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District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner *and* 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region a/w Service Employees International Union. Cases 05–CA–216482, 05–CA–230128, and 05–CA–238809

May 8, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

On September 4, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Union[1] each filed an answering brief, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2] The Board has considered the decision and the record in light of the exceptions,[3] and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions as further discussed below, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[5]

I. INTRODUCTION

We agree with the judge that the Respondent failed and refused to bargain in good faith with the Union for a successor collective-bargaining agreement. The judge found that the Respondent engaged in bad-faith bargaining principally through pressing a combination of three bargaining proposals for 14 months: (1) a no-strike provision; (2) a provision eliminating binding arbitration; and (3) an expansive management-rights clause that left the Respondent with unilateral control over virtually all significant terms and conditions of employment. We agree with the judge that the record evidence warrants a finding of bad-faith bargaining because the Respondent's proposals, taken as a whole, would have left employees and the Union with substantially fewer rights and less protection than provided by law without a contract. Taken together, the Respondent's bargaining proposals evidenced the Respondent's effort to frustrate the reaching of a collective-bargaining agreement.

II. ANALYTIC FRAMEWORK

The applicable principles are well-established. As the Board has explained, we examine an employer's proposals not to see whether they are acceptable to the union, but whether they demonstrate that the employer was seeking to frustrate any agreement with the union—as, for example, when accepting the proposals would leave the union with no meaningful role as the employees' statutory bargaining representative:

> In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. 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. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. 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

[1] 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region a/w Service Employees International Union.

[2] Member Wilcox is recused and took no part in the consideration of this case. An earlier decision in this proceeding was vacated by the Board. See *District Hospital Partners, L.P. d/b/a The George Washington University Hospital*, 372 NLRB No. 109 (2023) (vacating 370 NLRB No. 118 (2021), and ordering re-adjudication). In accordance with that decision, we have considered de novo the judge's decision and the record in light of the exceptions and briefs.

[3] No party has excepted to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by interviewing employees during its trial preparation without giving them assurances under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). We accordingly find it unnecessary to pass on the Respondent's exception to the judge's ruling permitting the General Counsel to amend the Amended Complaint to include that allegation.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We do not rely on the judge's finding as to when Jeanne Schmid learned of the decertification petition based on her December 11, 2016 email.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[5] We shall modify the judge's recommended Order to conform to the amended remedy, the Board's standard remedial language, and in accordance with *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

> provided by law without a contract. In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith.

Public Service Co. of Oklahoma (PSO), 334 NLRB 487, 487–488 (2001) (citations omitted), enfd. 318 F.3d 1173 (10th Cir. 2003). Accord: *Altura Communication Solutions, LLC*, 369 NLRB No. 85 (2020), enfd. mem. 848 Fed.Appx. 344 (9th Cir. 2021). We apply these settled principles here to the parties' bargaining for a successor collective-bargaining agreement.

II. FACTUAL BACKGROUND

We reprise the parties' course of bargaining, which the judge set out in full detail in his decision. For more than 20 years, the Union represented about 150 service employees at the Respondent's hospital. In advance of the expiration of the collective-bargaining agreement on December 19, 2016, the parties commenced bargaining in November 2016. Bargaining would continue for thirty sessions over almost 2 years. From the outset, the Respondent asserted that there were, in its view, many deficiencies in the expiring collective-bargaining agreement, and that it thus sought to substantially alter many of the contract provisions. Through nearly 2 years of bargaining, the Respondent maintained the same basic position. When the parties failed to reach a successor agreement, the Respondent withdrew recognition after its receipt of a decertification petition from employees in October 2018.

Looking at the specific proposals in question, on December 6, 2016, at the parties' third bargaining session, the Respondent presented the Union with a proposal for an expansive management-rights clause that, among other things, reserved for the Respondent the right to: (1) assign any amount of bargaining unit work to supervisors; (2) use contractors and contract personnel to perform bargaining unit work; (3) engage in searches of unit employees without limit; (4) discipline employees without cause; (5) change employees' health insurance and other benefits at any time; (6) determine what positions are and are not part of the unit; (7) determine the existence of bargaining unit work; and (8) determine the extent to which bargaining unit work could be performed at all. The Respondent also proposed a zipper clause nullifying all past practices and reaffirming the Respondent's right, without limitation, "to make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job."

On January 17, 2017, the Respondent presented the Union a discipline proposal that, among other things, deleted just-cause language, removed any discipline short of discharge from arbitration, and limited progressive discipline to only "where appropriate," thereby excluding incidents that the Respondent "deems as a major infraction of employee conduct or work rules." During the bargaining session, the parties discussed whether disciplinary actions other than discharges should be arbitrable. On January 31, 2017, the Union made a written proposal to the Respondent providing for arbitration of both final written warnings and discharges. Later that day, the Respondent rejected the proposal and tendered a new written proposal reiterating that arbitration would be restricted only to discharges.

On February 1, 2017, the Union submitted a counterproposal accepting most of the provisions in the Respondent's management-rights proposal but rejecting several of the specific provisions described above.

On March 28, 2017, the Respondent again presented a management-rights proposal, which was virtually identical to the one it tendered on December 6, 2016, except for providing that the Respondent "agrees to receive from the Union constructive suggestions, which [the Respondent] shall consider in its sole discretion."

On March 29, the Respondent presented two significant new proposals. First, it proposed for the first time in negotiations a no-strike provision prohibiting employee picketing and the use of economic weapons in response to violations of the collective-bargaining agreement or Federal law. Second, the Respondent presented a grievance-and-mediation proposal providing that any issue arising under the collective-bargaining agreement could be grieved to nonbinding mediation without permitting the parties to arbitrate any dispute. This proposal's rejection of arbitration included, contrary to the Respondent's previous proposal, the rejection of arbitration for discharges. In addition, the Respondent now proposed to delete both the union-security clause and the dues remittance authorization contained in the parties' previous contract.[6]

On April 5, 2017, the Union asserted that the parties should retain the grievance-and-arbitration language in the expired collective-bargaining agreement. Also on April 5, the Respondent handed the Union a revised discipline proposal that still provided for arbitration of discharges. The Union pointed out that this was inconsistent with the

[6] On April 6, 2017, the Union rejected the Respondent's proposal to delete the union-security and dues remittance authorization proposals. On September 5, 2018, the Union made a written counterproposal drawn from a union-security clause in a contract between the Union and a hospital owned by the Respondent. The Respondent reiterated its proposal to eliminate the union-security provision and the dues remittance provision.

Respondent's March 29, 2017 dispute-resolution proposal that provided that all grievances, including discharge grievances, would only be subject to nonbinding mediation instead of arbitration.[7] The Respondent did not attempt to reconcile the discrepancy at that time.

On April 6, 2017, the Union presented the Respondent with its initial wage proposal. It was not until over a year later, on May 18, 2018, that the Respondent made a counter-proposal on wages.[8] The Respondent throughout negotiations asserted that it would not grant a wage increase until a successor collective-bargaining agreement had been ratified.

On May 16, 2017, the Union asserted that the Respondent's combined-three proposals for a nonbinding dispute-resolution process, a no-strike provision, and an expansive management-rights clause constituted an unfair labor practice. Nevertheless, the Union continued to bargain, the parties negotiated other topics, and all the while the Respondent maintained its trio of proposals to which the Union objected.

On May 25, 2017, the Respondent informed the Union that it was revising its April 5, 2017 discipline proposal to provide for discharges to be mediated instead of arbitrated, in accordance with its March 29, 2017 dispute-resolution proposal. Thus, the Respondent backtracked from its January 17, 2017 discipline proposal, which had retained arbitration for discharges. On July 31, 2017, the Union asserted that it would not agree to a collective-bargaining agreement that did not provide for arbitration. The parties held several additional bargaining sessions over the next 7 months but the Respondent did not make any substantive changes to its position and the negotiations continued to flounder.

On March 12, 2018, the Union filed an unfair labor practice charge against the Respondent alleging, in part, that it "failed to bargain collectively and in good faith" with the Union by "maintaining a restrictive grievance/arbitration provision and no strike provision, while at the same time an expansive management rights clause in its contract proposals." Thereafter, on June 7, 2018, the Respondent withdrew its no-strike proposal, while reserving the right to reinstate it if the parties later agreed to arbitration. On September 5, 2018, because the parties were at a stalemate on arbitration, the Union presented the Respondent with grievance-and-arbitration language contained in its collective-bargaining agreements with other hospitals. The parties never reached an agreement on dispute-resolution language.

At the October 11, 2018, bargaining session, the Respondent renewed its pledge not to grant a wage increase until the parties had ratified a successor collective-bargaining agreement. It contemporaneously informed employees that wage increases would be given upon contract ratification. On October 25, 2018, the Respondent received a decertification petition signed by 81 of the 156 employees in the bargaining unit.[9] The following morning, the Respondent emailed the Union that it had "received objective evidence which clearly and unequivocally indicates that the Union has lost the support of a majority of bargaining unit employees" and that it was "withdrawing recognition of the Union effective immediately." The Respondent cancelled all future bargaining sessions. On November 1, 2018, the Respondent notified the former bargaining unit employees that it was "delighted to welcome [them] to the GWU Hospital team of non-union employees" and announced its implementation of new wage rates, compensation structure, and transit benefits.

IV. DISCUSSION

The Respondent commenced negotiations by proposing to the Union an extremely broad management-rights clause that reserved for the Respondent the right to, among other things, unilaterally—without any obligation to notify and bargain with the Union—change employee health insurance at any time, change employee benefits at any time, impose discipline on employees without cause, reassign bargaining unit work to contractors and supervisors, and determine the existence of bargaining unit work. The judge aptly found that the Respondent's management rights proposal, paired with its proposed zipper clause, gave it

> unfettered discretion to change virtually all aspects of bargaining unit operations, including . . . benefits, hiring, promotion and transfer, disciplinary action without just cause, job classifications, work schedules,

[7] The Respondent's January 17, 2017 discipline proposal had removed almost all discipline from arbitration but preserved arbitration for discharges.

[8] The Respondent's wage proposal provided for a new compensation structure incorporating a market-based adjustment and merit wage increases. On May 21, 2018, the Union expressed concerns about the wage proposal, including the method of calculating wage increases. The judge found that the Respondent responded that the wage proposal was nonnegotiable and that it would not agree to annual renegotiations over the wage ranges because they would always be the same as what the Respondent paid its nonunion employees. The Union countered by proposing that the Respondent guarantee merit increases based on employees meeting certain expectations as part of their performance evaluations. The Respondent rejected that proposal. The parties never reached an agreement on unit employees' wages.

[9] The decertification petition was first circulated by a unit employee in March 2018, after nearly a year and one-half of bargaining had elapsed. 27 of the signatures were dated after October 11, 2018.

> supervisors performing unit work, the use of part-time, per diem, agency and temporary employees, and work rules.

The Respondent remained committed to its expansive management-rights proposal. On March 28 and 29, 2017, after some 4 months of bargaining had elapsed and in response to the Union's counteroffer, the Respondent again presented an extremely broad management-rights clause that was virtually identical to its initial proposal, but with additional language unmistakably underscoring that it was seeking broad relinquishment of the Union's bargaining rights.[10]

The management-rights clause did not stand alone. Four months into the parties' negotiations in March 2017, the Respondent paired its broad management-rights proposal with a no-strike clause proposal, which entirely prohibited employee picketing of any kind, including even informational picketing, and expansively proscribed the use of economic weapons of any kind in response to violations of the collective-bargaining agreement or Federal law.[11] Thus, the Respondent sought both unfettered unilateral rights on a wide range of working conditions under its management-rights proposal and the unconditional surrender of the employees' statutory right to strike, picket, or use any type of economic weapons to contest, change, or ameliorate the Respondent's conduct.[12]

Moreover, in these late March 2017 negotiations, the Respondent additionally proposed eliminating binding arbitration.[13] Instead of a grievance-arbitration procedure, it proposed a grievance-and-mediation clause providing that any issue arising under the collective-bargaining agreement could be grieved only to nonbinding mediation without permitting the parties to arbitrate any dispute. Thus, at the same time it was proposing to eliminate the Union and employees' right to take collective economic action to enforce the agreement, the Respondent's proposal also precluded the employees and the Union from securing a binding dispute-resolution mechanism for addressing alleged violations of the agreement.

The combined proposals advanced by the Respondent beginning in March 2017 are precisely the type that have been deemed by the Board and the courts to show bad-faith bargaining. They grant the employer broad discretion to unilaterally act, without bargaining, on a wide range of employees' critical terms and conditions of employment, while simultaneously foreclosing virtually any avenue for the employees and their union to counteract the broad power the employer sought to arrogate to itself. It is settled that an inference of bad-faith bargaining is warranted "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." *PSO*, supra, 334 NLRB at 487–488.

That is the case here. The Respondent's management-rights proposal authorized it to make unilateral changes to a broad range of significant terms and conditions of employment, without bargaining or even giving notice to the Union. "Such proposals are evidence that an employer has failed to bargain with the required desire to enter into a collective-bargaining contract . . . because 'unions are statutorily guaranteed the right to bargain over any change in any term or condition of employment, [and therefore] could do just as well with no contract at all.'" *Altura Communication Solutions,* supra, 369 NLRB No. 85, slip op. at 4, quoting *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993).

Significantly, here the Respondent combined its management-rights proposal (which stripped the Union of much of its statutory right to bargain) with a no-strike provision and without any binding arbitration provision (which stripped the Union of its statutory right to strike and rejected any commitment to arbitrate disputes). As the Supreme Court's decisions reflect, Federal labor law has long recognized that the ability to arbitrate disputes is the quid pro quo for a union's agreement not to strike. See *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike"); *United Steelworkers v. American Mfg.Co.*, 363 U.S. 564, 567 (1960) ("one is the quid pro quo for the other"). Indeed, that compromise had also been an essential component of the parties' bargaining relationship for more than 20 years.

Considered in their entirety, the Respondent's trio of proposals 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

[10] The Respondent's March 2017 management-rights proposal doubled-down on the removal of the Union's right to bargain by adding that the Respondent "agrees to receive from the Union constructive suggestions, which [the Respondent] shall consider in its sole discretion." This added language, of course, constitutes no bargaining obligation at all.

[11] There had been no strikes or other job actions by the employees or the Union in the parties' 20-year bargaining relationship.

[12] The expansive no-strike proposal even precluded refusing to cross a picket line that was merely "near" the Respondent's premises, and further provided for discharge (or lesser discipline) at the Respondent's sole discretion for activity it deemed prohibited under the provision.

[13] The parties' expired contract contained a traditional grievance and arbitration procedure.

bargaining." *PSO*, supra, 334 NLRB at 489. Indeed, the broad management-rights language pressed by the Respondent permitted it to effectively eliminate the bargaining unit entirely without meaningful challenge from the Union, based on its unconstrained right to determine the existence of bargaining unit work and the extent to which bargaining unit work could be performed at all.

The Board's caselaw fully supports finding bad-faith bargaining here on the basis of the Respondent's combination of proposals, which denied the Union the right to challenge the Respondent's unilateral changes while having to cede substantially all of its representation function. In *Altura Communication Solutions*, the Board found that the employer's proposals, considered in combination, evinced a failure to bargain in good faith. The Board inferred bad faith from the triad of the employer's proposals combining a "remarkably broad" management-rights clause, a no-strike clause that would have precluded any and all "protest[s] regardless of the reason," and a grievance procedure that would exclude from its scope the Respondent's exercise of the extraordinarily broad discretion provided it its proposals. See 369 NLRB No. 85, slip op. at 4. "The Board has consistently found such proposals to be an indicator of bad faith," the *Altura* Board observed, declaring that under that combination of proposals "employees and the Union would be left with no avenue to challenge any of the Respondent's decisions with regard to the nearly exhaustive rights reserved to the Respondent under the management-rights clause, even if the Respondent decided to eliminate the bargaining unit entirely." Id. The Ninth Circuit enforced the Board's decision. See *Altura Communication Solutions, LLC v. NLRB*, supra, 848 Fed.Appx. 344.

Similarly, in *PSO*, the Board found that the Respondent failed to bargain in good faith by insisting on a management-rights proposal granting it unilateral control to change virtually all significant terms and conditions of employment of unit employees, and coupled this relinquishment of the Union's statutory right to bargain with a no-strike provision relinquishing the Union's right to protest such employer changes, and further coupled with a "virtually meaningless" arbitration provision. This denied the union "the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith." *PSO*, supra, 334 NLRB at 488. The Tenth Circuit enforced the Board's decision.[14]

It is thus settled that employer proposals which, taken as a whole, would leave employees with fewer rights than they would have without a contract evidence unlawful bad-faith bargaining because they are designed to frustrate the collective-bargaining process. The paradigmatic example is when an employer—as here— simultaneously insists on a broad management rights clause, a no-strike provision, and no effective grievance-and-arbitration procedure.[15]

The Respondent argues that the precedent discussed here is inapposite because its no-strike and no-arbitration proposals, at least, were not final offers, and on June 7, 2018, the Respondent withdrew its no-strike proposal.[16] But the fact that the Respondent relented on one of its proposals after maintaining them for 14 months does not negate a finding of bad-faith bargaining here. The statutory duty to bargain in good faith encompasses the bargaining process, as a whole, from beginning to end (whether agreement or lawful impasse). An employer cannot escape the consequences of its bad-faith bargaining by holding back final offers to be deployed if and when a union seeks recourse at the Board for the employer's unlawful bargaining tactics. Here, the Respondent maintained its adherence to its trio of unlawful proposals for some 14 months, encompassing 24 bargaining sessions, from late March 2017 through early June 2018. These 14 months constituted the majority of the months the parties were in bargaining. A union cannot fairly be expected to bargain indefinitely while waiting for the employer to begin bargaining in good faith, nor is the union required to file a charge with the Board in order to trigger the employer's

[14] See *Public Service Company of Oklahoma v. NLRB*, 318 F.3d 1173, 1177 (10th Cir. 2003) ("The Board's decision was not based on the illegality of any particular proposal. Instead, the Board held the Company violated the Act by insisting as a price for any collective-bargaining agreement that its employees give up their statutory rights to be properly represented by the Union. In other words, the Company's rigid adherence throughout negotiations to a battery of contract proposals undermining the Union's ability to function as the employees' bargaining representative demonstrated it could not seriously have expected meaningful collective bargaining.") (internal quotation marks omitted).

