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August 15, 2019

Hon. Robert Giannasi
Chief Administrative Law Judge
National Labor Relations Board
Division of Judges
1015 Half St. SE
Washington, DC 20570

Re: Mountain View Care and Rehabilitation Center, LLC
Cases 04-CA-235894 & 04-CA-238216

Dear Judge Giannasi:

Attached please find a Brief by Counsel for the General Counsel in the above-captioned case. A copy of the Brief have this day been served on the person below via e-mail.

Very truly yours,

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

MOUNTAIN VIEW CARE AND
REHABILITATION CENTER, LLC

and

Cases 04-CA-235894
04-CA-238216

RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION

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

**TO: THE HONORABLE ROBERT GIANNASI
CHIEF ADMINISTRATIVE LAW JUDGE
NATIONAL LABOR RELATIONS BOARD**

Respectfully Submitted,



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Dated: August 15, 2019

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I. STATEMENT OF THE CASE

This case involves employer conduct aimed at eroding employee support for a Union at two critical points in time when employee support for Union activity is often precarious and vulnerable to coercion. First, shortly after the Board certified a unit of Certified Nurses Aids (CNAs) but before bargaining over an initial contract had begun, Mountain View Health Care and Rehabilitation Center, LLC (Respondent) changed its paid time off (PTO) policy and erased employees' accumulated leave banks, without providing the Retail, Wholesale, and Department Store Union (Union) with notice and an opportunity to bargain. Second, when other employees at Respondent's 2309 Stafford Avenue, Scranton, Pennsylvania facility (Facility) began organizing, Respondent deployed one of the most effective and time-tested strategies for suppressing a nascent union organizing drive — the discharge of a prominent union supporter. Both are serious violations that strike at the very heart of the collective bargaining rights guaranteed by the Act.

II. PROCEDURAL HISTORY

The Charging Party Union filed the first charge, 04-CA-235894, on February 13, 2019 (GC 1(a)).¹ It filed a first amendment to that charge on March 6, 2019,² and a second amendment on May 14 (GC-1(c); GC-1(e)). It filed a second charge, 04-CA-238216 on March 22, which was later amended on May 1, (GC-1(g); GC-1(i)).

On May 16, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Consolidated Complaint) alleging that Respondent has been

¹ References to the Transcript are identified by the page number(s) in parenthesis. Exhibits are identified with number of the exhibit. General Counsel's exhibits are shown as (GC-), Respondent's exhibits as (R-), and joint exhibits as (J-).

² All dates herein occurred in 2019, unless otherwise stated.

engaging in conduct in violation of Sections 8(a)(5), (3), and (1) of the Act (GC-1(k)). Specifically, the Consolidated Complaint alleges that: 1) at some point between August 2018 and January, Respondent unilaterally changed its PTO policy to a new policy and eliminated bargaining unit employees' accrued leave balances without providing the Union with notice and an opportunity to bargain; 2) on about March 4, through its Administrator Donna Molinaro and its Human Resources Director Linda Yarros, in Yarros' office, interrogated an employee about their union activities and the union activities of other employees; 3) on or about March 4, Respondent suspended Yolanda Ramos because of her Union activities; and 4) on or about March 5, Respondent discharged Ramos because of her Union activities (GC-1(k)). On May 30, Respondent filed an answer to the Consolidated complaint denying these allegations and raising no affirmative defenses (GC-1(m)). Also on May 30, the Regional Director issued an Order rescheduling the hearing for July 8 (GC-1(n)).

On June 19, the Board authorized the General Counsel to seek an injunction, related to Respondent's alleged violations of Sections 8(a)(3) and (1), pursuant to Section 10(j) of the Act. On July 1, 2019, a hearing was held before the Honorable Robert Mariani, of the United States District Court of the Middle District of Pennsylvania. On July 2, Judge Mariani issued an Order enjoining Respondent from certain conduct and ordering certain affirmative actions. *Walsh v. Mountain View Care and Rehabilitation Center, LLC*, 2019 WL 2865891 (W.D. Pa. July 2, 2019). Based on the temporary nature of that Order, the General Counsel is requesting that this case receive expedited processing as set forth in Section 102.94 of the Board's rules (17).

On July 8, a hearing on the allegations in the Consolidated Complaint was held before Chief Administrative Law Judge Robert Giannasi in Philadelphia, Pennsylvania. At the start of the hearing, the General Counsel amended Consolidated Complaint paragraph 8(a) and Respondent

amended its Answer to admit the substantive allegations in paragraphs 8(a), (b), and (c) (12-14; GC-2). Respondent also raised, for the first time, an affirmative defense alleging that the unilateral change allegation in the Consolidated Complaint was untimely under Section 10(b) of the Act (14).

III. FACTS AND ARGUMENT

A. The Unilateral Change

Facts

Overview of Operations

Respondent operates a 180-bed short-term rehabilitation and long-term care nursing home at the Facility (38). In February or March 2018, Respondent took over ownership and operation of the Facility from its previous owner, Geisinger (38). Respondent retained all the former employees and left many of their terms and conditions of employment unchanged—including their paid time off (PTO) policy (14; 38; J-1).

On June 14, 2018, the Board Certified the Union as the Collective Bargaining Representative for a Unit of CNAs at the Facility

On or about June 14, 2018, the Board certified the Union as the 9(a) representative of the following appropriate unit:

INCLUDED: All full-time and regular part-time Certified Nursing Assistants (CNAs) and Restorative Aides employed by the Employer at its 2309 Stafford Avenue, Scranton, PA facility.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act (GC 1-(k); GC-1(m)).

Respondent Adopts the Legacy PTO Policy

It is undisputed that between Respondent's takeover of operations to about August 2018, it adopted the legacy PTO policy used by Geisinger (Legacy PTO Policy) (14; J-1). In addition to

having six defined paid holidays each year, the policy also created three leave banks, each with different specified uses (76-78; J-1). There was a PTO bank, a personal holiday bank, and an extended PTO bank used for sick leave. Each bank had different amounts of leave added at the beginning of each year and accrued leave at different rates, depending on one's employment status and years of service (76-78; J-1).

At the end of each year, employees could roll over leave from the PTO bank and/or the personal holidays bank into the extended PTO bank, with the caveat that there must always be a minimum of 40 hours in the PTO bank (77; J-1). Similarly, employees could sell back leave from their PTO and personal holiday banks, subject to those same conditions (77-78; J-1). The leave banks for one employee, CNA Cynthia Young, as of January 31, 2018, are shown in General Counsel Exhibit 9.

