

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

LOUISVILLE & JEFFERSON COUNTY PUBLIC  
DEFENDER CORPORATION

and

Cases 09-CA-291568  
09-CA-291555  
09-CA-293332

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO (IBEW),  
LOCAL 369

*Linda B. Finch, Esq.*,  
for the General Counsel.

*James U. Smith III, Esq.*,  
*W. Kevin Smith, Esq.*, and  
*Kevin M. Norris, Esq.*,  
for the Respondent.

*David Leightty, Esq.*,  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Louisville, Kentucky, on November 2–3, 2022. International Brotherhood of Electrical Workers, AFL–CIO (IBEW), Local 369, filed the charge in case 09–CA–291555 on March 1, 2022, the charge in case 09–CA–291568 on March 1, 2022, and the charge in case 09–CA–293332 on March 31, 2022. (GC Exh. 1(a), (c), (e).) The General Counsel issued an order consolidating cases, consolidated and notice of hearing on May 19, 2022. (GC Exh. 1(g).) Louisville & Jefferson County Public Defender Corporation, (Respondent) timely filed its answer on June 1, 2022, denying the relevant allegations. (GC Exh. 1(i).) Thereafter, on July 14, 2022, the Regional Director for Region 9 of the National Labor Relations Board (Board) issued an order severing and withdrawing certain allegation of consolidated complaint in Cases 09–CA–291555 and 09–CA–291568, severing case 09–CA–291555 from 09–CA–291568, as case 09–CA–291555 was pending before the Board. (GC Exh. 1(o).) On July 29, 2022, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing in cases 09–CA–291568 and 09–CA–293332. (GC Exh. 1(u).) Respondent timely answered the July 29, 2022, consolidated complaint on August 12, 2022, again denying the relevant allegations. (GC Exh. 1(bb).) On September 7, 2022, the General Counsel issued an amendment to the consolidated complaint. (GC Exh. 1(cc).) Respondent answered the amendment to the consolidated complaint on September 20, 2022, denying the allegations. (GC Exh. 1(ee).) Then, on

September 30, 2022, the General Counsel issued an order consolidating cases in cases 09–CA–291555, 291568, and 09–CA–293332.<sup>1</sup> (GC Exh, 1(ff).)

5 After considering all of the evidence and testimony presented, as well as the briefs of the parties, I find that Respondent violated the National Labor Relations Act (the Act) as alleged in the complaint.

10 The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,<sup>2</sup> and after carefully considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

15 I. JURISDICTION

Louisville & Jefferson County Public Defender Corporation, (Respondent or PDC), a 501(c)(3) not for profit corporation, with an office and place of business in Louisville, Kentucky, has been engaged in the business of providing legal services to indigent adults and juveniles within the Commonwealth of Kentucky. In conducting its operations, during a 12-month period ending April 30, 2022, Respondent derived gross revenues in excess of \$250,000, and purchased and received goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(i), 1(bb).)

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II. ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent’s Operations*

30 Respondent is a non-profit corporation providing legal representation to indigent people in Jefferson County, Kentucky. (Tr. 142.) Courts determine whether individuals charged with a crime are eligible for Respondent’s services. (Tr. 144.) Respondent is notified of appointments by the courts and must accept all cases to which it is appointed. (Tr. 144–145.)

35 Respondent is divided into numerous divisions. (R. Exh. 1.) Respondent’s largest division is the Adult Trial Division, which has the most attorneys and heaviest caseload. (Tr. 146; 182.) The Major/Special Litigation Division handles arraignments, public interest cases, and other larger issues. (Tr. 147.) The Capital Trial Division handles death penalty cases. (Tr. 147.) The Appellate Division handles cases before the Commonwealth’s Courts of Appeals and the

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<sup>1</sup> On July 22, 2022, the General Counsel filed a Motion for Summary Judgment with the Board. (GC Exh. 1(ff).) On September 28, 2022, the Board issued an order denying the General Counsel’s motion. (Id.)

<sup>2</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Kentucky Supreme Court. (Tr. 150.) Respondent also has a Paralegal Division, a Social Services Division, and an Investigative Division. (R. Exh. 1; Tr. 152.)

5 The Juvenile Trial Division represents individuals under the age of 18 charged with crimes or status offenses. (R. Exh. 1; Tr. 148–149.) The Mental Inquest Warrant (MIW) docket is part of the Juvenile Trial Division. (Tr. 149.) As part of this docket, Respondent represents individuals confined at state psychiatric hospitals to protect their rights. (Tr. 149.) The MIW docket is heard on Tuesdays and Thursdays, along with a short docket on Monday afternoons. (Tr. 181.) The MIW attorney position is a part-time position. (Tr. 181.)

10 Leo Smith is Respondent’s Executive Director. (Tr. 142.) He has been employed at the PDC for 40 years. (Tr. 142.) Respondent admits, and I find, that Leo Smith is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(i), 1(bb).)

15 When a conflict of interest arises as to the representation of a particular defendant, Respondent appoints outside counsel. (Tr. 153–155.) Respondent has an Assigned Counsel Plan that has been in use since 1972. (R. Exh. 2; Tr. 154.) Attorneys who are interested in serving as AAIGNED (outside) counsel may fill out a form to express their interest. (R. Exh. 3; Tr. 155.) A description of the duties of assigned counsel are provided to interested attorneys. (R. Exh. 2; Tr. 155.) When a case is completed by outside counsel, the attorney submits a voucher for payment. (R. Exh. 4; Tr. 157.)

#### 25 *B. Union Organizing Drive and History of Labor Relations*

In 1999, the Board certified another labor organization as the exclusive collective-bargaining representative of Respondent’s attorney employees. (R. Exh. 23, p. 4.) At that time, James David Niehaus, a staff attorney in Respondent’s office, filed a petition with the Kentucky Supreme Court seeking relief from any obligations resulting from the certification of bargaining representative.<sup>3</sup> (R. Exh. 23, p. 4.) In 2000, the court denied Niehaus’ petition. (R. Exh. 23, p. 5.)

30 On about September 30, 2021, Union Attorney Ben Basil and Union Business Manager Larry Wendler met with some of Respondent’s staff attorneys to explain the organizing process. (Tr. 43.) Respondent’s attorneys voiced several concerns, including caseloads, compensation, a desire for paid time off and parental leave, and how they represented clients. (Tr. 43–44.) The Union collected a sufficient number of authorization cards and filed for an election with NLRB Region 9 on November 21. (R. Exh. 15; Tr. 44.) The unit consisted of about 50–60 employees.

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<sup>3</sup> The Board granted the General Counsel’s motion for summary judgement and found that Respondent violated Section 8(a)(5) and (1) for refusing to bargain with its employees’ representative in *Louisville-Jefferson County Public Defender Corp.*, 330 NLRB No. 105, slip op. at 2, 2000 WL 228487 (2000) (not reported in Board volumes), a case arising out of the prior organizing effort. In that decision, the Board found the following unit appropriate for collective bargaining, “All full-time and regular part-time nonsupervisory staff attorneys, including law school graduates who are awaiting bar results, employed by [Respondent] at its Louisville, Kentucky facility, excluding all office clerical employees and all other professional employees, guards and supervisors as defined in the Act.” (Id.)

(Tr. 44.) The representation petition was investigated and processed by Field Examiner Alaina Nikonow. (R. Exh. 15.)

5 Executive Director Leo Smith hired the law firm of Smith & Smith to represent Respondent before the Board. (Tr. 219.) Attorney James Smith, of Smith & Smith, emailed Nikonow on November 17 raising several “unresolved, potential ethical restrictions that would apply to the representation of attorney-employees in Kentucky.” (R. Exh. 16.) Smith went on to state

10 PDC intends to raise these concerns to the Kentucky Bar Association, governed by the Kentucky Supreme Court, to ensure that it is not engaging in unethical conduct in connection with any negotiations with the attorney-employees’ bargaining unit representative.

