Consumer and Worker Protection

THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AND WORKER PROTECTION

NYC DEPARTMENT OF CONSUMER AND WORKER PROTECTION, *Petitioner*, *-against-* CHAMPION SECURITY SERVICES INC. AND STEPHAN A. SCIARABBA, *Respondents*.	OATH Index No. 2293/21 **Final Agency Decision**

On October 23, 2023, following a 9-day trial, Administrative Law Judge Faye Lewis of the Office of Administrative Trials and Hearings ("OATH") issued a Report and Recommendation ("OATH R&R") in the above-captioned matter. OATH found that Petitioner established most of the Earned Sick and Safe Time Act charges alleged in its petition and recommended that Respondents be ordered to pay civil penalties of $32,300, employee relief of $27,894.24, and back pay of $27,608.58, plus interest, to employee Jose Colon ("Mr. Colon").

The Department of Consumer and Worker Protection ("DCWP" or "Department") now issues this Final Agency Decision pursuant to section 2203(h)(l) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York. The Department did not receive any written arguments from the parties to this matter. Following review of the record, the Department adopts the OATH R&R subject to the modifications explained below.

DISCUSSION

The OATH R&R recommended that Mr. Colón be awarded $27,608.58 in back pay for Petitioner's termination of Mr. Colón in violation of the Earned Safe and Sick Time Act. The Department adopts the award amount. However, as explained below, the Department modifies the OATH R&R to accurately explain the calculation of interest on the award of back pay.

I. Determination of Intermediate Date of Back Pay Period

Mr. Colón is entitled to interest at a rate of 9% per year on the amount of back pay awarded. N.Y. C.P.L.R. § 5004(a); *see also Dep't of Consumer and Worker Protection v. Mr. Coco 172 Inc.*, No. 1672/20, at 2 (DCWP Nov. 3, 2022). Where damages are incurred at various times, such as is the case with back pay, "interest shall be computed upon each item from the date it was

incurred or upon all of the damages from a single reasonable intermediate date." N.Y. C.P.L.R. § 5001(b).

The OATH R&R stated that Mr. Colón "be awarded 9% interest on the back pay award, calculated from an intermediate date between November 30, 2020, when his employment was terminated, to the date of the [DCWP] Commissioner's [final] determination." OATH R&R at 84. The reasonable intermediate date contemplated by the C.P.L.R., however, is based on the period of time during which the employee should have been paid, not the period of time from termination to final decision. *See Mr. Coco 172 Inc.*, No. 1672/20, at 2.

Here, Mr. Colón's relevant back pay period is November 30, 2020, the date on which he was terminated, to September 13, 2021, the date on which he resumed full-time employment. A reasonable intermediate date is April 22, 2021, halfway through the period.

II. Calculation of Interest on Back Pay

The formula for simple interest can be written as: (P x n x r / 100 x 1/365), where 'P' is the principal amount, 'n' is the number of days, and 'r' is the rate of interest per year. Here, the number of days from April 22, 2021, to January 5, 2024, is 988 days. The interest awarded amounts to $6,726.56. The total award of back pay to Mr. Colón with interest amounts to $34,335.14 ($27,608.58 in back pay plus $6,726.56 in back pay interest).

CONCLUSION

OATH's Report and Recommendation is adopted subject to the modifications explained above. Respondents are ordered to pay $32,300 in civil penalties to the Department, $34,335.14 in back pay to Mr. Colón, and a total of $27,894.24 in employee relief, as summarized on page 84 of the OATH R&R.

_____ Date: 01/05/2024

Vilda Vera Mayuga
Commissioner
Department of Consumer and Worker Protection

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ASIM REHMAN
COMMISSIONER AND
CHIEF ADMINISTRATIVE LAW JUDGE

FAYE LEWIS
ADMINISTRATIVE LAW JUDGE
212-933-3013

October 23, 2023

Hon. Vilda Vera Mayuga
Commissioner
NYC Department of Consumer and Worker Protection
42 Broadway, 8th Floor
New York, NY 10004

Re: *Dep't of Consumer and Worker Protection v. Champion Security Services,*
OATH Index No. 2293/21

Dear Commissioner Mayuga:

Enclosed for your review and decision is my Report and Recommendation regarding the above referenced proceeding. A copy of the report has been sent to the respondent, who has a right to comment on it before you take final action. Your office should promptly inform the respondent of the date by which comments should be submitted.

Please have your office send a copy of your final decision to the Office of Administrative Trials and Hearings by email to lawclerks@oath.nyc.gov so that we may complete our files.

Very truly yours,

Faye Lewis

Faye Lewis
Administrative Law Judge

FL: jb

Encl.

c: Claudia Henriquez, Esq.
Caroline Friedman, Esq.
Stephan Sciarabba

Dep't of Consumer and Worker Protection v. Champion Security Services, Inc., et al.

OATH Index No. 2293/21 (October 23, 2023)

Respondents violated the Earned Sick and Safe Time Act by: failing to permit employees to use paid sick time from 2017 through July 30, 2020; failing to maintain a written sick time policy before July 2020, and later issuing a noncompliant policy; providing a false document to petitioner; interfering with petitioner's investigation; retaliating against employees for asserting their rights under ESSTA, including firing one employee; failing to distribute notices of employee rights and provide required information with pay statements; requiring an employee to find a replacement worker, and improperly requiring another employee to provide medical documentation; failing to pay sick time for an employee sick with COVID-19; and charging time used to get the COVID-19 vaccine to sick time. Other related charges were not proven. Based on the proven charges, respondents are ordered to pay $32,300 in civil penalties, $27,894.24 in employee relief, and $27,608.58 in lost wages plus interest to the employee who was fired.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CONSUMER AND WORKER PROTECTION
Petitioner
-against-
CHAMPION SECURITY SERVICES, INC. AND STEPHAN A. SCIARABBA
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the New York City Department of Consumer and Worker Protection ("DCWP" or "Department"), brought this proceeding under sections 2203(e), (f), and (h) of the New York City Charter and section 20-924(a) of the Administrative Code. *See also* 6 RCNY § 6-01(a) (Lexis

2023). Petitioner alleges in 25 counts[1] that respondents, Champion Security Services, Inc. ("Champion") and Stephan A. Sciarabba, violated the Earned Safe and Sick Time Act ("ESSTA") and the implementing rules ("the rules"), 6 RCNY § 7-201 *et seq.* (ALJ Ex. 1), by: failing to permit eligible employees to use paid safe/sick time ("sick time")[2] between 2017 and 2020; failing to maintain a written sick time policy between September 2016 and July 30, 2020; maintaining impermissible written policies thereafter; failing to distribute notices of employee rights and provide required pay statements with sick time information; providing the Department with false documents; interfering with the Department's investigation and retaliating against employees who respondent believed to have complained to the Department, including terminating employee Jose Colón; interfering with employees' rights to determine the amount of safe and sick time used; requiring Mr. Colón to submit medical documentation when he submitted a sick leave request for November 19, 2020; interfering with two workers' rights to determine the amount of sick time used; failing to pay another employee for sick time used, requiring him to find a replacement worker when he asked to use sick time, and failing to treat his health condition confidentially.

Over a nine-day trial, conducted by videoconference, Mr. Sciarabba, the owner and President of Champion, appeared on behalf of himself and his company. Respondent[3] previously discharged his counsel, who was relieved from representation (ALJ Ex. 8). In keeping with rule 103(A)(8) of Appendix A to title 48 of the Rules of the City of New York, the Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, I advised respondent of his right to an attorney or non-attorney representative and confirmed that he wanted to represent himself (Tr. 6-7). Throughout the trial, I also explained the trial process, such as opening statements, direct examination, objections, and cross-examination (*see, e.g.*, Tr. 27, 36, 37, 95, 141, 153, 156, 165-66, 200, 204-05, 234).

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[1] In its post-trial memorandum of law, petitioner moved to withdraw counts 23 and 25 and paragraph 191(f) of count 12. That application is granted. *See* 48 RCNY § 1-25 (amendment of pleadings more than 25 days before the commencement of trial "may be made only on consent of the parties or by leave of the administrative law judge on motion").

[2] The Administrative Code uses the term "safe/sick time" to refer to both sick time, relating to absences due to an employee or family member's illness or health condition, and safe time, relating to absences due to domestic violence and related offenses. Admin. Code §§ 20-912, 20-914(a)-(b). For simplicity, this decision will use the phrase "sick time" to include both safe and sick time.

[3] For clarity, this decision refers to Mr. Sciarabba as "respondent."

Both petitioner and respondent presented extensive testimony. Petitioner called five witnesses: Juana Abreu, an investigator for DCWP's Office of Labor Policy and Standards ("OLPS") and the supervising investigator on this case; the three complainants, Michael Mazzella, Jose Colón, and James Williams; and plant operator Stephen Novosad. Respondent testified in his own behalf and called four witnesses: former employees Tesy Guzman, Sayyidah Wethington, and Johnny Velez, and respondent's wife, Dawn Sciarabba. Both parties presented documentary evidence.

For the reasons below, I find that petitioner established most of the charges in the petition, with these exceptions. Petitioner did not prove that portion of count one alleging that respondent interfered with the Department's investigation by producing a backdated employee handbook. Petitioner did not prove count seven, alleging that an email sent on December 4, 2020,[4] constituted a non-compliant sick leave policy, or count 19, alleging non-confidential handling of a health condition disclosed solely for the purpose of requesting sick leave. Count nine, alleging failure to provide pay statements with required sick time information, was sustained as to September 30, 2020, through June 27, 2021, only. Count 12, alleging interference with the Department's investigation, was not sustained as to paragraph 191(i), relating to requiring employees to return a sick time policy contained in an employee handbook. Count 14, alleging retaliation against Mr. Williams, was not sustained as to paragraph 202(a), (c), and (d), relating to certain comments and conduct during telephone calls. Count 16, alleging retaliation against Mr. Mazzella, was not sustained as to paragraph 213(e), relating to a specific comment purportedly made by respondent. Count 17, alleging failure to pay Mr. Mazzella for sick time in February and March 2021, was sustained only as to failure to pay for 32 hours of sick time. For the proven charges, I recommend that respondents pay $32,300 in civil penalties to petitioner, $27,894.24 in employee relief, and $27,608.58 in lost wages, plus interest, to Mr. Colón.

