UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

UNIVERSAL HEALTH SERVICES, INC. AND GEORGE WASHINGTON UNIVERSITY D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL,	)	
and	)	CASE NOS. 05-CA-216482 05-CA-230128 05-CA-238809
1199 SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS EAST, MD/DC REGION A/W SERVICE EMPLOYEES INTERNATIONAL UNION.	)	

POST-HEARING BRIEF ON BEHALF OF RESPONDENTS UNIVERSAL HEALTH SERVICES, INC. AND GEORGE WASHINGTON UNIVERSITY D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL

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I. STATEMENT OF THE CASE

This matter was tried before Administrative Law Michael A. Rosas on June 18-20, 2019 in Washington D.C. Respondent is an acute care hospital in Washington D.C. – The George Washington University Hospital ("the Hospital" or "GWUH"). 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Regional a/w Service Employees International Union ("the Union") represented employees in the Environmental Services and Food Services (also referred to as "Dietary") departments at the Hospital.

The Hospital and the Union (collectively, "the Parties") met to negotiate a successor collective bargaining agreement ("CBA") between November 2016 and October 2018. The Parties' prior CBA expired during the course of negotiations on December 19, 2016. Prior to reaching agreement on a successor CBA, the Hospital withdrew recognition from the Union on October 26, 2018, after objective evidence indicated that the Union had lost majority support.

The General Counsel alleges that the Hospital violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act") by bargaining with no intention of reaching an agreement, improperly withdrawing recognition from the Union, and subsequently, failing and refusing to bargain with the Union after the withdrawal of recognition. (G.C. Ex. 1HH, ¶¶ 7-11.)[1] The General Counsel also alleges that representatives of the Hospital improperly interrogated employees regarding the allegations in this proceeding. (G.C. Ex. 1HH, ¶12.)

In support of his claims, the General Counsel alleges that the Hospital (a) maintained and adhered to bargaining proposals that provided the bargaining unit with fewer rights than if they had no agreement (specifically, by proposing a restrictive dispute resolution procedure, a no-

[1] The General Counsel's exhibits are designated as "(G.C. Ex. [exhibit number] at [page number])"; the Hospital's exhibits are designated as "(R. Ex. [exhibit number] at [page number])"; and the transcript is designated as: "(Tr. at [page number].)"

strike provision, and an expansive management rights clause), (b) engaging in regressive bargaining with respect to its proposal on discipline, (c) and maintaining and adhering to bargaining proposals that deleted union security and gave the Hospital unfettered discretion with respect to wages. (G.C. Ex. 1HH, ¶7.) The General Counsel further asserted that following the withdrawal, the Hospital changed the employees' wage rate, compensation structure, and access to transit benefits without affording the Union an opportunity to bargain. (G.C. Ex. 1HH, ¶8-10.) Finally, the General Counsel alleges that a November 1, 2018 memorandum from the Hospital to employees improperly blamed the Union for not securing a benefit on their behalf, and that Hospital representatives engaged in coercive interrogation of employees prior to the hearing in this matter. (G.C. Ex. 1HH, ¶¶ 11-12.)

The Hospital timely answered the First Amended Consolidated Complaint, denying that it violated the Act. (G.C. Exs. 1CC, 1EE.) The tribunal considered any new allegations asserted in the Second Amended Consolidated Complaint ("Complaint"), served post-hearing on June 25, 2019, automatically denied. (Tr. at 654; G.C. Ex. 1HH.)

In more detail, the Hospital bargained in good-faith with the Union over 30 sessions that spanned 22 months. The Hospital engaged in hard bargaining, but always intended to reach an agreement with the Union; the Union, on the other hand, engaged in intransigent conduct throughout the negotiations. The Hospital withdrew recognition from the Union only after it received objective evidence from a majority of employees in the bargaining unit that they no longer wished to be represented by the Union for purposes of collective bargaining. There is no evidence that prior to withdrawal, the Hospital violated the Act, and even assuming that it did (which it did not), there is no evidence that the violations were of the type that would or did cause disaffection within the bargaining unit. Following the proper withdrawal, the Hospital was

not required to bargain with the Union. And finally, all employee interviews contained the appropriate *Johnnie's Poultry* notifications, and any testimony to the contrary was inconsistent and not as credible as that of the representatives accused of the misconduct. As the General Counsel failed to meet his burden, the Complaint should be dismissed in its entirety.

II. FACTUAL OVERVIEW

The Hospital and the Union were parties to a CBA that expired on December 19, 2016. (G.C. Ex. 30.) The Parties engaged in negotiations for a successor agreement over 30 sessions that spanned a time period of 22 months, November 21, 2016-October 11, 2018. (R. Ex. 3, *passim*.) Steve Bernstein, an attorney with the law firm of FisherPhillips, acted as lead negotiator for the Hospital (Tr. at 509, 537-38), joined by Jeanne Schmid, Staff Vice President of Labor Relations, and members of the Hospital's HR and management teams (R. Ex. 3, *passim*). Stephen Godoff, an attorney with Abato, Rubenstein & Abato, P.A., represented the Union (Tr. at 28-29), along with a series of Union employees that included Lisa Wallace and Antoinette Turner on various dates throughout 2016 and 2017 and Yahnae Barner and Wallace on various dates throughout 2018 (R. Ex. 3, *passim*).

The Parties met in person, typically at the Hospital's offices on K Street, for negotiations on the following dates:

1. November 21, 2016	11. February 23, 2017	21. January 17, 2018
2. November 22, 2016	12. March 28, 2017	22. February 13, 2018
3. December 6, 2016	13. March 29, 2017	23. May 18, 2018
4. December 7, 2016	14. April 5, 2017	24. May 21, 2018
5. December 21, 2016	15. April 6, 2017	25. July 31, 2018
6. December 22, 2016	16. May 16, 2017	26. August 1, 2018
7. January 17, 2017	17. June 12, 2017	27. September 5, 2018
8. January 31, 2017	18. July 12, 2017	28. September 6, 2018
9. February 1, 2017	19. July 31, 2017	29. October 10, 2018
10. February 22, 2017	20. October 6, 2017	30. October 11, 2018

(R. Ex. 3, *passim*.) Bernstein was the only individual that was present for every session, with Schmid missing four sessions and Godoff missing six sessions,[2] and Barner, the only Union employee that testified at the hearing, missing 21 sessions.[3] (*Id*.)

During the very first session on November 21, 2016, Bernstein laid out the Hospital's guiding principles for the negotiations: "We want a contract that is clear [] to the managers that will utilize it." (R. Ex. 3 at 0006.) Schmid expounded, stating, "[A] lot of what we have is out of date and antiquated. We want to streamline and [make it] as modern as possible. (*Id.*) This is a sentiment and direction that Bernstein and Schmid would remind the Union about on multiple occasions, including, for example, on December 7, 2016 (R. Ex. 3 at 0050 ("We want someone to be able to pick up this agreement and understand what is not tolerated.")), December 22, 2016 (R. Ex. 3 at 0085 ("[O]ur goal is to come out with more clarity. We meant it. We want to make sure whoever picks this [up] understands what's expected of them.")), and March 29, 2017 (R. Ex. 3 at 0177 ("We've come in good faith to do this contract. We made [the] point on day one our goal to renegotiate start to finish more clear [articles], remains our goal today.")). *See also* Tr. at 77 (Godoff agreeing that the Hospital's committee repeatedly stated that they wanted to modernize the contract and also make it easier to read; Godoff also agreeing that the expired CBA could use some updating).).

A similar sentiment, expressed in virtually every session, was the Hospital's willingness to accept counters, a sentiment that at times became a plea as the Union failed to provide written counters to many of the proposals for months, if not years, on end. For example, at the second

[2] Schmid missed sessions on January 31, February 1, 22 and 23, 2017; Godoff missed sessions on November 21 and 22 and December 6, 2016, and January 17, February 23, and September 5, 2018. (R. Ex. 3, *passim*.)

[3] Barner only attended the sessions on January 17, February 13, May 18 and 21, August 1, September 5 and 6, and October 10 and 11, 2018. (R. Ex. 3, *passim*.)

session on November 22, 2016, after Turner (a) turned her chair away from the Hospital's committee and said, "I'm not paying her any attention" (as Schmid presented the Hospital's Human Resources Files proposal) (R. Ex. 3 at 0024), and (b) told Bernstein "This won't make us be nice" (apparently referring to process that had arisen from a labor/management committee meeting 18 months earlier) (R. Ex. 3 at 0026), Bernstein reminded them, "You can counter or reject without a counter" (*Id.*). The Union's delay tactics continued throughout negotiations. At one point, on July 31, 2018, Bernstein again reminded the Union that the bulk of open proposals remained with them.[4] As an excuse for the Union's recalcitrance, Brown claimed, for the first time, that the Union believed that a related issue (the Hospital's miscalculation of wages for the Dietary employees) had to be completed "before moving on to bargaining." (R. Ex. 3 at 0334.) Schmid quickly pointed out that the Parties never made any such agreement (*Id.*), and of course, the Union's own conduct belies Brown's untrue statement (*see, e.g.*, R. Ex. 3 at 0213-0214 and R. Ex. 2 at 3776-3777 (Union passing and discussing its Wage and Safe Harbor proposals during 04/06/2017 bargaining session held after Dietary underpayments already at issue); R. Ex. 3 at 0255-0257 and R. Ex. 2 at 3805-3807 (Union passing and discussing its Recognition & Classification proposal during 07/31/2017 session where Brown simultaneously claimed bargaining was stayed).[5] Days where the Hospital asked the Union to please provide a counter to a pending proposal included:

[4] Bernstein would review the status of all of the proposals during every session, which Godoff found helpful. (Tr. at 78; *see also* Tr. at 132 (Barner confirming Bernstein's practice); R. Ex. 19.)

[5] In addition, the dietary underpayment had not even been finalized at the time Brown gave her excuse. (R. Ex. 3 at 0356-0358 (discussing on September 5, 2018 the status of dietary underpayment and fact that spreadsheet with calculations for it not yet complete); R. Ex. 3 at 0409 (discussion that dietary underpayment was going to be issued on October 19).)

DATE	ARTICLE	COMMENT	R. Ex. 3
11/21/16	General Discussion	Bernstein to Turner: "You are now getting into a pattern that you want us to write up words for you….ask that you counter the language you see and pass along."	0005, ¶¶10-11
11/22/16	Probationary Employees & Classifications	Bernstein: "You can counter propose."	0016, ¶2
11/22/16	HR Files	Bernstein: "You can counter or reject without a counter."	0026, ¶2
12/7/16	Discrimination	Bernstein: "How about giving us something?"	0050, ¶7
		Schmid: "We would welcome a counter."	0050, ¶9
12/7/16	General Discussion following caucus	Bernstein: "Anything on the table to offer as a counter?" (Godoff tells him to "ask Lisa [Wallace]" & she responds "no.")	0058, ¶¶7-9
12/21/16	Access	Schmid: "Are you going to provide a written counter?" Turner responds: "not today."	0067, ¶18-0068, ¶1
12/21/16	General Discussion after union reviewed several articles	Schmid: "You're going to give us written counters to reflect what we talked about?"	0071, ¶6
12/22/16	Availability to Provide Service	Bernstein to Godoff: "Welcome to counter propose."	0085, ¶8
		Schmid to Godoff: "Counter" and "if you don't like it, counter."	0088, ¶2
		Schmid to Godoff: "If you don't like it, counter."	0088, ¶6
		Bernstein to Godoff: "Are you planning on written counter with a suggestion?"	0092, ¶11
01/17/17	Seniority, Layoff & Recall	Bernstein to Godoff: "Are you ready to offer a counter proposal?"	0100, ¶14
		Bernstein to Godoff: "Will we see it in writing?"	0100, ¶16
		Bernstein to Godoff: "You're putting in writing?"	0101, ¶4
		Schmid to Godoff: "Help if you provide a written counter. We heard your opinions just write a counter; make it difficult to respond if you don't put it in writing."	0102, ¶1

DATE	ARTICLE	COMMENT	R. Ex. 3
		Schmid to Godoff: "counter our offer" and "put it in writing."	0102, ¶¶13,15
		Bernstein to Godoff: "Welcome a counter"	0103, ¶16
01/31/17	General Discussion	Turner asks Bernstein: "Can you send us what we owe you as far as a counter?"	0126, ¶10
02/23/17	Discipline	Bernstein to Turner/Godoff: "If you could get us a counter on that."	0157, ¶14
03/28/17	Management Rights	Bernstein: "What I don't have is a written proposal from you guys."	0165, ¶6
04/05/17	Union Security	Bernstein: "You're welcome to propose counters."	0182, ¶1
04/05/17	Grievance & Mediation	Bernstein: "You are always welcome to counter."	0186, ¶16
		Bernstein: "Put them in writing."	0186, ¶21
04/05/17	Discipline	Bernstein: "Let me put it this way, I would welcome a counter to this language."	0201, ¶2
04/05/17	Discipline & Job Postings	Bernstein: "We're awaiting counter."	0201, ¶10
04/05/17	Union Security	Bernstein: "Going into March, union security which you don't want to counter."	0202, ¶10
04/05/17	Availability to Provide Service	Bernstein: "Don't think we have a formal written counter."	0203, ¶6
04/05/17	Safe Harbor	Bernstein: Put more time into countering instead of critiquing. Godoff: Here's the counter – No.	0195, ¶¶6, 7
04/06/17	Availability to Provide Service	Bernstein: "I assume we will get a counter."	0206, ¶6
		Bernstein: "You [sic] welcome to do a counter."	0209, ¶8
04/06/17	Discipline	Bernstein: "We never got a counter from you"; Turner responds: "we counter"; Bernstein responds: "not in writing."	0210, ¶¶10-12
05/16/17	Restricted Access	Godoff: "We never did a response to restricted access?" Schmid responds: "nothing in writing."	0220, ¶¶6-7
05/16/17	Complete Understanding	Bernstein: "I want to say you rejected it with no counter."	0220, ¶8

DATE	ARTICLE	COMMENT	R. Ex. 3
05/16/17	Availability to Provide Service	Bernstein: "I'm guessing it was a verbal response but it was not put in writing"; "we should make sure the record is clear"; and "I think today our position is to capture that in writing."	0220, ¶14- 0221, ¶1
05/21/18	Wages	Schmid to Barner: "Well then, counter."	0310, ¶5
		Bernstein to Godoff: "We will accept a counter."	0311, ¶1
05/21/18	Safe Harbor	Schmid to Godoff: "Can we get a written counter?"	0320, ¶6
05/21/18	Discipline	Schmid: "Can you counter?" Bernstein: "Just send us something."	0322, ¶¶8, 10
07/31/18	General Discussion	Bernstein: "I show 15 employer proposal[s] that are opened and have not drawn a union counter and in Steve's [Godoff] fairness, that counter that we get are just along the lines of 'heck no.'"	0334, ¶6
07/31/18	Availability to Provide Service	Schmid: "Are you ultimately going to reduce this to writing?"	0336, ¶14
		Schmid: "Okay, but are you going to put this in writing?"	0336, ¶24
		Schmid: "Well we need a counter."	0338, ¶11
		Bernstein: "We would welcome the counter proposal that lays out that proposal."	0339, ¶2
		Schmid: "All we are saying is counter it; just rejecting it isn't a counter."	0340, ¶1
08/01/18	Availability to Provide Service	Bernstein: "What you seem to be asking for is a catch all kind of defense for employees in circumstances beyond their control; you are welcome to submit a counter that handles that or insert it where you think it's appropriate."	0349, ¶4
		Bernstein: "Well okay so what we got last night a series of comments on the proposal; allow me to send you the proposal turn it into your proposal."	0349, ¶6
		Bernstein: "You [are] welcome to counter."	0350, ¶6

DATE	ARTICLE	COMMENT	R. Ex. 3
09/05/18	Safe Harbor	Bernstein: "I would only add when you are in a position to do so, it would help to get these in writing; I'm more than happy to send the electronic version."	0360, ¶1
09/05/18	Dues	Schmid: "It's like pulling teeth to get a proposal in writing with tracked changes."	0362, ¶1
09/06/18	Management Rights	Schmid: "Well we would like it in writing; it's hard to keep track of it, we would like a counter in writing, and we are not writing your counters for you."	0371, ¶17
09/06/18	Solicitation & Distribution	Bernstein: "Is there anything that precludes the union from taking the proposals and putting them in writing, so that in months from now someone's looking over what we've done here, there's no confusion."	0372, ¶1
		Bernstein: "I don't understand what the difficulty is in reducing it to writing."	0372, ¶7
		Schmid: "You still need to counter."	0372, ¶5
09/06/18	Dues Check Off	Bernstein: "We would certainly welcome counters on it."	0383, ¶6
10/10/18	Wages	Schmid: "We gave you a proposal in May and you haven't responded to it"	0400, ¶12
		Schmid: "We explained it to you. You haven't countered."	0400, ¶14

The Union also had a talking point, taking the position, almost from the first session, that the Hospital did not want to get an agreement, and they positioned themselves to ensure an agreement did not happen over the 22 months of negotiations. On December 7, 2016, **Godoff's very first session**, he gave introductory remarks that referred to the course of negotiations (which consisted of three sessions at that point) as "disturbing," and he questioned the Hospital's "intentions" and whether the Hospital really wanted to get a contract with the Union.[6] (R. Ex. 3

[6] During that same session, Godoff also referred to the Hospital's Human Resources Files proposal as "a nothing burger" and "an absolute waste of everyone's time." (R. Ex. 3 at 0049.) Two sessions later on December 22, in response to the Hospital's Layoff proposal, Godoff

at 0045; *see also, e.g.*, R. Ex. 3 at 0177 (on March 29, 2017, Godoff stating, "What you're doing is dragging out a process with no intention of getting to a [contract] in the end."); R. Ex. 3 at 0181 (on April 5, Godoff stating, "We no longer believe you have any interest in a contract with us."); Tr. at 124 (Godoff testifying that he told the Union after the March 29, 2017 session "that in my view you are never going to get a contract").)

