UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

800 RIVER ROAD OPERATING OPERATING COMPANY, LLC d/b/a CARE ONE AT NEW MILFORD	)	
Petitioner,	)	20-1280
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent.	)	Petition for Review

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner 800 River Road Operating Company, LLC d/b/a Care One at New Milford, petitions this Court to review and set aside the ruling in the attached Decision and Order of the National Labor Relations Board that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by reducing the work hours of certain bargaining unit employees without notifying and offering to bargain with their certified bargaining representative, 1199 SEIU United Healthcare Workers East,[1] dated June 23, 2020, and reported at 369 NLRB No. 109.

[1] Petitioner is not petitioning this Court to review and set aside the ruling in the attached Decision and Order dismissing the complaint allegations that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by not providing 1199 SEIU United Healthcare Workers East notice and an opportunity to bargain prior to taking certain discipline.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 24th day of July, 2020, the foregoing **Petition for Review** was served upon the following persons at the addresses shown below via Federal Express and was filed with the Clerk of the Court which will send notification of the filing to the following persons at the addresses shown below:

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DISCLOSURE STATEMENT OF PETITIONER 800 RIVER ROAD OPERATING COMPANY, LLC d/b/a CARE ONE AT NEW MILFORD

Petitioner 800 River Road Operating Company, LLC d/b/a Care One at New Milford, by and through its attorneys Fisher & Phillips LLP, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, declares that its sole member is THCI of New Jersey, LLC, and that no publicly held company has a 10% or greater interest in any of the entities identified above.

A supplemental disclosure statement will be filed upon any change in the information provided by this statement.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 24th day of July, 2020, the foregoing **Disclosure Statement of Petitioner 800 River Road Operating Company, LLC d/b/a Care One at New Milford** was served upon the following persons at the addresses shown below via Federal Express and was filed with the Clerk of the Court which will send notification of the filing to the following persons at the addresses shown below:

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

800 River Road Operating Company, LLC d/b/a Care One at New Milford *and* 1199 SEIU, United Healthcare Workers East. Case 22–CA–204545

June 23, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The principal question presented in the case is whether to adhere to the holding of *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016) (*Total Security*), and, accordingly, to affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by disciplining four employees without first providing the Union with notice and an opportunity to bargain.[1] In *Total Security*, a Board majority, with then-Member Miscimarra dissenting, purported to clarify extant law by imposing a new statutory obligation on employers upon commencement of a collective-bargaining relationship. The decision required an employer, with limited exceptions, to provide a union with notice and opportunity to bargain about discretionary elements of an existing disciplinary policy before imposing serious discipline on any individual union-represented employees who are not yet covered by a collective-bargaining agreement. An employer's failure to engage in such bargaining would violate Section 8(a)(5) of the Act even when the employer did not alter a preexisting disciplinary policy or practice but, instead, merely continued to exercise discretion consistent with that policy or practice when determining whether and how to discipline individuals. Further, the customary remedy for this violation would include reinstatement and backpay for a disciplined employee, unless the employer could prove that the discipline was imposed "for cause" within the meaning of Section 10(c) of the Act.

For the reasons that follow, we overrule *Total Security* and reinstate the law as it existed for 80 years, from the Act's inception until issuance of that decision. During that time, the Board did not recognize a predisciplinary bargaining obligation under the Act.[2] In fact, in *Fresno Bee*, 337 NLRB 1161 (2002), the Board affirmed an administrative law judge's rejection of the General Counsel's theory that such an obligation existed. Dismissively overruling that controlling precedent as "demonstrably incorrect,"[3] the *Total Security* majority claimed that the predisciplinary bargaining obligation was allegedly consistent with general Board precedent governing an employer's bargaining obligations prior to making material changes in bargaining-unit employees' terms and conditions of employment. To the contrary, *Total Security*'s imposition of a predisciplinary bargaining obligation (1) conflicts with a specific Board precedent and the rationale of the Supreme Court's *Weingarten*[4] decision relevant to this issue; (2) misconstrues the general unilateral-change doctrine announced in the Court's *Katz*[5] decision with respect to what constitutes a material change in working conditions; and (3) imposes a complicated and burdensome bargaining scheme that is irreconcilable with the general body of law governing statutory bargaining practices. For these reasons, *Total Security* must be overruled.

We further find that it is appropriate to apply our decision retroactively "'to all pending cases in whatever stage,'" including in the instant case.[6] Therefore, applying the appropriate standard, we conclude that the Respondent did not have a duty to provide the Union with notice and an opportunity to bargain prior to suspending three

[1] On November 20, 2018, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief. On October 17, 2019, the Board granted the motion by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) for leave to file an amicus brief and, thereafter, accepted its filed brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing employees' payroll hours from 40 hours per week to 37.5 hours per week. In adopting this finding, we clarify that the correct evidentiary standard is whether the General Counsel has shown by a preponderance of the evidence that the Respondent made a material change to the employees' terms and conditions of employment, and we find that burden satisfied. See *Columbia Memorial Hospital*, 362 NLRB 1256, 1270 (2015).

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and our findings, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020); and we shall substitute a new notice to conform to the Order as modified.

[2] We recognize that the Board first announced this new bargaining obligation four years earlier in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012). However, that decision was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

[3] 364 NLRB No. 106, slip op. at 7.

[4] *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

[5] *NLRB v. Katz*, 369 U.S. 736 (1962).

[6] *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

employees and discharging a fourth. As a result, we dismiss the complaint allegation that those disciplinary actions were unlawful.

Background

The parties stipulated to the relevant facts. In 2012, the Union was certified as the exclusive collective-bargaining representative of certain nonprofessional employees at the Respondent's rehabilitation and nursing care facility. The Respondent tested the certification, which the District of Columbia Circuit ultimately upheld on January 24, 2017.[7]

During this time, the Respondent maintained a disciplinary policy in its employee handbook. The relevant portion states:

> Disciplinary Action
>
> If your conduct is unsatisfactory, your Supervisor may provide guidance and support to help you make the necessary corrections. The Center has developed a disciplinary action process that focuses upon early correction of misconduct, with the total responsibility for resolving the issues and concerns in your hands. Your Supervisor is there to provide support and coaching.
>
> The following highlights a list of actions that the Center may use while administering discipline. Please note that these are guidelines only, and are not intended to imply a series of "steps" that will be followed in all instances. Any of the disciplinary actions described below, including termination, may be initiated at any stage of the process depending on the nature of the specific inappropriate behavior, conduct, or performance and other relevant factors.
>
> √ Verbal or Written Warning
> √ Suspension or Suspension Pending Further Investigation
> √ Final Written Warning
> √ Termination of Employment

Between October 2016 and March 2017, the Respondent suspended employees Jasmine Gordon, Linda Rhoads, and Jesus Mendez, and discharged employee Shantai Bills, pursuant to its disciplinary policy. The Respondent did not provide the Union with notice or an opportunity to bargain prior to disciplining the employees. On June 2, 2017, during negotiations for an initial collective-bargaining agreement, the Respondent informed the Union of the suspensions and discharge. The Union did not request bargaining over any of the suspensions or the discharge.

The judge found that the suspensions and discharge met the definition of serious discipline under *Total Security*[8] and that the Respondent was required to provide notice and an opportunity to bargain to the Union before it disciplined the employees. Accordingly, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to engage in prediscipline bargaining with the Union. In their briefs to the Board, both the General Counsel and the Respondent argue that *Total Security* should be overruled. The Charging Party and AFL–CIO, however, argue that *Total Security* was correctly decided and should be maintained.[9]

Discussion

The Act had been in effect for 76 years when the Board first identified a substantive predisciplinary bargaining obligation in *Alan Ritchey*, and for 80 years when it reinstated and expanded the vacated holding of that case in *Total Security*. To be sure, "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *Weingarten*, supra, 420 U.S. at 968. Indeed, the Supreme Court recognized in *Weingarten* that the Board reasonably made such an adaptation when it recognized for the first time a right, implicit in Section 7 of the Act, for a bargaining-unit employee to refuse to submit to an interview that the employee reasonably fears may result in discipline without having a union representative present. But the imposition of the bargaining obligation in *Total Security* did not result from any changing pattern of industrial life. To the contrary, as dissenting Member Miscimarra recognized, "[e]mployee discipline is hardly a new development in our statute's 80-year history." 364 NLRB No. 106, slip op. at 18. And as we shall discuss, the *Weingarten* Court itself clearly considered and approved the law governing bargaining obligations for employee discipline that had existed during that period.

The *Total Security* Board nevertheless portrayed its holding as a clarification of existing Board precedents applying the unilateral-change doctrine announced by the Supreme Court in its seminal *Katz* decision. This doctrine holds that, upon commencement of a bargaining

[7] *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378 (D.C. Cir. 2017), enfg. 362 NLRB 967 (2015).