[15] See e.g., *Target Rock*, 324 NLRB 373, 386 (1997) ("An employer acts in bad faith when, during negotiations, it simultaneously insists on a broad management-rights clause, a no strike provision, and no effective grievance-and-arbitration procedure."), enfd. 172 F.3d 921 (D.C. Cir. 1998); *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn.7 (1976) ("We have consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure.")(collecting cases). See *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 8-10 (2018), enfd. 2019 WL 12276113 (2019); *Regency Service Carts*, 345 NLRB 671, 672–676 (2005); *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859 fn. 4 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

[16] The Respondent withdrew its no-strike proposal only after the Union filed its unfair labor practice charge in this case.

duty to bargain: the union it is not "compelled to continue [a] charade." See *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 608 (7th Cir.1979) (if "the negotiations were not progressing because of the employer's insistence on unreasonable provisions, the Union should not be compelled to continue the charade for more sessions before asserting its statutorily protected right").

The bad faith reflected by the Respondent's 14-month bargaining posture is all the more obvious in the context of the Respondent's stated goals for the parties' negotiations. The Respondent informed the Union at the outset of bargaining, and on numerous occasions thereafter, that it sought to substantially alter many if not most of the provisions of the parties' expired collective-bargaining agreement.[17] The Respondent's approach to the negotiations thus anticipated a lengthy bargaining period, even absent the burden of grappling with the Respondent's maintenance of its trifecta of unlawful proposals. By adding the broad no-strike and no-arbitration proposal to the mix after negotiations had been underway for 4 months, the Respondent threw a wrench into the bargaining process and stymied any prospect of agreement. The Respondent's commitment to those proposals for over 14 months of negotiations added a layer of obstruction and delay that prevented timely good-faith bargaining from occurring.[18]

We accordingly find that the Respondent's combining and maintaining for 14 months of its broad management-rights, broad no-strike, and no-arbitration proposals, by itself, constitutes bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act, under the well-established legal principles that we apply here.

Like the judge, we also find that there were additional indicia of bad faith bargaining which confirm our finding of a violation of the Act based on the trio of proposals (broad management-rights, broad no-strike, and no-arbitration proposals) discussed above. Specifically, the Respondent's wage proposal, union-security proposal, and regressive bargaining concerning the arbitration of discharges, provide, as discussed below, additional indicia of bad-faith bargaining in the Respondent's bargaining proposals. These additional indicia, combined with the trio of proposals, further confirm our finding that the Respondent violated its bargaining obligation. While we have found that the trio, by itself, establishes bad faith bargaining, we also find, alternatively, that the trio, with the addition of and in combination with the additional indicia of bad bargaining discussed below, establish a violation of Section 8(a)(5) and (1) of the Act.[19] We accordingly turn to discussion of the additional indicia of the Respondent's bad-faith bargaining.

First, the judge found that the Respondent advanced a wage proposal which gave it near-unrestricted discretion. Long-standing Board precedent holds that an employer seeking to deny a union any role in determining wages during the life of a collective-bargaining agreement evinces bad-faith bargaining. See *Altura Communication Solutions, LLC*, supra, 369 NLRB No. 85, slip op. at 4–5; *Kitsap Tenant Support Services*, 366 NLRB No. 98, supra, slip op. at 8 (employer "sought to deny the [u]nion any role in establishing wage rates during the life of the contract"); *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998) (employer violated the Act by attempting to implement discretionary wage increases that deprive the union of any role as the employee representative, which is antithetical to collective bargaining.); and *A-1 King Size Sandwiches*, supra, 265 NLRB at 858–859.[20]

The Respondent introduced this wage proposal into negotiations on May 18, 2018, after one and a half years of bargaining had already elapsed, and after the Respondent had been insisting on its unlawful trio of proposals for over a year. We agree that the Respondent's approach to negotiating wages further supports a finding of bad-faith bargaining because its wage proposal gave it substantial, if not complete, discretion over employees' wages.

That proposal provided for a new compensation structure starting in August 2019. The Respondent's proposal incorporated a market-based adjustment that relied on unit employees' overall work experience, not just their time with the Respondent, as well as merit wage increases. Under the proposal, the Respondent had complete discretion over both types of wage increases. Regarding the market-based adjustment, the Respondent's proposal allowed it to implement an increase "in order to keep up with the

[17] As the Union stated to the Respondent at the March 26, 2017 bargaining session, there were 20 noneconomic provisions in the expired collective-bargaining agreement and the Respondent had proposed to overhaul 19 of them.

[18] At the same time that e the Respondent's conduct served to significantly protract the parties' bargaining, the Respondent informed employees that they would receive no wage increases until a collective-bargaining agreement was ratified. The Respondent thus used its unlawful conduct to undermine the Union's support among employees, effectively requiring the Union to choose between agreeing to its unlawful combination of proposals and being blamed by employees for preventing a wage increase. Such an approach cannot be reconciled with good-faith bargaining.

[19] We need not decide whether the additional indica, independently or individually, or in some combination, without the trio, would establish a finding of bad-faith bargaining.

[20] The Respondent's proposal is similar to the proposal in *A-1 King Size Sandwiches* where the employer sought to determine wage increases on the basis of semi-annual wage reviews, where it would make the final decision and had the exclusive right to evaluate, reward, promote and demote employees, leaving the union's participation in the process meaningless. See 265 NLRB at 859.

market, or attract and retain staff in those jobs" without bargaining with the Union. As to the merit wage increases, because "[t]he evaluation process and merit increase awards for bargaining unit employees shall follow and be incorporated into the same general merit criteria and process used for all non-bargaining unit employees at the Hospital," under the proposal the Respondent would have had unilateral discretion in setting unit employees' wages for the life of the collective-bargaining agreement. The Respondent also sought sole discretion in conducting employee evaluations.

The Respondent argues that its wage proposal relied partially on non-discretionary components, such as its proposed shift differential changes and lump-sum bonus payments, and that its calculation of employees' overall work experience used to place employees into specific pay ranges would also be based on objective criteria. But even assuming that is true, it is insufficient to absolve the Respondent. The Respondent did not offer to bargain over the parameters of, and the objective criteria used to determine, a merit wage increase. Instead, its non-negotiable position was that unit employees would be placed on a hospital-wide pay scale that the Respondent would unilaterally determine and then any wage increases would be based on merit as determined by employee evaluations, over which the Respondent would have sole discretion and which could not be grieved. Thus, by depriving the Union from having any role in setting the market-based adjustments and merit wage increases, the Respondent's proposal sought to prevent the Union from having a meaningful role in bargaining unit employees' wages. Instead, the Respondent would rely exclusively on the methodology it used for setting the wages of its nonunion employees. Moreover, the Respondent never wavered from its position that the Union would be excluded from any participation in determining wage increases during the life of the contract, over which the Respondent retained unfettered discretion. We accordingly find that the Respondent's wage proposal sought to grant the Respondent unfettered discretion to set employees' wages and to deny the Union its statutory right to bargain over the subject which, in combination with its other proposals discussed above, evinces bad-faith bargaining.[21]

Second, the judge also found that the Respondent's insistence on its proposal to eliminate the expired contract's union-security clause further reflected the Respondent's bad-faith bargaining. The Respondent made this proposal on March 29, 2017, coincident with introducing its trio of proposals discussed above. The Union rejected the Respondent's proposal at that time, and in September 2018 made a counterproposal drawn from a union-security clause in a contract between the Union and a Boston hospital owned and managed by Universal Health Services. The Respondent reiterated its proposal to eliminate the union-security provision. The parties never reached an agreement on union-security language.

The judge properly found that this conduct further reflects the Respondent's unlawful intent to frustrate the bargaining process. The Respondent justified its proposal based on its philosophical objection to a union-security clause, rejecting the Union's counterproposal and arguing, "it's not fair to force employees to pay dues to keep their jobs at [the Respondent]." The Board has long held, however, that a "philosophical" objection to a union-security clause does not relieve an employer of its obligation to bargain over the subject. See *Kalthia Group Hotels, Inc. and Manas Hospitality LLC d/b/a Holiday Inn Express Sacramento*, 366 NLRB No. 118, slip op. at 19–20 (2018). "While the Act does not require that an employer grant a union's bargaining proposals for union-security and dues-checkoff provisions, the assertion of 'philosophical' objections does not satisfy the statutory obligation to bargain in good faith concerning these matters." *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1040 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982).[22]

The Respondent concedes it expressed philosophical opposition to the union- security clause, but claims it had a legitimate reason for eliminating the clause: that it hindered its recruitment of employees. The judge considered that justification, but disbelieved it because the Respondent failed to provide substantiation for its claim. On exceptions, the Respondent does not point to any evidence that the judge failed to consider.

The Respondent advances yet a third reason to justify its bargaining position to eliminate the union-security provision: that employees complained about it. In its

[21] The judge found that the Respondent presented its wage proposal as nonnegotiable, and that it would not agree to annual re-negotiations over the wage ranges because they would always be the same as what the Respondent paid its nonunion employees. The Board has long held that a "party who enters into bargaining negotiations with a 'take-it-or-leave-it' attitude violates its duty to bargain." *General Electric Co.*, 150 NLRB 192, 194 (1964); see also, *NLRB v. Truitt Mfg.*, 351 U.S. 149, 154 (1956) (Frankfurter, J., concurring) (good faith bargaining "is inconsistent with a predetermined resolve not to budge from an initial position.").

[22] See also *CJC Holdings,* 320 NLRB 1041, 1047 (1996), affd. 110 F.3d 794 (5th Cir. 1997)*; Chester County Hospital,* 320 NLRB 604, 622 (1995), enfd. 116 F.3d 469 (3d Cir. 1997); *Carolina Paper Board Co.*, 183 NLRB 544, 551 (1970). The Respondent also sought to eliminate the dues-checkoff provision from the expired collective-bargaining agreement based on its philosophical objection.

exceptions, the Respondent does not argue that this implicated more than a few employees.[23] We find that, in light of the Respondent's admitted and impermissible philosophical objection that it was "not fair" to require employee to pay union security fees, its additional assertion that a small number of employees complained about union-security does not serve to establish the legitimacy of its objection. Indeed, in this context is hardly distinguishable from its philosophical objection. Nor does it lend substantiation to its alleged recruitment concern rejected by the judge.

In these circumstances, we adopt the judge's finding that the Respondent failed to advance a legitimate business justification for its proposed elimination of the union-security clause, and thus its bargaining conduct regarding union security independently reflects the Respondent's unlawful intent to frustrate the bargaining process.[24]

Third, we agree with the judge that the Respondent's regressive bargaining over whether discharges would be subject to binding arbitration is evidence of bad-faith bargaining. An examination of its proposals in two areas—discipline and dispute-resolution—shows the Respondent's regressive behavior. On January 17, 2017, the Respondent presented the Union a discipline proposal that, among other things, removed any discipline short of discharge from arbitration, but preserved binding arbitration for discharges. On April 5, 2017, the Respondent provided the Union a revised discipline proposal that still provided for arbitration of discharges. The Union pointed out that this *discipline* proposal was inconsistent with the Respondent's earlier March 29, 2017 *dispute-resolution* proposal, which provided that all grievances, including discharge grievances, would only be subject to nonbinding mediation instead of arbitration. On May 25, 2017, the Respondent then emailed the Union a further revised discipline proposal providing that a discharge grievance would only be subject to nonbinding mediation instead of arbitration.

The Respondent thus backtracked from its initial January 2017 discipline proposal which had provided for arbitration of discharges. The Board will find that a regressive bargaining proposal—a less favorable proposal than one made earlier—is evidence of bad-faith bargaining when it is made without explanation or when the stated reason for the step backward appears dubious.[25] That is the case here.

The Respondent does not dispute that it engaged in regressive bargaining. Instead, it claims that its conduct was merely a mistake. The Respondent asserts that arbitration of discharges should not have been included in its January 2017 discipline proposal and, essentially, that it was not aware of its January 2017 discipline proposal when it made its March 2017 dispute-resolution proposal that provided for only nonbinding mediation for discharges.

We find the Respondent's asserted explanation fails to constitute a legitimate basis for its regressive conduct. The judge found that the parties at the January 17, 2017 bargaining session specifically discussed the proposal that discipline would not be arbitrable, with the (important) exception of discharges. Nothing in the parties' discussion suggests that the significant exception for discharges was inadvertent. This contemporaneous conduct strongly undercuts the plausibility of the Respondent's "mistake" explanation.[26]

The Respondent further describes its regressive conduct as merely reflecting a discrepancy in its overall package of proposals and as intended to establish consistency within the Respondent's proposals. Of course, the Respondent could have resolved that asserted discrepancy by choosing to preserve binding arbitration for discharges, as it originally proposed in January 2017. Instead, the Respondent decided, by its regressive May 25, 2017 proposal, that it wanted to prohibit all arbitration, including for discharges, and adjusted its discipline proposal accordingly. At that point, the parties had already engaged in months of negotiations with the understanding that disputed discharges—an issue critical to unit employees–would be resolved in binding fashion by a neutral arbitrator. The Respondent's regressive proposal to eliminate that right further evinces intent to frustrate agreement. Grievance and arbitration provisions are a cornerstone of collective-bargaining agreements, and the Respondent's regressive conduct evidences the Respondent's desire to avoid an agreement, rather than reach one.

[23] There are about 150 employees in the bargaining unit.

[24] We also observe, though, that we would still find the Respondent's combination of proposals to be unlawful even without consideration of the union security proposal.

[25] *See Mid-Continent Concret*e, 336 NLRB 258, 260 (2001), enfd. sub nom. *NLRB v. Hardesty Co., Inc.,* 308 F.3d 859 (8th Cir. 2002); *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) ("Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose frustrating the possibility of agreement."); and *U.S. Ecology Corp*., 331 NLRB 223, 225 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001).

[26] The Respondent suggests it only later divined its mistake and so notified the Union at the April 5, 2017 bargaining session. This assertion is not clearly supported by the Respondent's s bargaining notes, however. In any event, the Respondent took no action to rectify its purported mistake at that time. The Respondent admits in its exceptions brief to the Board that it did not amend its discipline proposal to provide for only non-binding mediation of discharges until May 25, 2017, more than 4 months after it tendered its initial discipline proposal permitting the Union to arbitrate unit employee discharges.

Accordingly, we affirm the judge's finding that the Respondent failed to bargain in good-faith for a successor collective-bargaining.[27]

We further adopt the judge's conclusion that the Respondent's withdrawal of recognition on October 26, 2018, was unlawful. An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), affd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997).[28] This is the case here. The prolonged delay in achieving good-faith bargaining caused by the Respondent's unlawful conduct detrimentally impacted employees—who were awaiting the conclusion of negotiations for a wage increase—and was likely to cause their disaffection from the Union. "Lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive." Id. at 177. In turn, we find, as the judge did, that the Respondent's unilateral changes to employees' terms and conditions of employment, made after the unlawful withdrawal of recognition, were also unlawful. See *Flying Foods*, 345 NLRB 101, 104 (2005), enfd. 471 F.3d 178 (D.C. Cir. 2006).

V. CONCLUSION

The "fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals, which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative." *Reichhold Chemicals, Inc.*, 288 NLRB at 70. We find, for all the reasons set forth above, that substantial evidence in the record demonstrates this to be the case here.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with, and withdrawing recognition from, the Union, we shall, in agreement with the judge, order the Respondent to meet with the Union on request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract.[29]

In addition, having found, in agreement with the judge, that the Respondent violated Section 8(a)(5) by making unilateral changes to the unit employees' terms and conditions of employment, we shall order the Respondent to make unit employees whole for any loss of earnings or other benefits suffered as a result of its unlawful unilateral implementation of changed terms and conditions of employment.[30] Such amounts 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,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[31] In addition, in

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[27] We reiterate that our finding of bad faith bargaining is based on our objective evaluation of the Respondent's bargaining proposals. Our analysis does not rely on any away-from-the-table bargaining conduct by the Respondent. "Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to." *NLRB v. Wright Motors, Inc.*, supra, 603 F.2d at 609. See, e.g., *Prentice-Hall Inc*., 290 NLRB 646, 646 (1988) (employer demand for sweeping waivers of employees' statutory rights, while offering little in return, with no away-from-the-table evidence of bad-faith bargaining, was simply "not the behavior of an employer who is trying to achieve a collective-bargaining agreement.").

[28] We agree with the judge that unremedied bargaining violations, like the one at issue here, are analyzed under the Board's *Lee Lumber* decision. However, we also agree, that the withdrawal of recognition was unlawful under the alternate analysis set forth in *Master Slack, Corp*., 271 NLRB 78, 84 (1984).

[29] We agree with the judge that an affirmative bargaining order is warranted in this case. While the Respondent made a bare exception to this remedial provision, it does not argue that the affirmative bargaining order is improper if the Board affirms the judge's 8(a)(5) violation finding. Indeed, the Respondent acknowledges in its exceptions brief that the Board's standard remedy for a Sec. 8(a)(5) bad-faith bargaining violation is an affirmative bargaining order. In the absence of a particularized exception to the affirmative bargaining order, the Board does not need to furnish a specific justification for it. See *Scepter v. NLRB,* 280 F.3d 1053, 1057 (D.C. Cir. 2002) (the Board may issue an affirmative bargaining order without providing a specific justification in the absence of particular exceptions). See *Altura Communication Solutions*, supra, 369 NLRB No. 85, slip op. at 6, fn. 16; *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119, slip op. at 1 fn. 2 (2019) (collecting cases). Contrary to the judge, we find that a bargaining schedule remedy is not necessary in the circumstances of this case.

[30] The judge included make-whole relief for the unilateral change violations in his recommended Order, but did not address the matter in the remedy section of his decision.

[31] The judge additionally ordered the Respondent to provide make-whole relief to Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens, and Arlene Smith whole for any loss of earnings and other benefits incurred during bargaining. In adopting this remedy ordered by the judge, we note that any such amounts should be computed in the same manner.

accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), we shall order the Respondent to compensate employees for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful unilateral changes. Compensation for these harms 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.

Further, in including make-whole relief provisions in his recommended Order, the judge inadvertently failed to address the adverse tax consequences and Social Security Administration reporting remedial requirements associated with make-whole relief. Doing so here, we shall order the Respondent to compensate the unit employees for any adverse tax consequences of receiving lump-sum backpay awards in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to file a report with the Regional Director for Region 5 allocating the backpay award to the appropriate calendar years for each employee in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In addition to the backpay allocation report, we shall order the Respondent to file with the Regional Director for Region 5 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award, in accordance with *Cascades Containerboard Packaging-Niagara*, 370 NLRB No.76 (2021), as modified in 371 NLRB No. 25 (2021).

ORDER

The National Labor Relations Board orders that the Respondent, District Hospital Partners, L.P. d/b/a The George Washington University Hospital, A Limited Partnership, and UHS of D.C., Inc., General Partner, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(c) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(d) 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on November 1, 2018.

