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

NEW CONCEPTS FOR LIVING, INC.

	CASES	**22-CA-187407**
		22-CA-195819
and		**22-CA-197088**
		22-CA-205843
		22-CA-208390

COMMUNICATIONS WORKERS LOCAL 1040

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the Acting General Counsel files the following exceptions to the Decision of Administrative Law Judge Jeffrey Gardner, dated January 8, 20210:

1. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in overall bad-faith bargaining. (ALJD 9-16)

   A. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) of the Act by encouraging and soliciting employee support for the filing of the decertification petition. (ALJD 9-10)

      (1) The ALJ erred in failing to conclude that Steven Setteducati, during his meetings with employees at the River Vale group home on October 18, 2016, provided more than ministerial aid to employees, by soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of the decertification petition. (ALJD, 9-10)

(2) The ALJ erred in finding that:

a. the decertification petition was being circulated among employees "well before October 2016" and that "based on a description of the efforts, it was an ongoing process of at least weeks." (ALJD 4, 4, n.5)

b. "petitioner Marshall's efforts to gather support for the petition had been in the works for weeks or longer." (ALJD 9)

c. Bryan Baldicanas recorded a phone call between Williams and Setteducati while standing in or about the doorway to Williams' office on October 18, 2016. (ALJD 5, n. 6)

d. "no evidence that any employee signatures were elicited from that one location in support of the decertification petition following Setteducati's appearance there." (ALJD 9)

e. on October 18, 2016, Setteducati went to the River Vale group home for a staff meeting that lasted 15 minutes. (ALJD 4)

f. while meeting with employees at the River Vale group home on October 18, 2016 Setteducati told employees that Respondent would continue to bargain with the Union if they did not file the decertification petition. (ALJD 9)

(3) The ALJ erred in failing to find that:

a. Setteducati arrived at the River Vale group home after the staff meeting ended, and he spoke with employees for 15 minutes. (ALJD 4)

b. during his first meeting with employees at the River Vale group home on October 18, 2016, Setteducati told employees that if there was no Union, he would be able to give merit raises, which the Union would not let him do. (ALJD 4-5, 9-10)

c. during his second meeting with employees at the River Vale group home on October 18, 2016, Setteducati:

   i. repeatedly told employees that negotiations would begin in one week, and after that date, it would be too late to file a decertification petition and get rid of the Union;

   ii. Told employees that without the Union, he would be able to give merit raises, which the Union would not let him do;

   iii. Told employees "We've fired 50 people over the past 8 years… and not one job have they saved."

   iv. Repeatedly told employees "What has the Union done for you?"

   (ALJD 4-5, 9-10)

d. during the time period Setteducati visited the River Vale group home, a paper soliciting signatures supporting the decertification petition was posted in a public area. (ALJD 4-5, 9-10)

e. during the time period before the decertification petition was filed, Setteducati called Williams and asked him about the location of the signature sheet for the decertification petition. (ALJD 4-5, 9-10)

f. during the time period before the decertification petition was filed, Setteducati had similar meetings with other staff. (ALJD 4-5, 9-10)

(4) The ALJ erred in failing to conclude that:

a. Setteducati's statement to employees noted above in paragraph 1A(3)(c)(ii) was an implicit promise of benefit, meant to discourage employee support for the Union. (ALJD 9-10)

b. Setteducati's statement noted above in paragraph 1A(3)(C)(iii), by blaming the Union for its own conduct, conveyed to employees that their support for the Union was futile. (ALJD 9-10)

c. by telling employees that all the Union had done in ten years was get employees a 50-cent raise, he blamed the Union for its own conduct and therefore conveyed to employees that their support for the Union was futile. (ALJD 9-10)

d. Setteducati's statements noted above in paragraph 1A(3)(c) are coercive. (ALJD 9-10)

B. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) of the Act by soliciting employees to sign letters resigning their Union membership and withdrawing authorization of dues deduction. (ALJD 10)

(1) The ALJ erred in failing to conclude that Respondent's distribution of the December 28, 2016 memorandum and the resignation/dues revocation form was coercive. (ALJD 10)

a. The ALJ erred in failing to recognize Respondent's admission, in its Answer, to the allegation in paragraph (17) (a) and (b) of the Complaint that supervisor Janet Booker handed out the Resignation/Dues Revocation letter to employees at Respondent's

Haledon facility in December 2016 and specifically on December 28, 2016. (ALJD 6, 10)

b. The ALJ erred in failing to recognize Respondent's admission, in its Answer, to the allegation in paragraph 17(c) of the Complaint that supervisor Caroline Frazier handed out the Resignation/Dues Revocation letter to employees at Respondent's Clifton facility on December 28, 2016. (ALJD 6, 10)

c. The ALJ erred in failing to recognize Respondent's admission, in GC Exhibit 63, that Caroline Frazier and Booker were House Managers and supervisors under Section 2(11) of the Act. (ALJD 6, 10)

d. The ALJ erred in finding that the lack of testimony from Frazier and Booker is dispositive in finding that Respondent unlawfully solicited employees to sign letters resigning their Union membership and withdrawing authorization of dues deduction.

e. The ALJ erred in relying in *Valley Hospital Medical Center, Inc.*, 369 NLRB No. 139 (2019), which does not affect the requirement that employers must provide neutral information regarding resignation and dues checkoff, and they may not provide assistance, attempt to monitor employees' choices, or create a situation where employees would tend to feel peril in refraining from resignation or revocation. (ALJD 10)

f. The ALJ erred in failing to find that the Resignation/Dues Revocation letter was not just a revocation of dues checkoff authorization, but a resignation from membership in the Union. (ALJD 6, 10)

g. The ALJ erred in failing to find that at the same time Respondent distributed the Resignation/Dues Revocation letter, it also distributed to employees a December 28, 2016 letter from Setteducati, in which Setteducati informed employees that:

   i. he was providing employees information in response to questions he had received regarding payroll deduction for payment of dues.