Respondent unilaterally changes the PTO Policy

On or about August 1, 2018, Respondent began distributing a new handbook to employees that described, on page 26, a PTO policy (New PTO Policy) different than the Legacy PTO Policy described above (14; J-1; J-2). To the extent that the handbook was intended to announce a change in the PTO Policy, Respondent declined to provide notice to the Union or an opportunity to bargain about this change, even though the Union had already been the CNAs' certified representative for approximately two months (14; GC-1(k)).

The New PTO Policy only has one category of PTO, which accrues at lower rates than under the Legacy PTO Policy (J-2). There are also no defined paid holidays (J-2). The New PTO Policy's "buy-back" program is significantly less generous than the previous plan—employees may only cash out their accumulated leave at 50% of face value, whereas employees previously cashed out their leave at 100% of its monetary value (78; J-1; J-2).

Respondent erases employees' accumulated leave banks

While, the New PTO Policy is silent on what happens to any leave accrued prior to the change, between late August 2018 and January 2019, all the bargaining unit employees had their PTO banks erased, including a period where they all had negative balances (87-88;128-129; GC-10). This resulted in huge losses of accrued leave for bargaining unit employees. For example, Young's pay stub for the payroll period ending on August 18, 2018 shows she had 160.15 hours of accrued sick leave and 47.28 hours of accrued PTO (GC-10, p. 22). However, her paystubs between October 2018 and December 9, 2018 do not show any accrued leave balances (GC-10, pp. 23-25). When this information finally reappears in Young's pay stub for the payroll period ending on December 23, 2018, her sick leave balance is gone and she has a PTO balance of -62.45 (GC-10, p. 26). While her negative PTO balance was eventually readjusted to reflect a positive balance in the payroll period ending April 13, the monetary value of Young's leave on August 18, 2018 was approximately \$3,267.02—all of which has been forfeited (GC-10, pp. 22 and 34).³ Respondent stipulated that the paystubs of all other bargaining unit employees would reflect similar forfeitures in accrued leave (128).

Respondent's effort to impute knowledge of the change to the Union through distribution of handbook

To the extent that Respondent's handbook was intended to announce a change in the PTO policy, it is undisputed that Respondent did not provide a copy of the handbook to the Union until September 2018, and that this was the only way Respondent arguably communicated the change (124). However, Respondent contends that its notice to the Union was effectuated through

³ This calculation is based on Young's hourly rate of \$15.75, as reflected on her paystubs.

bargaining unit employees. It is undisputed that Respondent never offered the Union an opportunity to bargain about the change (13-14).

Young testified that she received a copy of the handbook in August 2018, but neither she, nor Respondent, offered a more specific date (92). Young testified that she currently serves on the Union's bargaining committee, but there is no evidence regarding whether she was on the committee when she received a copy of the handbook (66). Additionally, the parties did not begin negotiations for a first contract until October 2018 (121).

CNA, and fellow bargaining committee member, Danielle Albano testified that Respondent never provided her with a handbook, and that she did not see it until a coworker showed it to her in October 2018 (110- 111). Respondent also introduced evidence showing that 36 non-bargaining unit dietary and food service employees received the handbook on July 30, 2018 (R-2). There is no evidence that any bargaining unit employees was notified of the New PTO Policy on or before August 13, 2018—the date six months before the filing of the unfair labor practice charge in Case 04-CA-235894 (GC-1(a)).

Respondent conceals the changes from bargaining unit employees

Young testified that on two occasions between January and March, she went to Yarros' office to ask her about the changes to the PTO balances appearing on her pay stubs (89-90). On the first occasion, Yarros told Young that the changes were due to a glitch and that it would get straightened out (89). On the second occasion, Yarros "looked into it and cleared it up and added 40 hours back to [Young's] PTO time" (89). Young was never told by management that the PTO policy had changed (T 90). Yarros testified at length at the hearing and declined to dispute the statements Young attributed to her.

Similarly, Albano also offered un rebutted testimony that around August 2018, she first noticed changes to PTO reflected on her pay stubs (105). She then called Yarros, who told her that there was a glitch in the system and that everything was going to be taken care of (105-106). Nevertheless, the “glitch” was never fixed, and Albano’s hours were never restored (106-107). Yarros also did not dispute Albano’s testimony. Therefore, Young’s and Albano’s testimony about these Yarros’ efforts to cover up Respondent’s changes to PTO should be credited.

Lastly, Collective Bargaining Representative Danie Tarrow testified that the Union did not have actual notice of the unilateral change until January, when Yarros finally told one or more unidentified bargaining unit employees that their leave balances had been permanently eliminated (122). Despite the fact that Respondent and the Union had been engaged in bargaining for a first collective bargaining agreement since October 2018, Respondent never informed the Union about the New PTO Policy or the erasure of employees’ leave banks.

Argument

Respondent violated Section 8(a)(5) of the Act by unilaterally changing the PTO policy of bargaining unit employees and by erasing employees’ accumulated leave banks.

Employers have a duty to refrain from unilaterally changing any terms or conditions of represented employees without first bargaining with the employees’ collective bargaining representative to a lawful impasse. See *Oberthur Techs. of Am. Corp.*, 368 NLRB No. 5, Slip op. at 3 (2019). “In other words, before the employer can change a term or condition of employment, it must give the union notice of the proposed change and opportunity to bargain over it, and it must do so ‘sufficiently in advance of actual implementation . . . to allow a reasonable opportunity to bargain.’” Id. quoting *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). PTO policies are a mandatory subject of bargaining, and along with wages and healthcare, form part of the core of employees’ terms and conditions of employment.

See, e.g. *Pepsi America, Inc.*, 339 NLRB 986 (2003) and *Verizon New York, Inc.*, 339 NLRB 30 (2003).

Here, the stipulated facts clearly establish a violation of 8(a)(5). For several months after taking over the Facility, including for months after the Union was certified as the CNAs' collective bargaining representative, Respondent kept the Legacy PTO Policy in effect and recognized employees' accrued leave banks. Once the Union was certified as the bargaining unit's representative, Respondent acquired a duty not to make changes to their employees' terms and conditions of employment without first providing the Union with notice and an opportunity to bargain. *Oberthur Techs. of Am. Corp.*, 368 NLRB at slip op. 3 (2019) Respondent admits it did not provide the Union with such an opportunity but nevertheless contends that the Union had notice of the violation more than six months before the charge was filed, and thus the allegation is time barred by Section 10(b) of the Act.