There were only four days that neither party passed a written proposal (May 16, July 12, and October 6, 2017 and February 13, 2018).[7] (R. Exs. 1, 2 and 3, *passim*.) There were only two additional days where the Hospital did not pass a written proposal (April 6 and June 12, 2017). (R. Exs. 1, 2 and 3, *passim*.) In contrast, there were 11 additional days where the Union did not pass a written proposal (November 21 and 22 and December 22, 2016, January 17, February 23, March 29, and April 5, 2017, May 18 and 21, July 31, and September 6, 2018). (*Id.*) Totaling over one third of the bargaining sessions, these dates included four of the first seven sessions the Parties were together (November 21 and 22 and December 22, 2016, and January 17, 2017), and three sessions in a row in 2018 (May 18 and 21 and July 31) (four, if you count February 13 where neither party passed a written proposal). (*Id.*)

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interrupted Bernstein's explanation of the proposal, stating, "Some things are so important [we] will wind up being at war. War with SEIU." (R. Ex. 3 at 0090.) Bernstein cautioned that the Union's unwillingness to let him even finish his explanation indicated they were unwilling to give due consideration to the proposal, and he told Godoff that words like "war" were not helpful to the process. (R. Ex. 3 at 0091.) Notwithstanding, at the next session, Godoff continued, calling the proposal "bullshit," "disgusting," "gratuitous bullshit and nastiness," "a disgrace," and stating "management flexibility my ass," and inviting the Hospital's committee to "walk out the door." (R. Ex. 3 at 0100-0101.) The Hospital's committee declined Godoff's invitation, with Bernstein telling him "You here to bargain or argue? … You registered your opinion; are you ready to offer a counter proposal?" (R. Ex. 3 at 0100).) Notably, when the Union did finally engage in discussion about the proposal, Godoff noted that the evaluation criteria proposal by the Hospital "is in the workers favor," indicating that at least some portion of the proposal was not "bullshit." (R. Ex. 3 at 0105.)

[7] Overall, the Hospital prepared and passed 54 proposals; the Union, 40. (R. Exs. 1, 2, and 3, *passim*.)

The Hospital passed its final initial non-economic proposal on April 5, 2017 (Safe Harbor for Safety Concerns (R. Ex. 1 at 3617-3618)), meaning the Union had all of the Hospital's desired non-economic changes by that date.[8] (R. Ex. 3 at 0188 (Bernstein explaining Union had contract (absent safety related proposal he tendered that afternoon).) On May 16, Bernstein again confirmed, "we have no other non-eco items beyond what we have exchanged" and referenced that Article 6 (Hours for Employees), which the Hospital viewed as economic, would be tendered soon.[9] Godoff's response was to refuse to accept any other non-economic proposals from the Hospital. (Tr. at 85-86; R. Ex. 3 at 0222 ("We're not going to accept the proposals at this point; you can send it to us but no we are not going to agree … we can't accept new proposals now").) This was five months into negotiations, and the Hospital had diligently, and with due seriousness to working toward a contract, passed an initial proposal or counter at every single session prior to Godoff's mandate. (R. Exs. 1, 2 and 3, *passim*.) The Union made its first economic (Wages) proposal the following day. (R. Ex. 2 at 3780-3782.)

As demonstrated in the bargaining notes and proposals, the Parties spent considerable time negotiating all aspects of most proposals, working off similar drafts for each move and counter-move. (R. Exs. 1, 2, and 3 *passim*.) However, on September 5, 2018, the Union, via Godoff's colleague Brian Esders, presented a series of proposals that had clearly been photocopied from another contract and bore no resemblance to the proposals that had thus far been passed across the table. Those proposals concerned: Check-Off (R. Ex. 2 at 3811-3812),

[8] Godoff, as was typical, reacted emotionally to the Safe Harbor proposal, stating, "Do you guys give a shit? It's a disgusting proposal," and when Bernstein suggested the Union put more time in countering instead of critiquing, Godoff replied, "Here's the counter – no." (R. Ex. 3 at 0193-0195.) Of note, Godoff admitted he freely cursed during the Parties' caucuses, although he never heard that type of language from Bernstein or Schmid. (Tr. at 80-91.)

[9] The Hospital ultimately never tendered an Hours for Employees policy.

Grievance Procedure (R. Ex. 2 at 3813-15), Management Rights (R. Ex. 2 at 3816), Union Announcements & Conferences (R. Ex. 2 at 3817), and Union Security (R. Ex. 2 at 3818) ("League Proposals"). After some confusion where neither Esders, nor any of his committee, could (or would) explain the source or purpose of the radically different League Proposals (R. Ex. 3 at 0360-0362), Esders returned after a lunch break and explained that the proposals had been copied from a "league contract" that the Union had used with other employers. (R. Ex. 3 at 0363.) At the time, Esders admitted there was "going to be some work to tailor [the League Proposals] to GW." (*Id.*; *see also* Tr. at 141 (Barner opining that it was "normal" to pull and propose language from a different contract "if it's fit to make, to make it work," which of course, did not occur here); Tr. at 158 (Barner admitting no modifications were made to the League Proposals to tailor them for GWUH).) As noted by Barner, the Hospital's committee was understandably "taken aback" and "had lots of questions" about the radical departure from the Parties' prior work. (Tr. at 140-41; *see also* Tr. at 109-110 (Godoff confirming Bernstein asked a lot of questions about the League Proposals and that Bernstein "rightly" viewed them as divergent from "where we had been.").)

At the time of the withdrawal of recognition, there was evidence of progress at the table. The Parties' five tentative agreements ("TAs") were all signed during three of the final four sessions in 2018: September 5 (Non-Discrimination (R. Ex. 1 at 3674-75) and Union-Management Conferences (R. Ex. 1 at 3680)), September 6 (Agreement (R. Ex. 1 at 3681), Job Postings & Filling of Vacancies (R. Ex. 1 at 3684-3685), and Uniforms (R. Ex. 1 at 3690)), and October 11 (HR Files (R. Ex. 1 at 3696)). Notably, absent undue delay, there is no explanation for the Union's reluctance to sign the TAs earlier. For example, on Non-Discrimination, the Union waited 18 months and 14 sessions until September 5, 2018 to TA the Hospital's last

counter that had been tendered on March 28, 2017. (R. Ex. 1 at 3674-75.) Similarly, the Hospital originally proposed eliminating the Union-Management Conferences article on April 5, 2017; the Union TA'd the Hospital's proposal 17 months and 12 sessions later on September 5, 2018. (R. Ex. 1 at 3680.) And finally, the Hospital proposed the Agreement article on December 7, 2016; the Union waited 21 months and 23 sessions before agreeing to TA the proposal on September 6, 2018. (R. Ex. 1 at 3681.) Notably, during these periods of Union inactivity, the Petition gathered signatures. (*See* fn. 30, *infra.)*

With respect to the specific proposals alleged to be at issue here, the Hospital made its initial **Grievance and Mediation** proposal on March 29, 2017. (R. Ex. 1 at 3601-3603.) The Union let the proposal languish until finally making its first counter (a League proposal) on September 5, 2018 – 18 months later. (R. Ex. 2 at 3813-3815.) The Hospital amended its **Discipline** proposal to bring it in conformity with the **Grievance and Mediation** proposal (the alleged "regressive" proposal) on May 25, 2017. (R. Ex. 1 at 3627-3630.)

The Hospital made its initial **No Strike/No Lockout** proposal on March 29, 2017. (R. Ex. 1 at 3610-3611.) The Union never countered the proposal, and ultimately, after 15 months with no response, the Hospital "bid against itself" and withdrew it on June 7, 2018. (R. Ex. 1 at 3655-58.)

The Hospital made its initial **Rights and Duties of Managers ("Management Rights")** proposal on December 6, 2017. (R. Ex. 1 at 3542-3543.) After some back-and-forth and a counter by the Hospital on March 28, 2017 (R. Ex. 1 at 3593-3594), the Union let the proposal languish until finally making a counter (a League proposal) on September 5, 2018 – 18 months later (R. Ex. 2 at 3816).

The Hospital made its initial **Union Security** proposal on March 29, 2017. (R. Ex. 1 at 3614.) After rejecting it without any substantive counter (R. Ex. 2 at 3771), the Union let the proposal languish until finally making a substantive counter (a League proposal) on September 5, 2018 – 18 months later. (R. Ex. 2 at 3818.)

The Union made its initial **Wage** proposal on April 6, 2018 (R. Ex. 2 at 3780-3782), amending it in June of that year (R. Ex. 2 at 3791-3792). The Hospital made its first counter six sessions later on May 18 and 21, 2018. (R. Ex. 1 at 3641-3643, R. Ex. 1 at 3640.) At the time of withdrawal five months later in October, the Union had not countered the Hospital's **Wage** proposal. Because the Petition constituted objective evidence of the Union's loss of majority support (*see* Section C, *infra*), the Hospital cancelled the Parties' previously scheduled bargaining dates of October 31 and November 1. (Tr. at 143.)

Additional relevant facts are presented below in conjunction with the legal arguments to which they apply.

III. ARGUMENT AND CITATION TO AUTHORITY

A. The General Counsel Bears the Burden of Proving that an Unfair Labor Practice Occurred

"The General Counsel carries the burden of proving the elements of an unfair labor practice which means it bears the burden of persuasion as well as of production." *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (internal citations omitted). Therefore, the General Counsel bears the burden of introducing evidence in support of each allegation of the Complaint and bears the burden of establishing by a preponderance of the evidence that a violation of the Act occurred. *NLRB v. Tranp. Mmgt. Co.*, 462 U.S. 393 (1983); 28 U.S.C. §160 (c).

As set forth in detail below, the General Counsel has failed to meet this burden. Accordingly, given that the Hospital's actions in this case were exceedingly measured, appropriate, and lawful, the General Counsel has failed to satisfy his burden of proof and persuasion, and this Complaint should be dismissed in its entirety.

B. The Hospital Bargained in Good-Faith and With the Intention of Reaching a Contract; the Union Did Not Follow Suit

1. There is No Evidence the Hospital "Maintained and Adhered" to its Initial and Early Proposals That Were Never Countered by the Union

GRIEVANCE AND MEDIATION (ARBITRATION)	
03/29/2017	**Hospital Proposal #1 (R. Ex. 1 at 3601-3603.)**
04/05/2017	Discussion (R. Ex. 3 at 0186.)
05/16/2017	Discussion (R. Ex. 3 at 0221.)
05/25/2017	**Hospital Proposal #2 (R Ex. 1 at 3627, 3631-3633), sent via e-mail**
07/12/2017	Discussion (R. Ex. 3 at 0245.)
09/05/2018	**Union Proposal #1 (R. Ex. 2 at 3813-3815) (League Proposal)**
09/06/2018	Discussion (R. Ex. 3 at 0374-0380.)
10/10/2018	Discussion (R. Ex. 3 at 0402-0403.)

NO STRIKE/NO LOCKOUT	
Date	**References to Record**
03/29/2017	**Hospital Proposal #1 (R. Ex. 1 at 3610-3611)**
04/05/2017	Discussion (R. Ex. 1 at 0187-0188)
06/07/2018	**Hospital Proposal #2 (R. Ex. 1 at 3655-3658), sent via e-mail**
07/31/2018	Discussion (R. Ex. 1 at 0327)

RIGHTS AND DUTIES OF MANAGERS ("MANAGEMENT RIGHTS")	
Date	**References to Record**
12/06/2016	**Hospital Proposal #1 (R. Ex. 1 at 3542-3543)**
12/07/2016	Discussion (R. Ex. 3 at 0054)
02/01/2017	**Union Proposal #1 (R. Ex. 2 at 3761-3763)**
03/28/2017	**Hospital Proposal #2 (R. Ex. 1 at 3593-3594)**
09/05/2018	**Union Proposal #2 (R. Ex. 2 at 3816.) (League Proposal)**
09/06/2018	**Hospital Proposal #3 (R. Ex. 1 at 3676-3677)**

The General Counsel's allegation is that the Hospital "maintained and adhered" to certain improper bargaining proposals. The allegation is patently false.

First, the Union agrees that the Hospital never, not once, indicated that any of its proposals were its "last and final" offer. (Tr. at 128, 158.) Further, it is impossible to find that the Hospital "maintained and adhered to" a series of unreasonable positions because the fact of the matter is that the Hospital was precluded from taking anything other than an **initial** position on two of the three objected-to proposals due to the Union's failure to engage in actual discussion and bargaining on the issues. *See, e.g., Fitzgerald Mills Corp.*, 313 F.2d 260, 265 (2d Cir. 1963) (neither party expects first proposal to be accepted) and other cases cited therein, *infra*. Specifically, the Hospital presented *initial* proposals on **Grievance and Mediation** and **No Strike/No Lockout**, and the Union waited 18 months to respond to the former and never responded to the latter.

When the Union finally did respond to the Hospital's **Grievance and Mediation** proposal on September 5, 2018, they provided a League Proposal which did not bear any resemblance, at all, to the Hospital's initial proposal or the expired CBA. As just a few examples, when the Parties actually discussed the dueling dispute resolution proposals on September 6 (the Hospital's 03/29/2017 proposal and the Union's 09/05/2018 League counter), the Hospital asked about having an informal step in the process, Godoff agreed "informal is when most grievances will be resolved," prompting Bernstein to point out that the Union's proposal did not include that important step. (R. Ex. 3 at 0376.) When the Parties moved on to discuss the time period between steps in the grievance process, Godoff stated that "we define 'reasonable' as 10 days," to which Schmid pointed out, "but that's not what [the Union's counter] says in this proposal." (R. Ex. 3 at 0377-0378.) In a third discrepancy (and what serves as yet another example of the Hospital's willingness to consider arbitration), on September 6, Bernstein asked Godoff if the Union believed there should be limits to the arbitrator's authority. (R. Ex. 3 at 0380.) Godoff

replied "yes," and Schmid pointed out that while such a limitation was in the expired CBA, it was another component notably absent from the Union's proposal. (*Id.*).

At the time of the withdrawal of recognition, the Parties had discussed the dispute resolution process on September 5 and 6 and October 10, 2018, each time the Hospital trying to understand the real purpose and meaning of the League proposal and expressing a willingness to negotiate. As of October 10, Godoff admitted that the League Proposal needed "modification" in order to work at the Hospital. (R. Ex. 3 at 402.)

On its face, the Hospital's proposed dispute resolution procedure offered independent mediation (to include a panel of mediators for selection) as a meaningful way to resolve disputes; this process was not available to non-bargaining unit employees. (Tr. at 90-91.) And while the Union may have taken issue with the Hospital's *initial* **Grievance and Mediation** proposal, the Hospital had not tendered its final dispute resolution proposal, and in fact, at least three times in 2018, including on the last two days of negotiations, October 10 and 11, the Hospital's committee continued to make reference to the potential that the Parties could ultimately agree to arbitration. (R. Ex. 3 at 0327 (while explaining the withdrawal of the **No Strike/No Lockout** proposal on July 31, 2018, Schmid explaining that the withdrawal "**goes hand-in-hand with the mediation clause we submitted so that could change if we go back to arbitration, but right now we have a mediation clause on the table")**; Tr. at 90 (Godoff confirming Schmid discussed potential reinstatement of the **No Strike/No Lockout** proposal if the Parties ultimately agreed to arbitration); R. Ex. 3 at 0380 (Bernstein inquiring as to whether there should be limits placed on the "arbitrator's authority"); R. Ex. 3 at 0411 (Bernstein indicating that the Hospital was proposing mediation "as of today").) Clearly, the Hospital's actions were the antithesis of the "maintenance and adherence" alleged by the General Counsel.

The Union committed the same course of conduct with respect to the Hospital's **No Strike/No Lockout** proposal. After 15 months passed without any counter from the Union to the Hospital's *initial* **No Strike/No Lockout** proposal, the Hospital "bid against itself" and withdrew the proposal on June 7, 2018. (Tr. at 87 (Godoff confirming the Union never countered), 119-20 (Godoff explaining the Union did not counter because it did not "perceive" the proposal "as serious" so "no response [was] necessary"); R. Ex. 1 at 3655-56 (e-mail from Bernstein to Godoff stating, "Good morning to you both. This is to advise you of the Hospital's decision to withdraw its no-strike proposal tendered as a replacement of Article 21 on March 29, 2017.").) Instead, the Hospital offered no restriction at all on the Union's right to engage in a work stoppage. (R. Ex. 3 at 0327 (Schmid clarifying that the Hospital's current position is that there would be no restrictions on work stoppages: "[W]e are proposing no "no strike" contract and no new language.").) Therefore, as of June 7, 2018, this element of the allegedly illegal combination of proposals was no longer in place, having lingered as long as it did silently and solely due to intransigence by the Union.

