Kitsap Tenant Support Services, Inc. *and* Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL–CIO. Cases 19–CA–074715, 19–CA–079006, 19–CA–082869, 19–CA–086006, 19–CA–088935, 19–CA–088938, 19–CA–090108, 19–CA–096118 and 19–CA–099659

May 31, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE AND MCFERRAN

On June 4, 2014, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Charging Party adopted the General Counsel's exceptions and supporting brief as its exceptions and brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent also filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

[1] We shall modify the judge's conclusions of law and substitute a new remedy, order, and notice to conform to the violations found.

On April 29, 2013, the Respondent filed a motion to dismiss the second amended complaint, asserting that former Acting General Counsel Lafe Solomon did not properly hold the position of General Counsel on March 27, 2013, when the second amended complaint issued. The Respondent argued that Solomon's appointment was invalid under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq. On September 6, 2013, Judge Pollack denied that motion. Subsequently, in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 137 S. Ct. 929 (2017), the Supreme Court held that under the FVRA, Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, when President Obama nominated him to be General Counsel. However, we find that subsequent events have rendered moot the Respondent's argument that Solomon's lack of authority after his nomination precludes further litigation in this matter. Specifically, on April 14, 2017, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case that states, in relevant part, as follows:

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, 796 F.3d 67, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at *10.
>
> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. Id. at *9 (citing 5 U.S.C. § 3348(e)(1)).
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution in this matter, we reject as moot any challenge to the actions taken by Solomon as Acting General Counsel after his nomination on January 5, 2011.

In its motion to dismiss, the Respondent also challenged the authority of Regional Director Ronald K. Hooks in this case, asserting that Regional Director Hooks was appointed on January 6, 2012. The assertion is incorrect. Although Regional Director Hooks' appointment was announced on January 6, 2012, the Board approved his appointment on December 22, 2011, at which time it had a quorum.

Introduction

The Respondent provides residential support services to developmentally disabled individuals. In November 2011, the Union began an organizing campaign to represent employees who provide caregiving services to these disabled clients at several of the Respondent's residential programs. On December 20, 2011, the Union filed a representation petition seeking an election in a unit consisting of those employees. On March 15, 2012, the Union won the election. On March 23, 2012, the Board certified the Union as the representative of the Respondent's Direct Service Staff and Head of Households (HOHs).

This case involves multiple allegations of unfair labor practices involving the Respondent's conduct during collective-bargaining negotiations with the Union, changes in the Respondent's disciplinary practices following the start of the union organizing campaign and, subsequently, the Union's certification, and disciplinary actions taken by the Respondent against employees who supported the Union. The judge found merit in some of

the complaint allegations, dismissed some, and failed to rule on a number of others. As explained below, we find that the Respondent violated the National Labor Relations Act by (1) failing to meet with the Union at reasonable times during collective bargaining; failing to furnish, or delaying in furnishing, the Union with relevant information; and engaging in overall-bad faith bargaining; (2) discharging, demoting, placing on administrative leave, and otherwise disciplining employees because they supported the Union; and (3) more strictly enforcing its disciplinary rules in retaliation for employees' union activities and support. Finally, as explained below, we sever and retain for further consideration complaint allegations that the Respondent unlawfully maintained seven employee handbook rules.

I. 8(A)(5) ALLEGATIONS

A. Facts

On April 23, 2012,[2] the Union's lead negotiator, Sarah Clifthorne, sent Gary Lofland, the Respondent's lead negotiator, an email proposing three initial bargaining sessions on May 30 and 31, June 5 and 6, and June 26–28. As of May 14, Lofland had yet to respond. That day, Clifthorne emailed Lofland, requested a response concerning the Union's proposed bargaining dates, and informed Lofland that the Union could no longer meet on May 30 and 31. By May 21, Lofland still had not responded. Clifthorne emailed Lofland again on May 21, requested a response, and reminded Lofland that she had also left messages with his receptionist. Lofland responded that day by email, blaming his delay on "being out of the office."[3] Lofland proposed that the parties set one initial meeting, on either June 5 or 6, and requested that the Union provide a written contract proposal at this first meeting.

On May 22, Clifthorne replied that the Union was available to meet on June 5 and 6. Clifthorne reported that the Union had selected five employees to participate in contract negotiations and requested that the Respondent grant the employees unpaid leave on June 4 "to prepare for our negotiations."[4] On June 1, Clifthorne sent Lofland the Union's first information request.[5]

That same day, Lofland notified Clifthorne that the Respondent could no longer meet on June 5 or 6. Remarkably, Lofland blamed the Union for its "delay in responding to the available dates" and said those dates were "not realistic," claiming that the Union failed to timely conduct training for bargaining team members, submit an information request, and develop a written proposal. Clifthorne and employee Gary Martell, one of the Union's employee bargaining representatives, testified without contradiction that the Union completed its training session for employee bargaining representatives on June 4, as scheduled.

On June 5, Clifthorne proposed meeting on multiple dates in June, July, and August. In total, the Union proposed 26 potential bargaining dates. On June 8, Lofland agreed to meet on July 13 and stated that the Respondent would only agree to additional dates after completing that first bargaining session. Lofland asserted that the "normal ebbs and flow of business and life preclude[d]" him from meeting the Union's "perceived needs and wants" to meet at an earlier date. The Union agreed to meet on July 13 and continued to request, without success, that the Respondent agree to additional bargaining dates in July and August.

On June 11, Lofland responded to the Union's June 1 information request, producing some of the Union's requested information and stating that the "response will be supplemented at a later time." The Respondent does not dispute the General Counsel's assertion that as of June 11, the Respondent had not furnished the Union the following: (1) employee schedules, house name, and shift information; (2) employee transfers, promotions, and movement in and out of the unit since December 11, 2011; (3) job descriptions and memos about job expectations; (4) memos or written materials on policies and procedures, rules, and guidelines for employees; (5) history of wages and raises for employees for a 5-year period; (6) training programs and requirements for staff, including all training records since December 1, 2011; and

[2] All subsequent dates are in 2012 unless otherwise indicated.

[3] According to Clifthorne's May 14 email, Lofland had been on vacation, but the vacation ended sometime before May 14.

[4] During late May and early June, the parties discussed issues surrounding these five employees' participation in bargaining, which the parties ultimately resolved.

[5] Although this information request is dated May 22, the Union submitted this request to the Respondent on June 1. In this request, the Union requested copies of the following: (1) an organizational chart; (2) a "current employee list with job class," work locations, dates of hire, and pay levels; (3) a "list of job classes"; (4) employee schedules, "house name" [employees are assigned to work at various client residences, i.e., houses], and shift information; (5) employees' paid time off accrual rates, vacation, and personal leave; (6) overtime paid to employees; (7) employee transfers, promotions, and movements in and out of the unit since December 11, 2011; (8) job descriptions and memos about job expectations; (9) a current employee handbook; (10) memos or written materials on policies and procedures, rules, and guidelines for employees; (11) current disciplinary procedures, process, and forms; (12) job evaluations, including process and forms used; (13) benefit plans, including health care, dental, vision, and 401(k), including the number of employees enrolled in each program; (14) history of health, dental, and vision insurance cost for employees/employer for a five-year period; (15) history of wages and raises for employees for a five-year period; (16) training programs and requirements for staff, including all training records since December 1, 2011; and (17) all payments received from the State.

(7) all payments received from the State. Concerning the request for payments received from the State, the Respondent asserted that it had no obligation to provide that information.

On July 13, the parties met for the first time. At this meeting, scheduled to last the entire day,[6] the Union spent the first one and one-half hours walking through its contract proposal, which the Union had furnished to the Respondent a week earlier. The proposal included a "just cause" provision for employee discipline, a union security provision, dues checkoff, a 3-step grievance procedure (followed by arbitration as a final option if the grievance procedure was unsuccessful), a progressive disciplinary policy, and a limited management-rights clause. The Union proposed a starting wage rate for Direct Service Staff of $12.09 an hour and an HOH starting wage rate of $14.09 an hour, with gradual annual increases for both. The Respondent made no proposals and had no questions about the Union's proposed contract. Clifthorne testified that after a 20-minute caucus, the Respondent announced that it "wasn't prepared to talk about [the Union's proposal] further" and declared that they "were done for the day." Clifthorne further testified that following another caucus, the parties reconvened at 11:35 a.m., scheduled meetings for August 6 and 15, and ended bargaining for the day.

On July 17, the Union submitted a second information request to the Respondent, seeking "documents and information regarding [Kitsap's] job descriptions and recruitment postings for Head of Household (HOH) positions." The Union explained that although the Respondent had indicated that the HOH job description could be found in the employee handbook, which the Respondent provided to the Union on June 11, the handbook did not in fact include the HOH job description. The Union also reported that it had "recently [been] made aware that [Kitsap had] changed some of the language and job requirements for HOH's," which were reflected in HOH job postings. Accordingly, the Union requested (1) "[t]rue and accurate copies of any and all HOH and direct service staff job descriptions that [Kitsap] has created and used within the last twelve (12) calendar months. The job postings should indicate the position that was open, any work locations, and the date of the job posting announcement," and (2) "[a]ny and all memos created by [Kitsap] regarding HOH and direct service staff job descriptions and job duties within the last twelve (12) calendar months."

[6] The parties had earlier agreed to all-day (9 a.m. to 5 p.m.) bargaining sessions.

On Monday, August 6, the parties met for the second time. They discussed the Respondent's first proposed contract, which the Respondent had provided to the Union the prior Friday, August 3. The proposal included a broad management-rights clause, at-will employment, no union security, a grievance procedure without arbitration,[7] and a discretionary disciplinary procedure.[8] The Respondent announced that it intended to eliminate the Head of Household position and replace it with the supervisory position of Household Manager. The Respondent proposed a Direct Service Staff starting wage rate of $10.09 an hour and a $10.25 an hour starting wage rate for night-shift employees. The wage proposal also provided that the Respondent "reserves the right to reduce the rates paid if the Department of Social & Health Services reduces the benchmark rate, the Legislature reduces funding, or changes to health care laws and contributions occur. The Employer shall provide at least thirty (30) days notice to the Union of such change." Because the Respondent proposed eliminating the HOH position, it proposed no wage rates for that position. The Respondent ended the bargaining session at noon. The parties agreed to meet on September 17. In the interim, on August 13, citing a State audit, Lofland canceled the parties' previously agreed-upon August 15 meeting.

On September 17, the parties met for the third time. Prior to that meeting, the Union provided the Respondent with a modified proposal. The parties do not assert, nor does the record demonstrate, that this modified proposal contained any meaningful changes from the Union's earlier proposal. The judge found that the Respondent "refused to discuss certain proposals" during the meeting. Clifthorne testified that the Respondent refused to discuss union security, seniority, and "many" additional issues. Discussions that day ended shortly before noon.

On October 12, in response to the Union's June 1 and July 17 information requests, the Respondent provided the Union with the requested list of HOH job duties. The Respondent did not provide the Union a job description

[7] The Respondent proposed that, following exhaustion of a 3-step review procedure before human resource officers and other managers, the Union "may file a civil complaint in the Superior Court of Kitsap County."

[8] The proposal regarding discipline provided that "progressive and corrective discipline may be appropriate" and "[d]isciplinary actions or measures may include" initial verbal reprimand, initial written reprimand, final written reprimand, suspension without pay, and discharge. The proposal further provided that "[t]he step to be utilized and the degree of discipline to be imposed is solely within the judgment and discretion of [Kitsap]."

for Direct Service Staff employees or the requested memos and job postings concerning the HOH position.[9]

On October 16, the parties met for the fourth time.[10] Four days earlier, the Respondent had provided the Union with modifications to its proposed contract. The parties do not assert, nor does the record demonstrate, that these modifications contained any meaningful changes except for two changes to the management-rights clause, which added that the Respondent had the right to "transfer bargaining unit members" and "assign bargaining unit work to supervisors."[11] Clifthorne testified that the parties discussed a variety of topics, including management rights, at-will employment, layoffs and recall rights, employee morale, employees' access to their personnel files, cell phone usage, union security, and automatic payroll deduction of union dues. Clifthorne requested bargaining dates in November. On October 25, Lofland responded: "Dealing with a torn Achilles tendon, be to you soon." On October 29, Clifthorne again requested that the parties set future bargaining dates.

On October 29, the Union submitted a third information request to the Respondent for (1) a job description for the Respondent's proposed Household Manager position, (2) total ISS dollars [i.e., payments received from the State] paid to bargaining-unit members per month, including overtime since March 2012,[12] (3) total reimbursement for mileage costs paid to bargaining-unit members per month since March 2012, (4) the total amount Kitsap paid for taxes and benefits for bargaining-unit members per month since March 2012, and (5) the total amount Kitsap paid for mileage reimbursement for bargaining-unit members for client transportation per month since March 2012.

On November 12, Lofland responded to Clifthorne's requests for additional bargaining dates, blaming his delay on "miscommunication with my assistant" and stating that he was available on November 19, 20, or 26 and December 17, 18, or 19. Lofland stated that the Respondent could not meet on consecutive days, however, because it would be burdensome on management.

On November 20, Lofland responded to the Union's October 29 information request. The Respondent provided a copy of the job description for its proposed House Manager position and both reimbursement figures for employee mileage costs. The Respondent refused, however, to provide the Union with ISS dollars paid to bargaining-unit members. Lofland asserted that the Respondent was "not obligated to provide financial information . . . because [Kitsap] does not plead inability to pay."[13]

On November 26, the parties met for the fifth time. Contrary to the Respondent's earlier announcement that it intended to eliminate the HOH position, the parties

[9] The General Counsel does not contend that the Respondent's failure to provide a job description for Direct Service Staff employees violated the Act.

[10] The judge mistakenly found that the parties' next bargaining session was on November 26.

[11] As modified, the Respondent's proposed management-rights clause provided as follows:

> [T]he Employer reserves and retains, solely and exclusively, all of the inherent rights, functions, and prerogatives of management. The following shall be deemed representative and characteristic of the customary and usual rights which are retained by the Employer but shall not be deemed to exclude any and all other management rights: (1) The right to hire employees; (2) The right to assign/reassign or schedule the date, time, hours, location, and duties of work; (3) The right to promote, demote, suspend, discipline, layoff, or discharge employees; (4) The right to maintain order and efficiency; (5) The right to determine the number of employees assigned to any shift and to adjust staffing plans, eliminate, or add units; (6) The right to assign the type of equipment to be used by employees in the performance of their work duties; (7) The right to subcontract work; (8) The right to sell all or part of the business operations; (9) The right to grant and/or schedule time off, including annual leave; (10) The right to cease all or part of business operations; (11) The right to make such reasonable rules, regulations, deployment plan and policy and operational manual adjustments as it may from time to time deem best for the purposes of maintaining order, safety, and effective operation of its business and/or compliance with the contractual and regulatory requirements of its customers; (12) The right to increase compensation and/or benefits of employees above that minimally required under the terms of this Agreement; (13) The right to transfer bargaining unit members; (14) The right to choose, provide, locate, and relocate employees; (15) The right to assign bargaining unit work to supervisors; (16) The right to enforce the Employer's Policies and Operations Manuals; (17) The right to develop, implement, and enforce quality assurance programs and standards of care; (18) The right to make employee assignments and to designate employee staffing compositions; (19) The right to design, submit, negotiate, and implement contracts; and (20) The right to change providers and/or administrators for the benefit programs described in this Agreement.

