UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALIVIO MEDICAL CENTER, INC.

and

Case 13-CA-300158

SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS AND INDIANA, CTW, CLC

Helen Gutierrez, Esq.,
for the General Counsel.
Josiah A. Groff, Esq.,
(Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich), Chicago, Illinois,
for the Charging Party.
Scott Cruz, Esq.,*(Greensfelder, Hemker & Gale, PC) and Grant T. Pecor, Esq., (Barnes & Thornburg, LLP and Miller Canfield, PLC), Chicago, Illinois,*
for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case on September 25 and 26, and December 9, 2024, in Chicago, Illinois. Service Employees International Union, Healthcare Illinois and Indiana, CTW, CLC (the Union), filed the initial charge on June 26, 2022, and filed amended charges on August 2 and August 8, 2022, and February 1 and March 7, 2023. The Regional Director for Region 13 of the National Labor Relations Board (the Board) issued the Complaint on March 14, 2023. The Complaint alleges that Alivio Medical Center, Inc., (the Respondent or the Employer) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: refusing the Union's request to bargain over a general policy concerning work authorization and handling of Social Security number "no-match" issues; failing to

provide the Union with prior notice and an opportunity to bargain over, and refusing the Respondent's request to bargain over, the Respondent's decision and the effects of its decision, to require that employees resolve no-match issues within a specific time period; refusing the Union's request that it be provided with the letter that the Respondent received from its payroll services provider regarding the "no-match" issues. The Complaint alleges that as a result of the Respondent's unlawfully imposed requirement for resolving no-match issues, it terminated employees J. Gonzalez, J. Montoya, Y. Sanchez, and A. Sotelo[1]. The Respondent filed a timely answer in which it denied committing the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with facilities in Chicago, Illinois, and Berwyn, Illinois, and provides healthcare services. In conducting its operations, the Respondent annually derives gross revenues in excess of $250,000, and purchases and receives at its Chicago and Berwyn, Illinois, facilities, products, goods and materials valued in excess of $5000 directly from points outside the State of Illinois. The Respondent admits, and I find, that at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. The Respondent admits, and I find, that at all relevant times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is a health care institution with locations in Chicago, Illinois, and Berwyn, Illinois. For approximately 20 years, the Union has represented a bargaining unit of employees that includes medical assistants, medical records clerks, patient representatives, and maintenance aides working at the two locations. The events at issue here straddled the effective periods of two collective bargaining agreements between the parties. The predecessor collective bargaining agreement (CBA) was in effect from May 13, 2020, until June 30, 2022. General Counsel Exhibit Number (GC Exh.) 26. On April 26, 2022, the Union notified the Respondent of its intent to bargain a successor CBA, GC Exh. 27, and, after 8 or 9 sessions, the parties ratified a new CBA, Transcript at Page(s) (Tr.) 32, with effective dates of July 1, 2022, to June 30, 2025, GC Exh. 25.

[1] In the briefs of the parties, this individual's surname is sometimes rendered "Soto" rather than "Sotelo." I use Sotelo, which is how the name is set forth in the Complaint.

III. "NO MATCH" ALERTS

The Respondent uses an outside entity, ADP, for payroll services. On May 3, 2022, the Respondent received an email from ADP stating that some of the employee information provided by the Respondent to the Internal Revenue Service (IRS) on Affordable Care Act forms had triggered error alerts. Respondent Exhibit Number (R Exh.) 14. The error alerts meant that the name and/or social security number reported for each of these employees was not consistent with the information in the IRS database. The ADP email stated that the Respondent was already liable for penalties of $110 or $160 per employee, and that if the errors were not corrected by August 1, 2022, the Respondent would be liable for an additional penalty of $120 or $280 per employee.[2] The email stated that "ADP highly recommends making any corrections to [the f]orms as soon as possible to avoid potential increases in penalties as we move closer to August." The correspondence did not state that IRS had actually levied any of the penalties, only that IRS "may" do so, and, in fact, IRS had not imposed penalties at that time. Tr. 435. The text of the ADP email did not identify the employees whose information had generated the no-match alerts, or recite the problematic information, but the email did include a hyperlink to a webpage where the specifics could be found. The employees whose information resulted in no-match alerts included four members of the bargaining unit – Gonzalez, Montoya, Sanchez, and Sotelo – all of whom were ultimately terminated by the Respondent and for whom the General Counsel seeks relief in this litigation.

This was not the first time that the Respondent had received "no match" alerts for employees. In 2019, the Social Security Administration (SSA) notified the Respondent that the social security numbers it submitted for some employees did not match the names submitted for those employees. Tr. 406. In that instance, the Respondent initially notified the employees that they had to correct the problems, but ultimately the Respondent decided not to take further action. The Respondent made that decision after reviewing information supplied by a lawyer for the employees. That information included a SSA fact sheet stating that the SSA no-match notifications were "educational" only and that SSA "do[es] not take any action, nor are there any SSA-related consequences, for employers' non-compliance with the letters." Tr. 406-410, R Exh. 37. The fact sheet stated, further, that a "no-match is not an indication of an employee's work authorization or immigration status."

In the case of the 2022 no-match alert from IRS, the Respondent required that the employees correct the issues. Scott Cruz, the Respondent's legal counsel and co-counsel at trial, testified that he researched the matter and concluded that IRS, unlike SSA, "had power and authority to issue both civil and criminal penalties against an employer for not responding to a no match letter." Tr. 411-412. On June 2, 2022, Maria Granados, the Respondent's Interim Director of Human Resources,[3] issued letters to

[2] I list two potential penalty amounts because it is not clear from the ADP email whether the amounts set forth in the email are separate penalties or cumulative totals.

[3] At the time of the earlier, 2019, no-match notices from SSA, a different individual was the Respondent's director of human resources. Tr. 462.

unit employees Gonzalez, Montoya, Montoya, and Sotelo regarding the problem. Granados informed each of the employees that the name and social security number the Respondent had for him or her did not match the information maintained in the IRS databases. The letter stated that "IRS requires Alivio to correct any incorrect SSNs reported," and stated that "I am requesting that by no later than July 25, 2022, you please provide me with the updated and/or corrected information so that I may . . . refile it with the IRS, as the IRS requires," or, in the alternative, that the employee visit the local SSA office to resolve the issue. GC Exhs. 28 and 36, R Exh. 25.

During the 1-month period between when ADP notified the Respondent of the no-match alerts (May 3), and when Granados issued the directive to the bargaining unit employees (June 2), the Respondent did not notify the Union: that the Respondent received the no-match alerts; about what, if anything, the Respondent planned to require bargaining unit employees to do in response; or that the Respondent would be issuing the June 2 letters to multiple bargaining unit employees. Tr. 390-391. Although the Respondent did not notify the Union about the no-match alerts or its June 2 letters to unit employees, the Union became aware of the issue when employees brought the June 2 letters to the attention of Brenda Bedolla, a union organizer. Tr. 29-30. Bedolla and her supervisor decided that the Union would bargain over the requirements set forth in the letters a few days later when, on June 8, the parties were scheduled to begin negotiations for a successor CBA. Tr. 31-32

IV. CONTRACT NEGOTIATIONS IN 2025

The Respondent and the Union began bargaining on June 8, 2022, for a successor to the CBA that was expiring on July 1. The lead negotiator for the Respondent was Granados (interim director of human resources), and the lead negotiator for the Union was Bedolla (union organizer). The parties had eight or nine bargaining sessions and, on June 29, signed an agreement on all terms for the successor CBA. Tr. 32. July 1 was the effective date for the successor CBA.