15 (R. Exh. 16; Tr. 90–91.)

Later that same day, Field Examiner Nikonow responded to Respondent’s Attorney James Smith’s email. (R. Exh. 16.) Nikonow stated

20 I relayed your position to the ARD and [Regional] Director and as suspected, we see no reason to delay processing the petition, while preserving your right to seek clarity on the matter with the Kentucky Supreme Court at some point following the election, if necessary.

25 (R. Exh. 16.) Respondent also raised this issue in its statement of position on November 18. (R. Exh. 17.) Specifically, Respondent stated

30 As the Employer advised the Region on November 17, 2021, in connection with Case No. 09-RC-285757, the Employer will seek resolution of issues pertaining to the Kentucky Rules of Professional Conduct and ethical restrictions imposed on the Employer and/or its employed attorneys with respect to any duty that the Employer may have to recognize and bargain with Petitioner as the collective bargaining representative of Staff Attorneys and law school graduates licensed to practice pursuant to SCR 2.116.

35 (R. Exh. 17.)

The parties entered into a stipulated election agreement on November 18.<sup>4</sup> (R. Exh. 18.) The election was conducted by way of mail ballots. (Tr. 44.) The ballots were mailed to eligible voters in December and the ballot count was conducted on January 11, 2022. (Tr. 44.)  
40 Following the ballot count, the Union was certified as the bargaining representative of the following unit:

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<sup>4</sup> In so doing, Respondent waived its right to a preelection hearing. (R. Exh. 18.) Respondent further agreed that the proposed unit was appropriate for the purposes of collective-bargaining within the meaning of Section 9(c) of the Act. (Id.)

All full-time and regular part-time non-supervisory staff attorneys licensed to practice law in Kentucky, including law school graduates who are awaiting bar results but licensed to practice under Kentucky SCR 2.116, employed by the Employer at its 719 West Jefferson Street, Louisville, Kentucky facility, excluding all other professional employees, all non-professional employees, and all office clerical employees, guards and supervisors as defined in the Act.

(GC Exh. 2; R. Exh. 20; Tr. 45.) The parties disagree as to whether division chiefs and deputy division chiefs should be included in the unit. (Tr. 101.)

### C. *Seadler Petition and Continued Ethical Concerns*

Sheila Seadler was an attorney employed by Respondent in the bargaining unit. (Tr. 87.) In December 2021, Seadler filed a petition in the Kentucky Supreme Court.<sup>5</sup> (R. Exh. 21.) Seadler moved for an order prohibiting or delaying the formation of a collective-bargaining unit composed of non-supervisory attorneys employed by Respondent. (R. Exh. 21.) Respondent filed a motion to intervene in this proceeding. (R. Exh. 22.) The Union filed a response to Seadler's petition, asserting that Seadler had improperly filed the petition without seeking an opinion from the Kentucky Bar Association Ethics Committee and opposing the relief sought. (R. Exh. 23.) On March 24, 2022, the Kentucky Supreme Court denied both Seadler's petition and Respondent's motion to intervene. (R. Exh. 29.)

On March 24, the Union sent a letter attached to an email to Respondent's attorneys. (R. Exh. 30.) The Union stated that Seadler's petition had been denied in a unanimous opinion of the Kentucky Supreme Court. (R. Exh. 30.) The Union demanded that Respondent reply to an information request it had made on February 7 within a week. (R. Exh. 30.)

Thereafter, on April 7, Respondent filed a formal request for an ethics opinion with the Kentucky Bar Association. (R. Exh. 34.) Respondent noted that in the ruling on the Seadler petition, the Kentucky Supreme Court stated that, "a supervisory writ is inappropriate because SCR 3.530 provides the proper procedural mechanism to place before this Court a question relating to the interpretation of the Kentucky Rules of Professional Conduct." (R. Exh. 34.) Respondent went on to argue its ethical concerns that membership in a labor organization for purposes of collective-bargaining creates an impermissible conflict with a criminal defense attorney's responsibility to individual clients and puts supervisory attorneys at odds with their ethical duties. (R. Exh. 34.)

On May 18, 2022, the chair of the Kentucky Bar Association Ethics Committee responded to Respondent's request for a formal ethics opinion, denying the request. (R. Exh. 36.) However, the Committee indicated that it would address the request of any individual attorney related to ethical concerns as a result of any party, including a labor organization, that may place the attorney in jeopardy of violating the Rules of Professional Conduct. (R. Exh. 36.)

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<sup>5</sup> Seadler's attorney was James David Neihaus, the same attorney who filed for relief during the 1999-2000 organizing effort. (R. Exh. 21.)

Following this denial, Respondent indicated that it would seek further guidance from the Kentucky Supreme Court, but would begin gathering information pursuant to the Union's information requests. (R. Exh. 37.) In June 2022, Respondent filed a petition for a supervisory writ in the Kentucky Supreme Court. (GC Exh. 3; Tr. 46.) The PDC asked the court for an interpretation of the Rules of the Kentucky Supreme Court, including the Rules of Professional Conduct, to determine whether those rules permit attorneys to be members of a collective-bargaining unit. (GC Exh. 3; Tr. 46–47.) This petition was denied on October 20, 2022. (GC Exh. 3; Tr. 46.)

#### D. Outsourcing

In 1992, budget cuts were enacted for all Commonwealth agencies in Kentucky. (R. Exhs. 5, 6, 6.1; Tr. 158.) Due to the funding cuts, the public defender did not fill two open positions. (R. Exh. Tr. 158–163.) In addition, Respondent did not supply attorneys for individuals involuntarily hospitalized.<sup>6</sup> (R. Exh. 5.) Funding was restored after about 6 months. (Tr. 159.)

In 2000, a shortage of attorneys resulted in Respondent contracting complete dockets out to private attorneys. (R. Exhs. 7, 8, 8A; Tr. 164–165.) At that time, three traffic dockets and a family court docket were handled by contracting. (R. Exh. 7; Tr. 166, 168.) PDC staff attorneys stayed on any assigned cases until they were resolved, but new cases were sent to private attorneys. (R. Exh. 7; Tr. 166–167.) This outsourcing was planned through the end of the fiscal year, but ended up lasting longer, until December 2001. (Tr. 167.)

More recently, in 2021, Respondent enacted a Temporary Workload Reduction Plan or TWRP.<sup>7</sup> (Tr. 138, 175.) Full staffing for Respondent would have been 78 attorneys, however, at the time of the TWRP's enactment staffing was in the 50s. (Tr. 175.) Factors contributing to the Respondent's staffing woes included low numbers of attorneys and a backlog of cases resulting from the COVID-19 pandemic. (Tr. 177.) As a result, Respondent claims it went back to what it had done 20 years prior, outsourcing. (Tr. 177–178.) The TWRP was still in effect at the time of the hearing. (Tr. 138, 180.)

The target number of attorneys in the PDC is about 75. (Tr. 126.) Respondent started fiscal year 2021 with 59 attorneys and added 13 attorneys during the year. (R. Exh. 14.1; Tr. 200.) By the end of fiscal year 2021, 14 attorneys had resigned, so Respondent ended the year with one attorney less than it had started with. (R. Exh. 14.1.) Respondent started fiscal year 2022 with 58 attorneys and added 15 more during the year. (R. Exh. 14.2; Tr. 200.) During fiscal year 2022, 28 attorneys resigned. (R. 14.2; Tr. 200.) Thus, Respondent ended fiscal year 2022 with only 45 attorneys. (R. Exh. 14.2; Tr. 200.)