[8] As further discussed below, serious discipline was defined in *Total Security* as discipline that has an "inevitable and immediate impact on an employee's tenure, status, or earnings," such as suspension, demotion, or discharge. 364 NLRB No. 106, slip op. at 3–4. The Board distinguished this from "lesser" discipline, to which different bargaining rules apply. Id., slip op. at 4.

[9] While exceptions were pending before the Board, the Charging Party filed a motion for partial withdrawal, seeking to withdraw the allegation that the Respondent's unilateral imposition of discretionary disciplines violated the Act. On August 29, 2019, the Board issued an order denying the motion. *800 River Road Operating Co., LLC d/b/a Care One at New Milford*, 368 NLRB No. 60 (2019).

relationship, employers of union-represented employees are required to refrain from making a material change regarding any term or condition of their employees' employment that constitutes a mandatory subject of bargaining unless notice and an opportunity to bargain is provided to the union.

In *Total Security*, the Board cited several Board cases applying *Katz* in support of its position. Of those cases, however, only one was even arguably on point with respect to the specific issue of a predicipline bargaining obligation under the Act. In contrast, the *Total Security* decision simply dismissed the one Board decision directly on point: *Fresno Bee*. In that case, the Board reached the same conclusion that we reach today when it affirmed without further comment the judge's conclusion, and supporting analysis, that no such obligation exists when an employer exercises discretion within the framework of an established disciplinary policy.

The General Counsel in *Fresno Bee* specifically argued that the employer violated Section 8(a)(5) of the Act by failing to notify the union and bargain to impasse prior to disciplining several bargaining-unit employees. Each disciplinary action was undisputedly taken in accord with an established disciplinary policy and while the parties were still negotiating a first bargaining agreement. The General Counsel maintained that even though the disciplinary actions taken did not involve a unilateral change in the established policy, they were nevertheless unilateral changes within the meaning of *Katz* because each action involved the exercise of discretion inherent in the overall policy.

In support of this theory of violation, the General Counsel relied on two Board cases, *Eugene Iovine* and *Adair Standish*.[10] The judge distinguished both cases, neither of which involved disciplinary actions. *Iovine* involved a decision to reduce employee hours, and *Adair* involved a decision about the selection of employees for occasional economic layoffs. Both cases involved the exercise of management discretion, but unlike in *Fresno Bee*, the employer actions were not consistent with any established practice. As the judge correctly noted, "[i]n *Iovine*, there was a demonstrable change from preceding practices and in *Adair* there was no established method for determining when layoffs would occur or which employees would be selected." 337 NLRB at 1186. Accordingly, under *Katz*, the employers in both cases had an obligation to bargain with the respective unions prior to taking actions that constituted material changes in working conditions.

The judge then rejected the General Counsel's contention that the exercise of any discretion, even if consistent with an established disciplinary policy, necessarily meant that each individual disciplinary action involved a material change requiring bargaining under *Katz*. She reasoned that

> [e]mployee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline. Here, however, Respondent maintains detailed and thorough written discipline policies and procedures that long antedate the Union's advent. The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy . . . . There is no evidence that Respondent did not apply its preexisting employment rules or disciplinary system in determining discipline herein. Therefore, Respondent made no unilateral change in lawful terms or conditions of employment when it applied discipline.

Id. at 1186–1187 (footnotes omitted).

In spite of the fact that the Board's decision in *Fresno Bee* was an unqualified affirmation of the judge's thorough analysis and resulting conclusion that the respondent in that case had not made a unilateral change, the *Total Security* majority claimed that "the Board has never clearly and adequately explained how (and to what extent) the [*Katz* unilateral-change] doctrine requiring employers to bargain over discretionary aspects of unilateral changes applies to the discipline of individual employees." 364 NLRB No. 106, slip op. at 1.[11] In general, the majority relied on precedent applying *Katz* in other contexts, including the *Iovine* and *Adair Standish* cases distinguished by the judge in *Fresno Bee* as well as *Oneita Knitting Mills*, 205 NLRB 500 (1973), which is similarly distinguishable.[12]

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[10] *Eugene Iovine, Inc.*, 328 NLRB 294 (1999); *Adair Standish Corp.*, 292 NLRB 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

[11] In a sense, that was true: the Board had never explained how the *Katz* unilateral-change doctrine *applies* to the discipline of individual employees because it had explained, in *Fresno Bee*, that *Katz* does *not* apply to the discipline of individual employees pursuant to unchanged disciplinary policies. This, the *Total Security* majority disregarded.

[12] The judge in *Oneita*, whose decision was affirmed in relevant part without comment by the Board, found that the employer exercised unfettered discretion in determining the amount of individual merit wage increases. The judge therefore correctly found that advance notice and bargaining was required under *Katz*. However, as dissenting Board members have observed, the Board has incorrectly interpreted *Oneita* in subsequent cases, including *Total Security*, as support for the proposition that *any* discretionary action taken, even if consistent with an established practice or policy, is a material change requiring bargaining under *Katz*. See, e.g., *Washoe Medical Center, Inc.*, 337 NLRB 202, 203 (2001) (Member Hurtgen, dissenting), and *Washoe Medical Center, Inc.*, 337 NLRB 944, 945–946 (2002) (Member Cowen, dissenting). As discussed

The majority also claimed to find strong support in *Washoe Medical Center*, 337 NLRB 202 (2001), which it described as the Board's "only substantive discussion of the obligation to bargain over discretionary discipline prior to *Fresno Bee.*" 364 NLRB No. 106, slip op. at 1. The three-member panel in *Washoe* affirmed on other grounds the judge's dismissal of an allegation that the employer violated Section 8(a)(5) by failing to give the union notice and opportunity to bargain prior to taking disciplinary actions that involved the exercise of discretion consistent with an established disciplinary practice. It is true that a footnote in the panel decision stated, without elaboration, that in light of *Oneita*, the panel rejected the judge's comment that the General Counsel had to do more than "show only some exercise of discretion to prove the alleged violation." 337 NLRB at 202 fn. 1. However, the *Total Security* majority failed to mention that the judge in *Washoe* was also the judge in the subsequent *Fresno Bee* case and made essentially the same analysis with respect to the General Counsel's failure to prove the same alleged violation. Notably, the Board panel that unanimously affirmed the judge's analysis in *Fresno Bee* included two members of the *Washoe* panel. In these circumstances, we find that *Fresno Bee* implicitly overruled *Washoe* in relevant part. The *Total Security* majority at least tacitly acknowledged this when finding it necessary to overrule *Fresno Bee*.[13]

Apart from the holding in *Fresno Bee*, language in the Supreme Court's *Weingarten* decision also generally supports the conclusion that employers do not have a statutory prediscipline bargaining obligation. In *Weingarten*, the Court agreed with the Board that a bargaining-unit employee has the right to request that a union representative be present when the employee reasonably believes that an investigatory interview could result in discipline. In doing so, the Court quoted with approval language from two Board cases, *Quality Mfg. Co.*, 195 NLRB 197 (1972), and *Mobil Oil Corp.*, 196 NLRB 1052 (1972), that not only established this right to representation but also "shaped the contours and limits of that statutory right."[14] Specifically, the Court endorsed the Board's statements in those cases that the exercise of the right to representation during an investigatory interview "may not interfere with legitimate employer prerogatives," 420 U.S. at 258, and that, should an employee decline to participate in an investigatory interview, "'[t]he employer would then be *free to act* on the basis of information obtained from other sources,'" id. at 259 (quoting *Mobil Oil Corp.*, 196 NLRB at 1052) (emphasis added); accord *Quality Mfg. Co.*, 195 NLRB 197. Most significantly, the Court also emphasized that "the employer has no duty to bargain with any union representative," 420 U.S. at 259, and quoted approvingly the Board's statement in *Mobil Oil* that "'we are not giving the Union any particular rights with respect to pre-disciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations,'" id. (quoting *Mobil Oil Corp.*, 196 NLRB at 1052 fn. 3).[15]

The *Total Security* majority emphasized that the specific issue decided in *Weingarten*—whether represented employees have the Section 7 right to request that a union representative be present at investigatory interviews—is different from the question of whether an employer has any Section 8(d) obligation to bargain with a union before imposing discipline. It also attempted to cabin the above-quoted statements in *Weingarten* as dicta applicable only to prediscipline investigations, with no relevance to whether an employer must bargain with a union prior to imposing discipline. No one disputes that *Weingarten* ultimately answered a different question than the question presented here. But the *Total Security* decision fails to come to grips with the fact that the Supreme Court's approval of the Board's answer to the question of limited union representation during a prediscipline investigatory interview was based in substantial part on the view that the result would not interfere with extant bargaining obligations and employer prerogatives. We must assume that the Court was fully aware that Board law at that time did not impose any obligation on an employer to bargain with a union prior to imposing discipline on individual employees. Accordingly, there is no other reasonable interpretation of the Court's unqualified statements about an employer's bargaining duty and a union's bargaining rights than to conclude that the Court implicitly approved the state of law as it then existed.[16]

below, that incorrect view of general bargaining obligations under *Katz* was inconsistent with other Board precedents and was expressly rejected in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

[13] Should there be any doubt about *Washoe*'s continuing validity, we overrule it to the extent inconsistent with our decision today.