The Union's initial contract proposal, submitted to the Respondent on June 8 at the first bargaining session, included, among other proposals, the addition of a section titled "Work Authorization and Re-verification." GC Exh. 29.[4] The Union's proposed Work Authorization policy read:

> The Employer shall not impose work authorization verification or re-verification requirements greater than those required by law. An employee going through the verification or re-verification process shall be entitled to be represented by a Union representative.
>
> The employee shall have the right to choose which work authorization documents to present to the Employer during the verification or re-verification process as required by law.

[4] This section is unnumbered, but comes immediately after Article XXI (Health Insurance).

> Unless prohibited by law, the Employer shall grant up to thirty (30) days' unpaid leave to the employee in order to correct any work authorization issue. Upon return from leave and remediation of the issue, the employee shall return to his or her former position, without loss of seniority.
>
> SSA No-Match Letters or Other No-Matches
>
> Except as required by law, neither a Social Security Administration "no match" letter, an IRS "no match," nor a phone or computer verification of a no match, shall constitute a basis for taking any adverse employment action against an employee, for requiring an employee to correct the no-match, or for re-verifying the employee's work authorization. Upon receipt of the no match letter, the Employer shall notify the employee and provide the employee and Union with a copy of the letter.
>
> Change in Social Security Number or Name
>
> Falsification of employment application through misstatement or knowing omission of pertinent facts or information may warrant immediate discharge. Except as required by law, an employee shall not be discharged or suffer loss of seniority solely for the reason that the employee of his or her own initiative provides proof of a lawful and accurate change of name o[r] social security number.

On the same day that the Union presented its initial contract proposal, June 8, the Respondent made a comprehensive counterproposal. In response to the Union's proposal for a general policy on work authorization, the Respondent stated, "NOT AGREED." R Exh. 2. The Respondent did not suggest changes to the policy proposal or propose alternative language. During discussions regarding the proposal, the Respondent contended that the Union was asking the Respondent to agree to language that would potentially require it to violate the law and expose it to liability. Tr. 36, 379-380. The Respondent's negotiator, Granados, noted that the policy was the same one the Union had proposed years earlier during negotiations for the predecessor contract, and that the Respondent had rejected it for the same reason at that time. Tr. 379. The Union's negotiator testified that the policy was the same as what other employers had agreed to in their contracts with the Union. Tr. 36.

The Union's next three comprehensive contract counterproposals each included the same policy on work authorization that was in its first contract proposal. R Exh. 4, R Exh. 7, R Exh. 9. Although the parties made movement to narrow their differences on every other contract issue, the Respondent in each instance rejected the Union's proposal for a work authorization policy in its entirety and did not propose any changes or alternative language. Tr. 36-37; R Exh. 5, R Exh. 6, R Exh. 8, R Exh. 10.

During the bargaining sessions, there was also discussion of the Respondent's June 2 directives to the four unit members regarding the IRS no-match alerts. The Union stated that it wanted to bargain over the directives and presented the proposed work authorization policy as its proposal for addressing those directives and the no-match alerts. Tr. 35, 77-78.

On June 22, after the Union concluded that the parties could reach agreement regarding all CBA elements except the policy on work authorization, the Union made a counterproposal that withdrew that proposed policy in its entirety and stated under the same heading: "Management will meet to negotiate the impact of the current no match status of employees. The first meeting shall be scheduled no later than July 15, 2022." GC Exh. 30; Tr. 37-38. The Respondent made a CBA counterproposal on June 24, which included the following language: "Management will meet to negotiate the effect of the current IRS reporting errors. Alivio does not agree to include language in the CBA regarding work authorization/reverification. Proposed meeting dates: July 7th or 11th at 10am."[5] The same day, the Union agreed to the Respondent's language, but noted that it "would like to utilize both [July 7 and 11] to meet." GC Exh. 32. Later that day, the Respondent confirmed that, as requested by the Union, it would meet on both dates to negotiate the effect of the IRS reporting errors, GC Exh. 32.

On June 29, the parties signed a document agreeing to the terms for the new CBA, and on August 12 and August 15 the parties executed the CBA, noting that the agreement had become effective on July 1. GC Exh. 34;[6] R Exh. 12; GC Exh. 25 at Pages 58 and 59.

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[5] Bedolla, the union negotiator, testified that the new language reflected the parties' verbal agreement to "meet outside of this particular bargaining table to discuss the bargaining over a policy." Tr. 37. I do not credit that testimony, which was contradicted by both the language agreed to and the testimony of Granados, the Respondent's negotiator. Tr. 385. Contrary to Bedolla's testimony on this subject, the agreed upon language expressly states that, outside the CBA negotiations (i.e., "outside of this particular bargaining table"), the parties would bargain over the "effect of the current IRS reporting errors," GC Exh. 32, not over the Union's withdrawn proposal for a general policy on work authorization. To the extent that a work authorization policy is mentioned at all, the parties expressly recognize that the Respondent is *not* agreeing to include language on that subject in the CBA. Granados testified that during the contract negotiations, the Union withdrew its proposal for a general policy and, "in its place, the[Union] asked for management to meet and negotiate the impact of the current no match status of the four employees" and that a general policy on work authorization was not going to be part of those future discussions. Tr. 385. I credit Granados' testimony on this subject, which is more consistent with the documentary evidence than Bedolla's contrary testimony.

[6] The final agreement regarding contract terms, which was signed by both parties, includes the following section:

WORK AUTHORIZATION/RE-VERIFICATION

Management will meet to negotiate the effect of the current IRS reporting errors. Alivio does not agree to include language in the CBA regarding work authorization/re-verification. CONFIRMED meeting dates July 7th and 11th at 10am.

V. OTHER PROVISIONS OF CBA AND EMPLOYEE HANDBOOK

Several provisions that were common to both the predecessor CBA and the successor CBA have been raised as relevant to the validity of the Respondent's treatment of the four unit employees whose information generated no-match alerts and of its bargaining obligations regarding both that treatment and regarding a policy addressing employees' work authorization.

The CBA includes the following "entire agreement" language, also known as a "zipper clause":

> This Agreement constitutes the entire agreement between the parties and concludes all collective bargaining negotiations for the term hereof. Inasmuch as both parties have had a full opportunity to negotiate with respect to all matters relating to wages, hours and all other terms and conditions of employment, neither party is under any duty to bargain with respect to any changes, modifications or additions to this Agreement to take effect during the term.

GC Exh. 25, Page 58; GC Exh. 26, Page 57

The CBA section on "standards of conduct," provides:

> The following activities and/or conduct shall not be tolerated by any employee of the Employer and will be deemed cause for termination:
>
> * * *
>
> 5. Insubordination or refusing to obey instructions and refusal to assist in special assignments;
>
> * * *
>
> 11. Intentionally falsifying any record including but not limited to medical records and time records:
>
> * * *
>
> 17. If an employee falsifies material information on his or her application for employment when the falsity comes to light after the employee has acquired seniority;
>
> * * *

> The Employer shall have the right to discipline, suspend or discharge an employee for just cause.