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<sup>6</sup> Although Respondent asserts that this represented an outsourcing of the MIW docket, there is no evidence to support that assertion. (R. Brf. p. 20.) Instead, the newspaper articles admitted into evidence by Respondent indicate that the PDC merely did not send attorneys to court for these individuals. (R. Exhs. 5, 6, 6.1.) In response, the Commonwealth of Kentucky paid private attorneys to temporarily appear in court. (R. Exhs. 5, 6, 6.1.) I find that this does not implicate any action by the PDC with regard to paying private attorneys or outsourcing the MIW docket.

<sup>7</sup> No written version of this plan was introduced into evidence.

PDC Executive Director Leo Smith first notified Respondent's employees about the TWRP in an email dated December 14, 2021. (GC Exh. 18; Tr. 116, 136–137.) Respondent patterned the TWRP after its Assigned Counsel Plan. (GC Exh. 18; Tr. 178.) Respondent created a voucher form, like its Assigned Counsel Plan voucher form, for attorneys to seek reimbursement for handling outsourced cases. (R. Exh. 9.) Smith stated that the plan had evolved and had begun to have the desired effect. (GC Exh. 18.) However, Smith stated that more needed to be done to reduce the workload in the Adult Trial Division and, until that was accomplished, any scheduled, requested, or contemplated transfers of attorneys to divisions other than the Adult Trial Division were indefinitely postponed. (GC Exh. 18.) Smith closed by indicating that he hoped that this course of action would be temporary. (Id.)

At some point, Respondent decided to effectuate further cost saving measures by outsourcing its MIW docket.<sup>8</sup> (Tr. 180.) PDC Executive Director Leo Smith testified that this decision was based on staffing numbers, losing attorneys, and because Respondent could not hire and retain enough attorneys. (Tr. 180.) Respondent also considered whether to outsource its Juvenile Trial Division and Capital Trial Division, although Leo Smith noted that few private practitioners will take on death penalty cases. (Tr. 197.)

Leo Smith testified that the PDC's first and foremost obligation is to its indigent clients. (Tr. 203.) He further testified that the office rotates people to ensure adequate representation and to allow attorneys to gain experience. (Tr. 203.)

The Union became aware of Respondent's intention to subcontract unit work and remove unit personnel from the MIW "department." (GC Exh. 13; Tr. 70.) The Union was not made aware of the plan by Respondent. Instead, a bargaining unit member advised the Union of the plan. (Tr. 70.) As a result, on March 18, 2022, Union Attorney Basil sent a letter to PDC Executive Director Leo Smith regarding these actions. (GC Exh. 13.) In his letter, Basil made the following request

Please provide us with the following: (1 ) notice of any proposed unilateral changes in terms and conditions of employment, including but not limited to the plan to subcontract all work from the MIW Department and reassign its bargaining unit workers; (2) Information concerning this plan, including the date it was announced to bargaining unit members, the amount to be spent on contractors or other workers outside the bargaining unit or corporation, and the name(s) of contractors or their firm(s), and; (3) Any contracts or subcontracts for MIW work.

(GC Exh. 13.) Basil reminded Executive Director Leo Smith that it is unlawful to make changes to mandatory subjects of bargaining without first bargaining and asking him not to make any unilateral charges regarding the MIW "Department." (GC Exh. 13.) Finally, Basil asked for dates to meet and bargain. (Id.) On March 24, Basil sent a follow-up letter regarding the changes to the MIW docket to Respondent's Attorney Kevin Smith. (GC Exh. 14.) Basil again requested dates to meet and bargain. (Id.) A few minutes later, Attorney Kevin Smith responded, indicating that he intended to reply. (GC. Exh. 15.)

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<sup>8</sup> There is no evidence as to when exactly Respondent made this decision.

On March 28, Respondent’s Attorney Kevin Smith sent another email to Union Attorney Basil, apologizing for the delay in responding to Basil’s March 18 letter. (GC Exh. 16.) He stated that he would send a response as soon as possible. (Id.) On March 30, Kevin Smith sent his response. (GC Exh. 17.) In his letter, Kevin Smith explained that the MIW is not a department, but a discrete docket assigned to the Juvenile Trial Division. (GC Exh. 17.) Attorney Chirstopher Schulz had been assigned to the MIW docket in September 2021. (Id.) He went on to state that the decision to return Schulz to the Adult Trial Division on April 4, 2022, was made by Executive Director Smith based upon continued attrition in the Adult Trial Division, as well as the ability of Executive Director Smith to contract the limited MIW docket as a whole on a temporary basis to a private attorney. (Id.) According to Attorney Kevin Smith, the decision to contract out the MIW docket was an “extension of a program implemented by Public Defender Corporation in July 2021. . .” (GC Exh. 17, p. 3.) Executive Director Leo Smith testified that it would be difficult to contract out an Adult Trial Division docket because this division encompasses 13 circuit courts, 17 district courts, and 10 family courts. (Tr. 184–185.)

Leo Smith also testified that rotating attorneys among the divisions was somewhat commonplace at the PDC. (Tr. 203.) He did not explain why and when attorneys are rotated other than to say, “we like the idea of rotating individuals at some point in time during their career, because they get additional experience in other cases.” (Tr. 203.) He further testified that rotation is used to spread out resources to make sure Respondent can adequately represent its clients. (Tr. 203.)

#### 25 *E. Employment of Christopher Schulz*

Christopher Schulz has been employed by Respondent as an attorney since 2016. (Tr. 112.) He currently serves as a staff attorney in the Adult Trial Division. (Tr. 112.) He was hired by Respondent into the Adult Trial Division, where he served until transferring to the MIW docket on September 1, 2021. (Tr. 112–113.) The MIW docket is part of the Juvenile Trial Division. (Id.) When Schulz was moved to the MIW docket, he kept his Adult Trial Division cases until they closed. (Tr. 118; 202.)

Schulz became of the Union’s organizing campaign in Respondent’s office in September or October 2021. (Tr. 113.) He helped spread the word and, in 2022, he began wearing union pins at work. (Tr. 112–113.) He described himself as supportive of the campaign. (Tr. 113.)

Gretchen Zimmerman held the MIW docket position prior to Schulz. When Schulz became aware that Zimmerman was leaving the office, he asked Deputy Chief Public Defender Beth McMahon to be considered for the MIW docket position. (Tr. 113–114.) He later met with Executive Director Leo Smith about the position. (Tr. 121.) Schulz admitted that he was not sure how the position was assigned, but he believed that seniority played a role. (Tr. 114.) He further believed that the assignment was not permanent and would last a year. (Tr. 114.) He knew of one exception to the 1 year tenure because Gretchen Zimmerman served in the role for 2 years. (Tr. 114.) Leo Smith testified that Zimmerman handled other Juvenile Trial Division cases in addition to the MIW docket. (Tr. 204.)

Schulz began serving in the MIW docket position on September 1, 2021. (Tr. 115.) He was sent back to the Adult Trial Division on April 4, 2022, only 7 months later.<sup>9</sup> (Tr. 112—113.) Schulz was told by Executive Director Leo Smith and Deputy Chief Beth McMahon that he had to go back to the Adult Trial Division because, he thought, they needed more attorneys there. (Tr. 115.) Schulz was not aware of any other attorneys who were moved at the same time. (Tr. 124.) Leo Smith explained that it was more beneficial for Respondent to move Schulz back to the Adult Trial Division. (Tr. 202.) The MIW docket represented 40–50 percent of Schulz’ case load, so moving him back to the Adult Trial Division was like getting 40–50 percent of an attorney in that much busier division. (Tr. 202.)