[14] *Weingarten*, 420 U.S. at 256.

[15] In upholding the Board's recognition of the statutory right to representation prescribed in *Weingarten*, the Court also noted that the right was "in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews." 420 U.S. at 267 (citations omitted). It is telling that the new right created in *Total Security* is, in fact, contrary to industry practice, where most collective-bargaining agreements do not require such predisciplinary bargaining.

[16] The *Total Security* majority opined that even if the Supreme Court's dicta in *Weingarten* was applicable to the issue presented here, its holding was defensible because of the Board's right to "change its position as long as it explains the rationale for the change." *Total Security*, 364 NLRB No. 106, slip op. at 7 fn. 17. We seriously question whether the quoted language from the Court's opinion was dicta, inasmuch as the Court treated the reasoning reflected there as necessary to the result it reached. Even if properly characterized as dicta, the meaning

As stated above, *Total Security* cannot be reconciled with precedent specifically supporting the view that there is no statutory prediscipline bargaining obligation, giving due consideration to the unique characteristics of disciplinary decision making, which necessarily involves some managerial discretion. However, the greatest failing of *Total Security* is the majority's fundamentally mistaken interpretation of the *Katz* unilateral-change doctrine regarding when a material change has occurred in employees' terms and conditions of employment. Sections 8(a)(5) and (d) of the Act require an employer to bargain in good faith, upon request, with the collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment. In *Katz*, the Supreme Court held that, upon commencement of a bargaining relationship, employers of union-represented employees are required to maintain the status quo, i.e., refrain from making a material change regarding any term or condition of its employees' employment that constitutes a mandatory subject of bargaining, unless notice and an opportunity to bargain regarding a contemplated change to the status quo is provided to the union. *NLRB v. Katz*, 369 U.S. 736 (1962).[17]

In some circumstances, maintaining the status quo actually requires an employer to make changes. See id. at 746; see also *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002). This often occurs when an employer's practice or policy itself has become a term and condition of employment. For instance, when an employer has an established practice of granting raises every year, *Katz* prohibits the employer from materially deviating from that practice without affording the union notice and an opportunity to bargain.[18] This principle is often referred to as the "dynamic status quo" and was described by Professors Gorman and Finkin in their well-known labor law treatise as follows:

> [T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a "change" in working conditions at all.[19]

In *Raytheon*, supra, 365 NLRB No. 161, the Board acknowledged this principle and held that an employer's "change" following the expiration of a collective-bargaining agreement, based on and preserving the status quo of the employer's past practice, does not violate Section 8(a)(5) of the Act notwithstanding that it involves the exercise of discretion. See id., slip op. at 13. In doing so, the Board specifically rejected the idea that "every action constitutes a change within the meaning of *Katz*, regardless of what an employer has done in the past, if the employer's actions involve any discretion." Id. *Raytheon* thus recognized that discretionary aspects of a policy or practice are as much a part of the status quo as the nondiscretionary aspects.

Katz itself addressed employer actions taken after commencement of a bargaining relationship but before the parties have bargained to agreement or impasse, and the same bargaining principles apply as defined in *Raytheon*. In this critical respect, the *Total Security* majority erred by looking only at whether the application of an employer's preexisting disciplinary policy or practice to discipline an individual employee included the use of *any* discretion and holding that the exercise of that discretion always means a "change" occurred within the meaning of *Katz* requiring advance notice and bargaining. Furthermore, the majority in *Total Security* so held even when acknowledging that it is impossible for an employer to craft a disciplinary policy that would cover every conceivable scenario such that the exercise of discretion would never be required. 364 NLRB No. 106, slip op. at 11 (observing that "discretion is inherent—in fact, unavoidable—in most kinds of discipline"). As a result, under *Total Security Management* almost every serious individual disciplinary action would constitute a material change in terms and conditions of employment requiring prior notice and an opportunity to bargain under *Katz*. This is precisely the rationale that the Board rejected in *Raytheon* as "incompatible with established law as reflected in *NLRB v. Katz* as well as fundamental purposes of the Act." 365 NLRB No. 161, slip op. at 10.

Instead, we find that the correct analysis under *Katz* must focus on whether an employer's individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established policy or practice. See id., slip op. at 16. "The fact that [policies or practices] reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy." *Fresno Bee*, above at 1188. As such, in order to maintain the status quo, an employer must

of the Court's language is clear, and we have serious doubts whether the Board has the authority to "change its mind" in contravention of the Court's own mindset.

[17] The same principles apply upon expiration of a collective-bargaining agreement. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

[18] See, e.g., *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).

[19] Robert A. Gorman, Matthew W. Finkin, *Labor Law Analysis and Advocacy*, at 720 (Juris 2013).

continue to make decisions materially consistent with its established policy or practice, including its use of discretion, after the certification or recognition of a union. To do otherwise would constitute a change from its preexisting policy or practice, prohibited by *Katz*.

Finally, not only is the *Total Security* prediscipline bargaining obligation contrary to the fundamental principles set forth in *Katz*, *Weingarten*, and Board precedent discussed above, it also cannot be reconciled with other aspects of the law governing collective-bargaining practices under the Act. Recognizing the obvious fact that requiring employers to bargain in advance over the discretionary aspects of all decisions involving serious individual disciplinary actions would invariably "interfere with legitimate employer prerogatives"[20] by delaying those actions, the *Total Security* majority purported to "minimize the burden on employers"[21] by creating a hybrid bargaining scheme without parallel in Board precedent and bereft of statutory support. Under this scheme, the duty to engage in prediscipline bargaining only applies when "serious discipline" is contemplated, not lesser discipline, although both are material aspects of the same mandatory bargaining subject. Next, this duty to bargain arises after the decision has been made to impose serious discipline but before the discipline is imposed, and it requires bargaining about the decision itself. Finally, the prediscipline bargaining obligation does not require the parties to bargain to agreement or impasse before the employer is permitted to impose discipline, as long as bargaining continues thereafter. 364 NLRB No. 106, slip op. at 9. It is unclear exactly when discipline could be lawfully imposed after bargaining has commenced.

In sum, *Total Security* shredded longstanding principles governing the duty to bargain. It announced separate bargaining obligations for a single mandatory bargaining subject, mandating a bifurcated bargaining process for serious discipline and a single, unified post-discipline process for what might be deemed lesser discipline. There is no basis in Section 8(d) of the Act or its application in precedent governing collective-bargaining practice for making those distinctions with respect to the duty to bargain. In determining whether a statutory bargaining obligation exists, the Board only considers whether the employer contemplates an action that will effect a material change in a mandatory subject of bargaining. The Board does not further evaluate the severity of that material change, in terms of its impact on an employee or employees, in determining when the employer must furnish notice and opportunity to bargain. Further, prior to *Total Security*, the statutory obligation to engage in decision bargaining was understood to require notice and opportunity to bargain *before* a decision is made,[22] while effects bargaining (addressing the impact of the decision) arises *after* the decision has been made but before it is implemented.[23] Finally, once the duty to bargain attaches, an employer is typically not allowed to implement its decision until the parties have reached agreement or good-faith impasse.[24] These settled principles, familiar to every practitioner of traditional labor law, the *Total Security* majority simply pushed aside.

Total Security also nominally provided an exception to the prediscipline bargaining obligation. First, it allowed an employer to avoid this obligation when an employee's "continued presence on the job presents a serious, imminent danger to the employer's business or personnel." 364 NLRB No. 106, slip op. at 9. Only then could an employer act unilaterally, i.e., without providing the union notice and an opportunity to bargain. Presumably, in the likely event of Board litigation over an alleged bargaining violation, the burden of proving this exigent danger would be on the employer, as is the case for other exigent circumstances limiting or excusing the bargaining obligation.[25] Employers confronted with a potentially dangerous employee would have to act at risk of violating the Act and incurring remedial liability. This is particularly so inasmuch as *Total Security* provided no guidance as to when this exception would apply, stating only that the "scope of such exigent circumstances is best defined going forward, case by case." Id., slip op. at 9. In other words, the message of the *Total Security* majority to employers torn between erring on the side of safety and avoiding liability was, "the correct choice is for us to know and for you to find out."

The *Total Security* decision also purported to provide employers a safe harbor alternative, permitting parties to negotiate and implement an interim grievance-arbitration procedure to address disciplinary decisions before reaching a final collective-bargaining agreement. 364 NLRB No. 106, slip op. at 9 fn. 22. Only in this manner could an

[20] *Weingarten*, 420 U.S. at 258.

[21] 364 NLRB No. 106, slip op. at 8.