   ii. no one at NCFL is obligated to pay Union Dues to keep their job right now. The contract expired 2 ½ years ago;

   iii. You have the right to resign from membership in the Union and paying dues at any time, BUT the Union may take the position that you can only revoke your Union Dues payroll deduction authorizations twice a year: By December 31st and June 30th. If you do not revoke by December 30th, you may be forced to pay Union Dues for another 6 months; and

   iv. there is no reward for stopping Union Dues or punishment for continuing to pay Union Dues. (ALJD 6, 10)

h. The ALJ erred in failing to find that the December 28 letter did not provide employees any assurance that they would not face retaliation for failing to withdraw from the Union. (ALJD 6, 1)

i. The ALJ erred in failing to find that there was no evidence to support a finding that employees had asked for information regarding payroll deduction for payment of dues. (ALJD 6, 10)

j. The ALJ erred in failing to find that beginning on August 1, 2016, in lieu of distributing a Union authorization card to authorize dues deduction, Respondent began distributing to employees a form it created, entitled "Authorization for Payroll Deduction of Union Dues," which capped Union dues at 1.3% of total pay, allowed for revocation of authorization at any time subject to the labor contract requirements, and was not an application for Union membership.

k. The ALJ erred in failing to find that the Union authorization card did not cap Union dues, allowed for revocation of authorization according to the schedule set forth in Setteducati's December 28, 2016 letter, and was also an application for Union membership. (ALJD 6, 10)

l. The ALJ erred in failing to find that the parties' expired contract did not provide a specific window for revoking dues authorization. (ALJD 6, 10)

m. The ALJ erred in failing to find that Respondent received 41 signed Authorization for Payroll Deduction of Union Dues forms between August 1 and November 14, 2016. (ALJD 6, 10)

n. The ALJ erred in failing to find that the instructions in Setteducati's December 28, 2016 letter regarding the timing of revocation of dues authorization was incorrect for the 41 individuals who had signed Respondent's Authorization for Payroll Deduction of Union Dues forms. (ALJD 6, 10)

o. The ALJ erred in failing to find that Respondent faxed 79 signed Resignation/Dues Revocation letters to the Union on December 30, 2016, just two days after the letters were first distributed to employees, and by failing to find that Respondent also mailed copies of the letters to the Union by regular and certified mail. (ALJD 6, 10)

p. The ALJ erred in failing to find that Respondent distributed the Resignation/Dues Revocation letters during a time where other unfair labor practices remained unremedied. (ALJD 6-7, 10-12)

q. The ALJ erred in failing to conclude that by distributing the Resignation/Dues Revocation letter, Respondent monitored employees' support for the Union and created an atmosphere in which employees would tend to feel peril in refraining to sign the letter. (ALJD 6-7, 10-12)

(2) The ALJ erred in failing to conclude that Respondent's distribution of the December 28, 2016 memorandum and the resignation/dues revocation letters was an unlawful poll of employees' support for the Union. (ALJD 10)

a. The ALJ erred in failing to find that by distributing the Resignation/Dues Revocation letter, Respondent placed employees in a position in which they reasonably would feel pressured to make an observable choice that demonstrates their support for or rejection of the Union. (ALJD 6-7, 10-12)

b. The ALJ erred in failing to find that Respondent did not establish a legitimate basis for knowing employees' Union preferences at the time it distributed the December 28, 2016 memorandum and resignation/dues revocation letters.

c. The ALJ erred in failing to find that Respondent used employees' responses to Resignation/Dues Revocation letter as support for its assertion during bargaining that the Union did not maintain majority support, and to justify its refusal to agree to Union shop and dues checkoff until the Union proved majority status. (ALJD 6-7, 10-12)

C. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide financial information. (ALJD 12-13)

(1) The ALJ erred in failing to find that during bargaining, James Cusack told the Union that:

a. its only source of revenue was the State, and it had received no increase in five years;

b. "We're in survival mode;"

c. in addition to a wage freeze, benefit levels needed to remain the same;

d. wage increases would only be possible if Respondent received more funding;

e. Respondent won't let its properties go into foreclosure or turn the lights out to give employees a raise;

f. there was no money available for wage increases;

g. wage increases would only be possible if Respondent received more funding;

h. "I suppose you're saying that we shouldn't pay the mortgage and give the money to the employees. You would suppose that we turn the lights out. Right?"

i. "We are not taking the position that we can't make increases, but we won't do it. We could burn down [] one of the facilities and pay you the insurance;"

(ALJD 7, 12-13)

(2) The ALJ erred in failing to find that in its Answer, Respondent "admitted that it proposed a wage freeze until this grant funded non-profit received an increase in funding from the state." (ALJD 7, 12-13)

(3) The ALJ erred in failing to find that the bargaining session on March 7, 2016, more than one month after the Union made its request for financial records, was the first time Respondent's attorney James Cusack told the Union that Respondent's position was not that it couldn't pay, but that it won't pay. (ALJD 7, 12-13)

(4) The ALJ erred in failing to find that Cusack's statements that Respondent "won't pay" were accompanied by other statements indicating that Respondent was unable to pay. (ALJD 7, 12-13)

(5) The ALJ erred in failing to find that Respondent asserted an inability to pay the Union's bargaining demands. (ALJD 7, 12-13)

(6) The ALJ erred in failing to find that Cusack's statements in the March 7, 2016 bargaining session and thereafter, that Respondent would not pay, rather than it could not pay, are not effective retractions of his earlier assertions of inability to pay. (ALJD 7, 12-13)

(7) The ALJ erred in finding that Respondent provided the Union 3 years of Form 990s. (ALJD 13)

(8) The ALJ erred in failing to find that Respondent only provided the Union the Form 990 for 2015, and it did not provide that form until sometime after June 2017.

