



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 22
20 WASHINGTON PL
FL 5
NEWARK, NJ 07102-3127

Agency Website: www.nlr.gov
Telephone: (973)645-2100
Fax: (973)645-3852

May 1, 2020

National Labor Relations Board
Office of the Executive Secretary
Roxanne L. Rothchild, Executive Secretary

Re: Alameda Center for Rehabilitation and Healthcare Inc.
Case Nos. 22-CA-180564 & 22-CA-188462

Dear Ms. Rothchild,

Please accept this letter as Counsel for the General Counsel's (CGC) Answering Brief to the exceptions and supporting brief filed by Respondent in the above-mentioned cases¹.

Initially, it should be noted that Respondent's exceptions and supporting brief fail to identify the sections of the ALJD to which exceptions are taken and fail to provide specific page citations to the record relied on. Therefore, it is respectfully requested that both the exceptions and brief be rejected for non-compliance with the Board's Rule 102.46(a)(1) and (2)².

¹ References to the Administrative Law Judge's Decision will be referred to as "ALJD" followed by page number:start line - end line or footnote number. References to the General Counsel exhibits will be referred to as "GC", followed by the exhibit number.

² The Board's Rule 102.46(a)(1)(i)(B) and (C) provide specifically that each exception must "[i]dentify that part of the Administrative Law Judge's decision to which exceptions is taken" and "provide precise citations of the portions of the record relied on", respectively, and (ii) provides that..."Any exception which fails to comply with the foregoing requirements may be disregarded." Similarly, the Board's Rule 102.46(a)(2)(ii) and (iii) provide that a supporting brief must contain "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate" and "[t]he argument, presenting clearly the points of facts and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other materials relied on", respectively.

Should the Board accept Respondent's exceptions and brief, those documents contain incorrect statements of law and fact which will be addressed here.

Respondent argues in its brief that the ALJ improperly relied on sheer conjecture and speculation and relied solely on Respondent's payroll record to conclude that had Respondent timely provided access to a 401(k) plan, all ten discriminatees named in Attachment A of the Amended Compliance Specification ("ACS") and Judge Green's Supplemental Order dated April 3, 2020 would have participated in such a 401(k) plan at the same rate of contribution as they had in the 401(k) plan of their former employer, Respondent's predecessor. In support of this argument, Respondent cited only one case – a judge's decision in *Raleigh Manor, Ltd. Partnership d/b/a Care Haven of Raleigh*, 1996 WL 33321597 (N.L.R.B. Div. of Judges), the facts of which are clearly distinguishable from the facts in the instant matter. In *Raleigh Manor*, the ALJ found the employer's offer of its 401(k) program to only the nonunion employees to be a violation of the Act. The ALJ declined to order the employer to retroactively enroll all the union employees in the 401(k) plan, not because there would be a windfall to the employees, as incorrectly suggested by Respondent in its brief. Rather, the ALJ considered the fact that the employees might not wish to participate in the 401(k) for personal financial reasons: because money would be deducted from their pay as contributions; because of their restricted ability to recoup their contributions; and because of the employer's announcement that it would not provide any matching contributions on behalf of the participating employees. In so deciding, the ALJ acknowledged Respondent's bookkeeper's testimony that it was these factors that led her to withdraw from the 401(k) plan. Thus, the ALJ decided that "[g]iven these facts" he "was 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 behalf, as the General Counsel suggests, would clearly be inappropriate as it would be based on nothing more than sheer speculation...” *Id.* at 5-6. Clearly, the “speculation” that concerned the ALJ in *Raleigh Manor* was based on the lack of demonstrated interest by any of the unit employees in participating in the employer’s 401(k) plan. To suggest otherwise, as Respondent has, is a misrepresentation of the facts in *Raleigh Manor*, *Id.*

It is based on this same logic that in the instant matter, the Regional Director of Region 22 made the well-reasoned decision to not seek a wholesale remedy for every unit employee, but only for the employees who demonstrated an interest in participating in a 401(k) plan, i.e. those employees who had participated in the prior plan as well as the employee who immediately signed up for Respondent’s 401(k) plan once it became available in January 2017. Thus, Judge Green properly rejected Respondent’s defense that there was no way to determine if those employees would have continued to contribute at the same rate had Respondent made a 401(k) plan available immediately upon its assumption of the predecessor’s business. In this regard, the ALJ correctly held that “the Respondent’s employees did not have access to a 401(k) plan during the backpay period and it is irrelevant, as hypothetical, what they did or did not do in the absence of such a plan. Rather, as in *Lou’s Transport*, the better method of determining whether employees would have contributed to a 401(k) plan during the relevant backpay period is by looking at whether and to what extent they participated when such plans were actually available.” (ALJD 5:14-19) Judge Green further correctly concluded that “[W]hile evidence that certain employees did not make contributions in April 2016 or January 2017 (or did not contribute the same percentage of

gross earnings) may add a degree of ambiguity as to whether and how much those employees would have contributed to their 401(k) plans during the backpay period, such uncertainties are resolved against the wrongdoer in a compliance proceeding. *Lou's Transport, Inc.*, 366 NLRB No. 140 slip op. at p. 7 (2018); *Webco Industries, Inc.*, 340 NLRB 10, 11 (2003); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982)." (ALJD 6:17-24)