No one replaced Schulz in the MIW docket. (Tr. 116.) Instead, the position was outsourced to Attorney Nick Boggs. (R. Exh. 14; Tr. 116.) On March 2, 2022, Executive Director Leo Smith sent a letter to Boggs, “memorializing our agreement today in which we retained your professional and legal services to handle cases . . . on the MIW/Mental Health Inquest Docket beginning Monday, April 4, 2022.” (R. Exh. 14.) Boggs would be paid \$1,000.00 per week for his services.<sup>10</sup> (R. Exh. 14.)

Executive Director Leo Smith spoke to several private practitioners before selecting Boggs. (Tr. 195.) He was impressed with Boggs’ enthusiasm and interest. (Tr. 195.) Boggs had previously worked in the Adult Trial Division of the PDC but had no experience with MIW work. (Tr. 195.) At the time of the hearing, Boggs was still performing all MIW work for the PDC. (Tr. 196.)

#### *F. Information and Bargaining Requests*

On February 7, 2022, Union Counsel Ben Basil sent a letter to Executive Director Leo Smith. (GC Exh. 4; Tr. 47.) The letter requested information from Respondent. (GC Exh. 4; Tr. 48.) Basil sent the information request to prepare for bargaining. (Tr. 48.) The Union requested

1. All written policies, rules, or procedures related to terms and conditions of employment for members of the bargaining unit.
2. All “long-standing office policies” applicable to members of the bargaining unit.
3. Any “office manual” applicable to members of the bargaining unit.
4. The current wages or salary for each staff attorney, deputy division chief, and division chief/team leader.
5. Job descriptions for the staff attorney, deputy division chief, and division chief/team leader positions.

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<sup>9</sup> To Schulz’ knowledge, the TWRP was not applied to the MIW docket between July 2021 and March 2022. (Tr. 117.)

<sup>10</sup> In essence, Respondent would pay about \$52,000 per year for a job that would occupy 45–50 percent of an attorney’s time.

- 5 6. Criteria and formulas relevant to the calculation of mid-year performance allowance available to members of the bargaining unit. (i.e., how is this “allowance” calculated?)
7. The summary plan description for health insurance available to members of the bargaining unit.
- 10 8. The summary plan description for dental insurance available to members of the bargaining unit.
9. The summary plan description for vision insurance available to members of the bargaining unit.
- 15 10. The summary plan description or other policy information for short term disability insurance available to members of the bargaining unit.
- 20 11. The summary plan description or other policy information for term life insurance available to members of the bargaining unit.
12. The summary plan description or other policy information for long term disability insurance available to members of the bargaining unit.
- 25 13. Plan documents regarding the “Money Purchase Pension Plan” available to members of the bargaining unit.
14. All paid time off (“PTO”) policies and procedures relevant to members of the bargaining unit.
- 30 15. An explanation of how PTO is accrued and how it may be requested and used.
16. The amount of PTO available to each attorney in the bargaining unit as of the date of your response to this request.
- 35 17. All vacation policies and procedures relevant to members of the bargaining unit.
18. An explanation of how vacation time is accrued and how it may be requested and used.
- 40 19. All sick leave policies and procedures relevant to members of the bargaining unit.
- 45 20. An explanation of how sick leave is accrued and how it may be requested and used.

21. The number of cases contracted to attorneys outside the Corporation as of present.

5 22. The number of cases contracted to attorneys outside the Corporation for calendar year 2021.

23. The amount of fees or fee schedule paid to attorneys outside the Corporation per case that is contracted out.

10 24. The total number of cases assigned to each attorney in the bargaining unit as of the date of your response to this request.

15 25. The number of Class A felonies assigned to each attorney in the bargaining unit as of the date of your response to this request.

26. The number of cases involving alleged “violent offenses” as defined by KRS 439.3401 assigned to each attorney in the bargaining unit as of the date of your response to this request.

20 27. The number of Circuit Court cases assigned to each attorney in the bargaining unit as of the date of your response to this request.

28. The currently applicable case reduction plan.

25 29. Plans or directions for assignment of cases to attorneys during the probationary period for new hires including, but not limited to, the plans or directions regarding the number of cases assigned to each attorney and seriousness of the alleged offenses assigned to each attorney.

30 30. Plans or directions for assignment of cases to attorneys including, but not limited to, the plans or directions regarding the number of cases assigned to each attorney and seriousness of the alleged offenses assigned to each attorney.

35 31. The data sent to the Department of Public Advocacy regarding caseloads for the fiscal year 2020–2021 and 2021–2022.

40 32. All agreements, contracts, or other documents requiring attorneys to reimburse the Corporation for training or costs incurred for training, such as travel, lodging, etc.

(GC Exh. 1(g), Att. A, 1(u), Att. A.)

45 On February 16, 2022, Union Attorney Basil sent a follow-up email to Respondent’s Attorneys Kevin Smith and James Smith, asking when they planned to respond to the February 7 request. (GC Exh. 5; Tr. 49.) On February 18, Kevin Smith responded to Basil’s email, apologizing for the delay, and indicating, “we are working on the response. I plan to get it to you

next week.” (GC Exh. 5.) On February 23, Basil sent an email to Kevin Smith requesting dates and times for collective bargaining. (GC Exh. 12.)

5 On about February 25, Respondent sent a letter through its attorneys indicating it would not respond to the February 7 request for information. (GC Exh. 6; Tr. 51.) Respondent’s Attorney Kevin Smith stated

10 Notwithstanding [the] Certification of Representative, it is the position of [the] Public Defender Corporation that it is inappropriate and premature to commence the process of collective bargaining with IBEW Local 369, which includes the request for information contained in the February 7 [l]etter. . .

15 (GC Exh. 6.) The reasons cited by Kevin Smith were the pendency of the Seadler petition, the Kentucky Rules of Professional Conduct and Rules of the Kentucky Supreme Court, ethical concerns raised with NLRB Region 9 prior to the election, and NLRB Region 9’s response to those concerns. (GC Exh. 6.)

20 It was not until June 2022 that Respondent began providing documents responsive to the February requests for information. On June 13, Respondent sent a letter indicating its intent to respond. (GC Exh. 7; Tr. 53.) On June 17, Respondent’s attorneys sent a letter noting the Union’s detailed request and indicating that, “certain responses to information requests will be provided as they are available over the next two weeks.” (GC Exh. 8.) Attached to this letter were responses to requests 7 through 12 of the Union’s February 7 information request. (GC Exh. 8; Tr. 53.) Kevin Smith also indicated that the PDC would provide bargaining dates to the  
25 Union when PDC Executive Director Leo Smith returned to the office after June 20. (GC Exh. 8.)

30 On July 1, Respondent provided information responsive to items 1–6 and 13–32 of the Union’s February 7 letter. (GC Exh. 9; Tr. 54.) On July 19, Respondent’s Attorney Kevin Smith sent another letter to the Union, attaching information responsive to requests 25 and 26. (GC Exh. 10; Tr. 56.) Respondent provided additional information on August 5. (R. Exh. 41; Tr. 54.)

35 On September 16, the Union sent a letter to Kevin Smith clarifying and explaining some of its information requests, as well as requesting additional information. (GC Exh. 11; R. Exh. 42.) Kevin Smith responded to Union Attorney Basil’s letter on September 25. (R. Exh. 43.) Due to the unavailability of Executive Director Leo Smith, Kevin Smith promised to follow up with Basil when Leo Smith became available. (R. Exh. 43.) On October 18, Kevin Smith provided more information on behalf of Respondent. (R. Exh. 44; Tr. 54.)