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[4], Count 7 of the petitioner mistakenly alludes to a December 4, 2020, email. The email in issue (Pet. Ex. 15 at 140) was sent on December 3, 2020. The charge is amended to conform to the proof, given that the December 3, 2020, email was introduced at trial and both parties testified about it. There being no prejudice, the amendment is appropriate. *Dep't of Consumer Affairs v. 809 Collision Inc.*, OATH Index No. 578/18 at 22 (Apr. 20, 2018) (amendment of charges to conform to the proof permissible only in the absence of prejudice to a respondent); *Health & Hospitals Corp. (North Central Bronx Hospital) v. Cross,* OATH Index No. 315/97 (Jan. 27, 1997) (where petition alleged misconduct on one date, but evidence at trial pertained to different date, and respondent understood which date was in issue and defended against misconduct on that date, amendment of charge to conform to the proof was appropriate) .

ANALYSIS

Introduction

Under ESSTA, an employer with five or more employees must provide qualifying employees with paid sick time, give all employees written notice of their rights under the law, and retain records for three years demonstrating compliance with the law. Admin. Code §§ 20-913(a)(1), 20-919(a), 20-920 (Lexis 2023). Employers are required to permit employees to accrue sick time at a rate of at least one hour for every 30 hours worked. Admin. Code § 20-913(b). Employers are further required to permit employees to use sick time as accrued, starting (during the time encompassed in the charges) 120 calendar days after employment. Admin. Code § 20-913(d); 6 RCNY § 7-211(c)(1). Employers must also distribute a notice of employee rights and provide pay statements showing the amount of sick time accrued, and must maintain and distribute a written sick time policy that meets or exceeds the requirements of ESSTA and the rules. Admin. Code §§ 20-913(a); 919(c); 6 RCNY §§ 7-211(a)-(c). Employers are prohibited from retaliating or threatening retaliation against employees who exercise or attempt to exercise their rights under the law, and from interfering with the Department's investigation. Protected activity includes asking for or using sick time, and prohibited retaliation includes termination of employment. Admin. Code § 20-918; 6 RCNY § 7-108.

ESSTA incorporates the definition of "employer" set forth in section 190(3) of the New York Labor Law. Admin. Code § 20-912. This includes "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." Labor Law § 190(3) (Lexis 2023). Thus, in determining if an entity or person is an employer under ESSTA, this tribunal has applied the "economic reality" test used by courts in interpreting the Labor Law, which considers the extent of control imposed by the alleged employer over their workers. This test considers whether the alleged employer had the power to hire and fire employees, supervised and controlled employee work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records. No single factor is determinative. *See, e.g.*, *Dep't of Consumer Affairs v. Brewer, Attorneys & Counselors*, OATH Index No. 514/19 at 11-12 (July 9, 2019), *citing Ramirez v. RiverBay Corp.*, 35 F. Supp. 3d 513, 520-21 (S.D.N.Y. 2014).

The rules similarly define a "joint employer" as "each of two or more employers who has some control over the work or working conditions of an employee or employees." *See* 6 RCNY

§ 7-101(b). Under the economic reality test, both corporate entities and corporate officers or managers with hiring and firing authority have been found to be joint employers liable under ESSTA. *See Dep't of Consumer and Worker Protection v. Mr. Coco 162 Inc.*, OATH Index No. 1672/20 at 8-9, 12 (Jan. 28, 2022), *adopted in part, modified in part*, Comm'r Dec. (Nov. 3, 2022) (president/manager of corporation with power to hire and fire employees and set the rate of pay found jointly liable under ESSTA); *Brewer, Attorneys & Counselors*, OATH 514/19 at 12 (founding partner of firm was a "hands-on manager and the firm's ultimate authority" who made hiring and firing decisions and was therefore jointly liable as an employer for ESSTA violations); *Dep't of Consumer Affairs v. AQP General Services Corp.*, OATH Index No. 236/19 at 15-16 (May 10, 2019) (sole owner of corporation who hired and fired employee, set her rate of pay, and determined her assignments jointly liable under ESSTA).

Petitioner contends that respondents: failed to maintain a written paid sick time policy from approximately September 2016 through July 30, 2020 (counts 2-5); maintained an unlawful paid sick time policy as articulated in two emails sent in July 2020 and December 2020 (counts 6-7); failed to provide employees with accrued sick time from 2017 through at least July 30, 2020 (count ten); failed to permit employees to use paid sick time in 2017, 2018, 2019, and 2020 (count 11); failed since September 30, 2020 (when this provision of the law went into effect) to provide employees with pay statements or other written documentation relating to the amount of sick time accrued and the total balance of accrued sick time (count nine), and failed to distribute notices of employee rights under ESSTA (count eight).

Petitioner also asserts that respondents violated the law and rules after its investigation began in July 2020 by producing falsified records to the Department, retaliating against employees who were thought to have complained to the Department, and giving the Department falsified records. Petitioner contends that respondent gave the Department a "seemingly fabricated" email exchange about work schedules and a sick leave policy backdated to January 1, 2020 (count one). Petitioner alleges that respondents interfered with the investigation and retaliated against employees by: attempting to coach workers on how to respond to investigative queries; threatening to terminate complaining employees or otherwise hold them accountable; suspending employees' time off and putting leave restrictions in place pending the conclusion of the Department's investigation; requiring workers to return copies of a non-compliant safe/sick time policy; and

disciplining two workers by issuing them a disciplinary counseling notice for their refusal to state that respondent gave them paid sick leave (count 12).

In addition, petitioner contends that respondent retaliated against four employees who had complained to the Department about the earned sick leave and sick time policy: Mr. Williams (named in the petition as "worker 1"), Mr. Mazzella (named in the petition as "worker 2"), Mr. Colón (named in the petition as "worker 3"), and Mr. Velez (named in the petition as "worker 4") (counts 12-14, 16, 20-21, 23). Petitioner contends that the retaliation included: issuing written disciplinary notices or write-ups to Mr. Mazzella, Mr. Colón, and Mr. Williams (counts 12, 14, 16, 20); terminating Mr. Colón's employment on December 2, 2020 (count 21); making threats in conversations with Mr. Mazzella and Mr. Williams (counts 14, 16); refusing to grant or discuss Mr. Mazzella's vacation request (count 16); and, on a workplace-wide basis, limiting the amount of time off permitted to employees and requiring documentation by a health care provider for absences of any length (count 13).

Finally, petitioner alleges that respondents violated ESSTA by: requiring Mr. Colón to submit medical documentation when he submitted a sick leave request for November 19, 2020 (count 22); interfering with Mr. Williams' and Mr. Velez's right to determine the amount of sick time used (counts 15, 24); and failing to pay Mr. Mazzella for sick time used, requiring him to find a replacement worker when he asked to use sick time, and failing to treat his health condition confidentially (counts 17-19).

Preliminarily, there is no dispute that respondent is an "employer" under ESSTA. Respondent described himself as President, Chief Operating Officer, and sole owner and shareholder of Champion (Pet. Ex. 2; Tr. 1352). Champion's corporate headquarters is located at his residence (Pet. Ex. 2). On September 1, 2016, Champion subcontracted with G4S Secure Solutions ("G4S"), which had contracted with the New York Power Authority ("NYPA") to provide on-site security guard services at the Pouch Power Station on Staten Island, which is a NYPA site (Abreu: Tr. 61; Sciarabba: Tr. 1352-354). Upon taking over the contract, respondent hired five security officers: Mr. Williams, Mr. Mazzella, Mr. Colón, Ms. Wethington, and another officer named Yaseen Javaid (Pet. Ex. 2). On May 1, 2017, respondent hired a sixth security officer, Mr. Velez (*Id.*). Except for Ms. Wethington, whose employment was terminated on November 26, 2019, these security officers continued to work for Champion at the Pouch station until September 2021, when Champion lost the subcontract (Colón: Tr. 762; Williams: Tr. 987;

Pet. Ex. 2). As more fully discussed below, the record shows that respondent made all decisions relating to his employees, including hiring, disciplining and firing, setting work schedules, issuing employee handbooks, and granting and denying leave. Thus, respondent is jointly liable with Champion for any proven ESSTA violations.

In addition, because five of the security officers started employment on September 1, 2016, they were eligible to use accrued sick time by January 1, 2017. Mr. Velez, who began employment on May 1, 2017, was eligible to use accrued sick time by August 29, 2017. Admin. Code §20-913(d)(1); 6 RCNY § 7-211(c)(1).

The parties have dramatically different views of respondents' compliance with ESSTA. In essence, petitioner contends that none of respondents' employees used sick leave from 2017 through July 2020. For the most part, petitioner's witnesses testified that they did not get paid sick leave. Moreover, Mr. Mazzella and Mr. Colón testified that if employees needed to take a sick day, they would have to find someone to cover their shift, and that while they would be paid for the sick day, the employee covering for them would not be paid and they would have to pay that employee out of their own pockets. Petitioner contends that after workers filed a complaint with the Department about not getting sick leave, respondents engaged in a "concerted campaign" of retaliation against them, including threats, pretextual write-ups, and ultimately the termination of Mr. Colón's employment (Tr. 28-30; Pet. Post-Trial Mem. at 24). Petitioner further contends that respondents provided false documents to DCWP in the course of its investigation (Tr. 29-30).

Respondent concedes that he was not fully compliant with ESSTA (Tr. 33), stating that this was Champion's first contract in New York City and he was not familiar with all the regulations (Tr. 34). But he maintains that that was the "only thing [that respondents] did wrong" and that once he learned in July 2020 that he was non-compliant, he amended his policies to comply with ESSTA (Tr. 34, 1380). In his closing statement, respondent asserted that he provided sick leave to his employees, as shown by a multitude of payroll records introduced at trial (Resp. Post-Trial Mem. at 2). The three former employees who he called as witnesses — Mr. Velez, Ms. Guzman, and Ms. Wethington — testified that respondent told them they would get sick leave when he hired them to work at the Pouch site, and Ms. Guzman and Ms. Wethington testified that respondent gave them some time off relating to medical issues. Respondent also denied retaliating against employees because of the investigation, contending that any disciplinary actions that he took, including the "indefinite suspension" of Mr. Colón, were warranted by the employees'

misconduct and that any restrictions which he placed upon the use of vacation or sick leave were warranted by business necessity (Tr. 1365).