GC Exh. 25, Pages 41 to 43 (Articles XXVI and XXVII); GC Exh. 26, Pages 40 to 42. The CBA also contains a Management Rights clause that provides, inter alia, that the employer has the "right: to suspend, discipline or discharge for just cause," and that this right is "not subject to bargaining" absent "a specific and express obligation of this Agreement." GC Exh. 25, Pages 4 to 6 (Article IV); GC Exh. 26, Pages 4 to 6.

VI. NEGOTIATIONS IN JULY, SUBSEQUENT TO EFFECTIVE DATE OF SUCCESSOR CBA; INFORMATION REQUEST

In July, after the Union and the Respondent signed off on terms for the successor CBA, and after the effective date of that CBA, the parties met for further negotiations. During those negotiations, the Union attempted to bargain with the Respondent over a general policy on work authorization and reverification that could then be applied to the unit employees whose names and/or social security numbers had triggered the IRS no-match alerts. The Respondent, on the other hand, insisted on confining the bargaining to the subject that it had expressly committed to bargain about in the June 29 agreement on CBA terms (i.e., the effects of the current IRS reporting errors), and refused to revisit the subject of a general policy on work authorization and reverification. During these negotiations, the Union's lead bargaining representative was attorney Josiah Groff and the Respondent's lead bargaining representative was attorney Scott Cruz. Neither Groff nor Cruz had been present at the bargaining sessions that culminated, on June 29, with Granados and Bedolla signing the agreement on terms for the CBA that became effective on July 1. Tr. 197-198, 379, 413.[7]

The negotiations that occurred after completion of CBA negotiations began on July 7. That day, the parties met and also communicated by email. Present for the Union were Groff, Bedolla, and a union steward. Present for the Respondent were Cruz and Granados. Cruz stated the Respondent was there to bargain over the effects of the Respondent's June 2 directives to unit employees Gonzalez, Montoya, Sanchez, and Sotelo. Tr. 414-415. Groff responded that the Union's desire was that the parties first reach agreement on a general policy on work authorization and then discuss the treatment of the four unit employees pursuant to that general policy. Ibid.; R Exh. 11. By email, Groff "demand[ed]" that the Respondent, which had previously rejected the Union's CBA proposal for a general policy without offering an alternative, propose its own general policy, and further demanded that no employee be adversely affected due to the no-match alerts until negotiations on a general policy were completed. R Exh. 11. Cruz responded that the Respondent would not agree to, or even discuss, a general policy on the subject, but rather would address future work authorization/reverification issues on an ad hoc basis. Tr. 417-419, 424. Cruz opined that the Respondent did not have to bargain regarding a general policy because it was "hypothetical" whether any issues of that nature would arise in the future and because the employer's duties regarding work authorization and reverification were dictated by law. Tr. 216-218. Groff

[7] Both Groff and Cruz were legal counsel, as well as witnesses, at the hearing in this matter.

countered that even if was true that the Respondent's duties were dictated by law, the parties would still have to bargain over the effects of its actions to comply with those duties. For example, Groff stated, the parties could negotiate for a policy regarding the amount of time employees would have to remedy such issues and about granting paid time off that employees could use to seek to remedy those issues. R Exh. 11 at Page 2.

In an email to Cruz on July 7, Groff included an information request for a copy of the ADP correspondence – i.e., the communication from the Respondent's payroll services provider that brought the no-match alerts to the Respondent's attention and which, according to Cruz, represented the Respondent's understanding of its legal obligations with respect to those alerts. R Exh. 11 and R Exh. 16. Groff stated that "[t]his information [wa]s necessary for the Union to make a specific proposal about how to handle the present situation with these four employees." R Exh. 11. Groff noted that, during the meeting earlier that day, the Respondent had asserted that the ADP correspondence was confidential, and Groff asked the Respondent to propose an accommodation to address the confidentiality concern.

Cruz, in a July 13 email to Groff, stated that the parties had already bargained over the Union's proposal for a general policy as part of the CBA negotiations and that the Union's withdrawal of that proposal during CBA negotiations meant that the Union had "waived its right to bargain over that issue and Alivio has no obligation to do so now." R Exh. 12, Page 4. Cruz also made a proposal regarding the treatment of the unit employees whose information had generated no-match alerts. Tr. 428; R Exh. 12. Specifically, he proposed that each of those employees be allowed to take a paid day off on either July 18 or July 19 and use that time to meet with SSA and obtain documentation showing that the no-match issue had been resolved. Ibid. Cruz stated that the Respondent would not extend the deadline for employees to correct the issue past the July 25 date that the Respondent had originally set forth in the June 2 letters. R Exh. 12 at Page 5.

With respect to the Union's information request for the ADP letter, Cruz stated that the Respondent was only willing provide "a redacted copy of the correspondence" and only if the Union promised "that the correspondence will be used by the Union only for the limited purpose of advising the 4 union members on their present Social Security issue, and not provided to any outside third party." Cruz asserted that the Respondent's proposed limitation was justified by concern that "the document could be provided to a government agency . . . and used as a basis to initiate an audit of Alivio's personnel records and documents." R Exh. 12 at Pages 1 to 2.

The next day, July 14, Groff responded by again demanding that the Respondent refrain from terminating any of the unit employees based on the no-match alerts until after bargaining was completed. R Exh. 13.[8] Groff also stated that, regarding the Union's information request, the Union would agree to use the ADP letter only for dealings with the Respondent and would not provide it to any third party. Later that day,

[8] This exhibit contains both the text of Groff's email, and also Cruz's response in the form of his annotations to Groff's email.

Cruz emailed a response to Groff's communication. Cruz stated, inter alia, that the Respondent would not extend the July 25 deadline for employees to remedy the no-match issues. Cruz also stated that Groff's promises with respect to use of the ADP correspondence were "not sufficient" because the Respondent was demanding that the Union not only limit its use of the letter to dealings with the Respondent, but further limit its use to the narrower subject of dealings with the Respondent over the current no-match alerts. R Exh. 13, Page 2.

On July 15, Cruz met with Groff and Bedolla using teleconferencing technology. During the meeting, Cruz stated that the ADP correspondence reflected the Respondent's understanding of what the Respondent was legally required to do in response to the no-match alerts. Tr. 151-152, 234-235. He confirmed that while the correspondence stated that the Respondent was already subject to potential IRS fines based on the no-match issues, the IRS had not, in fact, imposed any penalties on the Respondent. Tr. 435. Cruz stated that the Respondent was willing to continue to engage in effects bargaining over the no-match alerts. Tr. 445-446. Groff, in his response, again took the position that the parties had to negotiate a general policy that the Respondent would follow before negotiating over the treatment of the four unit employees. Ibid.