40 Union Attorney Basil testified that most of the Union’s information requests have been satisfied. Specifically, requests 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 27, 28, 30, 31, and 32 have been fulfilled. (Tr. 58–63.) However, Basil also testified that he was not sure if Respondent had fully complied with requests 1, 2, 3, 4, and 29. (Tr. 55–56, 63.) Basil did not testify regarding the status of requests 23, 24, or 26, however, they are all referenced in  
45 Kevin Smith’s letter of July 1, 2022. (R. Exh. 39.) In the letter, Kevin Smith provides information responsive to requests 24 and 26 and objects to providing information responsive to request 23. (Id.)

Respondent has not provided any of the information requested by the Union on March 18 concerning the subcontracting of the MIW docket. (GC Exh. 13; Tr. 79.) In a letter, the Union requested information on plans to subcontract MIW work, the date the plan was announced to the unit, the amount of money spent on subcontracting, names of contractors or firms, and copies of the contracts and subcontracts for work. (Tr. 79.) The information requested in GC Exh. 13 was requested so that the Union could bargain over the subcontracting of the MIW docket and removal of Schulz from the docket. (Tr. 79.) The parties were still bargaining as of the date of the hearing, but no future dates had been set. (Tr. 80.)

## DISCUSSION AND ANALYSIS

### A. *Witness Credibility*

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Some of my credibility findings are incorporated into the findings of fact set forth above.

I found Union Attorney Ben Basil to be a credible witness. He testified in a forthright and candid fashion. He conceded facts that might be viewed as contrary to the Union's position, such as that Respondent's initial refusal to provide information was a conditional refusal. (Tr. 90.) His testimony did not waver on cross-examination and was consistent with the documentary evidence presented at the hearing. Thus, I credit Basil's testimony.

I was only able to partially credit Christopher Schulz' testimony. He appeared somewhat nervous while testifying. He often hedged or qualified his testimony. For example, he used phrases like "I think" and "to my knowledge" frequently while testifying. (Tr. 115, 117.) He further couldn't recall the details of his conversation with Executive Director Leo Smith and Deputy Chief Beth McMahon where they discussed his return to the Adult Trial Division and was only able to provide the "gist" of the conversation. (Tr. 124.) Thus, I credit Schulz' testimony unless it is contradicted by documentary or more specific, credible testimony.

I also found Ryan Dischinger to be a credible witness. His brief testimony was given in frank manner. His testimony was uncontroverted and consistent with the documentary evidence in the case. Respondent chose not to cross-examine him. Therefore, I credit Dischinger's testimony.

Finally, I found PDC Executive Director Leo Smith to be a generally credible witness. His answers tended to ramble and trail off. However, he maintained a calm demeanor under harsh cross-examination. His testimony was not contradicted in any meaningful way by the other evidence in this case. Thus, I credit his testimony.

## B. Legal Standards

5 An employer's duty to bargain in good faith attaches with the issuance of the certification of representative. *NP Palace, LLC*, 368 NLRB No. 148 slip op. at 7 (2019). Thus, the duty to bargain in this case attached on January 21, 2021. (GC Exh. 2.) In cases where an employer contests the certification of representative, unilateral changes after an election are made at the employer's peril. *Celotex Corp.*, 259 NLRB 1186, 1193 (1982).

10 In dealing with its employees' collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224 NLRB 1506 (1976). In each case, the inquiry is whether or not both parties meet their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

20 Information requests regarding bargaining unit employees' terms and conditions of employment are presumptively relevant and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635, 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). If the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the requesting party has the burden of establishing the relevance of the requested material. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *The Earthgrains Co.*, 349 NLRB 389 (2007).

30 Almost all of the information sought by the Union in this case was presumptively relevant. The vast majority of the requests made by the Union in its letters of February 7, 2022, February 16, 2022, March 18, 2022, and March 24, 2022, concerned the wages, performance allowances, job descriptions, benefits, time off, case load, courtroom staffing, case assignments, training expenses, and policies related to the bargaining unit. The lone exception is that the Union asked about subcontracts for unit work in its letters of February 7 and March 18, 2022.

35 When a union seeks information concerning employees outside of the bargaining unit, there is no presumption of relevance, and the union has the burden to show relevance in such circumstances. *E.I. DuPont de Nemours and Co.*, 744 F.2d 536, 538 (6th Cir. 1984). The test for relevancy is a broad discovery-type standard under which the union must show a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). After a union demonstrates the relevancy of the requested information, the burden shifts to Respondent to establish that the information was not relevant, did not exist, or for some other valid and acceptable reason could be furnished to the requesting party. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992), and *Postal Service*, 276 NLRB 1282 (1985). In *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 1 (2022), the Board upheld an administrative law judge's decision 45 finding a violation when an employer refused to provide information about the outsourcing of unit work. See *West Summit Flexible Packaging*, 310 NLRB 45, 45 (1993) (employer violated Section 8(a)(5) by refusing to provide the Union information showing work transferred outside

the bargaining unit); *W-L Molding Co.*, 272 NLRB 1239, 1240–1241 (1984) (violation where employer did not provide information concerning the subcontracting of unit work).

The Board has determined that information not directly pertaining to bargaining unit employees may be relevant to the Union’s responsibilities in terms of conducting negotiations, specifically with respect to formulating and responding to bargaining proposals. See, e.g., *Caldwell Mfg. Co.*, 346 NLRB 1159, 1169–1160 (2006) (information relevant given the probability of its usefulness to the Union in deciding what proposals to accept and make.); *Leland Stanford Junior University*, 262 NLRB 136, 152 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983) (information relevant where necessary for the union to “fashion realistic contract proposals”). Specifically, the Board has found that information concerning subcontracting is relevant and necessary to the Union’s role as collective-bargaining representative. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 872 (2001).

Absent evidence of justification, an unreasonable delay in furnishing relevant information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *PAE Aviation and Technical Services, LLC.*, 366 NLRB No. 95, slip op. at 3 (2018). It is an employer’s duty to furnish relevant information as promptly as possible, given the circumstances, as a union is entitled to the information at the time the information request is made. *Id.* In determining whether a party has failed to produce information in a timely manner, “the Board considers a variety of factors, including the nature of the information sought (including whether the requested information is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party.” *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 2 (2017). The analysis is an objective one, focusing not on whether the employer delayed in bad faith, but rather on whether it supplied the requested information in a reasonable time. *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 3 (2018). Even though an employer has not expressly refused to furnish the information, its failure to make a diligent effort to obtain or to provide the information reasonably promptly may be equated with a flat refusal. *Shaw’s Supermarkets*, 339 NLRB 871, 875 (2003), citing *NLRB v. John C. Swift Co.*, 124 NLRB 394 (1959), *enfd.* in part and denied in part 277 F.2d 641 (7th Cir. 1960).

Although there is not a per se rule for what constitutes an unreasonable delay, the Board has found delays from 2 to 16 weeks to be unreasonable. See *Capitol Steel & Iron Co.*, 317 NLRB 809 (1995) (2 weeks unreasonable); *Aeolian Corp.*, 247 NLRB 1231, 1245 (1980) (3 weeks unreasonable); *Postal Service*, 308 NLRB 547, 551 (1992) (4 weeks unreasonable); *Postal Service*, 332 NLRB 635 (2000) (5 weeks unreasonable); *Linwood Care Center*, 367 NLRB No. 14, slip op. at 5 (2018) (6 weeks unreasonable); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7 weeks unreasonable); and *Regency Service Carts*, 345 NLRB 1286 (2005) (16 weeks unreasonable).

