

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

**MOUNTAIN VIEW CARE AND
REHABILITATION CENTER, LLC**

and

**RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION**

:
:
: **Case No. 04-CA-235894 and**
: **04-CA-238216**
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**POST-HEARING BRIEF OF EMPLOYER/RESPONDENT MOUNTAIN VIEW CARE
AND REHABILITATION CENTER**

Respondent Mountain View Care and Rehabilitation Center (hereinafter “Mountain View”), by its attorneys, pursuant to the directive of Administrative Law Judge Robert Giannasi that briefs were due from the parties on August 8, 2019, with an extension granted to August 15, 2019, and Case Handling Manual 11244.1 (relating to filing of briefs), hereby submits this Post-Hearing Brief in support of its position that Yolanda Ramos was terminated pursuant to Mountain View’s Progressive Disciplinary Process, and not due to anti-union animus; and that the Charge Related to the Change in Terms and Conditions of Employment was not timely filed.

PROCEDURAL HISTORY AND STATUS

RWDSU Local 108/UFCW (“Union”) filed two separate Unfair Labor Practice charges that are at issue in this matter. Case Number 04-CA-235894, in which the Union claimed an improper change in employee terms and conditions of employment was first filed on February 13, 2019. That Charge was Amended on March 6, 2019 and May 14, 2019. Case Number 04-CA-238216 relating to the termination of Yolanda Ramos for violation of Mountain View’s solicitation policy was filed on March 21, 2019. That Charge was Amended on May 1, 2019.

After an investigation conducted by Hearing Attorney and Senior Field Attorney David G. Rodriguez, Esq., the Cases were Consolidated and a Joint Complaint was issued on May 16, 2019. Mountain View filed a timely Answer to the Consolidated Complaint on May 30, 2019.

A hearing was held before Administrative Law Judge Robert Giannasi on Monday, July 8, 2019. At the close of the hearing, the Administrative Law Judge directed that the parties file Briefs on or before Thursday August 8, 2019 and subsequently extended the deadline to Thursday August 15.

Per the direction of Administrative Law Judge Giannasi, the two issues are discussed separately in the Brief. Relevant facts are identified separately with citations to the record.

YOLANDA RAMOS WAS TERMINATED PURSUANT TO MOUNTAIN VIEW'S PROGRESSIVE DISCIPLINARY POLICY, AND NOT DUE TO ANTI-UNION ANIMUS

The National Labor Relations Board determines if employees have been disciplined for their protected activity under a burden shifting framework. Under that framework, 1) if an employee engages in protected concerted activity, 2) the employer has knowledge of that activity, and 3) there is animus on the part of the employer, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the employee's protected conduct. Here, Mountain View concedes the first two parts of the analysis framework: that Ms. Ramos was engaged in protected concerted activity; and that Mountain View was aware of her activity. But Mountain View denies that the General Counsel has met its burden on the third part-- anti-union animus in its decision to terminate Ms. Ramos. Pursuant to a recent Board decision, the General Counsel must show that the Employer acted with anti-union animus, whereas before anti-union animus could be inferred. Even if the General Counsel had met this burden and proved anti-union animus, Mountain View satisfied the burden that would have then

shifted to it by demonstrating it would have terminated Ms. Ramos' employment regardless of whether she was involved in protected activity.

Yarros Termination- Relevant Facts

Mountain View's Solicitation Policy

- Mountain View has a Solicitation Policy that is contained in its Employee Handbook. Respondent's Exhibit 1.
- Mountain View's Solicitation Policy prohibits, among other activities by non-employees, employees soliciting in resident care areas or on working time. Respondent's Exhibit 1, at p. 42; General Counsel Exhibit 3.
- Mountain View's Solicitation Policy allows the Administrator to approve solicitations made for charitable purposes. Respondent's Exhibit 1, at p. 42; General Counsel Exhibit 3.
- Mountain View's Solicitation Policy provides that employees participating in solicitations that violate the policy are subject to disciplinary action, up to and including termination. Respondent's Exhibit 1, at p. 42; General Counsel Exhibit 3.
- A Violation of Mountain View's Solicitation Policy is a Group IV Violation under Mountain View's Progressive Disciplinary Policy. Respondent's Exhibit 1, at p. 63.
- Under Mountain View's Progressive Disciplinary Policy, a Group IV Violation requires termination for the First Offense. Respondent's Exhibit 1, at p. 65.
- The Solicitation Policy was a policy first implemented at Mountain View in August of 2018. Testimony of Linda Yarros, at p. 35, lns. 14-16.
- The Parties Stipulated that there was no solicitation policy in effect at the facility prior to August 2018. Stipulation entered at p. 127, lns. 1-7.