(c) Make Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith whole for any loss of earnings and other benefits incurred during bargaining, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Make unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful unilateral changes in terms and conditions of employment since November 1, 2018, in the manner set forth in the amended remedy section of this decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) File with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(g) Within 14 days after service by the Region, post at its facility in Washington, D.C., copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for

[32] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic

Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2018.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 5 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 8, 2024

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

In 2021, the Board issued a decision, reported at 370 NLRB No. 118, in which it dismissed the instant complaint in its entirety. Two years later, and over my dissent, the Board vacated that decision. *District Hospital Partners, L.P., d/b/a The George Washington Hospital*, 372 NLRB No. 109 (2023). For the reasons discussed in my dissent in that case, I believe that the 2021 decision dismissing the complaint should be controlling. Id., slip op. at pp. 7–10 (Member Kaplan, dissenting). Accordingly, I would dismiss the Section 8(a)(5) and (1) allegations that my colleagues have decided to revisit herein on that basis. I take no position on the merits of the Board's original decision or on my colleagues' analysis in this decision.

Dated, Washington, D.C. May 8, 2024

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT withdraw recognition from the Union and fail and refuse to bargain with the Union as your exclusive collective-bargaining representative.

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

means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

WE WILL, on the Union's request, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on November 1, 2018.

WE WILL make Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens, and Arlene Smith whole for any loss of earnings and other benefits incurred during bargaining, plus interest.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful changes to your terms and conditions of employment since November 1, 2018, and WE WILL also make such employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful changes, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER

The Board's decision can be found at https://www.nlrb.gov/case/05-CA-216482 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.

Barbara Duvall and *Andrew Andela, Esqs.,* for the General Counsel.
Stephen Godoff, Esq. (Abato, Rubenstein & Abato, PA), of Baltimore, Maryland, for the Charging Party.
Tammie Rattray and *Paul Beshears, Esqs. (Ford Harrison LLP),* of Tampa, Florida and Atlanta, Georgia, *Steven Bernstein, Esq. (Fisher & Phillips*), of Tampa, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, District of Columbia on June 18-20, 2019. The complaint alleges that District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner (the Hospital or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] by failing and refusing to bargain in good faith and with no intention of reaching an agreement for a successor collective-bargaining agreement with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) as the exclusive collective-bargaining representative of its employees. The complaint further alleges that the Hospital improperly withdrew recognition from the Union after nearly 2 years of bad faith and regressive bargaining, subsequently rejected the Union's request to continue bargaining and immediately proceeded to implement unilateral changes to employees terms and conditions of employment. At hearing, the General Counsel moved to amend the complaint to further allege that Hospital representatives improperly interrogated potential employee witnesses.

The Hospital disputes the allegations and contends that it engaged in hard, but good faith, bargaining over the course of 30 bargaining sessions. It contends that it withdrew recognition from the Union only after it received objective evidence from a majority of employees in the bargaining unit that they no longer wished to be represented by the Union for purposes of collective-bargaining. Even if it did engage in any unfair labor practices during bargaining, the Hospital avers that none caused the disaffection that eventually developed among a majority of the

[1] 29 U.S.C. §§ 151–169.

bargaining unit. Since the withdrawal was proper, the Hospital contends that it was then entitled to implement unilateral changes to employees' terms and conditions of employment, as well as notify employees that the changes were related to the Union's shortcomings and their newfound status as nonunion employees. Finally, the Hospital denies that its counsel coercively interrogated employees in preparation for hearing and that they properly advised the employees of their rights, including the right to decline to give testimony without threat of reprisal.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel, the Hospital and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Hospital, a limited partnership, is engaged in providing short-term acute medical care to the general public from its health care facility in Washington, D.C. In conducting such business operations, the Hospital annually derives gross revenues in excess of $250,000 and receives goods and materials valued in excess of $5,000 directly from points outside of Washington, D.C. Additionally, the Hospital's business operations within the District of Columbia are encompassed by the National Labor Relations Board's (the Board) plenary jurisdiction over enterprises in that jurisdiction. The Hospital admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has a been a healthcare institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties' Collective Bargaining History

The Hospital is jointly owned by George Washington University and District Hospital Partners, L.P. District Hospital Partners, L.P. is a subsidiary of Universal Health Services, Inc. (UHS). The Union represents a bargaining unit of about 150 regular full-time and regular part-time employees in the Environmental Services ("EVS"), Linen Services, Ambulatory Care Center, and Food Services ("Dietary") departments of George Washington University Hospital (the bargaining unit).

The Hospital's recognition of the Union has been embodied in successive collective-bargaining agreements spanning more than 20 years.[4] The most recent agreement was effective from December 20, 2012 through December 19, 2016 (the CBA). That agreement, as well as the one before it, were negotiated within a week and without the assistance of counsel. The CBA defines the bargaining unit, in pertinent part, as follows:

> Article 1 – Recognition
>
> Section 1.1 The Employer recognizes the Union as the exclusive bargaining agent for a unit of all regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital. The job classifications are named in Section 2 below, but excluding, all executive, professional, technical, clerical, and supervisory employees (including foreman), temporary employees, guards, employees not regularly scheduled for a standard workweek of twenty (20) or more hours, and all other employees in job classifications not specifically named in Section 1.2 below.
>
> Section 1.2
>
> Crew Leader, Environmental Services
> Service Worker
> Service Worker Trainee
> Senior Service Worker
> Linen Service Worker Trainee
> Linen Service Worker
>
> Cook I
> Cook II
> Utility Worker
> Food Service Worker
> Nutrition Associate
>
> Section 1.3 For purposes of this Agreement, the following terms have the meanings stated below:
>
> (a) "regular full-time employee(s)" means employee(s) in a bargaining unit who hold regular full-time positions and who are regularly scheduled to work forty (40) hours per week;
>
> (b) "regular part-time-employee(s)" means employee(s) in a bargaining unit who hold regular part-time positions and who are regularly scheduled to work twenty (20) or more hours per week; any regular part-time employee working over 35 hours a week shall receive an additional twenty cents (20) an hour to his or her straight-time hourly rate for each hour worked from 36 to 40. If an employee works in excess of 40 hours per week[,] such additional amount will not be paid;
>
> (c) "temporary employee(s)," excluded from bargaining units, means employees who are identified as temporary employees on Employer records and are hired for a period

[2] The parties' joint motion to correct the record, dated July 31, 2019, is granted.

[3] There were very few credibility issues in this case. An unidentified Hospital employees took notes of the sessions. The General Counsel introduced selected portions of those bargaining notes, while the Hospital moved at the conclusion of the hearing to admit the notes for all 30 bargaining sessions. I received all of the notes over objection of the General Counsel. The notes did not always capture the detailed exchanges between the parties. They did, however, cover the topics covered at the meetings and were corroborated in most instances by witness testimony, subsequent correspondence, and exchanged proposals and counterproposals. (R. Exh. 3.)

[4] GC Exh. 30.

of no longer than six (6) months, or whose temporary status is subsequently renewed for periods not to exceed three (3) months, or who are hired to replace one or more employees who are absent on leave from work, even if for longer than (6) months;

(d) "employee(s)" as hereinafter used means both regular full-time employees and regular part-time employees as defined above, unless a provision applies only to one of these categories of employees, in which case the term shall include only the category of employee to which the provision applies.

Other provisions that figured prominently in the bargaining at issue include the following relating to union security, wages and the grievance/arbitration process:

Article 2—Union Security

Section 2.1 The Employer agrees that as a condition of continued employment, all employees who are presently members of the Union shall maintain said membership, and all employees who are not presently members of the Union and all new employees shall become members on the first day of the first full calendar month which follows completion of sixty (60) days of employment, or the thirtieth day following the effective date of this Agreement, whichever is later. The Employer agrees to provide the Union with a quarterly report of new members, their addresses and job titles.

Section 2.2 Membership in the Union, insofar as this Agreement is concerned, shall mean that an employee tenders the periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership therein.

Section 2.3 The Employer further agrees that upon request of the Union it will discharge any employee who in accordance with the above, fails to tender the periodic dues and initiation fees uniformly required to obtain and maintain membership in said Union.

Section 2.4 The Union agrees to indemnify and hold the Employer harmless from any and all claims, suits, judgments, attachments, and any other liability resulting from the Employer's actions in accordance with this Article.

Article 7—Wage Rates

Section 7.1 (a) Effective January 1, 2013, employees on the payroll as of that date shall Receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2014, employees on the payroll as of that date shall receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2015, employees on the payroll as o that date shall receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2016, employees on the payroll as of that date shall receive a pay increase of one percent (1 %) of their present straight-time hourly rate.

(b) If any employee's straight-time hourly rate of pay, upon being increased as provided above, is less than the straight-time hourly rate for his/her job classification as listed in the relevant column of Exhibit 3, the employee's straight-time hourly rate will be the higher rate, and whichever straight time hourly rate is higher will be used as the basis for computing all paid leave and other benefits provided under this Agreement.

Section 7.2 Employees who are hired on or after the date of execution of this Agreement or who transfer to a new job classification on or after the date of execution of this Agreement will be hired or transferred in accordance with the hourly rates of pay set forth in Exhibit 3; provided that in the case of a transfer to a job classification in the same or a higher pay grade, the employee may retain his/her former hourly rate of pay, if higher.

Section 7.3 An employee shall receive a shift differential forty ($.40) cents per hour over his/her straight-time hourly rate for hours worked between 7:00PM and 5:00AM. No shift differential will be paid for any hours for which an employee is paid at a time-and-a-half (1½) or greater rate.

Section 7.4 An employee shall receive a weekend differential thirty ($.30) cents per hour-over his/her straight-time hourly rate for hours worked between 12:00 AM Saturday and 12:00 AM Monday. No shift differential will be paid for any hours for which an employee is paid at a time-and-a-half (1 ½) or greater rate.

Section 7.5 It is understood and agreed that an employee from a lower classification assigned to perform one (1) hour or more per day in a classification paying a higher rate Section 8.1 of pay per hour as set forth in Exhibit 3 shall receive the higher rate of pay for all hours worked in the higher classification. Nothing in this Agreement, however, shall be construed to prohibit the employee from performing tasks as a trainee for a higher paid classification at his/her regular rate for a period not to exceed two months. An employee may be assigned to perform work in a lower classification when emergencies or unpredictable events occur which prevent the normal operational schedule to be followed, but in such temporary instances will retain his or her regular rate of pay per hour.

Article 18—Grievance and Arbitration

Section 18.1 General. A grievance is defined as a complaint by the Union over an alleged violation of any specific provision of this Agreement that occurs during its term. A grievance shall be in written form, signed and dated by an authorized union representative.

Section 18.2 Time Limits, "Working days" as used in this Article means Monday through Friday, excluding observed holidays. Unless the parties have agreed in advance in writing to a specific extension of time, any grievance or demand for arbitration which is not filed by the Union at each step within the time limits contained herein is waived and the grievance is deemed to be concluded in accordance with the Employer's decision, and there shall be no further processing of the grievance or any arbitration delivery in writing by person or by mail, and if filing is by mail, the date of the official U.S. Postal Service postmark shall be the date of filing.

Section 18.3 Meetings. If the authorized Union representative or the aggrieved employee fails to attend a scheduled grievance meeting without prior notification to the Employer, the grievance shall be deemed concluded in accordance with the Employer's decision and there shall be no further processing of the grievance or any arbitration thereon.

Section 18.4 Steps 1. 2 and 3. Except as provided in Section 18.4 (d) below, Steps 1, 2 and 3 are as follows:

(a) Step 1. A grievance shall be filed at Step 1 with the supervisor within ten (10) working days after the action on which the grievance is based. The parties may agree to hold a meeting at this Step. If the grievance is not settled or denied by the supervisor or his/her designee within five (5) working days after it is filed at Step 1, the grievance shall be deemed denied at the expiration of such five (5) working days and the Union may, proceed to file the grievance at Step 2 as provided below.

(b) Step 2. A grievance shall be filed at Step 2 with the department head, within five (5) working days after the grievance is denied at Step 1. A meeting for the purpose of attempting to resolve the grievance shall be held at this Step. If the grievance is not settled or denied by the depat1ment head or his designee within ten (10) working days after it is filed at Step 2, however, the grievance shall be deemed denied at the expiration of such ten (10) working days and the Union may proceed to file the grievance at Step 3 as provided below,

(c) Step 3. Within five (5) working days after the grievance is denied at Step 2 a grievance shall be filed at Step 3 with the Director of Human Resources. A meeting for the purpose of attempting to resolve the grievance shall be held at this Step. If the grievance is not settled or denied by the Director of Human Resources or his/her designee within ten (10) working days after it is filed at Step 3, however, the grievance shall be deemed denied at the expiration of such ten (10) working days and the Union may proceed to invoke the arbitration procedure as provided in Section 18.5 below.

(d) Discharges: Discipline Imposed by Department Head. A grievance which arises from a discharge or from disciplinary action imposed directly by the department head shall start at Step II instead of Step I and shall be filed within ten (10) working days after the action on which the grievance is based. All other provisions of Section 18.4 shall apply.

Section 18.5 (a) Demand for Arbitration. A written demand for arbitration shall be filed by the Union with the Director of Human Resources within thirty (30) working days after the grievance is denied at Step 3. At the same time, the Union will request the Federal Mediation and Conciliation Service (with a copy to the Employer) to furnish a list of not less than nine (9) arbitrators. Selection shall be made by the Union and then the Employer representatives alternatively striking any name from the list until only one name remains. The final name remaining shall be the arbitrator of the grievance.

(b) Authority of Arbitrator. The arbitrator shall have no authority to hear and determine any case that has not been processed and submitted to him/her in accordance with the time and procedural requirements of the Article unless the parties have specifically agreed in writing to a waiver of the particular requirements. The arbitrator's authority and his/her opinion and award shall be confined exclusively to the specific provision or provisions of this Agreement at issue between the Union and Employer. The arbitrator shall have no authority to add to, alter, amend, Ot! modify any provision of this Agreement. The arbitrator shall not hear ot· decide more than one grievance without the mutual consent of the Employer and the Union. The arbitrator shall render a decision as expeditiously as possible, and no later than thirty (30) working days after the close of the hearing, unless otherwise agreed to. The award in writing of the arbitrator within the proper jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee, the Union and the Employer. Before either party flies an action in court to enforce or vacate an arbitrator's award, the

(c) Expenses. The Union and the Employer shall each beat its own expenses in any arbitration proceedings, except that they shall share equally the fee and other expenses of the arbitrator in connection with the grievance submitted.

B. Overview of the Bargaining Period

The Hospital and the Union met for 30 sessions between November 2016 and October 2018. The Hospital's bargaining team was led by outside counsel Steven Bernstein and Jeanne Schmid, the Hospital's vice president of labor relations. Both were new to the bargaining relationship, although Bernstein had represented the Hospital since 2014 during the decertification of the Hospital security officers' union. Other Hospital negotiators included supervisors Rhonda Evans, Eric McGee, Makita Miller and Robert Trump. The Union's lead bargainers included outside counsel Stephen Godoff[5] and Brian Esders, Union representatives Lisa Wallace,[6] Antoinette Turner and Yahnae Barner, and unit employees Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith.

The parties met at the Hospital's administrative offices, some distance from the medical center, on K Street in Washington, D.C. for negotiations on the following dates:

1. November 21, 2016	2. November 22, 2016
3. December 6, 2016	4. December 7, 2016
5. December 21, 2016	6. December 22, 2016
7. January 17, 2017	8. January 31, 2017
9. February 1, 2017	10. February 22, 2017
11. February 23, 2017	12. March 28, 2017
13. March 29, 2017	14. April 5, 2017
15. April 6, 2017	16. May 16, 2017
17. June 12, 2017	18. July 12, 2017

[5] Godoff admitted he used profanity on numerous occasions during the bargaining sessions and never heard that type of language from Bernstein or Schmid. (Tr. 80-91.)

[6] Although not clarified in the record, I find that Lisa Wallace subsequently changed her name to Lisa Barnes.

19. July 31, 2017	20. October 6, 2017
21. January 17, 2018	22. February 13, 2018
23. May 18, 2018	24. May 21, 2018
25. July 31, 2018	26. August 1, 2018
27. September 5, 2018	28. September 6, 2018
29. October 10, 2018	30. October 11, 2018

C. The Bargaining Sessions

1. November 21 and 22, 2016 Bargaining Sessions

At the first bargaining session on November 21, 2016, the parties discussed the scheduling of bargaining sessions and time allocated to each, whether employee negotiators would be compensated by the Hospital for their time at bargaining, and various other "housekeeping" items. From the outset and on numerous occasions thereafter, Bernstein and Schmid stressed that they sought to substantially alter many of the CBA provisions on the grounds that they were antiquated and ambiguous in various respects.[7]

The 2nd day of negotiations on November 22, 2016 focused on weather related transportation issues, the usage of cots, proposed changes to Articles 25 (union announcements & conferences) and 28 (personnel folders), and a new article on restricted access to hospital and patient care areas. The Union gave verbal counter-offers to the recognition and nondiscrimination clauses.[8] The contentiousness of the negotiations due to a previous labor/management committee dispute surfaced in several snide comments by Turner.[9]

Following those bargaining sessions, the Hospital issued its first "Bargaining Brief" (bargaining brief) to supervisors on December 1, 2016, which included the following "talking points:" the union has communicated with hostility and has not provided any proposals or responses to the proposals introduced by the hospital. They have not been prepared; as a result, the meetings have been unproductive unfortunately; This is the first time GWUH is presenting a bargaining brief and we do not believe the union will be happy with us doing so. Therefore, please be vigilant as union presence may increase as soon as today."[10]

2. The December 6 and 7, 2016 Bargaining Sessions

With the CBA about to expire on December 12, 2016, the parties resumed bargaining on December 6 and 7. On December 6, Bernstein presented the Union with proposed sweeping changes to Article 30, the management rights clause, which had been embedded in all of the predecessor agreements between the parties.[11] The proposal reserved the Hospital's rights to: (1) assign any amount of bargaining unit work to supervisors; (2) use contractors and contract personnel to perform bargaining unit work; (3) engage in searches of unit employees without limit; (4) discipline employees without cause; (5) change employees' health insurance and other benefits at any time; (6) determine what positions are and are not part of the unit; (7) determine the existence of bargaining unit work; and (8) determine the extent to which bargaining unit work could be performed at all. Along with its management rights proposal, the Hospital also proposed to nullify past practices:

> The parties further agree that all past practices, side agreements of understandings, verbal or written, of every kind and nature which may have developed or existed prior to the effective date of this Agreement are superseded and extinguished by this Agreement and, effective with execution of this Agreement, shall be wholly void and without force and effect. Nothing contained in this Article shall be construed as impairing or limiting the Hospital's Management Rights . . . including, without limitation, the Hospital's right to make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job.

