

March 3, 2020

Via Electronic Filing

Judge Benjamin Green
Administrative Law Judge
National Labor Relations Board
Division of Judges
26 Federal Plaza
41st Floor, Suite 41-120
New York, NY 10278

**Re: Alameda Center for Rehabilitation and Healthcare INC. and
1199 SEIU, United Healthcare Workers East, New Jersey
Case No.: 22-CA-180564 & 22-CA-188462**

Dear Judge Green:

In response to your inquiry, Respondent's post hearing brief was filed on February 28th, with Region 22 and a copy was emailed that day to Union's Counsel- William, Massey, Esq electronic confirmation to the Region 22 number 1025225312. Due to clerical error, it was mistakenly electronically filed with the Region rather than the Division of Judges. I apologize for any inconvenience to all parties and accept responsibility. Attached is a copy of the post-hearing brief and confirmation.

Thank you for your consideration to this matter.

Sincerely,

JASINSKI, P.C.

/S/ David F. Jasinski

DAVID F. JASINSKI

CC: Sharon Chau, Esq
William Massey, Esq

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

ALAMEDA CENTER FOR REHABILITATION AND
HEALTHCARE, INC.

Cases: 22-CA-180564
22-CA-188462

and

1199 SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS EAST,
NEW JERSEY

PRELIMINARY STATEMENT

There are few, if any, facts in dispute in this matter. The negotiated collective bargaining agreement provides in pertinent part:

Article 31 401(k) Savings Plan

Each employee who has completed at least one (1) years (sic) of continuous service and worked 1,000 hours the previous year shall be eligible to participate in the 401(k) Plan. Employer shall match 50% of each employee's contributions, up to a maximum of 3% of the employee's gross salary. (GC Ex.3)

In May, 2016, the current operator purchased the Facility and was forced to establish and implement its own 401(k) Plan. It could neither adopt nor continue the previous 401(k) plan since the prior owner's plan was not portable and the new owner did not have a plan of its own. As a result, it necessitated the creation and implementation of a 401(k) savings plan by the new owners.

There is no claim that the new operator failed and/or refused to honor the other terms of the collective bargaining agreement including, inter alia, the Union Security Clause. It took eight (8) months, however, the 401(k) Plan was ultimately implemented on or about the first full payroll in January, 2017. Under the policy, eligible LPNs were entitled to voluntarily participate and elect to voluntarily contribute a portion of their salary into the 401(k) Plan. The individual's

contribution triggered the Employer to match \$0.50 of every dollar contributed by the employee up to 3.0% of employee's gross payroll. The first full payroll in January 2017 only seven (7) employees immediately commenced to elect to participate. The payroll records showed the following: seven employees previously contributed to the 401(k) plan. Guernelle Modesir who previously contributed never contributed to the plan after its implementation. Enid Rivera never made voluntary contribution and only commenced contribution in January 2017. Two employees did not immediately participate. Margaret Ogundare started to participate July 27, 2017 and Neha Patel started to participate April 19, 2018 in the case of Ms. St. Juste she reduced her contribution from 10 to 5 percent (GCEx.5) General Counsel did not request payments for any other employees despite the fact they were eligible to participate.

General Counsel established three (3) categories to establish who was and was not eligible. Relying on "reasonable to assume" burden of proof, the categories were:

1. Employees who participated in the prior plan;
2. Individuals who were unable to contribute during the relevant period, who immediately signed up for the 401(k) plan once it became available; and
3. The Regional Director defined the third category who were not eligible. It was those individuals who did not participate in the prior plan, did not participate immediately upon the new plan becoming available, but only signed up a few months later. General Counsel admitted the Regional Director decided those individuals should not be included because there was no reasonable basis to conclude that they would have participated in the 401(k) plan had it been available. (Tr. 23.)

A 401(k) Plan (Defined contribution Plan) is different from a Pension Plan (Defined Benefit Plan). Under a defined benefit plan, the Employer makes mandatory contributions into

Pension Plan. By its definition, the 401(k) Plan is a voluntary savings vehicle. Employees have the freedom to participate, or not participate, and elect the amount of contribution based on their financial situation and interest in sheltering a portion of their paycheck. Here, the 401(k) plan establishes the predicate to Employer contribution, if any, is the voluntary contribution by the eligible employee. Until and unless the employee contributed into the 401(k) Plan, the employer had no obligation to contribute into the 401(k) Plan on behalf of the employee. As discussed herein, the majority of employees elected not to participate in the plan. Those who participated, did so at different contribution levels and at different times.