(9) The ALJ erred in finding that the 3 years of Form 990s that Respondent allegedly provided to the Union contained the bulk of financial information that the Union was seeking. (ALJD 13)

(10) The ALJ erred in finding that "the Union acknowledged that it had not reviewed that information, calling into question whether the Union even believed it needed that financial information." (ALJD 13)

(11) The ALJ erred in failing to find that Respondent did not provide the following information to the Union in response to its February 1, 2016 request:

1) the yearly budget for 2015, 2016, and 2017;
2) the yearly audits for 2014, 2015 and 2016;
3) the monthly budgets for 2016 to the present, including all expenditures identified by category and all sources of revenue;
4) the monthly bank statements for 2016 to the present;
5) salaries for all non-CWA represented employees on a monthly basis for 2016 through the present, with each employee and his/her salary identified;
6) the monthly costs for all mortgages on all properties for 2016 to the present;
7) the monthly costs for all utilities on all properties for 2016 to the present;
8) the monthly costs for all legal expenses for 2016 to the present; and
9) the amount of longevity bonus issued to each bargaining unit member in 2015 and 2016. (ALJD 7, 12-13)

12) The ALJ erred in failing to find that the Union's February 1, 2017 request sought information was relevant and necessary for the Union to fulfill its duties as bargaining representative. (ALJD 12-13)

D. The ALJ erred in failing to conclude that Respondent's regressive proposals were evidence of bad faith. (ALJD 12-13)

(1) The ALJ erred in failing to find that the Union requested bargaining by letter to Setteducati dated April 7, 2016. (ALJD 4)

(2) The ALJ erred in failing to make any factual findings regarding bargaining that took place during the parties' first two bargaining sessions in August and September 2016, including the contents of the Union's first proposal, dated August 24, 2016, Respondent's first proposal dated August 30, 2016, and the Union's response to Respondent's proposal, dated September 26, 2016. (ALJD 4, 12)

(3) The ALJ erred in failing to make factual findings regarding bargaining that took place during the parties' seven sessions between January 12, 2017 and August 29, 2017, including the dates each party made written proposals, the contents of those proposals, and statements made by the parties during bargaining. (ALJD 7)

(4) The ALJ erred in failing to find that the Union did not agree to Cusack's insistence, beginning at the third bargaining session on January 12, 2017, that proposals made in the past were off the table and the parties were starting from scratch. (ALJD 6)

(5) The ALJ erred in failing to find that Respondent's proposal for a wage freeze and wage reopener conditioned on future funding secured by the Union was regressive. (ALJD 12)

a. The ALJ erred in failing to find that Respondent's first proposal of August 30, 2016 included a proposal for a merit pay system, implemented by management at its own discretion, which was a change from the pay provisions in the expired contract. (ALJD 4, 12)

b. The ALJ erred in finding that Respondent's proposal for merit pay "was dismissed out-of-hand by the Union." (ALJD 6, 7, 12)

c. The ALJ erred in failing to find that the Union asked Respondent for further discussion regarding its August 30, 2016 proposal for a merit pay system. (ALJD 6, 7, 12)

d. ALJ erred in failing to find that at the parties' third bargaining session on January 12, 2017, and at all following bargaining sessions, Respondent insisted on a wage freeze. (ALJD 6, 7, 12)

e. The ALJ erred in failing to find that in Respondent's March 6, 2017 proposal, Appendix A, Respondent proposed that the "Union will use its best efforts with the State of New Jersey to secure an increase in the remuneration received by the employer. At such time that the Union is successful in these efforts on behalf of the employees, there will be a 'wage reopener.'" (ALJD 6, 7, 12)

f. The ALJ erred in failing to find that with the fee-for-service structure, lobbying for more funds would be impossible. (ALJD 6, 7, 12)

g. The ALJ erred in failing to find that Respondent's March 6, 2017 proposal eliminated its August 30, 2016 proposal to create a merit pay system. (ALJD 6, 7, 12)

h. The ALJ erred in failing to find that Respondent's June 16, 2017 proposal, Appendix A retained the wage reopener provision from the March 6 proposal and added a proposal that "pay increases will be based on merit." (ALJD 6, 7, 12)

i. The ALJ erred in failing to find that Respondent's June 16, 2017 proposal did not cure its earlier regressive offer. (ALJD 6, 7, 12)

j. The ALJ erred in failing to find that Respondent did not establish any justification for its claim that it could not afford raises. (ALJD 6, 7, 12)

k. The ALJ erred in failing to find that after it withdrew recognition, Respondent granted all unit employees an across-the-board raise. (ALJD 6, 7, 12)

(6) The ALJ erred in failing to conclude that Respondent's proposal that dues checkoff and union shop be removed from the successor contract was regressive. (ALJD 12)

a. The ALJ erred in failing to find that Respondent's first proposal of August 30, 2016 included a union security and dues checkoff provision. (ALJD 4, 12)

b. The ALJ erred in failing to find that during the parties' third bargaining session on January 12, 2017 and at all further bargaining sessions, Respondent refused to agree to union security and dues checkoff provisions. (ALJD 7, 12)

c. The ALJ erred in failing to find that Respondent's March 7, 2016 proposal contained a "Dues Check Off/No Union Shop" provision that proposed, "The Union be granted access to Respondent's facilities on payday at reasonable times with reasonable notice for collecting dues from any employees who feel inclined to make payments," and "New Concepts for Living employees will not be required to join or maintain membership in the Union." (ALJD 7, 12)

d. The ALJ erred in failing to find that Respondent's June 16, 2017 proposal added the provision that, "If employees opt to pay union dues, they may opt to pay an agency fee as a percent of union dues used for collective bargaining and union representation." (ALJD 7, 12)

e. The ALJ erred in failing to find that Respondent and its attorneys had an ideological opposition to union security and dues checkoff provisions. (ALJD 7, 12)

f. The ALJ erred in failing to find that Respondent's explanation that it proposed to remove union shop and dues deduction from the contract due to a concern that the Union lacked a majority status was not a legitimate basis for the proposal. (ALJD 7, 12)

g. The ALJ erred in failing to find that Respondent provided no legitimate purpose for opposing union security and dues deduction clauses. (ALJD 7, 12)