The management-rights clause also provided that, "[e]xcept when it can be reasonably shown that conduct or action by the Company is in violation of a specific provision of this Agreement, the exercise by the Company of its rights to operate and manage business and the affairs of the Company, to select and direct the working forces and to control and direct the use of its equipment, facilities and properties shall not be subject to the grievance procedure or to dispute resolution procedure." Finally, the management-rights clause stated: "Recognizing that [Kitsap] is subject to fluctuations in reimbursement rates which are determined by the Washington Department of Social and Health Services based upon funding by Washington Legislature, [Kitsap] expressly reserves the right to change and modify compensation (wages and benefits) resulting from or caused by Department or Legislative action subject only to providing the Union with 30 day advance notice of the change."

[12] As noted above, the Union first requested this state payment information on June 1.

[13] The Respondent also refused to provide the information regarding unit employee taxes and benefits paid by Kitsap. Lofland asserted that he did not believe this information was relevant. The General Counsel does not contend that this refusal violated the Act.

signed a tentative agreement to include the HOH position in the unit. They also agreed to next meet on December 18. On December 17, Lofland canceled that meeting because he was "feeling ill." Lofland said that he would contact Clifthorne later that week to schedule a January bargaining date. He did not do so.

On January 11, 2013, Clifthorne emailed Lofland and reported that the Union was available to meet "every day the last two weeks of January." On January 25, 2013, Lofland explained that he had been "somewhat preoccupied" because two "close family members" were scheduled to have surgery the following week and because of preparations for the unfair labor practice (ULP) hearing, which was to begin on February 12, 2013. Lofland suggested the parties meet on February 27 or 28, 2013, or "in the event the ULP hearing is postponed . . . [on] another date." On February 15, 2013, the judge rescheduled the hearing to begin in late May 2013.

On January 28, 2013, the Union accepted Lofland's proposed February 27 date and requested additional earlier dates in February, given the hearing postponement. The next day, Lofland stated that he was no longer available to meet in late February because he "apparently [had] been summoned for jury duty during that period." On February 4, 2013, Lofland clarified that he was to report for jury duty from February 25 through March 8. The parties agreed to meet on February 21, March 11, and March 12, 2013. Clifthorne later canceled the February 21 meeting.

On March 11 and 12, 2013, the parties met for the sixth and seventh times. Clifthorne testified without contradiction that the parties reached tentative agreements on hiring, seniority, layoff and recall procedures, employee training and development, performance evaluations, access to personnel files, employee privacy, reasonable accommodations, tools, equipment and supplies, a union-management committee, a drug and alcohol policy, employee cell phone use, and time clocks. The parties had yet to reach agreement on many significant issues, including union security, dues checkoff, hours of work, overtime, discipline, leave, holidays, transportation, a grievance procedure, benefits, compensation, the scope of a management-rights clause, and whether discharge should be for cause or at will.

The parties' final bargaining sessions were on April 4 and 5, 2013. The record reflects no positive movement on the outstanding bargaining issues. A week later, the Respondent reneged on its tentative agreement to include the HOH position in the unit. In an April 12 email, Lofland stated that "[t]he Employer's position is that it will eliminate the position of HOH and create a supervisory position of Household Manager. That proposal remains, as it always has been, subject to negotiations and compromise."

The parties engaged in additional bargaining sessions attended by a federal mediator from May through December 2013. The parties did not reach a collective-bargaining agreement at the conclusion of those sessions.

B. Analysis

1. The Respondent's refusal to meet and bargain at reasonable times

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to meet with the Union at reasonable times and systematically delaying the bargaining process. For the following reasons, we affirm the judge's conclusion that the Respondent violated the Act as alleged.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." In relevant part, Section 8(d) of the Act defines the phrase "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees *to meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." (emphasis added). Nearly 70 years ago, the Board fleshed out this statutory mandate, explaining that

> [t]he obligation to bargain collectively surely encompasses the affirmative duty to make expe[]ditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

J. H. Rutter-Rex Manufacturing Co., Inc., 86 NLRB 470, 506 (1949).

Beginning on April 23, the Union repeatedly requested initial bargaining dates without a response from the Respondent. On May 21, the Respondent finally agreed to meet on either June 5 or 6. However, the Respondent then rescinded its offer on June 1. Incredibly, the Respondent blamed this cancelation on the Union, falsely citing the Union's "delay in responding to available dates." It was the Respondent—not the Union—that waited almost one full month before agreeing to a date for an initial bargaining session, which it then canceled.

The Respondent's additional stated reasons for canceling this initial session—the Union's purported failure to train employee bargaining representatives, request information, and develop a written contract proposal—were equally baseless. On May 22, the Union reported to the Respondent that it intended to train its bargaining representatives on June 4, and the Union did just that. Moreover, neither the submission of an information request nor the preparation of a contract proposal is a valid prerequisite for an initial bargaining session.

In June, the Union continued to propose potential bargaining dates and questioned the Respondent's refusal to schedule more than one bargaining date at a time. The Respondent, however, again agreed to just one date, July 13. Accordingly, almost 12 weeks elapsed from the Union's first request for bargaining dates (on April 23) to the date the parties met for the first time, July 13.

The Respondent's dilatory tactics persisted. Although the parties had agreed that bargaining sessions would last from 9 a.m. to 5 p.m., the Respondent ended the parties' first bargaining session before noon, claiming that it was unprepared to discuss any element of the Union's initial contract proposal even though the Union had furnished that proposal to the Respondent a week earlier. At the second session on August 6, the Respondent again ended negotiations before noon. At the parties' third session on September 17, the Respondent refused to discuss a number of proposals and again prematurely ended that session before noon.

The parties met on October 16 and November 26, but the Respondent canceled the December 18 session with just one day's notice. Although the Respondent promised that it would reach out to the Union to reschedule that session, it did not do so. Only the Union made an effort to schedule additional sessions. On January 25, 2013, more than 5 weeks after canceling the December 18 session, the Respondent finally communicated with the Union and proposed to meet on February 21. Because of the Respondent's continued dilatory conduct, almost 3 months elapsed between its proposed February 21, 2013 session and the parties' previous meeting on November 26.

On these facts, we find that the Respondent violated Section 8(a)(5) by failing and refusing to meet with the Union at reasonable times to engage in collective bargaining. See *Fruehauf Trailer Services*, 335 NLRB 393, 393 (2001) (finding that employer failed to meet at reasonable times where "it took two letters from the [u]nion and the passage of almost 3 months before the [employer] met with the [u]nion for an initial bargaining session," and when the parties finally met, the employer did not "offer[] any substantive response to the [u]nion's initial proposal"); *Calex Corp.*, 322 NLRB 977, 978 (1997) (employer exhibited an unlawful "pattern of delay" where, even though the parties had 19 bargaining sessions in 15 months following union certification, the employer canceled a number of bargaining sessions because of various asserted scheduling problems), enfd. 144 F.3d 904 (6th Cir. 1998); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996) (finding that employer failed to meet at reasonable times where it would only bargain approximately 1 day per month, limited the time available for bargaining by insisting on meeting in the late afternoon and then leaving early to catch a flight, and was generally reluctant to schedule multiple bargaining dates in advance), enfd. 140 F.3d 169 (2d Cir. 1998).[14]

2. The Respondent's failures to provide, and delays in providing, requested relevant information

The complaint includes multiple allegations that the Respondent violated Section 8(a)(5) by failing to provide, and unreasonably delaying in providing, the Union with requested relevant information. The judge did not address any of these allegations, and the General Counsel has excepted to his failure to do so with respect to certain requests. Consistent with the General Counsel's exceptions, we find the following violations.

On June 1, the Union submitted its first information request.[15] On June 11, the Respondent provided some of the requested information. Left unfurnished was the following information, the relevance of which the Respondent does not question (except for item 7): (1) employee schedules, house name, and shift information; (2) employee transfers, promotions, and movement in and out of the unit since December 11, 2011; (3) job descriptions and memos about job expectations; (4) memos or written materials on policies and procedures, rules, and guidelines for employees; (5) history of wages and raises for employees for a 5-year period; (6) training programs and requirements for staff, including all training records since December 1, 2011; and (7) all payments received from the State. The General Counsel contends that the Re-

[14] It is no defense that the Respondent's chosen lead negotiator, Lofland, canceled bargaining sessions or was otherwise unavailable to meet due to personal and business-related matters, i.e., a vacation, an Achilles tendon injury, miscommunication with his assistant, jury duty, his health concerns and those of his relatives, a State audit, or his preparation for an unfair labor practice hearing. The Board has consistently rejected this "busy negotiator defense." See, e.g., *Calex Corp.*, 322 NLRB at 978 ("[I]t is well settled than an employer's chosen negotiator is its agent for the purposes of collective bargaining, and that if the negotiator causes delays in the negotiating process, the employer must bear the consequences.").

[15] The complaint mistakenly referred to this as the May 22 information request.

spondent violated Section 8(a)(5) by delaying in providing items 1–6 and by failing to provide item 7. For the following reasons, we agree.

The Respondent states that it provided the information requested in items 1–6 on "June 15, July 3, August 3, and September 14." Accordingly, by its own admission, the Respondent delayed in providing some of this information for 10 ½ weeks (June 1 to August 3), and it delayed in providing other of this information for 16 ½ weeks (June 1 to September 14). The Respondent offers no explanation for these delays. We find that these delays were unreasonable and unlawful. See, e.g., *Civil Service Employees Assn.*, 311 NLRB 6, 9 (1993) (10-week delay unlawful); *Montgomery Ward & Co.*, 234 NLRB 588, 589–590 (1978) (3-month delay unlawful).

Turning to the Union's request for information regarding payments received from the State, we find that the Respondent violated Section 8(a)(5) by failing to provide this information to the Union.[16] The Respondent argues that it is has no obligation to provide this financial information because a presumption of relevancy does not apply "to a request for financial structure or condition." The Respondent is correct that "generally, an employer is not obligated to open its financial records to a union unless the employer has claimed an inability to pay." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). The Respondent did not assert inability to pay. However, the Union did not seek general access to the Respondent's financial records. It only asked for information regarding payments the Respondent received from the State of Washington.

Where an employer adopts bargaining positions that make certain financial information relevant, the union is entitled to that information in order "to evaluate and verify the [employer's] assertions and develop its own bargaining positions." Id. The Respondent's proposed management-rights clause and compensation proposal stated that because of "fluctuations" or "reduc[tions]" in State reimbursement rates, the Respondent would reserve the right to modify compensation and benefits on 30 days' notice to the Union. Moreover, the parties' competing proposals regarding compensation suggested that they disagreed on whether current appropriation levels allowed for an increase in existing wage rates. In July, the Union proposed wage rates of $12.09/hour and $14.09/hour for Direct Service Staff and HOHs, respectively. In August, the Respondent proposed maintaining the Direct Service Staff wage rate at $10.09/hour. We find that the information the Union requested regarding payments received from the State would have aided the Union in determining whether the Respondent had any room for potential movement on wage rates—a crucially important bargaining subject—based on current appropriations.[17]

On July 17, the Union requested job descriptions, memos, and job postings concerning the Respondent's HOH position. The Respondent does not question the relevance of this information. On October 12, the Respondent provided the Union with a list of HOH job duties, without any explanation for the delay. We find that this almost 3-month delay in providing this information violated Section 8(a)(5). See *Montgomery Ward & Co.*, 234 NLRB at 589–590 (3-month delay unlawful). The Respondent entirely failed to provide the Union with copies of memos and job postings concerning the HOH position. We find that the failure to provide this relevant information also violated Section 8(a)(5).[18]

3. The Respondent's overall bad-faith bargaining

The complaint alleges, and the General Counsel argues in his exceptions, that the Respondent's conduct, viewed in its entirety, demonstrates that the Respondent was bargaining without a sincere desire to reach a collective-bargaining agreement, and therefore the Respondent engaged in overall bad-faith bargaining. The judge did not address this complaint allegation. For the following reasons, we agree with the General Counsel and find that the totality of the Respondent's conduct during negotia-

[16] Again, the Union repeated its request for this information on October 29. At that time, the Union clarified that it sought "total ISS dollars [a term used to describe payments received from the State] paid to bargaining unit members per month, including overtime since March 2012." The Respondent again refused to provide this information.

[17] We need not pass on whether the Respondent violated the Act by its refusal to furnish information regarding payments received from the State in response to the Union's June 1 request for that information, before the Respondent had given the Union its initial contract proposal (on August 3). The Union asked for the same information again on October 29, by which time the Respondent had clearly linked its bargaining positions to State reimbursement rates. The Respondent's refusal to furnish the information in response to the October 29 request was clearly unlawful under *Caldwell*, supra. The precise date of the violation has no effect on the remedy.

[18] We reject the General Counsel's argument that the Respondent further violated Sec. 8(a)(5) by failing to sufficiently explain the meaning of two terms it used during negotiations. First, on May 21, Lofland stated to the Union that the Respondent's negotiating team would need final approval from "the Board" before the parties could reach a full and complete agreement. The General Counsel asserts that the Respondent refused to identify the "Board." In a June 1 letter to the Union, however, Lofland explained that the "Board" referred to "the Board of Directors of [Kitsap.]" Second, in its compensation proposal, the Respondent stated that current employees, except those working night shifts, would be "red circled." Although the Respondent's proposal did not define the term "red circled," the General Counsel does not dispute the Respondent's assertion that Clifthorne, as an experienced negotiator, would have understood that term to mean that those employees would "continue to receive the same rate of wages."

tions demonstrates that it engaged in bad-faith bargaining.

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960). In determining whether a party has violated its statutory duty to bargain in good faith, the Board "looks to the totality of the circumstances in which the bargaining took place." *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

As discussed in greater detail above, we find that the Respondent exhibited bad faith by engaging in dilatory tactics, failing to provide the Union with requested relevant information, and delaying in providing the Union with relevant information. The Respondent's dilatory tactics began almost immediately after the Union's certification and persisted throughout negotiations. The information the Respondent unreasonably delayed in furnishing to the Union involved matters critical to the Union's ability to formulate proposals and engage in meaningful bargaining, including unit employees' wage histories, schedules, work history, training, employee job descriptions, the Respondent's rules and policies, and information about the HOH position. Moreover, the Respondent's outright refusal to provide information concerning State payments impacted the Union's ability to meaningfully bargain over wages and benefits, perhaps the most critical of all mandatory subjects of bargaining. The Board has found that such unlawful conduct is evidence of an employer's overall bad faith. See, e.g., *Regency Service Carts, Inc.*, 345 NLRB 671, 672–673 (2005).