During the July 15 teleconference meeting, Cruz allowed Groff and Bedolla to view a redacted version of the ADP correspondence on their screens, R Exh. 14, but did not allow them to keep a copy of it, take a picture of it, or make notes while viewing it. Tr.234-235.[9] Cruz did not place a time limit on the Union's review of the ADP

[9] Groff testified that he did not take notes during the period when Cruz allowed him to view the screen showing the redacted ADP email, but Cruz testified that he could tell from watching the on-screen image of Groff that he was taking notes because his head "was going up and down" and "I think [was] right handed, jotting down notes." Tr. 234-235; 434. I credit Groff's testimony about his actions while viewing the ADP correspondence over Cruz's testimony about what he says he surmised from watching Groff's on-screen image. This is true both because Groff was in a better position to observe what he was, or was not, doing during that period of time, and also because I found Groff generally a more credible witness than Cruz regarding disputed factual matters. Groff was a forthcoming witness who did not give the impression of slanting or exaggerating his account of facts in order to favor the Union's position. He freely gave testimony that was favorable to the Respondent and did not resort to evasive or non-responsive answers during cross examination. See, e.g., Tr. 198 (Groff concedes that he "d[id]n't know what the Union and Alivio had agreed to during contract negotiations other than what the wording of [the agreement reached on June 29] says"), Tr. 234 (Groff agrees that Cruz did not place a time limit on his on-screen review of the ADP communication). Cruz, on the other hand, at times testified evasively and/or disingenuously. He was evasive, for example, on cross examination when asked to admit that the Respondent had previously, in 2019, received no-match alerts for unit employees but had not terminated the employees at that time. Tr. 463-464. Cruz claimed that Groff's statement that the parties had "ventilated" their respective positions regarding a general policy meant that Groff agreed they had bargained in good faith to impasse, whereas it is abundantly clear that what Groff was saying was that they had ventilated their positions about the legality of the Respondent's unwillingness to bargain. Tr. 442, R Exh. 15 (last

correspondence, but waited for Groff to say, after about 5 minutes, that he was finished. The correspondence – and email – notified the Respondent that the information submitted to IRS had generated no-match alerts for some of its employees, but did not identify who those employees were. Instead, the correspondence included a hyperlink that re-directed to information identifying the employees and their information. Cruz did not open that hyperlink while Groff and Bedolla were viewing the ADP correspondence. Nor did Cruz otherwise display those elements of the ADP communication to them. Tr. 465-466; Brief of Respondent at Page 49. The version of the ADP correspondence that was shown to the Union was 2 to 3 pages long and includes, inter alia, references to certain federal forms, IRS deadlines, and potential fines. Bedolla testified that the redactions the Respondent had made to the copy the Union was shown, R Exh. 14, made it "very difficult to put things together," Tr. 45.

On July 15, the same day that the meeting ended, Groff sent an email to Cruz in which he explained that allowing the Union "a few minutes viewing the [ADP correspondence] on a screen is inadequate" and that "without a copy of this correspondence to review in detail, and to review with other Union representatives . . . the Union cannot meaningfully bargain these issues." GC Exh. 10(b). Regarding the negotiations themselves, Groff stated that the Union was continuing to demand that the Respondent bargain over a general policy and "understand[s] your position to be that Alivio will not bargain any further." Groff concluded that "because we have ventilated our respective perspectives" the Union intended to seek a resolution through the unfair labor practice charge process.

In Cruz's email communications to Groff between July 19 and July 21, he stated, inter alia, that he agreed that the parties had "fully ventilated" their positions, and suggests that this means that Groff agreed that the parties had, after good faith bargaining, reached impasse. GC Exh. 11, R Exh. 15 (last page of exhibit), R Exh. 19, Tr. 442; see also Brief of Respondent at Pages 30 to 31 and n. 13. Cruz also took the position that the Union, by withdrawing its proposal for a general work authorization/reverification policy during bargaining for a CBA, had waived bargaining over such a policy and over Alivio's decision to comply with the IRS' directive regarding "the federal immigration mandates (assuming *arguendo* that Alivio ever had such a duty)." Cruz stated that the ADP correspondence set forth the federal immigration mandates and directives with which the Respondent was legally required to comply. During a phone conversation on July 20, Cruz told Groff that the Respondent would consider it insubordination if the unit employees did not comply with the directives in the June 2 letters, but he declined to state what the consequence would be for such insubordination. Tr. 263.

During this July 14 to 21 time period, the parties did reach some agreements regarding the implementation of the Respondent's June 2 directive to employees.[10]

page of exhibit), R Exh. 19.

[10] This progress came after a substantial delay attributable to the conduct of both the Respondent and the Union. The Respondent had waited a month after receiving the May 3 ADP correspondence regarding no-match alerts before informing the employees about them

Cruz responded to Groff's July 14 demand that no action be taken against the four unit employees, by stating that the Respondent would allow each of the employees a paid day off on either July 18 or July 19 to go to the Social Security Office" and remedy the no-match issue, but that the Respondent would not extend the July 25 compliance date for them to remedy those issues. R Exh. 16 at Page 4 (Cruz's Annotations to Groff's 7/14/2022 email). In a July 20 communication, Groff proposed to Cruz that the Respondent allow the employees the paid day off before July 25 (since the July 18 and 19 dates previously proposed by the Respondent had passed) "for the purpose of going in person to their local Social Security Office to resolve any issue as perceived by the IRS regarding their name and/or the SSN associated with their name." R Exh. 18; Tr. 445-446, 448. Groff also took the position that the Respondent was required to abstain from taking any adverse actions against employees who did not remedy their no-match alerts by July 25 because the Respondent's decision, in 2019, to allow unit employees to disregard the SSA no-match letters established a "practice" that would be unilaterally changed by requiring unit employees to address the IRS no-match alerts at-issue here. In an email on July 20, Cruz agreed to permit the four unit employees to use a paid day off on July 21 or July 22 to remedy their no-match issues. R Exh. 20. Cruz stated, again, that the Respondent would not extend the July 25 compliance deadline and denied that any contrary practice had been established by how the Respondent handled no-match letters from SSA in 2019. R Exh. 20 at Page 1.

Despite the fact that the Respondent consistently stated in negotiations with the Union that it would not extend the July 25 deadline, when the July 25 date arrived the Respondent, without notice to the Union, informed the four employees that it was extending the deadline to July 29. Tr. 164, 354, 452-453. Groff, in a July 26 email to Cruz, stated that he had heard about the extension and asked if Cruz would explain what led the Respondent to grant it. GC Exh. 14. Cruz responded that day, "No, I will not. Other than, giving your members more time, including yet another opportunity for a paid day off to fix the issue, and comply with a lawful directive." GC Exh. 15.

VII. RESPONDENT TERMINATES EMPLOYEES WHO DID NOT REMEDY THE IRS NO-MATCH ALERTS

Between July 29 and August 1, 2022, the Respondent met with, and terminated, each of the four unit employees to whom it issued the June 2 directives.[11]

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on June 2. It did not notify, or bargain with, the Union before issuing the June 2 letters that set a deadline for the employees to remedy the no-match alerts. The Respondent resisted providing the Union with a copy of the ADP correspondence even though Cruz stated that the correspondence set forth the Respondent's understanding of the federal mandates with respect to the no-match alerts. For its part, although the Union found out about the Respondent's June 2 directive to the four unit employees prior to the first CBA negotiating session on June 8, it insisted for weeks that the parties bargain over a general work authorization policy before bargaining over the effects of the directives in the June 2 letters to employees.