After the Hospital began posting contentious bargaining briefs, the Union brought Godoff into the negotiations on December 7, 2016. Godoff started off with a bang, accusing the Hospital of creating an atmosphere that was very difficult to negotiate in and questioning its interest in arriving at a new contract.[12] At one point, he also referred to the Hospital's personnel folders proposal as "a nothing burger" and "an absolute waste of everyone's time."[13]

By the end of bargaining on December 7, the Union had tendered counteroffers for the recognition clause, non-discrimination clause and personnel folders.[14] It rejected the distribution and solicitation proposal, while the Hospital rejected the hostile environment side letter and proposed a job posting provision.

On December 9, 2016, Schmid distributed the Hospital's second bargaining brief asserting, in pertinent part, that the Union had a different negotiator each day, did not bring a computer or printer and objected to the bargaining brief posted after the last meeting. The brief concluded with a reminder that Hospital management was available to answer any questions about bargaining. Schmid's subsequent email on December 11 also reminded supervisors not to "review, discuss or sign any petition, or anything that looks like a petition with anyone," since "doing so will disrupt the integrity of the process."[15]

3. The December 21 and 22, 2016 Bargaining Sessions

By the December 21, 2016 session, the proposed ground rules from the November 21 session had still not been agreed upon. As he sought to do at the outset of every session, Bernstein reviewed the status of all of the proposals during every session,

[7] Godoff confirmed that the CBA could use some updating, but not to the drastic extent that the Hospital's negotiators sought. (Tr. 77; R. Ex. 3 at 6, 50, 85, 177.)

[8] R. Exh. 5.

[9] R. Exh. 3 at 24-26.

[10] Following nearly every bargaining session, the Hospital required supervisors to read and distribute bargaining briefs to unit employees at pre-shift meetings. Along with some of the bargaining briefs were "talking points" for supervisors to share with bargaining unit employees. (GC Exh. 40.)

[11] The Hospital's rationale for the proposal was that the management rights language in the current and earlier contracts was outdated and required clarification. (GC Exh. 2; R. Exh. 1 at 3542-3543.)

[12] Godoff conceded that he used profane language at various times, but noted that the voices were raised on both sides. (Tr. 80-81; R. Exh. 3 at 45.) Indeed, the Hospital's bargaining notes reflected numerous instances in which Wallace and Schmid interrupted each other.

[13] R. Exh. 3 at 49.

[14] R. Exh. 5.

[15] GC Exh. 36.

which Godoff found useful because of the infrequency of the bargaining sessions. Negotiations began with discussion of changes to job postings, visitation and bulletin boards. The Union presented language that was used in a contract with Georgetown Hospital, which the Hospital rejected. Godoff mentioned that the Union had a good relationship with Georgetown Hospital. Schmid responded that "we're not Georgetown."[16]

On December 22, 2016, the parties discussed the Hospital's proposals to modify Article 6 (hours for employees), specifically, procedures for calling out late and absences. The parties did not agree on any terms; Godoff characterized the Hospital's proposal to authorize termination based on a few absences as draconian and unprecedented. Bernstein's proposal to meld Articles 15 (layoff and recall) and 23 (seniority) was also rejected. The Union opposed these changes as well because they diminished seniority by authorizing layoffs based on performance evaluations rather than seniority. Godoff expressed the Union's dismay to such a proposal: "If you're hell bent on these kinds of things we will end up with a fight. Some things are so important will wind up being at war. War with SEIU."[17]

4. The January 17, 2017 Bargaining Session

On January 17, 2017, the Hospital provided the Union with a proposal to replace Article 22 (Suspension and Discharge) with a draft entitled "Discipline."[18] Among the substantial departures from the longstanding language appearing in Article 22 were provisions: (1) deleting "just cause" language; (2) excluding any discipline short of discharge from "the full grievance and arbitration procedure;" (3) placing limits on employees' right to union representation at investigatory interviews; (4) allowing the Hospital to rely on final written warnings for 4 years; and (5) permitting the Hospital to apply progressive discipline "where appropriate," and to skip steps for certain enumerated infractions, as well as "any other incident [or event] that the Hospital deems as a major [or egregious] infraction of employee conduct or work rules." During the ensuing discussion, the Hospital took the position that discipline, with the exception of termination, should be grieved and not arbitrated.[19]

The parties also resumed discussion over the Hospital's proposal to replace Articles 15 and 23 relating to seniority, layoff and recall. The expired CBA did not contain a time limit on recall rights; however, the Hospital proposed limiting the time period for recall to 2 months from the date of layoff. The Hospital also proposed eliminating 2 weeks of severance pay; the Union countered verbally, which Schmid found to make the negotiations very difficult. Godoff called the proposal "disgusting . . . Gratuitous bull shit and nastiness I have no interest in [discussing]. Proposal is so mean spirited it is a disgrace . . . Management flexibility my ass." Notwithstanding the emotional response, Godoff signaled a willingness to counter the proposal. In the meantime, he countered with a proposal that the Hospital agree to restoration of Article 15.4 which provides for 2 weeks of severance pay to laid-off employees with at least 6 months of service.[20]

Two days later, the Hospital circulated a bargaining brief summarizing the topics discussed and pointing out that "[d]uring these sessions the union formally proposed: Nothing." The brief also denounced the Union's conduct during the sessions and limited availability:

> ● Starting with these January bargaining sessions, the union has refused to continue to meet with the Hospital's bargaining team during working hours. The union is insisting on meeting in the evenings because the Hospital agreed to pay the union's bargaining committee members for their time at the table only through the end of the-last year. The Hospital has maintained that the union should pay their own bargaining committee, since the committee is bargaining on behalf of the union, not the Hospital. The union, however, refuses to do so.
> ● Instead the union now wants to meet in the evenings for half of the time we had previously spent in bargaining each day. Instead of meeting for approximately 7 hours from 10 am to 5 pm each day, the union wants to meet from 4 pm to 7:30 pm—with a break for dinner. The union acknowledged that this is likely to slow down the pace of bargaining significantly.
> ● Yesterday afternoon, we were in bargaining for 30 minutes when the union took a 45 minute break for dinner. We met together for 45 more minutes after their dinner, and then we ended for the evening. In the short time that we were together at the bargaining table:
> ● The union's chief negotiator spent the first twenty minutes of valuable time cursing and yelling at the Hospital's bargaining team;
> ● The Hospital's chief negotiator made clear that its committee was prepared to walk out if that continued;
> ● The union informed the Hospital that it is no longer able to negotiate on any Fridays, forcing us to change an already agreed-upon date to accommodate that new restriction.
> ● Despite the fact that the Hospital's counsel has repeatedly asked for written counter-proposals, the union provided none and informed the Hospital that it would not be able to provide any written counters in the evening because there was no one in their offices in Baltimore to type the proposals at that time. But, it is the union that is insisting on meeting in the evening.

The brief concluded with the dates of the next sessions and a reminder that "your leadership and the senior leadership team" were available to answer any questions about bargaining.[21]

5. The January 31 and February 1, 2017 Bargaining Sessions

At the January 31, 2017 bargaining session, the Union provided a written counterproposal to the Hospital's proposed

[16] R. Exh. 3 at 66.
[17] R. Ex. 3 at 90–93.
[18] GC Exh. 4; R. Exh. 1 at 3561–3563.
[19] Bernstein initially asserted on direct examination that the arbitration provision in the Hospital's discipline proposal was a mistake or "error" and "inaccurate," but when pressed on cross-examination he admitted that it was in fact not a mistake and the parties actually discussed the arbitration provision when the Hospital introduced the disciplinary proposal. (Tr. 42-44, 118–119, 188–190, 554–556, 597–599, 608–609; GC Exh. 46; R. Exh. 3 at 98–109.)
[20] R. Exh. 3 at 100–105.
[21] GC Exh. 5.

disciplinary proposal to replace Article 22.[22] The Union proposed, among other things: (1) that employees be notified within a certain period of time of discipline; (2) that the Hospital produce the work rules it referenced in its discipline proposal; and (3) for final written warnings to be added to the list of arbitrable actions. The Hospital countered in writing and agreed to some notification to employees of the discipline; to a deadline by which discharged employees must be paid; that employees would not be disciplined in public; and to strike the catch-all provisions regarding conduct exempt from progressive discipline.[23] The parties also discussed several outstanding items, including personnel files, non-discrimination, recognition clause, solicitation, job postings and seniority/layoff and recall.

When the parties met on February 1, 2017, the Union tendered a counterproposal to the Hospital's management rights proposal by accepting 22 of its 26 subsections. The Union also agreed to the Hospital's introductory language, with the exception of a portion permitting the Hospital to subcontract services or products.

The bargaining brief issued by the Hospital on February 2 listed the pending proposals by the Hospital and the Union, as well as a detailed summary of the positions of the parties during bargaining, and accused the Union of dragging out negotiations:

> The evening sessions are much shorter than the sessions we were attending during the day. We now typically begin after 4:00 and end at 7:30 pm, with a break for the union's dinner. The amount of actual time spent in bargaining is now less than 2 hours per day. Unfortunately, at this pace, it could take longer to work through the process.[24]

6. The February 22 and 23, 2017 Afternoon Bargaining Sessions

During the February 22 session, the parties exchanged proposals relating to discipline, solicitation and notification of job postings, and discussed revisions to the bargaining unit, probationary periods and eligibility for benefits, and minimum work hours for full-time employees. The Hospital also tendered a proposal to revise Article 28 (personnel folders). The parties tentatively agreed to the proposals regarding discipline. On several occasions during these sessions, the Union's negotiators expressed a sense of urgency about the need to move to the economic issues.

At the conclusion of the session, Turner noted that "[w]e have to start economics why can't you give a non-economic proposals. Your strategy is to prolong. You won't want to pay these employees and pay retro." Bernstein ignored her comment and went on to discuss the need to revise the arbitration language.

At the outset of the February 23 bargaining session, Godoff expressed frustration with the pace of negotiations and insisted that the parties agree to on more than 2 1/2-days per month. Bernstein replied that the Hospital was only willing to schedule two full days of bargaining per month. Godoff responded by threatening to file charges. Bernstein invited the Union to propose dates and Turner replied with twelve dates in March and April. Bernstein immediately replied by agreeing to schedule two dates for bargaining—April 5 and 6, 2017. Turner replied that members had been limited to the afternoon/evening sessions, which Bernstein recognized was due to the fact that the Hospital refused to compensate unit employees for time spent attending collective-bargaining after the CBA expired. [25]

Bernstein handed out proposals relating to uniforms (Article 16), job postings and filling vacancies. He requested a written counter to the Hospital's discipline proposal (Article 22) and the parties resumed bargaining over Articles 1 (recognition) and 26 (classifications).

7. The March 28 and 29, 2017 Bargaining Sessions

At the March 28 and 29, 2017 sessions, the Hospital tendered counterproposals on discipline and job postings, and the parties reached tentative agreements on uniforms. Bernstein also introduced four proposals: a counterproposal for managerial duties and rights, a new proposal for union security (Article 2), grievance and mediation (Article 18) and no-strikes or lockouts (Article 21). [26]

The Hospital's March 28 management rights proposal countered the Union's February 1 proposal. However, it was virtually identical to the Hospital's December 6 proposal, with the exception that the Hospital agreed "to receive from the Union constructive suggestions, which the Hospital shall consider in its sole discretion."[27] Godoff, hardly impressed, told Bernstein to "Get the fuck out of here. Put it in the bargaining notes keep going with your proposal."[28]

Three new Hospital proposals were tendered on March 29. Its union security proposal sought to delete that provision, as well as the dues remittance authorization.[29] That proposal was not discussed. However, the no-strike proposal, which would have precluded picketing and the use of "economic weapons" in response to contract violations or violation of federal law, evoked a strong response from Godoff:

> Want to be clear at this point. We'll take a look at this document; not sure if we are prepared to bargain. Now into the end of March after months of negotiations on innumerable contract provisions that have taken a tremendous amount of time to go through and only TA[30] 1 or 2 of those documents. To submit on 3/29 a brand (sic) document that requires more time and effort. These negotiations have been extremely protracted and we have only 2 days and now into May before were (sic) even able to consider language non-economic matters. Make clear now that we fully expect on the 6th of April to present economic proposals and begin to bargain over them. Not walking away from stuff we bargaining but will tell you under no

[22] GC Exh. 6; R. Exh. 2.

[23] GC Exh. 7.

[24] GC Exh. 8.

[25] R. Exh. 3 at 149–152.

[26] GC Exh. 9–12; R. Exh. 1 at 3601–3603, 3610–3611, 3614, 3627–3630.

[27] Schmid's testimony confirmed that the Hospital's proposal did not change from its December 6 proposal. (Tr. 248.)

[28] Contrary to the Hospital's representation in the bargaining brief that followed, Godoff's vulgar reference was obviously a rejection of the proposal and not a directive to Bernstein to leave. (Tr. 168.)

[29] R. Exh. 1 3598–3600.

[30] TA is shorthand for tentative agreement.

> circumstance not accept any new proposals into April, not accepted at that point. Again I don't know, it may simply clarify responsibilities, we can't make this a forever negotiation and have to hear from you on issues on retroactivity on wage increases before going into 5–6 months on a contract that's been around for 20 years or more. Reinventing a brand new contract with less than 1 arbitration a year; never been any job action in 20 years so there's nothing I see in the present contract that has been problematic for either party. No complaints from mgmt., they have been 3 day off. [No]w talking 5 months at a minimum. That's where we are. Want to make sure we are bargaining toward a contract not spinning wheels. People not had a raise, contract already 3 months old. Serious concern of ours, not making progressing fast enough, think we ought to lock in dates in [M]ay so we can at least make sure we are done by May. Concern [we'll] be here.[31]

Bernstein agreed to schedule bargaining dates for May but insisted the parties bargain over the new proposals, insisting they were all urgent. In response to Schmid's comment that the Union had not fully responded to the Hospital's proposals, Godoff replied:

> You're full of shit . . . we've given you everything. You don't know what the hell is going on. By sticking out month after month these people are going without a raise. Paying without 12 an hour. She pisses me off and you ruin these negotiations.[32]

After a brief exchange, Bernstein asked if it was the Union's position that it would no longer discuss non-economic proposals. Godoff replied:

> Reaching point you are not bargaining in good faith, becoming the suspicion. Not agreed on employee wants to look at personnel file for a union rep to help them go through the file. What's happening is people are becoming concerned, this is a continuing, [we're] going to get [to] new. We're not into [M]ay. Takes us hours to go through non-economic.

The Hospital's negotiators then noted the need to tighten or clarify language because numerous contract interpretation issues had arisen over the years. Godoff replied:

> We've all been in negotiations; there have been issues with management and union about interpretation. For [management] to come and change and clarify position but to come in and say on provisions never been a dispute and spend hours and hours raises red flag for the union. What you're doing is dragging out a process with no intention on getting to a process in the end. If we're going to have a fight not sure if we want to wait to have a fight. I'll be candid, with certain exceptions members of your committee, really did want to get to a contract and I've assured the union this is difficult and time consuming but intentions are honest. Also some that raises a red flag. After months of negotiations new proposal on a strike clause with no labor dispute in 20 years, never had a picket line, never had anything but health positive labor mgmt. relations. Why all of a sudden is the no strike clause a significant concern that would postpone a raise, for wages by July below minimum wage for DC? We're concerned about that.[33]

As bargaining continued, Bernstein tendered a proposal to replace Article 18 (grievance and arbitration) with a grievance and non-binding mediation provision, and amended its previous disciplinary proposal. The proposal curtailed the Union's ability to file lawsuits alleging violations of the CBA unless the breach involved a provision subject to mediation. Construed in conjunction with the disciplinary proposal, the proposed process essentially relegated discipline short of discharge to the grievance process and foreclosed access to mediation and further litigation. Godoff took exception, noting that "[t]his is potentially goodbye to this session. We won't have time to read through this today."

Bernstein then distributed a proposal to replace Article 3 (dues check-off). Godoff replied that "[t]his is bullshit . . .Come on [give] us the other things. [We're] out of here." As the union negotiators were leaving, Godoff said that they would take the rest of the afternoon to "look at what you gave us."[34]

This was a pivotal development in the negotiations, as the proposals stymied the Union's objective of advancing to bargaining over economic terms. In fact, Godoff advised the Union's bargaining team after this session that the proposals were "a clear announcement by management that they would never enter into an agreement with [the Union]."[35]

The Hospital's March 30, 2017 bargaining brief focused on the more raucous aspects of the March 28-29 sessions and completely omitted any reference to the concessions made by the Union in its February 1 counterproposal on management rights, as well as the Hospital's refusal to change its position between December 6 and March 29.[36] In addition, the brief highlighted the Union's refusal to "allow supervisory employees to perform bargaining unit work. We don't see how that helps staff members who would like to be able to rely on their directors' managers' and supervisors' help when facing a difficult task or call-outs[.]" The brief also stated that the "union's negotiator was dismissive of the Hospital's March 28 proposal and told the Hospital they needed to 'Get the F*** Out!! and that they would not be willing to consider further Hospital proposals on the subject." The remainder of the brief was also critical of the Union's conduct:

> As the Hospital's VP of Labor Relations [Ms. Schmid] attempted to explain the Hospital's position, the union's attorney [Mr. Godoff] cut her off before shouting, "She pisses me off!"

[31] R. Exh. 3 at 175–176.

[32] Godoff conceded that he lost his temper at this particular session and "threw [Hospital's counsel] out of the room." (Tr. 51–52). After that session, Godoff told the Union "that in my view you are never going to get a contract." (Tr. 124.)

[33] R. Exh. 3 at 175–178.

[34] R. Exh. 3 at 179–180.

[35] Godoff's testimony that the Union asserted on March 29 that the proposals would remove the Union's ability to enforce employees' rights was not reflected in the bargaining notes. (Tr. 51, 126). He did contend at that time, however, that the proposals were not justified based on the excellent labor relations history between the parties—no strikes or labor disputes, with the exception of one arbitration proceeding—during the past 20 years. (R. Exh. 3 at 176–178, 185.)

[36] GC Exh, 13.

> Then, turning directly to her he added, "You've ruined these negotiations!" The Hospital's VP of Labor Relations replied, "You don't intimidate me." At that point the attorney said, "If I wanted to intimidate you, I could have."
>
> Mr. Andrews then chimed in by repeating the lawyer's statement that, "This is bullshit!" The Hospital's chief negotiator [Mr. Bernstein] replied, "Just so I capture that clearly, is 'bullshit' one word or two?" In the presence of the entire room, including several female members of both committees, Mr. Andrews (who was apparently sitting in for the union's lead negotiator), replied, "There are three things that I don't tolerate -- Bullshit, Bigotry, and Bitches." Many participants were disgusted by that remark which seemed to be directed at a number of people in the room.
>
> The Hospital's negotiator made one more effort to redirect the union's attorney to the Hospital's proposals, only to have him respond, "Kiss my ass!" Mr. Andrews added, "Capture that!" Unfortunately, the meeting adjourned on that note at 1:00pm, with the union's attorney making clear that he was unwilling to continue the meeting or return to the negotiating room despite the fact that negotiations were scheduled to continue for the balance of the afternoon.

