffer, and then Jasinski stormed out allegedly because a Jewish woman called him an anti-semitic name when she was referring to herself, "Please don't talk to me like I am a schmuck.").

that frustrated the bargaining process for the entire initial certification year.<sup>116</sup> Accordingly, the ALJ correctly decided that a 12-month extension of the certification year is warranted.

Please note that the General Counsel has filed cross exception with regards to this *Mar-Jac* remedy because the ALJ inadvertently left out the *Mac-Jac* remedy in his order and he failed to state when the 12-month extension of the certification year commences in his remedy.

**H. The ALJ was within his authority to order the remedy for the violations he found. (Exceptions 54-56)**

The ALJ was authorized, in accordance with Section 102.45 of the Board's Rules and Regulations and Section 10(c) of the Act, to order appropriate remedies to effectuate the policies of the Act in his recommended decision "[i]f the Respondent is found to have engaged in the alleged unfair labor practices." Here, the ALJ found certain violations and ordered corresponding appropriate remedy. Therefore, Respondent's exceptions are without merit.

**I. The ALJ correctly permitted the General Counsel to amend its Complaint and by permitting Katherine Hansen be recalled to testify after the amendment of the Complaint. (Exceptions 6-7)**

Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board.<sup>117</sup> This provision affords the judge "wide discretion" to grant or deny a motion to amend. However, in exercising that discretion the judge should consider: "(1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving

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<sup>116</sup> *Northwest Graphics*, 342 NLRB 1288, 1289-1290 (2004) (extending certification year 12 months), enfd. mem. 156 Fed. Appx. 331 (D.C. Cir. 2005).

<sup>117</sup> See also *Folsom Ready Mix, Inc.*, 338 NLRB 1172 n. 1 (2003).

to amend, and (3) whether the matter was fully litigated.”<sup>118</sup> The Second Circuit had agreed with the Board in finding no prejudice to the respondent when the amendment was substantially similar to an allegation already alleged in the Complaint, and was added before the General Counsel completed the case in chief, and the respondent could have recalled any of the General Counsel’s witnesses that had already testified.<sup>119</sup>

Although the ALJD appeared to say that the General Counsel amended the Complaint to add the allegation of overall bad faith bargaining, the record clearly showed that the amendment to the Complaint was made to *clarify* the allegation of overall bad faith bargaining.<sup>120</sup> The original complaint contained an overall bad faith bargaining allegation. Therefore, in considering the factors above, the ALJ correctly concluded that Respondent was not prejudiced because Respondent had prior notice and had been given leeway in cross examination regarding it. The clarification was made during the General Counsel’s case in chief and Respondent had an opportunity to fully litigate it by cross examining the General Counsel’s witnesses as well as to call witnesses on its case in chief. Therefore, the ALJ correctly permitted the amendment to *clarify* the allegation of overall bad faith bargaining.

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<sup>118</sup> *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8 (2015), *enfd.* 651 Fed. Appx. 34 (2d Cir. 2016).

<sup>119</sup> *Id.*, *supra*. See also *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112, slip op. at 1 n.1 (2016) (judge did not deny the respondent due process by granting the General Counsel’s motion to add an 8(a)(1) allegation because respondent had an opportunity to introduce evidence regarding the allegation before the hearing closed), *enfd.* 847 F.3d 180 (5th Cir. 2017); *Amglo Kemlite Laboratories*, 360 NLRB 319, 323 (2014) (judge erred in denying the General Counsel’s motion, on the last day of the 3-day hearing, to amend the complaint to allege an 8(a)(1) threat of mass discharge, as respondent had the opportunity to examine both the witness and the official who made the remark, and the motion amended an existing complaint allegation, which alleged a similar threat on the same day, to conform to that evidence), *enfd.* 833 F.3d 824 (7th Cir. 2016); and *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992) (judge abused her discretion by denying the General Counsel’s motion during the hearing to add a Johnnie’s Poultry allegation that respondent’s counsel had improperly questioned employees about the case without giving assurances against reprisal as the allegation was fully litigated; and the respondent had therefore suffered no prejudice), *enfd. mem.* 998 F.2d 1004 (3d Cir. 1993).

<sup>120</sup> Tr. 454.

Pursuant to the proper amendment of the Complaint clarifying the General Counsel's allegation of overall bad faith bargaining, the ALJ did not abuse his discretion to allow the General Counsel to continue with the presentation of her case by recalling Ms. Hansen to testify on the overall bad faith bargaining allegation because Respondent was not prejudiced as he had the full opportunity to cross examine her, which he did, and to respond to her testimony with his own witnesses in his case in chief.

#### **IV. CONCLUSION AND REMEDY**

For the foregoing reasons, the General Counsel urges finding that Respondent's contentions in its Exceptions and Brief in Support of Exceptions are without merit, and that the ALJ correctly found that Respondent violated the Act in his ALJD. Accordingly, the ALJ's decision, findings, and conclusions of law and recommended remedy should be adopted, except for those issue to which the General Counsel filed limited cross exceptions.

Dated at New York, New York,  
This 29<sup>th</sup> day of March 2019.

Respectfully submitted,



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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**ATLANTICARE MANAGEMENT LLC D/B/A  
PUTNAM RIDGE NURSING HOME**

**Case Nos.    02-CA-177329  
                  02-CA-193189  
                  02-CA-198370  
                  02-CA-206253  
                  02-CA-210245**

**and**

**1199 SEIU UNITED HEALTHCARE WORKERS EAST**

**AFFIDAVIT OF SERVICE**

I, the undersigned, certify that the *Counsel for General Counsel's Answering Brief to the Respondent's Exceptions to the Administrative Law Judge Decision* was served on the parties on Friday, March 29, 2019, as follows:

By E-filing

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