Importantly, it is not *per se* bad faith, as alleged by the General Counsel, for an employer to seek a work stoppages provision while concurrently rejecting arbitration. *NLRB v. Cummer-Graham Co.*, 279 F.2d 757 (5th Cir. 1960) (it was not a refusal to bargain in good faith where employer refused to agree to arbitration clause but was adamant about securing a no strike clause), *denying enforcement of, in part*, 122 NLRB 1044 (1959); *see also Drake American Bakeries v. Bakery Workers*, 370 U.S. 254, 261 n. 7 (1962) (rejecting "flat and general rule that [no strike and arbitration] clauses are properly to be regarded as exact counterweights"); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). Even if it was, the Hospital's No Strike/No Lockout provision was withdrawn in June 2018, and even that did not motivate the

Union to re-engage in negotiations on the remaining **Grievance and Mediation** proposal for another three months.

That leaves the Hospital's **Management Rights** proposal. The Board has long-held that "it is not unlawful for an employer to propose and bargain for a broad management-rights clause." *Ferguson Enterprises, Inc.*, 349 NLRB 617, 625 (2007); *St. George Warehouse, Inc.*, 341 NLRB 904 (2004). Even if one were to characterize the Hospital's **Management Rights** proposal as impermissibly "broad," there are not enough additional factors to demonstrate that the Hospital was bargaining in bad faith, especially where the Union, yet again, failed to engage in meaningful negotiations on the topic.

In short form, the Union had, in fact, agreed to a large majority of the **Management Rights** proposal as of February 1, 2017 (R. Ex. 2 at 3761-3763), but as with other proposals, after the Hospital timely countered on March 28, 2017 (R. Ex. 1 at 3593-3594), the Union simply stopped negotiating, and it did not pass another counter for 19 months, until it passed the League Proposal on September 5, 2018 (R. Ex. 2 at 3816).

More specifically, during the December 6, 2016 session, the Hospital provided the Union with its *initial* **Management Rights** proposal, and Bernstein explained the basis for it. (Tr. at 34-35 (Godoff explaining that Bernstein reviewed proposal, "with explanation of what they were doing" and that each subsection was reviewed); R. Ex. 1 at 3542-3543; *see also* R. Ex. 3 at 0043-0044.) As part of that explanation, Bernstein explained that because the Hospital was also proposing a "zipper clause," it believed the **Management Rights** article needed to be expanded. (R. Ex. 3 at 0044 ("A lot of new language. Zipper clause makes clear if not in contract no obligation for either party. Tried to be comprehensive. Capture things we're exercising. That's

the spirit we are delivering this proposal."); *see also* Tr. at 92, 95-96 (Godoff recalling introduction of zipper clause).)

During a bargaining session that took place the following day, the Union provided its verbal response to the Hospital's **Management Rights** proposal. In doing so, Godoff shared his views on the proposal, expressing specific objections to the subcontracting and security language contained therein. (R. Ex. 3 at 0054-0056.) During that session, Bernstein explained that with respect to the proposal, "We want to be as clear and specific as we can, especially when you review against a zipper clause" (R. Ex. 3 at 0054), a sentiment Godoff, at least at the time, appeared to understand, as he responded, "I understand why you would want clarity."[10] (*Id*.) At the end of the day on December 7, Bernstein encouraged the Union to respond to the Hospital's *initial* **Management Rights** proposal with a written counterproposal of its own. (R. Ex. 3 at 0055.)

On February 1, 2017, the Union furnished the Hospital with its first written counterproposal to the Hospital's **Management Rights** proposal in show changes mode, based upon an electronic version of the Hospital's initial proposal. (R. Ex. 2 at 3761-3763.) Upon presenting the counterproposal, Godoff explained the basis for it, and noted that the Union "want[s] to give broad right to manage [the] facility as you need to [to] make this place work." (R. Ex. 3 at 0129-0130.)

Specifically, Godoff conveyed the Union's desire to retain language within Article 30.3 of the expired CBA, which provided that the Hospital, in exercising its management functions,

[10] This, along with Godoff's testimony that Bernstein reviewed the entire **Management Rights** proposal with the Union's committee (including each subsection) (Tr. at 34-35), directly contradicts Godoff's later testimony at the hearing wherein he claimed that the Hospital "didn't really" provide an explanation and "was at a loss for [an] explanation" for their **Management Rights** proposal (Tr. at 35-36).

may subcontract any bargaining unit work only so long as it does not result in a layoff or termination of any employee in the bargaining unit at the time of subcontracting, and so long as the seniority and rate of pay of any employee transferred as a result of such subcontracting is maintained. Godoff suggested that any management rights language should expressly incorporate this provision by reference. (R. Ex. 3 at 0130.) Godoff proceeded to address Subsections a-z of the Hospital's initial proposal, stating the Union's position as to each. He stated that the Union agreed and/or had no objection to Subsections a, b, c, d, f, g, h, j, k, n, o, p, q, r, u, v, y or z. (R. Ex. 3 at 0129-0130; *see also* Tr. at 103-105.)

With respect to Subsection s, Godoff stated that he needed to "hold" his response because he could not remember what the Union's bargaining committee had previously agreed to. (R. Ex. 3 at 0130.) With respect to Subsections e and w, Godoff indicated that he needed to "hold" his explanation for why the Union was rejecting the proposals. (R. Ex. 3 at 0129-0130.) With respect to Subsection i, Godoff suggested that the Union's only objection was with respect to the term, "seniority." (R. Ex. 3 at 0129.) With respect to Subsection 1, Godoff asked for an explanation as to what the Hospital meant by that provision, and Bernstein responded that it was referring to additional work to be performed in the cafeteria, to which Godoff responded that the Union had no objections. Godoff, however, maintained his objection to that portion of Subsection 1 relating to the Hospital's authority to subcontract bargaining unit work, which was rejected in its entirety. (R. Ex. 3 at 0129-0130.) With respect to Subsection t, Godoff objected only to the proposed elimination of the words, "for cause." (R. Ex. 3 at 0130.) With respect to Subsection x, Godoff objected only to the words, "without limitation." (R. Ex. 3 at 0130.) *See also* Tr. at 103-105. Godoff went on to explain that the Union had rejected the Hospital's proposal to delete language

at the end of its management rights proposal providing for the Hospital's receipt of constructive suggestions, which the Hospital might then consider at its discretion. (R. Ex. 3 at 0130.)

On March 28, the Hospital tendered a written counterproposal to the Union's February 1 management rights counterproposal in show changes mode, and again, Bernstein explained the basis for the Hospital's position. (R. Ex. 3 at 0165-0170; R. Ex. 1 at 3593.) Bernstein explained that the Hospital was rejecting the Union's counterproposal to incorporate previous Article 30.3 by reference. Bernstein went on to explain that the Hospital was rejecting the Union's counterproposals to delete: (1) Subsection e (reserving the authority to introduce changes in the methods of operation); (2) portions of Subsection i (regarding seniority); (3) Subsection 1 (regarding subcontracting); (4) Subsection m (regarding supervisory employees performing bargaining unit work); (5) Subsection w (regarding selecting and changing benefit plan carriers); and, (6) Subsection x (regarding security of the facility). (R. Ex. 3 at 0165-0170.) And although it was not discussed, the Hospital's March 28 counterproposal also rejected a provision in the Union's February 1 counterproposal that restrained the Hospital's authority to exercise its management rights as follows: "None of the aforesaid Management Rights shall be exercised in an unreasonable manner." The Hospital did agree to the Union's proposal not to delete language allowing it to receive constructive suggestions from the Union at its sole discretion. (R. Ex. 1 at 3593-3594; Tr. at 50.) After receiving the Hospital's counter, Godoff told the Hospital's committee "to get the fuck out of here." (R. Ex. 3 at 0168.)

Regardless of Godoff's disappointment with the Hospital's counter, the fact remains that by that point in time, March 2017, the only items in the **Management Rights** proposal on which the parties had yet to agree were the Union's proposed subcontracting language, along with Hospital proposals set forth in Subsections e, i, 1, m, w, and x. (R. Ex. 1 at 3593-3594.)

Notwithstanding, the General Counsel now attempts to take the Hospital to task for the substance of its proposal, even though the Union had agreed to a clear majority of it.

As it had done with the **Grievance and Mediation** and **No Strike/No Lockout** proposals, the Union failed to counter the Hospital's **Management Rights** counter for 18 months, until September 5, 2018. At the beginning of the September 5 session, Esders provided the Hospital with several League Proposals, including **Management Rights**. (R. Ex. 2 at 3816.) On the face of the proposal, it was clear that it was copied from an entirely different collective-bargaining agreement, and that it did not contain any of the concessions (or related provisions) that had appeared with the Union's prior counterproposal on management rights, tendered back on February 1, 2017. (*Cf.* R. Ex. 2 at 3761-3763 and R. Ex. 2 at 3816.) To the contrary, the only surviving aspects of the Union's prior counterproposal related to prerogatives that are traditionally reserved with management, including the Hospital's general authority to: (1) direct and schedule the working force; (2) plan, direct and control operations; (3) hire and lay off employees; (4) reorganize, combine or discontinue operations; (5) introduce new or improved methods and facilities; and (6) establish rules and regulations. (R. Ex. 2 at 3816.) The Union's September 5 counterproposal also retained general language agreeing to cooperate with the Hospital to attain and maintain full efficiency, and imposing a corresponding duty on the Hospital to receive and consider constructive suggestions. (*Id.*)

Further, the Union's September 5 counterproposal directly contradicted its February 1, 2017 counterproposal to the extent it now contained language imposing an outright restriction on all subcontracting regardless of bargaining unit impact ("No subcontracting bargaining unit work"). In its February 1 counterproposal, the Union had previously agreed to subcontracting,

provided it did not lead to the layoff of unit employees or their loss of seniority. (*Cf.* R. Ex. 2 at 3761-3763 and R. Ex. 2 at 3816.)

The Union's September 5 counterproposal also regressed from its initial **Management Rights** proposal by withdrawing no less than twenty specific waivers to which it had previously agreed, including those conferring sole and unfettered authority on the Hospital to:

1. promote, demote, transfer and recall employees to work;

2. restructure jobs or work flow processes or methods and to establish any department or method of maintenance or service;

3. introduce new or improved equipment;

4. establish, add to, reduce, combine or discontinue job classifications;

5. assign, transfer and/or reassign, temporarily or permanently, job duties and tasks regardless of employee job classifications or department as necessary to meet patient care needs, including those required to provide patient-centered care;[11]

6. determine the number of employees, as well as the existence, number and type of positions to be filled by employees, and to determine the use of part-time, per diem, agency and temporary employees;

7. use individuals not employed by the Hospital in any aspect of the Hospital's operations for training and/or education purposes, or in emergency situations;

8. establish work schedules, and determine what work and duties are to be performed;

9. supervise employees and their work, including the right to decide the number of employees that may be assigned to any shift or job, or the equipment to be employed in the performance of such work;

10. determine the quality, quantity and pace of work and tasks to be performed;

11. establish and determine employees' competency and qualifications;

[11] The Union had previously agreed to all aspects of this clause except for inclusion of "seniority" as a factor that could be disregarded with respect to exercising authority to assign, transfer and/or reassign job duties and tasks. The Union's September 5 counterproposal omits the entire provision concerning this authority.

12. determine acceptable standards of performance based on productivity, efficiency, and quality and require that such standards be met;

13. change and enforce all work rules, regulations, policies and practices for the purpose of maintaining order, safety and efficient and effective operations, and to require that such rules be complied with by employees;

14. reprimand, suspend, discharge or otherwise discipline employees for cause;

15. determine whether and when there is a job vacancy;

16. determine the qualifications for a position and to take steps to determine if any individual is capable of meeting those qualifications;

17. ensure the security of its facility and property, including the rights of inspection and search;

18. change Hospital rules, regulations, policies and practices not inconsistent with the terms of the Agreement;

19. change, alter, or modify any policy, practice or decision not inconsistent with the terms of the Agreement with respect to any of the rights reserved, retained or enumerated above, or with respect to any other rights reserved to the Hospital and otherwise – generally to manage the facilities of the Hospital so as to attain and maintain full operating efficiency; and

20. delegate some or all of these functions as needed to licensed clinical or professional staff acting in the interest of the Hospitals.

(*Id.*) Lastly, the Union's September 5 counterproposal deleted the following language from its February 1, 2017 counterproposal: "Any of the rights, powers and authority the Hospital had prior to entering this Agreement are retained by the Hospital." (*Id.*)

During the afternoon session on September 5, Bernstein conveyed to Esders that the Union's most recent **Management Rights** counterproposal differed substantially from its counterpart in the expired agreement, and from its own previous counterproposal on this same issue. Bernstein pointed out that it appeared as though the Union's proposal was excerpted from an entirely different agreement. (R. Ex. 3 at 0360.) Bernstein asked Esders where it came from, and Esders responded that he did not draft it, nor was he aware of its origins. (*Id.*) At that point, Bernstein pressed Esders for an explanation as to why the Union was proposing new language

that bore no resemblance to either the expired contract or to the Union's prior counterproposal; Esders replied that he was writing down Bernstein's questions and would try to get them all answered. (*Id.*)

Godoff returned to the table for the September 6, bargaining session. During the afternoon session, Bernstein told Godoff that he did not see any attempt in the Union's latest proposal to take the Hospital's prior proposal (or the Union's counter to that proposal) into account. (R. Ex. 3 at 0386.) Bernstein then said that, from the Hospital's perspective, the Union's proposal instead looked like a flagrant attempt to substantially narrow the scope of the Hospital's fundamental management prerogatives, instead of remaining faithful to the progress demonstrated by prior exchanges between the parties. (*Id.*) Godoff responded merely by generalizing that the Union "was willing to work with the Hospital," prompting Bernstein to hold up the Union's latest proposal and declare, "That's not what this says." (*Id.*) In response, Godoff stated that until yesterday, the Union had made it clear it could live with the old contract; Bernstein interjected, referring again to the Union's most recent proposal and stating, "That's not what this says either." (*Id.*) At that point, Godoff stated that the Union's **Management Rights** counterproposal was intended to move the parties forward, to which Bernstein responded by asking him how the proposal moved the parties forward when it negates every word of the Hospital's prior proposal (along with the Union's prior counterproposal). (*Id.*)

Schmid interjected, explaining that the Union's most recent proposal had failed to contemplate its preceding one, or the Hospital's counterproposal to which it was supposedly responding. (*Id.*) Godoff replied, "Sure it does," and added, "Forget the Hospital for a second." (*Id.*) At that point, Bernstein pointed out that the entire second half of Section 30.1 (part of the original management rights clause) was now missing from the Union's current proposal. (*Id.*)

Godoff asked Bernstein to show him what he was referring to, and Bernstein gestured to page 33 of the expired agreement and added that the Union had completely failed to respond to the Hospital's latest proposal. (*Id.*) Godoff responded by holding up a copy of the Union's current management rights proposal, arguing that the Union had in fact responded to the Hospital's most recent proposal. Pointing to the September 5 Union counterproposal, Godoff adopted the September 5 proposal, stating, "We did respond to it, we gave you this." (*Id.*) It was at this point that Bernstein re-proposed the Hospital's prior March 28, 2017 counterproposal. (*Id.*; R. Ex. 1 at 3676-3677.)

When the parties reconvened for additional sessions on October 10-11, 2018, Bernstein reviewed the status of the outstanding proposals exchanged by both sides (as he regularly did), including the Hospital's most recent **Management Rights** re-proposal. (R. Ex. 3 at 0392, 0398-0399, and 0403.) The Union, however, failed to tender a counteroffer or otherwise address the issue.

The Board holds that the withdrawal of a proposal which had previously been agreed upon will be considered unlawful and designed to frustrate the bargaining process unless good cause is shown for the withdrawal. *Transit Services Corp*., 312 NLRB 477, 483 (1993); *see also White Cap, Inc.*, 325 NLRB 1166, 1169 (1998) ("The Board examines the respondent's explanation for its change in position to determine whether it was undertaken in bad faith and designed to impede agreement."). The Union has failed to provide any believable rationale for withdrawing from its agreement to substantially all of the provisions of a **Management Rights** article initially proposed by the Hospital in December 2016. Moreover, the Union has not explained why it tendered completely contradictory provisions concerning subcontracting and restraints on the Hospital's authority to exercise its management rights. The only explanation for

the League Proposal offered by the Union to date is that was "a shot in the dark" and/or intended to "keep the ball rolling." (Tr. at 108, 140.)

The Union's conduct is clearly regressive under Board law. In *International Union of Journeymen & Allied Trades, Local 124 (Galaxy Towers)*, Case 22-CB-010448 (June 11, 2008), the Division of Advice concluded that complaint should issue against the union for withdrawing from a tentative agreement without good cause. The union in that case agreed to give management the right, among other things, to subcontract unit work. The union later informed the employer, through its new bargaining representative, that it never agreed to a subcontracting clause. The union's only excuse for reneging on the agreement was that "no self-respecting union would agree to this." The Division of Advice found that the union engaged in unlawful regressive bargaining, rejecting the union's defense that it never entered into an agreement to permit subcontracting. Although noting that the union did not advance the argument, the Division of Advice also specifically rejected ally potential argument that withdrawal of the prior agreement was justified by the union's change in bargaining representative.