Respondent failed to meet its burden to prove that the unilateral change allegations is barred by Section 10(b) of the Act

It is well established that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. See *Desks, Inc.*, 295 NLRB 1, 11 (1989). "Further, the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b)." *Chinese American Planning Council*, 307 NLRB 410 (1992). A charging party's knowledge can be actual or constructive. This means that a charging party must exercise "reasonable diligence" and the 10(b) period will begin when a reasonable person or entity would have gained knowledge of the violation. See *Moeller Bros. Body Shop*, 306 NLRB 191, 192 (1992) (the charging party union was able to immediately discover the violation when it visited the shop for the first time in 12 years). Whether unit employees' knowledge is imputed to their bargaining representative for purposes of determining when the 10(b) limitations period

commences depends on the factual context. See *Adair Standish Corp.*, 295 NLRB 985, 986 (1989). However, such knowledge is not imputed to the Charging Party where there was surreptitious conduct or fraudulent concealment, and the 10(b) period is tolled accordingly. See *O'neill, LTD.*, 288 NLRB 1354 (1988).

Respondent has failed at nearly every turn to establish its 10(b) defense by a preponderance of the evidence. Respondent contends that its new handbook, which contains the New PTO Policy, provided the Union with clear and unequivocal notice that it had violated Section 8(a)(5) of the Act.

However, the only evidence Respondent introduced to meet its burden to show that the charge was untimely consists of a document showing that a group of the unrepresented dietary and food service employees received a copy the new handbook just over six months before the charge was filed. Respondent did not establish by a preponderance of the evidence, when, or even if, bargaining unit employees received a copy of the new handbook. Meanwhile, uncontested evidence shows that the Union did not receive a copy of the handbook until September 2018, well within the 10(b) period.

To the extent Respondent seeks to impute knowledge of the unilateral change to the Union through Young, it has also failed to meet its burden of proof. Under certain circumstances the Board has imputed knowledge of unfair labor practices to a union through its employee shop stewards. *Baytown Sun*, 255 NLRB 154, 160 (1982) (steward's knowledge imputed to union for purposes of 10(b) where the steward in question was found to be more than a steward in that she was closely tied to the union, she was a member of the union's negotiating committee, and had attended all of the two-dozen-plus negotiating sessions between the respondent and the union), c.f. *Catalina Portland Cement Co.*, 330 NLRB 144 (1999) (knowledge of unilateral change not

imputed through longtime steward because there was no evidence that he was an authorized agent of the union for the purpose of receiving notice of a unilateral change). Here, there is no evidence that Young was serving on the bargaining committee when she received the handbook in August 2018, and the circumstantial evidence suggests that she would not yet have been appointed to the committee because bargaining did not begin until October 2018. In addition, Young did not specify when in August she received the handbook, so it may well have been after the August 13, 2018 10(b) date. Thus, Respondent failed to meet its burden to show that the charge underlying the Section 8(a)(5) allegation in the Consolidated Complaint was untimely. The analysis could and should stop at this point, with a finding that Respondent has failed to carry its 10(b) defense.

Even assuming, *arguendo*, that a represented employee whose knowledge could be imputed to the Union received a handbook before the 10(b) date, Respondent's defense still fails for two reasons. First, in order to discover the change, the employees would have had to read Respondent's 70-page handbook in its entirety and compare it to their current terms and conditions of employment; without any hint from management that it contained any changes, or where those changes might be located. Facially, this is not the type of change the Union, or those whose knowledge is imputed to the Union, would have been able to discover immediately, or even quickly, by exercising "reasonable diligence." *Moeller Bros. Body Shop*, 306 NLRB at 192.

Second, even if bargaining unit employees should have spotted the change merely from being given a new handbook, Respondent was actively misleading employees about their PTO and assuring them that nothing about their accrued leave would be restored. In such circumstances, the 10(b) period is tolled until the Charging Party gains actual knowledge or could have gained the knowledge through "reasonable diligence" from another source. *O'Neill*,

LTD., 288 NLRB 1354 (1988). The Union did not have actual knowledge of the change until January 2019, and then only from its members, not from Respondent.

The only other potential source of knowledge suggested by the record evidence is when the Union itself received a copy of the handbook in September 2018. Again, even if the Union should have become aware of the change at that point, by reading the handbook in its entirety and comparing it with employees' former terms and conditions of employment, September 2018 is well within the 10(b) period. Because Respondent was unable to carry the burden of its affirmative defense, the General Counsel submits that Respondent violated Sections 8(a)(5) and (1) as alleged.

B. Ramos' Interrogation, Suspension, and Discharge

Facts

Ramos engages in Union Activity

In early 2019, the Union began organizing to expand its existing unit of CNAs. In February, CNA Danielle Albano, a member of the Union's bargaining committee, approached Dietary Aide Yolanda Ramos and spoke to her about joining the Union (39). On Thursday, February 28, Ramos signed a petition accepting membership to the Union and authorizing it to act as her collective bargaining representative (GC-4).

However, Ramos' efforts to support the Union did not end there. That same day, she began collecting signatures for the Union petition from her coworkers (40). Between February 28 and March 1, Ramos spoke with seven coworkers, in both the kitchen and the dining room, and successfully secured three signatures (40-41). One of the coworkers Ramos spoke to was Dietary Aide Levi Kania (42).

Respondent learns of the Ramos' Union activity and begins laying the groundwork for her discharge

On March 1, Kania alerted Respondent to Ramos' solicitation activities (134). Yarros asked Levi to write a statement about what had occurred (141). Kania's statement identified Ramos as the person who had asked him to sign the petition but makes no mention of where the solicitation took place (GC-12). Yarros took the statement to Molinaro, Respondent's highest ranking official at the Facility (143).

Molinaro asked Yarros to ask Kania to clarify his statement, purportedly because there was nothing to indicate whether they were on a break at the time (158). During the hearing, Yarros testified that she neither remembered when she asked Kania to clarify his statement (although she believed it was the same day), nor precisely what she said to Kania (145). However, she said something to him which caused him to produce a second statement which identified the date, time, and place of the alleged solicitation, and indicated that to the best of his knowledge neither employee was on break. (145-146; GC-13). Yarros returned to Molinaro with Kania's second statement, and Molinaro asked for her to schedule a meeting with Ramos (T 158).

Respondent's highest-ranking officials interrogate Ramos about her Union activity

The following Monday, March 4, Ramos was scheduled to begin work at 4:00 pm (43). However, she received a text from Respondent telling her to come in 30 minutes early (43.) Ramos arrived at the Facility at 3:30 pm and proceeded to Yarros' office for a meeting (43). Here the testimony begins to diverge, although Molinaro's and Ramos' testimony are remarkably consistent, with only Yarros' diverging on major details. Yarros and Molinaro were in Yarros' office (43; 159). Molinaro began the meeting by asking if Ramos had asked any of her coworkers to sign a Union petition (43). Molinaro denied that her interrogation specified whether the petition was on behalf of the Union (159). Ramos initially denied that she had done so (44; 159). Ramos

testified that she lied because she feared retaliation from Respondent if she answered in the affirmative (60).