The Respondent's conduct concerning the HOH position is further evidence of its bad faith. It is well settled that "the withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed on." *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007) (internal quotation omitted); see also *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (1993) (stating that when "an employer withdraws a bargaining proposal on which tentative agreement has been reached and, in its place, substitutes a regressive proposal, this conduct has the inevitable and foreseeable effect of obstructing and impeding the collective-bargaining process"), enfd. sub nom. *NLRB v. Valley West Health Care*, 67 F.3d 307 (9th Cir. 1995). The Respondent offered no explanation for its April 2013 decision to repudiate the parties' tentative agreement the previous November to include the HOH position in the bargaining unit. Such regressive bargaining suggests the Respondent was not serious about coming to an agreement and would continue to walk back proposals so as to frustrate the Union and delay agreement. We find that this unexplained conduct concerning an issue so crucial to collective bargaining—the composition of the bargaining unit—is inconsistent with a sincere willingness to reach agreement.[19]

Finally, although we conclude that the conduct described above, without more, warrants a finding of overall bad-faith bargaining, we agree with the General Counsel that the Respondent's bargaining proposals further demonstrate that the Respondent failed to bargain in good faith. The Board does not evaluate whether particular proposals are acceptable or unacceptable. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403–404 (1952). However, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, such bargaining positions constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69, 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 487–488. Put somewhat differently, an inference of bad-faith bargaining is warranted when an employer's proposals "would strip the [u]nion of any effective method of representing

[19] The scope of the bargaining unit is a permissive subject of bargaining and cannot be modified by the employer without the consent of the union or the approval of the Board. See, e.g., *Solutia, Inc.*, 357 NLRB 58, 62 (2011), enfd. 699 F.3d 50 (1st Cir. 2012). The judge found, however, that the Respondent did not unlawfully insist on the removal of the HOH position from the unit because it did not insist on its position to the point of impasse. There are no exceptions to the judge's finding.

its members . . . further excluding it from any participation in decisions affecting important conditions of employment . . . thus exposing the company's bad faith." *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859 (1982) (internal quotations omitted), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). We recognize, of course, that under the Act neither the Board nor the courts may compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements. *American National Insurance Co.*, 343 U.S. at 403–404. Our examination of the Respondent's proposals is undertaken to determine, not their merits, but "whether in combination and by the manner proposed they evidence an intent not to reach agreement." *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

Considering these factors, we find that the Respondent's proposals evinced bad-faith bargaining. First, the Respondent sought to deny the Union any role in determining wages and benefits during the life of the contract. The compensation provision of the Respondent's final October contract proposal provided that the Respondent "reserves the right to reduce the rates paid if the Department of Social & Health Services reduces the benchmark rate, the Legislature reduces funding, or changes to health care laws and contributions occur." Under this proposal, the Union would be entitled only to *receive notice* of any wage rate changes, not to bargain over proposed changes in wage rates. This provision left no doubt that the Respondent sought to deny the Union any role in establishing wage rates during the life of the contract. The management-rights clause of the Respondent's final contract proposal repeated this language and clarified that the Respondent considered "compensation" to include "wages and benefits." The management-rights clause also provided that the Respondent had the "right to increase compensation and/or benefits of employees above that minimally required under the terms of this Agreement."

Second, by its proposals regarding discipline and discharge, the Respondent sought to retain unfettered discretion over those vitally important areas as well. The Respondent's final contract proposal provided for "at will" employment, with no limits on the Respondent's right to discharge unit employees (other than those limits imposed by law). Although the discipline provision in the Respondent's proposed final contract provided for a progressive disciplinary schedule, utilizing that schedule would be entirely at the discretion of the Respondent. The proposed contract provided that the Respondent "*may*" follow a progressive disciplinary schedule, and the "step to be utilized and the degree of discipline to be imposed is [sic] *solely within the judgment and discretion of [Kitsap]*" (emphasis added). The Respondent's proposed management-rights clause similarly provided the Respondent with the "sole[] and exclusive[] . . . right[]" to "promote, demote, suspend, discipline, layoff, or discharge employees." The proposed management-rights clause also would have granted the Respondent the exclusive right to "make . . . reasonable rules, regulations, deployment plan and policy and operational manual adjustments" and to "enforce the Employer's policies and Operations Manual." This language would grant to the Respondent unilateral control over work rules, policies, and other regulations, which obviously also affect employee discipline.

Finally, the Respondent's proposed contract would exclude from the grievance procedure the Respondent's exercise of the extraordinarily broad discretion provided it under many of these proposed provisions. The Respondent's proposed management-rights clause provided that the rights established therein "shall not be subject to the grievance procedure or to dispute resolution procedure." [20] Accordingly, employees and the Union would be left with no avenue to challenge any of the Respondent's decisions with regard to the nearly exhaustive list of rights reserved to the Respondent under the management-rights clause. The Board has consistently found this factor to be an indicator of bad faith. See, e.g., *Regency Service Carts*, 345 NLRB at 675, 722 (where employer's management-rights clause was "extremely broad," employer exhibited bad faith by proposing that rights granted therein would not be "subject to the grievance procedure and/or arbitration").

These proposals of the Respondent would have required the Union "to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 489; see also *Regency Service Carts*, 345 NLRB at 672–676 (employer bargained in bad faith where it engaged in dilatory tactics, failed to timely respond to information requests, adhered to a proposed management-rights clause that left it with "unilateral control [] over virtually all significant terms and conditions of employment," and insisted on a

[20] The Respondent's proposed management-rights clause additionally grants the Respondent the exclusive right to control other significant terms and conditions of employment, including employees' work schedules; the subcontracting of work; the granting and scheduling of time off, including annual leave; the transfer and relocation of bargaining-unit members; and the assignment of bargaining-unit work to supervisors.

grievance and arbitration clause that excluded from arbitral review the employer's exercise of discretion under its proposed management-rights clause); *A-1 King Size Sandwiches, Inc.*, 265 NLRB at 858–859 (employer bargained in bad faith where it insisted on the unilateral right to set wage rates and "total control over virtually every significant aspect of the employment relationship," including discipline and discharge, work rules and regulations, subcontracting, and the transferring of unit work). In sum, the Respondent's collective-bargaining proposals provide an additional basis for finding the Respondent's bad faith.

For all the reasons discussed above, we find that the Respondent violated Section 8(a)(5) by engaging in overall bad-faith bargaining.[21]

II. 8(A)(3) ALLEGATIONS

The complaint alleges that the Respondent violated Section 8(a)(3) of the Act through a variety of disciplinary actions involving five employees. The judge dismissed all these allegations except for three involving employee Lisa Hennings.[22] For the reasons that follow, we adopt the judge's findings regarding the three violations involving Hennings, we adopt the judge's dismissal of certain 8(a)(3) allegations, and we reverse the judge and find certain additional 8(a)(3) violations as discussed below.[23]

A. Bonnie Minor

1. Facts

As noted, the Union began its organizing campaign in November 2011. Union Organizer Timothy Tharp testified that the Union engaged in a preelection "blitz" during the first weekend of December 2011. As part of this blitz, the Union visited over 50 employees at their homes, solicited employee signatures for authorization cards, and held a meeting on Sunday, December 4 at a local hotel. Tharp further testified that on December 14, the Union mailed employees a flyer, which included the names and photographs of several employees and identified these employees as members of the Union's organizing committee. The judge found that the Respondent learned of the union campaign in December 2011. General Manager Alan Frey, who played a significant role in all of the Respondent's allegedly unlawful disciplinary actions, testified that he learned of the campaign in November 2011. Frey also admitted seeing the union flyer "sometime [in the] middle of December." The Respondent opposed the Union's organizational efforts. Beginning December 7, 2011, the Respondent held several mandatory employee meetings, where a consultant hired by the Respondent advocated against unionization.

The Respondent hired Minor in June 2008 and promoted her to an HOH position in late 2009. Minor was a member of the Union's organizing committee. Minor also attended union meetings, including the December 4 blitz meeting. Her picture was included on the union flyer. On December 1, 2011, Minor received a strongly positive performance evaluation.[24]

In the fall of 2011, Minor and HOH Johnson Ezebrio volunteered to organize multiresidence Thanksgiving and Christmas parties. The Respondent does not dispute the General Counsel's claim that the Respondent has no set rules or guidelines for the planning of such parties. The Respondent's clients were responsible for contributing money for food and other party-related expenses. Prior to the Thanksgiving party, employees reported to Minor that some clients could not afford to participate in both parties. Minor decided to cancel the Christmas party. On December 7, 2011, Frey called Minor, told her she had no right to cancel the party, and instructed her to reschedule the party, which she promptly did. Frey made no mention of discipline.

That same day, after Frey's phone call with Minor, employee Joy Woodward called Frey to report Minor. Woodward reported that Minor told three clients that during her conversation with Frey, Frey had screamed at, yelled at, and been mean to Minor. Frey testified that this behavior concerned him, and he called Minor into his office to discuss it. Human Resources representative Kathy Grice also attended this meeting. Minor complained that Frey treated her like he was her father, but she admitted that Frey did not yell or scream during their

[21] The judge found that the Union, at an unspecified time, "agreed to Respondent's [management-rights] proposal with a minor exception." However, the only statement in the record concerning this finding is Respondent's counsel's assertion, during closing arguments at the Board hearing, that the Union agreed to that proposal during federal mediation, which began in May 2013. Nevertheless, the judge's finding, which no party excepted to, does not impact our determination that the Respondent engaged in overall bad-faith bargaining at least through April 2013.

[22] See Sec. D, below.

[23] No party excepts to the judge's dismissal of 8(a)(3) allegations involving disciplinary actions taken against employee Terry Owens. At the hearing, the General Counsel withdrew 8(a)(3) allegations involving employee Lenora Jones. There are also no exceptions to the judge's dismissal of the allegation that the discharge of employee Johnnie Driskell violated Sec. 8(a)(3). As discussed below, however, the General Counsel contends that the ALJ erred in failing to address whether Driskell's discharge also violated Sec. 8(a)(1). See Part III, infra.

[24] Minor received the highest rating ("[c]onsistently at highest standard") in seven out of ten performance evaluation categories: ability to learn, knowledge of work, initiative, attitude toward company policy, dependability, personality, and attitude. Minor received the second highest rating ("[u]sually of highest quality") in the remaining three categories: quality of work, quantity of work, and industry.

phone conversation. Frey explained to Minor that her behavior was inappropriate because it constituted "triangulation," but he did not indicate any discipline would be forthcoming or was even being considered.

Psychotherapist Michael Allan Comte explained that triangulation occurs when a staff member uses a client to get what the staff member wants. Comte further testified that clients should not learn of conflict between management and staff because such knowledge would be counter-therapeutic. The General Counsel does not dispute the Respondent's assertion that "Client T," a rape victim, overheard Minor's remarks. Frey testified that it took 15 years for him to build a trusting relationship with Client T and that Minor's triangulation could risk that relationship as well as the Respondent's relationship with additional clients.

Shortly after her meeting with Frey and Grice, Minor attended the Respondent's first mandatory meeting related to the union campaign. During the meeting, Minor asked the consultant "how much money [the] Respondent was paying him." Immediately after that meeting, Minor left the facility to attend a union organizing meeting.

After the organizing meeting had concluded, Grice called Minor to inform her that the Respondent had decided to terminate her employment. Minor testified that Grice explained that the termination was the result of her insubordination. The next day, the Respondent issued Minor a letter of termination, which cited Minor's failure to follow protocol concerning the holiday party, poor attitude and judgment crossing professional boundaries, misrepresentation of information to clients and staff, and causing distress to clients.

2. Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(3) by discharging Minor on December 7, 2011. The judge dismissed this allegation. We reverse and find the violation.

Our analysis of the Respondent's disciplinary actions in this case, including Minor's discharge, is governed by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel has the burden to prove that an employee's Section 7 activity was a motivating factor in the employer's adverse employment action against the employee. The elements required to support the General Counsel's initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). Unlawful employer motivation may be established by circumstantial evidence, including, among other things, (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatees, (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016).

If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union or other protected concerted activity. *Libertyville Toyota*, 360 NLRB at 1301. The employer does not meet its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. See, e.g., *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). If the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons in the absence of the protected conduct. See, e.g., *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).[25]

[25] Contrary to the judge's characterization of *Wright Line*, "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel . . . to demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." See *Libertyville Toyota*, 360 NLRB at 1301 fn. 10 (2014) (collecting cases), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).

Regarding *Wright Line*, supra, Chairman Ring agrees with the views expressed by Member Kaplan in *Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3–4 fn. 8 (2018), and by former Member Johnson in *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53 fn. 2 (2013). Thus, he agrees that there is no separate and distinct "nexus" element that the General Counsel must satisfy under *Wright Line*. He emphasizes, however, that *Wright Line* is inherently a causation test. Thus, identification of a causal nexus as a separate element the General Counsel must establish to sustain his burden of proof is superfluous because "[t]he ultimate inquiry" is whether there is a nexus between the employee's protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012). To the extent his colleagues suggest that the General Counsel *invariably* sustains his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains evidence of animus, Chairman Ring disagrees. Not just any evidence of animus against protected activity generally will necessarily satisfy the initial *Wright Line* burden of proving unlawful motivation for the particular

We find that the General Counsel has met his initial burden of showing that Minor's protected activity was a motivating factor in the Respondent's decision to discharge her. There is no dispute that Minor engaged in union activity and that the Respondent knew of such activity. She was a member of the Union's initial organizing campaign and attended union meetings, including the December 4 meeting that capped the Union's campaign blitz. At the Respondent's December 7 mandatory campaign meeting, Minor asked the Respondent's consultant how much the Respondent paid him.

The suspicious timing of Minor's discharge supports our finding that the General Counsel met his initial burden of showing the Respondent's antiunion animus. The Respondent became aware of the Union's organizing campaign a short time before Minor's December 7 discharge. It is undisputed that the campaign blitz, which occurred just days before Minor's discharge, was highly visible. It appears that the Respondent was concerned enough about the Union's mounting campaign, including the blitz, to quickly schedule a mandatory employee meeting facilitated by an outside consultant. Notably, the Respondent discharged Minor on the very day of that first mandatory campaign meeting, at which Minor challenged the Respondent's consultant and expressed her prounion sentiment. Minor's discharge also occurred shortly after she attended a union meeting that same day. We find that this timing strongly supports a finding that Minor's prounion activity was a motivating factor in the Respondent's decision to discharge her.[26] See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) ("The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity . . . may raise an inference of animus and unlawful motive."); *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2 (2015) ("'Timing alone may suggest anti-union animus as a motivating factor in an employer's action.'") (quoting *Masland Industries*, 311 NLRB 184, 197 (1993)), petition for review dismissed 2017 WL 160821 (D.C. Cir. 2017).

The timing of the Respondent's decision is even more suspicious given its proximity to Minor's strongly positive performance evaluation, which she received just 1 week prior to her discharge. Thus, the Respondent chose to quickly discharge Minor, rather than issuing her a lesser form of discipline, despite having just given her a positive performance evaluation and despite the lack of any evidence that Minor had ever been disciplined previously. See *Toll Mfg. Co.*, 341 NLRB 833, 833 (2004) (finding that employer acted with unlawful motivation where it discharged a leading union activist "precipitously and without prior warning on the heels of the union campaign").

Finally, the Respondent's extensive unfair labor practices in violation of Section 8(a)(5), including its overall failure to bargain in good faith, further demonstrate its animus. See, e.g., *U.S. Marine Corp.*, 293 NLRB 669, 669–671 (1989) (animus demonstrated by, among other things, employer's "numerous 8(a)(5) violations," including its failure to provide information and bad-faith bargaining), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992).

Accordingly, the burden shifted to the Respondent to show that it would have discharged Minor even in the absence of her union activity. We find that the Respondent did not meet its burden in this regard. The Respondent argues that Minor's triangulation—her (false) claim, in the presence of Client T, that Frey had screamed at, yelled at, and been mean to her—was "potentially far-reaching" and would have "serious consequences" to its clients. The General Counsel does not dispute Comte's testimony that it is counter-therapeutic for clients, like Client T, to be enmeshed in conflicts between employees and their supervisors. However, while Minor engaged in improper conduct, the judge made an unsubstantiated leap in finding that the Respondent had carried its *Wright Line* defense burden to prove that her discharge would have occurred without regard to Minor's protected conduct. Neither the judge nor the Respondent identified any instances of termination for prior employee counter-therapeutic conduct. The judge summarily concluded that Minor engaged in a "major violation of policy" but failed to identify any protocol by the Respondent for discharging employees for counter-therapeutic conduct. Indeed, discussed below are examples of Respondent's employees who purposefully physically injured clients—surely also deemed a major violation of policy—without being terminated. The judge's finding that Minor's "major violation of policy" warranted her discharge does not equate to a finding that the Respondent met its *Wright Line* defense burden. See *Hicks Oil & Hicksgas,* 293 NLRB 84, 85 (1989) ("A judge's personal belief that the

adverse employment action at issue. See, e.g., *Roadway Express, Inc.*, 347 NLRB 1419, 1419 fn. 2 (2006) (finding that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial *Wright Line* burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004) (finding insufficient facts to show that the respondent's animus against employee Rosario's union activity was a motivating factor in the decision not to recall him), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005). Applying this standard, Chairman Ring agrees with the findings set forth below.