[22] See, e.g., *National Family Opinion, Inc.*, 246 NLRB 521, 530 (1979) (finding unlawful employer's decision to subcontract because union was only told of "a completed decision rather than a decision yet to be finalized").

[23] See, e.g., *Willamette Tug & Barge Co.*, 300 NLRB 282, 282–283 (1990) ("[T]he employer's duty [is] to give preimplementation notice to the union to allow time for effects bargaining.")

[24] See, e.g., *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[25] See, e.g., *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Bottom Line Enterprises*, supra.

employer elude the cumbersome and confusing pre-discipline bargaining obligations. Yet the establishment of this interim safe harbor grievance-arbitration policy would require separate bargaining over a single issue while the parties are still engaged in overall negotiations. Section 8(d) and its interpretation in judicial and Board precedent strongly disfavor such piecemeal bargaining. First-contract bargaining is difficult enough without the prospect of separate bargaining over the creation of an interim disciplinary system which would itself then continue to be the subject of further bargaining in the parties' negotiations for an overall contract. Moreover, any such bargaining over an interim safe harbor agreement would have to be consensual. It is clear that the Act would preclude forcing either party to agree to an interim arrangement, and no party would violate the Act if it refused to bargain for such. Indeed, it is difficult to understand why a union intent on maximizing its advantage in collective bargaining would ever consent to negotiate an interim disciplinary agreement, when it could just as well use the employer's desire to be free of pre-disciplinary bargaining as leverage in negotiations for an overall agreement. In reality, the supposed safe harbor offered by *Total Security* is illusory.

All in all, the lengths to which the *Total Security* majority went to devise a contorted bargaining scheme at odds with traditional bargaining practices only underscore the error of the decision to impose *any* pre-discipline bargaining obligation. Both the rationale for that decision and the scheme for its enforcement are insupportable as a matter of law and logic.

For all of the reasons stated above, we overrule the new bargaining requirements imposed by the *Total Security* majority and return to long-standing law establishing that, upon commencement of a collective-bargaining relationship, employers do not have an obligation under Section 8(d) and 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice. As dissenting Member Miscimarra cogently observed in *Total Security*, "it is not plausible to believe these new requirements have support in our statute but somehow escaped the attention of Congress, the Supreme Court, other courts, and previous Boards for the past 80 years."[26] Today's decision restores the state of the law governing pre-discipline bargaining to what it was during that long period of experience under the Act and from which *Total Security* impermissibly diverged.

Retroactive Application of the Correct Standard

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

We do not envision that any ill effects will result from applying the standard we announce here to this case and to all pending cases. No party that has acted in reliance on *Total Security Management* will be found to have violated the Act as a result of our decision today. In reliance on *Total Security Management*, parties may have engaged in bargaining that our decision today renders unnecessary, but such bargaining is merely rendered superfluous by our decision, not unlawful. True, parties will have been put to unnecessary time and expense, but those were consequences of the decision we overrule, not of applying our decision retroactively. The four individuals whose discipline is at issue in this case will apparently also suffer no manifest injustice from retroactive application, inasmuch as the Charging Party noted in its Motion for Partial Withdrawal that it had determined those employees engaged in misconduct and were disciplined "for cause." On the other hand, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, above. As we have explained, *Total Security Management* was contrary to decades-old Board and Court precedent, and it was ill-advised on policy grounds. Accordingly, we find that application of our new standard in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, above. We shall do so now.

Thus, applying the principles set forth above and in *Fresno Bee*, we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act. The

[26] Our decision today falls in line with other judicial and Board decisions rejecting recent efforts to identify and enforce new rights and obligations under the Act that had somehow managed to escape notice for decades. In *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court resoundingly rejected the Board's attempt to read into Sec. 7 of the Act a new substantive employee right to engage in class actions. It noted that "[t]his Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board." Id. at 1619. In *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013), the court rejected the attempt "to create a new ULP based on the failure to post notices educating employees about their Section 7 rights." Id. at 163. And in *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Board rejected an argument advocating the establishment of an unprecedented unfair labor practice that would require finding that an employer's misclassification of its employees as independent contractors, standing alone, is a per se violation of Sec. 8(a)(1).

Respondent applied its preexisting disciplinary policy, which included the use of discretion, in disciplining the four employees, which it is lawfully permitted to do. We therefore dismiss the corresponding complaint allegation that the Respondent unlawfully failed to provide notice and an opportunity to bargain before imposing discipline.

ORDER

The National Labor Relations Board orders that the Respondent, 800 River Road Operating Company, LLC d/b/a Care One at New Milford, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees, including reducing payroll hours, without first notifying the Union and giving it an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the change in the terms and conditions of employment for its unit employees that were unilaterally implemented.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry 10 aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists, and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, 15 occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards, and supervisors as defined in the Act.

(c) Make affected employees whole for any loss of earnings and other benefits suffered as a result of the reduction in their payroll hours, in the manner set forth in the remedy section of the decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Post at its New Milford, New Jersey facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

[27] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 23, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment, including reducing payroll hours, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry 10 aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists, and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, 15 occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards, and supervisors as defined in the Act.

WE WILL make affected employees whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in payroll hours, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

800 RIVER ROAD OPERATING COMPANY, LLC D/B/A
CARE ONE AT NEW MILFORD

The Board's decision can be found at https://www.nlrb.gov/case/22-CA-204545 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Sharon Chau, Esq., for the General Counsel.
Stephen C. Mitchell, Esq., Seth Kaufman, and *Brian Gershengorn (Fisher & Phillips, LLP),* for the Respondent.
William S. Massey, Esq. and *Jessica E. Harris, Esq. (Gladstein, Reif & Meginniss, LLP),* for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. A trial was conducted in this matter on July 10, 2018 in Newark, New Jersey. The complaint, as amended at trial, alleges that the Respondent unilaterally, without notifying and offering to bargain with the Union, (1) reduced the work hours of 20-unit employees and (2) discharged one and suspended three-unit employees. The Respondent has denied these allegations. Additional complaint allegations were resolved by the parties and/or withdrawn by the General Counsel prior to trial. As discussed at length below, I find merit to the allegations which were litigated.

Posthearing briefs were filed by the General Counsel, the Respondent, and the Union.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The Respondent is a New Jersey Limited Liability Company with an office and place of business in New Milford, New Jersey and has been engaged in the business of providing long-term and posthospital rehabilitation care. During the 12-month period before the complaint issued, the respondent derived gross revenues in excess of $100,000. During the same time period, the Respondent purchased and received at its New Milford, New Jersey facility goods and supplies valued in excess of $5000 directly from suppliers located outside the State of New Jersey.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

Procedural history

Pursuant to a representation petition filed January 23, 2012 and a stipulated election agreement approved on February 7, 2012, an election was conducted on March 9, 2012, in case 22–RC–073078 among the following unit of employees:

> All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by the [Respondent] at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.

A majority of the unit employees voted in favor of representation.

The Respondent filed objections to the election, but those objections were overruled by the Board in decisions dated July 2, 2012, and January 9, 2013. In its January 9, 2013 decision, the Board certified the Union as the bargaining representative of unit employees. *800 River Road Operating Co.*, 359 NLRB 522 (2013). The Respondent tested this certification by refusing to bargain. Upon additional developments, including the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), on November 26, 2014, the Board conducted a de novo review of the Respondent's election objections, rejected those objections, and issued a new Certification of Representative. On June 15, 2015, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. On January 24, 2017, the United States Court of Appeals for the District of Columbia Circuit enforced the Board's order. On March 21, 2017, the same Court of Appeals issued a formal mandate in accordance with its judgment of January 24, 2017.

Change in hours

The General Counsel contends that the following employees had their hours reduced during the payroll period ending on the dates listed below (third column):

Name	**Title**	**Hours Change in Payroll Period Ending**
Abraham, Mariamma	Recreation Assistant	2/1/2014
Boby, Rosilin	Recreation Assistant	2/1/2014
Jiminez, Sara	Recreation Assistant	2/1/2014
Timms, Donna	Recreation Assistant	2/1/2014
Tom, Shiril	Recreation Assistant	2/1/2014
Bustos, Benjamin	Dietary Aide	7/19/2014
Coronado, Evelyn	Dietary Aide	7/19/2014
Farr, Elaine	Dietary Aide	7/19/2014
Fontanez, Enrique	Dietary Aide	7/19/2014
Ricarze, Vicente	Dietary Aide	7/19/2014
Tolentino, Allan	Dietary Aide	7/19/2014
Varhese, George	Dietary Aide	7/19/2014
Bazile, Desinette	Housekeeper	7/19/2014
Benoit, Julienne	Housekeeper	7/19/2014
Murray, Paulette	Housekeeper	7/19/2014
Abouzeid, Charles	Laundry Aide	7/19/2014
Ramkhalawan, Jean	Laundry Aide	7/19/2014
Irabon, Edgardo	Porter	7/19/2014
Hegarty, Andrew	Maintenance Worker	9/16/2014
Sormani, Dawn-Marie	Receptionist	3/28/2015

The Respondent introduced into evidence a wage and benefit summary which indicates that it was "revised 5/1/2019." The wage and benefit summary includes a provision on paid leave which states, in part, as follows:

> **3) VACATION/HOLIDAY /SICK TIME**
>
> **General Provisions/Eligibility and Waiting Periods:**
>
> Employees actively employed on a full-time basis (regularly

work 37.5 hours or more per week) are eligible for vacation, holiday pay, and sick time. Employees actively employed on a part-time basis (regularly work 24 to less than 37.5 hours per week) are eligible for pro-rated vacation, holiday pay, and sick time.