To prevail at this administrative trial, petitioner must establish the charges by a preponderance of the credible evidence. *See Brewer, Attorneys & Counselors*, OATH 514/19 at 7, *citing Taxi & Limousine Comm'n v. Sobczak*, OATH Index No. 1691/08 at 2 (Apr. 7, 2008), *modified on penalty*, Comm'r Dec. (May 9, 2008). In assessing credibility, relevant factors include demeanor, consistency of a witness's testimony, supporting evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here, I found the complainants more credible than respondent and his witnesses. Their testimony was consistent and often detailed, and for the most part they corroborated each other. By contrast, the payroll records upon which respondent relied did not support his claim that he paid his employees sick leave. In addition, documentary evidence — including respondent's own emails, text messages, and counseling notices — did not support respondent's claims that any changes in leave policy or disciplinary actions were warranted by business necessity. To the contrary, this evidence supported the complainants' testimony that respondent repeatedly retaliated against them and attempted to interfere with their participation in the investigation because he believed they had complained about him to the Department or because they had asserted their rights under ESSTA. In addition, the closeness in time between the start of the Department's investigation and multiple adverse employment actions taken by respondent is consistent with retaliation and interference under ESSTA.

Individual counts are discussed below.

Counts relating to conduct before July 2020

Counts 2-5: failure to maintain written paid sick time policies

Counts 2-5 allege that respondents failed to maintain a written paid sick time policy from approximately September 2016, through approximately July 30, 2020, in violation of section 7-211 of the rules. Count two alleges a violation of section 7-211(a), requiring employers to maintain written sick time policies in a single writing. Counts 3-5 allege that respondents violated section 7-211(c), which requires that an employer's written sick time policies meet or exceed the requirements of ESSTA. More specifically, count three alleges a violation of section 7-211(c)(1),

which requires that the employer's written policies state the employer's method of calculating sick time. Count four alleges a violation of section 7-211(c)(2), which requires that the employer's written policies include "the employer's policies regarding the use of . . . sick time, including any limitations or conditions" on such use, such as a requirement for advance notice, written documentation, and any "reasonable minimum increment or fixed period" for the use of accrued sick time. Count five alleges that respondents violated section 7-211(c)(3), which requires that the employer's written policies include the policy for "carry-over of unused . . . sick time at the end of an employer's calendar year."

Petitioner met its burden of proof on these counts. The evidence showed that respondent updated the employee handbooks to include a detailed section on sick time, but not until July 2020, and that before then, he did not have a written policy on sick time.

It was undisputed that respondent provided the security officers with an employee handbook, titled "Champion Security Employee Handbook/Security Officers Guide." Respondent indicated that he gave the security officers the employee handbook in August 2016, before the contract start date, except for Mr. Velez, who received the handbook on May 1, 2017, his first date of employment. According to respondent, he updated the handbook yearly by January 1, and gave his employees the updated copy, for which they had to sign an acknowledgment of receipt (Pet. Ex. 2).

Mr. Mazzella and Mr. Williams testified that although they received employee handbooks regularly, it was not until July 2020, after the investigation began, that they received an employee handbook containing a paid sick time policy. Before then the handbook did not mention sick time (Mazzella: Tr. 424-25; Williams: Tr. 1008, 1016). Their testimony was corroborated by photographs of three pages of an employee handbook, including a cover page indicating, "Effective Date January 1st, 2020, Edition" (Pet. Ex. 21 at 155, 156-57).[5] Mr. Williams testified that he took these photographs after respondent distributed the handbook in January 2020 (Tr. 1007-08; Pet. Ex. 21 at 155, 156-57). This handbook does not refer to sick time or leave or safe time or leave. Instead, it contains two paragraphs on "Leave of Absence," relating to unpaid leave of absences under the Family and Medical Leave Act ("FMLA"), "other medical leave,

[5] Because petitioner's exhibits were provided in a single 230-page document, references to corresponding PDF page numbers are included for ease of reference. PDF numbers are also included when referring to respondent's exhibits, which were also voluminous.

military leave, personal leave, and jury duty leave." The handbook further states that employees seeking such leave "must submit a 'Days Off/Vacation Request' (CSS Form 83) at least 1 week in advance of their scheduled day-off or personal leave request dates." The handbook provides additional information about FMLA and military leave, including in the section on FMLA that Form 83 should be used for leave that is foreseeable or planned medical treatment, and that if the leave is not foreseeable, it should be requested as soon as possible (Pet. Ex. 21 at 156-57).

In contrast to the testimony of Mr. Mazzella and Mr. Williams, respondent told the Department that he had had a sick leave policy in effect at the Pouch site since 2016. The Department sent respondent a request for documents and information on July 13, 2020, at the start of its investigation. As part of his response, respondent provided the Department with an employee handbook, the front page of which read, "Effective Date January 1st, 2020 Edition" (Pet. Ex. 1 at 2-5; Pet. Ex. 3 at 28). This handbook contains a section on "Leave of Absence Sick," spanning almost three pages. It indicates that employees who work 80 hours or more in a calendar year are eligible for paid sick leave, states how the sick leave is accrued, the purposes for which it can be used, the minimum daily increment in which it can be taken, when advance notice and/or documentation is required, and the prohibition against retaliation for the use of sick leave (Pet. Ex. 3 at 56-68). Respondent stated in his response that "the leave of absence safe and sick" sections of the policy "were inclusive in the Champion Security Employee Handbook since the start of the NYPA contract in 2016" (Pet. Ex. 3 at 17).

I did not find respondent's statement that he had a sick leave policy in his employee handbooks since 2016 to be credible. Both Mr. Mazzella and Mr. Williams credibly testified that it was not until July 2020 that they received a handbook containing information about sick leave. At that time, they had to return the older handbook (which also contained a "January 1, 2020" effective date) and sign for the newer one (Mazzella: Tr. 424-25; Williams: Tr. 1016; Pet. Ex 22 at 159). In addition, respondent's own testimony undercuts his written statement. Respondent admitted that in July 2020, after the investigation started, he amended his policies to comply with ESSTA and told DCWP Investigator John Tarantino that he was going to issue new employee handbooks including information about ESSTA as soon as possible (Tr. 1380). Moreover,

Investigator Abreu, who supervised Investigator Tarantino on this case,[6] explained that the safe leave policy contained in the handbook provided by respondent could not possibly have been included in employee handbooks since 2016, because the law relating to safe leave did not go into effect until 2018 (Tr. 72).

Considering the testimony and photographs, petitioner established that respondent did not maintain a written sick time policy before July 2020. Respondent amended the employee handbook in July 2020 to include a sick leave policy and backdated that handbook to January 2020. Thus, respondent violated sections 7-211(a) and (c) of the rules, requiring employers to maintain written sick time policies that meet or exceed the requirements of ESSTA. Counts two to five are sustained.

Count 8: failure to distribute notices of employee rights

Count eight alleges that respondents failed to distribute Notices of Employee Rights to each employee, as required by section 20-919(a) of ESSTA. This provision requires an employer to provide employees with "written notice" of their right to the accrual and use of sick time. Employers must "conspicuously" post the notice "in an area accessible to employees" and must also provide the notice to each of their employees at the commencement of employment.

This count is sustained based on the testimony of Mr. Mazzella, Mr. Williams, and respondent. Mr. Mazzella and Mr. Williams testified that respondent taped a "Notice of Employee Rights: Safe and Sick Leave" ("the Notice") in the window of the security guard booth in 2020. Neither employee had seen this Notice before, and neither were given their own copy of the Notice (Mazzella: Tr. 390, 396, 397; Williams: Tr. 1004-05; Pet. Ex. 19 at 151). Respondent corroborated this testimony, stating that he posted the Notice in the security guard booth in 2020 after learning once the investigation began that he was not in compliance with ESSTA (Tr. 1381). The Notice, which is a form generated by the Department, explains the rate at which employees accrue sick leave (one hour for every 30 hours worked) and the purposes for which they can use sick leave (Pet. Ex. 19 at 151).

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[6] Investigator Tarantino was the investigator assigned to this case but was on leave at the time of the trial. Investigator Abreu testified that as his supervisor, she met with him frequently throughout the investigation and reviewed documents that he received as well as his notes and memoranda (Tr. 50). She said that she was "very familiar" with his discussions with respondents' employees because he would speak to her "right away" whenever "there was an interaction or something that happened" on the case (*Id.*).

In sum, this count is sustained because the record establishes that respondent never distributed the Notice to his employees and that he did not post the Notice until after July 2020, when the investigation began.

Count 10: workplace-wide failure to provide employees with accrued paid safe/sick time

Count ten alleges that respondents failed to provide for the accrual of sick time by their employees, in violation of section 20-913(b) of ESSTA, which requires employers with 99 or fewer employees to provide a minimum of one hour of paid sick time for every 30 hours worked by an employee, up to a cap of 40 hours in a calendar year.

This count is sustained based upon the testimony of Mr. Mazzella, Mr. Williams, and respondent, and the payroll records produced by respondent to the Department during its investigation. Mr. Williams testified that before seeing the Notice posted in the employee booth in July 2020, he did not see any information relating to how he accrued sick time at Champion (Tr. 1005). Mr. Mazzella, similarly, testified that before filing his complaint with the Department on June 18, 2020 (Pet. Ex. 26 at 172), he had not been provided with any information about sick time accrual (Tr. 397). In addition, respondent acknowledged in response to the Department's request for documents that he did not keep track of his employees' accrual of sick leave, and that each employee kept track "of time accrued," utilizing "an honor system" (Pet. Ex. 2 at 22). He also admitted that none of his payroll records before July 2020 made any mention of sick leave (Tr. 1381).