[11] I note that there is no allegation that animus against union or protected concerted activity played a part in the termination of any of these employees. The allegation is that they were

Gonzalez: Gonzalez began working for the Respondent in August of 2007. At the time the Respondent terminated his employment, Gonzalez was a maintenance worker and a member of the bargaining unit. Granados, the Respondent's interim human resources director, called Gonzalez and told him to meet with her before his next shift. Tr. 371-373. Gonzalez met with Granados on August 1, with Union organizer Bedolla present. Tr. 59, 372-373. Granados asked Gonzalez if he had gone to the Social Security Administration to remedy the no-match issue as directed by the Respondent's June 2 letter to him. Tr. 59-60, 276-277, 373-374. Gonzalez responded that he had not done so, and Granados asked why not. Gonzalez responded, "You know why." Granados asked if the issue could be fixed, and Bedolla advised Gonzalez that he did not have to answer that question. Granados told Gonzalez that if he refused to answer the question she would consider it insubordination and that insubordination was grounds for termination. Tr. 117, 373-374. Gonzalez stated that he did not have an answer and that if this meant Granados needed to terminate his employment "that's fine." Tr. 276-277. Granados told Gonzalez that he was terminated for insubordination based on his refusal to cooperate in the investigation by answering her question. Tr. 59-60,113.[12]

Although Granados told Gonzalez that the Respondent would provide him with a letter regarding his termination, Gonzalez never received anything in writing from the Respondent stating the reason for his termination. Tr. 277, 375. The Respondent did not give the Union advance notice before terminating Gonzalez. Tr. 60-61.

Montoya: On July 29, unit employee Montoya came to Granados' office without being summoned. Tr. 355. Montoya stated that she wanted to talk about the June 2 letter in which the Respondent had directed her to remedy the IRS no-match alert. Tr 356-357. Granados offered to have a union steward present, but Montoya declined. Montoya stated that she had nothing to provide to the Respondent in response to the June 2 letter. Granados asked Montoya if the social security number she had provided to the Respondent was her true number and Montoya said that it was not. Granados terminated Montoya's employment, but told Montoya that she could reapply in the future after remedying the problem.

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discharged in violation of the employer's bargaining obligations.

[12] The Respondent's counsel also argues that there was no duty to bargain over the June 2 directives and the resulting discharges because it would have been unlawful for the company to continue employing alien persons knowing that they were not unauthorized to work in the country. Brief of Respondent at Pages 31-32 (citing 8 U.S.C. Sections 1324a(a)(1)(A), (2)). This argument fails because the record does not show that the Respondent concluded that any of the four discharged employees were alien persons who lacked work authorization. I note that Granados, who made the termination decisions and was the only management official called as a witness, did not testify that she acted based on a conclusion that any of the terminated employees was an alien person not authorized to work in the United States.

Sanchez: On July 30, Grandos told unit employee Sanchez to meet with her before leaving work that day. Tr. 360-361. Granados offered to allow Sanchez to have a union representative present for the meeting, but Sanchez declined and stated, "I just want to get this over with today." Tr. 362-363. Granados told Sanchez that, contrary to what was suggested in a letter Sanchez had provided to Granados, the Respondent was not asking for a residency card. R Exh. 32; Tr. 364-365. When Granados asked if Sanchez had corrected the no-match issue, Sanchez answered that she was in the process of doing so, but that it would take 6 months to a year to complete that process. Granados asked Sanchez if the social security number that Sanchez had submitted to the Respondent was her "actual number" and Sanchez said that it was not. Ibid. Granados terminated Sanchez's employment, but stated that Sanchez could reapply when she had remedied the problem.

Sotelo: During the week following July 30, Granados met with unit employee Sotelo about the June 2 letter that the Respondent had issued to him. Tr. 368. Union steward Margarita Navez also attended the meeting. Tr. 128-129. Granados stated that she was not "reverifying" Sotelo or requesting a "residency card" from him – possibilities that had been referenced in a letter that Sotelo had submitted. R Exh. 34; Tr. 370-371. Granados asked Sotelo if he was able to correct the issue referenced in the June 2 letter. Sotelo said he could not and Granados terminated his employment.

ANALYSIS

I. DID RESPONDENT DEVIATE FROM AN ESTABLISHED PAST PRACTICE REGARDING WORK AUTHORIZATION/REVERIFICATION AND NO-MATCH ISSUES?

The General Counsel and the Union assert that the Respondent had an established past practice with respect to work authorization/reverification and no-match letters and that it unilaterally changed that practice when it required the four unit employees who had provided names and/or social security numbers that were inconsistent with government records to correct those issues by July 25, a week before the Respondent's own potential liability for IRS fines was set to increase. Brief of General Counsel at 18; Brief of Charging Party at Page 22. The argument that a prior practice existed is based on the company's response in 2019 when it received notice from SSA that the information it submitted for a number of employees did not match the SSA's records. In 2019, the Respondent initially directed the employees to correct the issues, but decided not to enforce that directive after the employees' counsel provided information that persuaded the Respondent that SSA was not threatening to impose consequences for any failure to correct the errors. The information that counsel provided also stated that the SSA no-match alerts were not evidence of the employees' work authorization or immigration status.

As the parties asserting a unilateral deviation from an established practice, the General Counsel and the Respondent have the burden of showing the existence of the established practice. *National Steel & Shipbuilding,* 348 NLRB 320, 323 (2006), enfd. 256 Fed. Appx. 360 (D.C. Cir. 2007). I find that the evidence presented here does not

meet that burden with respect to the IRS no-match alerts. It is true that in 2019 when SSA issued no match letters for a number of the Respondent's employees (including the four involved here) the Respondent did not require the employees to remedy those issues. Evidence of that single episode falls short of meeting the burden of showing that the Respondent had a practice or custom of allowing employees to disregard no-match issues raised by government agencies. Moreover, even if one assumes that the single episode in 2019 created an established past practice with respect to SSA no-match alerts, it was not shown that the past practice extended to the IRS no-match alerts. Neither the General Counsel, nor the Union, showed that the Respondent had not reasonably concluded that non-compliance with the 2022 IRS no-match alerts, unlike noncompliance with the 2019 SSA no-match alerts, exposed the Respondent to liability for government penalties.

I find that the record does not support the contention that the Respondent had an established practice that it deviated from when it directed employees to remedy the IRS no-match alerts.

II. DID THE RESPONDENT FAIL TO MEET BARGAINING OBLIGATIONS WITH RESPECT TO ITS DIRECTIVE THAT EMPLOYEES ADDRESS THE NO-MATCH ALERTS?

Where, as here, employees are represented by a union, their employer violates Section 8(a)(5) and (1) of the Act by making a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz,* 369 U.S. 736, 747 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Midwest Terminals*, 365 NLRB 1680, 1691 (2017); *Whitesell Corp.*, 357 NLRB 1119, 1171 (2011); *Ivy Steel & Wire, Inc.,* 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo,* 311 NLRB 869, 873-874 (1993); *Associated Services for the Blind,* 299 NLRB 1150, 1164-1165 (1990); *Bethlehem Steel Co. (Shipbuilding Div.),* 136 NLRB 1500, 1503 (1962). For the reasons previously discussed, I find that the Respondent's June 2 directive requiring four unit employees to remedy their IRS no-match issues did not constitute a unilateral change to an established past practice regarding work authorization and/or no-match issues.