[26] Indeed, when Frey first met with Minor to discuss the incident—which occurred before she expressed her prounion sentiment at the Respondent's mandatory meeting—Frey did not mention discipline of any kind.

employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on [the nondiscriminatory] reason alone."), enfd. 942 F.2d 1140 (7th Cir. 1991). We do not condone Minor's conduct, and we fully recognize the Respondent's important role in ensuring the well-being of its clients. However, the Respondent's articulation of a legitimate reason for its termination decision does not constitute a showing that it would have discharged Minor for that reason even in the absence of Minor's union activities. See *Bruce Packing Co.*, 357 NLRB at 1086–1087 (employer does not meet its *Wright Line* defense burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct). Accordingly, we find that the Respondent violated Section 8(a)(3) when it discharged Minor on December 7, 2011.

B. Alicia Sale and Hannah Gates

1. Facts

Alicia Sale and Hannah Gates worked as Direct Service Staff at the same client residence. Both were prominent supporters of the Union. Sale and Gates appeared on the union flyer mailed to employees on December 14, 2011, which identified them as members of the union organizing committee. As noted, Frey admitted seeing the flyer in mid-December 2011.

On the morning of December 20, 2011, Gates called HOH Jessica Lanzoratta after Sale discovered that a client (Client R) had a bruise and scratch on his leg. Frey testified that Client R is 84 years old and suffers significant speech and physical issues due to cerebral palsy. Lanzoratta reported Client R's physical issues to Frey, who that same morning visited the residence, along with Program Coordinator Mieke Middelhoven. It is undisputed that Sale and Gates were responsible for Client R's care that day.

Frey and Sale met in Client R's room. Frey evaluated Client R and determined that his wheelchair caused the injuries. Client R also complained to Frey that his stomach hurt. Frey testified that Client R stated that he had been asking to go to the doctor all morning. Frey also testified that Sale admitted as much. Sale and Gates testified that Client R did not ask to see a doctor that morning. The judge acknowledged this conflicting testimony and tacitly credited Frey, finding that "Frey heard from client R that he had requested to see a doctor." [27] The Respondent arranged for Lanzoratta to take Client R to the doctor.

That same day (December 20, 2011), the Respondent completed an incident report, which named Gates as the involved employee. The report does not mention Sale. The report explained that Gates observed Client R's injuries, that Frey and Middelhoven determined that the injuries were likely due to a sharp piece of metal on Client R's wheelchair, and that "[Kitsap] Staff are covering up this piece of metal to alleviate the sharp point to avoid further injuries." On the afternoon of December 20, 2011, the Region faxed notification to Frey that the Union had filed its election petition.

Gates testified that an employee from the wheelchair company visited the residence on December 21, 2011. Gates testified that the company employee inspected the wheelchair, reported to Gates that he did not see anything that would have hurt Client R, but suggested they pad the wheelchair if they saw fit. Gates testified that HOH Lanzoratta told her that she would purchase materials to pad the wheelchair. Gates further testified that Frey was aware of the wheelchair company's visit, that Lanzoratta would repair the wheelchair, and that Frey was not upset that Sale and Gates failed to repair the wheelchair.

Although the judge did not explicitly cite Gates' testimony, he appeared to credit Frey's contrary testimony. Frey testified that he told Sale and Gates to repair the wheelchair—which is consistent with the earlier incident report stating that "[Kitsap] Staff are covering up this piece of metal . . . to avoid further injuries"—and that they failed to do so. The judge found that Frey returned to the residence on December 21, discovered the repairs had not been made by Sale and Gates as requested, and completed them himself.

On December 23, 2011, the Respondent informed Sale and Gates, through identical letters, that it had placed them on administrative leave pending further investigation.[28] The letters fault Sale and Gates for not honoring Client R's requests to see a doctor and for failing to repair the wheelchair. The letters conclude that the employees' "failure to act in response to the client's needs and requests jeopardized the client [and] Kitsap . . . and constitutes neglect." On January 4, Gates attended a representation case hearing as a supporter of the Union.

Frey reported the incidents to the State of Washington. The State's investigator, Rodney Johnson, testified at the

[27] The General Counsel 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.

[28] These letters do not state that Sale's and Gates' suspensions were without pay, and the General Counsel does not allege as much.

hearing. Johnson testified that he first contacted Frey about the investigation by phone on January 31.

On February 1, the Respondent discharged Sale and Gates. The Respondent issued them identical discharge letters, which cited their refusal "to seek medical assistance in a timely manner for Client [R] when he asked to be transported the Doctor as he was having severe stomach pains" and their failure to follow an order "to cover these sharp points [on the wheelchair] with tape."

State investigator Johnson testified that following his initial contact with Frey, he subsequently interviewed Sale, Gates, Client R, and HOH Lanzoratta. On March 27, the State "closed this case without disciplinary action because no violation was determined."

2. Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(3) by placing Sale and Gates on administrative leave on December 23, 2011, and by discharging them on February 1. The judge dismissed these allegations. We reverse and find the violations.

The General Counsel has met his initial burden of showing that Sale's and Gates' protected activity was a motivating factor in the adverse employment actions. Both employees engaged in protected activity, and the Respondent had knowledge of that protected activity. Sale and Gates supported the Union, including by participating as members of the union organizing committee. Their names and pictures appeared on the union flyer, of which Frey became aware in mid-December 2011.

The timing of the adverse actions taken against Sale and Gates supports a finding that the General Counsel met his initial burden of showing antiunion animus. The Respondent placed Sale and Gates on administrative leave 3 weeks after the union blitz, less than 2 weeks after they appeared on the union flyer, and just 2 days after the Respondent received notice that the Union's campaign was successful enough to support the filing of an election petition. In addition, the Respondent discharged Gates about 1 month after Gates attended the preelection hearing, where she lent her support to the Union.

Notably, the Respondent did not wait until the conclusion of the investigation before deciding to discharge Sale and Gates. They were discharged on February 1, even though the results of the investigation were not issued until March 27. Both employees were on administrative leave during the investigation; there was no evident risk to patients that could have prompted the Respondent's hasty decision.

The General Counsel has further demonstrated animus by his strong showing that Sale and Gates were treated disparately compared to other employees who committed similar acts. The General Counsel introduced disciplinary reports concerning employees Jackie Cavanaugh and Gerry Goodman. Regarding Cavanaugh, on December 2, 2011, Manager Dawn Worthing filed an incident management report stating that Cavanaugh yelled at a client, pulled the client by her arms, put her knee into the client's side, and pushed the client's chair from behind in an effort to place the client in a timeout. Frey reported this incident to the State of Washington for investigation. Frey testified that the State closed its investigation on October 17 (the record does not indicate the outcome of that investigation). Frey further testified that, during the investigation, Cavanaugh "stayed working the whole period of time" but "was never left unsupervised with a client." As of the May 2013 hearing date in this proceeding, the Respondent continued to employ Cavanaugh. Regarding Goodman, on August 25, 2011, Worthing filed an incident management report stating that Goodman purposely injured a client's ankle. The Respondent retrained all staff on how to physically transfer that client and prohibited Goodman from working alone with the client. The Respondent does not assert that it placed Goodman on administrative leave because of his misconduct.

The Respondent has failed to explain why it treated Sale and Gates far more harshly than Cavanaugh and Goodman for committing comparable, if not lesser, instances of patient neglect and mistreatment. Sale and Gates assertedly neglected to repair a client's wheelchair, causing injury to the client, and they failed to address the client's request to see a doctor. In contrast, the Respondent's client report for Cavanaugh documents intentional abuse, including physical abuse: pulling the client by her arms and putting her knee into the client's side. But whereas Sale and Gates were placed on administrative leave and subsequently discharged, the Respondent continued to employ Cavanaugh and merely ensured that she was not left unsupervised with that specific client. Notably, the Cavanaugh incident occurred just weeks before the Sale and Gates incident. The Goodman incident also involved a client's physical injury due to employee neglect or misjudgment, or worse: Worthing's report stated that Goodman *purposely* injured the client's ankle. Again, rather than discharging Goodman or placing her on administrative leave, the Respondent merely retrained staff and prohibited Goodman from working alone with that client. Consistent with well-established Board precedent, we find that the disparate treatment of Sale and Gates strongly supports an inference of unlawful motivation on the Respondent's part, which we draw. See, e.g., *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006) (employee's verbal warnings and discharge for failing to

sanitize tools found unlawful where "other employees received only written warnings for sanitation violations and were not discharged"); *Naomi Knitting Plant*, supra, 328 NLRB at 1283 (employee was discharged for conduct "for which other employees in the same position were not disciplined. Such is a classic case of disparate treatment.").

We find that the Respondent has not met its defense burden under *Wright Line*. The Respondent has offered no explanation for its disparate treatment of Sale and Gates. It contends that it had legitimate reasons for disciplining Sale and Gates because the testimony shows that they failed to repair the wheelchair and failed to act on Client R's requests to see a doctor. Again, however, the Respondent's burden is not merely to show that it had a legitimate reason to act as it did, but to prove that it would have taken the challenged actions had Sale and Gates not engaged in protected conduct. E.g., *Bruce Packing*, 357 NLRB at 1086–1087. The Respondent has not done so. Accordingly, we find that the Respondent violated Section 8(a)(3) when it placed Sale and Gates on administrative leave and subsequently discharged them.

C. Gary Martell

1. Facts

The Respondent hired Gary Martell in October 2011. That same month, Martell signed and initialed the Respondent's "Employee Professional Relationship Contract," which identifies "behavioral requirements that all staff must follow."[29] The General Counsel does not allege that this contract is unlawful. In December 2011, Martell began working with several clients as part of the Respondent's Supportive Living Lite (SLL) program. Unlike direct service clients, who require significant support, clients in the SLL program require less assistance. Martell's duties in this position included completing paperwork regarding clients' finances—i.e., preparing an accounting of clients' income and money spent—and presenting that paperwork to the Respondent during monthly meetings.

Client Resources Specialist Jamie Callahan testified that, during the spring of 2012, Martell failed to notice an unauthorized charge on a client's bank account. Callahan testified that she contacted the company to reverse the charge and instructed Martell to monitor the client's bank account to verify that the charge was reversed. The company did not reverse the charge, and Callahan testified that Martell failed to detect its failure to do so. There is no dispute that Martell struggled with properly completing financial paperwork.[30] Callahan testified that she continued to train Martell in this aspect of his responsibilities.

The Respondent presented undisputed evidence that Martell also failed to properly schedule his time with clients. Frey testified that Manager Worthing learned that Martell's monthly schedule revealed scheduling overlaps, i.e., instances where his schedule showed him working with two clients at the same time. Worthing testified that this was inappropriate because the Respondent can only bill one client for any given block of time.

On May 22, the Union notified the Respondent that it had selected five employees, including Martell, to serve on the Union's bargaining committee.[31]

In a May 31 email to Frey, Worthing reported that she worked with Martell to correct his scheduling overlaps. Worthing also noted that she discussed with Martell his "trouble with financial paperwork." On June 1, Frey issued Martell a written warning for his scheduling errors. The warning also notes that Callahan and Manager Molly Parsons reported that they had to "walk [Martell] through [his] financials on several occasions" and expressed their concern that Martell did not "grasp the concept of the required paperwork" and did not put forth much effort in completing it. The General Counsel does not allege that this written warning violated the Act.

On June 8, Martell met with Callahan and Parsons to discuss his May paperwork. Callahan testified that Martell's financial paperwork was "completely blank." Martell offered no explanation for his failure to complete the paperwork. Callahan immediately reported this to Frey, who instructed Martell to complete the paperwork in another room. A few minutes later, Frey returned and suspended Martell without pay.

[29] By signing the Respondent's Employee Professional Relationship Contract, Martell agreed that (1) he was "not allowed to have any personal contact with clients outside of [his] usual work hours," (2) he was "only allowed to be present at the clients [sic] home during [his] scheduled work shift," a policy that "helps protect against some staff being viewed as more caring than other staff and helps staff avoid developing personal relationships outside their professional role," and (3) he "must maintain clear separation of [his] personal life and [his] professional life"—specifically, he "shall not discuss information of high emotional content about [his] personal life with clients. This includes information about [his] personal relationships, work problems, financial situation, or living situation."

[30] The General Counsel acknowledges that "[e]ver since he was assigned to his first SLL client in December 2011, Martell had struggled with the paperwork required of him," and that "from January through May 2012 . . . Martell showed up to his monthly paperwork meetings at Respondent's office with incomplete financial paperwork and questions on how to properly complete it."

[31] The judge mistakenly found that Martell attended a bargaining session on June 4. The parties did not bargain on that date. Rather, the Union held its training session for bargaining representatives—including Martell—on June 4.

That same day, Frey issued Martell a letter listing six reasons for his suspension: (1) failure to complete the paperwork due in early June, (2) inaccurate January paperwork, (3) untimely and inaccurate April paperwork, (4) failure to appropriately complete his schedule by overlapping client time, (5) inappropriately raising his voice at staff on June 7, and (6) "dropp[ing] the ball" by failing to complete paperwork on a daily basis.

On June 12, Frey, Program Coordinator Middelhoven, Union Representative Tharp, and Martell met to discuss Martell's suspension. Martell admitted the scheduling errors and acknowledged that there was no excuse for his failure to complete the financial paperwork due in June.

On June 20, Frey informed Martell that he was still on suspension pending the Respondent's continued investigation into the matters outlined in Martell's June 8 written suspension. Frey asked that Martell respond to questions concerning the unauthorized bank charge incident discussed above, and more generally, Frey asked whether Martell understood the "importance of preparing client financials, both as a requirement of this agency and the State of Washington." Frey also raised a new issue, asking Martell to explain his decision "on more than a dozen occasions" to use clients' first and last names in financial paperwork, thereby "disclosing confidential information without a signed release to do so." Martell provided a written response as instructed.

During his suspension, Martell went to a client's home during nonworking hours and discussed his suspension with the client. Frey testified that he spoke with the client about his conversation with Martell. Frey testified that the client, who is autistic and has a tendency to fixate on things, spoke about the specifics of Martell's suspension and became "very obsessed" with the Union after speaking with Martell. On June 28, the Respondent sent Martell a letter asking that he explain his meeting and conversation with this client. On July 9, Martell provided a written response. Martell admitted that he told the client he was "in trouble for not completing [his] paperwork." He also acknowledged the Employee Professional Relationship Contract, which prohibits such conduct. On July 13, Martell participated in the parties' first bargaining session.

The Respondent discharged Martell on July 19. In an explanatory letter, the Respondent reiterated the six reasons cited in Frey's earlier suspension letter and added two additional reasons for Martell's discharge: (1) at a talent show rehearsal, engaging in a conversation with a staff member for an hour instead of engaging with clients and completing paperwork, and (2) failing to follow "[Kitsap] policies regarding confidentiality despite specific direction to do so." The letter also referenced Martell's failure to adhere to the Employee Professional Relationship Contract described above.

2. Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(3) by placing Martell on administrative leave on June 8 and discharging him on July 19. We adopt the judge's dismissal of these complaint allegations.

We find it unnecessary to determine whether the General Counsel met his initial burden under *Wright Line*. Even if he did, we find that the Respondent established that it would have suspended and discharged Martell even in the absence of his protected union activity. As explained above, Martell exhibited a pattern of poor performance in meeting his duty to complete financial paperwork. The Respondent did not ignore his poor performance but rather addressed it through training, coaching, and a lawful June 1 written warning. That warning did not lead to improved performance, as evidenced by Martell's showing up for a June 8 meeting having completed no financial paperwork at all. We are persuaded that the Respondent would have imposed further discipline on Martell for this incident even in the absence of his union activities.