The voluntariness of the 401(k) Plan in this matter was fully displayed by the limited number of employees who participated and the different levels of contributions made by the eligible employees, changes in contributions made by Lamarcie St. Juste, as well as the different dates of participation. Any and all decisions rested exclusively with the employees.

It is undisputed the Employer made the matching contribution.

STATEMENT OF CASE

On January 7, 2020 a hearing was held before the Honorable Benjamin Green. The Complaint in this matter was based on a series of assumptions without any specific evidence. Specifically, in Paragraph 5, the Complaint alleged in pertinent part:

“It is reasonable to assume the same employees would have continued to participate in the 401(k) plan throughout the back pay period.” (G.C.-2.)

The record testimony consisted solely of the payroll records. (G.C.-5.) It demonstrated, in January 2017, seven (7) LPNs opted to voluntarily contribute part of their salary into the 401(k) plan. (Ms. Modesir never contributed into the 401(k) Plan after implementation.) (G.C Ex.-5.) Under the terms of the 401(k) plan negotiated by the parties, the Employer matched 50% of

contributions. (Tr.43) The employees who elected to participate in the plan were neither subpoenaed to testify by the General Counsel nor provided of any affidavit. (Tr. 43.)

Consistent with the terms of the contract, General Counsel admitted employee contributions, if any, are voluntary and employees have the right to elect the level of contributions from their paycheck to the 401(k) plan. (Tr.39.) Conversely, employees have the choice not to participate in the 401(k) plan. (Tr. 39-40.)

It is undisputed the Regional Director established two categories in determining who was entitled to compensation. The Regional Director also found a disqualification for participation in the plan and that they were not identified as participating in the prior plan and they did not immediately sign up for the new plan. (Tr.39-40.)

Relying solely on the payroll records, General Counsel claims the damages for a class of employees of ten (10) LPNs. In this class, nine (9) individuals previously contributed and E. Rivera did not contribute prior to May 1, 2016 (G.C.-5) and opted to commence participation January 2017. (Tr.48.) The General Counsel has no knowledge why this individual did not participate prior to May, 2016 and elect to participate in January 2017. Of the nine employees who previously participated, three (3) either did not renew participation or renewed participation on different dates. For instance, Ms. Modesir never made voluntary contributions into 401-(K) plan after it was implemented. Ms. Ogundare commenced contributions in July 2017 (seven months after implementation) and Neha Patel commenced participation in April, 2018 (16 months after implementation.) Again, General Counsel had no knowledge for reasons the two LPNs elected to participate as long as sixteen (16) months after the plan was started. Finally, Ms. Lamarcie St. Juste reduced her contribution from 10% to 5% effective January 2017. (G.C.-5.) Again, no explanation for Ms. St. Juste's decision to reduce her contribution. As discussed

herein, the General Counsel is continuing to request 10% employee contribution for Ms. St. Juste.

None of the employees testified concerning the reasons they chose to participate on the dates in 2016 and 2017. (Tr. 43.) Likewise, there was no testimony for the percentage they elected to participate and explanation why they did not increase or decrease their percentage contribution. (Tr.49.) Finally, the record is absent of any evidence to mitigate the damages and use of any other savings vehicle to offset any loss during this eight (8) months period.

ARGUMENT

Substantial evidence is required to prove the claims in this case. Here, the allegations in the case amounts to complete reliance on standard of proof that it is “reasonable to assume.” By admission, General Counsel admits “reasonable to assume” is a legal determination. (Tr.42) It cannot be thrown around and surely cannot be taken lightly. More importantly, “reasonable to assume” is not the standard of proof in a 401(k) plan because by its definition any obligation to contribute stems from the threshold requirement that solely relies on the voluntary decisions by the employees. It must be grounded in facts and supported by credible evidence. Here, this case relied on sheer conjuncture and speculation by the General Counsel. As succinctly found by the ALJ in Raleigh Manor, Limited Partnership O/B/d HAVEN at Raleigh WL 33321594 speculation is simply unacceptable. Raleigh Manor, Ltd. P'ship d/b/a Care Haven of Raleigh & Dist. 1199, the Health Care & Soc. Serv. Union, Seiu, Afl-Cio, No. E NOS. 9-CA-32596, 1996 WL 33321597 (June 6, 1996 N.L.R.B. Div. of Judges). In that matter, the employer only offered a 401K program to bargaining unit members who were non union. The A.L.J. found a violation of the Act, but rejected General Counsel’s contention that the remedy should be the employer retroactively enrolling all the union employees in the 401K program and making all matching

contributions it would have made to plan. The ALJ determined that “I am not convinced that enrollment in the 401(k) Plan would have been a desirable option for all unit employees, and to order the Respondent to enroll all unit employees in the Plan and make them whole by submitting matching contributions on their behalf, as the General Counsel suggests, would clearly be inappropriate as it would be based on nothing more than sheer speculation, and further would result in a windfall to unit employees. Rather, I find that in the circumstances of this case, the more appropriate remedy would be to require that Respondent make the Plan available to all unit employees regardless of their Union membership.” 1996 WL 33321597 (June 6, 1996)