Count 11: workplace-wide failure to allow eligible employees to use paid sick time in 2017, 2018, 2019, and 2020

Count 11 charges that respondents violated section 20-913(d) of ESSTA, which states that an employee has the right to use sick time as it is accrued, by "actually and/or constructively" denying employees the right to use paid sick leave from 2017 through 2020. In its post-trial brief, however, petitioner limited the charge to the period ending July 30, 2020, acknowledging that the record showed that beginning in August 2020, respondents "occasionally" paid employees for sick leave (Pet. Post-Trial Mem. at 9, n. 18).

As discussed below, witness testimony and documents show that some of respondents' employees, such as Mr. Colón and Mr. Williams, may have occasionally received paid sick leave

before August 2020, but that other employees did not receive any paid sick leave, and that none of the employees were aware of their rights to sick leave under ESSTA until the investigation began in July 2020.

Mr. Colón was initially adamant that he never got paid for sick leave, except for one day (Tr. 737, 788). But later he said, "In four years, [respondent] only paid maybe twice or maybe three times" (Tr. 858-59, 860). Timesheets that respondent produced for Mr. Colón (Resp. Exs. H2, H4, H6, H8, H10, H12, H14, H16, H18, H20) do not contain any reference to sick days, except for three timesheets outside the period charged in count 11 (Resp. Exs. H2, H4, H20).[7]

By contrast, Mr. Mazzella unequivocally denied ever getting sick pay from Champion until after the investigation started in July 2020 (Tr. 388-89, 590). He asserted that before respondent posted the Notice in July 2020, Champion had told him "[n]othing whatsoever" about his right to sick leave under ESSTA (Tr. 390). He wrote in his complaint to the Department that he had been told "from the beginning that [he] was not entitled to any sick pay or sick leave," and that he had not been paid "any" sick leave since he started to work for Champion (Pet. Ex. 26 at 173). Mr. Mazzella testified further that he took vacation in 2017, for which he was not paid, and that when he asked respondent about it, respondent replied that the workers were "not entitled" to any sick time or paid vacations from Champion, because they did not have "the same contract as G4S" (Tr. 389). As a result, Mr. Mazzella testified, "95 percent of the time, I would work still sick because I didn't want to take a pay hit" (*Id.*).

Despite this testimony, Mr. Mazzella's timesheet for January 9, 2017, through January 15, 2017, along with the accompanying payroll summary, appears to indicate that he requested and was granted paid sick leave for Friday, January 13, 2017. The timesheet has the words "Sick day request" written in under the column for Friday, January 13, 2017, and the number "8" written in for the previous four days, resulting in 32 "total daily hours" and 40 "weekly hours" (Pet. Ex. 6 at 111; Resp. Ex. G1). The payroll summary for the week shows that Mr. Mazzella was paid for 40 hours (Resp. Ex. G2). Mr. Mazzella could not explain who made the request for a sick day on the timesheet or recall if he worked that day (Tr. 530). He was adamant, however, that he did not write "sick day request" on the timesheet, request sick time for the day, or get paid for sick time

[7] Mr. Colón acknowledged receiving a paid sick day on November 19, 2020 (Tr. 755), as indicated by his timesheet for that day (Resp. Ex. H20). In addition, two timesheets for November and December 2016 appear to show requests for sick days, and corresponding payrolls appear to show payment for those dates (Resp. Exs. H2-H5).

(Tr. 391). Mr. Mazzella also told Investigator Tarantino that he did not recall requesting a paid sick day in January 2017 (Abreu: Tr. 93).

Both Mr. Mazzella and Mr. Colón testified that when they called out sick, they had to find a coworker to cover their shifts. The replacement worker was expected to tell respondent that he was covering a shift. Respondent would tell both the worker calling out sick and the covering worker to write their regular hours on the timesheet. He would not pay sick time to the sick employee or pay the covering employee for the extra shift. Instead, the worker calling out sick would have to pay the covering worker out of his own pocket (Mazzella: Tr. 434, 439-41, 599, 613, 615; Colón: Tr. 738, 958-59, 968, 971). In a series of emails sent on October 11, 2020, to Mr. Mazzella, respondent berated Mr. Mazzella for not finding a replacement worker to cover a shift for which he was requesting sick time (Pet. Ex. 29 at 192, 194, 197). Under this practice, as Mr. Mazzella emphasized, "it wouldn't be in [respondent's] books or his records that [one employee] worked overtime and [another employee] took a sick time" (Tr. 441).

Mr. Williams also testified that respondent did not provide paid sick leave to his employees. Mr. Williams was the first employee to complain to the Department that he did not receive paid sick leave from September 2016 forward (Abreu: Tr. 52-53; Williams: Tr. 1070-71). He testified that he spoke with respondent about not getting paid sick leave before filing his complaint and respondent said that the law was different in New York City than upstate and that he would see what he could do to ensure that the employees were paid for sick leave (Tr. 1000). After that conversation, Mr. Williams tried to make doctors' appointments on his days off because he did not think that Champion would pay him sick leave and "didn't want to take the chance of taking a day off and not getting paid for it" (Tr. 1002). He testified that while he knew about ESSTA, respondent had never provided him with any information about the law before the investigation started (*Id.*).

Mr. Williams acknowledged, however, that respondent provided him with some paid days off around a death in the family in 2017 (Tr. 1091-93). His timesheet for October 9, 2017, through October 15, 2017, has a circle around the "Monday" column (for October 9), with the initials "SD" written under the circle. The timesheet also shows a total of 32 hours worked on other days (Tr. 1086; Resp. Ex. F8). The corresponding payroll report for this week shows that Mr. Williams was paid for 40 hours (Resp. Ex. F9). Mr. Williams acknowledged that the initials "SD" were his handwriting, testifying that respondent had "instructed" him to put "SD" on the timesheet and that

he assumes that "SD" stood for sick day (Tr. 1086-87).[8] Mr. Williams also recalled that he had a day off during the week of April 23-29, 2018, as shown by his timesheet (Resp. Ex. F12). This timesheet has a circle around "SA" (or Saturday). Mr. Williams testified that he circled the date as instructed by respondent, and that it showed a day off, but he did not recall what type of leave was used (Tr. 1120, 1136; Resp. Ex. F12).

In general, Mr. Williams explained, respondent would instruct him to circle the date on a timesheet or "write something in the blocks" on the timesheet if he needed a day off for a holiday or other paid time off (Tr. 1086, 1120). When asked what types of absences would require a circle, Mr. Williams explained, "In case . . . I needed the day off or I have a[n] altering, changing life event, such as an emergency and things like that, . . . that's when [respondent] . . . would do his best to try and pay me. Or . . . he would ask me to circle [the date] so he could remember" (Tr. 1121). Mr. Williams testified that he did not know what the practice of other workers was with regard to circling dates on their timesheets (*Id.*).

Unlike Mr. Mazzella and Mr. Colón, who testified that they had to pay coworkers to cover for them on sick days, Mr. Williams testified that respondent would sometimes ask him to cover shifts when coworkers called out sick and would pay him for the extra shift: as overtime until the investigation began, and after that, as straight time (Tr. 991-994; 1037-39). He did not know if the coworkers who were out sick were paid for the time that they were absent (Tr. 993-94). He also did not specify how frequently this occurred.

In contrast to petitioner's witnesses, Mr. Velez, Ms. Guzman, and Ms. Wethington testified that respondent told them that they would get five paid sick days per year (Guzman: Tr. 1216; Wethington: Tr. 1261; Velez: Tr. 1295). Mr. Velez, who is currently employed by Arrow Security ("Arrow"), the company that assumed the subcontract with G4S after Champion lost it, testified that he received some paid sick leave in 2020 due to serious family medical issues (Tr. 1313-15). He said that respondent told him to write "paid sick leave" on his timesheets on days when he was taking sick leave and that at the end of the week, respondent would "count it as a sick day" (Tr. 1297). Respondent also told him to circle dates that were holidays and "put holiday next to it" (*Id.*). He recalled seeing other workers "circle the holiday . . . and their sick time" (Tr. 1299).

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[8] Although outside the period in question, Mr. Williams' timesheet for October 31, 2016, to November 6, 2016, also has a notation for "sick day" and for "24 hours plus one sick day" (Resp. Ex. F2), and the corresponding payroll report for that week appears to show that he was paid for 32 hours (Resp. Ex. F3).

He did not recall any security officers exchanging money to replace the pay that Champion would normally pay through direct deposit (Tr. 1301-02).

Ms. Guzman, who is currently employed by respondent on a site on Long Island, testified that respondent "always" gave her paid time to take off as she needed, relating to her own and her mother's medical issues (Tr. 1217). Ms. Wethington testified that she used the "Days Off/Vacation Request (CSS Form 84)" to request two days off in September 2018, which was the method used at Pouch to request leave (Tr. 1264). This form has a section stating, "Reason for Absence (i.e., vacation/medical leave/training)," and has a question indicating, "How many paid vacation days do you want to use?" It does not, however, ask about whether an employee wants to use sick leave. On July 28, 2018, Ms. Wethington submitted the form, requesting two days off and writing, as the reason for her absence, "medical" (Resp. Ex. K1). Ms. Wethington explained that she was the site administrator at the Pouch station who reviewed the timesheets, and thus knew that a sick day would be inputted into the timesheets as "SD" and a holiday would be circled (Tr. 1262).

In addition to calling Mr. Velez, Ms. Guzman, and Ms. Wethington, respondent introduced an affidavit from Mr. Javaid, another former security officer. Respondent testified that Mr. Javaid declined to testify, saying that he did not want to get involved (Tr. 1343-44). In his affidavit, Mr. Javaid stated that Champion "always" gave him paid time off and sick leave, including paid sick leave in May and August 2021 (Resp. Ex. J9).