The General Counsel argues that Martell was treated disparately compared to other employees whom the General Counsel argues similarly failed to properly complete client financial paperwork.[32] While the Respondent does not dispute that it did not suspend or discharge these comparator employees, we do not find those instances comparable to Martell's conduct. The record demon-

[32] The General Counsel introduced evidence of four "Caregiver Document Events," which memorialized the following incidents:

(1) On September 22, 2011, the Respondent informed Muriel Spence that because she took two clients on a cruise, she was responsible for "ledgering their money." A few days later, Spence had not completed this ledgering. Spence requested an original balance, and the Respondent provided it.

(2) On June 8, Tamera McDowell did not show up for a paperwork meeting. McDowell claimed she forgot about the meeting, but the Respondent observed her working on the paperwork outside an office. McDowell admitted that she had not forgotten about the meeting and had not completed the paperwork, apologized for making excuses, and promised to complete her paperwork.

(3) On July 6, the Respondent explained to Kimberley Smith that she needed to maintain a daily running balance of a client's finances, rather than just an end-of-the-month balance.

(4) On September 10, Joshua Westgate arrived to a paperwork meeting without reconciling a client's bank statement and having failed to complete entries for two transactions. Westgate completed the reconciliation and two entries. The Respondent informed Westgate that it was important he complete and reconcile ledgers in advance of paperwork meetings.

strates that those employees failed, on one occasion, to properly complete financial paperwork. By comparison, Martell exhibited an ongoing pattern of failing to properly complete financial paperwork, for which he received training, coaching, and a lawful written warning. Martell's lawful warning accurately reflected this pattern of failure: it reported that the Respondent had to "walk [Martell] through [his] financials on several occasions," and it expressed concern that Martell did not "grasp the concept of the required paperwork." Moreover, on June 8 Martell showed up at his financial paperwork meeting without having prepared any records at all. In contrast, the General Counsel's comparators either failed to *fully* complete paperwork, or they fully completed their paperwork, but with mistakes.

The General Counsel argues that the Respondent was willing to tolerate Martell's incomplete paperwork for months and only chose to discipline him in early June after learning that he would represent the Union during contract negotiations. We are unpersuaded by this argument. The Respondent did not ignore Martell's incomplete paperwork. Callahan coached and trained Martell, and Worthing also worked with him. Moreover, there is no dispute that the written warning issued to Martell on June 1 was lawful, and this discipline also occurred after the Respondent learned of Martell's status as a union bargaining representative. Martell's performance following this lawful warning promptly went from bad to worse when he showed up on June 8 without having done *any* work on required financial reports. It stands to reason that the Respondent would treat Martell's failure to take the June 1 warning to heart by imposing additional and progressive discipline. We find that it would have done so regardless of Martell's union activity.

The General Counsel also questions the timing of the Respondent's decision to discharge Martell, just 6 days after the parties' first bargaining session. But the Respondent discharged Martell at that time only after he approached a client to complain about his suspension. The Respondent maintains a policy prohibiting such conduct, which the General Counsel does not allege to be unlawful. And the Respondent offered undisputed evidence that this discussion in fact had a negative impact on that client.

Finally, we reject the General Counsel's suggestion that the Respondent should be faulted for delaying almost 2 months before it decided to discharge Martell. The Respondent used this time to investigate Martell's actions, to meet with Martell and a union representative to discuss his suspension, and to provide Martell the opportunity to explain, in writing, his failure to provide a month's worth of financial paperwork, his decision to enmesh a client in his suspension, and his overall work performance. Frey testified that before he could discharge Martell, he had to discuss the matter with administrator Closser, speak to Callahan, and follow various HR procedures, all of which took time to complete. If anything, this conduct bolsters our finding that the Respondent met its defense burden under *Wright Line*. Cf. *Denholme & Mohr, Inc.*, 292 NLRB 61, 67 (1988) (finding that employer's "failure to investigate the alleged misconduct of its employees fully and fairly, or even to provide them with an opportunity to rebut the accusations made against them, suggests the presence of discriminatory motivation").

Accordingly, we dismiss all 8(a)(3) complaint allegations relating to Martell.[33]

D. Lisa Hennings

1. Facts

The Respondent hired Lisa Hennings in November 2009 and promoted her to an HOH position in early 2010. Hennings' name and picture appeared in the Union's December 2011 flyer. In December 2011, Hennings attended a company meeting, which Frey also attended. The judge found that at this meeting, Hennings "indicated to Frey that she was in favor of the Union." Specifically, Hennings testified that "the subject of the union came up," she told Frey "you know what side I'm on . . . I'm pro union," and Frey responded, "I kind of figured that." Union Representative Tharp testified that Hennings was present at the election vote count on March 15.

On March 16, the Respondent issued Hennings a letter of reprimand for lending money to three clients during a grocery trip. The reprimand noted that "the OPSL [Olympic Peninsula Supportive Living] Code of Conduct states '[c]aregivers are not to borrow or lend anything which includes money or food from their clients.'" The General Counsel does not dispute the existence of this rule or allege that it is unlawful. Hennings admitted that she lent the clients money, but testified that it was "common practice" for employees to lend clients money and that the Respondent "never" disciplined employees for doing so.

On April 12, the Respondent issued Hennings a written warning for being 7 minutes late to work. The Respond-

[33] Member Pearce would find that the Respondent did not meet its burden of showing it would have discharged Martell even in the absence of his protected activity. The Respondent learned about Martell's visit to the client in late June, but did not discharge him for that and other conduct until July 19, which was only *after* he participated in the July 13 bargaining session as a member of the Union's bargaining committee. The Respondent has failed to provide any valid explanation for this sequence.

ent does not dispute Hennings' testimony that she was late that day because she had attended a union meeting, where the Union held nominations to select members of its bargaining committee. In May, the Union announced that Hennings was a member of its bargaining committee. Hennings attended the August 6 bargaining session.

On August 10, the Respondent issued Hennings a letter of direction. The letter reported that Frey witnessed Hennings completing a staff schedule, which Frey asserted was not an HOH job duty. Hennings testified that she was not scheduling employees but rather writing down shift assignments that had been made by Human Resources Representative Grice. In the letter of direction, Frey stated: "May I remind you, that in sworn testimony, at NLRB Headquarters in Seattle, [Kitsap] Head of Households testified that they do not and have never scheduled staff." In the judge's words, Frey told Hennings that "she had better not be scheduling because there had been testimony in the Board representation case that head of households did not do scheduling." The judge found, however, that the Respondent presented contrary evidence at the representation-case hearing that "heads of household did scheduling for their households." The Respondent does not dispute the judge's finding.

On August 15, the Respondent issued Hennings a letter of direction regarding two issues, monthly narratives and medication charting. First, the letter noted that Hennings had only made three narrative entries for that month, and it admonished her for making "little progress." The letter also stated that "the trend you were setting seemed to also be followed by the rest of your Household as most of the narrative pages were empty for each of the clients." Second, the letter admonished Hennings for failing to record, on two occasions, why a client did not receive medication as scheduled. It is undisputed that caregivers are responsible for recording clients' daily activities, including a log of medication taken and any reason why a client did not receive medication.

On August 20, the Respondent issued Hennings a written warning for failing to work an assigned schedule. On that day, Hennings attended a birthday party at a residence (not her regularly assigned residence) and was responsible for the care of two clients who attended that party. To assist her daughter, who had locked herself out of her home, Hennings left the party at a time when one of her clients remained there. Hennings testified that the HOH running the party agreed to watch Hennings' client while Hennings helped her daughter. Hennings testified that after helping her daughter, she returned to her regularly assigned residence because by that time, her second client had also left the party. In the written warning, Frey stated that he happened to drive by when Hennings returned to her regularly assigned residence, and he did not see her with any clients. Frey expressed concern that Hennings was not attending the party and supporting her two clients, and he admonished Hennings for not securing coverage for her clients.

In November, the Union held a protest march at the home of the Respondent's owner. Hennings did not participate in this march. In December, Frey and the owner approached Hennings and complained about the march. Hennings stated that she was not involved. The Respondent does not dispute Hennings' testimony that Frey responded, "You're union, you're involved."

On February 4, 2013, Frey called Hennings, stated that he had serious concerns with her work, and placed her on administrative leave without pay. On February 6, 2013, the Respondent demoted Hennings. In a written document, Frey cited the following conduct as reasons for her demotion: (1) Hennings' April 2012 7-minute late arrival, (2) her August 2012 unauthorized scheduling of staff, (3) her August 2012 failure to complete narratives and note medication issues, and (4) her August 2012 decision to leave the client party to help her daughter. The Respondent also cited a host of additional reasons, including multiple medication errors, acting "too touchy feely" with clients, scheduling medical appointments without securing adequate staff coverage, and general job inattentiveness. Frey concluded that he had "serious concerns as to your ability to follow direction as given to you by your Supervisors as well as your ability to follow this agency's policy and procedures."

2. Analysis

For the following reasons, we adopt the judge's findings that the Respondent violated Section 8(a)(3) by issuing Hennings the April 12 written warning and the August 10 letter of direction, and by demoting Hennings on February 6, 2013. We reverse the judge and find that the Respondent also violated Section 8(a)(3) by issuing Hennings the August 15 letter of direction and by placing Hennings on administrative leave on February 4, 2013. Finally, we affirm the judge's dismissal of complaint allegations concerning Henning's March 16 letter of reprimand and her August 20 written warning.[34]

[34] In agreeing with the judge's dismissal of the allegation concerning the March 16 letter of reprimand, Chairman Ring and Member Pearce note that Hennings' conduct—lending money to clients—violated the Respondent's rules, and the judge implicitly discredited Hennings' testimony that lending money was a common practice engaged in by employees without discipline.

a. The April 12 written warning for lateness

We find that the General Counsel has met his initial burden under *Wright Line* to show that Hennings' protected conduct was a motivating factor in the Respondent's decision to issue Hennings a warning on April 12 for being 7 minutes late. Concerning this allegation and all others that involve Hennings, the General Counsel has established that Hennings actively supported the Union and that the Respondent had knowledge of that protected activity. Hennings' name and picture appeared in the Union's December 2011 flyer; at a December 2011 meeting with Frey, Hennings confirmed her prounion stance when she told Frey, "You know what side I'm on"; and Hennings was present at the March 15 election vote count. The timing of the April 12 warning also supports the General Counsel's case. On the same day she received this written warning, Hennings attended a meeting where the Union considered nominations for its bargaining committee. Indeed, this meeting was the reason Hennings was 7 minutes late.

In addition, the General Counsel established that other employees were guilty of more egregious instances of tardiness than Hennings' 7-minute late arrival, but unlike Hennings they were not disciplined. The Respondent does not dispute that the following employees received no discipline for the following conduct:

- In 2005, employee Manuel Gipson was a "no show no call" for 9 days, claimed time for several days that he had not worked, and offered a false medical excuse for his failure to work.
- In 2006, HOH Shirley Gallauher was "late for work between 5 and 15 minutes, 3 or 4 days per week."
- In 2007, employee Janice Henry was "late almost everyday [sic] for . . . two weeks." The Respondent warned her that if she were late again, "disciplinary action would need to be taken."
- In 2008, employee Andie Rood worked for just a few minutes and left, without telling the Respondent, because of a backache. Rood's unannounced departure resulted in clients being "low on food."

These instances of disparate treatment further support the General Counsel's *Wright Line* case.

The Respondent offered no explanation for this disparate treatment or any other evidence to show that it would have issued the April 12 warning even in the absence of Hennings' union activities. Accordingly, we find that the Respondent violated Section 8(a)(3) when, on April 12, it issued Hennings a written warning for being 7 minutes late.

b. The August 10 letter of direction for staff scheduling

Next, the General Counsel alleges that the Respondent violated Section 8(a)(3) when it issued Hennings a letter of direction on August 10 for scheduling staff. We find that the General Counsel met his initial burden of showing that Hennings' union activity was a motivating factor in this discipline. In addition to the above evidence of Hennings' protected activity and the Respondent's knowledge of it, in May the Union announced that Hennings would act as one of its bargaining representatives. In addition, Hennings was an HOH, and the letter of direction itself referenced the protected activity of HOHs in testifying at the representation-case hearing. In essence, the Respondent disciplined Hennings for conduct inconsistent with that testimony, not with her position as an HOH: Frey admitted that at the representation hearing, he testified that HOHs work "hand in hand" with HR Manager Grice regarding employee scheduling. Incredibly, the Respondent continues to argue that it does not permit HOHs to schedule staff and therefore Hennings' discipline for doing so was lawful. The Respondent does not dispute, however, that it took a contrary position at the representation-case hearing. Given this contradiction, we find pretextual the Respondent's asserted reason for issuing Hennings the August 10 letter of direction. Accordingly, we find that the Respondent violated Section 8(a)(3) when it issued the August 10 letter of direction.

c. The August 15 letter of direction for failing to complete narratives and medical charting

The General Counsel alleges that the Respondent violated Section 8(a)(3) on August 15 when it issued Hennings a letter of direction for failing to complete client narratives and medical charting. In addition to evidence cited above that supports the General Counsel's initial *Wright Line* case, we find persuasive the General Counsel's evidence of disparate treatment. Concerning Hennings' failure to complete client narratives, Frey noted in the letter of direction that "the trend you were setting seemed to also be followed by the rest of your Household as most of the narrative pages were empty for each of the clients." The Respondent does not dispute Hennings' testimony that the Respondent did not discipline these other employees for failing to complete client narratives. Concerning Hennings' medical charting errors, Hennings testified that other staff members were responsible for those errors. Although the Respondent argues that Hennings was also responsible for those errors because her position as an HOH required that she correct them, Frey admitted at the hearing that the employees who committed the errors did not receive any discipline. According-

ly, we find that the Respondent violated Section 8(a)(3) when, on August 15, it issued Hennings a letter of direction for failing to complete narratives and medical charting.

d. The February 4, 2013 administrative leave and February 6, 2013 demotion

We find that the Respondent also violated Section 8(a)(3) on February 4, 2013, when it placed Hennings on administrative leave, and on February 6, 2013, when it demoted Hennings. Two months earlier, the Respondent continued to show antiunion animus when Frey, in the presence of the Respondent's owner, accused Hennings of involvement in the Union's protest march outside the owner's home, stating, "You're union, you're involved." But even apart from this statement, the Respondent's adverse employment actions on February 4 and 6, 2013, violated the Act because they were based in part on discipline we have found unlawful. When Frey placed Hennings on administrative leave, he generally cited his serious concerns with her work, which logically encompasses work-related conduct for which Hennings had been unlawfully disciplined. And Hennings' demotion letter expressly relied on unlawful discipline, citing Hennings' April 12 written warning and August 10 and 15 letters of direction. Accordingly, the Respondent violated Section 8(a)(3) when, on February 4, 2013, it placed Hennings on administrative leave without pay, and when, on February 6, 2013, it demoted her. See *Hays Corp.,* 334 NLRB 48, 50 (2001) ("It is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful.").

e. The August 2012 written warning for leaving a client at a party

We also find that the Respondent has shown that it would have issued Hennings the August 2012 written warning even absent her protected activity. It is undisputed that one of Hennings' clients was attending a party, that Hennings was supposed to remain with this client, and that Hennings left the residence where the party was held to attend to a matter unrelated to work (helping her daughter, who had locked herself out of her home). The General Counsel introduced comparator evidence, but we find this evidence too dissimilar to show that Hennings was treated disparately. The General Counsel also points out that the Respondent did not discipline staff at the residence who agreed to watch Hennings' client. However, those employees remained at their assigned residence, while Hennings admittedly left her assigned residence to perform a matter unrelated to work. Finally, the General Counsel contends that Frey provided shifting explanations for his decision to issue Hennings this written warning, in that Frey initially testified that he disciplined Hennings because she left two clients alone at the residence, and Frey later acknowledged that Hennings had in fact left just one client alone. The General Counsel's contention is meritless. Frey testified that he disciplined Hennings because it is improper for an employee to leave clients—regardless of how many—when the employee is responsible to monitor them. Accordingly, like the judge, we dismiss the complaint allegation that the Respondent violated Section 8(a)(3) when it disciplined Hennings for doing so.