It is ironic that with the series of events outlined above, it is the Hospital that stands accused of bad-faith bargaining. While the Hospital stands accused of tendering an "overly broad" **Management Rights** clause, the truth of the matter is that the Parties had reached written agreement on a large majority of the proposal. Ironically, it was the Union who then violated the Act by engaging in regressive bargaining with the submission of the September 5 League Proposal. The Union's efforts to frustrate the bargaining process through blatantly regressive bargaining and undue delay in responding to the Hospital's proposals cannot be condoned.[12]

[12] The Hospital was so concerned about the Union's regressive bargaining and the lack of progress at the table that it filed a ULP charge against the Union on September 7, 2018 (before

The fact of the matter is that for the entire period of time the General Counsel accuses the Hospital of "maintaining and adhering" to a set of inappropriate proposals – **Grievance and Mediation, No Strike/No Lockout and Management Rights --** the Union was refusing to negotiate those proposals. When, after 18 months of complete silence, the Union made its proposals, it was cut and pasted from another contract and, as admitted by the Union, it needed to be modified to fit GWUH and/or was missing key elements both Parties agreed would be necessary.

As noted by the Fifth Circuit Court of Appeals, **"It is unreasonable and illogical to punish [a] Company for its negotiators' failure to engage in a discussion which the Union negotiators obdurately refused to participate."** *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 278 (5th Cir. 1997) (emphasis added) (rejecting General Counsel's contention that employer acted in bad faith where union failed to participate in negotiations regarding reductions in benefits); *see also In re Humble Oil & Refining Co.*, 161 NLRB 714, 722 (1966) (affirming ALJ's rejection of 8(a)(5) allegation against employer and noting, "A union aware, as this Union was, of its right to bargain collectively with respect to all changes and conditions and terms of employment of its members, should not be allowed to sit idly by following an employer's announcement of an anticipated change of such terms and conditions and then subsequently claim that the announcement, *per se*, constituted unilateral action and an unfair labor practice."); *Romo Paper Products Corp.*, 208 NLRB 644 (1974) (rejecting the General Counsel's contention that employer's "take-it-or-leave-it" approach violated 8(a)(5) where the union was "equally adamant in adhering to its proposals" and was not diligent in meeting with the employer and attempting to resolve the differences).

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the withdrawal) alleging a violation of Section 8(b)(3) of the Act. *See Case No. 05-CB-227065.* This is obviously not the conduct of a Party that is uninterested in getting an agreement.

2. A Mistake is Not "Regressive Bargaining"

DISCIPLINE	
Date	**References to Record**
01/17/2017	**Hospital Proposal #1** (R. Ex. 1 at 3561-3563)
01/31/2017	**Union Proposal #1** (R. Ex. 2 at 3742-3745)
01/31/2017	**Hospital Proposal #2** (R. Ex. 1 at 3567-3569)
02/22/2017	Discussion (R. Ex. 3 at 0137-0147)
02/23/2017	Discussion (R. Ex. 3 at 0157-0159)
03/28/2017	**Union Proposal #2** (R. Ex. 2 at 3750-3752; *see also* R. Ex. 3 at 0164 (Turner agreeing proposal dated 1/17 & 1/31, but passed 3/28))
03/29/2017	*Grievance & Mediation proposal passed but not discussed*
04/05/2017	**Hospital Proposal #3** (R. Ex. 1 at 3621-3623) *Grievance & Mediation discussed for first time*
05/25/2017	**Hospital Proposal #3 (revised) (via e-mail)** (R. Ex. 1 at 3627-3630)
07/12/2017	Discussion (R. Ex. 3 at 0244-0245)
07/31/2017	Discussion (R. Ex. 3 at 0258-0260)
05/21/2018	Discussion (R. Ex. 3 at 0313-0314)
10/11/2018	**Union Proposal #3** (R. Ex. 2 at 3824-3826)
10/11/2018	**Hospital Proposal #4** (R. Ex. 1 at 3693-3695)

In this instance, the General Counsel attempts to transform a mistake – one that was immediately corrected on a proposal that was still far from agreement – into evidence of bad-faith bargaining. This attempt must be rejected.

The timeline of events is largely not in dispute. The Hospital passed its initial **Discipline** proposal on January 17, 2017. (R. Ex. 1 at 3561-3563.) At that time, the Hospital had not yet prepared, much less passed, a proposal on dispute resolution, and would not do so until March of 2018. (Tr. at 554-555; R. Ex. 1 at 3601-3603.) During discussion on January 17, the Parties reviewed the entire proposal, to include the Hospital's proposal that discipline short of termination could only be grieved, but termination would be subject to the full dispute resolution process, referencing "arbitration." (R. Ex. 1 at 3562; R. Ex. 3 at 0106-0108.) Godoff found there to be a "number of problems" with the Hospital's *initial* **Discipline** proposal, with the "biggest problem" being its failure to address "just cause." (Tr. at 40.)

Between January 17 and the date the Hospital made its first dispute resolution proposal on March 29, 2017 (**Grievance and Mediation**), the Parties exchanged counters on January 31 (R. Ex. 1 at 3567-3569; R. Ex. 2 at 3742-3745; *see also* R. Ex. 3 at 0137-0138), and discussed the proposals on February 22 and 23 and March 28 (R. Ex. 3 at 0147-0148, 0157-0158, 0171-0172). During this time period, Godoff admits that the Hospital addressed some of the issues the Union had raised and made "significant concessions" in its **Discipline** proposal, including, but not limited to, reducing the length of time a discipline would remain active in an employee's file. (Tr. at 45, 48, 81.)

Critically, at the January 31, 2017 session, Bernstein reminded the Union, "We haven't tendered a grievance procedure." (R. Ex. 3 at 0126.) This is consistent with Bernstein's candid response at the hearing that the Hospital's **Discipline** proposal was not intended to be a dispute resolution proposal. (Tr. at 559.) Godoff appears to have felt the same way, as on March 28, 2018, Godoff suggested the Union is "willing to chop out document about arbitration," likely in an effort to resolve the crux of the proposal, the disciplinary process. (R. Ex. 3 at 0172.)

The Hospital passed its **Grievance and Mediation** proposal on March 29, but it was not discussed until April 5, the same day the Hospital made its third proposal on **Discipline**. In this third proposal, Godoff admits that the Hospital again moved on issues identified by the Union. (Tr. at 54-55; R. Ex. 1 at 3621-3623.) During the discussion, Godoff pointed out the one word discrepancy in the reference to "arbitration" within the **Discipline** proposal in light of the recently tendered **Grievance and Mediation** proposal, and Bernstein immediately acknowledged and verbally corrected the error.[13] (Tr. at 81-82, 555-556; R. Ex. 3 at 0187)

[13] Godoff raised the issue again during the May 16, 2017 session pointing out that the proposals "can't be reconciled," as, in part, the Discipline proposal "referred to arbitration of discharges."

(Bernstein stating, "Error; replace with mediation procedure. Both sides have errors and both sides have corrected."[14]).) The Hospital's April 5 counter was updated via a May 25 e-mail from Bernstein to Godoff, in which he explains:

> Per our discussion at the bargaining table this past week, I've gone ahead and attached Hospital proposals pertaining to both Discipline and Grievance and Mediation, which have been revised *in an effort to reconcile some of the discrepancies that you had pointed out in prior sessions*. For ease of convenience, I chose to highlight the substantive changes in the Discipline proposal to distinguish them from the other revisions reflected in show changes mode.

(Tr. at 556-558; R. Ex. 1 at 3627-3633 (emphasis added).) During the Parties' next session on July 12, Bernstein explained the revision as follows: "Yes, and the first change I made was to make it consistent with other aspects of our proposals … in line 89, this was in reference to a point you raised Steve, it was arbitration proposal, so I changed it to mediation …" (R. Ex. 3 at 0244.)

Subsequently, the Parties continued to negotiate the **Discipline** article, still discussing it and making progress up until the last bargaining session on October 11, with both the issue of

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(R. Ex. 3 at 0221.) However, neither party prepared nor passed a proposal on either Discipline or dispute resolution during this session.

[14] For example, on September 5, 2018, the Union gave a "verbal counter" on the Safe Harbor article; that counter regressed from language that the Union had already accepted. (*Cf.* R. Ex. 2 at 3776 (04/17/2017 Union counter) with R. Ex. 3 at 0359, 0362-0363 (Esders rejecting lines 17-20 "in full"and later confirming confirming intent to reject lines 17-20 while acknowledging it had been accepted in Union's 04/17/2017 counter).) When Bernstein pointed out the regression, the Union explained it as follows: "If [the now deleted language] was included [in a prior proposal], it was in error," and claimed that since the Hospital had not accepted the Union's last proposal, it was entitled to revert from the previously proposed and accepted language. (R. Ex. 3 at 0362-0363).) This Union "error" was of the exact same type and substance as the Hospital's error in its Discipline proposal, and applying the Union's logic, upon the Union's rejection of the Hospital's Discipline proposal, the Hospital was equally as entitled to revert from its prior proposal with arbitration and substitute mediation.

"just cause" and the issue of "arbitration" remaining to be resolved.[15] (Tr. at 118 (Godoff admitting there was additional movement by Hospital even after discrepancy raised and issues of "just cause" and dispute resolution remained), 128.)

Regressive proposals are neither unlawful *per se* nor necessarily indicative of surface bargaining. *See Optica Lee Borinquen, Inc.*, 307 NLRB 705, 721 (1992), *enforced*, 991 F.2d 786 (1st Cir. 1993) (even "proposals that seek deep reductions in allegedly noncompetitive existing benefits are not necessarily indicative of a desire to frustrate negotiations"). In gauging the employer's intent, the Board looks to its proffered justification. *Prentice-Hall, Inc.*, 306 NLRB 31 (1992) (good faith where employer had legitimate business reason for regressive proposals, which it fully explained to union).

Initially, in this case, the Hospital was not "regressive." "Regressive" generally means to move backwards or take away. Here, the Hospital's modification was not intended to move backwards from a previously asserted position; it was intended to establish consistency within the Hospital's various proposals.[16] (Tr. at 558-59.)

The Hospital's correction of the cross-reference in the **Discipline** proposal is certainly no more egregious than the Union passing (and adopting) five League Proposals across the table in September 2018 – proposals that were replete with incorrect, non-applicable references, procedures, and information, nor it is more egregious than the Union's reversion on the Safe Harbor proposal on September 5. (*See fn. 14, supra.*). As just one example, when the Parties

[15] In fact, on September 6, 2018, as had Godoff earlier (*see* R. Ex. 3 at 0172), Bernstein suggested that the Parties could work on the grievance portion of the proposal and "set [] aside" whether the process ended in arbitration or mediation. (R. Ex. 3 at 0375.)

[16] The Hospital does not minimize that the mistake was on a substantive matter. It does, however, contend it was just that – a mistake – and not a planned attempt to frustrate negotiations.

actually discussed the dueling dispute resolution proposals on September 6, 2018 (the Hospital's 03/29/2017 proposal and the Union's 09/05/2018 League counter), the Hospital pointed out that the Union proposal eliminated the informal step, and Godoff agreed "informal is when most grievance will be resolved," prompting Bernstein to point out that the Union's proposal did not include that important step. (R. Ex. 3 at 0376.) When the Parties moved on to discuss the time period between steps in the grievance process, Godoff stated that "we define 'reasonable' as 10 days," to which Schmid pointed out, "but that's not what [the Union's counter] says in this proposal." (R. Ex. 3 at 0377-0378.) In a third discrepancy, Bernstein asks Godoff if the Union believed there should be limits to the arbitrator's authority. (R. Ex. 3 at 0380.) (clearly showing a willingness to discuss arbitration). Godoff replied yes, and Schmid pointed out that while such a limitation was in the expired CBA, it was another component notably absent from the Union's proposal. (*Id.*)

Even if the May 25, 2017 **Discipline** proposal is considered "regressive," it was accompanied by a clear explanation for the change, and it was made early in the course of negotiations. As Bernstein explained to the Union's committee, the modification was made to bring the Discipline proposal in alignment with the recently-passed Grievance and Mediation proposal. Notably, "[T]he Board has found it immaterial whether the union, the General Counsel, or the administrative law judge found the asserted reasons for making the regressive proposals totally persuasive. What is important is whether they are 'so illogical' as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement." *Oklahoma Fixture Co.*, 331 N.L.R.B. 1116, 1118 (2000) (internal citations omitted), *enforced*, 332 F.3d 1284 (10th Cir. 2003). Clearly, the Hospital's explanation was "logical."

Critically, there was no agreement on the **Discipline** proposal at the time it was corrected; the Hospital did not regress from a tentative agreement, and there were multiple issues pending within the Discipline article (including Godoff's "biggest issue" of "just cause"), not just the forum for dispute resolution. As noted by the Board in *Oklahoma Fixture Co.*:

> The parties' proposals reflected the typical bargaining pattern of concessions in one area in return for more favorable terms in another. Significantly, the Union had rejected the Respondent's previous proposal. Under these circumstances, the Board cannot effectively preclude the Respondent from modifying or withdrawing specific portions of its rejected proposal, by concluding that withdrawal of proposed concessions constitutes bad-faith bargaining. Such a determination is tantamount to compelling concessions and regulating the content of the parties' agreement, powers clearly beyond the statutory authority of the Board.

331 NLRB at 1119.

To accept the General Counsel's position on this allegation is to hold that a party, whether employer or union, may not correct errors in its proposals without being in bad-faith, including proposals that remain in dispute and are not even the subject of a tentative agreement. That simply cannot be the case.

3. The Hospital was Entitled to Negotiate Union Security, and Its Initial Proposal was Not Unlawful

UNION SECURITY	
Date	**References to Record**
03/29/2017	**Hospital Proposal #1 (R. Ex. 1 at 3614)**
04/05/2017	Discussion/Union's verbal rejection of proposal #1 (R. Ex. 3 at 181-183)
04/06/2017	**Union Proposal #1 (R. Ex. 2 at 3771)** ("REJECT")
09/05/2018	**Union Proposal #2 (R. Ex. 2 at 3818)** (League Proposal)
09/06/2018	Discussion (R. Ex. 182-183)

The Hospital passed its first **Union Security** proposal on March 29, 2017, proposing to remove **Union Security** from the contract. (R. Ex. 1 at 3614.) The proposal was not discussed during that session, as Godoff abruptly ended the session while telling the Hospital's committee to "get the hell out of the room" (Tr. at 126) and/or "kiss [his] ass" (R. Ex. 3 at 0180). As such,

Bernstein was not able to explain the proposal until the Parties' next session on April 5, 2017. During that session, Bernstein explained that the Hospital had three reasons for making the proposal: (a) it had received complaints from current employees about the due obligation (a fact Wallace confirmed in stating, "it was only a few" (R. Ex. 3 at 0181)), (b) it acted as a hurdle in recruiting efforts, and (c) a philosophical opposition. (Tr. at 574-75; R. Ex. 3 at 0181-) Bernstein then invited the Union "to propose [a] counter." (R. Ex. 3 at 0182.)

During this same April 5 session, Godoff immediately pointed out that he was aware that the parent company has agreed to union security with the Union at another facility in Boston (Tr. at 83-84; R. Ex. 3 at 0182), demonstrating that the Union was well aware the Hospital was willing to negotiate their proposal (consistent with Bernstein's solicitation of a counter). In fact, Schmid emphasized this point, noting that the agreement in Boston was the "result of back and forth." (*Id.*) However, rather than engaging in actual negotiations, Godoff provided the Union's response then and there: "We'll give you our answer now. No." (R. Ex. 3 at 0183), confirming that rejection with a counter in writing on April 6 (R. Ex. 2 at 3771 (stating, "REJECT")). *See also* Tr. at 575 (Bernstein explaining, "It was a counter in the form obviously of a one-word 'Reject' and without any real further exchanges or attempt to, you know, modify the current union security clause in the contract; that's how we took it that day.").)

The parties did not discuss **Union Security** again until 17 months later on September 5, 2018 when the Union passed a League Proposal on the topic. (Tr. at 83, 575-76; R. Ex. 2 at 3818.) While the League Proposal bore no semblance to the existing CBA (*cf.* R. Ex. 2 at 3818 and GC Ex. 30 at p. 3-4), the next day, it did prompt the first actual discussion on the issue since the Union's April 2017 outright and curt rejection of the Hospital's initial proposal. (Tr. at 603; *see also* R. Ex. 3 at 0361-0362, 0366.) Indeed, in substantive discussions on September 6,

Bernstein was able to explain that the phrase "shall become" in the original CBA article was the Hospital's concern, and Godoff replied, "If that's your problem with it, we can certainly talk about it." (R. Ex. 3 at 0381-0382.) Following those discussions, it was Bernstein's understanding that the Union would tailor the League Proposal template into an actual counter for the Hospital's consideration. (Tr. at 574; *see also* R. Ex. 3 at 0382 (Godoff stating they will "clear [] up" non-applicable language and references in the League Proposal).) This would have been the first substantive and applicable counter provided by the Union on the topic. As admitted by the Union, at no time did the Hospital ever communicate that it had presented its "last and final" position on the issue of union security. (Tr. at 128, 158.)