Investigation and Termination of Yolanda Ramos

- Dietary Employee Levi Kania came to Linda Yarros “visibly upset” that a co-worker had asked him to sign a union paper. Testimony of Linda Yarros at p. 133, lns. 13-15; p. 136, lns. 10-12.
- Based on Ms. Yarros’ conversation with Mr. Kania, and statements he provided (General Counsel Exhibits 12 and 13), Ms. Molinaro was concerned that Mountain View’s Solicitation policy had been violated. Testimony of Donna Molinaro at p. 160, lns. 3-13.
- Ms. Ramos was brought into a meeting with Ms. Yarros and Mr. Molinaro as part of their investigation. Testimony of Linda Yarros at p. 138, lns. 25; testimony of Donna Molinaro at p. 158, lns. 17-19.
- During that meeting Yolanda Ramos eventually admitted having solicited a signature from Mr. Kania in the kitchen of the facility, which is their work area, while both were on work time. Testimony of Yolanda Ramos at p. 41, lns. 18-25; p. 54, lns. 1-4.
- When first asked about her solicitation of co-workers, Yolanda Ramos lied to Donna Molinaro and Linda Yarros before eventually admitting what she had done. Testimony of Yolanda Ramos, at p. 44, lns. 1-13; p. 60, lns. 9-25; testimony of Linda Yarros at p. 138, lns. 21-25.
- Yolanda Ramos recanted her lie denying soliciting Mr. Kania in the kitchen during work hours after Ms. Molinaro told Ms. Ramos she would verify by reviewing video footage from the kitchen and speak with other employees. Testimony of Donna Molinaro at p. 159, lns. 9-12.
- Yolanda Ramos claims she was told to lie to management if she were asked about soliciting co-workers. Testimony of Yolanda Ramos, at p. 54, lns. 5-7.

- Yolanda Ramos claims that whomever told her to lie to management about her solicitation of co-workers did not explain to her why she should lie. Testimony of Yolanda Ramos, at p. 54, lns. 15-17.
- Yolanda Ramos claims that she did not ask whomever told her to lie to management about her solicitation of co-workers why she should lie. Testimony of Yolanda Ramos, at p. 54, lns. 12-14.
- Yolanda Ramos was terminated for violating Mountain View's Solicitation policy. General Counsel Exhibit 7.
- Ms. Molinaro was concerned about Ms. Ramos having asked Mr. Kania to sign the Petition while the two were working both because Mr. Kania was upset about it, but also out of concern for resident safety. Testimony of Donna Molinaro at p. 166, lns. 11-24.
- Employees in the kitchen must make sure that they are preparing meal trays for Residents properly, in accordance with physician orders and the Residents' diets. Testimony of Donna Molinaro at p. 166, lns. 14-18.
- Donna Molinaro would not have been concerned about Yolanda Ramos soliciting Levi Kania if it had happened during a work break. Testimony of Donna Molinaro at p. 158, lns. 6-11.
- During Molinaro's interviews with Yolanda Ramos, Molinaro did not mention the type of petition for which Ms. Ramos was alleged to have been soliciting signatures. Testimony of Donna Molinaro at p. 159, lns. 6-8.
- Yolanda Ramos had previously been disciplined on August 3, 2018 for Work Not Satisfactory; and, issued a Verbal Warning. Respondent's Exhibit 5.