Respondent testified that he paid sick leave to his workers, even before the Department's investigation, even though he did not know about ESSTA before the investigation and assumed that the "same procedure" that he followed for upstate work applied (Tr. 1379, 1404). According to respondent, when the contract began, he asked G4S about their sick leave policy because the G4S/NYPA contract was a prevailing wage contract and he believed this meant that G4S's workers had to be paid sick time and vacation (Tr. 1357). In response, he received an email from G4S stating that it does not pay the officers "for vacation time or sick time in NYC," because they "receive the pay on an hourly basis built into the supplement benefit," but that the security officers would be "allowed to take vacation or sick time based on seniority" (Resp. Ex. E5). An accompanying email stated, "Please note, this goes for the Pouch locations as well" (Tr. 1357; Resp. Ex. E5). Respondent asserted that because he had experience with prevailing wage contracts, he knew this was wrong and that the supplemental "health and welfare" benefit in

prevailing wage contracts has "nothing to do" with ESSTA (Tr. 1357).[9] He testified that in a telephone conversation with Joe Falco, a Senior Vice President at G4S, he asked if he could pay his employees sick leave, coming out of his "own payroll, [his] own pocket, basically," and Mr. Falco "allowed it" (Tr. 1358). Respondent contended that he paid his employees sick leave but that G4S never reimbursed him for it (Tr. 1096). He acknowledged that he did not memorialize the phone call with Mr. Falco (Tr. 1357-58).

Respondent also contended that timesheets and payroll records that he submitted for Mr. Williams, Mr. Colón, and Mr. Mazzella show that he approved over forty occasions of paid sick leaves during a 38-month period (Tr. 1360).[10] As discussed below, some of these timesheets have circles around particular dates. Respondent appears to assert that the circles represent days for which employees received paid sick leave (Tr. 1360).

Regarding Mr. Colón, respondent introduced eight sets of timesheets and payroll records within the relevant period, one in 2017, four in 2018, one in 2019 and two in 2020 (Resp. Exs. H6-H19). These documents appear to show that Mr. Colón was paid for 32 hours even though he worked less hours: 24 hours during relevant weeks in July 2017, February 2018, March 2018, August 2018, and February 2020 (Resp. Exs. H6-H11, H14-H15, H18-H19); 16 hours the week of July 16-20, 2018 (Resp. Ex. H12-13), and eight hours during the week of July 8-14, 2019 (Resp. Exs. H16-17). There are no references to sick leave on these documents, but four timesheets (Resp. Exs. H8, H10, H12, H18) have one or more days circled for which regular daily hours for Mr. Colón are not entered.

Regarding Mr. Williams, respondent introduced timesheets and payrolls for three workweeks in 2017 (Resp. Exs. F4-F9), which show that he was paid for 32 hours a week even

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[9] The Department noted that ESSTA's definition of "employer" does not exclude contractors or subcontractors on prevailing wage contracts. *See* Admin. Code § 20-912. ESSTA does contain a carve-out for certain collective bargaining agreements, stating that it "shall not apply" to any employee covered by a collective bargaining agreement ("CBA") if the CBA (in the case of the construction and grocery industry) contains an express waiver or if the CBA (for all other employers) has an express waiver and provides for a comparable employee benefit. Admin. Code § 20-916. Here, there is no evidence that respondents' employees were unionized employees working under a CBA, much less a CBA with an express waiver and a comparable benefit. Moreover, while respondents submitted certified payroll reports to the U.S. Department of Labor showing hours worked, rate of pay, deductions, and net wages, these reports make no mention of supplemental benefits (Pet. Ex. 4 at 69 and Pet. Ex. 4 cont.; Resp. Ex. C). Respondent's payroll journal similarly makes no mention of supplemental benefits (Pet. Ex. 5 at 72 and Pet. Ex. 5 cont.). Thus, there is no evidence to show that respondents' employees received supplemental benefits in lieu of or equivalent to paid sick leave.

[10] Respondent stated that he had additional payroll records that he could have submitted, but did not, for Ms. Wethington, Mr. Velez, and Mr. Javaid (Tr. 1360).

though his timesheets showed 24 hours worked. The timesheet for October 9-15, 2017, has the "M" (for Monday) circled, and under it is written "SD" (Resp. Ex. F8).

Regarding Mr. Mazzella, respondent introduced timesheets and payroll records for ten workweeks within 2017-2019, which show that he was paid for 40 hours even though his timesheets show he only worked 32 hours (Resp. Exs. G1-20).[11] Only one timesheet showed a sick day request (Resp. Ex. G1) and eight of the nine remaining timesheets showed circled dates (Resp. Exs. G3, G5, G7, G9, G13, G15, G17, G19).

More generally, respondent asserted that the security guards, especially Mr. Mazzella and Mr. Colón, had "an agenda" against him and were "defiant" of his authority (Tr. 1370). He claimed that they were upset because he told them in February 2020 that they were not entitled to reimbursement for sick leave from G4S (Tr. 1363-64). Respondent highlighted that on February 21, 2020, Mr. Falco from G4S wrote an email, forwarded to him, indicating, "G4S has recently provided 100% of owed time off payments to all the security officers that have worked at NYPA within the 5 boroughs of NYC as per NYS prevailing wage requirements" (Resp. Ex. F43). Mr. Colón and Mr. Williams both received at least a portion of the payout from G4S because each worked part-time as an employee of G4S at a different NYPA site while also working for respondents (Colón: Tr. 734, 776, 845-47; Williams: Tr. 986-87, 1014, 1051, 1095). According to respondent, the other security guards became upset about the payout, which involved both vacation and sick leave, because they felt they were owed the "restitution pay" from G4S as well. He "challenged" them on this, saying they were not entitled to the pay because he had already paid them sick leave (Tr. 1361). Respondent believed that this established a "motive" for the security guards to complain to the Department that they were not being paid earned sick time, to "try to force G4S to pay them" (Tr. 1363).

I credited petitioner's evidence that, as a general rule, respondent did not provide paid sick leave to his employees. The record instead establishes that, at most, respondent occasionally provided paid sick leave to some employees, as Mr. Colón and Mr. Williams acknowledged. Mr. Colón recalled being paid three times for sick leave. Mr. Williams' testimony, along with the relevant timesheet, showed that respondent granted him paid sick leave on October 9, 2017.

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[11] Respondent also introduced a timesheet for October 12, 2020, through October 18, 2020, which has a circle around the "M" (for Monday), with the notation "sick day paid," (Resp Ex. G21). However, this is outside the period charged in count 11.

Although he testified that respondent gave him paid time off on other occasions, Mr. Williams did not specify whether that was paid sick leave or other vacation time. The record shows, however, that he limited his use of sick time by not scheduling doctors' appointments within working hours, because respondent did not ordinarily pay sick leave.

Mr. Williams was a particularly credible witness, because although he was the first to complain to the Department about respondent and felt that respondent held a "big grudge" against his employees because of the investigation (Tr. 1015), he did not appear to hold any personal animus toward respondent. He had a good working relationship with respondent, who trusted him to work as a site administrator after Ms. Wethington left and communicated with him regularly about timesheets and other issues (Tr. 1053-55, 1060, 1114). Mr. Williams also readily acknowledged that at the beginning of the contract, respondent paid the security officers out-of-pocket for about a month, saying that G4S owed him a lot of money and was not paying him (Tr. 1097). While respondent's cross-examination of Mr. Colón was particularly contentious — Mr. Colón called respondent "a liar" who would "do just about anything . . . just to make people look bad" (Tr. 905) — respondent's cross-examination of Mr. Williams was noteworthy for the civility which both men displayed toward each other. For example, they chatted cordially at the beginning of the cross-examination, and respondent later noted that he appreciated that Mr. Williams was "always very positive" and "very loyal" and that they had a "good rapport" (Tr. 1035, 1052-53).

I also found Mr. Mazzella and Mr. Colón to be credible. It was not surprising that they expressed animus toward respondent, given their testimony that respondent had not provided them with paid sick leave and had retaliated against them — firing Mr. Colón — as a result of the investigation. Mr. Mazzella was particularly insistent that he had never been paid sick leave, and that he did not request or receive paid sick leave on January 9, 2017, as his timesheet and the payroll records for that week suggest. Moreover, both witnesses repeatedly and consistently insisted that they had been forced to find other employees to cover their shifts when they took a sick day and that they had had to pay those employees out of their own pocket. This testimony was credible. Even though Mr. Williams testified to a different practice — that respondent would ask him to cover for employees who called out sick and pay him directly — Mr. Mazzella's testimony about having to find a replacement worker was corroborated by text messages on October 11, 2020, in which Mr. Mazzella said he was sick and respondent asked who he was getting to replace him (Pet. Ex. 29 at 188-98). Additionally, it appears that respondent treated

Mr. Williams differently from other employees: Mr. Williams testified that respondent sometimes gave him paid leave but told him not to tell his coworkers because it could cause disagreements (Tr. 1123). More importantly, Mr. Williams' testimony that he was paid to cover for sick workers does not establish that the workers whose shifts he was covering were granted paid sick leave. Indeed, Mr. Williams testified that he did not believe Champion provided paid sick leave.

The testimony of Mr. Williams, Mr. Colón, and Mr. Mazzella that they received little or no paid sick leave was made more credible by respondent's admissions that he did not know about ESSTA until the investigation began, he did not have a written sick leave policy, he did not advise his employees of their accrued sick leave, and he did not post the Notice of Rights until July 2020. Given the credibility of the witnesses, I was not persuaded by respondent's contention that they lied about his failure to pay sick leave because he told them that they were not entitled to the G4S payout.

I did not credit Ms. Guzman's, Mr. Velez's, and Ms. Wethington's testimony that respondent told them they would get five paid sick days per year. Although respondent told the Department in response to its document request that employees who worked between 120 days and 36 months accumulated five paid sick days a year (Pet. Ex. 2 at 19-21), there were no payroll records to support his testimony. Moreover, both Mr. Mazzella and Mr. Williams convincingly testified that respondent told them the opposite: that he did not provide paid sick leave. In addition, the reliability of Mr. Guzman's and Ms. Wethington's testimony was undercut by their lack of specificity about whether and when respondent provided them with paid sick leave. Ms. Guzman said that respondent always gave her "paid time off" to deal with medical issues, but she did not say it was sick leave. Ms. Wethington requested two days off in September 2018, relating to "medical reasons," but the form that she used to request the time off asked how many "vacation" days she was requesting. In addition, Mr. Velez only testified that he got paid sick leave in 2020. Moreover, according to Investigator Abreu, he told Investigator Tarantino that he did not get paid sick leave (Tr. 197).