. . . .

4. Depending on your position and work schedule, hourly and salaried employees generally work either 7.5 hour /day up to 37.5 hours /week or they may work 8 hours /day up to 40 hours /week.

. . . .

Vacation Provisions:

6. Employees may use their accrued vacation hours in a minimum of 30-minute increments. To schedule vacation, employees must give their supervisor a written request at least four weeks in advance, or Center practice, whichever is greater. Approval of vacation requests is based on the needs of the Center and made in the discretion of the Supervisor. Consideration of vacation requests is given on a first come, first served basis. When vacation requests are received at the same time, tenure with the Center will also be considered.

. . . .

13. Vacation hours may be taken based upon an employee's regularly scheduled work day up to a maximum of twelve (12) hours. For example, an employee who is regularly scheduled to work a seven and one-half (7 5) hour day may take seven and one-half (7.5) hours of vacation time.

Sick Time Provisions:

. . . .

10. Employees may use their accrued sick time hours in a minimum of 30-minute increments.

11. Sick time hours may be used based upon an employee's regularly scheduled work day up to a maximum of twelve (12) hours. For example, an employee who is regularly scheduled to work a seven and one-half (7.5) hour day may use seven and one-half (7.5) sick time hours.

. . . .

Holiday Provisions:

. . . .

3. Eligible-time and part-time hourly and salaried employees will receive holiday pay based on the average number of hours paid in each pay period in the most recent three (3) full calendar months up to a maximum of seven and one-half (7.5) hours for each holiday (8 hours of pay for employees who work an 8 hour daily schedule).

Attached to this decision as Appendix B are tables reflecting the hours of each employee in question by payroll period and week, including regular time, overtime, retro hours, sick leave used, vacation leave used, and holiday hours.

The parties stipulated that the Respondent did not give the Union notice and an opportunity to bargain in advance of any alleged reduction of hours.

The General Counsel relies exclusively on documents (particularly payroll records) and stipulations to establish a unilateral change in hours.[1] The payroll records introduced by the General Counsel indicate that employees largely accumulated (including time worked and leave) 40 hours per week before the payroll period in which their hours were allegedly reduced and 37.50 hours per week during and after the payroll period in which their hours were allegedly reduced. However, this pattern was not entirely consistent. Thus, it was not uncommon for employees to accumulate 39 to 39.75 hours per week before the alleged change and it was not uncommon for employees to accumulate up to 38.75 hours after the alleged change. It was far more rare for an employee to accumulate less than 39 hours in a week before the alleged change or more than 38.75 hour after the alleged change.[2]

Payroll leave deductions were also cited as a basis for evaluating a change in employee work weeks from 40 hours to 37.5 hours. Thus, for example, paystubs of Coronado, Farr, Tolentino and Hegarty reflect the use of sick and vacation time in 8-hour increments (corresponding to a 40-hour work week) before the alleged change in hours and increments of 7.5 hours (corresponding to a 37.5-hour work week) during or after the alleged changed.[3] More broadly, a review of the payroll records of all the employees in question reflect that sick/vacation was largely taken in 8-hour increments before the alleged change and 7.5-hour increments were largely taken after the alleged change. However, the payroll records are not entirely consistent in this regard either.

Maureen Montegari was called by the Respondent and the only witness to testify at trial. Montegari is employed by Care One Management LLC (Care One). She was a Care One Regional Director of Human Resources from 2010 to 2012, when she was promoted to Vice President of Human Resources (her current position). She has had responsibilities for the Respondent's facility in Milford, New Jersey in both positions.

Montegari testified that, since at least 2009 (when the wage and benefit summary was revised), full time employees have regularly been scheduled to work 37.5 hours per week but may work additional hours if they pick up an extra shift (for example, if

[1] The General Counsel did not call any witnesses at trial. The Respondent contends that the General Counsel "cherry picked" payroll records (immediately before and after the alleged change) which were favorable to its case. The Respondent's counsel indicated at trial an intention to introduce the "full" payroll records for a larger time period. However, the Respondent only introduced additional payroll records (beyond the General Counsel's submission) for one employee (Hegarty).

[2] These instances are highlighted in Appendix B.

[3] I consider increments of 8 and 7.5 hours to include multiples of those numbers, respectively. Thus, 16 or 24 hours of leave reflects 8-hour increments while 15 and 22.5 hours of leave reflects 7.5-hour increments. The payroll records also contain certain limited increments of leave that were not 8 hours or 7.5 hours (i.e., during the June 7, 2014 payroll period, Fontanez took 9 hours of sick leave the first week and Coronado took 10.5 hours of sick leave the second week).

someone calls in sick). According to Montegari, the shortest shifts are the 4-hour shifts worked by certain part time employees. Montegari testified that a facility administrator may sometimes hire full time employees (particularly rehab techs and rehabilitation assistants) to work 40-hour weeks as an "exception" in light of the needs of the facility. However, Montegari is not involved in these decisions.

With regard to particular employees at issue in this case, Montegari testified that Sormani was transferred from unit secretary to receptionist and speculated that the facility administrator changed Sormani's hours from 40 hours to 37.5 hours as a result. However, Montegari admitted that she "was not part of [Sormani's] transfer to a new position." Montegari also identified a master schedule for the period December 2015 to April 2017, which shows that Hegarty was largely scheduled to work 40-hour weeks throughout this time period.[4] However, Montegari testified that "the schedule does not capture whether or not the hours were worked[,][i]t captures what they were scheduled to work."

Suspensions and discharge

The Respondent took the following adverse employment actions against the employees named below:

Employee	**Adverse Employment Action**	**Date of Action**
Jasmine Gordon	Suspended	October 10, 2016
Shantai Bills	Discharged	January 4, 2017
Linda Rhoads	Suspended	February 1, 2017
Jesus Mendez	Suspended	March 23, 2017

The parties stipulated that the Respondent administered these suspensions and the discharge without notifying and offering to bargain with the Union before doing so. The parties also stipulated that the Union never demanded bargaining regarding these particular adverse employment actions.

ANALYSIS AND CONCLUSIONS

8(a)(1) Allegations

Reduction of hours

The General Counsel contends, and I agree, that the Respondent violated Section 8(a)(1) and (5) of the Act by reducing the hours of 20 unit employees.[5] The Board recently addressed "what constitutes a 'change' requiring notice to the union and the opportunity for bargaining prior to implementation." *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). In *Raytheon*, the Board found "that the [employer's] modifications in unit employee healthcare benefits in 2013 were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012."[6] Id. Since ongoing healthcare benefit modifications did "not materially vary in kind or degree from the changes made in prior years," they did not constitute a "change" and could be made unilaterally.

Here, the employees in question largely accrued 40 hours per week before and 37.5 hours per week during or after the payroll period identified by the General Counsel as the period when the change occurred. However, the employees did not always work exactly 40 or 37.5 hour per week. Accordingly, a question arises whether there was a material change in employees' hours or the mere continuation of minor deviations in hours insufficient to establish a "change."

Preliminarily, I note that the changes in hours cannot be attributed to employees working overtime since Montegari testified that employees only worked overtime hours when they picked up additional shifts. Montegari identified the shortest shifts as four hours and the weekly differences in hours at issue here are less than four hours. Therefore, the differences in hours were not the result of employees working additional overtime shifts.

Further, I place no significance on Montegari's testimony or the wage and benefit summary to the extent they indicate that employees were generally scheduled to work 37.5 hours per week.[7] The undisputed evidence demonstrates that some employees worked 40-hour weeks and Montegari was not involved in specific scheduling decisions which were made by administrators at the facility level. The best evidence is payroll records reflecting the hours employees actually accumulated each week. See *Electronic Data Systems International Corp.*, 278 NLRB 125 (1986). The Respondent had the opportunity to present additional payroll records to the extent those introduced by the General Counsel may have been isolated or somehow taken of context, and largely failed to do so.

In this case, the alleged reductions in hours did reflect a material variation in kind and degree as to constitute a "change" which required bargaining. Employees who generally accrued 40 hours per week and rarely if ever accrued less than 39 hours per week experienced a reduction in hours to 37.5-hour weeks and rarely if ever accrued more than 38.75 hours per week after the change.[8] Thus, unlike in *Raytheon*, the Respondent did not

[4] According to Montegari, the schedule was produced for this period of time because the Respondent began using computerized scheduling software Smartlinx Solutions LLC in December 2015. Before then, much of the schedules were handwritten and are no longer available.