- Yolanda Ramos was given a copy of Mountain View’s Employee Handbook on July 30, 2018. Testimony of Yolanda Ramos at p. 55, Ins. 5-14; Respondent’s Exhibit 2 at line 34.
- Nine days after receiving her Employee Handbook, Ms. Ramos returned a signed Acknowledgment of Receipt of the Employee Handbook in which she affirmed that she “read and understand the Handbook; and, agreed to follow it. I have been given an opportunity to have my questions answered” and “I understand that I have had the opportunity to discuss any questions I have concerning the Employee Handbook with the Administrator for clarification.” Testimony of Yolanda Ramos at p. 56, Ins. 1-17; Respondent’s Exhibit 3.

Other Solicitations By Employees

- Yolanda Ramos testified about having previously sold Easter candy at Mountain View in March of 2018 for her daughter’s school. Testimony of Yolanda Ramos, at p. 49, Ins. 10-14; p. 57, Ins. 11-15.
- Yolanda Ramos testified about having bought candy from a supervisor, Eric Kania for his daughter’s school. Testimony of Yolanda Ramos, at pp. 51-52, Ins. 24-9.
- Cynthia Young testified that she had sold Tupperware at the facility “right before August” of 2018. Testimony of Cynthia Young, at p. 70, Ins. 10-17.
- Cynthia Young testified that she did not think that any supervisors saw her selling Tupperware. Testimony of Cynthia Young at p. 71, Ins. 17-19.
- Cynthia Young described other employee solicitations for the sale of girl scout cookies and other candy for employees’ children’s schools where a “sheet would be left at the

station, and you just signed up for what you wanted.” Testimony of Cynthia Young, at pp. 72-73, lns. 23-8; p. 91, lns. 18-25.

- Danielle Albano testified that other employees sell candy and girl scout cookies. Testimony of Danielle Albano at p. 96, lns. 16-18.
- Danielle Albano testified that other employee solicitations were “family oriented”. Testimony of Danielle Albano at p. 102, ln. 17.
- Danielle Albano testified about purchasing candy from Amy Yarros. Testimony of Danielle Albano at p. 103, lns. 12-25.
- Donna Molinaro had approved employee requests for Girl Scout Cookie sales and candy. Testimony of Donna Molinaro at p. 165, lns. 11-16.
- Solicitations by Employees selling Girl Scout Cookies and candy were approved by the Nursing Home Administrator. Testimony of Linda Yarros at pp. 30-31, lns. 23-5.
- Donna Molinaro had no knowledge of employees selling items at work for personal/private gain, such as Tupperware, or Mary Kay. Testimony of Donna Molinaro at p. 165, lns. 17-25.
- Nancy Acosta testified to asking permission of the prior Administrator prior to placing a donation box in the break room to collect donated items for victims of Hurricane Maria. Testimony of Nancy Acosta at p. 116, lns. 4-11.
- As long as she has been administrator at Mountain View, Ms. Molinaro had “never had anybody come to me with a complaint about solicitation in the facility” before Levi Kania did. Testimony of Donna Molinaro at p. 161, lns. 18-19; and “No, I never had anybody – a resident, another employee, a family member – no.” at p. 176, lns. 1-4.

Solicitations by the Mountain View Auxiliary

- There is a Mountain View Auxiliary that holds charity sales for the benefit of Mountain View residents. Testimony of Cynthia Young, at p. 72, Ins. 12-22.
- Danielle Albano testified about solicitations by “Sophisticated Lady” which were actually solicitations on behalf of the Mountain View Auxiliary. Testimony of Danielle Albano at pps. 98-101, Ins. 4-7; p. 109, Ins. 14-25; Testimony of Donna Molinaro at pps. 164-165, Ins. 17-10.
- The Mountain View Auxiliary “are members of residents’ families or nonfamilies that meet once a month, every 2 months. They put on Valentine’s Day parties for the residents. They put on birthday parties for the residents. They do what’s called jewelry and purse sale for the residents. Any proceeds go to the residents.” Testimony of Linda Yarros at p. 34, Ins. 7-12.
- Donna Molinaro approved the solicitations by Sophisticated Lady on behalf of the Mountain View Auxiliary. Testimony of Donna Molinaro at p. 165, Ins. 7-8.