8. The April 5 and 6, 2017 Bargaining Sessions

After Bernstein opened the April 5, 2017 bargaining session by proposing to go resume bargaining over the Hospital's March 29 proposals, Godoff stated that the Union no longer believed that the Hospital was interested in reaching an agreement but would continue to bargain in good faith.[37] Bargaining proceeded with the Hospital's presentation of a counterproposal on discipline in which it agreed to timely notify employees.[38] The Union noted several discrepancies in the proposal with respect to arbitration versus the mediation of grievances as it was presented by the Hospital on March 29. The Union also orally countered by proposing that the longstanding grievance and arbitration procedure remain unchanged.[39] The Hospital did not budge on this issue, attributing the justification for the procedural change to a previous arbitration ruling. Nor did Bernstein attempt to reconcile the noted discrepancies at this meeting.

The Hospital presented its last noneconomic proposal at this session—the replacement of the safety clause (Article 20) with a safe harbor for safety concerns provision.[40] Once again, Godoff responded crudely, "Do you guys give a shit? It's a disgusting proposal," and when Bernstein suggested the Union put more time in countering instead of critiquing, Godoff replied, "Here's the counter—no."[41]

At the April 6, 2017 bargaining session, the Union countered with a rejection of the Hospital's proposals to delete the union security and dues check-off provisions.[42] It then presented its initial wage proposal—a five percent increase for all unit employees—consistent with the amounts in the expired CBA.[43]

In the bargaining brief that followed, the Hospital reported that the parties had reached tentative agreement on two proposals—the preamble and uniforms. The Hospital also continued its pattern of reporting on the bargaining derelictions of the Union negotiators: their arrival to bargaining 2 hours late and then bargaining for about four of the scheduled 12 hours; and failure to provide the Hospital with responses to 13 proposals while the Hospital needed to respond to three proposals. The Hospital also claimed that its objection to the union security clause was based on its belief "that employees should have a choice as to whether or not to pay union dues, and should not be fired, as the union is insisting, if they choose not to pay dues."[44]

9. The May 16, 2017 Bargaining Session

The parties started the May 16, 2017 session by reviewing the Union's most recent proposals relating to recognition and classification, restricted access, attendance policy, seniority layoff, union presence during employees' reviews of personnel files, nondiscrimination and no-striking. In particular, Godoff asserted that Bernstein's combined proposals for a no-strike clause, very broad management rights and non-binding labor arbitration constituted unfair labor practices. Bernstein simply plowed ahead with the next item on the list, grievance and mediation. He also brought up pending proposals relating to Articles 2, 24 and 25 on the solicitation and distribution of literature, bulletin boards and discipline. Finally, Bernstein stated that the he would be tendering a proposal to amend Article 6 (hours for employees), which the Hospital viewed as an economic item.[45] Godoff replied that Bernstein could send the proposals but the Union was not going to agree, adding that the parties had been bargaining for 6 months and the Union was no longer accepting new noneconomic proposals.

Bernstein tendered the new proposals and Godoff replied that there were 20 noneconomic provisions in the expired CBA and the Hospital had proposed to completely overhaul 19 of them. He added that the CBA language had been in effect for decades and the Hospital insisted on renegotiating every provision. As examples, he referred to Bernstein's insistence on revising the arbitration process when there had been a lack of arbitration, insistence on bargaining over layoff language when there had not been any layoffs, and bargaining over strike language when there had never been a picket line. Schmid insisted that the contract language was out of date. Godoff replied that parties normally negotiate when they are having difficulties with provisions they are working on and asked Bernstein to point to issues with any of the provisions.

Godoff mentioned that before concluding for the day, the Union wanted to add to its economic proposal and start discussing it. Bernstein replied that the Hospital did not want to move forward on economic issues because many noneconomic items were still pending. There was brief discussion over pay increases relating to specific job classifications before the parties broke for lunch. When they resumed, the parties bargained over recognition and classification, attendance and absence, union

[37] R. Exh. 3 at 181.

[38] GC Exh. 14.

[39] R. Exh. 3 at 181–203.

[40] R. Ex. 3 at 193–195.

[41] R. Exh. 1 at 3617–3618; R. Exh. 3 at 193–195.

[42] R. Exh. 2 at 3771.

[43] R. Exh. 2 at 3780–3782.

[44] GC Exh. 16.

[45] Ultimately, the Hospital never proposed such a policy. (Tr. 85–86; R. Exh. 3 at 222.)

activity/visitation and discipline.[46]

10. The Hospital's May 25, 2017 Revised Disciplinary Proposal

On May 25, 2017, Bernstein emailed Godoff a revised version of the Hospital's disciplinary and grievance-mediation proposals:

> Good afternoon Steve, I hope that all is well with you. My apologies for the delay, but per our discussion at the bargaining table this past week, I've gone ahead and attached Hospital proposals pertaining to both Discipline and Grievance and Mediation, which have been revised in an effort to reconcile some of the discrepancies that you had pointed out in prior sessions. For ease of convenience, I chose to highlight the substantive changes in the Discipline proposal to distinguish them from the other revisions reflected in show changes mode. As always, please do not hesitate to call with any questions. In the meantime, I look forward to seeing you and your team next month. Thanks.[47]

11. The June 12, 2017 Bargaining Session

The June 12, 2017 session opened with argument over the Hospital's continued refusal to pay employees on the bargaining committee for time spent in bargaining and their need to use paid time off to attend. Godoff noted that the Union agreed to have employee negotiators attend during scheduled days off on the assumption that bargaining would last a few sessions. He added that "the way you have bargained have led us into a lengthy process." Bernstein explained that his travel commitments precluded him from working past 6 p.m. and required that the next day's bargaining session be cancelled. Godoff replied that the Hospital still had not provided any response to its economic proposals, the parties had not been making any progress toward an agreement, and the employees had been working for months without a pay increase. Bernstein acknowledged receipt of the Union's most recent economic proposals, including a five percent pay increase shortly before the meeting and then passed out its proposal. The parties, however, spent the rest of the session updating a list of employees and their classifications.[48]

12. The July 12, 2017 Bargaining Session

After reviewing the Hospital's previous revisions to its arbitration and discipline proposals, the parties started the July 12, 2017 session with a discussion of the Hospital's spreadsheet of employees and issues with the incorrect wage rates paid to certain unit employees. After a lunch break, Bernstein asked for more time to review the Union's economic proposal and turned the focus to the Hospital's revised discipline and grievance proposals, which changed "documented" to "verbal" and "arbitration" to "mediation." Bernstein also said he was waiting for a counter to the Hospital's proposed changes to recognition and classification and management rights. He then discussed the job postings proposal that the parties were close to agreeing on. Godoff said the Union would consider it.

Bernstein acknowledged that the Hospital owed a proposal on safe harbor and then referred to its November 21 proposals and the Union's December 6 counterproposal on recognition and classification. The parties were apart on the Hospital's proposal to exclude crew leaders but agreed to other proposals. Bernstein then moved to probationary employees, proposing a 90 day probationary period, while the Union proposed 60 days with a potential 30 day extension. Discussion ensued regarding per diem, temporary and agency employees.[49]

13. The July 31, 2017 Bargaining Session

Bernstein opened the July 31, 2017 session by reporting that the Hospital was still processing employees' names to ensure compliance with the expired CBA. He then proposed bargaining over the recognition and classification issues, and the Union's December 6 counterproposal. The only issue there remained crew leaders. Godoff emphasized the Union's opposition to any proposal that would modify the definition of a full-time employee from 40 to 32 hours. Bernstein replied that such a change would have the effect of adding a lot more union dues payers. With respect to the parties' probationary period proposals, he said there was room for compromise. The Union proposed to agree to the Hospital's job postings proposal if the Hospital agreed to Union's last proposal regarding employee requests for a union representative and non-discrimination. Bernstein said the Hospital would consider it.[50]

After a break, the Union proposed to eliminate a contract provision entitling any person working over 35 hours per week to receive an additional 30-cents per hour. Bernstein characterized that as an economic item and deflected to the issue of crew leaders. He asserted that there was no classification for crew leaders and referred to them as lead employees. Godoff replied that crew leaders were non-supervisory and should be in the unit.

After another break, Godoff brought up discipline and insisted that the Union would not agree to a contract that did not provide just cause for disciplinary or provide for arbitration. He also requested a counterproposal with respect to the length of time for notices of discharge. The meeting ended with the Union's resistance to the Hospital's proposal to replace Article 25 (union announcements and conferences). Before concluding, the parties agreed to resume bargaining on September 7 and 8.[51]

14. The October 6, 2017 Bargaining Session

The October 6, 2017 session began with Bernstein proposing that the parties discuss wages. Godoff requested information for the previous 6 months of hours worked. Then there was discussion over the applicable wage rate, with Bernstein focusing on the "practice" rate and Godoff noting that the contract rate was applicable and that the time taking to get a handle on underpayment was for naught. He insisted that the printout demonstrated that employees were not being paid at the contract rates. After a 1 hour break, Bernstein agreed to have the Hospital look at the list again.

After an hour and a half lunch break, the Hospital maintained

[46] R. Exh. 3 at 220–225.
[47] GC Exh. 17.
[48] R. Exh. 3 at 231–237.
[49] R. Exh. 3 at 238–254.
[50] R. Exh. 2 at 3805–3807, R. Exh. 3 at 255–257.
[51] R. Exh. 3 at 255–262.

its position on whether a union representative could be present during review of a personnel file. Godoff said that the Hospital's refusal to move on non-discrimination constituted an unfair labor practice. Bernstein moved to the crew leader issue which remained in dispute. Regarding probationary periods, Godoff proposed 60 days with an additional 30 days if a manager needed more time to assess employee performance. The Union remained opposed to the Hospital's proposal to allow it to reduce full time employees' hours from 40 to 32 per week. Bernstein replied that the current language eroded the Hospital's rights under the management rights clause. Lisa Brown noted that this was the same conversation that the parties had months earlier. Bernstein replied that there had been "movement on other things on both sides." After Schmid asserted that the "vast majority of lack of counters has come from the other side of the table," Brown referred to the two economic proposals tendered by the Union. After Godoff insisted the only sticking point was the Union's insistence on allowing employees to have Union representatives present when they look at their files, Bernstein replied: "By my counts the employer has submitted 19 proposals, the union has submitted 19 proposals the ball is in the [Union's] court on some and it's in ours on some and my sense is that we're getting close to final statements."

The discussion then moved to per diem employees converting to full time if they work 60 straight days. As the discussion continued, the Union raised issues over employee training by other employees instead of supervisors. If that was going to continue to happen, however, the Union believed that employee trainers should at least be compensated. The Union also asked for an explanation as to why nonunit personnel were receiving a transportation benefit but unit employees were not.

Toward the end of the session, Bernstein asked if the Union had heard anything to that point that would alter its initial wage proposal in advance of the Hospital's initial wage proposal. Bernstein said, "I think your proposal is pretty straightforward just a straight bump, I just want to be sure you're not going to change it." After Godoff explained stated the reasons behind the Union's wage proposal, Bernstein said "it shouldn't surprise anyone that we're going to propose a new [structure]." Godoff conceded that the previous wage scheme was problematic because of discrepancies among departments, to which Bernstein replied, "I think we all owe it to whomever comes after us to be clear and make it easier to figure out." The meeting ended without an agreed upon resumption date.[52]

15. The January 17, 2018 Bargaining Session

Esders replaced Godoff, who recently underwent surgery, at the January 17, 2018 bargaining session. Bernstein reported that the Hospital had not yet paid any of the back wages owed unit employees. However, he did provide a revised spreadsheet previously sent to Godoff listing the back wages owed.

Bernstein proposed in writing a notice of dues checkoff going forward and the Hospital's intention to suspend dues checkoff effective February 1, 2018. He stressed that the Hospital's position was not negotiable: "Union can secure from other means." Esders replied that the Hospital was refusing to bargain over this implementation for the reasons stated in its letter. Bernstein confirmed that assertion.

Bernstein then summarized where the proposals stood up to that point. After a brief break, Bernstein proposed starting with the recognition clause. There was discussion of the minimum number of hours for full-time versus part-time, as well as per diem, temporary and agency employees. The Hospital proposed that part-timers stay at 20 hours per week. There was renewed discussion over the Hospital's request to eliminate the crew leader position, which led to the Union renewing its assertion that some performed supervisory duties but did not get compensated. As for the applicable probationary period, the Hospital did not budge from its position of 90 days, while the Union continued to push for 60 days plus an additional 30.

After a nearly 3 hour break, Esders charged that the Hospital engaged in unfair labor practices during the morning session, while Bernstein tried to restart the discussion of the dues check off notice. However, Esders commented that discussions were breaking down and the Union walked out at 3:18 p.m.[53]

16. The February 13, 2018 Bargaining Session

The February 13, 2018 bargaining session had numerous caucusing breaks. Bargaining started with discussion of a spreadsheet analysis of employees' wages in attempting to determine the underpayment amounts, as well as negotiating over the applicable interest rate. The Hospital agreed to forego repayment of overpayments. The parties broke after an hour, resumed an hour later with continued discussion and broke for lunch 10 minutes later at 12:45 p.m. with no agreement reached on repayment.

The parties resumed at 3:17 p.m. and continued discussion of repayment issues. They broke at 3:35 p.m. When they resumed at 4:01 p.m., the Union agreed to the repayment of identified underpayments with interest at the Hospital's proposed 4% rate—all contingent on a final agreement. Bernstein wanted to have the issue fully resolved on behalf of all unit employees, while Esders wanted to reserve their individual rights to arbitrate. They broke at 4:10 and resumed at 4:29 p.m. There was still disagreement on the 90 day timeframe for challenges to the repayment amounts. The Union offered to reduce that to 60 days. They broke at 4:37 and resumed at 4:45 p.m. at which time Bernstein countered with a demand that underpayment claims be resolved at bargaining. They broke at 4:49 and resumed at 4:56 p.m. The Union remained steadfast in its demand for employees to have recourse and the focus turned to the scheduling of 30 minute sessions on February 27 for each employee to meet with management regarding their specific underpayment claims. The meeting adjourned at 5:36 p.m. with no future date set.[54]

17. The May 18 and 21, 2018 Bargaining Sessions

The Hospital finally presented a wage proposal at the May 18, 2018 bargaining session.[55] The proposal included shift differential changes, and lump sum bonuses for quality performance and high attendance that were agreeable to the Union. The salary

[52] R. Exh. 3 at 263–275.

[53] R. Exh. 3 at 276–285.

[54] R. Exh. 3 at 286–300.

[55] The proposal referenced specific wage ranges in Appendix B, which was not provided at that time. (GC Exh. 18; R. Exh. 1 at 3640-3643.)

structure, however, was dissimilar to any of the wage components in the previous agreements between the parties.[56] It provided for a new compensation structure starting August 2019 that incorporated a market-based adjustment for each employee and merit wage increases for employees the Hospital deemed worthy. The proposal also based wage rates on employees' overall experience and not solely on their tenure with the Hospital. In addition, the Hospital retained sole discretion for evaluating employees, and its decisions would not subject to the grievance process; if a review resulted in termination, however, the employee could grieve or mediate the decision.[57]

When the parties returned to bargain on May 21, 2018, Godoff asked for Appendix B to the Hospital's wage proposal. Bernstein replied that it would be provided in the afternoon. Upon being provided with Appendix B, Godoff explained that he was unable to evaluate the proposal because it lacked specificity as to the overall range for the various classifications. It provided only the lowest and highest rates for each classification with no indication as to the specific wage rate for each unit employee. He requested further documentation in that regard, but Schmid insisted that she could only give "examples" based on her "knowledge of the market" for specific classifications.

The Union opposed to this proposal on several grounds: the delayed raises, the use of performance evaluations upon which to base merit-based increases starting August 2019, and the timeline and calculation of market-based increases. When Godoff expressed concern "that these employees haven't had a raise since January 2015," Bernstein replied, "Yes, it's an unfortunate side effect to bargaining." Bernstein and Schmid told the Union that this proposal was not negotiable. When Godoff asked whether the Hospital was going to at least negotiate the ranges from year to year, Schmid said, "No, the ranges are set for the hospital as a whole, it will be the same range for non-union employees and applied exactly the same way, people are going to be rewarded based on their individual merit." The Hospital's representations were consistent with the proposal's language that "[t]he evaluation process and merit increase awards for bargaining unit employees shall follow and be incorporated into the same general merit criteria and process used for all non-bargaining unit employees at the Hospital."[58]

The Union countered the Hospital's wage proposal by proposing the guarantee of merit increases based on performance evaluations where employees meet expectations or higher, but the Hospital rejected that proposal. The Hospital countered with a second wage proposal but the Union found no substantial concessions in the document.[59]

On May 21, 2018, the Hospital issued a bargaining brief blaming the Union for shortening the March 18 meeting when its bargaining team left because the Company had not returned from the lunch break by 1:50 p.m., insisting that it previously told the Union that the Hospital's negotiators had a telephone call at 1:30 p.m.

On June 7, 2018, Mr. Bernstein emailed the Union confirming that the Hospital was withdrawing its no-strike proposal and reinstating its proposal from March 29, 2017.[60]

18. The July 31, 2018 Bargaining Session

Bernstein started the July 31, 2018 session by reviewing the outstanding proposals and Lisa Brown asked Bernstein if he had the "back wage proposal that we asked for 4 times, that you said you would have prior to this session?" Bernstein replied that he still did not have the information because of a change in personnel requiring that the Hospital "redo some of that work." When asked by Brown as to how that changed the data, Bernstein clarified that it "changed the progress we were making on that data. Pressed by Brown for a date, Bernstein did not know. Godoff said that was "unacceptable performance on your part, it's been 3 or 4 months." Brown said the Union gave the Hospital a formula with the accurate calculations at the last session and it seemed like the Hospital was dragging out the back wage issue. Bernstein replied that the change in personnel changed the progress that the Hospital was making in compiling the data. Brown asked for a date that the information would be provided by. Bernstein did not know and changed the subject to the Union's last proposal.

After a lunch break, Brown asked Bernstein to discuss the Hospital's wage proposal information in Appendix B. He explained the pay ranges, which were based on years of experience for new hires. As the discussion progressed, Brown and Schmid disagreed on the Hospital's proposal to link future pay increases to merit or performance. Schmid argued that high performing employees were not being recognized under the current pay system, while Brown replied that the Hospital could always pay them more, and that workers doing the same work should receive the same pay, and the employer has disciplinary alternatives available to them for unsatisfactory work. Bernstein remarked that there were several open proposals. Brown replied that the Hospital needed to agree to more than the 2 days previously agreed to (September 5 and 6).