[5] "The Board has long held that an employer 'acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending' because if the union is ultimately certified, the employer will have violated Sec. 8(a)(5) by making those changes." *The Ardit Co.*, 364 NLRB No. 130 (2016) quoting *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Here, the Respondent does not contend it was entitled to act unilaterally because the final certification did not issue until November 26, 2014.

[6] *Raytheon* addressed the significance of changes made during the term of a collective bargaining agreement pursuant to a management rights clause, but that is not an issue here.

[7] Likewise, I do not find the master schedules relevant to the extent it shows that Hegarty was scheduled to work 40-hour weeks beginning December 2015. These schedules do not address the payroll periods at the time of the alleged change and do not reflect the hours that Hegarty actually worked.

[8] An employer does not violate Sec. 8(a)(5) of the Act when it unilaterally implements a change that is not "material, substantial and significant." *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902 (2000). However, the Board has held that a change in hours, even on a

effect changes at the same time and in the same manner as it had in the past.

The Respondent contends that the General Counsel did not establish a prima facie case because it "cherry picked" payroll records and did not call any witnesses at trial. However, in my opinion, the General Counsel did establish a prima facie case (and nothing more). The General Counsel introduced sufficient evidence to indicate that, on its face, a change occurred which was different than prior changes. As noted above, the Respondent failed to rebut the General Counsel's evidence or the pattern it demonstrated.

Turning to individual employees specifically addressed by the Respondent in its brief, I do not rely on Montegari's testimony that Sormani's hours were reduced because she (Sormani) changed positions. Montegari admitted that she "was not part of [Sormani's] transfer to a new position." Such testimony without personal knowledge of relevant events and the dates thereof is not helpful.[9]

However, Sormani's hours were more sporadic before the alleged reduction in hours (payroll period ending March 28, 2015) than other employees and this requires a closer look. Five out of 10 weeks prior to the payroll period ending March 28, 2015, Sormani accrued less than 39 hours of pay (as reflected in Appendix B and below):

Payroll Ending	Week 1 - Hours	Week 2 - Hours
1/17/2015	40 + 5.75 OT	34.75
1/31/2015	24 + 16 sick	40 vacation
2/14/2015	40 + 0.25 OT	37.5
2/28/2015	37.75 + 7.5 holiday	30.25 + 8 vacation
3/14/2015	40 + 1.5 OT	38
3/28/2015	37.75	36.50 + 1.33 vacation
4/11/2015	37.5	37.5
4/25/2015	38	37.75
5/9/2015	37.75	37.5
5/23/2015	37.75	38.25
6/6/2015	30 + 7.5 holiday	37.5

Nevertheless, Sormani accumulated 40 hours five out of 10 weeks prior to the payroll period during which the alleged change occurred and did not accrue more than 38.25 hours after the alleged change occurred. Montegari did not actually deny that Sormani's schedule was switched from a 40-hour week to a 37.5-hour week (although, as noted above, she did not evince any personal knowledge of the same). While, in Sormani's case, there is some overlap in the range of hours before and after the alleged unlawful change, I find the evidence sufficient to establish that she experienced a material variation in her hours.[10]

Turning to Hegarty, the one employee for whom the Respondent produced additional payroll records, the additional records did show more discrepancies before and after his alleged change in his hours. Thus, if holiday pay is excluded, records for the payroll periods from January 5, 2013, to August 2, 2014 (before the alleged change in hours during the payroll period ending August 16, 2014) showed that Hegarty accumulated less than 39 hours in 15 weeks. However, this is still a relatively small percentage (18 percent) in the context of 42 payroll periods covering 84 weeks. Far more often, Hegarty accumulated 40 hours per week during this time period. Accordingly, the expanded payroll records prior to the alleged change do not, in my opinion, defeat the General Counsel's case that a change in hours occurred.

The more significant evidence from the Respondent's submission is Hegarty's accumulation of over 40 hours during the first week of the payroll period ending September 27, 2014, and the first weeks of the payroll periods ending October 25 and November 8, 2014. Hegarty also worked 39.75 hours the week ending December 6, 2014. Thus, unlike the other employees, Hegarty went back to working certain 40-hour weeks fairly quickly after the alleged change. On the other hand, from the payroll period ending August 16, 2014 (when the change allegedly occurred) to the end of the year, Hegarty accumulated less than 39 hours 18 of 22 weeks. By contrast, Hegarty accrued at least 40 hours 18 of 22 weeks immediately prior to the payroll period ending August 16, 2014. While the allege change is most ambiguous with regard to Hegarty, I find the evidence sufficient to establish that a change of his hours did occur.

Hegarty's payroll records further show that, beginning the payroll period ending February 28, 2015, his hours returned, more regularly, to 40-hour weeks.[11] While this suggests that Hegarty's 40-hour week may have been reinstated in 2015, it does not change my finding that a unilateral change occurred in the first place. The Respondent argues in its brief that, to the extent the General Counsel established any violation, it must be limited to the pay registers the General Counsel entered into evidence. I do not limit my finding in this regard and any backpay associated with the changes in hours can be fleshed out and determined, if necessary, during a compliance proceeding. However, to the extent it is shown in such a proceeding that unilateral changes were ultimately reversed, the Respondent's liability would be limited on that basis.

Based on the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the hours of employees without notifying the Union and offering to bargain.

Unilateral suspensions and discharge

The General Counsel contends that the Respondent

limited basis, will be considered significant. *Id.* See also *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319, 1355 (2006).

[9] The Respondent asserted in its brief that a change in the department code on Sormani's payroll registers for the pay period ending May 9, 2015 reflects a change in her position. However, the record evidence does not indicate what the change in code actually means and, regardless, the change in code occurred after the alleged change in hours (three payroll periods earlier).

[10] Although not specifically addressed by the Respondent, I find that Abraham and Ricarze experienced a change in hours upon the same rational. Like Sormani, Abraham and Ricarze accumulated less than 39 hours in weeks prior to the alleged change in hours. However, more often, they accumulated at least 39 hours in advance of the alleged change and did not accumulate 39 hours after the alleged change.

[11] The Respondent produced Hegarty's payroll records for the period 2013 to 2016. Appendix B only includes the hours from 2013 to 2015. However, Hegarty continued to accrue 40-hour weeks in 2016.

unilaterally suspended three employees and discharged another employee without notifying and offering to bargain with the Union. I agree.

The Board has held that "discretionary discipline is a mandatory subject of bargaining and that employers may not unilaterally impose serious discipline . . . ." *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). Serious discipline includes suspension and discharge as those actions "have an inevitable and immediate impact on employees' tenure, status, or earnings." Id. "It is well established that where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain, the change is a fait accompli and a failure by the union to request bargaining will not constitute a waiver. *United States Postal Service*, 366 NLRB No. 168 (2018) citing *Aggregate Industries*, 359 NLRB 1419, 1422 (2013) and *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Here, the facts are not in dispute and the Respondent simply asserts that extant precedent should be overruled.

The adverse employment actions taken against the four employees in question were "serious" as the Board defines it and the Respondent admits that it did not give the Union notice and an opportunity to bargain. Further, the Union's subsequent failure to request bargaining over discipline which already issued does not constitute a waiver or a defense. Since I am bound by extant Board precedent, I find that the Respondent violated Section 8(a)(5) and (1) by disciplining employees as alleged in the complaint.

Conclusions of Law

1. The Respondent, 800 River Road Operating Company, LLC d/b/a Care One at Milford, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act:

(a) Unilaterally reduced the hours of Charles Abouzeid, Mariamma Abraham, Desinette Bazile, Julienne Benoit, Rosilin Boby, Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Andrew Hegarty, Edgardo Irabon, Sara Jiminez, Paulette Murray, Jean Ramkhalawan, Vicente Ricarze, Dawn-Marie Sormani, Donna Timms, Allan Tolentino, Shiril Tom, and George Varhese without notifying and offering to bargain with the Union, 1199 SEIU United Healthcare Workers East.

(b) Unilaterally administered adverse employment actions as follows to the employees listed below without notifying and offering to bargain with the Union:

Employee	***Adverse Employment Action***	**Date of Action**
Jasmine Gordon	Suspended	October 10, 2016
Shantai Bills	Discharge	January 4, 2017
Linda Rhoads	Suspended	February 1, 2017
Jesus Mendez	Suspended	March 23, 2017

3. The unfair labor practices committed by the Respondent affect Commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondents has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having refused to notify and offer to bargain with the Union regarding a reduction in the hours of certain employees and certain adverse employment actions, I will order Respondent to rescind those unilateral changes. With the exception of Shantai Bills, who was discharged, the Respondent shall make whole any employee whose hours were reduced or who were suspended for any loss of earnings and other benefits suffered as a result of its unlawful actions as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987). See *Community Health Services, Inc.*, 361 NLRB 333 (2014) aff'g. 356 NLRB 744 (2011) and 342 NLRB 398 (2004) after remand.