Here the General Counsel is seeking far beyond the proposal rejected by the A.L.J. in Raleigh Manor by insisting that the Employer make all contributions historically made by the employees, plus the Employer contribution along with the prospective loss of investment return. In order to achieve that remedy, the ALJ would need to rely on speculation that all the employees that formerly contributed to the old 401K plan would continue to participate in the newly implemented plan and that the employees would continue to contribute at the same rate. The payroll records demonstrate that this was not true in the case of Ms. Modesir who did not participate. Conversely, Ms. Enid Rivera did not participate with the old operator and only commenced contribution on January 2017. (G.C.-5.) Ms. Ogundare and Neha Patel commenced participation many months after it was offered. These examples evidence that there is nothing “reasonable to assume” with regards to their participation. As stated above there is nothing in the record to support that contention but evidence contrary to that assumption Ms. Modesir no longer participates at all, Ms. Ogundare and Ms. Patel waited seven and sixteen months respectively after the new plan was implemented to participate and Ms. St. Juste lowered their contribution rates. If anything, the empirical data the General Counsel relied upon shows the unpredictable

nature of participating in the plan and not the consistency the General Counsel is seeking the ALJ to assume. (G.C.-5.) Furthermore, the windfall to the employees rejected by the Raleigh Manor A.L.J. is magnified several times over if the General Counsel's method of remedy calculation is accepted here with the Employer making all the contributions on behalf of the Employee.

The same deficiencies the ALJ in Raleigh Manor found and reluctance to mandate contributions to a voluntary 401(k) Plan are readily apparent in this proceeding. With neither explanation nor defense, the General Counsel refused to call any of the employees necessary to explain their conclusions. No explanation for the varying dates the employees chose to participate in the 401(k) or the amount. No testimony explaining the change in voluntary contributions. No testimony to explain any steps initiated to explain any attempt to mitigate. No testimony that the employees could have indeed created their own savings vehicle. All of these questions are unanswered. There was no uniformity and no explanations for the different decisions. While the General Counsel will rely on the cloak of "reasonable to assume", the absence of any record testimony confirms the requested relief would be nothing more than sheer speculation. Indeed, as discussed herein, the General Counsel failed to follow the factors advocated and adopted by the Regional Director.

1. THE REQUESTED RELIEF REQUIRES THE ALJ TO REWRITE THE AGREEMENT BETWEEN THE PARTIES.

The 401(k) Plan negotiated by the parties allows the employee to make voluntary contributions into the 401(k) Plan. The Employer then, and only then, matches the contributions by 50%. The law is well established that a contract is not to be rewritten by the Court, even where the Court may think the outcome is inequitable. "A court may neither rewrite, under the

guise of interpretation, a term of the contract when the term is clear and unambiguous nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case.” Cruden v. Bank of New York, 957 F.2d 961, 976 (2d Cir. 1992). (internal citations omitted); The Circuit Courts have struck down similar attempts by the Board to have language plain and unambiguous either rewritten or crowbarred into a twisted interpretation. “It is a familiar rule that courts will not rewrite contracts for parties and we know of no authority for the Board to do so.” Employing Lithographers of Greater Miami, Fla. v. N. L. R. B., 301 F.2d 20, 28 (5th Cir. 1962). “However, the Union negotiated this clause with the Company, and that is the bargain it struck. Perhaps the Union agreed to this language because it assumed it could retain new members. It may also be as we surmise above, that the language is simply the result of poor drafting. However, it is not for us to say. It is not for this court to interpret the language in a manner that rewrites the CBA. Inasmuch as § 2.2 [of the contract] is plain on its face, we are bound by this interpretation.” Quick v. N.L.R.B., 245 F.3d 231, 248 (3d Cir. 2001). Nothing prevented the employees from increasing his contributions. The Plan was initiated in January 2017. Furthermore, there is no evidence whether the employees utilized alternate methods to participate in savings plans. Employees could have and may have initiated their own savings vehicles during the eight (8) month period between May through December. Indeed, they could have increased their contributions. The payroll records show the opposite in the case -- Ms. St. Juste reduced her contribution from 10-5%, and Ms. Modesir never contributed into the 401(k) after it was implemented. The requested relief would be a windfall for all of these employees.