Respondent's argument that the ALJ improperly accepted the payroll records offered by the CGC as supporting evidence is equally without merit and should be rejected. It is clear that the 401(k) deductions made in Respondent's first payroll were based on the participating employees' 401(k) contribution authorizations with their former employer. Thus, if Respondent deemed its own payroll records insufficient to determine the contribution rates of the participating employees, Respondent could have offered into the record the employees' 401(k) contribution authorizations – documents within Respondent's control. Respondent did not do so. In fact, as correctly noted in the ALJD, although Respondent has consistently claimed that CGC's calculations of 401(k) contributions owed as shown in Attachment A of the ACS are incorrect, Respondent has never offered alternative calculations or factors to be used as a basis for alternative calculations. (ALJD 4:12, GC 1f, i, j) Respondent's attacks on the ALJ's reliance on CGC's calculations which, are based on Respondent's own payroll, ring hollow and cannot be a basis for undermining the ALJ's correct reliance on those payroll records.

Respondent also argues that the ALJ improperly relied on *Republic Window and Doors*, 356 NLRB 1449 (2011) and *Webco Industries, Inc.*, 340 NLRB 10 (2003) in concluding that Respondent was responsible to make contributions on behalf of the ten named

discriminatees and the employer's matching portion. Respondent's argument is without merit and should be rejected as both these cases support Judge Green's conclusion. In that regard, the Board in *Republic Window and Doors*, found the employer to have unlawfully terminated its unit employees in December 2008 and unlawfully ceased to remit the employees' 401(k) contributions and the employer's matching contributions to the employees' 401(k) accounts, among other misconducts. As a remedy for the 401(k) violation, the Board ordered the employer to "make all such contributions that have not been made since that date [December 2008]..." Id. at 1450, 1452. The Board also ordered that "[T]o the extent that an employee has made personal contributions to his or her 401(k) account that have been accepted by the plan in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund", presumably to ensure that the fund would not receive duplicate contributions. Id at fn. 6. Similarly, the Board in *Webco Industries* ordered the employer to pay backpay and employee contributions in the amount of 12 percent of gross earnings, which the discriminatee made before his unlawful discharge, as well as the employer's matching contributions. Id at 11-12 & Appendix. Thus, Judge Green correctly relied on these Board cases in concluding that Respondent is responsible for the employees' contributions and the employer's matching contributions. (ALJD 7:7-22)

Although not specifically excepted, and therefore should be disregarded, Respondent argues in its brief that it is not liable for the 401(k) contributions and investment gains described in the ACS and the Supplemental Order because, it claims, the discriminatees failed to mitigate their damages. Respondent's argument has no basis in law and Respondent

provided no legal precedent requiring discriminatees in these circumstances to mitigate damages. To the contrary, in *KSM Industries, Inc.*, 355 NLRB 1344 (2010), enfd 682 F.3d 537 (7th Cir. 2012) the Board held that it was the employer's burden to establish any facts about interim earnings or benefits and rejected the employer's argument that a discriminatee's failure to participate in an interim employer's 401(k) plan was a failure of the duty to mitigate damages. The Board's holding is significant here because in the instant case, there was not even an interim 401(k) plan available for the discriminatees to participate in, thus Respondent's employees could not possibly have mitigated any damages. Indeed, Respondent could not provide any explanation as to how its employees could have mitigated damages given that it was Respondent's own unlawful failure to provide a 401(k) plan which prevented its employees from participating in that investment during the backpay period. Therefore, Respondent's mitigation of damages defense was properly rejected by Judge Green. (ALJD 5:2-7)

Respondent's remaining arguments that the ALJ improperly rewrote the collective-bargaining agreement between the parties and that the ALJ's remedy is punitive are the same arguments Respondent had proffered in its post-hearing brief and have been correctly rejected and addressed by the ALJD. (ALJD 4:31-48, ALJD 7:7-22) See also *Alaska Pulp Corp.*, 326 NLRB 522 (1998), where the Board ordered the employer to compensate the discriminatees for the lost opportunity to participate in the plan by establishing a plan for each discriminatee and to contribute for the discriminatees who should have been reinstated when the plan was implemented. The Board noted that this remedy "is necessary to effectuate the policies of the Act and well within our remedial authority, and is not punitive in nature." *Id.* at 526.

For all of the foregoing reasons, CGC respectfully requests that the Board reject and dismiss each of Respondent's Exceptions and its Brief. It is further urged that the Board adopt the Judge's findings and Supplemental Order as they are supported by credible record evidence and extant Board authority, and order Respondent to pay the employees' 401(k) contributions as well as employer matching contributions and to make the employees whole for any lost investment gains, and any other relief deemed appropriate.

Respectfully submitted,

/s/ _____
Sharon Chau
Counsel for the General Counsel

CERTIFICATION

This is to certify that copies of the foregoing Answering letter brief in response to Respondent's Exceptions to the ALJD has been duly served on the Office of the Executive Secretary, Respondent's counsel and Charging Party's counsel on May 1, 2020 as follows:

BY ELECTRONIC FILING

National Labor Relations Board
Office of the Executive Secretary
Roxanne L. Rothchild, Executive Secretary

BY ELECTRONIC MAIL

Gladstein, Reif & Meginniss, LLP
Attn.: William Massey, Esq.
wmassey@grmny.com

Jasinski, P.C.
Attn.: David Jasinski, Esq.
Djaskinski@jplawfirm.com