(7) The ALJ erred in failing to find that Respondent's proposal to remove arbitration from the contract was regressive. (ALJD 12)

a. The ALJ erred in failing to find that Respondent's first proposal of August 30, 2016 included a grievance procedure that included arbitration, with the costs of arbitration split by the parties and a permanent panel of arbitrators in lieu of using the Federal Mediation and Conciliation Service ("FMCS"), as the expired contract provided. (ALJD 4, 12)

b. The ALJ erred in failing to find that in its September 26, 2016 response to Respondent's first proposal, the Union agreed to Respondent's August 30, 2016 proposal to split the costs of arbitration, but did not agree to Respondent's proposal to replace the FMCS with a permanent panel of arbitrators. (ALJD 7, 12)

c. The ALJ erred in failing to find that during the third bargaining session on January 12, 2017, Respondent proposed to remove

arbitration from the contract during the third bargaining session on January 12, 2017. (ALJD 7, 12)

d. The ALJ erred in failing to find that on January 12, 2017, Union counsel opposed Respondent's proposal to remove arbitration from the contract, reminding Cusack that the parties had already agreed to it, with the parties splitting the costs. (ALJD 7, 12)

e. The ALJ erred in failing to find that during the fourth bargaining session on January 13, 2017, Respondent proposed to replace arbitration with a provision allowing the Union to go to court to enforce the contract or appeal grievance decisions. (ALJD 7, 12)

f. The ALJ erred in failing to find that Respondent's March 7, 2016 proposal eliminated arbitration, replacing it with a proposal to refer unresolved grievances to the appropriate court in Bergen County, New Jersey." (ALJD 6, 7, 12)

g. The ALJ erred in failing to find that during the parties' seventh bargaining session on June 16, 2017, Respondent presented a proposal that the parties "may opt for arbitration on an ad hoc basis," which meant that if Respondent did not agree to arbitrate, the Union would need to go to court to resolve the grievance. (ALJD 6, 7, 12)

h. The ALJ erred in failing to find that Respondent did not show good cause for withdrawing the parties' tentative agreement to arbitration, with the parties splitting the costs. (ALJD 6, 7, 12)

i. The ALJ erred in failing to find that Respondent's proposal to take all claims to court, rather than to arbitration, was unreasonable and frustrated the bargaining process. (ALJD 6, 7, 12)

j. The ALJ erred in failing to find that Respondent provided no legitimate purpose for opposing an arbitration clause.

(8) The ALJ erred in failing to conclude that Respondent's offer to reconsider Union shop if the Union agreed to poll the bargaining unit is evidence of its bad faith. (ALJD 12)

a. The ALJ erred in finding that Respondent's proposal to agree to union shop if the Union agreed to a poll of its members, "rather than being evidence of bad faith, was evidence of the genuine nature of its explanation as to why it was so resistant to a union shop." (ALJD 12)

b. The ALJ erred in failing to conclude that Respondent's refusal to consider Union shop unless the Union conducted a poll of its members to establish majority status was made with the intent to frustrate bargaining. (ALJD 12)

(9) The ALJ erred in failing to find that Respondent's request to meet for bargaining twice per week were unreasonable and insincere. (ALJD 7, 12)

(10) The ALJ erred in failing to find that the Union only cancelled one bargaining session, which it cancelled with good reason. (ALJD 7, 12)

(11) The ALJ erred in failing to conclude that Respondent's proposals to eliminate arbitration, Union shop and dues deduction and impose a wage freeze were made with the intent of frustrating bargaining. (ALJD 12)

(12) The ALJ erred in failing to conclude that Respondent's philosophical opposition to Union shop and dues checkoff are evidence of its bad faith bargaining. (ALJD 12)

E. The ALJ erred in failing to conclude that Respondent's removal of employees' addresses from the monthly list of unit members is evidence of bad faith. (ALJD 12)

(1) The ALJ erred in failing to find that until February 2017, Respondent provided the Union with a monthly list of bargaining-unit members, which included their names, addresses, seniority, department and hire date. (ALJD 12)

(2) The ALJ erred in failing to find that beginning in February 2017, Respondent stopped including employees' addresses on the monthly lists provided to the Union. (ALJD 12)

F. The ALJ erred in failing to conclude that Respondent's refusal to allow the Union access to its facilities is evidence of bad faith. (ALJD 11-13)

(1) The ALJ erred in failing to find that in the Fall of 2015, Adam Fishman granted Donna Ingram's request to meet with members inside Respondent's facilities, provided she first contacted group home supervisors directly to schedule the meetings. (ALJD 4, 6)

(2) The ALJ erred in failing to find that in May 2016, Respondent, by Steve Setteducati, denied the Union access to its facilities for the purposes of meeting with members. (ALJD 4, 6)

(3) The ALJ erred in failing to find that by letter dated December 21, 2016, Respondent, by Steve Setteducati, again denied the Union access to its facilities for the purposes of meeting with members. (ALJD 4, 6)

(4) The ALJ erred in failing to find that there is no evidence to support Respondent's assertion that the Union had intimidated or harassed members when visiting Respondent's group homes or members' residences. (ALJD 4, 6)

G. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) of the Act by distributing the August 15, 2017 memorandum to employees. (ALJD 10-11)

(1) The ALJ erred in failing to find that the August 15, 2017 memorandum was coercive. (ALJD 10-11)

a. The ALJ erred in failing to find that the August 15, 2017 memorandum distributed by Respondent, entitled "Voluntary Deduction of Union Dues," notified employees that:

i. since Respondent notified employees in late 2016 that they were not legally obligated to pay Union dues, over 95% of Respondent's employees had chosen to not pay them;

ii. to prove that the Union's complaint that Respondent coerced employees into not paying dues, Respondent was providing employees a Union authorization form, which they could return if they wanted to start paying dues;

iii. "If you want to START paying Union Dues: sign the attached form and return it to Human Resources. We will then send dues money deducted every two weeks from your paycheck directly to the Union."

iv. "If you do NOT want to start paying Union Dues: *you do not have to do anything*. NCFL will NOT take dues out of your paycheck unless you sign and return the attached card." (ALJD 10-11)

b. The ALJ erred in failing to find that the August 15, 2017 memorandum did not provide employees any assurance that they would not face retaliation for submitting a Union authorization form.

c. The ALJ erred in failing to find that by informing employees that over 95% of unit employees had elected to not pay Union dues, it appeals to employees to follow the group and advices them that if they choose to sign the authorization card, they will stick out.