Molinaro then asked Ramos to write down her version of the events (44; 159). Molinaro also mentioned that she would investigate and check surveillance camera footage in order to verify Ramos' statement (44; 159). As she was writing her statement, Ramos confessed that she had indeed asked a coworker to sign a Union petition (44; 159). Molinaro then asked Ramos why she lied (44; 159).

Ramos responded that she had been instructed that if anyone asked her about it, then she should deny it (44; 159). Molinaro then asked Ramos who had instructed her to lie about her Union activity in an apparent effort to find out who was behind the organizing effort (169).⁴ Molinaro then instructed Ramos to add the explanation for her decision not to tell the truth to her statement as well (T 45, 159, GC-5). Ramos' statement states the following:

I have asked a coworker if they would like to join a Union on Friday, March 1, 2019.

-Yolanda Ramos

I recently told the Director and Human Resources that I didn't because someone told me if I was asked to completely deny it.

-Yolanda Ramos

(GC-5). It is undisputed that Respondent did not asked Ramos for information regarding where the solicitation took place or whether it occurred during work time.

Respondent Suspends Ramos to investigate the "Union" petition

⁴ Ramos testified that Yarros had asked her this question (44).

At the conclusion of the March 4 meeting, Molinaro told Ramos she would be suspended, pending an investigation (45; 159-160). Respondent then handed Ramos a suspension notice that stated, in its entirety, as follows:

Suspended per the Administrator pending the investigation of the "Union" petition. (emphasis in original) (GC-6). According to Molinaro and Ramos, Respondent did not mention or reference its no-solicitation policy or any potential violation thereof.

Molinaro's testimony explicitly denying having mentioned the Union when she interrogated Ramos about the petition seems particularly incredible in light of the content of the suspension notice, which betrays Respondent's preoccupation with the nature of Ramos' conduct.

Yarros' testimony regarding the March 4 meeting is not credible or reliable

Yarros' testimony on these matters is quite different from either Molinaro's or Ramos' testimony. Yarros testified that Molinaro told Ramos that they were investigating a violation of the no-solicitation policy, even though Molinaro and Ramos both testified that the policy was not mentioned or raised until the following meeting, and despite Yarros' own affidavit, given about a month after the events in question, which does not reference to the no-solicitation policy at that meeting (46; 138; 159-160; GC-14). Yarros could not recall at which meeting Ramos initially lied and then confessed (139). She also did not remember Ramos writing a statement at that meeting, but rather that she brought it with her to the second meeting the next day and clarified that she did not believe the confession to have occurred until the second meeting either (139). However, upon questioning under cross-examination, her recollection changed and she remembered that Ramos had confessed at the same meeting (147). Lastly, Yarros testified that she did not ask Ramos who told her to lie, but rather said, "I don't believe you want to tell me who told you to deny it" (148).

Yarros testimony is confused and at times self-contradictory. Therefore, her testimony should be discredited to the extent that her testimony contradicts the consistent testimony of Ramos.

Respondent's perfunctory investigation leading up to Ramos' discharge

Respondent did not engage in any additional fact finding after its meeting with Ramos (161). Respondent did, however, determine that there had been a clear violation of its no-solicitation policy and contends Ramos "admitted" the violation, despite no evidence from Ramos regarding where or when she spoke to Kania (161; GC-7). Molinaro instructed Yarros to write up Ramos' termination, and to call Ramos back in for a second meeting (161). On March 5, Ramos received that call at 4:00 pm and came to the facility for a meeting (47).

Respondent Discharges Ramos for soliciting on behalf of the Union

On March 5, Ramos was called in for meeting with Yarros and Molinaro in Molinaro's office (47). Molinaro and Yarros were there when Ramos arrived (47). Molinaro told Ramos she was being discharged for violating Respondent's no-solicitation policy (47; 162). Ramos asked to see the policy, but Molinaro refused her request—referring to a need to clear this with legal counsel (47). Respondent then issued Ramos a termination notice that states:

On 3/1/19, after clocking in, you solicited a fellow employee who was also on the clock in a work area. In a statement you provided on 3/4/19, you admitted this violation. Per [Respondent's] Progressive Discipline Policy, a violation of [Respondent's] Solicitation Policy is a Group IV violation, which alone results in termination for the first offense. Additionally, you have a prior discipline from August of 2018 which also applies, placing you well over the threshold for termination.⁵ (GC-7).

⁵ During the hearing, it became apparent that Respondent had not actually relied on Ramos' past discipline in discharging her (168). In fact, Molinaro testified that she had no idea why Yarros had written this information into the termination notice (168). In contrast, Yarros testified that she had added Ramos' past discipline to the notice under at someone else's direction (150).

According to Respondent's handbook, Group IV violations are the most serious types of violations and *must* result in immediate discharge (R-1, page 63). According to the handbook, other Group IV violations include: (1) violations of the Resident Abuse Policy; (2) violations of the Sexual Harrassment Policy; (3) harassment or discrimination against others because of their sex, race, national origin, color, religion, age or disability; and other serious types of willful misconduct (R-1, page 63). In other words, according to its handbook, Respondent considers work-time solicitation among the most serious types of misconduct that warrant summary discharge.

The no-solicitation policy and Respondent's permissive culture of solicitation

Prior to her discharge, Ramos did not know Respondent had a no-solicitation policy (43). On the contrary, the culture at Respondent's Facility prior to her discharge had given her every reason to believe there was no rule against solicitation. Respondent concedes that prior to discharging Ramos, it never disciplined or investigated employees for violating the no-solicitation policy (126; GC-11). Ramos, Young, Albano, and CNA Nancy Acosta all testified at length about the many Girl Scout Cookie sales, chocolate and candy sales, Tupperware sales, and even sales by a small business, Sophisticated Lady, conducted during work time and in which employees freely participated (49-53; 67-73; 98-105; 116-117). All these solicitation activities were open, routine, and notorious—and Respondent's witnesses admitted being aware of many of them (28; 49-53; 67-73; 98-105; 116-117; 164; GC-14).

Nevertheless, Respondent contends that its culture of permissive solicitation encountered a sea-change when Respondent implemented a new handbook in August 2018. The no-solicitation policy in that handbook sets forth as follows:

For the safety of residents and to insure proper and consistent resident care, Mountain View places the following restrictions on solicitations:

1. Solicitation by all non-employees on Mountain View property is prohibited at all times.
2. Solicitation by employees in resident care areas for any reason is strictly prohibited;
3. Solicitation by employees in non-resident care areas while on working time is strictly prohibited.

Collections for charitable purposes shall be considered solicitations for the purposes of this policy, unless approved by the Administrator.