The Board has long held that union security is a mandatory subject of bargaining. See *Duro Fittings Company*, 121 NLRB 377, 383 (1958) ("[I]t has long been settled law that union security, being a condition of employment, is a bargainable issue."). However, an employer's decision not to agree to union security does not violate the Act. *Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455 (2002) (affirming ALJ's decision that employer did not violate 8(a)(5) when it refused to agree to union security). And a "philosophical opposition" alone does not establish bad-faith. (*Id.*)

This is not a case where the employer failed to support its position on union security with anything but philosophical grounds. This is not a case where the employer's affiliates had never agreed to union security, a fact known by the Union. This is also not a case where the employer entered negotiations with a fixed intent not to agree to any form of union security or dues checkoff (which it had actually proposed (R. Ex. 1 at 3595-3597)). As admitted by the Union, the Hospital never presented its position on **Union Security** as an absolute. (Tr. at 128.) *Cf. In re McLane Co.*, 166 N.L.R.B. 1036, 1042 (1967), *aff'd per curium*, 405 F.2d 483 (5th Cir. 1968)

(finding of bad-faith where employer's representative told union negotiator that he could present an alternative checkoff provision, but "it would not do any good because the Company would not agree to a checkoff, that he would just as soon agree to the language presented already if he were going to agree, that the fact was that he was not going to agree to any type of checkoff"); *Duro Fittings Company*, 121 NLRB at 384 (finding of bad faith where the employer's representative declared at the outset of negotiations that she would not represent any employer "inclined in any way to grant any semblance of union security" and that the employer "would not enter into any agreement that contained a union shop agreement requiring membership in the union as a condition of employment").)

This case is not even as extreme as *McCulloch Corporation*, 132 NLRB 201 (1961), where the Board held there was no violation of Section 8(a)(5) where the employer ultimately did not agree to union security. There, the employer "took the position from the beginning of negotiations that it would not agree to a union-shop or to a checkoff provision" and it "never retreated . . . from its refusal to agree to a union-security clause." 132 NLRB at 211. However, like the Hospital here, the employer "did discuss the issue at length during the bargaining sessions." While those discussions in *McCulloch* "appear to have been fruitless, they were not foreclosed." *Id.* As such, the Board refused to "find that by taking an adamant stand on this issue the Company violated Section 8(a)(5) of the Act." *Id.* (*citing*, *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952)).

Here, following the Union's refusal to discuss the Hospital's *initial* **Union Security** proposal as of April 2017, the issue sat stagnant until the Union finally re-addressed it in September 2018. At that time, the Parties' engaged in vigorous, and productive, discussions about the issue. The Hospital never said it would not consider union security, and in fact, was

waiting for a tailored counter from the Union at the time of the withdrawal of recognition. The General Counsel has simply failed to demonstrate that the Hospital's fluid, non-final position on union security violated Section 8(a)(5), and this allegation should be dismissed. *See, e.g.*, *A.M.F. Bowling Co.*, 314 NLRB 969, 974 (1994) ("[T]he General Counsel has failed to demonstrate that the Respondent asserted its proposal disingenuously or was unwilling to discuss union security with the Union. Nor is there sufficient evidence that the Respondent adhered to its proposal with the intent to frustrate agreement."); *Logemann Bros Co.*, 298 NLRB 1018, 1020 (1990) (rejecting argument that employer's proposal to eliminate union security was "predictably unacceptable" where a proposal to eliminate union security was accepted by the union in contract negotiations with another employer).

4. The Hospital's Initial Wage Proposal Did Not Grant it "Unfettered Discretion"

WAGES	
Date	**References to Record**
04/06/2017	**Union Proposal #1 (R. Ex. 2 at 3780-3782)**
05/16/2017	Discussion (R. Ex. 3 at 0224-0225)
06/12/2017	**Union Proposal #2 (R. Ex. 2 at 3791-3792)**
10/06/2017	Discussion (R. Ex. 3 at 0273)
05/18/2018	**Hospital Proposal #1 (R. Ex. 1 at 3641-3643)**
05/21/2018	**Hospital Proposal #1 (Appendix B) (R. Ex. 1 at 3640)**
07/31/2018	Discussion (R. Ex. 3 at 0328-0332)
08/01/2018	Discussion (R. Ex. 3 at 3666)
10/10/2018	Discussion (R. Ex. 3 at 0394-0397, 0400-0401)
10/11/2018	Discussion (R. Ex. 3 at 0405)

At the time the Union made its first **Wage** proposal on April 6, 2017 (R. Ex. 2 at 3780), the Parties had already been discussing an underpayment, and how to fix that underpayment, that occurred with respect to the Dietary employees.[17] (Tr. at 500-502 (Wallace discussing Dietary

[17] The Union agrees that the Hospital ultimately made the employees whole, with interest, despite the fact the entire recalculation process was frustrating to both parties. (Tr. at 63-65, 115.) To the extent the General Counsel attempts to imply this restitution (demanded by the

wage underpayment and fact it was "germane" to, and not a separate issue from, the negotiations for the new agreement).) The Parties agreed that the cause of the error in Dietary pay was the confusing two-tier wage scales (paying EVS and Dietary differently) found at Exhibits 3 and 4 of the expired CBA. (Tr. at 62-63, 110-11; R. Ex. 3 at 0215; GC Ex. 30 at pp. 37-39.) In fact, Godoff admitted that he "never disputed" that the pay system at the Hospital needed to be addressed, and admittedly, "encouraged management to come up with a fix." (Tr. at 111-112; *see also* Tr. at 582.)

When the Union made its initial **Wage** proposal on April 6, it did not attempt to address the issue that had led to the Dietary underpayment. (Tr. at 11-112; R. Ex. 2 at 3780; *see also* R. Ex. 3 at 0216 (Bernstein stating, "Current proposal does not tinker with that [existing wage structure], simplistic approach; straight forward.").) Instead, the Union simply requested 5% across-the-board raises (*Id.*; *see also* Tr. at 54 (Godoff stating, "It would call for across-the-board wage increases …. That's basically what the proposal was.")), essentially compounding the problem. However, when Godoff presented the Union's proposal, he made a few acknowledgements:

- "This business of having 2 separate wage systems, there are rates and rates that change over time presents problem[s], we understand that." (R. Ex. 3 at 0214.)
- "The dual scales created these gigantic disparities between different people performing the same jobs. … That's what directed us to the wage miscalculation. … [I]t's built into that system. We'd like to talk to you about that too. Like to moderate the problem. … It's hard to fix because it's built into wage structure. Same occupation, making 3, 4, 5 dollar difference. …" (R. Ex. 3 at 0215-0216.)
- "It's hard to fashion wage increase for this group." (R. Ex. 3 at 0216.)

Union and the settlement of a Union grievance) favorably assisted the Hospital by encouraging the Petition, securing a significant payment for a large portion of the bargaining unit should have only placed the Union, not the Hospital, in a favorable light.

(*See also* Tr. at 111-112.) The Union added to their economic proposal on June 12, adding a proposal for preceptor pay and proposing language related to the Union's training fund. (R. Ex. 2 at 3788-3792.)

The Parties further discussed **Wages** in October 2017. Following an extensive discussion about the Dietary underpayment, Bernstein asked the Union's committee: "[W]e all sat through discussion today and we talked about where we see the current contract wage structure, and you don't have to answer now - did you hear anything today at all that would alter your initial economic proposal? I think your proposal is pretty straightforward – just a straight bump, I just want to be sure you're not going to change it." (R. Ex. 3 at 0273.) Godoff again acknowledged the issues with the current structure, and the Negotiators confirmed their commitment to address the problem, with Godoff noting the current system (the same system the Union simply slapped 5% on top of) as "terribly unfair," and Bernstein opining that "we all owe it to whomever comes after us to be clear and make it easier to figure out." (*Id.*)

Three sessions later, on Friday, May 18, 2018, the Hospital made its first **Wage** proposal. (R. Ex. 1 at 3641-3643.) The Hospital meticulously explained the proposal, including the merit and bonus components that were being proposed. (R. Ex. 3 at 0303.) The Hospital did not have the "Appendix B" (ranges and differentials) finalized for discussion that day, but committed to providing it to the Union at their next session, Monday, May 21, which they did.[18] (R. Ex. 3 at 0314; *see also* R. Ex. 1 at 3651-3654 (05/21 Appendix B).)

Godoff admits there were portions of the Hospital's *initial* **Wage** proposal that he liked, finding the differentials to be "a positive step" and noting "no one was going to object to lump

[18] At the hearing, Godoff complained that the "problem" with the Hospital's May 18 Wage proposal was "there was no Appendix B." (Tr. at 66.) The complaint is disingenuous as it is undisputed that the Hospital promised and provided the Union the Appendix at the next session which was the next business day.

sum bonuses" as the Hospital had proposed.[19] (Tr. at 112, 125; *see also* R. Ex. 3 at 315 (describing increase in all differentials as a "productive move").) **The Union admits that both of these components of the Hospital's Wage proposal were non-discretionary.** (Tr. at 112-13.) The Union also agreed that it was favorable that "everybody was going to get a raise." (Tr. at 125.)

The Parties continued to discuss the proposal, with the Hospital's committee emphasizing that the years of experience ("YOE") criteria that they were proposing to use to place employees into various pay ranges, was objective.[20] (R. Ex. 3 at 0303, 0328.) When Godoff asked where individual YOE would fall under the proposal, Bernstein candidly admitted that the placement was a process the Hospital had not yet undertaken. (R. Ex. 3 at 0317.) Godoff noted that, "[I]t may very well be that we don't have a complaint with it, but this is [a] complicated process …" (R. Ex. 3 at 0318.)

At the next session, July 31, the Parties again discussed the Hospital's **Wage** proposal, and by then, the Hospital had completed the process of aligning YOE with a wage rate within each range, and the Parties discussed the Hospital's preference to have a non-disclosure agreement in place prior to production of the data. (R. Ex. 3 at 0328-0332.) Ultimately, the Hospital provided the data to the Union without such an agreement on August 1, and further arranged for the Union to have cafeteria access so they could review the data with individual bargaining unit members. (Tr. at 138, 582-83; R. Ex. 3 at 0395 (Bernstein referencing prior

[19] There were no bonus opportunities in the expired CBA. (*See* G.C. Ex. 30 at 10-11.)

[20] When the Parties again discussed YOE on August 1, 2018, Schmid clarified that with respect to an employee's experience outside of the Hospital, **"we're willing to review anything the employee or you all present to us that suggests our calculations were off."** (R. Ex. 3 at 0352; *see also,* R. Ex. 3 at 0401-0402 (confirming the Hospital will review any YOE information provided by an employee and that the Hospital wanted to "make things right").)

discussion about making cafeteria available for union to discuss placements with staff); R. Ex. 17 (e-mail with YOE spreadsheet)[21].)

Despite this seemingly productive exchange, the Union shared their unwillingness to negotiate the merit component of the proposal. During the July 31 session, Brown stated, twice, that the Union "is not going to look to do" merit, and "merit is not anything the union is looking to do." (R. Ex. 3 at 0331-0332.) When Schmid asked her, "[W]hat if your membership wants it?" Brown replied "Not every decision has to go through the members …." (R. Ex. 3 at 0332.)

On August 1, the Hospital presented an updated Appendix B that raised two of the ranges. (R. Ex. 1 at 3666.) That same day, Schmid verbally added to the Hospital's **Wage** proposal a floor; specifically, that every employee would get at least a 2% increase at the time of ratification and placement in the Hospital's proposed ranges. (Tr. at 113-114; R. Ex. 3 at 0351.) This offer was again discussed and confirmed on October 11. (R. Ex. 3 at 0412 (Schmid stating, "Immediately upon ratification, all employee will get an increase of at least 2%.").)

During the October 10, 2018 session, Godoff inexplicably asked, "how do the merit based increases work?", and Schmid had to remind him that she answered that question, in detail, when she presented the proposal on May 18. (R. Ex. 3 at 0395-0396.) After Schmid again answered Godoff's first question, he then asked, "Where are you placing the employees in the range?", and Schmid again had to remind him that the Hospital had already provided that information to the Union as well. (*Id.*; *see also* R. Ex. 17 (e-mail with YOE spreadsheet).)

At the time of the withdrawal, the Union had not made a counter to the Hospital's initial wage proposal. (Tr. at 114; *see also* R. Ex. 3 at 0400 (on October 10, Schmid pointing out that

[21] Barner provided inaccurate testimony on this issue at the hearing when she testified that the Union never got any documents related to the **Wage** proposal and "never got answers" to its question about "what the range would look like." (Tr. at 133-34; *cf.* Tr. at 138 (Barner contradicting her earlier testimony and admitting she received range information).)

Union had Hospital's Wage proposal since May and had not yet countered it).) The Union had possessed the Hospital's **Wage** proposal, to include ranges and differentials, since May, and the data regarding the placement of YOE within the ranges since August 1.

At the hearing, Godoff claimed that the Hospital was "not bargaining" and the ranges were "not negotiable." (Tr. at 68.) He further claimed that the Hospital refused to consider the Union's verbal suggestion that an employee with a certain evaluation score receive a minimum merit increase. (Tr. at 69-70 (Godoff stating, "They had made it clear there weren't going to be any concessions. The range is what the range is. The merit system was the merit system that was in place for non-bargaining employees, and that was, that was it.").) However, Godoff's testimony is belied by the contemporaneous bargaining notes. On May 21, the same day Godoff asked if the Hospital would negotiate the ranges, Schmid invited the Union to "counter." (R. Ex. 3 at 0310; *see also* R. Ex. 3 at 0311 (that same day, Bernstein stating "we will accept a counter"); R. Ex. 3 at 0332 (following discussion about the role of performance evaluations in the Hospital's proposal, Bernstein stating, "Okay, we have work to do on that side of it.").)

This belated allegation is nothing more than a thinly-veiled attempt by the General Counsel to bring an alleged ULP within reasonably close proximity to the Petition. There are no facts to support the claim that the Hospital "maintained and adhered" to an illegal Wage proposal that had never been countered and which addressed a serious pay problem that the Union acknowledged existed within the bargaining unit.

Initially, the Hospital's **Wage** proposal did not give it "unfettered discretion" as alleged by the General Counsel. Within the Hospital's *initial* **Wage** proposal, there non-discretionary bonuses and non-discretionary differentials. There was also a minimum 2% raise for every employee in Year 1, and published ranges. *See, e.g., Audio Visual Services Group, Inc.*, 367

NLRB 103 (2019) (even though employer's wage proposal reserved right to set wage rates, the proposal did not provide for "unbridled discretion" where the rates would have to fall within published ranges). There was indeed a merit component, but it is not illegal for an employer to bargain for merit-based pay.

A merit wage increase proposal that confers on an employer broad discretionary powers is a mandatory subject of bargaining on which parties may lawfully bargain to impasse. *Woodland Clinic*, 331 NLRB 735, 740 (2000) (citing *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), *enfd.*, 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)). In *McClatchy*, the Board recognized a distinction between lawfully bargaining to impasse over such a proposal and unlawfully granting discretionary merit wage increases consistent with the proposal. The Board explained that the former is privileged by *NLRB v. American National Insurance*, 343 U.S. 395 (1952), in which the Court held that it was lawful for an employer to insist on the retention of discretion under a managements rights clause over certain mandatory subjects of bargaining. The latter, the Board explained, is prohibited as an exception to the general rule that an employer may implement proposals at impasse, because to permit an employer to implement a proposal giving it unfettered discretion over mandatory subjects like wages would be destructive to the collective-bargaining process.

Accordingly, under *McClatchy* and its progeny, merely proposing, even to impasse, a clause that gives unfettered discretion to the employer over wages is not unlawful bad faith bargaining. *See McClatchy*, above at 1391 ("Nothing in our decision precludes an employer from attempting to negotiate to agreement on retaining discretion over wage increases."); *Woodland*, above at 740 (""The pay-for-performance proposal here, which reserves substantial discretionary power to the Respondent, is similar to the merit pay increase proposal at issue in *McClatchy*

Newspapers.”); *Audio Visual Services Group, Inc.*, 367 NLRB 103 (2019) (the respondent’s offer of “status quo” wage rates, from which it never retreated, was not evidence of bad faith).

That is all that occurred here – the Hospital made an *initial* **Wage** proposal that had a merit component. The Union never countered it prior to the withdrawal. As noted by the Board, “[I]n negotiations, initial wage proposals do not mean much.” *Stone Container Corp.*, 1991 NLRB LEXIS 398, 19 (1991), *aff’d. by* 313 NLRB 336 (1993). Here, the Hospital had only made its *initial* proposal. There is simply no violation of Section 8(a)(5) under these facts. *See, e.g., Audio Visual Services Group*, 367 NLRB 103 (no violation of 8(a)(5) where employer made “opening offer” to retain discretion over wage increases during the term of the CBA and union never countered it).

5. The Hospital Engaged in Lawful Communications With Its Employees When it Issued Bargaining Updates

Throughout negotiations, the Hospital regularly communicated with its employees regarding the status of bargaining (“Bargaining Briefs”). The Hospital anticipates that the General Counsel is going to refer to the Bargaining Briefs as some type of evidence in support of their allegation of surface bargaining.[22] (*See* G.C. Ex. 3, 5, 8, 13, 16, 20, 22, 26, 27; *see also*, G.C. Ex. 36, 37, 38, 40, 43, 44.) However, the Bargaining Briefs were non-coercive, protected communications between the Hospital and its employees, and they should not be considered anything else. Importantly, the Board is “reluctant to find bad-faith bargaining exclusively on the basis of a party’s misconduct away from the bargaining table.” *Litton* Systems, 300 NLRB 324, 330 (1990), *enfd.*, 949 F.2d 249 (8th Cir. 1991), *cert denied,* 503 U.S. 985 (1992). Notwithstanding, because the General Counsel was unable to prove his case based on the

[22] The Bargaining Briefs were the subject of two other unfair labor practice charges filed by the Union, Case Nos. 05-CA-190351 and 05-CA-194830. Both were withdrawn by the Union (February 17 and June 30, 2017, respectively).