The Termination of Yolanda Ramos- Argument

In *Wright Line*, the National Labor Relations Board established a burden shifting analysis that is to be used when an employer is accused of having discharged an employee due to the Employee’s protected activity. *Id.*, 251 NLRB 1083 (1980), Under that framework, 1) if an employee engages in protected concerted activity, 2) the employer has knowledge of that activity, and 3) there is animus on the part of the employer, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the employee’s protected conduct. *Id.*, 251 NLRB at 1089. Here, Mountain View acknowledges the first two parts of the analysis framework: that Ms. Ramos was engaged in protected concerted activity;

and that Mountain View was aware of her activity. But Mountain View denies that the General Counsel met its burden to prove the third part-- anti-union animus in Mountain View's decision to terminate Ms. Ramos. In *Electrolux Home Products, Inc.*, the Board recently clarified the third part of the *Wright Line* framework. *Id.*, 368 NLRB No. 34 (2019). Under *Electrolux*, the General Counsel must show that the Employer acted with anti-union animus, whereas before anti-union animus could be inferred. *Id.*, 368 NLRB no 34 at p. 3. Here, the General Counsel did not meet that burden of proving anti-union animus, and relies solely on an inference that Mountain View's motivation was purely anti-union animus, despite testimony from the facility administrator, Donna Molinaro, that her concerns with this specific incident emanated from an employee being "visibly upset" while trying to perform his work duties-- important work duties that require attention to detail and implicate Resident safety. Even if the General Counsel had met this burden, Mountain View satisfied the burden that would have then shifted to it by demonstrating it would have terminated Ms. Ramos' employment regardless of whether she was involved in protected activity. As Molinaro testified, she would not have been concerned if the solicitation had happened during a work break.

The new and current operator of Mountain View took over operations in February of 2018. In late July of 2018, a new administrator, Donna Molinaro was hired. Shortly after Ms. Molinaro's hire, Mountain View issued a new Employee Handbook. That handbook contained the first solicitation policy implemented at the Mountain View facility. The policy prohibits employees from soliciting co-workers in work areas or on work time but includes an exception for charitable solicitations which are approved by the Administrator of the facility.

Solicitation policies such as Mountain View's, which allow for one type of solicitation, but prohibit other forms of solicitation, are permissible under Board law, so long as they are not

enforced selectively so as to limit only Union activity See, *Webco Indus., Inc.*, 327 NLRB 172, 185 (1998). As the Board explained:

The Board in *Hammary Mfg. Corp.*, 265 NLRB 57, 57 fn. 4 (1982), addressed the issue of consistency of a no-solicitation rule's application:

The Board and the courts consistently have held that an employer does not violate Section 8(a)(1) by permitting a small number of isolated “beneficent acts” as narrow exceptions to a no-solicitation rule. See, e.g., *Serv-Air, Inc. v. NLRB*, 395 F.2d 577 (10th Cir. 1968), on remand 175 NLRB 801 (1969); *Emerson Electric Co., U.S. Electrical Motors Division*, 187 NLRB 294 (1970). Thus, rather than finding an exception for charities to be a per se violation of the Act, the Board has evaluated the “quantum of ... incidents” involved to determine whether unlawful discrimination has occurred. See, e.g., *Serv-Air*, 175 NLRB 801 (1969); *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

Webco Indus., Inc. at 185. Here, Mountain View has an exception for charitable solicitations which are approved by the Administrator. While the General Counsel presented witnesses who claim they engaged in solicitation, the General Counsel has not shown that any of those solicitations violated Mountain View’s policy. Only Cynthia Young testified to having engaged in non-charitable solicitations by selling Tupperware, but that was “right before August” before the solicitation policy was introduced. It is telling that she no longer sold Tupperware at the Facility after the new policy was implemented.

Other solicitations that were described were for Girl Scout cookies or candy-- benefits for employee children or grandchildren, or for school trips¹. In the words of Board Witness and Bargaining Committee Member Danielle Albano “family oriented”. Administrator Donna

¹ Solicitations are made by the Mountain View Auxiliary for the benefit of Mountain View residents and in conjunction with the Mountain View Administration, but there was no evidence that employees engage in making those solicitations, that they are on work time, or in work areas.