d. The ALJ erred in failing to conclude that by distributing the August 15, 2017 memorandum and Union authorization card, Respondent monitored employees' support for the Union and created an atmosphere in which employees would tend to feel peril in submitting a signed Union authorization card. (ALJD 10-11)

e. The ALJ erred in failing to find that Respondent distributed the August 15, 2017 memorandum during a time where other unfair labor practices remained unremedied. (ALJD 10-11)

(2) The ALJ erred in failing to find that Respondent's distribution of the August 15, 2017 memorandum was an unlawful poll of employees' Union support. (ALJD 10-11)

a. The ALJ erred in failing to find that by distributing the August 15, 2017 memorandum and Union authorization card, Respondent placed employees in a position in which they reasonably would feel pressured to make an observable choice that demonstrates their support for or rejection of the Union. (ALJD 10-11)

b. The ALJ erred in failing to find that Respondent did not establish a legitimate basis for knowing employees' Union preferences at the time it distributed the August 15, 2017 memorandum and Union authorization card.

c. The ALJ erred in finding that the fact that no employees returned signed authorization cards supports a finding that Respondent did not monitor employees' support for the Union or conduct an unlawful poll. (ALJD 11)

H. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) of the Act during the September 2017 staff meeting by informing employees that it would be futile for them to select the Union as their bargaining representative. (ALJD 11)

(1) The ALJ erred in failing to find that statements made during the staff meeting were coercive and further evidence of bad-faith bargaining. (ALJD 11)

a. The ALJ erred in failing to find that on September 13, 2017, Respondent held a mandatory meeting for employees in the cafeteria of its Rochelle Park office, which was attended by about 30 staff, including supervisors and managers. (ALJD 11)

b. The ALJ erred in failing to find that during the September 13, 2017 meeting, Setteducati first spoke and then he introduced consultant Aria Green. (ALJD 11)

c. The ALJ erred in failing to find that during the meeting, Setteducati told employees that he had hired a new cleaning service at the day program, which would clean the facility every day after hours, a job that previously had been done by day program staff and was included in their job description. (ALJD 11)

d. The ALJ erred in failing to find that during the meeting, Setteducati told employees that he knew that cleaning the day program had long been a source of contention for the staff, and he knew they were happy to have the work taken away from them. (ALJD 11)

e. The ALJ erred in failing to find that Setteducati's hiring of the outside cleaning staff was done just 8 days before Respondent conducted a self-run election to determine if the Union maintained majority status. (ALJD 11)

f. The ALJ erred in failing to find that Setteducati's unilateral hiring of outside staff to perform unit members' work is further evidence

of Respondent's bad-faith bargaining and its overall goal of eliminating the Union and eroding Union support. (ALJD 11)

g. The ALJ erred in failing to find that towards the beginning of the meeting, Green distributed to all employees copies of the "Basic Guide to the National Labor Relations Act," a booklet that is published by the NLRB. (ALJD 11)

h. The ALJ erred in failing to find that Green told employees that he understood that some people had been intimidated by people showing up at their houses and talking to their neighbors, which was despicable. (ALJD 11)

i. The ALJ erred in failing to find that Green told employees that under the law, Respondent was required to send everyone's contact information to the Union, in advance of Respondent's self-run election, and the ALJ further erred in failing to find that this statement was not true. (ALJD 11)

j. The ALJ erred in failing to find that Green offered employees a non-solicitation form to complete, which would keep the Union from contacting them. (ALJD 11)

k. The ALJ erred in failing to find that Green told employees that as the exclusive collective-bargaining representative, the Union had control over everything in the work place – benefits, wages, leave time, sick time, and health benefits, and that a union might bargain

away their benefits and wages in order to get a union security and dues checkoff clause. (ALJD 11)

l. The ALJ erred in failing to find that the statements Green made during the meeting were not based on any objective facts. (ALJD 11)

m. The ALJ erred in failing to conclude that Green's statements noted above in subparagraph (k) were unlawful because they implied that employees would lose benefits by choosing the Union in the upcoming election. (ALJD 11)

(2) The ALJ erred in failing to find that statements in flyers distributed during the September 13, 2017 meeting were coercive and further evidence of bad-faith bargaining. (ALJD 11)

a. The ALJ erred in failing to find that during the September 13, 2017 meeting, consultant Ari Green instructed employees to pick up a September 12, 2017 letter from Setteducati that was available on a table, and he noted that they also received a copy of the letter with their paychecks. (ALJD 11)

b. The ALJ erred in failing to find that in Setteducati's September 12, 2017 letter, he wrote the following:

i. "I believe many of you may be aware of some of the favorable compensation adjustments that I have made with non-union staff since I became your CEO."

ii. "While I regularly reach out to Trenton to try to get more funding, we have asked the CWA union representatives to help us with these efforts, however they have never shown

an interest in helping us, nor have they made any attempts that we are aware of, or even shown us any results."

iii. "As a matter of fact, over the last 10 years, your union representatives have only gotten you a 50 cent per hour raise over all that time – that's a whopping 5 pennies per year. Compare that to what this same union has done for federal and state workers, and I believe you would be rightfully outraged."

iv. "Undeniably, almost all of you stopped paying dues as soon as you knew you could, that that sure seems like you felt you weren't getting what you paid for."

v. "Still, I can't be sure. If I were sure, I could probably just stop recognizing the union right now. We considered that … but concluded that this is your choice, your decision. You should get to vote on whether you wish to keep paying your money to the union to be your exclusive bargaining agent, or move on without them, working with me face to face without the union between us." (ALJD 11)

c. The ALJ erred in failing to find that the statements made by Setteducati in his September 12, 2017 letter to employees, described above, blamed the Union for its own conduct, implying therefore that voting for the Union would be futile. (ALJD 11)

d. The ALJ erred in failing to find that at the meeting, Respondent distributed a flyer entitled "FACT OF THE DAY," which informed them:

i. "ALERT: NLRB RULES REQUIRED NCFL TO PROVIDE THE UNION YOUR HOME ADDRESS, EMAIL AND PHONE NUMBER (S0 IF YOU ARE A VOTER IN THE SEPTEMBER 21st ELECTION"

ii. "The NLRB requires us to provide the union names, addresses, phone numbers, et in any election and we are bound to follow the NLRB rules even though the election will be conducted by independent arbitrators and election officials."