Hospital's good-faith proposals at the table, the Hospital anticipates that the General Counsel will urge the tribunal to improperly use these protected communications in an effort to bolster his faulty claims.

Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Board has interpreted this provision to privilege non-coercive communication between an employer and its employees in the context of the collective-bargaining process. *United Technologies Corp.*, 274 NLRB 609, 610 (1985). As the Board has recognized, "permitting the fullest freedom of expression by each party" nurtures a "healthy and stable bargaining process." *Id.* It is not for the Board to "police or censor propaganda." *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966); *see also Long Island College Hosp.*, 327 NLRB 944, 947 (1999) ("[O]verenthusiastic use of rhetoric" protected by the Act unless it is knowingly false or made with reckless disregard for the truth).

The only limitation for employers is that the expression cannot contain any "threat of reprisal or force or promise of benefit." Section 8(c). Thus, according to the Board, "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006); *see also Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708 (1992), *enfd. mem.*, 991 F.2d 786 (1st Cir. 1993) ("Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness.").

The Board has consistently held that Section 8(c) protects an employer's right to communicate facts and opinions about the union's conduct during collective-bargaining negotiations. See, e.g., *Children's Center*, 347 NLRB at 36 ("All that the General Counsel has proven here is that the Respondent expressed an unfavorable opinion about the Union, its positions, and its actions."); *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 135 (2d Cir. 1986) ("None of the employer's communications to its employees were coercive. While strong language was used, stating that the union was on 'a collision course,' that their preparation was 'thoughtless and irresponsible,' and that their offers were 'unrealistic,' the employer never directly said—nor even implied—that the workers would be better off without the Union."); *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) (finding employer did not violate the Act by issuing "various bulletins to employees . . . essentially criticizing the Union's demands and tactics and setting forth its own version of the progress of negotiations"); *Procter & Gamble Mfg. Co.*, 160 NLRB 334, 340 (1966) ("The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith.").

The Hospital's Bargaining Briefs did not in any way unlawfully denigrate the Union. Moreover, the Union was perfectly capable of communicating its own position to employees about the status of bargaining, including responding to the Hospital's Briefs to clear up any perceived "misrepresentations" by the Hospital.

Section 8(c) plainly authorizes the Hospital to communicate with its employees about the Union, and Board law confirms that right extends to communications about the status of collective-bargaining negotiations. Nothing in the Hospital's communications was untruthful.

But even if it was, the law does not regulate veracity. The law simply prohibits the Hospital from making threats or promises or otherwise interfering with employees' Section 7 rights. The Bargaining Briefs did none of those things. For these reasons, the lawful, non-coercive Bargaining Briefs should not be relied upon in any manner.

6. The General Counsel Failed to Establish That the Hospital Engaged in Surface Bargaining

When reviewing allegations of bad-faith bargaining, the Board examines the totality of the employer's conduct. *Regency Service* Carts, 345 NLRB 671 (2005). The Board "may not, either directly or indirectly, compel concession or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat'l Ins.*, 343 U.S. 395, 404 (1952). And the Board has cautioned that a finding of surface bargaining should not be based on a combination of proposals alone. *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993) (rejecting ALJ's reliance "exclusively on the combination of certain of the proposals made by the [employer]"). Notwithstanding this directive, that is precisely what the General Counsel has alleged in this matter.

Importantly, there is no authority suggesting that certain proposals are in and of themselves *per se* indications of bad faith. The fact that proposals may be deemed disadvantageous to a party is not sufficient to justify such a finding. *Reichhold Chemicals (II)*, 288 NLRB 69, 69 (1988) (Board's examination of bargaining proposals will not involve decisions "that particular proposals are either 'acceptable' or 'unacceptable' to a party"); *see also Arkansas La. Gas Co.*, 154 NLRB 878, 60 (1965) (company-proposed changes in no-strike, management-rights, arbitration-and-grievance, and insurance-and-pension provisions not so onerous or unreasonable as to bespeak bad faith).

Instead, the Board measures whether the cumulative nature of the proposals nullifies the Union's ability to act as collective bargaining representative. *Reichhold Chemicals (II),* 288 NLRB at 84. The threshold in this regard is high, and includes proposals that require a union to cede its representational functions, or which grant the employer "unilateral control of over virtually all significant terms and conditions of employment of unit employees." *Regency Service Carts*, 345 NLRB 671, 675 (2005).

"Hard bargaining" is not a violation of 8(a)(5). *See, e.g.*, *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993) (merely "hard bargaining" where the employer insisted on broad management rights, at-will employment, merit increases and no arbitration and union likewise insisted on just cause for disicpline and arbitraiton of disputes); *Formosa Plastics Corp.*, 320 NLRB 631 (1996) (no violation of 8(a)(5) where employer's "strategy was to obtain the contract it wanted by progressive concessions of its own after an initial tactic of shock bargaining"); *Kitsap Tenant Support Svcs.*, 366 NLRB 98 (2018) ("The Board must ultimately determine whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.") (internal citations omitted).) Concessions are not required. *American National Insurance Co.* at 343 U.S. 404; *see also I. Bahcall Steel & Pipe*, 287 N.L.R.B. 1257 (1988) (refusing to find violation of 8(a)(5) where the General Counsel's argument was based on allegation that the employer's original proposal (that was admittedly "sweeping and drastic" and "different in content and form" from existing CBA and that included "substantial[] reduc[tions] in most of the economic provisions) was defective, and therefore, the employer violated the Act by making it, as "to hold otherwise would be to indirectly compel a concession by finding that the original contract proposals could not be lawfully advanced").

While concessions will not be mandated, the Parties are required to meaningfully participate in the process. *Endo Labs., Inc.,* 239 N.L.R.B. 1074 (1978) (finding violation of 8(a)(5) and reviewing "presentation" of proposals versus their "substance" where one party presented a "take-it-or-leave-it" approach, rather than the "give-and-take" that "characterizes good-faith bargaining"). "In the realities of the bargaining process, neither party expects its first proposal to be accepted." *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d at 265, *enforcing*, 133 NLRB 877 (1961), *cert. denied,* 375 U.S. 834 (1963); *see also* Tr. at 75 (Godoff "of course" agreeing that a party's first proposal is not necessarily its last). Further, simply because a proposal is "predictably unacceptable," it will not justify an inference of bad faith if the proposal does not foreclose future negotiations. *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), *enforced,* 313 F.2d 260 (2d Cir. 1963), *cert. denied,* 375 U.S. 834 (1963); *see also, NLRB v. Crockett-Bradley*, 598 F.2d 971, 975-77 (5th Cir. 1979) (even though employer proposed broad management rights clause, no-strike clause, and zipper clause, finding of surface bargaining improper, especially where parties were still at the stage where they were making proposals, employer had attended bargaining sessions, and other articles, while not agreed, were "progressing"); *Gulf States Mfrs. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), *reh'g in banc denied,* 598 F.2d 896 (5th Cir. 1976). Negotiating tactics are permissible. *Crockett-Bradley*, 598 F.2d at 976 (rejecting finding of "bad faith" against employer for engaging in "negotiating tactic" (suggesting that employees reaffrm their desire to pay union dues every month), and pointing out that union engaged in similar "negotiating tactics" (significantly above market wage proposal).)

While the Board has been inconsistent in its analysis of surface bargaining allegations, in *Atlanta Hilton & Tower*, the Board provided some guidance:

> Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, … other conduct has been held to be indicative of a lack

> of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.

271 NLRB 1600, 1603 (1984) (rejecting charge against employer of surface bargaining due to absence of seven factors and other indicia and noting, "A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree."). Here, the Hospital stands accused of only one of those indicia – alleged unreasonable bargaining demands. However, as discussed above, the Hospital's proposals were never absolute, and the Hospital was entitled to make them.

"The Board will not find that an employer failed to bargain in good faith if the union failed to test the empoyer's willingness to bargain." *Audio Visual Services Group, Inc.*, 367 NLRB 103 (2019). Here, the Union admits that the Hospital never, not once, stated that it was entrenched in a proposal or that it had presented its "last and final" offer. (Tr. at 128, 158.) In contrast, the Union was more resolute than the Hospital on certain issues, including union security, just cause for discipline, and arbitration, where the Union stated an outright refusal to consider any position other than their own. (*See, e.g., with respect to issues of "just cause" and arbitration,* R. Ex. 3 at 0108 (Godoff stating, Union would "not enter[] in[to] [an] agreement that doesn't have just cause language"); R. Ex. 3 at 0147 (stating, "Think we made clear not agree to contract nobody can get discipline without just cause."); R. Ex. 3 at 0203 (Godoff stating, "Never agree to discipline that does not have 'just cause.'"); R. Ex. 3 at 0260 (Godoff stating, "Never sign contract that not provide just cause for discipline or provide for arbitration," and "Never going to agree to that. Don't want to spin any wheels.").)

Audio Visual Services Group is illustrative. There, the Board overruled an ALJ's finding that the employer engaged in surface bargaining where the employer's initial proposals included:

(a) with respect to economics, the employer would (i) maintain (not raise) existing wage rates for current employees, (ii) set wage rates for future hires within specific ranges for each job class, (iii) determine future wage increases during the life of the contract, and (iv) provide represented employees the same benefits as unrepresented employees, and (b) with respect to noneconomics, the employer (a) proposed a discipline article that required a "reasonable belief" standard, but did not require progressive discipline, (b) proposed a grievance and arbitration article that only provided for non-binding arbitration (although a party could seek enforcement of the decision in court) and did not allow arbitration of discipline that did not involve the loss of time or pay, grievances that did not involve personal relief to the grievant, or allegations of discrimination or unfair labor practices, among others, and (c) proposed a management rights clause that gave it "sole discretion" over a variety of subjects. In addition to rejecting the ALJ's findings as to the proposals themselves, the Board held that the union "did not sufficiently test the employer's willingness to bargain prior to filing its bad-faith bargaining charge," and specifically observed that "while the [employer] held firm to its initial proposals for wages, benefits, discipline, and grievance and arbitration, it did not display a general unwillingness to bargain over those subjects, and it did not suggest that its initial proposals for those subjects were 'take it or leave it.'" *See also Captain's* Table, 289 NLRB 22, 24 (1988) (no violation where union failed to sufficiently test employer's willingness to enter into agreement, as the employer's first counterproposal on wages "was a starting point for future negotiations" and the employer "neither stated nor suggested by its conduct that it intended its first wage offer to be its last" and employer's initial wage proposal was pending and awaiting a counter from the union when bargaining ceased). Importantly, there, like here, the union complained about employer communications away from the table. The Board noted that even if the communications were not

privileged under Section 8(c), they were not significant enough to support a finding of bad faith "where … the union failed to test the [employer's] willingness to reach an agreement at the bargaining table."

Here, the Hospital's proposals, both individually and collectively, do not violate Section 8(a)(5) of the Act. At most, they are indicative of hard bargaining. More accurately, they existed in combination due to the Union's failure to engage in productive negotiations about them. As stated by the Court in *Hi-Tech* and the Board in *Audio Visual Services Group,* a union may not sit idly and refuse to meaningfully participate in negotiations, no matter how distasteful it may find the employer's proposals. 128 F.3d at 278; 367 NLRB 103.

The General Counsel's 8(a)(5) allegation must be dismissed. Indeed, as demonstrated above, the only party who engaged in intransigent behavior was the Union. Regardless of (or despite) the content of the Hospital's (largely initial) proposals, the Union failed to negotiate with the Hospital about them. Rather than attempt to seek relief at the bargaining table, the Union allowed negotiations to remain dormant while pursuing an unfair labor practice charge at the Board. Throughout this time period, the Hospital continued to meet with the Union in an effort to bargain a successor agreement, continued to timely respond to the Union's requests for information, and importantly, continued to remind the Union at virtually every session which proposals remained pending with them and again and again requested counters so these important matters could be discussed, and ideally, resolved.[23]

Notwithstanding, the Union waited 18 months (March 2017-September 2018) to counter the Hospital's initial **Grievance and Mediation** proposal (and then it was with a League proposal), 18 months (March 2017-September 2018) to substantively counter the Hospital's

[23] Indeed, the Hospital asked the Union to present a counter at no less than 18 of the 30 sessions. *See Chart, Section II, supra.*

initial **Union Security** proposal (and then it was with a League proposal), 18 months (March 2017-September 2018) to counter the Hospital's second **Management Rights** proposal (and then it was with a League proposal), and, even after the passage of years, it never bothered to counter the Hospital's **No Strike/No Lockout** proposal (March 2017 until Hospital's withdrawal in June 2018). In addition, at the time of the withdrawal of recognition in October 2018, the Hospital's initial **Wage** proposal had been pending since May without a counter from the Union. Under these facts, there simply is no violation of Section 8(a)(5) of the Act and the Complaint is due to be dismissed.

C. The Hospital Did Not Violate Section 8(a)(5) Of The Act By Withdrawing Recognition Of The Union Because The Union No Longer Enjoyed Support From A Majority Of Employees In The Unit

In paragraphs 8, 9 and 10 of the Complaint, the General Counsel alleges the Hospital committed an unfair labor practice when it withdrew recognition of the Union on October 26, 2018 and thereafter refused to recognize the Union or bargain with it prior to implementing changes to the terms and conditions of employment. (GC Ex. 1HH). Under Section 8(a)(5) of the Act, an employer has a continuing obligation to recognize and bargain with an incumbent union. That obligation ends, however, if the union no longer enjoys majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001). In *Levitz*, the Board concluded an employer does not violate Section 8(a)(5) if it withdraws recognition of an incumbent union and proves that at the time of withdraw, the union was not supported by a majority of the unit employees. *Id.* at 725. Here, the credible evidence conclusively establishes that as of October 26, 2018, a majority of unit employees did not want the Union to serve as their bargaining representative. Accordingly, the Hospital did not violate Section 8(a)(5) by withdrawing recognition of the Union on that date, and as a result, paragraphs 8 through 10 of the Complaint should be dismissed.

1. Factual Background

During the afternoon of October 25, 2018, unit employee Eugene Smith hand-delivered a 22-page petition ("the Petition") to Hospital CEO Kim Russo at her office in the main Hospital location. (Tr. at 422-23.) Each page of the Petition recites the same introductory language: "To be filed with the appropriate National Labor Relations Board Regional Office." (R. Ex. 7.) Underneath that heading is the phrase, "PETITION TO REMOVE UNION AS REPRESENTATIVE." Then, the following language appears:

> The undersigned employees of George Washington University Hospital (employer name) do not want to be represented by 1199 SEIU, United Healthcare Workers East Maryland/DC Region (union name), hereafter referred to as "union."
>
> Should the undersigned employees constitute 30% or more, but less than 50%, of the bargaining unit represented by the union, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority of employees also no longer wish to be represented by the union.
>
> In addition, should the undersigned employees constitute 50% or more of the bargaining unit represented by the union, the undersigned employees hereby request that our employer immediately withdraw recognition from the union, as it does not enjoy the support of a majority of employees in the bargaining unit.

Id. Following the above-quoted language on each page of the Petition are lines for employee names, signatures, and dates. The Petition contains a total of 105 employee signatures dated between March 16 and October 25, 2018. (*Id.*)

Russo called Schmid who was at the Hospital's Human Resources ("HR") Department located off site at 2131 K Street NW, and advised her she had received the Petition and was having it delivered to HR. (Tr. at 227, 522.) Schmid had a roster printed from the Hospital's human resources information system ("HRIS"), which is referred to as "Lawson," of all employees in bargaining unit positions. (Tr. at 230, 510; R. Ex. 8.) The roster included a total of 161 employees. (R. Ex. 8.) Five of the employees on the roster had a full-time equivalent

("FTE") status of 0.4 or less.[24] The recognition article of the collective bargaining agreement excludes from the bargaining unit "employees not regularly scheduled for a standard workweek of twenty (20) or more hours …." (GC. Ex. 30, Section 1.1.) Thus, the Parties had agreed through their collective bargaining agreement that employees with a FTE status of less than 0.5 are not included in the unit. Based on the exclusion of these five employees, Schmid concluded there were 156 bargaining unit employees. (Tr. at 230; R. Ex. at 8.)

The Hospital then set about determining whether the Petition had been signed by at least 50% of the 156 bargaining unit employees. That task was performed by two Hospital directors, Marcia Levinson and Elzbieta Kmiecik, with the assistance of Schmid. (Tr. at 522.) Levinson and Kmiecik first confirmed whether the signers of the Petition appeared on the employee roster that Schmid had obtained that afternoon from the Lawson system. (Tr. at 523.) Following this process, it was determined the employment of six signatory employees with the Hospital had been terminated prior to October 25. (Tr. at 524-25.) Consequently, the word "term" was notated on the Petition beside each of those names. (R. Ex. 7.) Levinson and Kmiecik also came across a number of duplicate signatures on the Petition (14 in all), including one from Tariq Farnell, an employee who was also not in the unit. The word "duplicate" was written on the petition beside each of the duplicate names where they appeared a second time. (*Id.*).