III. THE SECTION 8(A)(1) WORK-RULE ALLEGATIONS

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining seven handbook rules: (1) Professional Boundaries, (2) Professional Standards, (3) Conditions of Employment, (4) Misconduct, (5) Canvassing or Soliciting, (6) Employee Professional Relationships, and (7) Reasons for Termination. We find that it will effectuate the policies of the Act to sever these allegations and retain them for further consideration.

In addition to alleging that the discharges of Minor, Driskell, and Martell violated Section 8(a)(3) of the Act, the General Counsel also contends they were unlawful under Section 8(a)(1) on the basis that the Respondent discharged each of these employees pursuant to an allegedly overbroad rule. Having found Minor's discharge violated Section 8(a)(3), we find it unnecessary to pass on whether her discharge was also unlawful under this alternate theory of violation because doing so would not materially affect the remedy.[35] As to the discharges of Driskell and Martell, we find no merit to the General Counsel's 8(a)(1) theory of violation because the record fails to demonstrate that the Respondent relied on any allegedly unlawful work rule as a basis for their discharges. The letters of termination issued to Martell in July and to Driskell in September do not cite any of the rules alleged to be unlawful, nor is there any clear indication in the record that the Respondent otherwise relied on any of those rules when it discharged Martell and Driskell.

IV. STRICTER ENFORCEMENT OF RULES IN RESPONSE TO UNION ACTIVITY

The complaint alleges that the Respondent violated Section 8(a)(3) by "chang[ing] its past practice of not

[35] Having found it unnecessary to pass on this theory of violation, Chairman Ring does not reach the legal issue of whether an employer violates Sec. 8(a)(1) by disciplining an employee pursuant to an unlawfully overbroad work rule.

enforcing its rules, policies, and/or procedures and . . . implement[ing] a new practice of strictly enforcing those rules, policies and/or procedures" in response to employees' union activities and to the Union's certification as bargaining representative. The judge did not address this allegation. For the reasons that follow, we find that the Respondent violated the Act as alleged.

An employer violates Section 8(a)(3) when it increases discipline of its employees or more strictly enforces its work rules in response to union activities. *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), enfd. 928 F.2d 609 (2d Cir. 1991). "If the General Counsel demonstrates that the pattern of discipline after the commencement of union activity deviated from the pattern prior to the start of union activity, a prima facie case of discriminatory motive is established requiring the Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities." *Jennie-O Foods*, 301 NLRB 305, 311 (1991).

Initially, we find that the General Counsel established a prima facie case of discriminatory motivation. Employee Gates testified that Frey "started showing up more after the union." Employee Jack Hopkins testified that after the union campaign went "public," "working conditions became difficult, if not oppressive." Hopkins testified that inspections, which a "co-worker" previously completed on a monthly basis, "became more frequent" and were "now done by a member of the management team." Hopkins further testified that "inspections which formerly just included things like the smoke detectors, they would go through the kitchen cabinet and pull out every can and inspect every expiration date. There was that kind of pressure put on." Employees Hennings and Terry Owens corroborated this testimony. Owens, who started working for the Respondent in February 2011, testified that he never saw Frey or Kimberly Krusi (another member of management) visit his assigned residences until "December of 2011 to January of 2012," when the union campaign was underway. Hennings testified that prior to that campaign, Frey visited her assigned residence "maybe once every two weeks," but he visited "more frequently" after the union campaign commenced.

Hennings' additional testimony demonstrates that the Respondent also began to document disciplinary actions more rigorously. Hennings testified that after she received her March 16 letter of reprimand, Client Resource Specialist Callahan explained to Hennings "that she [Callahan] understood what I was going through, but that they were looking at a possible audit and they were having to—when they discipline or terminate[] people, they were now having to document in the files." The timing of this new audit policy is telling: the election, which the Union won, took place on March 15, the day before Hennings received the letter of reprimand.[36]

We also find compelling the undisputed testimony of union negotiator Clifthorne. Clifthorne testified that during the October bargaining session, the parties discussed employee access to their personnel files, including past disciplinary documents and performance evaluations. Clifthorne testified that in the course of this discussion, Frey said: "If people wanted more write-ups, they could have them, starting then." The Respondent does not dispute this testimony. And on the very day Frey made this comment, the Respondent issued 10 employees written warnings for failing to properly complete client narratives. The Respondent does not dispute the General Counsel's assertion that, prior to this date, there is no documentary evidence that the Respondent ever disciplined employees for failing to complete narratives. Moreover, in addition to instances of discipline alleged to have violated Section 8(a)(3), discussed above, the General Counsel introduced evidence of over 40 written disciplines issued by the Respondent from April 2012—the month after the Union's certification—through December 2012. This represented a sharp break from prior practice. Indeed, the Respondent admits that there is "little evidence of discipline" prior to the Union's arrival and that it only began documenting discipline because unionization purportedly required it to do so. Yet the Respondent cites no specific testimony to confirm that it disciplined employees prior to the Union's arrival as frequently as it did post-unionization. Accordingly, we find not only that the General Counsel established a prima facie case of discriminatory motivation, but also that the Respondent failed to show that its increased discipline was motivated by considerations unrelated to its employees' union activities. *Jennie-O Foods*, supra.

Based on the foregoing, we find that the Respondent violated Section 8(a)(3) by more strictly enforcing its disciplinary rules because its employees supported the Union and engaged in union activities. See *St. John's Community Services—New Jersey*, 355 NLRB 414, 414–415 (2010) (employer violated Section 8(a)(3) where, prior to unionization, it inconsistently enforced its medication administration policy, told an employee that it would go "by the book" because of its employees' union activity, and discharged an employee under its new "by the book" policy "less than 2 weeks after the [u]nion's certification"); *Print Fulfillment Services LLC*, 361 NLRB 1243, 1245–1247 (2014) (employer violated Sec-

[36] We have dismissed the allegation that the letter of reprimand violated the Act.

tion 8(a)(3) where it responded to a union's request for information concerning its disciplinary policies by announcing and implementing a new policy of "keep[ing] records of any disciplinary actions").

AMENDED CONCLUSIONS OF LAW

1. Kitsap Tenant Support Services, Inc. (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SL Lite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet with the Union at reasonable times for the purposes of collective bargaining.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information requested on October 29, 2012, concerning State of Washington payments received, which is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

6. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information requested on July 17, 2012, concerning copies of memos and job postings related to the HOH position, which is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

7. The Respondent has violated Section 8(a)(5) and (1) of the Act by unreasonably delaying in furnishing the Union with information requested on June 1, 2012, and July 17, 2012, which is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

8. The Respondent has violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith with no intention of reaching a collective-bargaining agreement.

9. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Bonnie Minor on December 7, 2011.

10. The Respondent has violated Section 8(a)(3) and (1) of the Act by placing Alicia Sale and Hannah Gates on administrative leave on December 23, 2011, and discharging Sale and Gates on February 1, 2012.

11. The Respondent has violated Section 8(a)(3) and (1) of the Act by issuing Lisa Hennings the following discipline:

(a) an April 12, 2012 written warning for being 7 minutes late;

(b) an August 10, 2012 letter of direction for staff scheduling;

(c) an August 15, 2012 letter of direction for failing to complete narratives and medical charting;

(d) on February 4, 2013, placing Hennings on administrative leave without pay; and

(e) on February 6, 2013, demoting Hennings.

12. The Respondent has violated Section 8(a)(3) and (1) of the Act by initiating a policy or practice of enforcing its disciplinary rules more strictly than in the past in retaliation for its employees' union activities or support.

13. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide relevant and necessary information requested by the Union on July 17, 2012, and October 29, 2012, we shall order the Respondent to provide the Union with the requested information.

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to bargain at reasonable times and in good faith with the Union, we shall order the Respondent to meet at reasonable times and

bargain in good faith with the Union as the exclusive bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody the understanding in a written agreement.

We grant the General Counsel's request for a 12-month extension of the certification year pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962). An extension of the certification year is warranted where an employer "has refused to bargain with the elected bargaining representative during part or all of the year immediately following the certification" and as a result "has taken from the Union the opportunity to bargain during the period when [u]nions are generally at their greatest strength." *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004) (internal quotations omitted), enfd. 156 Fed. Appx. 331 (D.C. Cir. 2005). The appropriate length for the extension must be determined by considering "the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations." Id.

Here, the Board certified the Union as the exclusive collective-bargaining representative of the unit employees in March 2012. As explained in greater detail above, because of the Respondent's dilatory tactics, the parties' first bargaining session did not occur until July 2012. The Respondent's dilatory tactics continued through February 2013. The Respondent unlawfully delayed in providing the Union with relevant information as late as September 2012. From at least October 2012 forward, the Respondent unlawfully refused to provide the Union with critical State reimbursement information concerning employee wages and benefits—information the Respondent itself made relevant by the positions it adopted in collective bargaining. Beginning in August 2012 when it put forward its proposed contract, the Respondent pursued contract proposals that were inconsistent with a genuine desire to reach agreement. The Respondent's overall bad-faith bargaining conduct culminated in its April 2013 repudiation of the parties' tentative agreement to include the HOH position in the unit. Accordingly, the Respondent's unlawful conduct interfered with bargaining and undermined the Union throughout the certification year. A 12-month extension of the certification year is necessary to ensure that the Union receives the 1-year period of good-faith bargaining to which it is entitled.[37]

[37] This 12-month extension commences when the Respondent begins to bargain in good faith. See, e.g., *Burrows Paper*, 332 NLRB 82 (2000).

For these same reasons, we also agree with the General Counsel that a bargaining schedule requiring the Respondent to meet and bargain with the Union on a regular and timely basis is appropriate and would effectuate the purposes of the Act. See *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), enfd. 540 Fed. Appx. 484 (6th Cir. 2013). Upon the Union's request, we order the Respondent to bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees. We shall also require the Respondent to submit written bargaining progress reports every 15 days to the compliance officer for Region 19, and to serve copies of those reports on the Union.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Bonnie Minor, Alicia Sale, and Hannah Gates, we shall also order the Respondent to make those unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Backpay 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 Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Bonnie Minor, Alicia Sale, and Hannah Gates for their search-for-work and interim employment expenses regardless of whether those expenses exceed 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, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by demoting employee Lisa Hennings and placing Hennings on administrative leave without pay, we shall also order the Respondent to make Hennings whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against her. Backpay shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate unit employees for any adverse tax consequences of

receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 19 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

We shall also order the Respondent to offer employees Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hennings full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Further, the Respondent shall be required to remove from its files and records all references to (i) the discharges of Bonnie Minor, Alicia Sale, and Hannah Gates, (ii) the administrative leave of Sale and Gates, and (iii) the letters of direction, written warning, administrative leave without pay, and demotion of Hennings, and to notify them in writing that this has been done and that those actions will not be used against them in any way.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by initiating a policy or practice of enforcing its disciplinary rules more strictly in retaliation for its employees' union activities or support, we shall order the Respondent to rescind that policy or practice.

ORDER

The National Labor Relations Board orders that the Respondent, Kitsap Tenant Support Services, Inc., Bremerton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet at reasonable times with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL–CIO (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service Staff (DSS) working in Respondent's Supported Living Lite Program (SL Lite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

(b) Failing and refusing to bargain collectively with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) Failing and refusing to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) Failing and refusing to bargain in good faith with the Union for a collective-bargaining agreement affecting the wages, hours, and working conditions of bargaining-unit employees.

(e) Discharging, demoting, placing on administrative leave, disciplining, or otherwise discriminating against employees because of their support for and activities on behalf of the Union.

(f) Enforcing its disciplinary rules more strictly than in the past in retaliation for its employees' union activities or support.

(g) 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) Beginning within 15 days of the Union's request, meet with the Union at reasonable times and bargain in good faith with the Union as the exclusive bargaining representative of employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a written agreement. Upon the Union's request, such bargaining sessions shall be held for a minimum of 15 hours per week, or in the alternative on another schedule to which the Union agrees. Respondent shall submit written bargaining progress reports every 15 days to the compliance officer for Region 19, and shall serve copies thereof on the Union.

(b) Furnish to the Union in a timely manner the information requested by the Union on October 29, 2012, regarding payments received from the State of Washington, and on July 17, 2012, concerning memos and job postings related to the HOH position.

(c) Within 14 days from the date of this Order, offer Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hen-

nings full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hennings whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(e) Compensate Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hennings for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Bonnie Minor, Alicia Sale, and Hannah Gates; the unlawful placement of Sale and Gates on administrative leave; and the unlawful letters of direction, written warning, placement on administrative leave without pay, and demotion of Lisa Hennings, and within 3 days thereafter notify them in writing that this has been done and that these actions will not be used against them in any way.

(g) 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.

(h) Within 14 days from the date of this Order, rescind, in writing, its policy or practice of enforcing its disciplinary rules more strictly in retaliation for its employees' union activities or support.

(i) Within 14 days after service by the Region, post at its facilities in Bremerton and Port Angeles, Washington, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 19, 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, the 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 any of the facilities 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 the closed facility or facilities at any time since December 7, 2011.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 19 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.

IT IS FURTHER ORDERED that the allegations in paragraphs 10(a)-(g) and 13 of the second amended consolidated complaint in Cases 19–CA–074715, –079006, –082869, –086006, –088935, –088938, –090108, –096118, and –099659 are severed and retained for further consideration by the Board.

Dated, Washington, D.C. May 31, 2018

_____

John F. Ring, Chairman

_____

Mark Gaston Pearce, Member

_____

Lauren McFerran, 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.

[38] 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."

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 fail and refuse to meet at reasonable times with Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service Staff (DSS) working in Respondent's Supported Living Lite Program (SL Lite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

WE WILL NOT fail and refuse to bargain in good faith with the Union for a collective-bargaining agreement affecting the wages, hours, and working conditions of our bargaining-unit employees.

WE WILL NOT refuse to furnish, or unreasonably delay furnishing, information requested by the Union that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our bargaining-unit employees.

WE WILL NOT discipline, demote, discharge, place you on administrative leave, or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT enforce our disciplinary rules more strictly than in the past in retaliation for your union activities or union support.

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, beginning within 15 days of the Union's request, meet with the Union at reasonable times and bargain in good faith with the Union as your exclusive bargaining representative with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a written agreement. Upon the Union's request, such bargaining sessions shall be held for a minimum of 15 hours per week, or in the alternative on another schedule to which the Union agrees.

WE WILL submit written bargaining progress reports every 15 days to the compliance officer for Region 19, and WE WILL serve copies of these reports on the Union.

WE WILL furnish to the Union, in a timely manner, the information requested by the Union on October 29, 2012, regarding payments received from the State of Washington, and on July 17, 2012, concerning memos and job postings related to the HOH position.

WE WILL, within 14 days from the date of the Board's order, offer Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hennings full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hennings whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Bonnie Minor, Alicia Sale, Hannah Gates, and Lisa Hennings for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Bonnie Minor, Alicia Sale, and Hannah Gates; the unlawful placement of Sale and Gates on administrative leave; and the unlawful letters of direction, written warning, placement on administrative leave without pay, and demotion of Lisa Hennings, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that those actions will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, rescind, in writing, our policy or practice of enforcing our disciplinary rules more strictly in retaliation for your union activities or union support.

KITSAP TENANT SUPPORT SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/19-CA-074715 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.