At the conclusion of that discussion, Bernstein commented that the parties "made good progress today," but Schmid started an argument over whether the Union had countered any of the Hospital's proposals. Bernstein mentioned fifteen Hospital proposals that had not drawn a counterproposal and two Union proposals that the Hospital had not countered. Lisa Brown replied that the back wage issue needed to be resolved before moving on to other issues. Schmid disputed that assertion but they both agreed that the back wages needed to be resolved and an economic proposal from the Hospital if the non-economic issues were not resolved. Schmid disputed that assertion and Bernstein noted that the parties had never agreed to ground rules. Brown

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[56] This finding is based on the credible and undisputed testimony of Godoff, Schmid and Bernstein. (Tr. 60–62, 203–205, 580–582.)

[57] The parties took a lunch break at 12:22 p.m. with the Union negotiators expecting that the Hospital's negotiators would be right back. When they took longer than expected the Union warned that they would leave if the Hospital's negotiators did not return by 1:50 p.m. They did not return by that time and the Union negotiators left. (GC Exh. 18; R. Exh. 3 at 301–304.)

[58] R. Exh. 3 at 305–310.

[59] GC Exh. 19.

[60] GC Exh. 21; R. Exh. 1 at 3655–3658.

urged that the parties move quicker and stated that if the parties did not get the non-economics resolved, the Union would come back with a package, but needed the documents on back wages and the Hospital's economic proposal. After an explanation by Bernstein of what was not countered by the Union, Godoff remarked that the Hospital had moved away from the contract that was in place for 20 years. Brown added that the Hospital took an aggressive nonunion position and there were not enough days scheduled to move bargaining forward. She added that a month in between meetings disrupted any flow that might have been generated from previous meetings.[61]

19. The August 1, 2018 Bargaining Session

At the August 1, 2018 session, Bernstein acknowledged receiving the Union's counterproposal the previous day relating to availability of service (absences in excess of 3 days) and referred to the applicability of FMLA guidelines and extended leave banks. They also discussed clocking in procedures. Bernstein then proposed a disciplinary schedule of up to 24 months. The Union broke to consider the proposal and the Hospital needed additional time to meet with the payroll department to review the back wage data.

When they resumed 2 hours later, the Union raised questions about emergency situations excusing justifiable lateness and absences, and agreed to submit a counterproposal. The discussion then turned to the Hospital's proposal to reduce official time for grievances from 1 hour per week per delegate to a total of 300 hours per year.

The Hospital's yearly break-down of the market-wage rate proposal reflected an increase in base pay to $13.75 and a range of pay based on experience increased by a minimum of 2 percent, but was contingent on the Union agreeing to a performance merit system. Godoff said the Union would have to review the data. Bernstein also acknowledged that employees needed to be made whole for back wages.

The parties then haggled over the Hospital's proposed merit increases starting in 2021. The meeting ended with Godoff acknowledging that the Union owed a counter on availability of service. The parties concluded with a discussion of available dates in September.[62]

After the session, the Hospital issued a bargaining brief blaming the Union for still not having responding to 15 Hospital proposals, wasting time by switching negotiators at the bargaining table, and criticized the Union for rejecting the Hospital's merit pay proposal:

> The union made it clear that "the union does not agree to merit pay." When asked shouldn't it be the employees who decide whether they want merit pay increases, the union said, "not every decision has to go to the members, in here [the bargaining team]—a this is the union."

The Brief concluded with a summary of the Hospital's merit wage proposal and criticism of the Union's position as inimical to the notion of rewarding "good performers."[63]

[61] R. Exh. 3 at 326–345.
[62] R. Exh. 3 at 346–354.
[63] GC Exh. 22.

20. The September 5 and 6, 2018 Bargaining Sessions

At the September 5 session, the Union provided several counter proposals. The Union agreed to the Hospital's April 5 proposal to delete Article 24. The Union provided written counter proposals to the Hospital's March 28-29 proposals regarding Article 18 (grievance procedures),[64] Article 2 (union security),[65] Article 3 (dues check off), and Article 30 (management rights).[66]

Bernstein summarized the outstanding proposals. The Hospital had not yet countered the Union's visitation proposal, but Bernstein noted that the Hospital had a competing proposal from November 22, 2016. With respect to the Union's safe harbor proposal of April 6 and 7, the Hospital submitted a counterproposal. Others outstanding proposals included Hospital proposals to supplement the integration clause (Article 29), seniority layoff and recall, solicitation and distribution, and personnel files revision of Article 28. The parties were also apart on management rights, grievances, dues check off, union security and non-discrimination, discipline, recognition and classification, and wages. Bernstein added that the parties were confirmed for further bargaining on October 31 and November 1.

Esders began discussion of backpay and the back wage spreadsheet. The Union disagreed with the Hospital's proposed four percent interest rate. The Hospital tendered its safe harbor proposal again, which it said was the last noneconomic item on its list.

After an hour break, the Union countered by rejecting a portion of the safe harbor proposal and proposing minor language changes. The Union then moved to the backpay spreadsheet. Esders noted, however, that the information was incomplete and the Union needed specific amounts to be inserted and would then need to review that information.

Bernstein discussed into the four Union proposals. With respect to the management rights and dues check off proposals, Bernstein said they were substantially different from the CBA and asked where they came from. He added that there had been no counter to the Hospital's wage proposal. After the lunch break, Esders explained that the revised proposals were from other agreements. The union security proposal was copied from the Union's agreement with a Boston hospital owned and managed by UHS; the management rights, grievance and arbitration proposals were copied from agreements between the Union and a group of New York hospitals. The Hospital negotiators took issue with those proposals and Esders agreed that they needed revision.

The parties tentatively agreed to the Hospital's nondiscrimination proposal. Other proposals tentatively agreed to included job postings, uniforms and the preamble. The parties also agreed to compromise language replacing Article 25 (union announcements). With respect to the Hospital's May 2018 recognition and classification proposals, the Union argued in favor of keeping the crew leader classification because the position still existed. The Hospital pushed for a 90 day probationary period and the Union countered with a proposal that any extension beyond 90 days required Union consent. The Hospital countered the

[64] GC Exh. 23; R. Exh. 2 at 3813–3815.
[65] GC Exh. 24; R. Ex. 2 at 3818.
[66] GC Exh. 25; R. Exh. 2 at 3816.

personnel files proposal (Article 28) by proposing that any Union representative present be limited to an "internal union delegate." Schmid reiterated the Hospital's counterproposal to eliminate the Union security clause. The Union insisted that the backpay issue be resolved instantly, but Bernstein disagreed. Schmid again conceded the wage underpayments and Bernstein said that the Hospital wanted to make unit employees whole but wanted to ensure that it was done correctly.[67]

At the September 6 session, Bernstein went through five tentative agreements—the preamble, uniforms, job postings, nondiscrimination and deletion of Article 24 (union-management conferences). Outstanding were Hospital proposals regarding restricted access, layoff and recall, solicitation and distribution and management rights. Argument ensued when Godoff said that the Union accepted the Hospital's solicitation and distribution proposal with the exception of one word. Schmid insisted that the Union put that in writing so the changes could be tracked. Godoff pushed back, maintaining that there was nothing to track since the Union essentially agreed to the proposal.

Contentious discussion ensued regarding the Hospital's safe harbor proposal with Godoff insisting that the section simply mirror OSHA protections while Schmid maintained that it was the employee's decision. Godoff took exception, asking "what is the problem with stating what the federal protection (sic) are, you have to post the fucking thing in your building anyways (sic) you're proposing to put in a contract that that this is an agreement they no longer have their rights under federal law." Schmid disagreed.

The parties discussed the Union's grievance and arbitration counterproposals but did not reach an agreement. With respect to the Union security proposal from the day before, the Hospital wanted to keep it at 60 days, while the Union still proposed 30 days. Godoff also asserted that the Hospital's continued insistence on "language to do away with forced dues" was unacceptable.

After a lunch break, the parties bargained over the dues check off proposal. Schmid repeated the Hospital's desire to eliminate forced dues check off. She then added that "it's also an issue for us that we don't want it" and "it's not fair to force employees to pay dues to keep their jobs at [the Hospital." Godoff replied that employees made that decision when they voted in favor of union representation. Schmid replied, "Decades ago." After Schmid added that the Union has never given unit employees the choice of whether or not to pay dues, Godoff replied that Schmid "[did] not understand how it works." Wallace then implied that Hospital pushed for decertification. Godoff followed with a remark that the Hospital did not like unions. Bernstein replied that "[w]e do like choice." After noting that that the Hospital had discontinued dues check off deductions, Schmid attributed it to the fact that the CBA expired.

There was further discussion over the Hospital's management rights and solicitation and distribution proposals. In addition, the Hospital proposed a different approach to educational benefits and training. The Union agreed to review that proposal and the session ended.

The September 7, 2018 bargaining brief following those sessions was entitled, "We are going to have blacken your name - the name of this institution—SEIU Negotiator, threatening that the union will damage the reputation of the Hospital because the Hospital has proposed giving employees CHOICE about whether they wish to pay dues to the union." (emphasis in original) The brief criticized the Union latest proposals as emanated from "a very old contract involving hospitals and nursing homes in New York, with language dating back to 1968." The bargaining brief further stated that the proposals did not respond to any of the Hospital's proposals or reflect any of the Union's prior proposals, and were not based on the current contract language. Those assertions then led into criticism of the Union's competency:

> The Hospital, at this point, expressed frustration that nothing the union had put across the table showed ANY effort or work on the union's part for the employees who they say they represent. How, the hospital asked, could the union be so intent on forcing employees to pay dues when this was the kind of slipshod work the union continues to bring to the table. It seemed to be yet another union grab for money, with no effort being made on behalf of the employees. The Hospital directly asked the union whether it believed that employees should have the freedom to choose whether on not they want to pay dues to the union. <u>The Hospital proposed that employees should NOT be forced to pay dues – they should have a choice</u>**. The union told the Hospital, "you can stick those proposals up your ass."** The Union said they would <u>never</u> agree to allow employees to have that choice. In fact, the union said that employees already made their choice about dues – back at the time the union was voted in over 20 years ago. Seriously?? (emphasis in original)
>
> The Hospital also questioned the union's misleading language which makes it appear that employees must be members of the union. The law says that no one can be forced to be a member of the union, (even though they may be forced to pay dues if the union negotiates a forced dues clause). The union did not want to change the language, even though they know it is misleading, saying "membership" does not mean "membership." That is completely nonsensical.
>
> Instead, the union continued, accusing the Hospital of "hating the union" when all the Hospital was doing was fighting for the freedom for employees to choose dues and choose membership. When the Hospital wouldn't back down, the union then threatened to blacken the name of the Hospital – in the city and with the mayor. The Hospital asked how that would help GWUH employees? The union had no answer.

The bargaining brief further stated that the Hospital proposed giving tuition reimbursement to unit employees instead of contributing to the Union's "completely ineffective" education fund. It also criticized the Union for spending hours talking about "old, recycled proposals for nursing homes" that had no relevance to unit employees instead of discussing the Hospital's July 2018

[67] R. Exh. 3 at 355–369.

wage proposal.[68]

21. The October 10 and 11, 2018 Bargaining Sessions

At the October 10, 2018 session, the Hospital finally produced a completed backpay spreadsheet and stated its intention to issue payments to unit employees. Bernstein then went over a list of noneconomic items – bulletin board postings, union security, dues check off and grievances. The bulletin board issue was close to being resolved but culminated with an argument between Schmid, who insisted that the Hospital see fliers before they were posted to ensure they did not contain political statements, and Godoff's insistence that the Union was entitled to educate unit members on their right to vote.

After the lunch break, the parties discussed but still did not come to agreement on numerous noneconomic issues, including management rights, discipline, dispute resolution, union security, and employee's personnel file reviews in the presence of a Union representative. The discussion then moved to the Hospital's wage proposal. Schmid commented that the Union had not replied to the Hospital's wage proposal. Godoff replied that the Union's failure to respond to the wage proposal was due to the time wasted time bargaining on the noneconomic issues. At Godoff's request, Bernstein and Schmid explained again how the merit wage-based process was going to work. The Hospital's position was unchanged.[69]

At the October 11, 2018 session, the parties discussed proposals relating to the preamble, uniforms, job postings, bulletin board posting, nondiscrimination, union management conference and personnel files. They tentatively agreed to the personnel files proposal, but did not reach agreements on any of the other noneconomic issues. The parties then discussed the Hospital's wage proposal. Schmid explained that all employees would receive a wage increase of at least two-percent immediately upon contract ratification.[70]

The Hospital's October 12, 2018 final bargaining brief was entitled, "Round 20 and still no decision. We aren't even close. Why?" After criticizing the Union's negotiators for wasting time, the brief described the Hospital's version of the bargaining over its wage proposal:

> Most importantly, the Hospital informed the union that it has completed the dietary back
> wage analysis. The Hospital provided the payout calculations and back up to the union. The Hospital let the union know that the Hospital plans to distribute the checks for these back wages to all affected employees, to make them whole, in a special payroll check to be run on Friday, October 19th.
>
> After months of silence on the Hospital's wage proposal, the union finally asked for further information about it. The union could have had this information three months ago and they could have had a counter proposal ready to give the Hospital. Instead, we have still not moved forward on wages because the union is just beginning to look at them. We advised the Union that, had they taken the time to review our wage proposal when we initially gave it to them FIVE months ago, then we would be much further along by this point.
>
> The Hospital expressed concern to the union that there is a rumor circulating that the Hospital is not offering even a dollar per hour increase to employees after all this time. This is very far from the truth. **We showed the union that the Hospital's proposal would provide immediate increases upon ratification of the contract to all staff.** These increases in many cases are very significant and reflect what the Hospital believes to be competitive wages for our jobs here in D.C. (emphasis in original)
>
> We explained to the union that –
>
> Under the Hospital's proposal:
>
> ● EVERYONE would **receive an increase immediately** upon ratification of the contract;
> ● Many employees would see **significant increases** – the highest being a 33% increase, with many individuals' increases being in the double digits;
> ● The **increases taken all together average approximately 9.7%;**
> ● The least anyone would receive would be 2%, and most of the employees in this category are those who have been hired in the last year with little or no experience and who have not been waiting years for an increase;
> ● Additionally, the Hospital's proposal **provides for an additional increase in 6 months (July 2019) based on merit,** as well as **additional lump sum bonuses based on department performance measures.**
>
> Under the Union's proposal:
>
> ● **The vast majority of employees would receive less than a one dollar raise.** Only those making $20/hour or more would see a one dollar or more raise;
> ● **The union's proposal does not provide for any reward for personal performance or for any bonuses.** (emphasis in original)[71]

D. Withdrawal of Recognition

1. Disaffection petition is circulated

Sometime in March 2018, EVS employee Eugene Smith began circulating a disaffection petition among other unit employees. While soliciting coworkers to sign the petition, Smith lauded Kim Russo, the Hospital's chief executive officer, and told them that they would get a pay raise and travel stipend if they got rid of the Union.[72] Smith was assisted by another EVS employee,

[68] GC Exh. 26.
[69] R. Exh. 3 at 391-404.
[70] R. Exh. 3 at 405-412.
[71] GC Exh. 27.
[72] Smith was not a very credible witness and, as such, I do not credit his testimony that "everybody wanted to sign" the petition. Many of his responses were vague, evasive and non-responsive. He assumed the leadership role in circulating the petition but was extremely vague and lacked recollection about the circumstances by which he allegedly received the blank petition from an unnamed kitchen employee. Smith's motivation for opposing the Union was simply unclear. He expressed strong sentiment about the Union's positions in bargaining but professed ignorance of the Union's wage proposals. I find that highly unlikely. (Tr. 398-419.)

Hardie Cooper.[73]

Some individuals, like EVS probationary employee Angelica Claros, signed the petition because they did not want union representation. She had been employed for about three months at the time she signed the petition on October 12, 2018. At the time, she was approached by an unknown individual who told her "you are a new hire, yes. You don't want a union." She replied, "No, I don't want it." Claros was unaware up to that point that she was even represented by the Union.[74] Others, like EVS employee William Barnes, did not have a problem with the Union but he still signed the petition on April 5, 2018, and again on August 23, 2018.[75]

Most who signed the petition, however, did so because they were disappointed with the Union's inability to get a new contract and the resulting wage increases. Freddie Ard, an EVS employee, signed the petition on April 2, 2018 because he wanted "to get a better benefit" and was concerned about his wage rate not increasing during bargaining.[76] Tsedale Benti, an EVS employee, signed the petition on April 25, 2018, had several concerns about the Union, including the fact that she had not received a raise.[77] Vivian Otchere, an EVS employee, signed the petition on June 22, 2018 after being told by an unknown individual that she might get a pay raise if she signed the petition.[78] Noel Reyes, a dietary employee, signed the petition on July 3, 2018 because the Union was unable to secure a contract and pay raise for the past 2 years.[79] Lewis Bellamy, an EVS employee, signed the petition on August 29, 2018 because the Union was not getting results from bargaining over 2 years, specifically pay raises.[80] Mary Collins, an EVS employee, signed the petition on October 13, 2018 because the Union was unable to get a contract and a wage increase.[81]

Schmid was well aware of the petition by July 2018.[82] As of September 11, 2018, however, the petition had been signed by only one-third of the bargaining unit. A total of 37 signatures were from employees who were hired after the expiration of the previous contract. Over the next month, no employees signed the petition.[83] During the next 2 weeks following the Hospital's issuance of the October 12, 2018 bargaining brief, which included the Hospital's issuance of backpay checks to dietary employees 7 days later, 27 more employees signed the petition. Of those 27 employees, 14 had been hired within the previous two months; six of those 14 employees had been employed less than 2 weeks.

Based on instructions from the Hospital's security department, which had experience with the prior withdrawal of recognition of its union, Smith delivered the petition to Russo during his shift at about 3:30 p.m. on October 25, 2018. She congratulated him, shook his hand and thanked him shook his hand, thanked and congratulated him. Russo also told him that she knew "it wasn't easy to do" and concluded the discussion by telling Smith that she needed to get the petition to human resources.[84]

2. The Hospital Withdraws Recognition

On October 24, 2018, Evans informed Schmid that the disaffection petition was going to be delivered to management on October 25, 2018. Schmid, who is based at UHS in Pennsylvania, and Bernstein, who is based out in Florida, traveled to the Hospital the next day in order to await the disaffection petition. Shortly after receiving it, Russo handed it off to Schmid. Within the next several hours, Schmid, with the assistance of supervisors and human resource staff, validated or dismissed all of the signatures on the petition based on a review of personnel and payroll records. The Hospital determined that 156 employees were members of the bargaining unit as of that date and that the disaffection petition had been signed by 81 of them.[85]

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[73] Cooper was also not a credible witness. He provided vague testimony about being unable to get ahold of the Union and his displeasure with his wage rate. Like Smith, he provided ambiguous and contradictory explanations as to who started the petition, who collected which signatures, including the signatures after October 12, 2018. (Tr. 374-376, 383, 387, 390-391, 395-397.)