That does not, however, end the inquiry with respect to the Respondent's bargaining obligations. The General Counsel and the Charging Party argue that the June 2 directive to the four unit employees constituted the imposition of a new disciplinary requirement and was a mandatory subject of bargaining regardless of whether that requirement departed from an established past practice. Brief of General Counsel;[13] Brief of Charging Party at Page 23. The Respondent counters that it was not required to bargain because it had no discretion in the matter inasmuch as the federal

[13] The General Counsel did not number the pages in its brief. For the discussion referenced, see the General Counsel's arguments citing: *Frontier Communications Corp.*, 370 NLRB No. 131 (2021), enfd. 2022 Westlaw 17484277 (4th Cir. 2022); *Ruprecht Co.*, 366 NLRB No. 179 (2018); *United Cerebral Palsy of New York City*, 347 NLRB 603 (2005); and *Washington Beef, Inc.*, 328 NLRB 612 (1999).

law required that the employees resolve the IRS no-match issues regarding their names and/or social security numbers.[14]

This is an issue on which both sides are right to a degree. The Respondent had no discretion, and therefore no bargaining obligation, with respect to its directive that employees resolve the no-match issues; but the Respondent did have discretion and a bargaining obligation with respect to both the effects of that directive and with respect to its requirement that employees resolve the no-match issues by July 25. In *Long Island Day Care Services*, the Board found that the employer had no obligation to bargain over a salary enhancement granted to employees where the employer was subject to a directive from the Department of Health and Human Services (HHS) that left the employer with no discretion regarding the grant of that salary enhancement. 303 NLRB 112, 117 (1991); see also *Washington Beef*, 328 NLRB at 619-620 (employer had no discretion, and therefore no duty to bargain, over the termination of employees pursuant to a directive from the Immigration and Naturalization Service (INS) that threatened monetary penalties). Similarly, in this instance the Respondent's information, not contradicted by the other parties, was that IRS required that the no-match alerts be remedied and that the Respondent would be subject to government penalties for noncompliance. I find, therefore, that the Respondent had no choice but to direct the four employees to resolve their IRS no-match issues. The decisions in *Ruprecht Co.*, supra, and *Frontier Communications*, supra, which are cited by the General Counsel and the Charging Party, do not contradict this outcome since in those cases the employers imposed the work authorization requirement on their own, without specific prompting from a government agency and a threat of penalties.[15]

On the other hand, the record shows that the Respondent did have discretion and a bargaining obligation with respect to both the effects of the directive that employees resolve their no-match alerts and with respect to its imposition of the July 25 deadline. Indeed, the Respondent exercised that discretion by offering the employees paid time off to use for resolving the issue and by changing the deadline it imposed on the employees. Although the Respondent did bargain to some extent in July 2022, and although the insistence of the Union on bargaining a general policy on work authorization before turning to those issues contributed to a delay in bargaining, I find

[14] The Respondent also argues that the June 2 directive did not involve discipline or discharge. Although that letter was not expressly a disciplinary rule, the Respondent did, in fact, terminate each of the four employees immediately upon being told that the employee could not, or would not, comply with the directive. Moreover, in response to the Union's repeated demand that the Respondent agree to refrain from disciplining or discharging employees pending bargaining over a work authorization policy, the Respondent did not state that discipline or discharge would not be the result if employees failed to comply. Based on this, and the record as a whole, I find that the June 2 directive was understood by the four employees, by the Union, and by the Respondent, as one for which compliance was required on pain of discharge or other discipline.

[15] The Charging Party and the General Counsel also cite the decision in *Aramark Education Services, Inc.*, 355 NLRB 60 (2011). That decision was issued at a time when the Board had only two members and therefore is not valid precedent under the Supreme Court's subsequent holding in *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

that the Respondent fell short of meeting its bargaining obligations with respect to both the effects of the directive and to its imposition of the July 25 deadline. See *Washington Beef*, supra (Where employer faces an INS threat of legal action if it does not either obtain valid work authorization documents from identified employees, or terminate those employees, the employer has a bargaining obligation with respect to "peripheral matters" such as the length of time the employees are given to provide the documentation, but the "employer's duty to bargain does not extend to the termination decision itself."). Specifically, I find that the Respondent violated its effects bargaining obligation by failing to give the Union notice before it issued the directive to employees. The Respondent was informed of the IRS no-match alerts on May 3, but it did not give the Union any notice of its intentions between that time and when, on June 2, it directed the union-represented employees to resolve the issues. Even when it issued the directive to those employees, the Respondent did not notify the Union; rather the Union discovered the action when affected employees contacted a union official for assistance. Where an employer's obligation is confined to effects bargaining, the employer still has a duty to give pre-implementation notice to a union representing the employees. *Hilton Anchorage*, 371 NLRB No. 151, slip op. at 4 (2022) (citing *Allison Corp.*, 330 NLRB 1363, 1366 (2000)), enfd. 98 F.4th 314 (D.C. Cir. 2024). "The Board 'requires pre-implementation notice because there may be alternatives that the employer and union can explore to avoid or reduce the impact of the decision without calling into question the decision itself.'" Ibid., also citing *Frontier Communications*, 370 NLRB No. 131, slip op. at 11. In addition, I find that the Respondent violated its bargaining obligation by consistently refusing to bargain with the Union over extending the July 25 deadline only to extend that deadline without notice to, or bargaining with, the Union.

I also find that the Respondent violated its obligations under Section 8(a)(5) and (1) when it refused the Union's request for a copy of the May 3 email from ADP, which notified the Respondent of the IRS no-match alerts and which the Respondent's attorney, Cruz, said set forth the Respondent's understanding of what it was legally required to do in response to those alerts. That email concerned bargaining unit employees and, therefore, was presumptively relevant to the Union's representational responsibilities. See *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), enfd. 843 F.3d 999 (D.C. Cir. 2016); see also *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) (employer violates the Act by refusing to provide information that is relevant and necessary to the union carrying out its representational duties and responsibilities). The Respondent should have provided the ADP email to the Union without delay. Cruz's assertion to Groff that the Respondent was withholding the ADP communication out of concern that the Union would provide the communication to "a government agency" for use "to initiate an audit" is specious given that the subject of the ADP communication was the very fact that a government agency with enforcement authority had flagged the issues. At any rate, any arguably legitimate concerns that the Respondent had about disclosure to a third party were addressed when the Union acceded to the Respondent's demand that the Union agree not to disclose the email to any third party. Even after the Union agreed to that, the Respondent refused to provide the Union with a copy of the requested ADP communication.