Richard Fiol and *Elizabeth DeVleming,* for the General Counsel.

Gary Lofland (Halverson Northwest Law Group), of Yakima, Washington, for the Respondent.

Terry C, Jensen and *SaNni Lemonidis (Robblee Detwiler & Black),* of Seattle Washington, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Seattle, Washington, on various dates beginning May 28, 2013, and ending November 14, 2013. On February 16, 2012, Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL–CIO (the Union) filed the original charge in Case 19–CA–074715 alleging that Kitsap Tenant Support Services, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Union filed the charge in Case 19–CA–079006 on April 17, 2012. On June 11, 2012, the Union filed the charge in Case 19–CA–082869. On July 25, 2012, the Union filed an amended charge in Case 19–CA–082869. The Union filed amended charges in Case 19–CA–082869 on December 7, 2012, and January 30, 2013, respectively. The Union filed the charge in Case 19-CA-086006 on July 25, 2012. The Union filed the charge in Case 19–CA–088935 on September 10, 2012. On October 9, 2012, the charge was amended. The charge in Case 19–CA–088935 was amended on October 1, 2012, and again on January 10, 2013. The Charge in Case 19–CA–088938 was filed on September 10, 2012. The Union filed amended charges in Case 19–CA–088938 on January 30 and February 8, 2013.

The charge in Case 19–CA–090108 was filed on September 26, 2012, alleging that Respondent violated Section 8(a)(1) and (5) of the Act. The charge in Case 19–CA–090108 was amended on January 10, 2013. On January 10, 2013, the Union filed the charge in Case 19–CA–096118. The charge in Case 19–CA–099659 was filed on March 4, 2013. On June 22, 2012, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. An order further consolidating cases and amended complaint issued on February 28, 2013. A second amended consolidated complaint was issued on March 27, 2013. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent Corporation, with an office and principal place of business in Bremerton, Washington, has been engaged in the business of providing residential support services. In the 12 months prior to the issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of $250,000. Further, Respondent performed services valued in excess of $50,000 directly to the State of Washington. Accordingly, Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent's primary business office is located in Bremerton, Washington; it also maintains an office in Port Angeles, Washington. Respondent operates three divisions, home care, tenant support and community protection services. This case involves the Union's attempt to organize Respondent's tenant support services and community protection service operations. The Union was certified as the exclusive representative for direct service staff and head of households in the intensive tenant support program on March 23, 2012. The employees in the community protection services were held to be guards and not included in the bargaining unit.

The Union's organizing campaign began in November 2011. In December 2011 Respondent learned of the Union's campaign and held its first campaign meeting on December 7, 2011. On December 20, the Union filed its petition with Region 19 of the Board seeking to represent a unit of approximately 150 of Respondent's employees in the intensive tenant support services and community protection services programs.

Employee Bonnie Minor was hired by Respondent in June 2008. At the time of her discharge in December 2011, Minor was working as the head of household at Respondent's Olym-

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

pus House. In late 2011, Minor was planning Thanksgiving and Christmas parties for Respondent's clients. Minor received calls from other employees that the clients could not afford two parties. Since the Thanksgiving party was only days away, Minor decided to cancel the Christmas party. On December 6, Minor was told by Jamie Callahan, client resource manager, to put the Christmas party back on schedule.

On December 4, Minor became a member of the Union's organizing committee and her picture was printed on a union flyer. On December 7, Minor spoke out in favor of the Union at the Respondent's union campaign meeting. On the morning of December 7, Minor received a phone call from Alan Frey, Respondent's general manager, to tell her to reschedule the Christmas party. He told Minor that she had no right to cancel the party. Minor said she had canceled the party because clients could not afford two parties. Immediately thereafter, Minor rescheduled the Christmas party.

Minor was asked to meet with Frey that afternoon, Minor met with Fry and Human Resources Coordinator Kathy Grice. Frey again told Minor that she had to reschedule their Christmas party. Minor stated that she had already rescheduled the party.

Minor attended Respondent's union campaign meeting shortly after her meeting with Frey. Minor asked Respondent's consultant how much money Respondent was paying him. The consultant declined to answer.

Minor then attended a union meeting. Shortly after the union meeting, Minor received a call from Grice informing her that she was being terminated. Respondent's discharge letter states that Minor failed to follow the protocol set forth by a direct supervisor in regards to a client party and gift exchange. The letter also criticizes Minor for her poor attitude and judgment crossing professional boundaries, misrepresenting information in regards to client and staff causing distress to the clients.

Frey testified that he learned on the morning of December 7, that Minor had told three clients that Frey had screamed and yelled at her and had been mean to her. Frey had a meeting with Minor that afternoon in which she admitted that she told clients that Fry had screamed and yelled at her. When Frey asked why Minor had done so, she answered that Frey was treating her like her father. She admitted that Frey had not yelled or screamed. Frey explained that what Minor had done was "triangulation" and inappropriate. The harm was to clients and the trust Frey had built with those clients over the years. I find support for Frey's explanation in the testimony of expert witness Allan Comte.

Employee Alicia Sale began working for Respondent in 2008. Employee Hannah Gates began working for Respondent in 2010. Sale and Gates had their pictures on a prounion flyer. On December 20, 2011, Sale and Gates were working at Respondent's "men's house. That morning Sale noticed a bruise and scratch on client R. Sale notified Gates of the situation and Gates called the head of household who was at the "women's house." Gates documented the injury in the client's folder. Client R then complained to Sale of a stomachache. Sale and Gates checked R's temperature and bowel movements. At that point the head of household called back and said that Fry and Mieke Middelhoven would be coming to the house. Gates told the head of household about R's stomachache.

That morning, Frey and Mieke Middlehoven, program coordinator, arrived at the men's house. Upon arriving at the house, Frey inspected client R's injury and determined that the bruise had come from client R's wheelchair. Frey instructed Gates and Sale to pad and tape the wheelchair. Fry spoke to the client and asked whether client R had requested to see a doctor. Client R responded that he had. According to Frey, Sale stated that client R had been asking to see a doctor all morning. At the hearing, Sale denied this. According to Frey, Sale stated that there was not enough staff to take client R to the doctor. Middlehoven made arrangements for Sale to go to the women's house and for the head of household to take client R to the doctor.

The following day, Frey returned to the men's house. He found that the wheelchair had not been repaired as he had directed. He taped the wheelchair himself. Frey placed Sale and Gates on administrative leave for failing to provide medical attention to client R and for failing to tape the wheelchair as directed. Both Sale and Gates denied that client R had requested to go to the doctor. It is clear that failure to take a client who has requested medical attention to a doctor is abusive.

On December 23, Sale and Gates were informed by Grice that they were being placed on administrative leave, because they had not taken client R to the doctor and had not timely repaired his wheelchair. Fry reported this incident to the State of Washington.

On February 1, 2012, Fry discharged Sale and Gates for the incidents of December 20. The State of Washington later dismissed the charges against Sale and Gates substantially because it could not rely on the testimony of client R.

Employee Terry Owens started working for Respondent in the community protection program in February 2011. On December 9, 2011, Owens attended Respondent's union campaign meeting. Owens spoke out in favor of the Union at that meeting. Owens met with Frey on December 12 and presented Frey with 10 questions. Three weeks later, Owens testified for the Union in the representation case.

On February 14, 2012, Frey observed a locked cabinet in the house where Owens worked. Owens explained that client J had agreed to store junk food in the locked cabinet and that the head of household would control client J's food intake. Owens told Frey that client J still had access to other food cabinets; Frey also observed postings that were degrading to client J. The next day Frey called a meeting with Owens. Frey placed Owens on administrative leave. The head of household was suspended pending investigation and later resigned.

Frey told Owens that he was on administrative leave so that Frey could investigate the locked cabinet. About a week later Owens met with Frey. Owens was discharged on March 28. The Respondent claims that Owens asked to be discharged. Owens was terminated for his treatment of client J; placing restrictions on client J. Frey testified that he observed Owens behavior toward client J and found it to be inappropriate, Frey testified that Owens seemed angry and failed to understand that his approach had been wrong.

Employee Gary Martell was hired by Respondent in October 2011. In December 2011, Martell began working in the supportive living program. Martell worked with different clients in different locations. On May 22, 2012, the Union notified Respondent that Martell had been elected to the Union's bargaining team. Martell attended a bargaining session on June 4.

Martell attended a paperwork meeting in the first week of June with Callahan and Parsons. The ledger part of Martell's paperwork was blank. Callahan asked why the paperwork was not done and Martell did not make an excuse. Callahan informed Frey that Martell's paperwork was not complete. Frey took Martell to another room and told him to complete the paperwork.

A few minutes later, Frey entered the room and stated that Martell was being placed on administrative leave because his paperwork was incomplete. Frey testified that Martell had not performed any work after being placed in the back room. Martell received a letter dated June 8 from Frey stating that he was on administrative leave. Included in the letter were allegations that Martell's schedule included overlaps indicating that Martell was in two places at one time. (GC Exh. 129.) On June 12, Martell met with Frey. According to Frey, at this meeting, Martell acknowledged that there was no excuse for not completing his paperwork. Martell admitted missing service hours for clients.

After being placed on administrative leave, Martell went to a client's home and told the client that he had been placed on administrative leave. Such conduct is prohibited by Respondent. On July 19, 2012, Martell was terminated by Frey. Martell was terminated for not completing his paperwork, not providing service hours, and visiting a client while on administrative leave.

Employee Johnnie Driskell began working for Respondent in February 2004. In May 2011, Driskell was demoted from head of household to caregiver. Driskell was later reinstated as a head of household. Driskell was a leader in the union campaign; her picture was included with union supporters in the Union's mid-December flyer. Driskell was later elected to the Union's bargaining team.

On June 6, 2012, Driskell was presented with a written warning for being late for her June 4 shift. Driskell had left a phone message on June 1, stating that she was switching shifts with another employee on June 4, so that she could participate in the Union's bargaining training. Driskell was to report at 4 p.m. on June 4. However, on June 4, Driskell did not report until 4:15 p.m. Overtime was paid to an employee who worked until Driskell arrived.

On Sunday June 24, Frey wrote Driskell regarding a plan of care meeting held without the presence of a member of management. The purpose of plan of care meeting is to review the care needed and the hours of service allocated for the care of the client. Driskell did not call the meeting. According to Frey, Driskell had worked with the client only 2 months and that a member of management needed to be present. Management requested an additional meeting. As a result of that meeting, the hours of service to the client were increased. Respondent claims that Frey's letter to Driskell was not disciplinary but rather provided guidance to Driskell.

On July 19, 2012, Driskell received a disciplinary warning for loaning client money. Driskell claimed that she did what she had done in the past. Frey met with Driskell and a union representative. Driskell claimed that everyone loaned money to clients. Frey cited policy against loaning money to clients. Driskell then claimed that it was not a loan but a gift.

On July 22, while off duty, Driskell received a call from the house where she was head of household. The staff reported that two clients were not getting along and they requested Driskell's assistance. Driskell drove to the house and found that two clients had struggled over a television remote control. Driskell met with Frey the next day but did not mention the incident. After meeting with Frey, Driskell reported the incident to management. Driskell described the incident as pushing. The next day, Frey placed Driskell on suspension.

Respondent placed Driskell on administrative leave pending the investigation of a client-to-client assault. Driskell had not seen any meaningful contact between the clients. Frey reported Driskell to the State of Washington for not reporting a client-to-client assault. A meeting was held between Frey and Driskell and a union representative on August 3. Frey ended the meeting as a result of the union representative's conduct. Frey held another meeting with Driskell on August 14. Frey did not appreciate Driskell's attitude at the meeting. On August 23, Frey terminated Driskell's employment.

Employee Lisa Hennings was hired by Respondent in November 2009. In early 2010, Hennings was promoted to a head of household position. In November 2011, Hennings became involved in the Union's organizing campaign. Her picture appeared on the Union's flyer in December 2011. In December 2012, Hennings attended a meeting at Respondent's Port Angeles office. At the meeting Hennings indicated to Frey that she was in favor of the Union. In May 2012, Hennings was elected to the Union's bargaining committee.

On March 16, 2012, Hennings received a letter of reprimand for loaning clients money. On a trip to a grocery store with three clients, Hennings lent the clients money so that they could pay for all their groceries.

On April 12, Hennings received a warning for being late. Hennings had called the head of household to say that she would be a few minutes late. The next day, Hennings spoke with Grice. Grice stated that Hennings had not called the office. Hennings had never before been disciplined for being a few minutes late.

On August 6, Hennings attended a bargaining session as a member of the Union's bargaining team. On August 9, Hennings was writing down the shifts to be worked at her house. There had been confusion due to employee absences. Frey told Hennings that she had better not be scheduling because there had been testimony in the Board representation case that head of households did not do scheduling. Hennings answered that she was not scheduling but merely helping management. Frey checked with his office and found that Hennings was not helping management with the schedule.

On August 16, Hennings received a letter of direction regarding monthly narratives and medication charting. Hennings was cited for too few narratives of client progress. There were two medical errors in the reports.

On August 20, Hennings received a written warning for failure to work her assigned shift. On August 17, Frey had driven by the house where Hennings worked and observed her getting out of her car alone. Frey thought Hennings was at another house supporting clients at a party. Hennings explained that she had left the party to aid her daughter and that she had asked another staff person to watch her client. Hennings was written up for not working her assignment and not notifying the office to secure coverage for her client.

In December 2012, Frey and M. E. Closser, Respondent's owner, approached Hennings and complained that the Union had marched on Closser's home. Hennings said that she was not there. Closser and Frey pressed the issue but Hennings denied responsibility.

On February 4, 2013, Frey called Hennings and stated that he had concerns with her work and that she would be placed on administrative leave while he investigated. Thereafter, Hennings was demoted from her position as head of household. There was no reduction in pay. Frey was concerned about her caregiving and training, completing necessary paperwork, completing narratives, leaving clients unattended, and not calling the office. Hennings requested a transfer to the graveyard shift where there was less responsibility.

The Union was certified as the exclusive collective-bargaining agent on March 20, 2012. The Union requested bargaining dates on April 23. On May 21, Respondent agreed to bargaining dates. On May 21, the Union informed Respondent of the identity of the 5 employee members of the bargaining committee. Respondent did not meet with the Union until July 13.

At the July 13 meeting, the Union discussed its first proposal which it provided to Respondent the previous week. Respondent made no proposals at that meeting. On August 6, Respondent made its first proposal. The Union opposed Respondent's proposals on management rights, at-will employment, lack of union security, and removing head of households from the bargaining unit. The Union contended that Respondent's proposals on management rights and at-will employment would nullify nearly everything but compensation that the Union was attempting to bargain for. No tentative agreements were reached but the parties agreed to meet again on September 17.

The parties met on September 17. Prior to that meeting the Union had provided Respondent with modified proposals. Respondent refused to discuss certain proposals. The parties next met on November 26. The parties reached an agreement on the bargaining unit and agreed to meet on December 18. Respondent later canceled the December 18 meeting. Respondent finally agreed to meet on February 27, 2013. That date was canceled and the parties agreed to meet on March 11 and 12.

In May 2012, Respondent sent the Union a letter in which it stated that it reserved the right for its "Board" to void any tentative agreements. The Union responded asking, "[T]o which Board are you referring to?" Respondent answered that it was referring to its board of directors. The Union sent a request for information on June 1. Respondent answered that request on June 11. On July 17, the Union made a request for information regarding the head of household position. Respondent provided information on October 12, 2012. The Union requested another information request on October 29. The Union requested documents and/or information regarding the money spent on unit employees. Respondent refused to furnish such information.