Similarly, although Mr. Javaid asserted in an affidavit that Champion "always" gave him paid time off and sick leave, the only reference he made to paid sick leave was for May and August 2021, which is after the period charged in count 11. In addition, as Mr. Javaid declined to testify at trial, his affidavit is less reliable because the truthfulness of his statements could not be tested through cross-examination.

Moreover, text messages between respondent and Mr. Mazzella, dated January 14, 2020, January 22, 2020, and March 13, 2020, are inconsistent with respondent's claim that he provided paid sick leave (Pet. Ex. 27 at 175-185). On January 14, 2020, Mr. Mazzella asked respondent if he knew what was "going on with the back pay for sick days and my 2 years unpaid vacation?" (*Id.* at 175). Respondent did not reply that he had already paid Mr. Mazzella for sick days. Instead, he said, "We're not getting it," because only employees of G4S would be getting the payout (*Id.* at 177). Mr. Mazzella then asked if this meant that respondent, as the security officers' employer, would "need to pay us out" (*Id.*). There is no indication that respondent replied to this question. Mr. Mazzella followed up about a week later, asking on January 22 if respondent had "any idea" what was happening "with unpaid sick days, personal days and unpaid vacation," as well as a raise (*Id.* at 180). Respondent replied, "nothing yet," and later, on March 13, 2020, texted that he had spoken to Mr. Falco at G4S about the issue and that Mr. Falco had told him that "on this contract it's [respondent's] responsibility to pay [employees] for sick leave and vacation pay" (*Id.* at 181). Respondent further wrote that he would get his employees "reimbursed" and "figure something out for you" (*Id.* at 183). The two men then exchanged texts about not trusting G4S (*Id.*), and Mr. Mazzella replied that he would speak to respondent to get "reimbursed the money" he is owed (*Id.* at 184). Respondent wrote back that it "would have been nice to get some of that money back and redistribute to you guys" and that "[t]he good thing is at least from now on you guys get paid vacation and sick leave . . . the way it should be" (*Id.* at 185).

I was similarly unpersuaded by respondent's contention that timesheets and payroll records that he submitted show that he approved many sick leave requests from Mr. Mazzella, Mr. Colón, and Mr. Williams before July 2020. During the charged time period,[12] there are only two timesheet entries with a specific notation relating to sick leave: the October 9-15, 2017, timesheet entry for Mr. Williams (which has "SD" written under the "M" for Monday, which is circled); and the January 9-15, 2017, timesheet for Mr. Mazzella, containing the words "Sick day request" written in under the Friday column. Mr. Williams acknowledged writing "SD" on the form while Mr. Mazzella vehemently denied doing so. In addition, four timesheets for Mr. Colón and eight timesheets for Mr. Mazzella (not including the one that has "SD" on it) have dates that are circled.

[12] Two sets of timesheets and payroll records relating to Mr. Mazzella (Resp. Exs. G21-G24), three sets of timesheets and payroll records relating to Mr. Colón (Resp. Exs. H2-H5, H20), and one set of timesheets and payroll records for Mr. Williams (Resp. Exs. F2, F3) are outside the period charged in count 11.

However, the evidence does not support respondents' contention that the circled dates represented paid sick leave.

The testimony of both site administrators established a distinction between the way sick days were designated and the way other absences were treated. Ms. Wethington testified that circled days on timesheets represented holidays and Mr. Williams testified that they represented holidays or other paid time off such as an emergency (Wethington: Tr. 1262; Williams: Tr. 1086).[13] By contrast, Ms. Wethington said sick days were designated by "SD." Although Mr. Williams said he did not know what other employees did with their timesheets, he recalled that respondent instructed him to put "SD" on one timesheet in 2017, which referred to a sick day (Tr. 1071, 1086-87; Resp. Ex. F8).[14] Likewise, while Mr. Velez testified that he had seen other workers circle holidays and sick time, he testified that respondent had told him to write "paid sick leave" whenever he took paid sick leave, which he said he did in 2020 (Tr. 1297).

Mr. Mazzella and Mr. Colón credibly denied circling dates on their timesheets to request paid sick leave. Although Mr. Colón recognized his printed name and signature on his timesheets, including the four timesheets with circles, he adamantly denied making these circles (Tr. 812, 814-17, 820, 821, 824-26). He said he had "no idea" what respondent had told the security officers about making circles on documents or why there were circles on timesheets (Tr. 815). Moreover, he testified that he could not have worked on Monday, July 8, 2019, as shown on the timesheet for that week (Resp. Ex. H16), because he worked another job on Mondays (Tr. 823).

Mr. Mazzella, similarly, said he did not make the circles on any of the eight timesheets with circled dates. He insisted that he "never, ever put a circle around" his hours, and that he "just [didn't] understand" why the timesheets looked the way they did (Tr. 533, 577). Elaborating, Mr. Mazzella explained that the timesheets have six rectangular boxes on each page, one for each employee, but the employees' names are not preprinted on the forms. He works the first shift of the week, Sunday night at midnight into Monday morning, which is why he puts his name in the first box at the top of the timesheet when he signs in at midnight (Tr. 579). If he was absent on Monday, as indicated by three timesheets, two of which have a circle around the "M" (Resp. Exs.

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[13] Despite Ms. Wethington's testimony that the circles represent paid holidays, the circled dates on the timesheets submitted by respondent (Resp. Exs. H8, 10, 12, 18; G3, G5, G7, G9, G13, G15, G17, G19) do not appear to reference New York State or federal holidays, even though two of the dates (February 11, 2018, and February 16, 2020) were the days before Lincoln's and Washington's Birthdays (Resp. Exs. H8, H18).

G11, G13, G17), he would not have been able to write his name in the first box on the page because another employee would have already done so (Tr. 579). Mr. Williams confirmed that Mr. Mazzella would be the "first person to do the new timesheet," on a Monday, so that if he took a sick day on a Monday, his name would not appear on the first box on the timesheet (Tr. 1057-58).

Thus, the payroll requests and timesheets do not support respondent's contention that he paid sick leave to his employees on the dates claimed. Only two timesheets, one disavowed by Mr. Mazzella, contain a specific reference to sick leave. Most of the others contain circles, and neither of the site administrators confirmed respondent's testimony that the circles on the timesheets represented sick days. Moreover, it is not clear who made the circles on the timesheets. Mr. Colón and Mr. Mazzella denied doing so, and I found their testimony to be credible. Respondent's contention that circled days refer to sick days was further undercut by Mr. Mazzella's testimony about the three timesheets showing Monday absences.

In addition, some of the timesheets appear to contain Wite-out or other markings (*see, e.g.*, Resp. Exs. F4, G5, H6). The timesheets remained within the security booth office at the site until respondent collected them at the beginning of the investigation (Mazzella: Tr. 524; Williams: Tr. 1111; Colón: Tr. 1317). These circumstances raised questions about when and how the timesheets were prepared and diminished the weight to be given to their entries.

In sum, the record establishes that while respondent may have occasionally provided paid sick leave to some employees, he did not do so on a regular basis for all employees before August 2020. Moreover, respondent acknowledged that he did not notify any of his employees of their rights under ESSTA until July 2020, when he posted the Notice, because he did not know about ESSTA until the investigation began. Thus, his employees did not know how much sick leave they had accrued and how much sick leave they were entitled to under ESSTA. This alone establishes that they were not provided the ability to use paid sick leave as required by section 20-913(d) of ESSTA. *See Dep't of Consumer Affairs v. PCC Cleaning Services, Inc.*, OATH Index No. 88/18, mem. dec. at 14-15 (June 26, 2018) (finding that company did not provide qualified employees with required sick leave even though it granted paid sick leave to some of its employees and noting, "[a]s there is no proof that the employees knew they had the right to paid sick leave, or the amount of leave hours they had available, or that such leave was available to care for a family member, these employees could not benefit from [ESSTA]").

Count 11 is sustained.

Counts relating to conduct commencing July 2020

Count 1: production of inaccurate records relating to employee handbook and email

Petitioner contends that respondents violated section 20-918 of ESSTA and section 7-109 of the rules by its production of these records. Section 29-918(a) broadly provides that "[n]o person shall interfere with any investigation, proceeding or hearing pursuant to this chapter." Section 7-109(c) requires employers to provide "true" and "accurate" records in response to a written request for information or records.

Petitioner claims that respondents violated these provisions in two ways. First, petitioner contends that respondent produced a paid sick leave policy to the Department that he falsely represented had been in effect since January 1, 2020 (count one, paragraph 141(a)). Second, petitioner alleges that respondent produced "a seemingly fabricated email exchange with G4S purporting to show that G4S instructed Respondents to change workers' schedules" (count one, paragraph 149(b)).

As discussed above, after receiving the Department's July 13, 2020, document and information request, respondent provided the Department with a copy of an employee handbook, the front page of which stated, "Effective Date January 1st, 2020 Edition" (Pet. Ex. 1 at 2-5; Pet. Ex. 3 at 28). The handbook contains a section on "Leave of Absence Sick," containing accurate information about ESSTA. Respondent stated in his response that the sick leave policies had been "inclusive" in the employee handbook since 2016 (Pet. Ex. 3 at 17). This was not true. The credible testimony of Mr. Mazzella and Mr. Williams and the photographs of the employee handbook established that the January 2020 handbook did not contain a section about sick or safe time or leave, but only a section on "leave of absence," pertaining to unpaid FMLA, medical, military, personal, and jury duty leave, and that the sections on sick leave were not added to the handbook until it was amended in July 2020 and provided to all employees. Indeed, respondent acknowledged telling Investigator Tarantino at the start of the investigation that he would issue "all new employee handbooks with the New York City Policy once I found out what it was" (Tr. 1380). Based on this evidence, petitioner established that respondent submitted a falsified document (the employee handbook with the January 1, 2020, effective date) to the Department, in violation of rule 7-109, as alleged.