iii. instructions for handling Union representatives who attempt to contact them and to fill out a no solicitation form if they feel threatened or harassed (ALJD 11)

e. The ALJ further erred in failing to find that the FACT of the DAY flyer contained further statements intending to make employees feel that the Union will harass and intimidate them. (ALJD 11)

2. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) of the Act by conducting a poll to determine whether employees wanted the Union to be their exclusive collective-bargaining representative. (ALJD 13-14)

A. The ALJ erred in concluding that Respondent established a valid good faith doubt as to the Union's majority status. (ALJD 13-14)

(1) The ALJ erred in failing to conclude that Respondent's asserted good faith doubt is based on circumstances created by its unfair labor practices. (ALJD 13-14)

(2) The ALJ erred in finding that "the lack of unit members attending bargaining sessions" supported a valid finding of good-faith doubt. (ALJD 13-14)

(3) The ALJ erred in finding that "the fact that 98% of the unit had withdrawn authorization for dues checkoff over 8 months earlier" supported a valid finding of good-faith doubt. (ALJD 13-14)

(4) The ALJ erred in finding that the fact that "not a single employee requested dues to be deducted in response to Respondent's specific offer to begin doing so a month earlier" supported a valid finding of good-faith doubt.(ALJD 13-14)

(5) The ALJ erred in finding that the decertification petition supported a valid finding of good-faith doubt. (ALJD 13-14)

B. The ALJ erred in failing to conclude that Respondent's numerous unfair labor practices in the preceding eleven months rendered the poll unlawful under *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967). (ALJD 13-14)

C. The ALJ erred in concluding that the poll satisfied *Struksnes'* other procedural safeguards, because Respondent conducted the poll in a coercive atmosphere that it created. (ALJD, 13-14)

(1) The ALJ erred in failing to find that Respondent's communications to employees regarding its September 17, 2021 poll were coercive, because the they blamed the Union for its own conduct, implied that the Union gave away their rights, thereby conveying to employees that their support for the Union was futile, and they misrepresented that Respondent conducted the poll according to NLRB rules. (ALJD 13-14)

(2) The ALJ erred in failing to find that Respondent falsely represented to employees that the poll was conducted in accordance with NLRB rules and procedures, which was coercive because it created the impression to employees that the poll was sanctioned by the Board. (ALJD 7, 13-14_

(3) The ALJ erred in failing to find that although Respondent purported to conduct the poll in accordance with NLRB procedures for a Board election, Respondent did not follow those procedures. (ALJD 13-14)

D. The ALJ erred in failing to make findings of fact regarding Respondent's communication to employees about its September 17, 2021 poll and failed to find that Respondent's communication was coercive. (ALJD 4, 13-14)

(1) The ALJ erred in failing to find that in the week before its September 21, 2017 poll, Respondent posted in the River Vale group home a document entitled "NOTICE OF SECRET BALLOT ELECTION," which notified employees represented by CWA Local 1040 that a secret ballot vote would take place on September 21st, gave the time and location of the vote, contained a sample ballot with the question, "Do you wish to be represented for the purpose of collective bargaining by CWA Local 1040?", and notified employees that "the votes will be counted by independent election officials after the polls close…" (ALJD 4, 13-14)

(2) The ALJ erred in failing to find that the week before its September 21st poll, also Respondent posted a flyer entitled "News Flash," which informed employees:

> If people paid dues to stop "disciplines or discharges' they didn't get their money's worth from the Union. In the 22 years that CWA has been at NCFL collecting your dues, not one discharge or termination was ever reversed .l.. and CWA signed one contract after another giving management the *"sole and exclusive right"* to *"suspend, demote, discharge"* employees. #EmptyPromises. (ALJD 4, 13-14) (emphasis in original)

(3) The ALJ erred in failing to find that on September 21, 2017, Respondent, by Steve Setteducati sent an email to its staff with the subject "Recent union flyer," in which he wrote:

a. The Union has sent out yet another inaccurate and misleading flyer. That has forced me to respond in order to <u>protect your right to vote;</u>

b. Tomorrow's vote is absolutely **legal**, and backed up by the **United States Supreme Court**;

c. The union blocked the NLRB vote last year, taking away your right to choose;

d. **The union does not want you to vote**;

e. Many long-time employees have expressed their dis-satisfaction with the union, stating that the union was totally absent in all the time that they had been with NCFL;

f. The union has cancelled contract negotiations, and has recently refused to set future negotiating dates;

g. The union would like NCFL to fire you if you don't want to pay union dues;

h. **The union has gotten you a total of 50 cents/hour raise over the last 10 years – That's 5 pennies per year for the last 10 years!** (ALJD 4, 13-14) (emphasis in original)

(4) The ALJ erred in failing to find that Setteducati attached to his September 20 email to employees a copy of a September 18, 2017 email Respondent sent to the Union. (ALJD 13-14)

(5) The ALJ erred in failing to find that in the September 18, 2017 Respondent sent to the Union, and then to employees, Respondent declared that:

a. "***You* have demanded that we force NCFL employees to pay you or get fired;"**

b. "***You* refuse to let them vote in an NLRB election and then *complain when they are given the opportunity to vote* in an independent poll, *so that you can keep them from voting to leave you*,** which they seem eager to do;"

c. "**When your forced dues clause expired, *they fled*…** *NO ONE wants to pay you because they see no value in what you do."*

d. "If you had any self-awareness, or objectivity, let alone the *slightest measure of concern for wasting your members' hard-earned money* on a fool's errand like *trying to force people who clearly have no use for you to give you their money* and their fealty when they clearly feel it is undeserved, you would stop this nonsense and disclaim interest."

e. "**We <u>will</u> conduct and poll and we – unlike – <u>will</u> honor the employees' wishes."**

f. "The Supreme Court of the United States, as well as the National Labor Relations Board, have set the rules for the conduct of this election, and we will follow them. If you want to participate, you should do the same, If you don't want to participate, and you just want to concede that you have lost majority support, please advise me of that…" (ALJD 4, 13-14)