As Levinson and Kmiecik were comparing the names on the Petition to the roster of employees, Schmid compared the names to another roster of employees that showed each employee's FTE status. (Tr. at 523; R. Ex. at 9.) Based on her review, Schmid identified four signatory employees as having fallen short of the minimum standard workweek requirement as

[24] The five employees in bargaining unit positions with a FTE of less than 0.5 were Komi Adjihono, Antwon Anthony, Stephanie Broderick, Latrice Diggs, and Angella Grant-Dawkins. (R. Ex. 8).

of October 25. The words "PRN not in unit" were written on the Petition beside each of those names. (R. Ex. 7.)

After striking non-unit and separated signatories as of October 25, Levinson and Kmiecik proceeded to validate the remaining signatures by comparing them to signatures that previously had been furnished on two separate forms maintained in the HR Department. (Tr. at 525.) Those forms generally consisted of offer letter receipt acknowledgment forms and W-4 tax forms. (R. Ex. 10.) On rare occasions where one of those documents was absent from the file, alternative forms (consisting of policy receipt acknowledgment, status change, or application forms) were used in their place. (*Id.*)

Upon accounting for both duplicate signatures and those of employees who were no longer employed or in the unit as of October 25, and after comparing the signatures to the signature exemplars, Levinson and Kmiecik determined the Petition contained valid signatures from 81 unit employees. (Tr. at 526; R. Ex. 7.) As the roster identified a total of 156 unit employees as of October 25 and the Petition included 81 valid signatures from bargaining unit employees, the Hospital concluded a majority, specifically, 51.9%, of bargaining unit employees no longer wanted to be represented by the Union.

2. At the Time of the Withdrawal, the Union No Longer Enjoyed Majority Support

As noted above, in *Levitz Furniture*, the Board held an employer does not violate the Act by withdrawing recognition of an incumbent union if it proves that at the time of withdrawal, the union was not supported by a majority of the unit employees. 333 NLRB at 725. An employer can meet its burden under *Levitz Furniture* by relying on "a petition signed by a majority of the employees in the bargaining unit." *Id.; see also, KFMB Stations,* 349 NLRB 373, 377 (2007) (decertification petition signed by majority of employees deemed

sufficient evidence that union actually lost majority support); *Lexus of Concord, Inc.*, 343 NLRB 851, 851-852 (2004) (same). Here, the Hospital conclusively established that when it withdrew recognition, the Union no longer enjoyed support from a majority of bargaining unit employees.

a. The Undisputed Evidence Proved The Signatures On The Petition Were Authentic

In order to be valid, the signatures on a petition must be authenticated. The Board has held that signatures may be validated by comparing them with "[w]riting exemplars from [the employer's] personnel records." *Flying Foods,* 345 NLRB 101, 103 (2005); *see also,* Memorandum GC 02-01 (Guidelines Memorandum Concerning *Levitz),* p. 4 fn. 13 ("In order to be valid, such a petition must contain the signatures of a majority of employees employed in the unit at the time of the withdrawal of recognition, and the employer must demonstrate that those signatures are facially authentic, usually by comparing them with employee signatures contained in the employer's business records or by witness authentication."); *Consolidated Biscuit Co.*, 1996 NLRB LEXIS 668, *43 (1996) ("Certainly, an employer has proven actual loss of majority status by an employee petition of which signatures are authenticated, at least by the personnel manager, and verified by comparison to employee signatures in personnel files."); *Hartz Mountain Corp.*, 295 N.L.R.B. 418, 424 (1989) ("The assistant personnel manager…credibly testified that she compared the signatures on the petition against those found in the employees' personnel files.").

The undisputed record evidence establishes that when the Hospital received the Petition on October 25, it immediately began investigating whether the signatures on it were valid and constituted a majority of the bargaining unit employees. The Hospital tested the validity of the signatures using the Board's approved method by using multiple employees to cross-verify them

with exemplars in the employees' personnel files. After a thorough review, the Hospital was able to validate 81 signatures on the Petition. Neither the General Counsel nor the Union presented any evidence questioning the validity of any of the 81 signatures relied upon by the Hospital. Accordingly, the undisputed evidence establishes the Petition included 81 authentic signatures.

b. The Credible Record Evidence Established The Petition Was Signed By 81 Members Of The Bargaining Unit

While the General Counsel did not challenge the authenticity of the 81 signatures relied upon by the Hospital, he contends some of the 81 signers were not members of the bargaining unit. The General Counsel argues the signatures of eight of the signers should not be counted because they were *per diem*, or PRN, employees as of October 25, 2018, when the Petition was delivered to the Hospital. The only evidence the General Counsel presented in support of this argument was the testimony of Eric McGee, the Hospital's Assistant Director of Human Resources. (Tr. at 256.) McGee agreed with the General Counsel that for the following individuals, the most recent status recorded in their hardcopy personnel files is that of *per diem*:

Kofi Addai (Tr. at 269);

Alita Gaskins (*Id.*);

Antoine Fowler (Tr. at 270);

Brenton Conte (*Id.*);

Shanece Calhoun (Tr. at 271);

Darren Bell (*Id.*);

Ronald Harris (*Id.*); and

William Barnes (Tr. at 272);

McGee cautioned, however, he would not rely on an employee's hardcopy personnel file to determine the status of an employee. (Tr. at 261.) This is so because a change in status from *per diem* to part-time or full-time initially is generated through an electronic personnel action record.

(Tr. at 260.) A hardcopy of the status change is not printed until after the change has gone through the complete approval process and been recorded electronically in Lawson, the Hospital's human resources information system. (Tr. at 260.) Even then, the hardcopy personnel file cannot be relied upon as reflecting the most current status, as the Hospital's Human Resources department has a backlog of filing. (Tr. at 262.) As a result, McGee testified he would not rely on documents in the hardcopy personnel file to determine an employee's current status; instead, he "would always go to the electronic system to verify accuracy." (Tr. at 261.)

McGee's testimony was corroborated by that of Michael Gilbart, an HRIS/compensation analyst with GWUH. (Tr. at 619.) Gilbart is responsible for maintaining and updating employee records in Lawson, the Hospital's human resources information system. (*Id.*). Gilbart explained that a change from *per diem* status to full-time or part-time status is initiated by the employee's supervisor making a request in the Hospital's electronic personnel action system. (Tr. at 641.) Gilbart by default is the first approver of the electronic personnel action. (Tr. at 625.) Once all of the required manager approvals are obtained electronically, Gilbart enters the personnel action change into Lawson. (Tr. at 631.) Gilbart's testimony that changes from *per diem* status to full-time or part-time status are electronically initiated, electronically approved, and electronically entered by him into Lawson confirms the Hospital's electronic human resources information system is the most accurate source of personnel information.

Here, the Hospital's "electronic system" indisputably establishes the eight signers the General Counsel seeks to challenge were not *per diem* employees as of October 25, 2018, when the Petition was provided to the Hospital. Gilbart printed from Lawson personnel action forms showing when each of these employees converted from *per diem* to full-time status. (R. Ex. 25.) Those personnel action forms prove that all eight of the signers alleged to be at issue were no

longer *per diem* employees as of October 25, 2018 when the Petition was submitted. Specifically, the forms show as follows:

- Kofi Addai changed from *per diem* to full-time status effective June 10, 2018. (R. Ex. 25 at 1.) Addai signed the Petition on October 13, 2018. (R. Ex. 7 at 16.)
- Alita Gaskins changed from *per diem* to full-time status effective September 2, 2018. (R. Ex. 25 at 19.) Gaskins signed the Petition on September 11, 2018. (R. Ex. 7 at 12.)
- Antoine Fowler changed from *per diem* to full-time status effective October 14, 2018. (R. Ex. 25 at 16.) Fowler signed the Petition on October 13, 2018. (R. Ex. 7 at 16).
- Brenton Contee changed from *per diem* to full-time status effective October 14, 2018. (R. Ex. at 25 at 13.) Conte signed the Petition on May 24, 2018. (R. Ex. 7 at 2.)
- Shanece Calhoun changed from *per diem* to full-time status effective June 10, 2018. (R. Ex. 25 at 10.) Calhoun signed the Petition on July 18, 2018. (R. Ex. 7 at 8.)
- Darren Bell changed from *per diem* to full-time status effective April 29, 2018. (R. Ex. 25 at p. 7.) Bell signed the Petition on April 5, 2018. (R. Ex. 7 at 1.)
- Ronald Harris changed from *per diem* to full-time status effective December 25, 2016. (R. Ex. 25 at 23.) Harris signed the Petition on April 5, 2018. (R. Ex. 7 at 1.)
- William Barnes changed from *per diem* to full-time status effective April 29, 2018. (R. Ex. 25 at 4.) Barnes signed the Petition on April 5, 2018 and again on August 23, 2018. (R. Ex. 7 at 1, 11.)

Gilbart also prepared a personnel action history report from Lawson showing all changes to any of the 81 Petition signers occurring between March 1, 2018 and October 25, 2018. (R. Ex. 24.) Accordingly, had any of the 81 Petition signers experienced a personnel action change during that time that would have removed them from the unit, such as converting to per diem status or transferring to a non-bargaining unit position, that change would have been reflected on the personnel action history report prepared by Gilbart. (*Id.*). There are no such changes. Therefore, it is clear that as of October 25, 2018, all eight of the signers the General Counsel seeks to

challenge were no longer *per diem* employees, but instead were members of the bargaining unit.[25]

The General Counsel also contends the signature of Tiffany Gray should not be considered because her most recent position shown in her hardcopy personnel file is that of Cashier, which is not a bargaining unit position. (Tr. at 272.) Again, however, the hardcopy personnel file is not the most accurate information. The personnel action forms that Gilbart printed from Lawson proves that Gray moved into the bargaining unit position of Food Service Worker effective July 8, 2018. (R. Ex. 25 at 22.) As Gray signed the Petition on October 22, 2018, her signature should be considered. (R. Ex. 7 at 21.)

c. The Undisputed Record Evidence Demonstrated There Were 151 Employees In The Bargaining Unit When The Petition Was Presented To The Hospital.

On October 25, 2018, when the Hospital received the Petition, it had a roster printed from the Hospital's human resources information system of all employees in bargaining unit positions. (Tr. at 230, 510; R. Ex. 8.) The roster included a total of 161 employees. (R. Ex. 8.) Five of the employees on the roster had a FTE status of 0.4 or less and were not counted as being in the bargaining unit in accordance with the Parties' collective bargaining agreement. Thus, the Hospital believed there were 156 employees in the bargaining unit as of October 25, 2018. In fact, there were 151.

[25] Although not raised as an issue at the hearing, the General Counsel may argue the signatures of Fowler, Contee, and Bell should not be considered because they were *per diem* employees when they signed the Petition. The Board has held, however, an authorization card signed by an individual before he was employed is not invalid so long as the individual is employed at the time the question of majority status is being considered. *Koons Ford of Annapolis*, 282 NLRB 506, 517 (1986); *Marlene Industries,* 171 NLRB 848, 858 (1968). Here, Fowler, Contee, and Bell were all employed in bargaining unit positions on October 25, 2018 when the Petition was presented to the Hospital. (R. Ex. 24.)

Prior to the hearing, Michael Gilbart prepared a report from Lawson showing all bargaining unit employees as of October 25, 2018. (R. Ex. 21.) That report lists 151 names. (*Id.*). The difference between the 156 employees listed on the October 25, 2018 roster and the roster prepared by Gilbart is that the October 25, 2018 roster included the names of employees whose employment terminated prior to October 25, 2018, but whose employment record in Lawson had not yet been updated. Gilbart testified it was not unusual for there to be a lag between the actual termination date and the date the termination was entered into Lawson. (Tr. at 626.)

Gilbart researched the names of the five individuals who appear on the October 25, 2018 roster (R. Ex. 8) as part of the 156 employees, but do not appear on the roster Gilbart later prepared (R. Ex. 21). Those five employees are Lillie Black, Javon Haines, Elinda Walker, Kiyanna Walker, and Joseph Tatum, who were all terminated prior to October 25, 2018. Gilbart provided personnel action forms showing that the effective dates of termination of Lillie Black, Javon Haines, Elinda Walker, and Kiyanna Walker were all prior to October 25, 2018 (R. Ex. 22); further, the Hospital's electronic time keeping records show that none of these employees worked any hours after their dates of termination (R. Ex. 23). Thus, these five employees were not in the bargaining unit as of October 25, 2018. As a result, as of that date, there were 151 employees in the bargaining unit, not 156.[26]

A careful review of the record establishes that the following facts are not in dispute:

- At least 81 bargaining unit employees signed the Petition that was presented to the Hospital;
- The signatures of these 81 employees are authentic; and

[26] Respondent Exhibit 22 consists of the personnel action forms showing the terminations of Lillie Black, Javon Haines, Elinda Walker, and Kiyanna Walker. Gilbart was unable to locate the personnel action form for the fifth employee, Joseph Tatum. (Tr. at 642.) Nonetheless, he was not a bargaining unit employee as of October 25, 2018 (R. Ex. 21).

- As of October 25, 2018, when the Petition was presented to the Hospital, there were 151 employees in the bargaining unit[27]; and

- Therefore, 53.6% of the bargaining unit unequivocally indicated they did not want to be represented by the Union.

Because a majority of employees signed cards stating that they no longer wished to be represented by the Union for purposes of collective bargaining, withdrawal of recognition was lawful and required. *See, e.g.*, *Renal Care of Buffalo*, 347 N.L.R.B. 1284 (2006). Accordingly, the Hospital did not violate the Act by withdrawing recognition.

D. The Evidence of Lost Majority Support was not Tainted by Unremedied Unfair Labor Practices.

An employer cannot withdraw recognition "in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Levitz,* 333 NLRB at 717 fn. 1 (citing *Williams Enterprises,* 312 NLRB 937, 939-940 (1993), *enfd.*, 50 F.3d 1280 (4th Cir. 1995)). However, the Board has held, "[n]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber and Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd. in part*, 117 F.3d 1454 (D.C. Cir. 1997).

The proper test to be applied based on the undisputed facts that emerged at the hearing is found in *Master Slack*, 271 NLRB 78 (1984). *Lee Lumber* does not apply. *Lee Lumber* involved a general refusal to *both* recognize and bargain with the incumbent union. Here, it is undisputed that the Hospital engaged in bargaining with the Union for a successor collective-bargaining

[27] In a unit of 151 employees, the number of signatories could drop to less than 77 (76 = .503), and the Union still would have lost majority support.

agreement, during the period of November 21, 2016 through about October 12, 2018. The Hospital withdrew recognition on October 26, 2018, two weeks after the most recent bargaining session and five days before the Parties' next scheduled session on October 31-November 1. (Tr. at 143.) At no point during this entire 22-month period did the Hospital generally refuse to recognize or bargain with the Union in this case, nor has the Region (or the Union) ever so much as suggested (much less proven) otherwise. There simply is no basis to contend that this case involves a general refusal to bargain, and *Lee Lumber* does not apply.[28]

In *Master Slack*, the Board identified the following factors as relevant in evaluating this causal relationship:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Id. at 84.

In this case, there are no unremedied unfair labor practices, let alone any that could have possibly tainted the Petition. At most, the Region has filed a Complaint against the Hospital *alleging* four violations of Section 8(a)(5) and (1) of the Act, premised entirely on bargaining proposals the Hospital previously had made to the Union between December 2016 and June 2017 (except Wages, which was proposed in May 2018), 10 months before the first signatures were ever provided. (*See* Case 05-CA-216482.) Specifically, the Complaint alleges that the Hospital: (1) simultaneously maintained and adhered to bargaining proposals

[28] Even if it did, however, *Lee Lumber* only adopted a presumption (and not a *per se* rule) which can be rebutted by establishing that employee disaffection arose *after* the employer resumed bargaining for a reasonable period without additional ULPs that would detrimentally affect bargaining. *Lee Lumber*, 322 NLRB at 177-78.

that provide the unit with fewer rights than afforded to them without a collective- bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no-strike provision, and an expansive management's right clause; (2) engaged in regressive bargaining by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing that the grievance procedure culminates in non-binding mediation; (3) simultaneously maintained and adhered to a bargaining proposal that deleted a longstanding union security clause provision; and (4) simultaneously maintained and adhered to a wage proposal that give the Hospital "unfettered discretion." (*See* Complaint at ¶7.)

The Hospital has steadfastly denied the merits of these allegations. Even assuming *arguendo* that these allegations had merit, however, the alleged misconduct is both unproven and facially insufficient to taint the Petition under *Master Slack* and its progeny.