The evidence is too equivocal, however, to establish that respondents "interfered" with the Department's investigation, since at the same time that respondent produced the back-dated employee handbook policy to the Department and falsely stated that policies had been in effect since 2016, he admitted to Investigator Tarantino that his employee handbooks did not contain the "New York City Policy," because he had not known that ESSTA existed before the investigation began. *See Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191,196 (1976) (finding that if the weight of the evidence is equally balanced between the two parties, petitioner's case must fail); *Police Dep't v. Lavia*, OATH Index No. 1037/12, mem. dec. at 9 (Jan. 13, 2012) ("Where the facts are in equipoise, the burden has not been met."); Prince, Richardson on Evidence § 3-206 (Lexis 2008) ("If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests."); *compare with Dep't of Consumer and Worker Protection v. J&O Security Services, Inc.,* OATH Index No. 2830/18 at 10 (Nov. 5, 2020), *adopted*, Comm'r Dec. (Apr. 30, 2021) (finding that employer who repeatedly contacted employee and pressured him to withdraw his complaint engaged in conduct "intended to halt the investigation" and thus unlawfully interfered with the investigation). Thus, count one, paragraph 141(a), relating to the employee handbook, is sustained only as to the violation of section 7-109 of the rules, not the violation of section 20-918 of the Administrative Code.

Count one, paragraph 141(b), also alleging production of falsified records and interference with the Department's investigation, focuses on an email dated July 2, 2021, which respondent produced to the Department during its investigation (Pet. Ex. 16 at 143). The email shows that it was sent at 10:20 a.m. on July 2, 2021, by Steven Sanders, who respondent testified was a district manager at G4S, to respondent, Mr. Falco and Mr. Johnson (both at G4S), and two other people, Angel Mor and Rickey Nesmith, whose connections with G4S are unclear. Contained within this email is a forwarded email from Michael Petti at NYPA to Mr. Johnson and Mr. Falco (sent on July 2, 2021, at 10:10:12 a.m.), copied to a group email for security sergeants at NYPA as well as eight individual NYPA security sergeants at NYPA. The subject line of that email is "City G4S Guard Schedule." There is no text to the email other than one sentence, "Please give Gina Campmany a call if you have any questions" (Pet. Ex. 6).

Respondent testified that he sent the Department this email to show that he received a directive from G4S to modify the employee schedules at the Pouch site. He said that Mr. Sanders,

a district manager at G4S, had telephoned him to say that G4S had been awarded a new contract for the NYPA sites and was going to change the hours worked on the sites (Tr. 1399). Investigator Abreu confirmed that the Department had asked respondent for this evidence because respondent had changed his employees' schedules in late July or August 2020, after the investigation began, and the Department believed this schedule change to be retaliatory (Tr. 126-27).[15]

Petitioner claims that respondent fabricated the July 2, 2021, email. Investigator Abreu testified that the Department sent this email to G4S and asked if it sent the email to respondent, and the attorneys for G4S said G4S had not done so (Tr. 132, 134). According to Investigator Abreu, "they" said that there was a person "on that email" who did not work for G4S in July 2021, so it was "impossible" for that person to be on the email (Tr. 132). Someone at G4S then provided someone at the Department with another email, dated March 27, 2020, at 10:20:39, and said that G4S had sent this email to respondent (Pet. Ex. 17). Investigator Abreu believed that the March 27, 2020, email looked "similar" to the email dated July 2, 2021 (Tr. 133), and Investigator Tarantino concluded that the July 2, 2021, email looked "questionable" (Tr. 140). However, Investigator Abreu did not speak to the G4S attorney herself and did not provide further details, other than saying that the attorney at G4S had the last name of "Hamilton" and another person at G4S with the first name of "Steven" was involved in "sending us this information" (Tr. 135).

The March 27, 2020, email that G4S forwarded to the Department is from Mr. Sanders to respondent. It states that NYPA had initiated a lockdown due to COVID-19 and that no guard coverage was needed at Pouch or any NYPA sites until further notice (Pet. Ex. 17). Like the July 2, 2021, email, the March 27, 2020, email closed with a sentence, "Please give Gina Campmany a call if you have any questions." Like the July 2, 2021, email, the March 27, 2020, email contained a forwarded message from Mr. Petti to Mr. Johnson and Mr. Falco. In both emails, the forwarded message was sent March 27, 2020, at 10:10:12 a.m., and was copied to the same general email for NYPA security sergeants and the same eight security guards, listed in the same order.

Asserting that the July 2, 2021, email was fraudulent, petitioner appears to contend that respondent used the March 27, 2020, email sent by G4S to him to fabricate the July 2, 2021, email which he submitted to the Department (Pet. Post-Trial Mem. at 11-12).

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[15] At trial, petitioner produced an email, dated July 5, 2021, sent by respondent to his employees announcing a schedule change (Pet. Ex. 23 at 161). Petitioner alleged that the schedule change was retaliatory in count 25 of the petition but moved to withdraw this count in its post-trial memorandum (Post-Trial Mem. at 25).

Investigator Abreu's testimony about these emails was limited. Although she recalled that an attorney at G4S told someone at the Department that the July 2, 2021, email that respondent produced was fraudulent because there was a person "on that email" who no longer worked at G4S, she did not speak to the G4S attorney or know the name of the Department attorney to whom the G4S attorney spoke. She did not provide the name of the employee at G4S who was asserted to have no longer worked there in July 2021, or clarify whether this was someone included as an addressee within the initial email (sent on 10:20 a.m.) or on the forwarded email within the email chain (sent at 10:10:12 a.m.).[16] Nor did Investigator Abreu explain whether the G4S attorney had spoken to Mr. Sanders, whether Mr. Sanders had denied writing this email, or whether a search had been conducted of all Mr. Sanders' emails for that date. Petitioner did not call the G4S attorney as a witness, and it is unclear whether he was available to testify. In sum, Investigator Abreu's testimony concerning the statements by the G4S attorney consisted of multiple levels of hearsay and lacked detail. *See Dep't of Correction v. Smith*, OATH Index Nos. 2526/19, 2527/19, 2528/19 & 198/20 at 5 (Nov. 12, 2019), *adopted*, Comm'r Dec. (Aug. 13, 2020) (noting that "we have consistently questioned" the reliability of double hearsay); *Fire Dep't v. Johnson*, OATH Index No. 1147/18 at 7-8 (May 3, 2018), *adopted*, Comm'r Dec. (June 13, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0645 (Nov. 23, 2018) (relevant factors in assessing the reliability of hearsay include the identity of the hearsay declarant, the availability of the declarant to testify, declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay to the party's case, and the magnitude of the administrative burden should it be excluded).

There are, however, substantial similarities between the July 2, 2021, email that respondent sent to the Department (Pet. Ex. 16) and the March 27, 2020, email sent by Mr. Sanders to respondent (Pet. Ex. 17). The similarities include that: both emails were sent at about 10:20 a.m. (Pet. Ex. 16 at 10:20 a.m. and Pet. Ex. 17 at 10:20:39 a.m.); both begin with the same greeting ("Hope all is well with you"); both contain forwarded emails with the same last line, relating to calling Ms. Campmany; and both of the forwarded emails were sent at the exact same time (10:10:12 a.m.) to the same nine people, listed in the same order on the emails. The generic

[16] Although petitioner asserted in its post-trial brief that one of the people included in the forwarded email within the July 2, 2021, email no longer worked for G4S in July 2021 (Pet Post-Trial Mem. at 11), this fact was not part of the record and should not be considered.

greeting and tag line are inconsequential, as it is not surprising that someone might use the same greeting or sign-off in their emails. The fact that the emails were both sent about 10:20 a.m. could be coincidental. It is, however, startling that the forwarded emails within both the March 27, 2020, email and the July 2, 2021, email were sent at the exact same time, down to the second (10:10:12 a.m.) and that the individuals copied on both forwarded emails are the same persons, listed in the same order. It is also unusual that the forwarded email from Mr. Petti within the July 2, 2021, email, despite having a subject line of "City G4S Guard Schedule," does not say anything about a change in guard schedule but only contains one line, advising the security sergeants to call Ms. Campmany with "any questions."

When questioned about the emails, respondent acknowledged that either Investigator Abreu or the Department's attorney had "mentioned" to him that G4S's attorney told the Department that G4S never sent respondent the July 2, 2021, email which he provided to the Department (Tr. 1400-01). He said that he wanted to "object to it," and if there was any "evidence to that in writing," he would "definitely" review it (Tr. 1401). Respondent did not say anything more about the July 2, 2021, email (*Id.*).

The peculiar and unexplained similarities between the forwarded emails in the March 27, 2020, email and the July 2, 2021, email, both as to time sent and individuals copied, enhance the reliability of Investigator Abreu's testimony that G4S told the Department that Mr. Sanders did not send the July 2, 2021, email to respondent. *See Johnson,* OATH 1147/18 at 7-8 (the degree to which hearsay is corroborated should be considered); *Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 at 7-8 (Sept. 18, 2006) (hearsay must be "carefully evaluated" before relied upon). By itself, Investigator Abreu's testimony would be insufficient to meet the Department's burden of proof. *See generally Gray v. Adduci*, 73 N.Y.2d 741, 742 (1988) (hearsay is admissible in administrative proceedings and may form the basis for an administrative determination if "sufficiently relevant and probative"). However, taken as a whole, the evidence is sufficient to find that the Department met its burden of proving respondent violated section 7-109 of the rules by falsifying the July 2, 2021, email that he sent to the Department. In so doing, respondent interfered with the Department's investigation, in violation of section 20-918 of the Administrative Code, because the Department was investigating whether the schedule change instituted by respondent was retaliatory under ESSTA. Count one, paragraph 141(b) is sustained.

Counts 6, 7: maintaining an insufficient written paid policy through emails; Count 12, paragraph 191(g-h) and Count 13: interference and retaliation

Petitioner alleges in counts six and seven that respondents maintained a written paid sick time policy in 2020, set forth in two emails to employees dated July 20, 2020, and December 3, 2020, that failed to meet or exceed the requirements enunciated in ESSTA, in violation of section 7-211(c) of the rules. Petitioner also charges that the July 20, 2020, email constituted interference with the Department's investigation (count 12, paragraph 191(g), (h)), as well as workplace-wide retaliation (Count 13), both in violation of section 20-918 of ESSTA.