C. *Respondent Violated the Act by Failing and Refusing to Provide and Unreasonably Delaying Providing Information to the Union*

In paragraph 6 of the complaint, issued on July 29, 2022, the General Counsel alleges that:

- 5 (a) Since about February 7, 2022, the Union has requested, in writing, that Respondent furnish the Union with the information described in Attachment A.
- (b) About February 16, 2022, the Union renewed its request, in writing, that Respondent furnish the Union with the information as described above in paragraph 6(a) and Attachment A.
- 10 (c) Since about March 18, 2022, the Union has requested, in writing, that Respondent furnish the Union with the information described in Attachment B.
- 15 (d) About March 24, 2022, the Union renewed its request, in writing, that Respondent furnish the Union with the information as described above in paragraph 6(c) and Attachment B.
- 20 (e) The information requested by the Union, as described above in paragraphs 6(a) through 6(d), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.
- (f) Since about February 25, 2022, and continuing thereafter, Respondent has failed and refused to furnish the Union with the information requested by it as described in paragraphs 6(a) and (b).
- 25 (g) Since about March 24, 2022, and continuing thereafter, Respondent has failed and refused to furnish the Union with the information requested by it as described in paragraphs 6(c) and (d).
- 30 (GC Exh. 1(g), 1(u).) The General Counsel further alleges that Respondent's conduct as described in paragraph 6 of the complaint violates Section 8(a)(5) and (1) of the Act. (Id.)

35 As indicated above, the Union made its initial information request on February 7, 2022, about 2 weeks after the Union's certification as the exclusive collective-bargaining representative of the unit. (GC Exh. 1(g), Att. A, 1(u), Att. A; GC Exh. 4; R. Exh. 24.) The Union reiterated its request on February 16. (GC Exh. 5.) The Union also initially requested dates to meet and bargain on February 23. (GC Exh. 12; R. Exh. 25.) Although Respondent initially indicated it would comply with the information request, it later stated that it would be inappropriate and premature for it to bargain or respond. (GC Exh. 6; R. Exh. 26.)

40 The Kentucky Supreme Court denied the Seadler petition on March 24, 2022. (R. Exh. 29.) On April 7, Respondent sought a formal ethics opinion from the Kentucky Bar Association. (R. Exh.34.) On May 18, the Kentucky Bar Association declined to issue a formal ethics opinion. (R. Exh. 36.) Undeterred, Respondent filed a petition for a supervisory writ with the Kentucky Supreme Court. (GC Exh.3.) The Kentucky Supreme Court denied this petition on October 20, 45 2022. (GC Exh. 3.)

Only after the Kentucky Bar Association's refusal to issue a formal ethics opinion did Respondent begin providing information pursuant to the Union's February 7, 2022, information request. Its initial disclosure came on June 17, over 4 months after the request was made and about a month after the Kentucky Bar Association's refusal to issue a formal ethics opinion.

5 Respondent continued to respond to the information requests in a piecemeal fashion through October 2022. Respondent did not explain what occasioned the delay in providing information after June 17. Nevertheless, the result was that some of the information requested by the Union in February 2022 was not provided for over 8 months.

10 Respondent contends it was privileged to delay providing information due to its ethics concerns. This contention fails for several reasons. First, Respondent was aware that one of its attorneys sought relief from the Kentucky Supreme Court in 2000 after another successful organizing drive and was rebuffed. In fact, the Seadler petition, filed over 20 years later, relied upon many of the same arguments as the earlier petition. Thus, Respondent should have known  
15 that the Seadler petition was unlikely to succeed.

Even if Respondent believed the Seadler petition would succeed, its dismissal of the petition by the Kentucky Supreme Court should have given Respondent pause that it should begin gathering the requested information. It did not. Instead, Respondent sought a formal ethics  
20 opinion from the Kentucky Bar Association on April 7, 2022. This request was denied on May 18. Nevertheless, Respondent still did not begin providing the information sought by the Union 3 months earlier for another month. Respondent also filed a petition for a supervisory writ with the Kentucky Supreme Court. This petition is remarkably similar to the Seadler petition. Not  
25 surprisingly, the Kentucky Supreme Court denied Respondent's petition on October 20, 2022.

Moreover, the Board has long held that attorneys may be properly included in bargaining units. In fact, attorneys were found to be part of an appropriate bargaining unit as far back as 1942. *Western Union Telegraph Co.*, 35 NLRB 271, 271 (1942). The Board has directly  
30 rejected a claim that attorneys cannot engage in collective bargaining:

We shall first consider whether the attorneys' professional status is sufficient to deprive them of the benefits of the Act. We have in the past certified labor organizations as the bargaining representatives of professional employees.<sup>2</sup> This practice has been inferentially endorsed by the Labor-Management Relations Act,  
35 1947, which contemplates the establishment of separate units of professional employees.<sup>3</sup> We are of the opinion, therefore, that the mere fact that the attorneys are professional personnel does not preclude them from being employees within the meaning of the Act, and entitled to its benefits, and we reject the Employer's contention in this respect.

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In our opinion the fact that the attorneys sought herein are, like all attorneys, officers of the court and fiduciaries, is not a sufficient basis for denying them the  
45 benefits of the Act. Attorneys, in general, including the Employer's attorneys, are subject to various rules \*1137 of conduct prescribed by the courts. The wages, hours, and conditions of employment of these attorneys, however, remain matters

to be determined by their Employer, rather than by the courts. Thus, as we have stated, the usual incidents of an employer-employee relationship exist here. Unlike attorneys generally, this Employer's attorneys are salaried; unlike attorneys generally, they work regular hours and receive regular vacations; and  
 5 unlike attorneys generally, their activities are greatly limited by policies set forth by their Employer. In this situation, the statutory objectives, including the right to collective bargaining, may be achieved despite any limitations imposed on the attorneys by virtue of their status as officers of the court.

10 *Lumberman's Mutual Casualty Co. of Chicago*, 75 NLRB 1132, 1135–1137 (1948).

Similar results have been reached in cases involving legal aid attorneys. The Board has found that staff and managing attorneys were appropriately part of the bargaining unit in a private, nonprofit corporation organized to provide legal services to the poor in the State of  
 15 Maryland. *Legal Aid Bureau, Inc.*, 319 NLRB 159, 160 (1995). A similar result was reached regarding an election where the employer was a nonprofit Wisconsin corporation engaged in providing free civil legal services to low-income persons. *Legal Action of Wisconsin*, 261 NLRB 1095 (1982). Thus, abundant caselaw exists demonstrating that attorneys may be properly included in collective-bargaining units.

20 The Board found a unit of *this* Respondent's attorneys appropriate for collective bargaining in a 2000 case. *Louisville-Jefferson County Public Defender Corp.*, 330 NLRB No. 105, slip op. at 1, fn. 1 (2000). In that case, Respondent's answer denied the appropriateness of the unit. *Id.* The Board found that under the Board's Rules, Respondent had the opportunity to litigate the  
 25 unit issue in the representation proceeding but elected not to do so, instead stipulating to the appropriateness of the unit. *Id.* By entering into this stipulation, the Board found that Respondent agreed that the unit described there was appropriate. *Id.* Similarly, in the instant case, Respondent did not litigate the issue of the unit's appropriateness, instead entering into a stipulated election agreement. Nevertheless, Respondent belatedly challenged the  
 30 appropriateness of the unit by raising ethical concerns. I find this argument somewhat disingenuous given the Board's earlier decision specific to this Respondent and reject this effort.<sup>11</sup>

35 Furthermore, any state court rules would be preempted by the Act under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, the U.S. Supreme Court held that states may not regulate activity that the Act protects, prohibits, or arguably protects and prohibits. See also *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 286 (1986). In subsequent decisions, the Court indicated that this holding should not be inflexibly applied in  
 40 certain situations, such as where the subject conduct is a merely "a peripheral concern" of the Act or touches interests "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it cannot] be inferred that Congress had deprived the States of the power to Act." See *Farmer v. Carpenters Local 25*, 430 U.S. 290, 296–297 (1977) and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180,

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<sup>11</sup> Current PDC Executive Director Leo Smith was the Deputy Chief Public Defender at the time of the 1999 organizing drive and subsequent 2000 Board decision. (Tr. 299.)