[74] Claros' equivocation when asked to explain the circumstances when she signed the petition indicated that she felt pressured as a new employee to sign it: I - - really I don't read, because when they just sign this and the Union, I say I don't want it. . . . (Tr. 312-314, 318-323.)

[75] Barnes did not credibly explain why he signed the petition after testifying that he no problem with the Union. He also professed ignorance when shown specific bargaining briefs, but conceded that similar documents were mailed to his home. (Tr. 280-281, 288-290.)

[76] Ard had returned to work at the Hospital in October 2016 and was told by the Union that he would get a pay raise after 90 days but was not aware that the CBA had expired. (Tr. 467-468, 476-477.)

[77] Benti was displeased with the Union's response to a disciplinary matter but conceded that she was primarily concerned with the fact that the raises had stopped as a result of bargaining. (Tr. 447-557.)

[78] Otchere testified that she signed the disaffection petition because the Union did not answer her questions but it was clear that her frustration was attributable to the Union inability to procure a pay raise (Tr. 345, 359–360.)

[79] Reyes testified that he signed because he felt that his department did not need a union. However, when asked for further explanation he testified that he felt that the Union did not do anything because he had not had a raise for 2 years. (Tr. 331-341.)

[80] Bellamy did not attend any of the bargaining sessions but was given the impression from others that the Union's wage were less than the amounts in the expired CBA. (Tr. 366–371.)

[81] Collins testified that she did not want to pay union dues but, in fact, she was not paying dues at the time that she signed the petition. (Tr. 298–299, 304–305.) Moreover, she conceded on cross-examination that she actually signed the petition because she was frustrated over the Union's inability to get the Hospital to agree to a new contract and a pay increase. (Tr. 310–311.)

[82] Schmid's vague recollection that she only learned of the petition from EVS assistant director Rhonda Evans sometime around "July, August, September" of 2018 was not credible based on her December 11, 2016 email and her recollection of other salient facts. (Tr. 224, 228–230; GC Exh. 36.)

[83] R. Exh. 7.

[84] Although Smith was on the clock, he had received supervisory permission to take the
petition to Russo's office, where he had to "wait a while" before meeting with Russo. (Tr. 414, 422–423.)

[85] The General Counsel notes that the Hospital neither struck probationary employees from the petition nor determined whether each signatory was part of the unit at the time they signed the petition. (Tr. 229–236, 510, 517, 521–523, 526; R. Exh. 8–10.) It does not argue, however,

By email during the morning of October 26, the Hospital withdrew its recognition of the Union as the exclusive collective-bargaining representative of the bargaining unit and revoked its access rights. The Union replied that it was still willing and able to bargain on the previously scheduled dates of October 31 and November 1, 2018. The Hospital rejected the Union's overture almost immediately and since that time refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit on the grounds that the Union no longer enjoyed the support of a majority of members in the bargaining unit.[86]

E. Unilateral Changes

Following its withdrawal of recognition from the Union, on November 1, 2018 the Hospital unilaterally implemented the following changes, including wage rates, compensation structure and transit benefits of EVS and dietary employees:

> Welcome EVS and Dietary Teams!
>
> We are delighted to welcome you to the GW Hospital team of non-union employees.
>
> We are proud to have you as part of our dedicated team here at GW Hospital . Each of you contributes greatly to the care of our patients, employees and visitors every single day. The vital role that you play is so important to our hospital. We are looking forward to working with you directly and supporting you in your development and growth.
>
> FIRST, WE WANT TO GIVE YOU AN UPDATE ABOUT THE ROLLOUT OF THE NEW PAY RATES AND BENEFITS YOU WILL NOW HAVE AS A NON-UNION EMPLOYEE:
>
> Monthly Commuter Subsidy
> This benefit is added onto your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it. Moving forward, you will receive this benefit as follows, starting with the pay period beginning November 11, 2018:
> Full-time: $100 per month
> Part-time: $50 per month
>
> Employee Engagement Activities
> We are thrilled to also have you join our other non-union employees in the following activities:
> ● Coffee with Kim – Kim will be scheduling special EVS/Dietary only coffees in the next few weeks; then, going forward, all other GW employees in the regularly scheduled Coffees with Kim.
> ● Staff Rounding.
> ● New hire Check-In Interviews with supervisors after 30 and 60 days. Stay Interview with your supervisor at 6 months and annually. These provide additional opportunity to talk about what is going well, your career goals, and any concerns you may have.
> have. out w at Is going well, your career goals, and any concerns you may have.
> • Opportunity to serve on Hospital employee committees.
> • Participation in action planning for GW Hospital engagement surveys.
>
> Pay
> ● In the next few weeks, we will be transitioning you to market-based pay rates (which take into account your years of experience) for your job classifications. Many of you will see significant increases, and everyone will receive at least a 3% increase in their pay.
> ● Additionally, in July, all former bargaining unit members will also be eligible for an additional increase – a merit based pay increase determined by your performance evaluation.
> ● We will also implement a lump sum bonus program in 2019 for all former bargaining unit employees in each department contingent on departmental scores.
>
> Benefits
> We will be transitioning everyone to our non-union benefit programs including PTO, Holidays and Leave Banks. We will share more information regarding these programs in the coming weeks.[87]

The memorandum went on to "clear up a few rumors," asserting that the withdrawal of recognition was not illegal and referred to the October 26 letter to the Union. In addition, the Hospital said the Union put out a flyer that the Union's assertion that the Hospital engaged in bad faith bargaining and would be contesting that charge before the Board. The Hospital reiterated that there is no "union contract still in place" and concluded with the following advisory: "If you don't want the union spending some other poor union person's dues fighting your rightful and legal decision to become non-union, you have every right to tell it so. **If the union really cares about what you think and want, as it says it does, it should respect your decision."** (emphasis in original)

As predicted in the memorandum, EVS and dietary department employees received wage increases in November or December 2018. The Hospital implemented the changes unilaterally and without affording the Union an opportunity to bargain over them at any time after the withdrawal of recognition on October 26, 2018.

F. The Hospital's Attorneys Meet with Prospective Witnesses

Prior to the hearing, the Hospital's attorneys, Tammie Rattray and Paul Beshears, accompanied by Schmid, arranged to meet with unit employees who signed the disaffection petition.[88] All were instructed by managers or supervisors to leave their work areas to meet with counsel in a Hospital administration office.

Once they arrived to meet with the attorneys, either Rattray or Beshears explained the purpose of the interviews as preparation for testimony in this proceeding, and explained that their participation was voluntary and they were free to refrain from any or

that any of the signatories should have been excluded from those counted as unit employees.

[86] GC Exh. 28.

[87] GC Exh. 29.

[88] Rattray and Beshears credibly explained the circumstances of their interviews with the witnesses, provided assurances as to the voluntary nature of their cooperation, and discussed and read each of the forms before having them sign them. (Tr. 485-488.)

all of the interview without recrimination. Their explanations to four of those employees – William Barnes,[89] Angelica Claros, Noel Reyes[90] and Vivian Otchere[91]– was followed up by reading or explaining the following printed statement to them, and then having each employee sign, print their names and date the form on June 6:

> JOHHNIE'S POULTRY STATEMENT[92]
> 1. I have given this statement at the request of [Tammie Rattray or Paul Beshears], who introduced [herself or himself] as an attorney who represents George Washington University Hospital ("GWUH") with regard to labor matters.
> 2. [Ms. Rattray or Mr. Beshears] informed me [she or he] is conducting an investigation in order to help GWUH to determine how to respond to an unfair labor practice case and that [she or he] would like to ask questions in order to obtain factual information which may be relevant to these issues.
> 3. [Ms. Rattray or Mr. Beshears] informed me my participation in this interview is entirely voluntary and that at any time I can decide that I do not want to participate in the interview. In that case, I would be free to stop speaking with [her or him].
> 4. [Ms. Rattray or Mr. Beshears] informed me that absolutely no action will be taken against me if I decline to be interviewed or if I decline to answer a particular question or any questions at all.
> 5. [Ms. Rattray or Mr. Beshears] informed me I will not in any way be disadvantaged or rewarded by GWUH based on whether my answer to any question is consistent or inconsistent with GWUH's position.
> I have read the above statement and I understand it. I have not been told anything which contradicts what is stated above.[93]

LEGAL ANALYSIS

I. THE HOSPITAL'S ALLEGED FAILURE OR REFUSAL TO BARGAIN IN GOOD FAITH

A. The Surface Bargaining Allegations

The General Counsel alleges that the Hospital engaged in surface bargaining by: (1) proposing and adhering to contract terms that would have left unit employees with fewer rights than they would have in the absence of a collective-bargaining agreement: (2) its unlawful combination of proposals–no arbitration and no work stoppages; (3) its unlawful combination of proposals–unfettered wage discretion, broad management rights, no arbitration, and no just cause for discipline; (4) engaging in regressive bargaining when it withdrew a proposal providing for arbitration of grievances based on employee discharges; and (5) failing to establish legitimate justifications for its insistence on drastic changes to contract language over which the parties previously had little to no dispute**.**

The Hospital denies the surface bargaining allegations and contends that it bargained in good faith and with the intention of reaching a contract. It avers that (1) there is no evidence that it maintained and adhered to initial proposals that were never countered by the Union; (2) a mistake is not regressive bargaining; (3) it was entitled to negotiate union security and its initial proposal was not unlawful; and (4) its initial wage proposal did not grant it unfettered discretion.

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). The Board recently reiterated this statutory mandate in *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 5 (2018), citing *J. H. Rutter-Rex Manufacturing Co., Inc.,* 86 NLRB 470, 506 (1949):

> [t]he obligation to bargain collectively surely encompasses the affirmative duty to make expeditious 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.

On March 29, 2017, the Hospital tendered no-strike and grievance and mediation proposals, along with a management rights proposal substantially identical to its December 6, 2016 proposal. The Hospital contends, however, that it never indicated that any of its proposals were its "last and final offer" and that it eventually withdrew its no-strike proposal. It also cites the Union's 18 month delay in responding to the Hospital's grievance and mediation proposal and failure to respond to its no-strike/no-

[89] The General Counsel argues that Barnes' initial testimony – that he was not given the requisite assurances at the outset of the interview – stands in contrast with his signed statement. However, I credited the testimony of Rattray and Beshears that they provided the assurances at the beginning of each encounter and, in Barnes' case, he did testify on redirect when presented with the signed statement that he was given certain assurances. (Tr. 282-283, 294-295; R. Exh. 11.)

[90] Reyes also testified that he was not given any assurances that he would not be retaliated

against when the attorneys questioned him prior to the hearing. (Tr. 335-336.) However, he was presented with the written form by one of the attorneys and signed it. Based on my observation of his testimony, I find that Reyes was articulate and likely understood the contents of the statement that he signed. (Tr. 342-343; R. Exh.13.)

[91] Otchere's conflicting testimony indicated that she signed the document after speaking with counsel for ten to fifteen minutes about the petition. Again, I credit the testimony of counsel that Otchere, like the other witnesses, were provided with the requisite assurances. (Tr. 351-364; R. Exh. 14.)

[92] *Johnnie's Poultry*, 146 NLRB 770 (1964) (Board established conditions under which an employer may interrogate an employee about Section 7 matters).

[93] R. Exh. 11-14.

lockout proposal. With respect to the Union's grievance and mediation counterproposal on September 5, 2018, the Hospital notes that it was copied from another hospital group's agreement and bore no resemblance to the expired CBA.

The Hospital essentially concedes the unlawfulness of its March 29, 2017 no-strike proposal, which it repeatedly attempted to tie-in with a non-binding mediation clause in lieu of arbitration. However, it asserts that it eventually withdrew the proposal over 14 months later on June 7, 2018.[94] The Hospital's initial January 17, 2017 disciplinary proposal unlawfully sought to eliminate the just cause requirement and proposed to exclude arbitration for all discipline except for discharge. See *Kitsap Tenant Support Services, Inc.*, 366 NLRB at 9 (employer's unlawful proposals included the unfettered right to administer discipline and discharge).

The Hospital's December 6, 2016 management rights proposal, which hardly budged over nearly 2 years of bargaining, unlawfully combined with its wage proposals to give it unfettered discretion to change virtually all aspects of bargaining unit operations, including wages, benefits, hiring, promotion and transfer, disciplinary action without just cause, job classifications, work schedules, supervisors performing unit work, the use of part-time, per diem, agency and temporary employees, and work rules. See *Kitsap Tenant Support Services, Inc.*, supra at 8 (bad faith proposal would have given employer the exclusive rights to determine wages, benefits, discipline, promotion, demotion, discipline, layoff, discharge, rules and regulations and operational functions, and an ineffective grievance procedure); *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996) (proposal to give employer unrestricted control over wages constituted bad faith bargaining); *Woodland Clinic*, 331 NLRB 735, 740 (2000) (same).

The Hospital notes that the Union took a long time in countering many of its proposals. However, the failure of the parties to move forward in an efficient manner is also attributable to the Union's resistance to the aforementioned bad faith proposals by the Hospital, which precipitated a seemingly perpetual humdrum of counterproposals that merely nicked along the surface. The Hospital also alludes to Godoff's offensive language during several bargaining sessions, but as the Board noted in *Victoria Packing Corp:*

> There can be no doubt that [the Union's representative] is a confrontational person, and that he approached the negotiations without the diplomacy of a foreign ambassador. However, no one expects labor negotiations to be conducted in the sitting room of the Harvard Club by persons having a gracious, gentle manner. 'For better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior.'

332 NLRB 597, 600 (2000). See also *Success Village*, 347 NLRB No. 1065, 1081 (employer improperly declared impasse during contentious negotiations based on the union's reference to employer's representative as an "asshole"); *Long Island Jewish Medical Center,* 296 NLRB 51, 71–72 (1989) (same).

The Hospital's prolonged adherence to no-strike, grievance and mediation, and management rights proposals, along with its unrestricted, ambiguous and unpredictable merit or market-based wage proposals, constituted bad faith surface bargaining in violation of Section 8(a)(5) and (1) of the Act. See *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005) (unlawful employer bargaining proposals included management rights clause granting it unfettered discretion over workplace rules, discipline and wages, a broad no-strike clause, and excluded arbitration to any challenges to employer's application of management rights); *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enf'd 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1034 (unlawful proposals included unfettered discretion over merit increases, scheduling and hours, layoff, recall, granting and denying leave, promotions, demotions, discipline, assignment of work outside the unit and changes to past practices, a broad no-strike clause, and exclusion of disciplinary decisions from the grievance-arbitration procedure).

In making and adhering to such a combination of proposals, the Hospital unlawfully endeavored to strip the Union of its role in representing bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act. See *Target Rock*, 324 NLRB 373, 386–387 (1997), enf'd. 172 F.3d 921 (D.C. Cir 1998) (simultaneous proposal and maintenance of no-strike provision, broad management rights clause, and ineffective grievance and arbitration procedure found unlawful); *Public Service of Oklahoma*, 334 NLRB 487, 488–489 (2001) (employer engaged in bad faith bargaining when it "insisted on unilateral control to change virtually all significant terms and conditions of employment of unit employees during the life of the contract)."

Moreover, the Hospital unlawfully insisted on eliminating the parties' longstanding union-security, basing its position on philosophical grounds—i.e., the belief that its employees should have the freedom of choice as to whether or not to join the Union and pay dues—without laying out a legitimate business justification. Schmid testified that the Hospital was impeded in its employee recruitment efforts due to its relationship with the Union but that allegation was not substantiated. Under the circumstances, the Hospital's insistence on eliminating the union security clause violated Section 8(a)(5) and (1). See *Kalthia Group Hotels, Inc.,* 366 NLRB No. 118 (2018) (employer unlawfully refused to consider any union-security provision on philosophical grounds and without advancing any legitimate business justification).

Finally, on April 5, 2017, the Hospital unlawfully regressed from its January 17, 2017 discipline proposal by tendering a grievance-mediation proposal that still undermined the effectiveness of the arbitration process. The Union noted the discrepancy and, on May 16, 2017, the Hospital conceded that its April 5 proposal conflicted with its January 17 proposal. Bernstein informed the Union that the Hospital would reconcile the proposals but never did and, on May 25, 2017, informed the Union that arbitration was out of the equation. See *Management & Training Corporation*, 366 NLRB No. 134, slip op. at 4 (2018) (regressive proposals are unlawful when "made in bad faith or are intended to frustrate agreement"); *Mid-Continent Concrete*, 336 NLRB

[94] R. Exh. 3 at 175–176.

258, 260 (2001) (unexplained, dubious regressive proposal suggests bad-faith bargaining).

B. *The Bargaining Briefs*

"[A]n employer's free speech right to communicate [its] views to [its] employees is firmly established, and cannot be infringed by a union or the Board. Thus, [Section 8(c) of the Act] merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be 'evidence of an unfair labor practice,' so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1)." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). That right also extends to non-coercive communication between an employer and its employees in the context of the collective-bargaining process. *United Technologies Corp.*, 274 NLRB 609, 610 (1985) (as the Board has recognized, "permitting the fullest freedom of expression by each party" nurtures a "healthy and stable bargaining process." It is not for the Board to "police or censor propaganda.") *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966); see also *Long Island College Hosp.*, 327 NLRB 944, 947 (1999) (overenthusiastic rhetoric is protected speech unless it is knowingly false or made with reckless disregard for the truth).

As previously mentioned, the bargaining briefs continually disparaged the Union during bargaining, misrepresented the parties' bargaining positions, including its wage proposals, and blamed the Union for the lack of a pay raise. Taken in context with the Hospital's unlawful surface bargaining tactics over a 2-year period, the bargaining briefs served to undercut unit employees' support for the Union. See *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011) (in the context of additional unlawful conduct, denigration of union conveyed implicit threat that union representation would be futile and employees would have to rely on employer to protect their interests); *General Electric*, 150 NLRB 192 (1964) (bargaining briefs compounded the effects of employer's bad-faith conduct during bargaining and at the table and, predictably, fueled employees' dissatisfaction with the union). See *Miller Waste Mills, Inc.*, 334 NLRB 466, 467 (2001) (Board upheld finding that employees became alienated from the union due to belief that it prevented a wage increase).

Although the bargaining briefs were the vehicles by which the effects of the Hospital's unlawful conduct was conveyed to unit employees, they did not convey any objective "threat of reprisal or force or promise of benefit." See *Children's Center*, 347 NLRB 35, 36 (2006) (employer "lawfully expressed an unfavorable opinion about the union, its positions, and its actions."); *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 135 (2d Cir. 1986) (employer lawfully asserted that the union was on "a collision course," their preparation was 'thoughtless and irresponsible," and that their offers were "unrealistic"); *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) (employer lawfully issued bulletins criticizing the Union's demands and tactics and setting forth its version of the negotiations).