First, excluding the **Wage** proposal (discussed below), the length of time between when the unfair labor practices allegedly occurred (May 2017) and when the Petition was presented (October 2018) is far too remote to infer a causal connection. Specifically, the Hospital passed its **Grievance & Mediation**, **Management Rights**, **No Strike-No Lockout**, and **Union Security** proposals on March 28 and 29, 2017, a full year before the first signature appeared on the Petition and 18 months prior to the time it was presented to the Hospital.[29] The Hospital's alleged "regressive bargaining" with its **Discipline** proposal began in March 2017 and was corrected by May 2017, 10 months before the first signature appeared on the Petition and 17

[29] While the **No Strike-No Lockout** proposal was withdrawn in June 2018 leaving no proposed restriction on work stoppages by the Hospital, the Union did not counter **Grievance & Mediation, Management Rights**, and **Union Security** until September 5, 2018 when it presented the League Proposals. At the time of the withdrawal, the Union had not conformed any of the "template" League Proposals into actual counters for the Hospital's consideration.

months before the withdrawal. The Hospital's *initial* **Wage** proposal, while tendered in May 2018, is unworthy of consideration as a contributing factor, as there cannot possibly be a causal connection, at least one attributable to the Hospital, when the Union had not even tendered a counter to it at the time of the withdrawal.[30] *Cf. Champion*, 2007 NLRB LEXIS 331, 19 (2007) (violations occurring between 5 and 6 months before the withdrawal of recognition "too remote in time to have caused the employees' disaffection with the Union") and *Garden Ridge Management,* 347 NLRB 131, 134 (2006) ("[T]he 5-month period between the Respondent's last refusal to hold additional bargaining sessions and the time the petition was presented . . . weighs against finding that the unfair labor practice caused employee sentiment against the Union."), with *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (eight to fifteen days was "close temporal proximity") and *Fruehauf Trailer Services,* 335 NLRB 393, 394 (2001) (finding employer's withdrawal unlawful where "it occurred in the midst of its continuing unlawful failure to meet and bargain with the Union at reasonable times and intervals . . .").

Second, the nature of the alleged violations simply do not support a finding of unlawful taint. In cases where the Board has found that an employer's unlawful conduct had the possibility of a detrimental or lasting effect on employees, the employer had typically committed hallmark violations of the Act, such as discharging union supporters (*see Goya Foods of Fla.*, 347 NLRB 1118, 1121-1122 (2006)); threatening employees with plant closure and job loss (*see JLL Rest., Inc.*, 347 NLRB 192, 193 (2006)); or making substantial unilateral changes like granting unprecedented wage increases (*see Overnite Transp. Co.*, 333 NLRB

[30] The General Counsel's belated inclusion of the specious claim about the Hospital's **Wage** proposal (first appearing in the Third Amended Charge filed on June 2, 2019 (16 days before the hearing)) is a clear attempt to bring some type of alleged infraction within the temporal proximity of the Petition activity. The attempt should be rejected, as it simply does not establish a violation of Section 8(a)(5) as outlined above.

1392, 1394 (2001)). No such evidence exists here, nor has a "hallmark violation" even been alleged (much less proven).

Even if the General Counsel ultimately were to obtain an adjudication that the Hospital committed the isolated violations based on the substance of its bargaining proposals, such a finding could not possibly rise to the level of hallmark violations deemed by the Board to have a "detrimental" or "lasting effect" on employees by completely frustrating the bargaining process. In *Fruehauf*, for example, the Board found the employer's dilatory bargaining tactics, including not meeting for three months, not presenting contract proposals, and not offering substantive responses to union proposals, were of a nature that tends to have a lasting negative effect on employees. 335 NLRB at 394 (citing *The Westgate Corp.*, 196 NLRB 306, 313 (1972) (when an employer delays bargaining, "unrest and suspicion are generated, the conclusion of an agreement is delayed, and the status of the bargaining representative is disparaged")).

There is no evidence of similar dilatory tactics associated with the Hospital's alleged unlawful bargaining conduct. Indeed, as outlined above, it was *the Union*, not the Hospital, that delayed bargaining by completely failing to respond to the Hospital's proposals for months on end, during which time, the Petition gathered signatures and the Union's recalcitrance created "unrest and suspicion."[31]

Third, the tendency of the Hospital's alleged violations was not to cause employee disaffection. In *Fruehauf*, the Board found that the employer's dilatory bargaining tactics had a tendency to cause employee disaffection. Here, however, the Hospital is not alleged to

[31] The first signature appeared on the Petition in March 2018. By the time the Union finally countered the Hospital's March 2017 proposals on September 5, 2018 with the League Proposals, the Petition already had at least 49 valid signatures on it (approximately 60% of the total).

have engaged in any dilatory bargaining tactics, nor is it alleged to have engaged in any unfair labor practices away from the bargaining table. Put simply, the isolated bargaining proposal allegations against the Hospital could not possibly have had a tendency to cause employee disaffection. At a minimum, when reviewing the Union's course of dealings during the same time frame, it is clear that the General Counsel has not proven by a preponderance of the evidence that the Hospital's alleged conduct was the causal connection of the employee disaffection.

Ten bargaining unit employee testified at the hearing in this matter.[32] Each had a unique reason for signing the Petition; none of those reasons included the alleged bad-faith bargaining by the Hospital:

- William Barnes: Barnes never attended any of the bargaining. He signed because "I didn't need a union … I was a good worker … I don't have any trouble, any problems over there. I do what I'm supposed to do. And I just work hard." (Tr. at 280.)

  Mary Collins: Collins signed the Petition because "I felt like the Union was no longer doing anything for us …. And I asked myself, well, you're giving all this money. At the end of the day what are you getting out of it?" Collins had personally tried to ask Union representatives questions after she attended the October 12 bargaining session, and she was dissatisfied with their lack of response. (Tr. at 298-99, 305.)
- Angelica Claros: Claros signed the Petition because she did not like having to belong to the union at her prior job with Mosaic. (Tr. at 313-14, 322.)

- Noel Reyes: Reyes signed the Petition because he did not feel as if he needed a union as they had not done anything for him. (Tr. at 333.) Reyes had felt that way since he started at the Hospital 16 years ago. (Tr. at 331, 338.)

- Vivian Otchere: Otchere signed the Petition because the Union at the Hospital was not as good as the union she had been a member in at her prior job, and

[32] The Hospital was limited to offering testimony from ten employees via the tribunal's June 13 2019 Order Denying General Counsel's Motion *in Limine*. At the hearing, the Hospital made a request to present additional employee testimony which was denied. (Tr. at 483-84.)

because they did not answer her questions and did not do anything for her. (Tr. at 346-47, 355, 357.)

- Lewis Bellamy: Bellamy signed the Petition because he has not liked his pay since he started, including the raises negotiated by the union under the prior CBA, and he found the union unprofessional insofar as they would leave bargaining sessions and use foul language. (Tr. at 368-39.)

- Hardie Cooper: Cooper signed the Petition for numerous reasons, including that "the Union was doing nothing for me," lack of raises, the fact he could not get in touch with anybody at the Union when he would try to call, and that he felt like he protected his own job by doing good work and did not need the Union for that. Cooper also had complaints about the Union being "unprofessional" and cursing at the bargaining sessions he had attended. (Tr. at 376-77, 385-87.)

- Eugene Smith: Smith was the Petitioner, and he signed because he did not think he needed to pay anybody to keep his job when he was doing a good job on his own. (Tr. at 398-99.)

- Tsedale Benti: Benti signed the Petition because when she called and texted the Union for help during a disciplinary matter, they did not assist her. (Tr. at 448-50.)

- Freddie Ard: Ard signed the Petition because he worked for the Hospital from 1986-2001 and returned in 2016, and during both tenures, he did not see that the Union did anything for him. (Tr. at 466-67.)

Finally, there is no evidence that the Hospital's allegedly unlawful bargaining proposals had an effect on employee morale, organizational activities, or membership in the union. In addition to the employee testimony, above, the most telling evidence is that the parties continued to bargain for nearly 16 months after the latest alleged unlawful bargaining proposal. See *Quazite Corp.*, 323 NLRB 511, 512 (1997) (parties' continuation of bargaining after most violations occurred militated against finding that those violations caused later loss of majority support). In this case, the first signatures on the Petition were dated in March 2018, nearly 10 months *after the latest* allegedly unlawful proposal was tendered (excluding the Hospital's Wage proposal).

In sum, even if the General Counsel were somehow able to obtain an adjudication that some of the Hospital's bargaining proposals were made in bad faith, there is absolutely no causal connection between those proposals and the employees' reported disaffection with the Union. The claim must be dismissed.

E. The Hospital Was Not Obligated to Bargain Over Wage Increases, or the Effects of the Wage Increases, Because the Union Was No Longer the Employees' Representative

The Complaint alleges that following the withdrawal of recognition, the Hospital granted employees wage increases, implemented a new compensation structure, and granted a transit benefit in order to undermine support for the Union and failed to bargain with the Union over the changes. (*See* G.C. Ex. 1-CC at ¶¶9, 10.) The Complaint also faults a post-withdrawal November 1, 2018 memorandum sent by the Hospital to employees, apparently contending that it disparaged the Union. (*See* G.C. Ex. 1-CC at ¶11.) However, the Hospital did not engage in any of these actions until *after* it withdrew recognition from the Union.

It is well-established that an employer is not required to bargain with a union once it has withdrawn recognition. *See, e.g. Mkt. Place, Inc.*, 304 NLRB 995, 1243 (1991) ("In view of my findings concerning the Respondent's lawful withdrawal of recognition, I further find that there was no bargaining obligation…."). Here, the Hospital lawfully withdrew recognition on October 26, 2018. Therefore, the Hospital had no obligation to bargain with the Union over changes they announced *after* they lawfully withdrew recognition.

F. The Hospital Did Not Violate Section 8(a)(1) Of The Act By Interviewing Employees In Preparation For The Hearing In This Matter

During the hearing in this matter, the General Counsel moved to amend the Complaint to allege the Hospital violated Section 8(a)(1) of the Act when, during its trial preparation, it interviewed employees without first advising them of their rights under *Johnnie's Poultry Co.,*

146 NLRB 770 (1964). In *Johnnie's Poultry Co.*, the Board held that to safeguard against the possible coercion that may occur when employees are questioned about matters involving their Section 7 rights,

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

146 NLRB at 775. The General Counsel's proposed amendment should not be allowed because no charge was filed raising these allegations, nor are the allegations closely related to any of the multiple charges filed in this case. Moreover, if the amendment is allowed, it should nonetheless be dismissed as the credible record evidence demonstrates the Hospital did not violate Section 8(a)(1) by interviewing employees.

1. <u>The General Counsel's Amendment Should Not Be Allowed Because It Is Not Based On Any Charge Filed In This Matter</u>.

Section 10(b) of the Act provides, in part,

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect ….

Thus, the Board's authority to issue a complaint is subject to the limitation that the complaint allegations must be based on a previously filed charge. In applying this standard, the exact allegations of the complaint need not be set out word for word in a prior-filed charge; nonetheless, the allegations in the compliant must be "those alleged in the charge [or] which grow out of them while the proceeding is pending before the Board." *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940). The Board's test to determine if allegations are sufficiently

related is set out in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Specifically, the Board considers whether,

1. the allegations contained in the proposed amendment are of the same class as the violations as those in the previously filed charge, such that the allegations must all involve the same legal theory and usually the same section of the Act;

2. the allegations contained in the proposed amendment arise from the same factual situation or sequence of events as the allegations in the previously filed charge, such that the allegations involve similar conduct, usually during the same time period with a similar object; and

3. the respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the allegations contained in the proposed amendment as it would in defending against the allegations in the previously filed charge.

In this case, none of these factors supports allowing the amendment. First, the General Counsel's proposed *Johnnie's Poultry* allegations are not of the same class of violations included in the previously filed charges, nor are they based on the same legal theory. A *Johnnie's Poultry* claim asserts the employer violated Section 8(a)(1) of the Act by interrogating an employee without advising him of his rights with respect to the interrogation. Most of the allegations in this case are based on the claim that the Hospital violated Section 8(a)(5) of the Act by failing to bargain in good faith and by withdrawing recognition of the Union. The proposed *Johnnie's Poultry* claim clearly is not of the same class of alleged violations as these Section 8(a)(5) claims. A Section 8(a)(1) violation is included in only one of the charges filed in this matter, case number 5-CA-238809. In particular, that allegation was based on the claim the Hospital undermined the Union by sending a memorandum to employees on November 1, 2018. (GC Ex. 1-CC at ¶11.) While that allegation is based on the same section of the Act as the proposed *Johnnie's Poultry* claim, it is not in any other way related. Accordingly, the first factor weighs against allowing the amendment.

The second factor considers whether the allegations arise from the same factual situation or sequence of events usually occurring during the same time period. The proposed *Johnnie's Poultry* claim is based on factual allegations wholly unrelated to the factual allegations in any of the previously filed charges in this matter. Moreover, the purported *Johnnie's Poultry* violation occurred months after all the allegations in the charges filed in this matter. Thus, the second factor also weighs against allowing the amendment.

Finally, the Hospital's defense to the proposed *Johnnie's Poultry* claim is in no way related to its defense of the violations alleged in the previously filed charges. More specifically, its defense is based on what was said and when it was said during the interviews where the *Johnnie's Poultry* violation allegedly occurred. That defense is not related in one aspect to its defenses to the allegations in the charges filed in this matter. This third factor provides no basis for allowing the proposed amendment.

Section 10(b) requires that a complaint be based on a previously filed charge. The allegations in the General Counsel's proposed complaint are not based on or related to any previously filed charge. The proposed amendment cannot be allowed. This result does not leave the General Counsel without recourse if he believes there is sufficient evidence to support issuing a complaint alleging a *Johnnie's Poultry* violation. He can solicit a charge claiming GWUH violated *Johnnie's Poultry* and thereafter issue the complaint. That approach is what is required by the Act. It also protects the due process rights of the Hospital to adequate notice of the charges against it, which would not be met by the General Counsel's proposed amendment. The proposed amendment should be denied.

2. The Credible Evidence Establishes the Hospital Did Not Violate *Johnnie's Poultry*.

The General Counsel contends the Hospital violated employees' *Johnnie's Poultry* protections during its preparation for the hearing in this case. There can be no dispute that all employees who were interviewed were notified of their rights under *Johnnie's Poultry*. In particular, the Hospital provided each employee in question with a written notification of his or her *Johnnie's Poultry* rights. (Tr. at 485-88; R. Exs. 11-14.) Rather, the General Counsel contends the Hospital violated *Johnnie's Poultry* because the employees were questioned about their Section 7 rights before they were provided notification of *Johnnie's Poultry* rights. The credible record evidence establishes there is no merit to the General Counsel's claim. The employees in question were interviewed by the Hospital's counsel of record in this case, Tammie Rattray and Paul Beshears, who both are experienced labor lawyers. Rattray has engaged in the practice of labor law for 21 years, while Beshears has been doing so for 34. Rattray and Beshears both testified the first thing they did during their interviews was to advise the employees of their *Johnnie's Poultry* rights and ask the employees to sign a *Johnnie's Poultry* statement acknowledging they had been advised of their rights. (Tr. at 486-87; 488.)

The General Counsel contends, however, Rattray and Beshears failed to provide some of the employees notification of their *Johnnie's Poultry* rights until later in the interview. For example, during her cross-examination, employee Vivian Otchere testified she signed her *Johnnie's Poultry* statement approximately 10 to 15 minutes into her interview. (Tr. at 363.) Otchere also testified that "as soon as I get there," Rattray told her she did not have to cooperate with the interview. (Tr. at 351-52.) On the other hand, Otchere stated she first was asked about the Petition and then provided notification of her *Johnnie's Poultry* rights. (Tr. at 353-54.) It is

clear Otchere was confused on this point and contradicted herself on the timing of when she was advised of her *Johnnie's Poultry* rights.

Overall, out of ten employees, two gave conflicting testimony as to the timing of their Johnnie's Poultry notification, Barnes (Tr. 282, 294-95) and Otchere (351-54, 363). The remaining eight employees either clearly testified that the notification was provided at the outset of their interview (Collins (Tr. at 303, 310), Claros (Tr. at 315, 317, 328-30), Reyes (Tr. at 335-36), Cooper (Tr. at 382-83), Benti (Tr. at 444-45), and Ardt (Tr. at 470-73)), or they were not asked about the notification during cross-examination (Bellamy, Smith).

To find a *Johnnie's Poultry* violation requires cherry picking those portions of Otchere's testimony that she was not immediately advised of her *Johnnie's Poultry* rights and ignoring her testimony that she was advised immediately. Further, it requires crediting this cherry-picked testimony over that of Rattray and Beshears, who are experienced labor lawyers fully aware of the requirements of *Johnnie's Poultry*. In addition, it requires one to believe that Rattray and Beshears properly administered the *Johnnie's Poultry* notification to eight employees, but inexplicably failed to do so for the two at issue. Finally, to find a *Johnnie's Poultry* violation requires one to accept that Rattray and Beshears would take the time to prepare blank *Johnnie's Poultry* statements for their use during employee interviews and then for some reason decide to not provide the statements or advise the employees of their rights until after questioning the employees about matters protected by Section 7. That is nonsensical.

It was readily apparent at the hearing in this matter that all of the employees (who were all EVS and Dietary workers) were properly advised of their *Johnnie's Poultry* rights and any testimony to the contrary was solely the result of nerves and confusion caused by aggressive, inappropriate and unclear questioning by the General Counsel. The credible evidence

clearly establishes the Hospital did not violate the *Johnnie's Poultry* rights of any employee. This allegation should be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, Respondent The George Washington University Hospital respectfully submits that the General Counsel's Complaint should be dismissed in its entirety.

Submitted this 16th day of August, 2019.

Submitted by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlrb.gov, and duly served electronically upon the following named individuals on this 16th day of August, 2019:

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