Molinaro confirmed that she had approved employees for those types of fundraisers. These types of fund raisers help to build employee relationships and a sense of community. For profit solicitations and non- charitable solicitations are different, and there is no evidence that any non-charitable solicitations occurred at the Facility from August of 2018 when the policy was first introduced, until Ms. Ramos solicited a coworker on March 1, 2019. It is particularly telling that no other employee, resident, or family had complained of any of the charitable solicitations before Levi Kania came to Linda Yarros “visibly upset” that Ms. Ramos had asked him to sign a petition while he was working.

Mountain View had a clear solicitation policy that was relatively new at the Facility. Simply because the first and only opportunity where enforcement is required involved an employee engaged in union activity does not mean the policy is being applied with discrimination. Had Mountain View not enforced its policy as written, it could have established a past practice of allowing any kind of solicitations by employees on work time and in work areas for any reason. Employees who would subsequently be disciplined for selling items for profit would claim they were discriminated against because Ms. Ramos had been permitted to solicit to the point of annoyance of a co-worker with no repercussion.

Furthermore, the fact that Ms. Ramos initially lied about her activity, demonstrates that she knew she was violating a work policy. Her lie was not a reason for her termination, given that she recanted it shortly after making it, but it was considered as evidence that she knew what she was doing was prohibited. She had reviewed her Employee Handbook which included the solicitation policy and progressive disciplinary system for nine days before confirming that she read and understood it. She claims that she was told to lie if asked about her activity, but denies asking why she should lie, or receiving any explanation as to why she was instructed to lie. She

testified that she would not have lied if she had been selling candy, demonstrating that she knew that approved charitable sales were tolerated, but not non-charitable solicitations.

Finally, even if, despite introducing no evidence to prove that Mountain View acted with Anti-Union animus in terminating Ms. Ramos, it is found that the General Counsel met its burden on the third part of the *Wright Line* test, the burden would then shift to Mountain View to show that it would have terminated Ms. Ramos' employment regardless of whether she was involved in protected activity. As Ms. Molinaro testified that she was concerned for resident safety because employees in the kitchen must concentrate and make sure that they are preparing meal trays for Residents properly, in accordance with physician orders and the Residents' diets. When an employee's actions in violation of company policy make a co-worker "visibly upset" there is a legitimate concern for resident safety. Ms. Molinaro also testified that she would not have been concerned about Ms. Ramos soliciting Mr. Kania if it had happened during a work break.

In conclusion, Mountain View's solicitation policy is valid on its face. It was a new policy that permitted charitable solicitations that were approved by the Administrator. There is no evidence that any non charitable solicitations were permitted after the policy was implemented, and Molinaro had approved charitable solicitations under the policy. The fact that the first instance of violation of the policy involved an employee soliciting for the Union does not mitigate an employer's obligation and right to enforce its valid work rules. Ms. Ramos knew what she was doing was against Mountain View policy, and she claims she blindly followed direction to lie about it.

The Union's Unfair Labor Practice Charge Claiming A Change in the Terms and Conditions of Employment Was Not Filed Timely

Unfair Labor Practice Charges must be filed within six (6) months of the alleged unfair labor practice. Section 10(b) of the NLRA. Here, the change occurred with the implementation of Mountain View's employee handbook on August 1, 2019. Employees, including members of the Union's bargaining committee, were told of change to their PTO policy at the end of July/beginning of August in 2018. A bargaining committee member noticed a change in her benefits in August. The Union's Charge was not filed until February 13, 2019, outside the six month time period.

Timeliness- Relevant Facts

- The Union first filed its Charge relating to change in Paid Time Off Benefits on February 13, 2019. General Counsel's Exhibit 1 (a).
- Employee Handbooks were distributed at the "end of July, beginning of August" 2018. Testimony of Linda Yarros at p. 131, lns. 23-25; Respondent's Exhibit 2.
- Cynthia Young received a copy of the Employee Handbook in August of 2018, and claims that all other employees received it then as well. Testimony of Cynthia Young at p. 92, lns. 5-20.
- Cynthia Young is a member of the Union's Bargaining Committee. Testimony of Cynthia Young at p. 66, lns. 14-15.
- Danielle Albano testified about seeing a change in her PTO accrual "around August of 2018." Testimony of Danielle Albano at p. 105, lns 14-17.
- Danielle Albano is a member of the Union's Bargaining Committee. Testimony of Danielle Albano at p. 107-108, lns. 24-3.