Employees participating or assisting in solicitation that violates this policy are subject to disciplinary action, up to and including termination.

(emphasis in original) (R-1, page 42). Despite the litany of restrictions placed on solicitations “for any reason,” Yarros conceded in her April 3 affidavit and again during the hearing that Respondent has never placed any restrictions on Girl Scout Cookie and other candy sales at the Facility (28; GC-14). Respondent never announced to employees that it had adopted a no-solicitation policy (61). It did not hold any meetings or training on the new policy, and so employees continued to solicit as they always had—and Respondent continued to allow these solicitations without disruption (61; 90).

Respondent nevertheless sought to explain away evidence of these solicitation activities, which involved the circulation of forms⁶ and the exchange of goods for money, by arguing that they had been “approved by the Administrator,” as required by the no-solicitation policy (R-1, page 42). Respondent thus seeks to use the narrow exception in the policy allowing charitable

⁶ Young testified that employees would leave Girl Scout Cookie sign-up forms at the nurse’s stations for employees to fill out and order cookies (72-73).

“collections” to explain away the overwhelming evidence that the implementation of the new no-solicitation policy had no impact on employees’ solicitation activities during work time.

However, Respondent’s evidence of prior approval of the solicitation activities is vague and not credible. Yarros confidently testified that each and every time anyone sold anything at the facility, they first got the approval of the administrator, regardless of whether the solicitation occurred on working time (31). However, under questioning by Your Honor, Yarros conceded that she had no firsthand knowledge of any such approvals (33). Therefore, her testimony on this point is unreliable and should not be credited. Later, Respondent’s introduced the following testimony from Molinaro on the subject of approval:

Q. Have there been instances where you've approved candy sales?

A. Girl Scout cookie sales. I can't remember exactly -- yes, yes. I can't remember if there was -- I know Girl Scout cookies several times, I believe. I bought Girl Scout cookies.

...

Q. Were the solicitations that you approved, were they all had their basis in a charitable giving?

A. Charitable donations, which I never had a problem with. No, I didn't.

(165). Thus, in an effort to present evidence directly contradicted by the testimony of several witnesses, Respondent only offered vague testimony in response to leading questions. Therefore, Respondent’s contention that it required employees to seek approval prior to engaging in solicitation is simply not credible. Molinaro and Yarros wholly failed to respond to the numerous specific instances of solicitation activity recounted by current employee witness—even the specific testimony of Albano, who recalled paying Yarros during working time for candy she purchased from Yarros’ daughter (104).

None of the employees who testified at the hearing (some of whom had personally engaged in solicitation at the Facility) were aware of any approval requirement for solicitation activities (50; 71; 96-97). Molinaro testified that she knew she had previously approved Girl Scout Cookie sales and the sales by Sophisticated Lady but could offer no further specific details (165). Notably, Sophisticated Lady is *not* a charity and 80% of the proceeds from their sales at the Facility are kept by the organization as revenue for its business, while 20% goes back to Respondent's auxiliary group (98; 165). The only testimony regarding a charitable collection was offered by Acosta, who testified that she had received permission to put out a collection box for victims impacted by Hurricane Maria in Puerto Rico (115).

Respondent padded its discharge rationale during the Board's investigation and at the administrative hearing

Subsequent to Ramos' discharge, Respondent sought to justify her discharge on additional grounds presented during the Region's investigation and at the July 8 administrative hearing. On April 5, in its position statement to the Region, Respondent presented a new justification for Ramos' discharge—that she had lied about engaging in solicitation when interrogated by management (GC-8). This rationale does not appear on Ramos' discharge documentation (GC-7). However, Respondent is now no longer contending that Ramos lying factored into the decision to discharge her (22).

Thereafter, during the July 8 administrative hearing, Respondent claimed, for the first time, that Ramos' suspension and termination had been based, at least in part, on endangering patient safety as a result of her solicitation (166; 170-174). Molinaro testified that conversations about "important things" should be handled on breaks, not when employees are working to prepare food for the residents (166). However, employee testimony is consistent that employees could and did

talk about whatever they wanted, including important and/or personal conversations, while on working time (42-43; 97-98; 166; 171). Like Respondent's rationale on lying, the "patient safety" rationale was not discussed during Respondent's meetings with Ramos and does not appear in her discharge notice (GC-7). Moreover, Respondent's investigation did not delve into whether Ramos' solicitation occurred in a time or manner that could have endangered resident's safety—Molinaro admitted as much under questioning by Your Honor (176).

Argument

On or about March 4, 2019, Respondent violated Section 8(a)(1) by interrogating Ramos about her Union activities and the Union activities of other employees

An employer "cannot discriminate against union adherents without first ascertaining who they are." *Cannon Elec. Co.*, 151 NLRB 1465, 1468 (1965). Therefore, the Board and Courts "have long recognized that the natural tendency of such inquiries is 'to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained.'" *Sea Breeze Health Care Center Inc.*, 331 NLRB 1131, 1132 (2000) quoting *NLRB v. West Coast Casket Co.*, 205 F.2d. 902, 904 (9th Cir. 1953). Furthermore, such questioning does not enjoy the protection of Section 8(c), because the "purpose of an inquiry is not to express views but to ascertain those of the persons questioned." *Stuksnes Constr. Co.*, 165 NLRB 1062, 1062 fn. 8 (1967).

With those principles in mind, the Board analyzes whether the question(s) were coercive under the totality of the circumstances, including but not limited to an analysis of the five factors the Board set forth in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub. nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985): 1) the background, i.e., is there a history of employer hostility and discrimination? 2) the nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual

employees? 3) the identity of the questioner, i.e. her position in the company hierarchy? 4) the place and method of interrogation, e.g. was the employee called from work to the boss's office? Was there an atmosphere of unnatural formality? and 5) the truthfulness of the reply. Although it is an objective test, the final factor gives some weight to the employee's subjective experience of the other four factors. See *Toma Metals, Inc.*, 342 NLRB 787, 789 fn. 9 (2004), citing *Cardinal Home Products*, 338 NLRB 1004, 1009 (2003) (both cases remark that the employee "did not hesitate to answer truthfully" as part of an overall finding that the questioning was lawful.)

Here, all five *Rossmore House* factors weigh in favor of a finding that Respondent unlawfully interrogated Ramos during the March 4 suspension meeting. While there is no evidence that Respondent unlawfully discriminated against employees prior to suspending Ramos, the very existence of the March 4 meeting was discriminatory in nature. Respondent had allowed unfettered solicitation by and to employees for years, even after nominally implementing a no-solicitation policy, but pulled all the investigatory stops to look into one instance of solicitation on behalf of a union. Thus, the background of the meeting is a clearly unlawfully motivated investigation intended to support the eventual discharge of a Union adherent.