188 fn. 13 (1978). However, the Court later clarified that such exceptions do not apply where there is an actual substantive conflict between the Act and state law.

5 If state law regulates conduct that is protected by federal law preemption follows as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then “[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.” *Free v. Bland*, 369 U.S. 663, 666, (1962). Here, Respondent’s purported reason for refusing to comply with the mandates of the Act was its concern that bargaining with its employees’ certified collective-  
10 bargaining representative doing so would violate state rules of professional conduct. However, these state rules would be preempted by the Act in the event of such a conflict. Accordingly, Respondent’s concern was not a valid or legitimate basis for refusing to comply with its obligations under the Act. Cf. *Holiday Inn on the Bay*, 317 NLRB 479, 483 (1995) (finding, for similar reasons, that the privacy provisions of the California Constitution would be preempted to  
15 the extent they prevented the employer from disclosing employee personnel files to the union that were relevant and necessary to processing grievances as required under the Act).

Moreover, Respondent’s reliance on the email from the Board Agent processing the representation petition to excuse its delay in providing information is similarly misplaced. The  
20 email from Field Examiner Nikonow does not indicate that Respondent could refuse to recognize and bargain with the Union following the election. (R. Exh. 16.) It does not indicate that Respondent could refuse to provide information to the Union after the election. Instead, the email merely says that regional management saw no reason to delay processing the representation petition and that Respondent could seek clarity after the election. Significantly,  
25 Respondent did not ask Nikonow to clarify or explain her statements or seek a pre-election hearing to dispute the bargaining unit sought by the Union. As such, I find Respondent could not rely on Nikonow’s statements to justify its refusal to provide information or bargain after the election.

30 In summary, Respondent did not complete its provision of documents to the Union until October 2002, over 8 months after the Union requested them. Respondent’s delay was not excused by its alleged ethical concerns. Aside from issues of preemption, Respondent had been previously advised by both the Board and Kentucky Supreme Court that even if Respondent had such concerns, it failed to explain why it did not begin providing documents after the denial of  
35 the Seadler petition in March. It further failed to explain its delay of almost a month in beginning to provide information after the Kentucky Bar Association’s refusal to provide a formal ethics opinion in May 2022. As such, I find that Respondent violated Section 8(a)(5) and (1) of the Act.

#### 40 *D. Respondent Violated the Act by Failing and Refusing to Bargain Over Outsourcing*

In paragraph 6 of the amendment to the consolidated complaint, issued on September 27, 2022, the General Counsel alleges

45 6. (h) About March 18, 2022, the Union requested that Respondent bargain collectively about the subcontracting of work in the Mental Inquest Warrant (MIW) Department and the removal of all unit employees from that Department.

(i) About March 24, 2022, the Union renewed its request that Respondent bargain collectively about the subcontracting of work in the MIW Department and the removal of all unit employees from that Department.

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(j) Since about March 18, 2022, Respondent has failed and refused to bargain collectively about the subjects set forth above in paragraphs 6(h) and 6(i).

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(k) The subjects set forth above in paragraphs 6(h) and 6(i) relate to the wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(GC Exh. 1(cc).) The General Counsel alleged that these acts constituted a violation of Section 8(a)(5) and (1) of the Act. (GC Exh. 1(u).)

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In 1965, the U.S. Supreme Court rejected the view that a violation of Section 8(a)(5) required a finding of the employer's subjective bad faith at the bargaining table and that the employer's unilateral change in terms and conditions of employment could not be a per se violation. *Wendt Corp.*, 372 NLRB No. 135, slip op. at 6 (2023), citing *NLRB v. Katz*, 369 U.S. 736 (1962). The Court explained that a unilateral change is "a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal" to bargain. *Id.* citing *Katz*. at 743. Accordingly, the Court declared that a unilateral change made during contract negotiations "must of necessity obstruct bargaining, contrary to the congressional policy" and "will rarely be justified by any reason of substance." *Id.* citing *Katz* at 747.

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The *Katz* court rejected the employer's argument that its past practice of acting unilaterally permitted it to make a unilateral change stating

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This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8 (a)(5), unless the fact that the [merit] . . . raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews--in effect, were a mere continuation of the status quo--differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

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369 U.S. at 747–747.

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In *Wendt Corp.*, the Board indicated that it has consistently held that, under *Katz*, a past practice can be "long-standing" only if it has been regular and frequent. 372 NLRB No. 135, slip op. at 7. "An employer's practices . . . which are regular and long-standing, rather than random

or intermittent, become terms and conditions of unit employees' employment . . . A past practice must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." Id. citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (citations omitted). The duration of the practice is critical to determining whether it was "so commonplace as to be a basic part of the job itself." Id. citing *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 842–843 (2004) (internal quotation marks and citation omitted). See, e.g., *A-V Corp.*, 209 NLRB 451, 452 (1974) (finding merit in past-practice defense where the evidence showed a "consistent practice over a considerable number of years").

The Board went on to summarize, stating that *Katz* has been interpreted to permit unilateral conduct *only* when the employer has shown the conduct is consistent with a longstanding past practice and is not informed by a large measure of discretion. (emphasis added) 372 NLRB No. 135, slip op. at 9. See *Eugene Iovine, Inc.*, 328 NLRB 294 (1999). *Wendt Corp* at 9. *Katz* described such unilateral conduct as automatic in nature rather than discretionary. See 369 U.S. at 746–747. The key to the analysis is whether the unilateral "change was fixed by an established formula containing variables beyond the employer's immediate influence . . . [and] resulted from nondiscretionary standards and guidelines." *Wendt Corp.* at 9, citing *Aaron Bros. Co. v. NLRB*, 661 F.2d 750, 753–754 (9th Cir. 1981).

In this case, the change made by Respondent in outsourcing the MIW docket and reassigning Attorney Christopher Schulz was completely discretionary. Executive Director Leo Smith made the decision with no outside forces or regulatory requirements occasioning the change. He alone decided to make these changes because of what he testified were staffing concerns, losing attorneys, and because Respondent could not hire and retain enough attorneys.

Furthermore, Respondent did not establish that its purported past practice was regular or frequent. The 1992 alleged outsourcing of the MIW docket was not an outsourcing at all. Instead, Respondent refused to send attorneys to represent involuntarily hospitalized persons and the Commonwealth intervened by sending a private attorney. Respondent took no action to outsource the MIW docket in 1992. In the early 2000's Respondent did outsource certain dockets, but not the MIW docket. Even if one were to accept this early 2000s outsourcing as some sort of past practice, it was over 20 years prior to the circumstances giving rise to this case. Thus, I find that Respondent has not established that it was privileged to outsource the MIW docket because of a past practice. Instead, I find that Respondent violated Section 8(a)(5) and (1) of the Act by outsourcing the MIW docket without first giving the Union notice and an opportunity to bargain.

Similarly, I find that Respondent violated the Act by transferring Attorney Schulz out of the MIW docket without first giving the Union notice or an opportunity to bargain. Executive Director Leo Smith testified that rotating attorneys among the divisions was somewhat commonplace. (Tr. 203.) However, he never explained why and when attorneys are rotated other than to say, "we like the idea of rotating individuals at some point in time during their career, because they get additional experience in other cases." (Tr. 203.) He further testified that rotation is used to spread out resources to make sure Respondent can adequately represent its clients. (Tr. 203.) Smith's testimony and the evidence in the case does not establish that Schulz' rotation out of the MIW docket position was part of a regular and frequent past practice. Instead, I find that Respondent's actions violated Section 8(a)(5) and (1) of the Act.