(6) The ALJ erred in failing to find that Respondent's communications to employees in advance of its September 21, 2017 poll blamed the Union for its unfair labor practices, thereby conveying to the members that their support for the Union was futile. (ALJD 4, 13-14)

E. The ALJ erred in failing to find that Respondent did not give employees assurances against reprisal before the poll.

F. The ALJ erred in failing to make findings of fact regarding the poll itself.

(1) The ALJ erred in failing to find that there is no record evidence establishing how Respondent determined who was eligible to vote in its September 21, 2017 poll and identified on the document it referred to as "the Excelsior List." (ALJD 4, 13-14)

(2) The ALJ erred in failing to find that the poll was taken in the conference room of Respondent's Rochelle Park headquarters, from 7:100 a.m. to 10:30 a.m. and from 2:00 p.m. to 5:30 p.m. (ALJD 4, 13-14)

(3) The ALJ erred in failing to find that during the poll, Lorna Williamson, a human resources assistant, and retired Judge Scancarella sat at a conference table in the conference room, but Scancarella was not present during the entire poll. (ALJD 4, 13-14)

(4) The ALJ erred in failing to find that on the opposite side of the conference table, the unmarked ballots were set out in a pile, a ballot box was placed further down the same side of the conference table, and a pile of white sheets was placed next to the ballot box. (ALJD 4, 13-14)

(5) The ALJ erred in failing to find that a makeshift voting booth was placed at the end of the table, but not all voters were directed to fill out their ballots in the booth. (ALJD 4, 13-14)

(6) The ALJ erred in failing to find that ballots were not handed to voters; instead voters were left to pick up a ballot from the pile on the conference table. (ALJD 4, 13-14)

(7) The ALJ erred in failing to find that the record does not reveal the purpose of the white sheets next to the ballot box. (ALJD 4, 13-14)

(8) The ALJ erred in failing to find that because voters were left to pick up a ballot from the pile on the conference table or a white sheet next to the ballot box, there was a possibility of voters casting more than one vote. (ALJD 4, 13-14)

(9) The ALJ erred in failing to find that while Williamson kept the official voter list, Scancarella also kept his own voter list, and he checked off voters' names as they voted. (ALJD 4, 13-14)

(10) The ALJ erred in failing to find that the voter lists used at the poll were not introduced into evidence, so due to the possibility of voters casting more than one vote, it cannot be determined if the tally of ballots represents the actual number of individuals who voted. (ALJD 4, 13-14)

(11) The ALJ erred in failing to find that at one point during the poll, the ballot box was overflowing, causing Scancarella to refold ballots and stuff them back into the box. (ALJD 4, 13-14)

(12) The ALJ erred in failing to find that there is no evidence regarding how the ballot box was maintained during the break in voting. (ALJD 4, 13-14)

(13) The ALJ erred in failing to find that the votes were not counted by independent election officials, as Respondent represented to employees. (ALJD 4, 13-14)

(14) The ALJ erred in finding that Scancarella presided over the poll. (ALJD 4, 13-14)

(15) The ALJ erred in failing to find that Scancarella was neither independent nor neutral, in part because he went to law school with Cusack. (ALJD 4, 13-14)

(16) The ALJ erred in failing to find that Scancarella had never conducted an NLRB election before and had no knowledge of NLRB election procedure. (ALJD 4, 13-14)

(17) The ALJ erred in failing to find that Scancarella received directions regarding the election from Cusack and Setteducati. (ALJD 4, 13-14)

(18) The ALJ erred in failing to find that the voting location was set up by Respondent, not by Scancarella. (ALJD 4, 13-14)

(19) The ALJ erred in failing to find that the ballot count was attended by Scancarella, Williamson, and Cuscak, and perhaps O'Reilly and Fishman as well, and no bargaining-unit members or Union representatives attended the count. (ALJD 4, 13-14)

(20) The ALJ erred in failing to find that although Scancarella signed the Tally of Ballots, he did not fill it out. (ALJD 4, 13-14)

(21) The ALJ erred in failing to find that the Tally of Ballots used was Form NLRB -760, which clearly notes that it is a form from the National Labor Relations Board. (ALJD 4, 13-14)

(22) The ALJ erred in failing to find that on Sunday, September 24, 2017, Scancarella sent an email to the Union, in which he documented the outcome of the election, informed the Union that he conducted the election according to the NLRB's Case Handling Manual, found the process was fair and consistent with the Board's election procedures to ensure anonymity and a non-coercive atmosphere, invited the Union to file written "objections" to the election with an offer of proof, and he would investigate the objections within 21 days of submission. (ALJD 4, 13-14)

(23) The ALJ erred in failing to find that Scancarella did not draft the September 24, 2017 email that he sent to the Union; it was drafted by Respondent or Respondent's counsel. (ALJD 4, 13-14)

G. The ALJ erred in failing to find that employees were not polled be secret ballot.

3. The ALJ erred in failing to conclude that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit. (ALJD 14-15)

A. The ALJ erred in failing to conclude that there was a direct causal nexus between Respondent's unfair labor practices and the outcome of its September 21, 2017 poll, satisfying all four factors set forth in *Master Slack Corp.*, 271 NLRB 78 (1984). (ALJD 4, 13-14)

(1) The ALJ erred in failing to conclude that Respondent's unfair labor practices was ongoing and pervasive during the eleven months preceding the September 21, 2017 poll and had a lasting effect on employees. (ALJD 4, 13-14)

(2) The ALJ erred in failing to conclude that the nature Respondent's unlawful conduct was for the dual purposes of causing employee disaffection with the Union and eliminating the Union as the employees' collective-bargaining representative. (ALJD 4, 13-14)

(3) The ALJ erred in failing to conclude that Respondent's unlawful conduct was the direct cause of employee disaffection and loss of Union membership. (ALJD 4, 13-14)

B. The ALJ erred in concluding that it was the Union's own absence over the span of multiple years that ultimately led to its loss of support. (ALJD 4, 13-14)

(1) The ALJ erred in finding that the Union's efforts to revive employee support were unsuccessful and "Ingram acknowledged that the Union's reception by employees was not positive. (ALJD 6)

(2) The ALJ erred in failing to find that Ingram began her efforts to revive employee support in the fall of 2015. (ALJD 4, 6)