The second *Rossmore House* factor regarding the nature of the information sought also weighs in favor of a finding that Respondent unlawfully interrogated Ramos. At the March 4 meeting, Respondent sought three, and only three pieces of information from Ramos: 1) whether she had asked a co-worker to sign a Union petition; 2) why Ramos initially denied having engaged in organizing activity on behalf of the Union; and 3) the identity of the employee who suggested she lie about her Union activities. The first question seeks to ascertain Ramos' own union sympathies, the second question is irrelevant to the investigation into Respondent's stated reason for the questioning, and the third question seeks for her to divulge the union sympathies of other

statutory employees. The nature of the questions asked by Respondent during this meeting show a preoccupation with Ramos' underlying Union activity, rather than a fact-finding mission into whether there had been a technical violation of the no-solicitation policy. Ramos was not asked where the solicitation had occurred or whether she had been on break. Instead, Respondent's questions were targeted to confirm that Ramos had engaged in Union activity and to ascertain who else was behind the organizing drive.

The third *Rossmore House* factor (the identity of the questioner) is not clear from the testimony, but it was either Molinaro, Respondent's highest ranking official, or Yarros, the Director of Human Resources, in the presence of Respondent's highest ranking official.

Addressing the fourth *Rossmore House* factor, the interrogation occurred in Yarros' office and Ramos was called into work early to attend, giving the meeting an "atmosphere of unnatural formality." *Morgan Services*, 284 NLRB 862, 863 (1987) (summoning employees from work to manager's office was "unusual event creating an atmosphere of unnatural formality"). The manner in which the meeting was called and the identity of the management officials at this meeting, two of Respondent's highest ranking officials, created an atmosphere where Ramos undoubtedly knew her job was in jeopardy the moment she set foot in Yarros' office on March 4 – all for having had the temerity to do what other employees had always been allowed to do before, solicit support from each other for causes they believe in.

Regarding the final *Rossmore House* factor, Ramos initially lied about having engaged in Union activity. During the hearing, Respondent's counsel repeatedly and aggressively questioned Ramos about why she had lied. Respondent's counsel went so far as to explicitly ask Ramos who had told her to lie if questioned about her Union support. Under questioning by Your Honor,

Ramos revealed she had lied because she was scared, and feared retaliation should she answer Respondent's questions truthfully.

Thus, the General Counsel submits that Respondent violated Section 8(a)(1) by unlawfully interrogating Ramos during the March 4 suspension meeting.

On or about March 4 and March 5, Respondent violated Section 8(a)(3) by suspending and discharging Ramos because of her Union activities

Section 8(a)(3) of the Act prohibits employers from engaging in "such discrimination as encourages or discourages membership in a labor organization..." *Radio Officers v. NLRB (A.H. Bull S.S. Co.)*, 347 US 17, 43 (1954). In order to establish unlawful discrimination under Section 8(a)(3) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in Union activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Knowledge of, and animus toward union activity can both be established through unlawful interrogations about said activity. *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112, slip op. at 2 (2016) citing *Atelier Condominium & Cooper Square Realty*, 361 NLRB 966, 970 (2014).

If the General Counsel meets his initial burden under *Wright Line*, the burden then shifts to Respondent to show that it would have taken the same action absent the unlawful motive. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014). If, however, the evidence shows that the

reasons given for its action are pretextual, Respondent fails to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Circumstantial evidence that the proffered reason is pretextual include, but are not limited to, disparate treatment,⁷ shifting defenses,⁸ and perfunctory investigation.⁹ Not coincidentally, these factors, among others, also strengthen the General Counsel's case of discriminatory motive, while simultaneously weakening Respondent's case that it would have taken the same action regardless of the discriminatory motive. See *Cellco Partnership D/B/A Verizon Wireless*, 365 NLRB No. 93 (2017); c.f. *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019) (pretext alone may not be sufficient to show unlawful motivation).

Lawful Restrictions on Solicitation

Soliciting on behalf of a union is activity protected by Section 7, and therefore employers may only lawfully prohibit solicitations by employees during working time. *Republic Aviation Corp. v. NLRB*, 324 US 793, 803 (1945). In developing policies placing restrictions on solicitation, an employer may not discriminate along Section 7 lines. *Register Guard*, 351 NLRB 1110, 1118 (2007), overruled on other grounds by *Purple Communications, Inc.*, 361 NLRB 1050 (2014). As the Board noted in *Register Guard*, allowing limited charitable solicitation may not require an employer to allow union solicitations. 351 NLRB at 1118, fn 19, citing *Hammary Mfg. Corp.*, 260 NLRB 57 (1982). That said, an employer in devising a no-solicitation policy, may not then enforce

⁷ See *St. Mary Margaret Mercy Healthcare Centers*, 350 NLRB 203, 203-204 (2007) (an employer finding of discrimination bolstered by the fact that the employer routinely allowed solicitation at the nurse's station and acted only to discipline an employee for soliciting for the union at a nurse's station).

⁸ See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

⁹ See *Sociedad Española De Auxilio Mutuo Y Beneficencia De P.R.*, 342 NLRB 458, 459 fn. 9 (2004).

it only to restrict Section 7 activity in a discriminatory manner. See *St. Mary Margaret Mercy Healthcare Centers*, 350 NLRB at 203-204; *Clinton Electronic Corp.*, 332 NLRB 479 (2000) (applying a valid no-solicitation rule in a discriminatory manner, by allowing solicitation for nonunion matters while proscribing union solicitation, is unlawful). Nor can an employer claim to be unaware of solicitations that violated its policy if such solicitations were “open and notorious,” that is “conducted in such a manner and at such times and places as could not escape the attention of the Respondent’s agents.” *Riley Stoker Corp.*, 223 NLRB 1146, 1150 (1976).

Here, in August 2018, Respondent nominally adopted a restrictive no-solicitation policy that banned: (1) all solicitations by non-employees; (2) all solicitation “for any reason” by employees in patient care areas; and (3) all solicitation by employees during working time. The policy then draws a narrow exception for “collections for charitable purposes,” which may only occur upon approval by Respondent’s Administrator. Finally, the policy warns employees that they will be considered in violation of the policy if they participate or assist in offending solicitations.

As discussed above, the credible evidence adduced at the administrative hearing establishes that Respondent never enforced an approval requirement for solicitations at the Facility, even though such solicitations were common, open, and occurred throughout the Facility. Moreover, none of the many sales discussed during the hearing were “collections.” This term can be understood to cover the types of collection boxes one commonly sees in workplaces and stores—collection boxes like the one Acosta set out for Hurricane Maria. However, Respondent sought to expand the meaning of “collections” to encompass the distribution of order forms, the sale of goods at the Facility, and even the permission Respondent gave to a small business to sell goods for profit. Thus, despite Respondent’s nominal adoption of a strict no-solicitation policy, at the time

of Ramos' discharge, Respondent's *de facto* policy allowed employees to freely engage in solicitation during working time.