*E. Respondent's Affirmative Defenses and Arguments Lack Merit*

Respondent raised seven affirmative defenses in its answers to the complaint.<sup>12</sup> It is well established that the burden of proving an affirmative defense lies with the party asserting it. *Marydale Products, Co., Inc.*, 133 NLRB 1232 (1961), and *Sage Development Co.*, 301 NLRB 1173, 1189 (1991). Respondent's defenses that the complaint fails to state a claim upon which relief can be granted, that any delay in providing information was due to Respondent's inability to get guidance from the Kentucky Supreme Court, and that the remedy sought would require it to engage in unethical conduct are rejected based upon my findings herein that Respondent violated the Act in this case. I further reject Respondent's defense that its actions did not constitute a unilateral change because they were based on a continuation of settled policies for the reasons stated elsewhere in this decision.

Respondent next alleges that it had no duty to respond to the information requests because the information was not relevant to the Charging Party's duties and obligations as the representative of the bargaining unit. In deciding that Respondent violated the Act, I have already found that the information was both relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the unit. Therefore, I reject this affirmative defense.

Respondent further raises defenses of waiver, estoppel, and that the remedy sought does not effectuate the purposes of the Act. A party may waive its right to bargain over a term or condition of employment, in which case unilateral action is permissible. See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). However, Respondent adduced no evidence that the Union waived its right to bargain over any issue in this case. Respondent did not explain its estoppel defense. See *Goodyear Tire & Rubber Co.*, 271 NLRB 343 (1984) (the Board's proceedings do not constitute "courts of equity" and unclean hands, laches and estoppel are not recognized in Board proceedings); also, *International Woodworkers (Kimtruss Corp.)*, 304 NLRB 1 (1991) (the Board would not recognize the unclean hand defense that the union may have acted improperly). Finally, Respondent does not explain what remedy it believes would not effectuate the purposes of the Act or how any remedy sought would not effectuate the purposes of the Act. As such, I reject these defenses.

In sum, I find that the General Counsel has established that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers, AFL-CIO (IBEW), Local 369, is a labor

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<sup>12</sup> Respondent's first defense was really its answer, admitting or denying the various complaint allegations.

organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide, and unreasonably delaying providing, the Union with the information it requested on February 7, 2022, February 16, 2022, March 18, 2022, and March 24, 2022, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act.
4. By failing and refusing to bargain with the Union regarding the outsourcing of work from the Mental Inquest Warrant (MIW) docket and the removal of all unit employees from that docket, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act.
5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. More specifically, having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist from failing, refusing, and unreasonably delaying in providing the Union with information relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of respondent's employees. Respondent shall also be ordered to, upon request, bargain in good faith with the Union regarding the subcontracting of the Mental Inquest Warrant docket and the removal of all unit employees from that docket. Respondent will further be ordered to post and mail a notice to employees attached as the Appendix. Additionally, Respondent shall be ordered to timely provide the Union with the information it requested that has not yet been provided within fourteen (14) days of the issuance of this decision and recommended order.

In her brief, the General Counsel seeks an order requiring Respondent to bargain in good faith with the Union, on request, for an extended period of time in conformity with *Mar-Jac Poultry*, 136 NLRB 785 (1962). However, the General Counsel did not request this remedy in any iteration of the complaint. (GC Exh. 1(g), 1(m), 1(u), 1(cc).) There was no general allegation that the Respondent failed to bargain with the Union in good faith following its certification and no indication how the Respondent's failure to provide information and subcontracting affected the parties' negotiations. The General Counsel did not raise a request for a *Mar-Jac* remedy at the hearing. In fact, when asked, the General Counsel indicated there was no bad-faith bargaining. (Tr. 80.) As such, I decline to impose this remedy. See *Buck Creek Coal*, 310 NLRB 1240, 1240 fn. 2 (1993) (Board declined to impose *Mar-Jac* remedy where there was no evidence that a unilateral change had any meaningful impact on the course of contract negotiations at the bargaining table between the parties).

The General Counsel also seeks a remedy that Respondent be ordered to bargain in good faith with the Union for a collective-bargaining agreement. Again, however, the General Counsel did not allege surface bargaining or a general failure to bargain in good faith. As such, I decline to order such a remedy.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

ORDER

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Respondent, Louisville & Jefferson County Public Defender Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information, and unreasonably delaying in providing it with information, that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of its employees in the following appropriate unit:

20

All full-time and regular part-time non-supervisory staff attorneys licensed to practice law in Kentucky, including law school graduates who are awaiting bar results but licensed to practice under Kentucky SCR 2.116, employed by the Employer at its 719 West Jefferson Street, Louisville, Kentucky facility, excluding all other professional employees, all non-professional employees, and all office clerical employees, guards and supervisors as defined in the Act.

25

(b) Failing and refusing to bargain in good faith with the Union with respect to the subcontracting of work from the Mental Inquest Warrant (MIW) docket and the removal of all unit employees from the docket.

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(c) 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.

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

(a) Furnish to the Union in a timely manner the information it requested on February 7, 2022, February 16, 2022, March 18, 2022, and March 24, 2022, that has not already been provided.

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<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Upon request, bargain in good faith with the Union regarding the subcontracting of the Mental Inquest Warrant docket and the removal of all unit employees from that docket.

5 (c) Within 14 days after service by the Region, post at its facility in Louisville,  
 Kentucky, copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice,  
 on forms provided by the Regional Director for Region 9 after being signed by  
 Respondent's authorized representative, shall be posted by Respondent and  
 10 maintained for 60 consecutive days in conspicuous places including all places where  
 notices to employees are customarily posted. In addition to physical posting of paper  
 notices, the notices shall be distributed electronically, such as by email, posting on an  
 intranet or an internet site, and/or other electronic means, if Respondent customarily  
 communicates with its employees by such means. Reasonable steps shall be taken by  
 Respondent to ensure that the notices are not altered, defaced, or covered by any other  
 15 material. In the event that, during the pendency of these proceedings, Respondent has  
 gone out of business or closed the facility involved in these proceedings, Respondent  
 shall duplicate and mail, at its own expense, a copy of the notice to all current  
 employees and former employees employed by Respondent at any time since  
 February 7, 2022.

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

25 Dated, Washington, D.C. November 24, 2023



30 Melissa M. Olivero  
 Melissa M. Olivero  
 Administrative Law Judge

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<sup>14</sup> If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

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

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, AFL–CIO (IBEW) Local 369 (the Union) by failing and refusing to furnish it with requested information, and unreasonably delaying in providing it with information, that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time non-supervisory staff attorneys licensed to practice law in Kentucky, including law school graduates who are awaiting bar results but licensed to practice under Kentucky SCR 2.116, employed by the Employer at its 719 West Jefferson Street, Louisville, Kentucky facility, excluding all other professional employees, all non-professional employees, and all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to bargain in good faith with the Union with respect to subcontracting work from the mental Inquest Warrant (MIW) docket and the removal of all unit employees from that docket.

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

WE WILL furnish to the Union in a timely fashion the information it requested on February 7, 2022, February 16, 2022, March 18, 2022, and March 24, 2022, that has not already been provided.

WE WILL upon request, bargain in good faith with the Union regarding the subcontracting of the Mental Inquest Warrant docket and the removal of all unit employees from that docket.

**LOUISVILLE & JEFFERSON COUNTY PUBLIC DEFENDER CORPORATION**

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.nlr.gov](http://www.nlr.gov).

Region 9, National Labor Relations Board  
550 Main Street, Room 3-111  
Cincinnati, OH 45202-3271  
(513) 684-3686  
Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/09-CA-291568](http://www.nlr.gov/case/09-CA-291568) 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 (513) 684-3733.