II. THE HOSPITAL'S WITHDRAWAL OF RECOGNITION

Pursuant to Section 8(a)(5) of the Act, an employer has a continuing obligation to recognize and bargain with an incumbent union. Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to enjoy majority support among unit employees, and an employer may withdraw recognition only on the basis of objective evidence showing that the union has actually lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001) (withdrawal of recognition lawful if employer proves that at the time of withdrawal the union was not supported by a majority of unit employees). The obligation to recognize and bargain with a union ends, however, if the union no longer enjoys majority support. Id. at 720.

As of October 25, 2018, the Hospital's employee roster listed 151 bargaining unit employees on the payroll. On that date, the Hospital was presented with a union disaffection petition containing 81 valid signatures of bargaining unit employees obtained between March 16 and October 25, 2018 – a majority of the bargaining unit.[95] The General Counsel contends, however, that the Hospital's surface and regressive bargaining, accompanied by the bargaining briefs, warrants a presumption that such conduct tainted the disaffection petition on which the Hospital based its withdrawal of recognition. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), affd. in part, 117 F.3d 1454 (D.C. Cir. 1997) (a causal relationship is presumed between unremedied bargaining violation and a subsequent showing of disaffection).

The Hospital argues that the *Lee Lumber* presumption does not apply because that case involved a general refusal to both recognize and bargain with the incumbent union. Instead, the Hospital relies on *Levitz Furniture Co.,* Id. at 725, to support its contention that its withdrawal of recognition was lawful because it submitted a disaffection petition signed by 53.6% of bargaining unit employees. Notwithstanding its disavowal of *Lee Lumber,* the Hospital relies on that decision for the proposition that "[n]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber,* 322 NLRB at 177. Finally, the Hospital contends that analysis of the facts reveals that they fall short of the standard set forth in *Master Slack*, 271 NLRB 78, 84 (1984), for establishing a tainted petition:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

[95] The General Counsel does not dispute the authenticity of the 81 signatures or the inclusion of those witnesses on list.

Regardless as to whether one applies *Lee Lumber* or *Master Slack*,[96] both decisions require proof of a causal connection between the petition and the Hospital's bad faith surface and regressive bargaining, compounded by its dissemination of bargaining briefs to employees lampooning the Union's frustrations and resistance to its unlawful conduct. Analyzing the case under the *Lee Lumber,* the Hospital's unlawful failure to bargain in good faith with the Union is presumed to have caused the subsequent employee disaffection. From the unit employees' viewpoint, the Hospital's surface and regressive bargaining, compounded by the bargaining briefs, clearly discredited the Union, conveyed a sense of futility in union representation and prompted many unit employees to sign the disaffection petition.

Analysis of the case under *Master Slack* produces the same result. The timing of the unfair labor practices were clearly connected to the withdrawal of recognition. The signature collection began in March 2018, after 16 months of bargaining, most of it precipitated by the Hospital's bad faith bargaining. A total of 81 eligible unit employees signed the disaffection petition. Thirty of those employees signed the petition between during the period that the Hospital adhered to its unlawful no-strike proposal (March 29 to June 7, 2018). The most striking development is that, while 54, or two-thirds, of those employees signed during the period from March to early October 2018, the remaining one-third—27 employees—signed the petition during the 2 weeks following the Hospital's issuance of the October 12 bargaining brief blaming the Union for blocking pay raises and leading up to the delivery of the petition to Russo on October 25, 2018.

The timing of those signatures strongly suggests a causal connection. See, e.g., *Gene's Bus Co.*, 357 NLRB 1009 (2011) (approximately seven months passed between manager's public denigration of and physical assault on the shop steward, and five to six months passed between direct-dealing incidents and the circulation of the decertification petition); *Bunting Bearings Corp*. 349 NLRB 1070 (2007) (month-long lockout ended just 8 days before the employees executed the May 29 petition and 15 days before the employer withdrew recognition); *AT Systems West*, 341 NLRB 57, 60 (2004) (9 months between unlawful direct dealing and circulation of decertification petition); *RTP Co*., 334 NLRB 466, 468 (2001) (finding "close temporal proximity" between the employer's unfair labor practices and its withdrawal of recognition where the unfair labor practices occurred 2 to 6 weeks prior to the antiunion petition on which the employer based its withdrawal of recognition).

The evidence establishes that the Hospital's conduct meets the other *Master Slack* factors as well. The Hospital consistently adhered to a consistent course of surface and regressive bargaining that prolonged bargaining and it followed those actions with bargaining briefs blaming the Union for the delays. After 16 months of protracted bargaining and no raise on the horizon, employees understandably became disillusioned with the Union. Twenty-six employees expressed their disaffection with the Union after the Hospital misrepresented on October 12, 2018 that the Union's wage proposal was inimical to their interests and they would be better off without union representation. See *Miller Waste Mills, Inc.*, 334 NLRB 466, 468–469 (2001) (employees became alienated from Union after employer misrepresented union's bargaining positions and blamed it for preventing employees from receiving their customary annual wage increase); *Detroit Edison*, 310 NLRB 564, 566 (1993) (employer's unfair labor practices "convey[ed] to employees the notion that they would receive more . . . without union representation. Such conduct improperly affects [the] bargaining relation-ship").

The last factor in a *Master Slack* analysis is whether the Hospital's surface and regressive bargaining had lasting effects on unit employees. The representative sample of employee sentiment produced by the Hospital demonstrated that most of those who signed the petition were displeased with the Union for failing to secure a new contract and wage increases during an lengthy period of bargaining. Two of the witnesses organized the disaffection effort and were clearly anti-union. Of the remaining eight employees, however, six conceded that the Union's inability to obtain pay raises from the Hospital for 2 years was a significant reason as to why they signed the disaffection petition.[97] First, the Hospital delayed in producing a wage proposal until May 2018. When it finally produced one, it tendered an unprecedented, radically different compensation system that spurred further rancor at the bargaining table. Its wage proposal was doomed on arrival. The proposal, which was presented as nonnegotiable, gave the Hospital unfettered discretion to set wage rates within a series of ambiguous ranges. Its October 12, 2018 misleading bargaining brief impugning the Union for hampering the issuance of pay raises triggered a stampede of disappointed unit employees to sign the petition over the course of the next 2 weeks. See *Mesker Door, Inc.*, 357 NLRB 591, 598 (2011) (unlawful statement that Board charges "would result in lost wage increases and lower bonus amounts" was so close in time to a flurry of petition signatures that it "appear[ed] to have directly affected employees' support for the Union").

Under the circumstances, the Hospital's October 26, 2018 withdrawal of recognition from the Union as the labor representative for unit employees violated Section 8(a)(5) and (1). In addition, the circumstances also require that the ensuing remedy include a bargaining order ordering the Hospital to bargain with the Union for a reasonable period of time and at least twice per week. See *Lee Lumber & Building Material Corp.,* 334 NLRB 399, 399 fn. 7 (2001). These circumstances include the Hospital's prolonged and unlawful failure and refusal to bargain in good faith with the Union, the widespread disaffection caused by the Hospital's surface and regressive bargaining, as well as the

[96] The General Counsel objected to the admission of subjective testimony regarding employee disaffection on the ground that analysis under the Master Slack test assesses only the likelihood that causation exists. See *SFO Good-Nite Inn*, 357 NLRB 79, 82–83 and fn. 26 (2011) (subjective employee testimony regarding their Union disaffection excluded due to "the inherent unreliability of such testimony). However, the Board recently left the door open on this issue in *Denton County*, 366 NLRB No. 103, slip op. at 3, fn. 10 (2018) (judge did not abuse his discretion in permitting the testimony of four employees who signed the disaffection petition). Moreover, the Board's administrative law judges, as expert fact finders in these labor relations disputes, are quite capable of assessing the reliability of subjective testimony in conjunction with the objective evidence.

[97] Mary Collins, Noel Reyes, Vivian Otchere, Lewis Bellamy, Tsedale Benti, and Freddie Ard.

compounding effect of those actions through bargaining briefs, and the fact that the Hospital has already proceeded unilaterally to change unit employees' terms and conditions of employment. Those changes adversely impacted unit employees' Section 7 rights as evidenced by the Hospital's newly acquired and unfettered discretion to determine their wages and the evisceration of critical due process rights that they had under the expired CBA relating to the disciplinary and grievance/arbitration processes.

III. THE NOVEMBER 1, 2018 MEMORANDUM

On November 1, 2018, the Hospital notified unit employees that it was unilaterally changing their terms and conditions of employment since they were now nonunion employees. The changes included a transition to market-based wage structure, lump sum bonuses, PTO, holiday and leave banks, and a monthly commuter subsidy. With respect to the transit benefit, the Hospital noted that "[t]his benefit is added to your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it."

Given that its withdrawal of recognition of the Union was unlawful, the parties were still in a bargaining relationship governed by the Act. Accordingly, the aforementioned unilateral changes, undertaken after rejecting the Union's offer to resume bargaining, also constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. See *Southern Bakeries, LLC*, 364 NLRB No. 64 (2016); *Narricort Industries, L.P.*, 353 NLRB 775, 776 FN 11 (2009); *Northwest Graphics, Inc.,* 342 NLRB 1288, 1288 (2004); *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009). I disagree, however, with the General Counsel's contention that the Hospital's statement that the Union failed to negotiate a transit benefit on their behalf constituted either a separate coercive act under Section 8(a)(1) or a separate bargaining violation under Section 8(a)(5). See *Litton Systems*, 300 NLRB 324, 330 (1990), enfd., 949 F.2d 249 (8th Cir. 1991), *cert denied,* 503 U.S. 985 (1992) (the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table").

IV. THE HOSPITAL'S WITNESS INTERVIEWS

In preparation for the hearing, the Hospital's attorneys met separately with unit employees in an office to discuss giving their providing testimony at the hearing. At the hearing, the General Counsel moved to strike certain witness testimony on the ground that, during trial preparation, the Hospital's attorneys interviewed employees without first advising them of their rights under *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964). The General Counsel also moves to and amend the complaint to add an allegation that those interviews amounted to coercive interrogation in violation of Section 8(a)(1) of the Act; that motion is granted and the allegations are deemed denied by the Hospital.

The Hospital opposes both motions on the grounds that its attorneys advised the witnesses of their rights to cooperate with counsel during the hearing preparation and to choose whether or not to testify at the hearing. The Hospital also contends that the proposed amendment should not be allowed because no charge was filed raising these allegations, nor are they closely related to any of the multiple charges filed in this case. Moreover, if the amendment is allowed, it should nonetheless be dismissed as the credible record evidence demonstrates the Hospital did not violate Section 8(a)(1) by interviewing employees.

The Hospital's contention that the charge is barred as untimely pursuant to Section 10(b) or otherwise unrelated to timely filed charges overlooks the fact that the issue did not accrue until a few weeks before the hearing when the witnesses were interviewed by trial counsel. Timeliness is not the issue, but rather, the judge's decision of whether to permit an amendment at the hearing. Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See *Folsom Ready Mix, Inc*., 338 NLRB 1172 fn. 1 (2003). In this case, the issue of employee interrogation did not come to light until the Hospital's witnesses testified at the hearing a few weeks later and were crossed-examined by the General Counsel. Under the circumstances, there is no basis to deny the General Counsel's motion to amend the complaint to add allegations relating to coercive interrogation. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993) (judge abused her discretion by denying motion during the hearing to add a *Johnnie's Poultry* allegation, as respondent's counsel introduced the subject employee statement at trial, the allegation was fully litigated, and the respondent had therefore suffered no prejudice).

In *Johnnie's Poultry Co.,* the Board held that to safeguard against the possible coercion that may occur when employees are questioned about matters involving their Section 7 rights,

> the employer must communicate to the employee the purpose of the questioning, assure
> him that no reprisal will take place, and obtain his participation on a voluntary basis; the
> questioning must occur in a context free from employer hostility to union organization
> and must not be itself coercive in nature; and the questions must not exceed the
> necessities of the legitimate purpose by prying into other union matters, eliciting
> information concerning an employee's subjective state of mind, or otherwise interfering
> with the statutory rights of employees.

Three of the employees interviewed—Barnes, Otchere and Reyes—provided conflicting testimony that they were either not advised about all of their rights under *Johnnie's Poultry* or received such advice after the interviews began. However, based on the credible evidence of the Hospital's experienced labor attorneys, Tammie Rattray and Paul Beshears, I found, in accordance with their custom and practice, that they read all of the witnesses their rights under *Johnnie's Poultry* from the preprinted forms and/or had them read and sign the forms further advising them of those rights at the outset of those interviews. Furthermore, the forms contained the requisite information – the purpose of the questioning, assured that no reprisal will take place and obtained the employee's voluntary participation.

Under the circumstances, I find that the credible evidence

establishes that the Hospital's attorneys provided the requisite assurances under *Johnnie's Poultry*. Accordingly, the General Counsel's motion to strike the testimony of witnesses called by the Hospital is denied and that allegation is dismissed.

Conclusions of Law

1. District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner (the Hospital) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has a been a healthcare institution within the meaning of Section 2(14) of the Act.

2. 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (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 regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

4. The Hospital has violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith during negotiations with no intention of reaching a successor collective-bargaining agreement by:

(a) Adhering to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

(b) Engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.

(c) Maintaining and adhering to bargaining proposals that delete a longstanding union security provision.

(d) Maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.

(e) Unlawfully withdrawing recognition from the Union on October 26, 2018 after committing unfair labor practices that are likely to cause loss of union support among employees.

5. The Hospital further violated Section 8(a)(5) and (1) by: (a) refusing to bargain with the Union as the exclusive collective bargaining representative of employees in the aforementioned bargaining unit on or after October 26, 2018, and (b) unilaterally implementing changes to employees' terms and conditions of employment and refusing to bargain over such changes on November 1, 2018.

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

Remedy

Having found that the Hospital has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom. Under the circumstances, however, a cease-and-desist order alone would be inadequate to remedy the Hospital's withdrawal of recognition. Accordingly, the Hospital shall be ordered to take certain affirmative action designed to effectuate the policies of the Act, including the issuance of an affirmative bargaining order. An affirmative bargaining order is appropriate in these circumstances due to the Hospital's prolonged and unlawful failure and refusal to bargain in good faith with the Union, the extensive disaffection caused by the Hospital's surface and regressive bargaining, the compounding of the effect of those actions through bargaining briefs, and the Hospital's unilaterally change to unit employees' terms and conditions of employment. *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Caterair International*, 322 NLRB 64, 68 (1996). Those changes adversely impacted unit employees' Section 7 rights as evidenced by the Hospital's newly acquired and unfettered discretion to determine unit employees' wages and the evisceration of due process provided under the expired CBA relating to the disciplinary and grievance/arbitration processes.

Having found that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union, the Hospital shall be ordered to meet at reasonable times and 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. Due to the Hospital counsel's refusal to meet more than twice per month during the bad-faith bargaining period, a bargaining schedule requiring the Hospital 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, the Hospital shall be required 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. The Hospital shall also be required to submit written bargaining progress reports every 15 days to the compliance officer for Region 5, and to serve copies of those reports on the Union.

Finally, given the nature of the violations, the prolonged period of bad faith bargaining, and the previous practice between the parties, the Hospital shall be ordered to make the following employee negotiators whole for any earnings and/or leave lost while attending bargaining sessions: Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens, and Arlene Smith. *Frontier Hotel & Casino*, 318 NLRB 857, 857 (1995) (employees reimbursed for expenses incurred during bargaining where employer engaged in "egregious and deliberate surface bargaining"). I decline, however, to issue such an order with respect to the costs of the union representatives in attending two bargaining sessions per month.

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

entire record, I issue the following recommended[98]

ORDER

The Respondent, District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union as the certified exclusive collective-bargaining representative of employees in the following appropriate unit:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) Engaging in the following surface, regressive and bad-faith bargaining with the Union for a successor collective-bargaining agreement:

> (1) Adhering to bargaining proposals that provide the unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.
>
> (2) Engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.
>
> (3) Maintaining and adhering to bargaining proposals that delete a longstanding union security provision.
>
> (4) Maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.
>
> (5) Unlawfully withdrawing recognition from the Union on October 26, 2018 after committing unfair labor practices that are likely to cause loss of union support among employees.

(c) Unilaterally implementing changes to employees' terms and conditions of employment without giving the Union an opportunity to bargain over such changes in good faith.

(d) 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) Recognize, and upon request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) Upon the Union's request, bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees.

(c) On the Union's request, rescind any or all of the unilaterally implemented changes made in the terms and conditions of employment of employees since November 1, 2018.

(d) Within 14 days from the Board's Order, make Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith whole for any loss of earnings and other benefits incurred during bargaining.

(e) Within 14 days from the Board's Order, compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

(f) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[99] in all places where notices to employees are customarily posted, including but not limited to the following locations at The George Washington University Hospital located at 900 23rd St N.W., Washington, D.C. 20037: the bulletin boards located in the Linen Services Department, the office of the Environmental Services department, and the kitchen located outside of the cafeteria in the Food Services department. The notices shall be posted by the Respondent and maintained for 60 consecutive days. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posted 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.

(g) Submit written bargaining progress reports every 15 days to the compliance officer for Region 5 and serve copies of those reports on the Union.

(h) Within 21 days after service by the Region, file with the Regional Director 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 4, 2019

APPENDIX

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

[98] 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.

[99] 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."

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.

1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region, a/w Service Employees International Union (the Union), is the employees' representative in dealing with us regarding wages, hours, and other working conditions of our employees in the following appropriate unit (the Unit):

> All regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Departments of George Washington University Hospital

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that delete a longstanding union security provision.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that give us unfettered discretion in your wages.

WE WILL NOT, during negotiations with the Union for a successor contract, engage in regressive bargaining, such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in nonbinding mediation.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT fail or refuse to continue negotiations for a successor contract with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT unilaterally make changes to the terms and conditions of employment of employees in the Unit without first giving notice to the Union and affording the Union an opportunity to bargain collectively with respect to such changes.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as your representative concerning wages, hours and working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL give the Union notice and an opportunity to bargain over any proposed changes to the wages, hours, and working conditions of employees in the Unit before putting such changes into effect.

WE WILL identify and, on the Union's request, rescind any changes that we have made unilaterally since November 1, 2018 to the wages, hours, and working conditions of employees in the Unit.

WE WILL compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

WE WILL pay the following employee bargaining committee members for any pay and/or leave they lost attending bargaining sessions: Cynthia Bey; Pamela Brooks; Aisha Brown; Marcia Hayes; Sonya Stevens; and Arlene Smith.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay award to the appropriate calendar year(s).

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-216482 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.