Activity

Yolanda Ramos was clearly engaged in protected Union activity when she asked Kania and other employees to sign a petition for the Union. As discussed above, Respondent could have lawfully placed limits on solicitation during working time, but it never did—until it learned Ramos was organizing for the Union.

Knowledge

Respondent admits that it learned of Ramos' Union activity through Kania on March 1. That information set off a chain of events that ultimately resulted in Ramos' unlawful suspension and discharge.

Animus

Respondent's unlawful interrogation of Ramos, when it had never so much as questioned anyone else about other solicitations prohibited by its policy, establishes not only that Respondent possessed generalized anti-Union animus, but that it bore particularized animus to the specific activity of collecting signatures for the Union. See *Remington Lodging & Hospitality, LLC*, 363 NLRB at slip op. at 2, citing *Atelier Condominium & Cooper Square Realty*, 361 NLRB at 970.

March 4 Suspension

The credible testimonial and documentary evidence regarding the March 4 suspension provides a clear admission of unlawful motivation. The only rationale provided on the contemporaneous "Notice of Disciplinary Action" issued to Ramos is that she was being

“suspended per Administrator pending the investigation of the ‘Union’ petition.” Moreover, Respondent’s preoccupation during this meeting, as evidenced by Yarros’ and Molinaro’s questions, was in learning about Ramos’ underlying Union activity and the identity of any other employees behind the organizing effort.

However, Molinaro did ask Yarros to have Kania clarify his statement as to whether he and Ramos were on break when Ramos asked him to sign the Union petition. That clarification is likely explained by an inference that Molinaro was homing in on Respondent’s pretextual reason for suspending Ramos, namely that she had violated Respondent’s solicitation policy.

It is undisputed that Ramos engaged in Union activity by collecting signatures for the Union’s petition. It is also undisputed that Respondent had knowledge of that activity from both Kania and Ramos, and that it harbored animus against her activities because they occurred on behalf of the Union.

Therefore, the burden shifts to the Employer to show that it would have suspended Ramos, regardless of her Union activity, because of its no-solicitation policy. Before answering that question, however, the trier of fact should first determine if the proffered reason was in fact relied upon or was merely a pretext. Here, there is both direct and circumstantial evidence that the proffered reason is pretextual. The suspension notice itself is direct evidence of Respondent’s motive and provides strong support for the conclusion that Respondent was offended by Ramos’ solicitation activity on behalf of the *Union*, rather than any general opposition to solicitation activity.

The circumstantial evidence also further supports this conclusion. First, the extreme disparate treatment here strongly suggests that Respondent never had a problem with work-time

solicitation by employees or non-employees—that is until it occurred on behalf of the Union’s organizing efforts. In fact, the only evidence to support that Respondent did not want its employees soliciting while on working time was in a policy it had buried in the employee handbook. Respondent did none of the things employers generally do when they are concerned with a widely practiced behavior in their workplace. It did not hold any meetings or trainings on the new policy, nor did it highlight the new policy in any way. It did not issue warnings to people who continued to engage in solicitation as they had before the issuance of the new policy. Indeed, Respondent did not enforce the new policy in any way until it caught an employee soliciting on behalf of the Union.

Respondent argues that there is no disparate treatment, and therefore no evidence of pretext, because this was the first incident of which it became aware that violated its new solicitation policy, and that it acted accordingly. However, in order to accept that argument, Your Honor would have to accept that all the solicitation that occurred after the implementation of the new policy, of which Respondent was aware in fact and as a matter of law,¹⁰ received the explicit pre-approval of the Administrator. Respondent has failed to sustain its burden of demonstrating that the violation of the no-solicitation policy was the real reason that it suspended Ramos. Respondent failed to present credible evidence that it ever enforced its nominal no-solicitation policy, or that it even required employees to obtain approval in order engage in solicitation. Respondent’s policy, both in writing and in practice, does not and has not compelled Respondent to suspend other employees pending its investigations into the many examples of non-approved charitable solicitation of which it was aware. Thus, its reliance on it here is clearly pretextual. It suggests that rather than a genuine interest in preventing potential disruptions caused by

¹⁰ *Riley Stoker Corp.*, 223 NLRB at 1150.

solicitation activities, Respondent's no-solicitation policy existed as a cudgel to be used to thwart Union organizing efforts.

March 5 Discharge

By the next day, Respondent was no longer openly admitting that it was disciplining Ramos because of the "Union" petition. Rather, it had formally seized upon the idea that the Union petition was a clear violation of its no-solicitation policy. All the reasons for finding the explanation for the suspension to be pretextual apply with equal force to the discharge. There is however, an additional argument in favor of finding that the proffered reason for the discharge was pretextual, namely that the investigation into whether Ramos violated the solicitation policy was perfunctory.

First, Respondent contends that Ramos admitted to committing a violation of the no-solicitation policy, but this is simply false. Ramos only admitted asking another employee to sign the Union petition—but she was not asked whether the solicitation occurred during working time, and her written statement is conspicuously silent on the issue. Second, Respondent did not confirm with either Kania or Ramos whether she had in fact presented him with the petition to sign or had just talked to him about signing the petition. Ramos's unrebutted testimony suggests that she did not, in fact, present Kania with the petition. All Respondent knew for sure at the conclusion of its investigation was that Ramos had discussed signing a Union petition with a coworker, and decided to discharge her on that basis. The overwhelming implication of which is, of course, that this is the real reason that she was terminated and that the proffered reason is pretextual. Finally, as discussed above, Respondent disparately enforced the no-solicitation policy by allowing it to remain dormant in the face of numerous and repeated violations, only to dust it off in order to justify the discharge of an employee engaged in Section 7 activity.

Shifting Defenses

Perhaps sensing the weakness of its argument for suspending and discharging Ramos, Respondent offered, at varying points, shifting defenses on its grounds for discharging Ramos. Initially, Respondent wrote in Ramos' discharge notice that her past discipline placed her "well over the threshold for termination."¹¹

Then, on April 5, Respondent represented to the Region that Ramos' "prior disciplines, coupled with her lying about her actions placed her well over the threshold for termination" (GC-8). However, Ramos' termination notice makes no mention of her "lie" and the fact is that almost immediately after initially denying her Union activity, she confessed to it. Moreover, it is well established that employees have no duty to truthfully respond to an unlawful interrogation and, further, that evidence that the employee lied about her Union activity is evidence itself of the interrogation's coercive impact. *Tradewest Incineration*, 336 NLRB 902, 906 (2001).