- Yolanda Ramos was given a copy of Mountain View’s Employee Handbook on July 30, 2018. Testimony of Yolanda Ramos at p. 55, lns. 5-14; Respondent’s Exhibit 2 at line 34.
- Nine days after receiving her Employee Handbook, Ms. Ramos returned a signed Acknowledgment of Receipt of the Employee Handbook in which she affirmed that she “read and understand the Handbook; and, agreed to follow it. I have been given an opportunity to have my questions answered” and “I understand that I have had the opportunity to discuss any questions I have concerning the Employee Handbook with the Administrator for clarification.” Testimony of Yolanda Ramos at p. 56, lns. 1-17; Respondent’s Exhibit 3.
- At least 36 Mountain View employees acknowledged receiving their employee handbooks on July 30, 2019. Respondent’s Exhibit 2.

Timeliness- Argument

Section 10(b) of the National Labor Relations Act provides

[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . 29 U.S.C.A. § 160(b).

There is no requirement in Section 10(b) of the National Labor Relations Act for the Union to have been given notice of the occurrence first. The Act requires the time bar to run from the occurrence of the alleged unfair labor practice in August. The Act does not require any notice to the Union and the Board should not require more than the Act. *See: U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 154 (1989) (declining to read into FOIA language Congress did not itself provide). Absent other indication, the standard rule is that such limitations begin to run at the time the plaintiff has the right to apply for relief; and, that the

plaintiff has no knowledge of that right or of the facts out of which the right arises does not postpone the period of limitation. *See: Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal., 522 U.S. 192, 201 (1997); TRW Inc. v. Andrews, 534 U.S. 19, 36-38 (2001) (Justices Scalia and Thomas concurring in the judgment).*

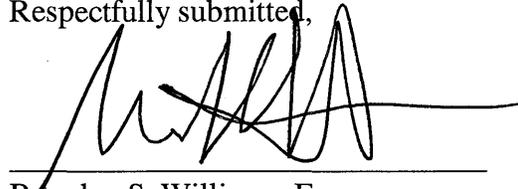
Here, however, Employees, including Union bargaining committee members, had notice in late July/early August of 2018 when they received their new employee handbooks and the change was implemented. This included Cynthia Young and Danielle Albano, members of the Union's bargaining committee. Yolanda Ramos received the Handbook on July 30, 2019 and returned her signed Acknowledgment dated August 8, 2019. At least 36 other employees acknowledged receiving Employee Handbooks on July 30, 2019.

In *Wire Prod. Mfg. Corp.*, the Administrative Law Judge looked to the time when a work rule was posted/communicated to the employees, as setting the date from which to calculate the time bar. *Id.*, 326 NLRB 625 at 633 (1998). "There is no dispute but that the rule in question was posted more than 6 months prior to the Union's first charge in this matter . . ." *Id.*

The Union's Unfair Labor Practice Charge was not filed until February 13, 2019, more than six months after the change was implemented and more than six months after employees and the union via its bargaining committee members were made aware of the changes and, in fact, experienced the changes on their pay checks. For this reason, the Charge related to the change in terms and conditions of employment should be time-barred.

WHEREFORE, Employer Mountain View requests the Board to dismiss the Consolidated Complaint as Amended with Prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Brandon S. Williams', written over a horizontal line.

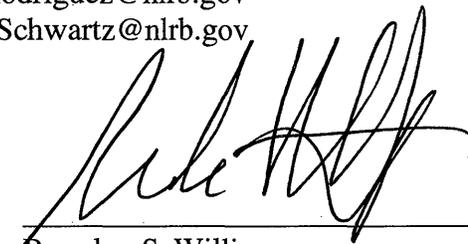
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DATE: August 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.21 of the Board's Rules and Regulations, a true and correct copy of the Brief of the Respondent was served by electronic mail, addressed as follows:

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DATE: August 15, 2019