The Respondent, having unlawfully discharged Bills, must offer her reinstatement to her former job or if her job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges enjoyed. The Respondent shall make Bills whole for any loss of earnings and other benefits suffered as a result of her unilateral discharge. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Bills for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Hess for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 22 a report allocating Bills' backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent will be required to remove from its files any reference to the unlawful suspension/discharge of Bills, Jasmine Gordon, Linda Rhoads, and Jesus Mendez and notify them in writing that their unlawful suspension or discharge will not be used against them in any way.

The Respondent shall be ordered to post the notice attached hereto as "Appendix A."

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended[12]

ORDER

The Respondent, 800 River Road Operating Company, LLC d/b/a Care One at New Milford, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notifying and offering to bargain with the Union, 1199 SEIU United Healthcare Workers East, changing the terms and conditions of employment of employees, including the reduction of employees' hours, discharge of employees, and/or suspension of employees.

(b) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shantai Bills reinstatement to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Bills, Jasmine Gordon, Linda Rhoads, and Jesus Mendez whole for any loss of earnings and other benefits suffered as a result of the unilateral adverse employment actions taken against them in the manner set forth in the remedy section of this decision.

(c) Make Charles Abouzeid, Mariamma Abraham, Desinette Bazile, Julienne Benoit, Rosilin Boby, Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Andrew Hegarty, Edgardo Irabon, Sara Jiminez, Paulette Murray, Jean Ramkhalawan, Vicente Ricarze, Dawn-Marie Sormani, Donna Timms, Allan Tolentino, Shiril Tom, and George Varhese whole for any loss of earnings and other benefits suffered as a result of the unilateral reduction of their hours in the manner set forth in the remedy section of this decision.

(d) Compensate Bills for search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and suspension of Bills, Gordon, Rhoads, and Mendez, and within three days thereafter, notify them in writing that this has been done and that the discharge and suspensions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Milford, New Jersey facility copies of the attached notice marked "Appendix A."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed, or are otherwise prevented from posting the notice at the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 20, 2018

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally, without notifying and offering to bargain with the Union, 1199 SEIU United Healthcare Workers East, change your terms and conditions of employment, including the reduction of your hours, termination of your employment, and/or suspension of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of this Order, offer Shanti Bills full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Bills whole for any loss of earnings and other benefits resulting from her unilateral discharge, less any net interim earnings, plus interest compounded daily.

WE WILL make Jasmine Gordon, Linda Rhoads, and Jesus Mendez whole for any loss of earnings or other benefits resulting from their unilateral suspensions plus interest compounded daily.

WE WILL make Charles Abouzeid, Mariamma Abraham, Desinette Bazile, Julienne Benoit, Rosilin Boby, Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Andrew Hegarty, Edgardo Irabon, Sara Jiminez, Paulette Murray, Jean Ramkhalawan, Vicente Ricarze, Dawn-Marie Sormani, Donna Timms, Allan Tolentino, Shiril Tom, and George Varhese whole for any loss of earnings or other benefits resulting from the unilateral reduction of their hours plus interest compounded daily.

WE WILL compensate all the employees named above for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Bills and unlawful suspensions of Gordon, Rhoads, and Mendez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharge or suspension will not be used against them in any way.

800 RIVER ROAD OPERATING COMPANY, LLC D/B/A CARE ONE AT NEW MILFORD

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-204545 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

The payroll periods of each alleged hour reduction are highlighted.
Weeks before the alleged change when employees accumulated less than 39 hours (excluding holidays) are highlighted.
Weeks after the allged change when employees accumulated 39 hours (excluding holidays) or more are highlighted.

Charles Abouzeid: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2				
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
May 10, 2014	40				40				
May 24, 2014	40				40				
June 7, 2014	40			8	40				
June 21, 2014	40.25				40				
July 5, 2014	40				40	6.25			8
July 19, 2014	40				37.5				
August 2, 2014	30		7.5		37.5				
August 16, 2014	37.5				30	7.5			
August 30, 2014	37.5				22.5	15			
September 13, 2014	37.25			8	37.75				
September 27, 2014	37.5				37.5				

Mariamma Abraham: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
October 26, 2013	40				40			
November 9, 2013	38.5				40			
November 23, 2013	40				4		8	
December 7, 2013	24			7.5	40			
December 21, 2013	40				38.75			
January 4, 2014	36			7.07	31.75			7
January 18, 2014	40				40			
February 1, 2014	35.5				37.5			
February 15, 2014	21.25	15			37.25			
March 1, 2014	37.5			7.27	37.5			
March 15, 2014	37.5				30		7.5	

Desinette Bazile: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	0	40			39.25			
May 24, 2014	40				39.5			
June 7, 2014	40			7.83	40			
June 21, 2014	40				40			
July 5, 2014	40				40			8
July 19, 2014	32		7.5		30		7.5	
August 2, 2014	37.5				37.5		7.5	
August 16,2 014	22.5							
August 30, 2014	7.5				37.25			
September 13, 2014	37			7.17	37.5			
September 27, 2014	37.5				36.75			

Julienne Benoit: Alleged Reduction in Hours During Payroll Period Ending July 19 , 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5				40			
May 24, 2014	32				40			
June 7, 2014	40			8	40			
June 21, 2014	40				40			
July 5, 2014	40				40			7.98
July 19, 2014	40				37.5			
August 2, 2014	37.25				0	37.5		
August 16,2 014	7.5		30		0	22.5	15	
August 30, 2014	30		7.5		37.5			
September 13, 2014	37			8	36.75			
September 27, 2014	29.75		7.5		36.75			

Rosilin Boby: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 9, 2013	40				40			
November 23, 2013	40				40			
December 7, 2013	40			7.5	40			
December 21, 2013	40				40			
January 4, 2014	24	16		7.5	40			7.5
January 18, 2014	40				40			7.5
February 1, 2014	38				37.5			
February 15, 2014	29.75		7.5		37.5			
March 1, 2014	37.5			7.5	37.5			
March 15, 2014	37.5				37.5			
March 29, 2014	37.5				37.5			

Benjamin Bustos: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	40				40			
May 24, 2014	31.75		8		40			
June 7, 2014	40			8	40			
June 21, 2014	31.5		8		39.75			
July 5, 2014	40				40			
July 19, 2014	40				31.25		8	
August 2, 2014	34.25				38.5			
August 16,2 014	38.75				38			
August 30, 2014	38				0		22.5	
September 13, 2014	30		8		37.5			
September 27, 2014	37.5				37.5			
October 11, 2014	37.5				37.5			

Evelyn Coronado: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	32		8		32	8		
May 24, 2014	40				32		8	
June 7, 2014	40				28.5	10.5		
June 21, 2014	40				40			
July 5, 2014	24	16			32	8		8
July 19, 2014	40				37.5			
August 2, 2014	36		7.5		22.5	15		
August 16,2 014	37.5				30	7.5		
August 30, 2014	37.5				37.5			
September 13, 2014	37.5		8		22.5	15		
September 27, 2014	37.5				37.75			
October 11, 2014	37.5				22	15		

Elaine Farr: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	32		8		40			
May 24, 2014	40				32	8		
June 7, 2014	39.75			8	40			
June 21, 2014	24	16			40			
July 5, 2014	32	8			40			8
July 19, 2014	40				30		7.5	
August 2, 2014	7.5	30			30	7.5		
August 16,2 014	37.5				38.25			
August 30, 2014	38				37.5		22.5	
September 13, 2014	30.5		7.5	8	38			
September 27, 2014	37.5				38			

Enrique Fontanez: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5				40			
May 24, 2014	40				40			
June 7, 2014	31		9	8	40			
June 21, 2014	39.5				39.5			
July 5, 2014	40				40			8
July 19, 2014	31.75	7.5			37			
August 2, 2014	7.5	30			0	37.5		
August 16,2 014	30	7.5			37.5			
August 30, 2014	37.5				37.5			
September 13, 2014	37.75			8	30	7.5		
September 27, 2014	30	7.5			22.5	15		

Andrew Hagerty: Alleged Reduction in Hours During Payroll Period Ending Augsut 16, 2014