The Respondent's eventual willingness to allow the Union to view a redacted version of the email on a screen during a bargaining session did not provide the Union with adequate access to that email. The ADP document itself did not identify the unit employees who were the subject of the IRS no-match alerts, or provide the substance of those alerts, but rather included a hyperlink to a website where that information was available. The Respondent did not open that hyperlink for the Union to view. Even aside from that, on the day that the Respondent permitted that limited review, the Union notified the Respondent that the access was inadequate and that "without a copy of this correspondence to review in detail, and to review with other Union representatives . . . the Union cannot meaningfully bargain these issues." I agree that the Union reasonably demanded the opportunity to review the communication in detail and review it with other union representatives, especially given the complications and nuance involved. Certainly, the Union's need far outweighed the Respondent's feeble explanation for withholding information about unit employees from their collective bargaining representative.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act: by failing to provide the Union with pre-implementation notice of, and an opportunity to bargain over the effects of, its June 2, 2022, directive that employees remedy IRS no-match alerts; on June 2, 2022, by unilaterally imposing a July 25, 2022, deadline for employees to resolve the IRS no-match alerts; by refusing to negotiate over the July 25, 2022, deadline for employees to resolve the IRS no-match alerts; by, on or about July 25, 2022, unilaterally extending the deadline for employees to resolve the no-match alerts; and by refusing to provide the Union with a copy of the ADP communication that the Union requested on July 7, 2022.

III. DID THE RESPONDENT FAIL TO MEET AN OBLIGATION TO BARGAIN OVER A GENERAL POLICY ON WORK AUTHORIZATION AND REVERIFICATION?

Section 8(a)(5) and (1) of the Act makes it unlawful for an employer to refuse to bargain in good faith with its employees' collective bargaining representative. The General Counsel and the Charging Party allege that in addition to acting unlawfully by refusing to bargain over the directives to the four unit employees, the Respondent violated the Act by refusing the Union's request to bargain about a general policy concerning work authorization and re-verification. According to the allegations in the Complaint, that refusal began on about June 8, 2022[16] – the first day of negotiations for a successor CBA. It is true that during CBA negotiations the Respondent stated that it would not agree to the Union's proposal to include a general policy on work authorization and reverification in the CBA and that, during the course of the CBA negotiations, it never made a counter proposal to that portion of the Union's contract proposal. It is also true, however, that not only did the Respondent communicate purported reasons for rejecting the policy proposal, but also that the Respondent and

[16] See GC Exh. 1(k) (Complaint at Paras. VI.(b) and (d), and VIII.(a)).

the Union compromised on every other issue necessary to reach a successor CBA. After just 3 weeks of negotiations, the parties signed an agreement covering all terms for their successor CBA. Under these circumstances, I find that the Respondent bargained in good faith and that the compromises made by the parties, including the Union's agreement to withdraw its proposal for a general policy on work authorization, constituted "the kind of 'horse trading' or 'give-and-take' that characterizes good-faith bargaining." *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978); see also *Merck, Sharp & Dohme Corp.,* 367 NLRB No. 122, slip op. at 4 (2019) ("The [collective-bargaining] process, by its nature, may involve hard negotiation, posturing, brinkmanship, and horse trading over a long period of time."). Therefore, I find that the Respondent's action during contract negotiations were not shown to violate its bargaining obligation regarding a general work authorization policy.

Regarding negotiations during the period after the effective date of the new contract, I agree with the General Counsel that some elements of the Union's proposed policy on work authorization and reverification were mandatory subjects of bargaining. The Respondent's argument that the subject was not susceptible to bargaining because management's actions were dictated by law[17] is not persuasive given that the Union's proposal for a general policy, inter alia, sought limits on the Respondent's discretion to *exceed* the requirements imposed by law. The Respondent had discretion regarding the imposition of requirements beyond the ones it was legally obligated to impose and those elements of the proposed policy were susceptible to bargaining. The imposition of authorization and reverification requirements that exceeded or differed from those imposed by law could lead to discipline and were a mandatory subject of bargaining. *United Cerebral Palsy of New York City*, 347 NLRB at 607; see also *Ruprecht Co.*, supra.

The Respondent, while denying that it had any obligation to bargain over a general policy on work authorization/reverification, also argues that it did not violate any bargaining obligation it might be found to have had because the Union waived bargaining and because the parties had reached an impasse on that subject. Based on the record here, I agree with the Respondent that the Union waived bargaining over a general work authorization policy for the term of the contract. The Board has held that a waiver of bargaining will be found if the waiver is "clear and unmistakable." *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024).[18] In this case, the Union

[17] See Brief of Respondent at Page 14 (claiming that Respondent was justified in refusing to agree to a general policy because it might "violate federal immigration law or deny [the Respondent] the ability to comply with directives from federal agencies), and Page 32 (Respondent argues that given the mandates of federal law "any bargaining obligation is negated by its lack of discretion."); see also Tr. 217-218.

[18] In its decision in *Endurance*, the Board stated that it would decide on a case-by-case basis whether pending cases should be analyzed under the "clear and unmistakable" waiver standard, as opposed to the "contract coverage" standard that the Board overturned in that decision. *Endurance*, slip op. at pages 16-17. I find it is appropriate here to analyze the matter under the "clear and unmistakable" standard. Although the conduct at-issue took place before the *Endurance* decision, the trial and briefing took place after the Board

agreed to withdraw its CBA proposal for a new general policy on work authorization while also agreeing to a contractual "zipper clause" providing that the CBA "concludes all collective bargaining negotiations during the term hereof" and that neither party has a further duty to bargain over additions to the contract.

The Board has found that a clear and unmistakable waiver may be found based on consideration of the language of a CBA zipper clause and the surrounding circumstances, including bargaining history and past practice. *Radioear Corp.*, 214 NLRB 362, 364 (1974), supplementing 199 NLRB 1161 (1972). The language of the zipper clause at-issue here includes a general statement that the agreed-to contract concludes all collective bargaining for the term of the contract. That language is broad enough to preclude collective bargaining about a new policy on work authorization/reverification, although arguably too broad to show a clear waiver of bargaining on that subject. Based on the surrounding circumstances, however, I find that the Union did, in fact, waive bargaining over a general policy on work authorization/reverification. I note, first, that the Respondent is invoking the zipper clause as a "shield" against a demand that it bargain over a new policy that the Union attempted unsuccessfully to add to the CBA, rather than as a "sword" by which the Respondent is attempting to force a change in the status quo. The Board has approved the use of a zipper clause as a "shield" against a demand for bargaining, even though it has often looked unfavorably on attempts to use a zipper clause as a "sword" to establish an employer's freedom to unilaterally institute new terms and conditions of employment not contained in the contract. See *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992), *TCI of New York*, 301 NLRB 822, 824-826 (1991), and *GTE Automatic Electric Inc.*, 261 NLRB 1491, 1491-1492 (1982). The fact that the Respondent is invoking the zipper clause as a shield, rather than as a sword, weighs in favor of finding a waiver, for the term of the CBA, of bargaining over a work authorization policy.

Another circumstance weighing in favor of finding a waiver is that the Union's proposal for a general policy was raised during negotiations for the CBA, but dropped by the Union during those negotiations after the Respondent expressed its rationale for declining to agree.[19] See *Michigan Bell*, 306 NLRB at 282 (in considering whether a zipper clause constituted a waiver of bargaining over a subject the Board considers whether the subject was "addressed . . . in bargaining over the contract"). By withdrawing its proposal on a general work authorization policy, the Union promptly secured both an agreement on an overall contract and the Respondent's express commitment "to meet to negotiate the effect of the current IRS reporting errors." The agreement by which the Union withdrew its proposal on a work authorization policy made no mention of reviving, after the parties struck their agreement on the CBA,

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announced the change. Moreover, in its brief the Respondent makes its argument under the "clear and unmistakable" standard even though that standard imposes a higher hurdle on its waiver defense. The General Counsel and the Charging Party also analyze the case under the "clear and unmistakable" standard, although they contend that waiver is not shown under either standard. Brief of General Counsel; Brief of Charging Party at Pages 24 to 26.