Finally, Molinaro's baseless assertion that her concern for resident safety motivated Respondent's conduct represents Respondent's final, desperate attempt to justify its unlawful conduct. Respondent's investigation clearly shows that Respondent was not concerned about resident safety. Kania's written statements do not contain any evidence that he was distraught by Ramos or even what the two employees were doing when the solicitation occurred. Respondent's interrogation of Ramos also showed no signs of concern for resident

¹¹ During the hearing, Molinaro conceded that Respondent had not relied on Ramos' past discipline in order to discharge her. Moreover, Yarros and Ramos could not agree on whose idea it was to add this information to the discharge notice. Yarros testified that she had done so per someone else's instruction, but Molinaro then testified that she had no idea why Yarros had inserted this language into the notice (150; 168).

safety and neither does any of the discipline issued to her. Molinaro's assertion that employees should not discuss serious topics during work is similarly belied by all the evidence and, even the, is not the asserted reason for discharging Ramos. Instead, Molinaro's assertion invoking resident safety was a weak attempt to gain sympathy and yield deference to her unlawful actions.

For the reasons stated above, the General Counsel submits that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Yolanda Ramos because of her Union activities.

IV. CONCLUSIONS AND REMEDY

Based on the foregoing, Counsel for the General Counsel submits that Respondent violated Section 8(a)(1), (3), and (5) of the Act as alleged in the Consolidated Complaint. Counsel for the General Counsel respectfully requests Your Honor to so find and order a full, comprehensive, and appropriate remedy.

As a remedy for Respondent's unfair labor practices, The General Counsel seeks an Order requiring Respondent to:

1. Cease and desist from:
 - a. Interrogating employees about their Union activities.
 - b. Enforcing the no-solicitation policy selectively and disparately by prohibiting union solicitations and distributions while permitting nonunion solicitations and distributions.
 - c. Discharging, suspending, or otherwise discriminating against employees because they support or assist the Union or engage in protected concerted activity.

- d. Failing and refusing to meet and bargain in good faith with the Union over any proposed changes in wages, hours and working conditions before putting such changes into effect.
- e. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act:

- f. Upon request of the Union rescind the new PTO policy and reinstitute the previous policy, including by reinstating the accrued leave balances that were eliminated.
- g. Offer Yolanda Ramos immediate and full reinstatement to her former job, or if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.
- h. Pay Yolanda Ramos for the wages and other benefits, with interest, she lost because of her discharge.
- i. Compensate Yolanda Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.
- j. Remove from its files all references to the suspension and discharge of Yolanda Ramos and notify her in writing that this had been done and that the suspension and discharge will not be used against her in any way.
- k. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records,

timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

- l. Within 14 days after service by the Region, post at its Scranton, Pennsylvania facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.
- m. within 14 days after service by the Region, (i) hold a mandatory employee meeting or meetings, on working time and at times when the Respondent customarily holds meetings, and scheduled to ensure the widest possible employee attendance, at which the Notice to Employees will be read to employees by a responsible Respondent official in the presence of a Board agent or, at the Respondent's option, have a Board agent read the Notice in the presence of a responsible Respondent official; (ii) announce the meeting(s) for the Notice reading in the same manner it would customarily announce a meeting of employees; (iii) require that all employees at the Facility attend the meeting(s); and (iv) have the prior approval of

the Regional Director of the Fourth Region of the National Labor Relations Board of the time and date of the meeting or meetings for the reading of the Court's Order and the Regional Director's approval of the content and method of the announcement to employees of the reading of the Courts Order.

- n. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Union has taken to comply.

The cease and desist order, and all but 2(h) of the affirmative provisions are standard remedies for these types of violations. The Board has recognized that a notice-reading remedy, requested in paragraph 2(h), may be warranted where Respondent commits “serious and widespread unfair labor practices.” *Farm Fresh Co., Target Once, LLC*, 361 NLRB 848, 848 fn 3 (2014), citing *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) (ordering notice reading “so that employees fully perceive that the [r]espondent and its managers are bound by the requirements of the Act”), rev. denied 400 F.3d 920 (D.C. Cir. 2005). The Board has held that a public reading of the notice is an “effective but moderate way to let in a warming wind of information, and more important, reassurance.” *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) citing *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969).

Here, the discharge of an employee organizer at the beginning of an organizing campaign, a so called “nip in the bud” discharge, is just such an egregious violation. Similarly, Respondent’s unilateral change to a core term and condition of employment before even beginning to negotiate a collective bargaining agreement with a newly certified Union threatens the national policy favoring stable labor relations enshrined in the Act. Respondent’s unfair labor practices were serious and widespread—impacting all bargaining unit employees and any employees who had

been interested in organizing prior to Ramos' discharge. Finally, the most egregious violations in this case were committed by Respondent's highest-ranking officials and involved retaliation against an employee *explicitly* because she had engaged in protected activity. Therefore, a Notice Reading remedy is justified and appropriate here.

Respectfully Submitted,



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Dated: August 15, 2019

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT interfere with, restrain or coerce you in the exercise of the above rights

The Retail, Wholesale and Department Store Union (Union) is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

INCLUDED: All full-time and regular part-time Certified Nursing Assistants (CNAs) and Restorative Aids employed by the Employer at its 2309 Stafford Avenue, Scranton, PA facility.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

WE WILL NOT ask you about your Union activities or about the Union activities of other employees.

WE WILL NOT enforce our no-solicitation and no-distribution rules selectively and disparately by prohibiting union solicitations and distributions while permitting nonunion solicitations and distributions.

WE WILL NOT suspend, fire, or otherwise discriminate against you because you support or assist the Union.

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

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

WE WILL, if requested by the Union, rescind the new PTO Policy we implemented without bargaining with the Union, and restore the accrued leave you lost as a result.

WE WILL pay you for the wages and other benefits lost because of the changes to terms and conditions of employment resulting for the new PTO Policy we implemented without bargaining with the Union.

WE WILL offer Yolanda Ramos immediate and full reinstatement to her former job, or if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL pay Yolanda Ramos for the wages and other benefits, with interest, she lost because we discharged her.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the suspension and discharge of Yolanda Ramos and **WE WILL**, within three days thereafter, notify her in writing that this had been done and that the suspension and discharge will not be used against her in any way.

WE WILL, within 14 days from the date of the Board's Order, compensate Yolanda Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

Mountain View Care and Rehabilitation Center, LLC

(Employer)

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

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

100 E Penn Square
Suite 403
Philadelphia, PA 19107

Telephone: (215)597-7601
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer