

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

In the Matter of:

AMERICAN BAPTIST HOMES OF
THE WEST d/b/a PIEDMONT
GARDENS,

Case No. 32-CA-063475

Employer,

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST,

Union.

**RESPONDENT'S LIMITED CROSS-EXCEPTIONS TO
THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

David S. Durham
Gilbert J. Tsai
ARNOLD & PORTER LLP
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600
Facsimile: 415/677-6262

Attorneys for Respondent
AMERICAN BAPTIST HOMES OF
THE WEST d/b/a PIEDMONT
GARDENS

On April 16, 2012, Administrative Law Judge Gerald M. Etchingham issued his decision in the above-referenced case. The ALJ correctly found that Respondent American Baptist Homes of the West d/b/a Piedmont Gardens (“Respondent”) did not violate Sections 8(a)(1) and (5) when it withheld witness statements regarding employee misconduct from the SEIU-UHW (“Union”). However, the ALJ concluded, incorrectly in our view, that Respondent unlawfully failed to provide the Union with the names and job titles of the witnesses.

On May 11, 2012, Counsel for the Acting General Counsel filed limited exceptions to the correctly-decided portions of the ALJ’s decision described above. On May 14, 2012, the Union filed identical limited exceptions.

Pursuant to the National Labor Relations Board’s Rules and Regulations, Section 102.46(e), Respondent hereby cross-excepts to the Decision of the Administrative Law Judge as follows:

Exception No.¹	Location (page:lines)	Exception
1	2:13-16	To the Administrative Law Judge’s reference to the trial conducted by ALJ Burton Litvack in <i>Piedmont Gardens</i> , Cases 32-CA-25247, 32-CA-25248, 32-CA-25266, 32-CA-25308, and 32-CA-25498, slip op. (August 9, 2011) (“earlier decision”) and the implication that the earlier decision is related in any way to the instant matter.
2	2:16-19	To the Administrative Law Judge’s adoption and administrative notice of Judge Litvack’s credibility findings with respect to Respondent’s Executive Director, Gayle Reynolds, in the earlier decision.
3	2:19-20	To the Administrative Law Judge’s characterization of Gayle Reynolds’ testimony in the earlier decision as

¹While Respondent believes that several of the Administrative Law Judge’s factual findings were in error and otherwise not supported by the record, in cases where findings are irrelevant to the underlying lawfulness or unlawfulness of the alleged conduct, no cross-exceptions are being taken. This should not be construed as an agreement with those factual findings.

Exception No.¹	Location (page:lines)	Exception
		“unbelievable, disingenuous, and outweighed by more reliable testimony.”
4	2:20-23	To the Administrative Law Judge’s finding that ALJ Litvack’s credibility findings as to Gayle Reynolds in the earlier decision are relevant.
5	<i>Id.</i>	To the Administrative Law Judge’s decision to place less weight on Gayle Reynolds’ testimony in this hearing, based on ALJ Litvack’s credibility findings in the earlier decision.
6	4:43-44	To the Administrative Law Judge’s finding that no credible evidence was produced of Mr. Bariudad’s threatening or intimidating conduct.
7	5:9-10	To the Administrative Law Judge’s implication that the Respondent’s practice of keeping witness statement confidential is not “actually needed.”
8	5:22-26	To the Administrative Law Judge’s misstatement of the record that the supervising charge nurse, rather than the CNA assigned to the floor, is responsible for responding to resident’s pages for assistance.
9	5:24-26	To the Administrative Law Judge’s finding, without basis in the record, that “at least” one charge nurse and one CNA other than Mr. Bariudad were available to respond to emergencies on the floor where Mr. Bariudad was assigned.
10	6:7-9	To the Administrative Law Judge’s finding that Lynda Hutton “altered” her testimony “after a short break.”
11	6:18-20	To the Administrative Law Judge’s finding that “threatening conduct” is the same as “intimidating conduct.”
12	6:20, 22	To the Administrative Law Judge’s characterization of Ms. Hutton’s testimony as “changed.”
13	6:20-23	To the Administrative Law Judge’s implication that Ms. Hutton changed her testimony due to influences occurring during a trial break.
14	7:1-3	To the Administrative Law Judge’s finding that Ms. Hutton prepared her written statement without anyone at Respondent asking her to prepare the statement.
15	7:17-18	To the Administrative Law Judge’s failure to find that Ms. Hutton believed that her identity as a witness would remain confidential.

Exception No.	Location (page:lines)	Exception
16	7:24-26	To the Administrative Law Judge's mischaracterization of Ms. Hutton's testimony that Mr. Bariudad's sleeping on the job did not pose a danger to the residents.
17	7:33-36	To the Administrative Law Judge's finding that Ms. Donna Mapp attempted to find out who was working with Mr. Bariudad on the night he was accused of sleeping on the job.
18	<i>Id.</i>	To the Administrative Law Judge's finding that Ms. Mapp attempted to find out who might have witnessed Mr. Bariudad sleeping on the job.
19	<i>Id.</i>	To the Administrative Law Judge's finding that Ms. Mapp interviewed employees about the events on the night Mr. Bariudad was sleeping on the job.
20	7:36-41	To the Administrative Law Judge's finding that Ms. Mapp discovered who was working with Mr. Bariudad on the night he was accused of sleeping on the job.
21	7:41-8:3	To the Administrative Law Judge's finding that Ms. Mapp looked to Respondent to supply the identities and witness statements only after conducting her own investigation.
22	7:43-49	To the Administrative Law Judge's failure to find that there could be potential negative ramifications if a resident in Respondent's assisted living section fell, was injured, and no one responded.
23	<i>Id.</i>	To the Administrative Law Judge's mischaracterization of Ms. Hutton's testimony as being "uncontroverted" that there was "no danger" to the residents at the time of Mr. Bariudad's alleged misconduct.
24	8:1-3	To the Administrative Law Judge's finding, without any basis in the record, that witnesses to Mr. Bariudad's misconduct "may have included residents."
25	8:3-8	To the Administrative Law Judge's incorrect finding that shift schedules are posted only for two-week periods.
26	9:35-36	To the Administrative Law Judge's statement that in 2011 the Respondent did not have evidence when it asserted a legitimate and substantial interest in keeping the names of striker replacements confidential.
27	10:9-12	To the Administrative Law Judge's rejection of Gayle Reynolds' testimony.

Exception No.¹	Location (page:lines)	Exception
28	<i>Id.</i>	To the Administrative Law Judge's finding that Gayle Reynolds' testimony was inconsistent with the record.
29	<i>Id.</i>	To the Administrative Law Judge's finding that no "credible" evidence was produced showing that anyone was ever threatened by Mr. Bariudad.
30	10:12-14	To the Administrative Law Judge's reliance on retired Judge Litvack's credibility findings regarding Gayle Reynolds.
31	10:14-16	To the Administrative Law Judge's failure to credit Gayle Reynolds' testimony about Respondent's policy to maintain the confidentiality of witness names, job titles, and identities.
32	10:22-25	To the Administrative Law Judge's failure to credit Alison Tobin's testimony that she first contacted Ms. Hutton to create a witness statement.
33	10:27-29	To the Administrative Law Judge's rejection of Alison Tobin's description of the conversation she had with Ms. Hutton that led to Ms. Hutton's first witness statement.
34	10:30-32	To the Administrative Law Judge's characterization of Respondent's counsel's questions to Alison Tobin as "leading."
35	<i>Id.</i>	To the Administrative Law Judge's finding that Ms. Hutton's legitimate concern about Mr. Bariudad's potential retaliation was an "undocumented fabrication."
36	10:32-35	To the Administrative Law Judge's finding that Ms. Hutton "allowed" Mr. Bariudad to sleep on the job.
37	10:37-39	To the Administrative Law Judge's rejection of Allison Tobin's testimony that CNA Burns was concerned about confidentiality.
38	10:46-49	To the Administrative Law Judge's conclusion that Ms. Hutton "allowed" Mr. Bariudad's work naps without any problems because they were "work colleagues."
39	11:10-11	To the Administrative Law Judge's failure to find that Mr. Bariudad verbally intimidated Ms. Hutton.
40	11:13-16	To the Administrative Law Judge's finding that portions of Lynda Hutton's testimony contradicted her earlier testimony.

Exception No.¹	Location (page:lines)	Exception
41	11:27-30	To the Administrative Law Judge's rejection of Ms. Hutton's credible statement that she would have resigned out of fear of Mr. Bariaud had she not understood her statement would be kept confidential.
42	11:30-31	To the Administrative Law Judge's mischaracterization of Ms. Hutton's testimony as stating that Mr. Bariaud "did not pose a threat at any time to anyone."
43	11:34-36	To the Administrative Law Judge's finding that Ms. Hutton would look to Respondent's representative Gayle Reynolds "apparently for guidance or approval."
44	14:7-8	To the Administrative Law Judge's conclusion that there is no credible record evidence of fear by employees of retaliation from Mr. Bariaud or the Union.
45	14:25-27	To the Administrative Law Judge's rejection of Respondent's argument that the Union could easily have discovered the names and job titles of witnesses on its own.
46	14:28-30	To the Administrative Law Judge's finding that work schedules are posted for no longer than two weeks.
47	14:34-35	To the Administrative Law Judge's finding that the Union asked witnesses whether they prepared witness statements.
48	14:49-15:2	To the Administrative Law Judge's finding that Mr. Bariaud's sleeping on the job did not endanger anyone.
49	15:2-4	To the Administrative Law Judge's finding that there was "excess staffing" on the night of Mr. Bariaud's alleged misconduct and that his misconduct therefore did not pose a danger to anyone.
50	15:4-8	To the Administrative Law Judge's incorrect analysis of <i>Pennsylvania Power, Alcan Rolled Products</i> , and <i>NIPSCO</i> including his conclusion those cases were distinguishable from the facts of this case.
51	15:9-10	To the Administrative Law Judge's misstatement of the law that Respondent must prove a "clear and present danger" of harassment before a confidentiality interest arises.
52	15:10-15	To the Administrative Law Judge's reliance on <i>Diamond Walnut Growers</i> and <i>Page Litho, Inc.</i>
53	15:15-17	To the Administrative Law Judge's finding that no credible

Exception No.¹	Location (page:lines)	Exception
		evidence existed that Respondent promised confidentiality as to the names and job titles of witnesses.
54	15:19-23	To the Administrative Law Judge's conclusion that Respondent has not proven a legitimate and substantial interest in preserving the confidentiality of witness names and job titles.
55	15:23-24	To the Administrative Law Judge's finding that Mr. Bariuad's sleeping on the job did not involve unsafe conduct.
56	15:23-25	To the Administrative Law Judge's finding that the witness names and job titles must be produced.
57	15:25-27	To the Administrative Law Judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the witness names and job titles of informants.
58	17:10-13	To the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(5) and (1) by refusing to provide the witness names and job titles of informants.
59	17:22-28	To the Administrative Law Judge's remedy in its entirety.
60	17:40-41	To the Administrative Law Judge's recommended Order for Respondent to cease and desist from the conduct alleged in Paragraph 1(a).
61	18:4-5	To the Administrative Law Judge's recommended Order for Respondent to provide the Union with the witness names and job titles.
62	18:7-20	To the Administrative Law Judge's recommended Order for Respondent to post the proposed Notice.
63	18:26-34	To the Administrative Law Judge's recommended Order that Gayle Reynolds publicly read the proposed Notice.
64	18:30-32	To the Administrative Law Judge's characterization of Respondent's alleged violations of the Act as "sufficiently serious" to warrant a public reading of the proposed Notice.
65	Appendix	To the first and second "We Will Not" paragraphs of the proposed Notice.
66	Appendix	To the "We Will" paragraph in the proposed Notice.

DATED: May 25, 2012.

Respectfully submitted,

By:  _____

David S. Durham
Gilbert J. Tsai
ARNOLD & PORTER LLP
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Attorneys for Employer

AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS

1 **PROOF OF SERVICE**

2 1. I am over eighteen years of age and not a party to this action. I am employed in the County
3 of San Francisco , State of California. My business address is 3 Embarcadero Center, 7th
4 Floor, San Francisco, CA 94111.

5 2. On May 25, 2012, I served the following document(s):

6 RESPONDENT'S LIMITED CROSS-EXCEPTIONS TO THE DECISION AND
7 RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE;

8 The document(s) served are included in the attached List of Documents.

9 3. I served the document(s) on the following person(s):

10 Noah J. Garber
11 William A. Baudler
12 National Labor Relations Board - General Counsel
13 1301 Clay Street, Suite 300N
14 Oakland, CA 94612
15 noah.garber@nlrb.gov
16 william.baudler@nlrb.gov

17 Yuri Y. Gottesman
18 Weinberg, Roger & Rosenfeld
19 1001 Marina Village Parkway, Suite 200
20 Alameda, CA 94501
21 ygottesman@unioncounsel.net

22 The names, addresses, and other applicable information about the persons served is
23 included in the attached Service List.

24 4. The documents were served by the following means:

25 **By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the
26 person(s) at the address(es) in Item 3 and **(check one)**:

27 deposited the sealed envelope with the United States Postal Service, with the postage
28 fully prepaid.

placed the envelope for collection and mailing, following our ordinary business
practices. I am readily familiar with this business' practice for collecting and processing
correspondence for mailing. On the same day the correspondence is placed for collection
and mailing, it is deposited in the ordinary course of business with the United States Postal
Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where the mailing occurred. The envelope or package was
placed in the mail at San Francisco, California.

By Overnight Delivery/Express Mail. I enclosed the documents and an unsigned copy of
this declaration in a sealed envelope or package designated by
[name of delivery company or U.S. Postal Service for Express Mail] addressed to the
persons at the address(es) listed in Item 3, with
[Express Mail postage or, if not Express Mail, delivery fees] prepaid or provided for. I

1 placed the sealed envelope or package for collection and delivery, following our ordinary
2 business practices. I am readily familiar with this business' practice for collecting and
3 processing correspondence for express delivery. On the same day the correspondence is
4 collected for delivery, it is placed for collection in the ordinary course of business in a box
5 regularly maintained by

6 **[name of delivery company or U.S. Postal Service for Express Mail]** or delivered to a
7 courier or driver authorized by **[name of delivery company]** to receive documents.

8 **By Messenger Service.** I served the documents by placing them in an envelope or package
9 addressed to the persons at the address(es) listed in Item 3 and providing them to a
10 professional messenger service for service. (See Declaration of Messenger below.)

11 **By Facsimile Transmission.** Based on an agreement between the parties to accept service
12 by facsimile transmission, which was confirmed in writing, I faxed the document(s) and an
13 unsigned copy of this declaration to the person(s) at the facsimile numbers listed in Item 3
14 on [type date], at [type time]. The transmission was reported as complete without error by a
15 transmission report issued by the facsimile machine that I used immediately following the
16 transmission. A true and correct copy of the facsimile transmission report, which I printed
17 out, is attached hereto.

18 **By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to
19 accept service by electronic transmission, I transmitted the document(s) and an unsigned
20 copy of this declaration to the person(s) at the electronic notification address(es) listed in
21 Item 3 on May 25, 2012 before 5:00 p.m. PST.

22 The transmission of the document was reported as complete and without error by
23 electronic receipt of a delivery confirmation, a true and correct copy of which is attached
24 hereto.

25 I did not receive, within a reasonable time after the transmission, any electronic
26 message or other indication that the transmission was unsuccessful.

27 **Via Court Notice of Electronic Filing.** The document(s) will be served by the court via
28 NEF and hyperlink to the document. On [type date], I checked the CM/ECF docket for this
case or adversary proceeding and determined that the person(s) listed in Item 3 are on the
Electronic Mail Notice List to receive NEF transmission at the email addresses indicated in
Item 3 **[or on the attached service list, if applicable]**.

STATE: I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

FEDERAL: I declare that I am employed in the office of a member of the bar of this court
at whose direction the service was made.

Dated: _____ Signature: _____

Type or Print Name: _____

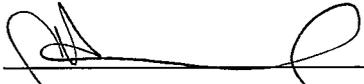
DECLARATION OF MESSENGER

By personal service. I personally delivered the envelope or package received from the
declarant above to the persons at the addresses listed in Item 3. (1) For a party represented
by an attorney, delivery was made to the attorney or at the attorney's office by leaving the
documents in an envelope or package, which was clearly labeled to identify the attorney
being served, with a receptionist or an individual in charge of the office or in a conspicuous
place in the office, between the hours of nine in the morning and five in the evening.
(2) For a party, delivery was made to the party or by leaving the documents at the party's

1 residence with some person not younger than 18 years of age between the hours of eight in
2 the morning and six in the evening. At the time of service, I was over 18 years of age. I am
3 not a party to the above-referenced legal proceeding. I served the envelope or package, as
4 stated above, on [type date].

5 I declare under penalty of perjury under the laws of the State of California that the foregoing
6 is true and correct.

7 Dated: 5/25/12

8 Signature: 

9 Type or Print Name: Jill Hernandez

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28