Respondent proposed a broad management-rights provision. Further, Respondent proposed an employment at-will provision. The Union sought just cause language. Respondent's proposed grievance provision did not apply unless there was a demonstrated specific violation of the collective-bargaining agreement. In its progressive discipline proposal, Respondent proposed that "the degree of discipline is solely within the judgment" of Respondent. Respondent slightly modified its management-rights proposal on October 16. Eventually the Union agreed substantially to Respondent's management-rights clause.

The General Counsel contends that Respondent failed and refused to bargain in good faith regarding the head of household position. On September 6, Respondent told the Union that it would bargain to impasse over the elimination of the head of household position and later implement its position. On November 26, the parties reached tentative agreement on the bargaining unit which included the heads of household. However, on April 12, 2013, Respondent stated that it would seek to eliminate the head of household position and create a supervisory household manager position.

The General Counsel contends that Respondent maintained the following rules in violation of Section 8(a)(1):

> Professional Standards: In the course of your work, you may have occasion to learn of matters which are confidential. It is your ethical obligation to consider all information about residents, clients, their families, and fellow employees, as privileged. You are expected to keep this knowledge in strict confidence. Never discuss any facet of Kitsap Tenant Services, Inc. or its programs either in or outside of your work site where they can be overheard by unauthorized people. To protect yourself from accidental infringement of the policy, please refer all matters to your Coordinator.
>
> Professional Boundaries: When an employee is no longer employed by KTSS, Inc., they are required to sign a confidentiality agreement stating they have not and will not reveal Client information or confidential matters learned while in the employ of the agency. Further, the employee must certify that they have not, nor in any way been party to or knowingly permitted:
>
> - Disclosure of any confidential matters, or trade secrets of Kitsap Tenant Services, Inc.
> - Retention or duplication of any confidential materials or documents issued to or used by the employee during employment.
>
> Employee Professional Relationships: You understand that you are not allowed to discuss any issue regarding your job performance or relationships with co-workers or supervisors with Clients or within earshot of Clients.
>
> Canvassing or Soliciting: Staff members are expected to keep such activities from occurring on our premises and work sites.

Employees are not allowed to sell, push products, or philosophy, religion to Clients or staff.

Conditions of Employment: Employee agrees not to divulge, publish, or otherwise make known to unauthorized persons or to the public any information contained in the course of providing services, where release of such information may possibly make the person or persons whom are receiving such services, supervisors, Clients families and/or fellow Caregivers identifiable. Employees should recognize that unauthorized release of confidential information might subject them to civil liability under the provisions of State law and/or dismissal from KTSS, Inc.

Reasons for Termination:

*Violation of Client and/or program confidentiality.
* Violation of policy and procedures of company.
* Misconduct as defined in the orientation manual.
* Failure to follow the Employee Professional Relationships Contract.
*Failure to sign and follow the Maintaining Client Confidentiality.

Misconduct: Giving Client information or opinions of the inner workings of the office (similar to rules previously mentioned).

III. CONCLUSIONS

The Rules

The Board held in *Kinder-Care Learning Centers,* 299 NLRB 1171 (1990), that employees have a Section 7 right to communicate regarding their terms and conditions of employment to other employees, an employer's customers, the media, and the public. In *Beth Israel Hospital v. NLRB,* 437 US 483 (1978), it was held that a hospital could prohibit solicitations in patient care areas because "the primary function of a hospital is patient care and . . . . a tranquil atmosphere is essential to carrying out that function." Here, Respondent has a fiduciary duty to keep client information confidential. Its clients are developmentally disabled and vulnerable, and should be protected concerning any information regarding their identity or plan of treatment. Information regarding Respondent's relationship with its caregivers could cause emotional problems for Respondent's developmentally disabled clients. Under these circumstances, I view patient care areas as anywhere the client may be. Thus, I find that Respondent's rule regarding discussing any issues related to job performance or relationships with coworkers or supervisors with clients or within earshot of clients' is necessary and a lawful exception to the general rule.

Employees have a Section 7 right to communicate regarding their terms and conditions of employment to other employees, an employer's customers, the media, and the public. When an employee is no longer employed by Respondent he or she is required to sign a confidentiality agreement stating they have not and will not reveal client information or confidential matters learned while in the employ of the agency. I find this rule too broad and thus violative of Section 7 of the Act.

The Employee Discipline

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line,* supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003).
>
> If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra, 251 NLRB at 1088 fn. 11.

The General Counsel has established both Bonnie Minor's union activities and the knowledge or constructive knowledge of those activities by Respondent. There is no doubt that Minor took the actions for which she was terminated. The issue as to Minor is whether or not the conduct was the reason for the discharge rather than her protected union activities. It is therefore the termination process that must be examined. The termination of Minor involved multiple steps and multiple actions by Respondent's Frey. Each must be evaluated under the standard set forth above.

First, I find that the actions of Frey regarding the Christmas party did not involve disparate treatment of Minor. Thus, I find that the initiation of the meeting respecting the incident was not improper. I further find that in telling clients that Frey had yelled and screamed at her, Minor engaged in a major violation of policy.

Having gotten past the investigative process, scrutiny must fall on the discharge decision. I have considered the demeanor of the witnesses, the arguments of the parties on brief and the record as well on this critical issue. I find that the General Counsel has not met his initial burden to show that antiunion sentiment was a "motivating factor" for Minor's discharge.

Considering the context, I find that the General Counsel has not been able to demonstrate by a preponderance of the credible evidence that the discharge involving Minor was based on antiunion sentiment. Finally, I find there was no antiunion animus in the final discharge decision taken or its being carried out as set forth above.

Given this finding, it follows that the General Counsel has failed to prove that Bonnie Minor was fired for union activities as alleged in the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Minor.

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line,* supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB at 1184. Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB at 848.

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra, 251 NLRB at 1088, fn. 11.

The General Counsel has established union activity by Alicia Sale and Hannah Gates. The issue here involves Respondent's reason for the discharge. Frey heard from client R that he had requested to see a doctor. Sale and Gates initially stated that they did not have the staff to take client R to the doctor. Frey asked them to tape client R's wheelchair and this was not done. Frey reported the failure to take client R to the doctor to the State of Washington. Here, I find that Frey acted upon his belief that Sale and Gates had improperly failed to take client R to the doctor. Thus, I find that Respondent has established that these employees would have been discharged even in the absence of union activities.

Terry Owens

In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that protected conduct was a "motivating factor" in the employer's decision. To establish this showing, the General Counsel must adduce evidence of protected activity, Respondent's knowledge of the protected activity, Respondent's animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employees' union activity. *American Gardens Management Co.,* 338 NLRB 644, 645 (2002), citing *Taylor & Gaskin, Inc.,* 277 NLRB 563 fn. 2 (1985), both incorporating *Wright Line*, supra.

The General Counsel has established that Owens was engaged in union activities and that Respondent had knowledge of those activities. Respondent established that Owens had taken part in restricting client J's access to food supplies and was aware of, if not the author of improper notices to client J. Frey observed and found wanting Owens interactions with client J. Accordingly, I find that Respondent established that Owens would have been discharged even in the absence of his union activities.

Gary Martell

The General Counsel has established that Martell engaged in union activities and that Respondent had knowledge of such activities. However, Martell failed to complete his required paperwork. Martell had no excuse for this failure. Martell was suspended pending an investigation. Martell improperly visited a client at the client's home and told the client that he had been suspended. Thereafter, Frey discharged Martell. Again, I find that Respondent has established that Martell engaged in conduct for which he would be discharged even in the absence of his union activities.

Johnnie Driskell

The General Counsel has established both Driskell's union activities and the knowledge of those activities by Respondent. There is no doubt that Driskell took the actions for which she was terminated. The issue as to Driskell is whether or not the conduct was the reason for the discharge rather than her pro-

tected union activities. It is therefore the termination process that must be examined. The termination of Driskell involved multiple steps and multiple actions by Respondent's Frey. Each must be evaluated under the standard set forth above.

First, I find that the action of Frey regarding Driskell's being late on June 6 questionable. Driskell had made arrangements to cover her shift and called when she would be late. Driskell received a letter of direction for not notifying Respondent of a plan of care meeting. This letter was not discipline. Further, this action was based on Driskell's conduct and not her union activities. Driskell received a warning for loaning a client money. This was in violation of company policy.

On July 22 Driskell intervened in a client-to-client dispute. She described the incident as pushing. Frey believed that there was client-to-client battery and reported this incident to the State of Washington. Driskell met with Frey on July 23 but did not mention the client dispute.

I have considered the demeanor of the witnesses, the arguments of the parties on brief, and the record as a while on this critical issue. I find that the General Counsel has not met his initial burden to show that antiunion sentiment was a "motivating factor" for Driskell's discharge.

Considering the context, I find that the General Counsel has not been able to demonstrate by a preponderance of the credible evidence that the discharge involving Driskell was based on antiunion sentiment. Finally, I find there was no antiunion animus in the final discharge decision taken or its being carried out as set forth above.

Given this finding, it follows that the General Counsel has failed to prove that Johnnie Driskell was fired for union activities as alleged in the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Driskell.

Lisa Hennings

In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst. Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that protected conduct was a "motivating factor" in the employer's decision. To establish this showing, the General Counsel must adduce evidence of protected activity, Respondent's knowledge of the protected activity, Respondent's animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employees' union activity. *American Gardens Management Co.,* 338 NLRB at 645, citing *Taylor & Gaskin, Inc.,* 277 NLRB 563 fn. 2 (1985), both incorporating *Wright Line*, supra.

The General Counsel has established that Lisa Hennings engaged in union activities and that Respondent had knowledge of those activities. Hennings received a letter of reprimand for loaning money to three clients. I find that this discipline was based on Hennings conduct and not her union activities. Hennings received a warning for being 7 minutes late. Other employees were late for longer periods of time without receiving discipline. Respondent did not explain this discrepancy.

Frey disciplined Hennings for staff scheduling. Frey said that since employees had testified that head of households had not done scheduling, Hennings should not be scheduling. Frey did not explain the inconsistency where Respondent had offered evidence in the representation case that heads of household did scheduling for their households.

Hennings received discipline for not doing narratives and for errors in medication charting. I find this discipline to be based in business reasons and, therefore, not discriminatory. Hennings received a warning for an incident on August 20. Frey had observed Hennings driving in her car when she was supposed to be at a party with a client. I find no violation in this discipline.

Respondent ultimately demoted Hennings for missing medical appointments, errors in medical charts, and her past disciplines. I find that the warnings to Hennings for being late and for scheduling were unlawful. To the extent that these warnings played a part in her demotion, I find the demotion unlawful.

The Alleged Refusal to Bargain

In determining good-faith bargaining, the Board examines the totality of the party's conduct both at and away from the bargaining table including delay tactics, failure and/or delay in providing information, unpalatable bargaining demands, and refusal to explain bargaining positions. *Fruehauf Trailer Services,* 335 NLRB 393 (2001). The determination of a party's subjective good faith in bargaining depends on an examination of the "totality of the circumstances". *NLRB v. Tomco Communications,* 567 F.2d 871, 883 (9th Cir. 1978). The Supreme Court has held that "the Board may not either directly or indirectly, compel concessions or otherwise sit in judgment on the substantive terms of collective bargaining agreements." *H. K. Porter Co. v. NLRB,* 397 U.S. 99, 106 (1970).

Section 8(a)(5) and (d) of the Act obligates parties to "confer in good faith with respect to wages, hours, and other terms and conditions of employment. " *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 344 (1958). The good-faith requirement means that a party may not "negotiate" with a closed mind or decline to negotiate on a mandatory subject with a closed mind or decline to negotiate on a mandatory bargaining subject. "While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result." *NLRB v, Truitt Mfg. Co.,* 351 U.S. 149, 152 (1956). Sincere effort to reach common ground is of the essence is of the essence of good-faith bargaining. *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 686 (9th Cir. 1943); *NLRB v. Reed & Prince Mfg. Co.,* 118 F.2d 874, 885 (1st Cir.), cert. denied 313 U.S. 595 (1941).

The quantity or length of bargaining does not establish or equate with good-faith bargaining. *NLRB v. American National Insurance Co.,* 343 U.S. 395, 404 (1952). The Board will consider the "totality of the conduct" in assessing whether bargaining was done in good faith. *NLRB v. Suffield Academy,* 322 F.3d 196 (2d Cir. 2003).

The General Counsel argues that Respondent delayed bargaining and engaged in dilatory tactics. Then after bargaining

commenced, Respondent continued to delay. It canceled meetings in July and August. As a result, the parties only met six times since March 2012. In my view, this is evidence of bad faith. *Fruehauf Trailer Services,* 335 NLRB 393 (2001).

The General Counsel further argues that Respondent put forth proposals that were repugnant to the Union. First, the General Counsel alleges that Respondent's proposed management-rights provision was so broad as to be repugnant to the Union. However, the Union agreed to Respondent's proposal with a minor exception.

The General Counsel further argues that Respondent's proposal to change the head of household position to a management position was evidence of bad faith. Section 8(a)(5) prohibits a party's insistence upon a permissible subject as a condition precedent to entering an agreement and precludes a good-faith impasse. *Borg-Warner Corp.,* 356 U.S. at 347–349. However, Respondent did not insist on this provision to impasse. No impasse was ever reached.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to delayed bargaining after the certification for almost 4 months.

4. Respondent violated Section 8(a)(1) by maintaining a rule prohibiting former employees from revealing client information or confidential matters learned while in the employ of the agency.

5. Respondent violated Section 8(a)(3) and (1) by disciplining Lisa Hennings for being late and for scheduling employees.

6. Respondent violated Section 8(a)(3) and (1) for demoting Lisa Hennings from her position as head of household.

7. Respondent's conduct above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Accordingly, I shall order Respondent to resume collective bargaining with the Union.

Having discriminatorily demoted employee Lisa Hennings, Respondent must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of demotion to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987).

Respondent must also be required to remove any and all references to its unlawful discipline of Hennings, from its files and notify Hennings in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against her in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[2]

ORDER

The Respondent, Kitsap Tenant Support Services, Inc, Bremerton and Port Angeles, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively by delaying bargaining for 4 months.

(b) Maintaining a rule whereby former employees are prohibited from revealing client information or confidential matters learned while in the employ of the agency.

(c) Disciplining or demoting employees for engaging in union activities.

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

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

(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SLl ite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act.

with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer Lisa Hennings full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed but for her unlawful demotion.

(c) Make Hennings whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Hennings,

[2] 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.

and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

(e) Within 14 days after service by the Region, post at its facilities in Bremerton and Port Angeles, Washington, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, 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, the 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. In the event that, during the pendency of these proceedings, 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 16, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 19, a sworn certification of a responsible official on a form provided by Region 19 attesting to the steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. June 4, 2014

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 refuse to bargain collectively by delaying bargaining for 4 months.

WE WILL NOT maintain a rule which prohibits former employees from discussing matters learned while employed by us.

WE WILL NOT discipline and/or demote employees because of their union activities.

WE WILL NOT make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against this employee.

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

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described below:

> All full-time and regular part-time employees working for Respondent as Direct Service Staff (DSS) or Head of Households (HOHs) in Respondent's Intensive Tenant Support Program (ITS) and Direct Service (DSS) working in Respondent's Supported Living Lite Program (SLl ite Programs), including such programs in Respondent's d/b/a, Olympic Peninsula Supported Living (OPSL) operations, located in or about Kitsap County, Port Angeles, and Port Townsend, Washington; excluding employees working in the Homecare division, Head of Households (HOHs) and Direct Service Staff (DSS) working in the Community Protection Program (CP Program) because they are guards as defined by the Act, and all other guards and supervisors as defined by the Act

with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make Lisa Hennings whole for her loss of earnings, if any, for unlawful discipline and demotion, with interest.

WE WILL remove from our files any reference to the unlawful discipline of Hennings.

KITSAP TENANT SUPPORT SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-074715 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[3] 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."