[19] I do not mean to suggest that the Union agreed with that rationale.

negotiations over the withdrawn policy proposal. To the contrary, the June 29 agreement on terms for the new CBA not only included the Union's withdrawal of its proposal on a general policy, but included an express recognition that the Respondent did not agree to the inclusion of any language regarding work authorization/re-verification in the CBA. Based on the zipper clause, and the surrounding circumstances, I find that the Union waived, for the duration of the CBA, bargaining over a policy on work authorization/re-verification and, in exchange, obtained an overall agreement on a CBA and a commitment regarding effects bargaining for the affected unit employees.

I find that the Union waived bargaining over a general policy on work authorization and reverification and that the Respondent did not fail to meet a bargaining obligation on that subject in violation of Section 8(a)(5) and (1) of the Act.

IV. DID THE RESPONDENT VIOLATE BARGAINING OBLIGATIONS WHEN IT TERMINATED THE EMPLOYMENT OF UNIT EMPLOYEES?

The General Counsel contends that the Respondent discharged the four unit employees pursuant to a directive imposed in violation of Section 8(a)(5) and, therefore, that those discharges were themselves violations of Section 8(a)(5). Brief of General Counsel, citing, *Great Western, Produce*, 299 NLRB 1004, 1005 (1990) and *Boland Marine & Mfg. Co.*, 225 NLRB 824 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977).[20] Although it is true that the Respondent fell short of meeting its bargaining obligations with respect to the effects of the June 2 directive and the deadline for compliance, the record is clear that those shortcomings did not cause the discharges. Regardless of whether the Respondent had bargained fully over the effects of the June 2 directive or over the deadline, the evidence shows that none of the four employees would have corrected the inaccurate information on their applications prior to the August 1 deadline that the Respondent itself had to meet in order to avoid liability for heightened IRS penalties. When the Respondent interviewed the employees about addressing their inaccurate information, three of them stated that they could not, or would not, do so. The fourth, Sanchez, stated that she was working to remedy the situation, but that it would take 6 to 12 months to do so. Even if the Respondent had given the Union pre-implementation notice and a copy of the ADP letter on May 3 – the earliest date that the record shows the Respondent itself was notified of the IRS no-match alerts – that would mean that Sanchez's issue would not have been remedied until, at the earliest, 3 months after the August 1 deadline that the employer itself was subject to.

[20] The General Counsel does not present an argument that, apart from an obligation to bargain over the June 2 directive and a general policy on work authorization, the Respondent had an obligation to engage in pre-decisional bargaining over the discharges. At any rate, the Respondent argues that, under current Board law, the company did not have an obligation to engage in pre-decisional bargaining with the Union over the discharges because it took those actions in accordance with established CBA disciplinary provisions regarding falsification of application information and insubordination. Brief of the Respondent at Page 33, discussing *Care One at New Milford*, 369 NLRB No. 109 (2020).

For these reasons I conclude that the discharges of the four unit employees did not violate Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

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

3. The Respondent failed to bargain in good faith, and violated Section 8(a)(5) and (1) of the Act: by failing to provide the Union with pre-implementation notice of, and an opportunity to bargain over the effects of, its June 2, 2022, directive that employees remedy the IRS no-match alerts; on June 2, 2022, by unilaterally imposing a July 25, 2022, deadline for employees to resolve the IRS no-match alerts; by refusing to negotiate with the Union over the July 25, 2022, deadline for employees to resolve the IRS no-match alerts; by, on about July 25, 2022, unilaterally extending the July 25, 2022, deadline for employees to resolve the IRS no-match alerts; and by refusing to provide the Union with a copy of the ADP communication that the Union requested on July 7, 2022.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered 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) by failing to provide the Union with pre-implementation notice and the opportunity to bargain over the effects of its directive that employees remedy their IRS no-match issues and over its imposition of a deadline for doing so, I recommend that it cease and desist from failing to notify and, on request, bargain with the Union before issuing any future such directive to unit employees.[21]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[22]

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[21] The record shows that the Union raised, as subjects for effects bargaining, the possibility of granting the four affected unit employees paid days off to remedy their no-match issues and of suspending the deadline for doing so. The Union did not raise any subjects for effects bargaining that would justify the provision of relief to the four terminated bargaining unit employees at this time.

[22] 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.

ORDER

The Respondent, Alivio Medical Center, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) failing to provide the Union with pre-implementation notice and an opportunity to bargain over the effects of an employer directive that a bargaining unit employee resolve an IRS no-match alert.

(b) failing to provide the Union with pre-implementation notice and an opportunity to bargain over any deadline set forth in an employer directive requiring a bargaining unit employee to resolve an IRS no-match alert.

(c) unilaterally changing the deadline by which it requires that a bargaining unit employee resolve an IRS no-match alert.

(d) failing or refusing to provide the Union with requested information that is relevant and necessary to the Union carrying out its representational duties and responsibilities.

(e) 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 actions necessary to effectuate the policies of the Act.

(a) Provide the Union with a copy of the May 3, 2022, no-match communication from ADP in a manner that allows the Union to access imbedded hyperlink information regarding bargaining unit employees.

(b) Within 14 days after service by the Region post at its Chicago, Illinois, and Berwyn, Illinois, facilities copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 13 of the National Labor Relations Board, 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

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102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] 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."

customarily posted. In addition to physical posting of paper notices, the notice shall be distributed to employees electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its Chicago, Illinois, or Berwyn, Illinois, facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees of those facilities employed by the Respondent since June 2, 2022.

(c) Within 21 days after service by the Region, file with the Director for Region 13 sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 15, 2025.

PAUL BOGAS
U.S. Administrative Law Judge

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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail to provide Service Employees International Union, Healthcare Illinois, Indiana, CTW, CLC, (the Union) with pre-implementation notice and an opportunity to bargain over the effects of any management directive that a bargaining unit employee resolve an Internal Revenue Service (IRS) no-match issue.

WE WILL NOT fail to provide the Union with pre-implementation notice and an opportunity to bargain over any deadline set in a management directive requiring a bargaining unit employee to resolve an IRS no-match alert.

WE WILL NOT refuse to negotiate with the Union regarding, and/or unilaterally change, the deadline by which we have directed a bargaining unit employee to resolve an IRS no-match alert.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to the Union carrying out its representational duties and responsibilities.

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

WE WILL, provide the Union with a copy of the May 3, 2022, ADP communication notifying us of no-match alerts and do so in a manner that allows the Union to access hyperlink information regarding bargaining unit employees.

ALIVIO MEDICAL CENTER, INC.

(Employer)

Dated _____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Harris Tower, 233 Peachtree Street, N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-300158 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (470) 343-7498.