2. **THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE GENERAL ECONOMICS REQUESTED REMEDY.**

As argued above, there is no provision in the Agreement requiring the Employer to make the initial contributions on behalf of the employee or for the employee to make any contributions

at all to a 401K plan. In fact, there is no evidence that any of the employees attempted to make any contributions to the 401(k) during the open period, inquired about making contributions to the 401k, sought an alternative retirement contribution option, escrowed the money in a bank account or event that employees set the money under their mattress until the succeeding 401(k) plan was set up. Instead, the Board presented testimony from one individual, Ms. Fricke, an NLRB compliance officer. Ms. Fricke testified that she made calculations of what she believed each employee would have contributed based on past payroll records (Tr. 41-42.) She further testified that her calculations were based on “hypotheticals” (Tr. 43-44.) In fact, she admitted that she had no evidence of whether any of the employees would have made the voluntary contributions to the 401k plan. (P. 44). Notably absent was any testimony, affidavits or even discussions with the employees allegedly adversely effected that they would have utilized the replacement 401k plan or that they would have continued to contribute at the same rate. The record consists solely of assumptions based on past actions.

The Supreme Court has struck down speculative damage calculations sought by the Board. Remedies “must be sufficiently tailored to expunge only the actual, and not merely speculative consequences of the unfair labor practices.” Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900, 902-904 (1984). It remains a cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices. *Id.* at 900–01. Although under slightly different circumstances, this Board has also rejected speculative damage calculations. See In Re Oil Capitol Sheet Metal, Inc., 349 NLRB 1348, 1351 (2007).

3. **THE REMEDY SUGGESTED BY GENERAL COUNSEL IS PUNITIVE AND BEYOND THE AUTHORITY OF THE ACT.**

It is well settled that the remedy for a successful unfair practice charge is limited to making the employees whole. It is equally well settled that the remedy cannot be punitive in nature because it is beyond the authority of the Act and the Board. “Though the Board's remedial authority under the Act is quite broad, it does not encompass punitive measures.” Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940); see also UAW v. Russell, 356 U.S. 634, 643 (1958); Local 60, Carpenters v. NLRB, 365 U.S. 651 (1961). We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that ‘this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.’ Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 11–12, 61 S. Ct. 77, 79, 85 L. Ed. 6 (1940). Although the General Counsel may seek what it deems to be industrial justice, the remedy sought goes far beyond making the employees whole and results in a windfall for the employees. Requiring the employer and not the employees to make the contributions to the 401k allows the employees to keep what would have been deducted from their pay but reap the reward of not only the percentage match set forth in the CBA but also the required contribution to trigger the match. This is designed to be a punishment for the Employer to go beyond what would have been required in the CBA and would serve as what could only be described as a fine.

As discussed herein, the facts do not support the methodology established by the Regional Director. The “reasonable to assume” standard has not met the threshold to substantiate these claims. Nevertheless, in the event the ALJ finds standard of proof has been

met, which it has not, by the Regional Director's own methodology excludes the following from contributions: Guernelle Modesir, Margaret Ogundare, Enid Rivera and reduction of St. Juste from 10 to 5%. In terms of the 3% cap, the General Counsel's calculations have not factored 3%.

CONCLUSION

As set forth above, General Counsel seeks an award based on pure speculation that would require the ALJ to rewrite the agreement. In this proceeding, the "reasonable assumptions" are not supported by any credible evidence. The record instead necessitates a singular conclusion that is in direct opposition to the remedy General Counsel seeks- the empirical data is inconsistent and unsubstantiated. At best, it required the ALJ to guess who would have made voluntary contributions. Based on this hollow record, it is impossible to establish with any degree of certainty that the identified employees would continue to contribute at the same level and without delay to the successor 401-K if it were immediately implemented. Without the ability to prove a violation or accurately prove a loss, the ALJ need not deal with the punitive remedy the General Counsel seeks which would result in nothing more than a windfall for the employees.

Dated: February 28, 2020

Respectfully submitted,

JASINSKI, P.C.
Attorneys for Respondent
Alameda Center for Rehabilitation and
Healthcare, Inc.

By: *s/ David F. Jasinski*
DAVID F. JASINSKI

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and accurate copy of the foregoing
Brief to be served on February 28, 2020 via electronic mail upon:

William S. Massey, Esq.
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New York, NY 10003-4709

Dated: February 28, 2020

s/ David F. Jasinski
DAVID F. JASINSKI

Julyaure Suarez

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Case Name:	Alameda Center for Rehabilitation & Healthcare, LLC
Case Number:	22-CA-180564
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