(3) The ALJ erred in failing to find that Ingram met with employees at various group homes and in the day program after their monthly staff meetings until May 2016, just one month after the Union requested bargaining, when Respondent refused to allow the Union access to its facilities to meet with employees. (ALJD 4)

(4) The ALJ erred in finding that "the Union was turned away by employees on multiple occasions both at employee facilities and from the employees' individual residences." (ALJD 6)

(5) The ALJ erred in finding that although Ingram testified that she collected between 30 and 40 authorization cards between December 2016 and September 2017, the real number was likely lower. (ALJD 6)

4. The ALJ erred in his credibility determinations. (ALJD 8-9)

A. The ALJ erred in failing to identify when he credited one witness over another in making a factual finding. (ALJD 1-15)

B. The ALJ erred in making conclusory findings throughout the decision without identifying and explaining the witness(es) or other evidence that formed the basis for those findings. (ALJD 1-15)

C. The ALJ erred in making factual findings in pages 1 through 7 of the Decision based on observations of witnesses' testimonial demeanor, when most of the facts are undisputed, and witness testimony is corroborated by other witnesses, documentary evidence, and admitted recordings. (ALJD 8, n. 9)

D. The ALJ erred in finding Bryan Baldicanas generally "less than credible," without noting if and/or when Baldicanas' testimony was not credited. (ALJD 8)

E. The ALJ erred in finding Bryan Baldicanas generally "less than credible," because much of Baldicanas' testimony was corroborated by other witness testimony, documentary evidence and admitted recordings. (ALJD 8)

F. The ALJ erred in finding that Robert Yeager to be "less than credible in his testimony," without noting if and/or when Yeager's testimony was not credited. (ALJD 8)

G. The ALJ erred in finding that Robert Yeager to be "less than credible in his testimony," because much of Yeager's testimony was corroborated by other witness testimony and documentary evidence. (ALJD 8)

H. The ALJ erred in finding Carolyn Wade, Ruth Barrett, Saeed Martin and Annmarie Pinarski "mostly credible" in their testimony without noting if and or when their testimony was not credited. (ALJD 8)

I. The ALJ erred in finding Carolyn Wade, Barrett, Martin, and Annmarie Pinarski "mostly credible" rather than "fully credible" because much of their testimony was corroborated by other witness testimony, documentary evidence and/or admitted recordings. (ALJD 8)

J. The ALJ erred in finding Steve Setteducati, James Cusack, Adam Fishman, Janice Hoyda, and Cheryl O'Reilly credible. (ALJD 8)

K. The ALJ erred in finding that employee witnesses' testimony regarding the details of the September 21, 2017 poll were consistent and that they corroborated Cusack and O'Reilly. (ALJD 8-9)

L. The ALJ erred in finding that Respondent offered to provide "testimony from dozens of other employees," and that the ALJ made a ruling that further testimony would have been unnecessarily duplicative. (ALJD 3, n. 4; 8-9)

5. The ALJ erred in dismissing the Complaint. (ALJD 16)

6. The ALJ erred in failing to order that Respondent to cease and desist from:

A. refusing to recognize the Union as the exclusive collective-bargaining representative of its employees in the following unit:

All full-time and regular part-time drivers, direct care counselors, overnight direct care counselors, direct care counselors sub, day program counselors, residential counselors, center day program counselors, center senior counselors, floaters, substitutes, maintenance worker/repair staff, secretary/receptionist, and all other non-excluded employees employed by the Employer at all current and future residential and day programs locations. Confidential office clerical employees, administrative employees, managerial employees, professional employees, guards and supervisors as defined in the Act are excluded.

B. failing and refusing to meet with the Union for the purposes of bargaining;

C. failing and refusing to bargain in good faith with the Union;

D. providing more than ministerial assistance to employees in helping them remove the Union;

E. promising its employees merit wage increases and bonuses if they abandon their support for the Union;

F. soliciting employees to sign letters resigning their Union membership and withdrawing authorization of Union dues deduction;

G. coercing employees through its written memoranda to them about their rights to sign Union authorization cards and authorize Union dues deduction;

H. coercively polling employees about their Union sympathies;

I. threatening employees by informing them that it would be futile for them to selection the Union as their bargaining representative

J. failing and refusing to provide information to the Union that it requested on February 1, 2016;

6. The ALJ erred in failing to order Respondent to take the following affirmative action necessary to effectuate the policies of the Act:

A. Recognize the Union, on request.

B. Bargain in good faith with the Union, on request, for a period of one year from the issuance of a Board Order, as the recognized bargaining representative of Respondent's employees in the unit listed above.

C. Supply the Union, on a monthly basis, the names and addresses of its current bargaining-unit employees, along with the other information included on the monthly list of bargaining unit employee information it provides to the Union.

D. Provide the Union with the information it requested in its February 1, 2016 information request, as described above in Exception 1(c)(11).

E. Post in all of its facilities in which bargaining-unit employees work or report for work any Notice to Employees that may issue in this proceeding.

F. Electronically post the Notice to Employees to bargaining unit employees at all of its facilities in which bargaining-unit employees work or report for work if Respondent customarily uses electronic means such as an electronic bulletin board, e-mail, website, or intranet to communicate with those employees.

G. Mail the Notice to Employees to all current and former bargaining-unit employees who were employed by Respondent at any time since August 2016.

H. Send a copy of any Board Order and Notice to Employees that may issue in this proceeding to all of its supervisors at all its facilities in which bargaining-unit employees work or report for work.

I. Executive Officer Steve Setteducati, at a meeting or meetings scheduled to ensure the widest possible attendance, read the Notice to employees in English on work time in the presence of a Board agent, or alternatively order Respondent to a Board agent read the Notice to employees during work time in the presence of Respondent's Chief Executive Officer Steve Setteducati and Respondent's supervisors and managers.

Dated: Newark, New Jersey
March 5, 2021

Respectfully submitted,

/s/ Nancy Slahetka

_____

Nancy Slahetka
Counsel for the Acting General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

nancy.slahetka@nlrb.gov
phone: 862-762-7060
fax: 973-645-3852