	Week 1						Week 2				
Payroll Period Ending	Regular	OT	Retro	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
January 5, 2013	29.25						8				
January 19, 2013	39	3					40				
February 2, 2013	32						40				
February 16, 2013	40	20.75					40	1			
March 2, 2013	40	1					40				
March 16, 2013	40	11.75					40	2.75			
March 30, 2013	22.25						39.25				
April 13, 2013	37.25						40	14			
April 27, 2013	34.25						40				
May 11, 2013	40	5.5					13.5		8	8	
May 26, 2013	40	3.5					40	3			
June 8, 2013	40	3				5.08	40	3			
June 22, 2013	35				8		40	6			
July 6, 2013	40						40				8
July 20, 2013	27				13		37.5		3		
August 3, 2013	40	1.5					40				
August 17, 2013	40						40	1.25			
August 31, 2013	32.5			8			41				
September 14, 2013	33			8		8	40	0.75			
September 28, 2013	40						40	1.5			
October 12, 2013	32				8		40				
October 26, 2013	40						40	2.5			
November 9, 2013	40	0.75					40				
November 23, 2013	32		1	8			40				
December 7, 2013	32					8	32			8	
December 21, 2013	32			8			40	3.25			
January 4, 2014	32					8	36.75		8		8
January 18, 2014	24			16			32		8		
February 1, 2014	20						37				
February 15, 2014	40	4.25					37.25				
March 1, 2014	41					8	40				
March 15, 2014	40						40				
March 29, 2014	37						40				

Andrew Hagerty: Alleged Reduction in Hours During Payroll Period Ending Augsut 16, 2014 (continued)

	Week 1						Week 2				
Payroll Period Ending	Regular	OT	Retro	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
April 12, 2014	40						39				
April 26, 2014	40						40				
May 10, 2014	40.25						40				
May 24, 2014	40	0.75					32				
June 7, 2014	29.75				8	5.08	40				
June 21, 2014	40						32.25		8		
July 5, 2014	40						40	3.5			5.08
July 19, 2014	40						40				
August 2, 2014	40						40	1.5			
August 16, 2014	7.5			15	7.5		37.75				
August 30, 2014	38						37.5				
September 13, 2014	23.25				15	7.5	18.25		15		
September 27, 2014	40	1.75	5				38				
October 11, 2014	37.5						37.5				
October 25, 2014	40	1.25					37.5				
November 8, 2014	40	0.5					30		7.5		
November 22, 2014	37.5						30			7.5	
November 22, 2014	36.5						38.5				
December 6, 2014	38.75						39.75				
December 20, 2014	27			7.5			37.75				
January 3, 2014	15					7.5	15				7.5
January 17, 2015	15.25						22.5				
January 31, 2015	17						15.5				
February 14, 2015	15.5						38.75				
February 28, 2015	40	5.75				5.47	37.75				
March 14, 2015	26		8	8			40	3.25			
March 28, 2015	40	4.25					40	1.5			
April 11, 2015	40	0.5					40				
April 25, 2015	16			16			40	22.75			
May 9, 2015	24						33.25			15	
May 23, 2015	40	5.5					40	1.75			
June 6, 2015	40	3					40	1.5			
June 20, 2015	40	4.25					40	2			

Andrew Hagerty: Alleged Reduction in Hours During Payroll Period Ending Augsut 16, 2014 (continued)

	Week 1						Week 2				
Payroll Period Ending	Regular	OT	Retro	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
July 4, 2015	40	2.75					40	1.75			
July 18, 2015	40	1.75					16		22.5		
August 1, 2015	15.75		22.5				24.25				
August 15, 2015	24.25						24				
August 29, 2015	25						24				
September 12, 2015	16						32				7.4
September 26, 2015	27.25						40				
October 10, 2015	40	0.75					40				
October 24, 2015	40	0.5					32.5				
November 7, 2015	40	0.5					40	0.25			
November 21, 2015	40						40	2.75			
December 5, 2015	39.25					6.73	33.5				
December 19, 2015	40						32.25				

Edgardo Irabon: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1					Week 2			
Payroll Period Ending	Regular	OT	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5					40			
May 24, 2014	40					40			
June 7, 2014	39.75				8	40			
June 21, 2014	40					32.25		8	
July 5, 2014	40	0.25				40	0.25		
July 19, 2014	40					37.5			
August 2, 2014	37.75			7.5		0	37.5		
August 16, 2014	0		30			38.5			
August 30, 2014	38.5					38.5			
September 13, 2014	38.25				7.95	38.25			
September 27, 2014	38.25					38.75			

Sara Jiminez: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 23, 2013	40				40			
December 7, 2013	40			6.7	40			
December 21, 2013	40				40			
January 4, 2014	39.5			8	39.5			8
January 18, 2014	40				16		24	
February 1, 2014	38				37.5			
March 1, 2014	37.5			8	37.5			
March 15, 2014	37.5				37.5			
March 29, 2014	37.5				37.5			
April 12, 2014	37.5				37.25			

Paulette Murray: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
April 12, 2014	40				40			
April 26, 2014	32	8			40			
May 10, 2014	32	8			40			
May 24, 2014	32				40			
June 7, 2014	40			8	32			
June 21, 2014	32	8	8		32	8		
July 5, 2014	40				40			8
July 19, 2014	40				37.5			
August 2, 2014	37.5				37.5			
August 16,2 014	30				30		7.5	
August 30, 2014	30	7.5			30		8	
September 13, 2014	37.5			7.92	22.5	15		
September 27, 2014	0	37.5			0	37.5		

Jean Ramkhalawan: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1					Week 2			
Payroll Period Ending	Regular	OT	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	40					40			
May 24, 2014	39.5					40			
June 7, 2014	39.75				7.03	40			
June 21, 2014	40					32		8	
July 5, 2014	40	1.5				40			7.03
July 19, 2014	40	0.25				37.5			
August 2, 2014	30			7.5		7.5	30		
August 16,2 014	37.5					37.5			
August 30, 2014	37.25					30			
September 13, 2014	37.5				8	30		8	
September 27, 2014	37.5			7.5		37.5			

Vicente Ricarze: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5				37.5			
May 24, 2014	31	8			39.25			
June 7, 2014	39.25			7.98	23	16		
June 21, 2014	31.75	8			36			
July 5, 2014	39.25				38			7.92
July 19, 2014	39.5				25.75	7.5		
August 2, 2014	37.5				36.75			
August 16,2 014	37.5				0	37.5		
August 30, 2014	22.25	15			37.5			
September 13, 2014	37.25			7.82	37.5			
September 27, 2014	37.5				25.5		8	
October 11, 2014	37				37.5			
October 25, 2014	37.5				36.75			

Dawn-Marie Sormani: Alleged Reduction in Hours During Payroll Period Ending March 28, 2015

	Week 1					Week 2			
Payroll Period Ending	Regular	OT	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
January 17, 2015	40	5.75				34.75			
January 31, 2015	24			16		0	40		
February 14, 2015	40	0.25				37.5			
February 28, 2015	37.75				7.5	30.25	8		
March 14, 2015	40	1.5				38			
March 28, 2015	37.75					36.5	1.33		
April 11, 2015	37.5					37.5			
April 25, 2015	38					37.75			
May 9, 2015	37.75					37.5			
May 23, 2015	37.75					38.25			
June 6, 2015	30				7.5	37.5			

Donna Timms: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 9, 2013	40				40			
November 23, 2013	0	40			0	40		
December 7, 2013	40			8	40			
December 21, 2013	40				38	2		
January 4, 2014	40	0.5		8	40			8
January 18, 2014	40				30	8		
February 1, 2014	38				37.5			
February 15, 2014	37.5				30		7.5	
March 1, 2014	37.5			8	37.5			
March 15, 2014	34.5		3		37.5			
March 29, 2014	37.5				37.5			

Allan Tolentino: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
April 12, 2014	39.75				38.25			
April 26, 2014	39.25				32		8	
May 10, 2014	39.5				39.75			
May 24, 2014	38.25				32.5	8		
June 7, 2014	31.5			8	15.75			
June 21, 2014	39.5				40			
July 5, 2014	31.25	8			39.5			7.5
July 19, 2014	39.25				29.5		7.5	
August 2, 2014	37.5				37.5			
August 16,2 014	37				37.25			
August 30, 2014	29.75		7.5		39			
September 13, 2014	37.75			7.43	38.75			
September 27, 2014	38.75				29.75	7.5		

Shiril Tom: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 9, 2013	40				40			
November 23, 2013	40				40			
December 7, 2013	40			7.5	39.75			
December 21, 2013	40				40			
January 4, 2014	40			7.5	39.75			7.5
January 18, 2014	40				40			
February 1, 2014	38				37.5			
February 15, 2014	37.5				30	8		
March 1, 2014	37.5			7.5	37.5			
March 15, 2014	37.5				37.5			
March 29, 2014	23				23			

George Varghese: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
April 12, 2014	40				40			
April 26, 2014	32		8		24	8	8	
May 10, 2014	40				40			
May 24, 2014	40				40			
June 7, 2014	32	8		8	40			
June 21, 2014	40				40			
July 5, 2014	40				27.5	8		8
July 19, 2014	32	7.5			38			
August 2, 2014	37.5				37.5			
August 16,2 014	37.5				0	37.5		
August 30, 2014	37.5				30	7.5		
September 13, 2014	37.5			7.98	37.5			
September 27, 2014	37.5				25.5		8	