Counts 6, 12, 13: the July 20, 2020, email

Respondent's July 20, 2020, email, sent to six employees, has a subject heading, "Schedule Change and Time Off." It states:

> Please be advised that effective today (at Pouch Station only) and because of an ongoing Investigation directed toward Champion Security by NY City; no schedule changes or shift switches between Security Officers will occur. Effective today as well there will be no granting of time off, vacation or leave time etc. Safe or Sick leave time will be allowed only if it is foreseeable (3 Days or more); which will require employees to confirm to there [sic] supervisor in writing using the "Days Off / Vacation Request" form CSS 83 at least 1 week in advance of there [sic] scheduled initial day off. Failure to provide documentation in the form of the CSS 83 may result in employees request being denied. As well foreseeable Safe or Sick leave; employee must provide documentation from a Licensed Medical Provider to his supervisor.

(Pet. Ex. 7 at 113).

Respondent further noted in this email that Security Officer Velez would be the only employee allowed time off because his CSS 83 form had already been granted, but added, "I will not be accepting anymore requests from here on out." Continuing, respondent stated that "[u]p until this point," he had been "extremely fair" about granting all employees paid time off, including paid sick leave. He said he was "a person of strong moral character, conviction, and integrity," that he "expects" the security officers at Pouch "to act in the same manner," and that he believes that Champion would be "exonerated completely" and that "the dishonesty that was brought about to discredit Champion Security by individual(s) for their own personal gain will not be left without some form of accountability." Respondent noted, in bold lettering, "This is a temporary policy which will remain in effect until the completion of the Champion Security Investigation with NY City Consumer Affairs." The letter closed with a directive to employees, in bold and capital letters,

"Please respond back that you have read and understand this policy letter in its entirety" (Pet. Ex. 7 at 113).

The policy set forth in the July 2020 email does not comply with ESSTA. Contrary to the law, the policy permits sick leave only if foreseeable, requires medical documentation regardless of the amount of leave taken, and conditions the use of sick time on an employee's submission of a written request at least one week in advance. *See* Admin Code §§ 20-913(d); 20-914(a); 20-914(c); 6 RCNY §§ 7-205(b), 7-206(a) (permitting employees to take sick leave that is not foreseeable, stating that notice for unforeseeable leave may be required as soon as practicable, and permitting employers to request documentation only for leave in excess of three consecutive workdays). Count six is sustained.

Respondent's July 2020 email also constituted interference with the Department's investigation and retaliation under section 20-918 of ESSTA. This section prohibits "retaliation and interference" against employees and provides that employers may not "take any adverse action against an employee that penalizes" the employee for "exercising" their rights under ESSTA. Admin. Code § 20-918(b). The new leave policy is an "adverse action" under section 20-918(b) of ESSTA, as is respondent's not-so veiled threat that there would be "some form of accountability" for the "dishonesty" of individuals" who attempted to "discredit" Champion. Respondent explicitly linked the new leave policy to the Department's investigation, establishing that it was in retaliation for his employees' exercise of their rights under ESSTA by filing complaints with the Department relating to sick leave. Admin. Code §§ 20-918(b), (f); *Dep't of Consumer Affairs v. Excel Interior Contracting, Inc.*, OATH Index No. 174/18, mem. dec. at 16 (Aug. 2, 2018) (retaliation claim proven where respondents admitted in their written submission that the number of days which employee took off from work, which included sick days, was one of several factors considered in deciding who to lay off from employment); *see also Dep't of Environmental Protection v. Kanvin*, OATH Index No. 062/22 at 4 (Feb. 4, 2022), *adopted*, Comm'r Dec. (July 20, 2022) (retaliation includes actions, such as a threat to sue, which would deter a reasonable employee from cooperating with an investigation). In addition, respondent's statement that the leave policy was "temporary," pending the investigation, can be fairly construed as an attempt to "interfere" with the investigation by discouraging workers from participating with the investigation. Admin. Code § 20-918(a); *see J & O Security Services, Inc.*, OATH 2380/18 at 10.

For these reasons, count 12, paragraph 191(g-h), and count 13 are sustained.

Count 7: the December 3, 2020, email

Count seven alleges that respondent's December 3, 2020, email violated section 7-211(c) of the rules (Pet. Ex. 15 at 140). That email, sent to four employees, advised that Champion is "currently operating under-staffed," using just four security guards covering a "24/7" site, because of the suspension of a security officer. It further states that Mr. Javaid will "back-fill the hours needed to complete the schedule," but that Champion has "no remaining Security Personnel to cover should anyone request vacation or time-off." Respondent noted that he was in the process of trying to hire two more security guards, but that he needed approval from Poletti Security,[17] which might take some time because of COVID-19, and that in the interim, "Since I have to take our business needs into consideration first (like so many other business's during this pandemic); I am therefore unable to approve any Leave of Absence/PTO time off until we get at least one of the two personnel to the site."

Investigator Abreu understood the December 3, 2020, email to prohibit employees from using sick leave, based on its reference to "time off" (Tr. 123-24). Respondent, on the other hand, testified that he had to "cancel vacation leaves" because he was required to have five full-time employees and one-part time employee, and the combination of COVID-19 and the loss of a "hostile" employee "left the company shorthanded" (Tr. 1365-66).[18]

Petitioner, which has the burden of proof, did not establish that the December 3, 2020, email restricted or prohibited the use of sick or safe leave, as opposed to other paid time off. The December 3, 2020, email does not mention sick leave and respondent maintained that he had to cancel "vacation leaves." Moreover, by December 2020, respondent had amended his employee handbook policies to include a specific policy on sick leave, thus treating it differently than other sorts of leave.

Count seven was not proven and should be dismissed.

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[17] Respondent testified that Poletti Security provides oversight of security for all of the NYPA sites, and that every time he hires a new employee, they have to be cleared by Poletti Security, which reports directly to NYPA (Tr. 1374-75).

[18] As discussed below, Mr. Colón was placed on an "indefinite suspension" on November 30, 2020.

Count 9: failure to provide statement of amount of sick time accrued

Petitioner alleges that respondents violated section 20-919(c) since September 30, 2020, (the effective date of the law as amended),[19] by failing to provide employees with a pay statement or other written documentation each pay period containing the amount of sick time accrued during the pay period and the employee's total balance of accrued sick time.

Count nine is sustained as to September 30, 2020, through June 27, 2021, only. Investigator Abreu provided unequivocal and unrebutted testimony that respondent did not produce any payroll records before 2021 showing that employees were notified of how much sick leave they had available in each pay period (Tr. 94). Mr. Williams and Mr. Mazzella also testified that they were not provided with information about sick time accruals before the investigation began, and respondent admitted that he did not keep track of his employees' accrual of sick time and that none of his payroll records before July 2020 mentioned sick leave (Mazzella: Tr. 397; Williams: Tr. 1005; Sciarabba: Tr. 1381). This is sufficient to establish that respondent did not provide employees with payroll records showing sick time accruals in 2020.

As to 2021, however, Investigator Abreu testified that she received records from respondent showing that employees were notified of the amount of sick time they had available in each pay period (Tr. 94). She was not asked about what form these records took or when in 2021 they were provided to employees. Petitioner did not introduce payroll records for 2021, apart from three paystubs: two for Mr. Mazzella for pay periods ending February 14, 2021, and June 27, 2021 (Pet. Ex. 32 at 215; Pet. Ex. 25 at 170), and one for Mr. Williams, for the pay period ending May 9, 2021 (Pet. Ex. 20 at 153). As relates to the dates shown, these paystubs contradict Investigator Abreu's testimony: although they list sick time used for the pay period and year-to-date, they do not indicate the amount of sick time accrued during the pay period or the total balance of accrued sick time. Consistent with the paystubs, Mr. Mazzella testified that he was not given information in February 2021 about how much sick time he had earned that year or how much sick time he had available to use going forward (Tr. 507). It is fair to infer, based on these paystubs from two different employees in three separate months, that respondents did not provide employees with pay stubs showing accrued sick time through June 27, 2021, the last date of the paystubs.

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[19] *See* NYC Local Law 97 of 2020 (amending section 20-919(c) of the Administrative Code to take effect on September 30, 2020).

On this record, therefore, petitioner has established that respondents did not provide information on employee paystubs relating to the amount of sick time accrued during the pay period and total accrued sick time balances from September 30, 2020, through June 27, 2021. However, because Investigator Abreu testified that petitioner produced payroll records for 2021 showing sick time accrued, and the record does not contain any evidence contradicting her testimony relating to dates after June 27, 2021, petitioner did not establish that respondents failed to provide pay statements or other documentation showing sick leave accruals after June 27, 2021.

Accordingly, count nine is sustained in part, relating to respondent's failure from September 30, 2020, through June 27, 2021, to provide employees with pay statements or other documentation showing sick time accrued.

Count 12, paragraph 191(a-e, i-k): interference with the Department's investigation; Count 14, paragraph 202(a-d): retaliation; Count 16, paragraph 213(a-f): retaliation; Count 20, paragraph 232(a-c) retaliation

The allegations in the cited sections of count 12 pertain to: requiring employees to return copies of a non-compliant sick leave policy; coaching Mr. Williams, Mr. Mazzella, and Mr. Colón about how they would respond if interviewed by the Department; telling Mr. Williams and Mr. Mazzella that complaining employees would have their employment terminated; issuing Mr. Colón and Mr. Mazzella written counseling notices or write-ups on July 30, 2020, and July 31, 2020; and threatening to fire Mr. Colón for not signing his counseling notice. The allegations in the cited sections of counts 14, 16, and 20 overlap with the allegations in count 12 as they allege retaliatory behavior against Mr. Mazzella, Mr. Colón, and Mr. Williams, including coaching and other statements made during telephone calls, and written counseling notices issued against Mr. Mazzella and Mr. Colón.

Count 12, paragraph 191(i): returning non-compliant leave policy

Count 12, paragraph 191(i) charges that respondents interfered with the Department's investigation by requiring that employees return copies of a non-compliant leave policy "in order to prevent the non-compliant safe/sick time policy from reaching the Department." As discussed, respondent amended his employee handbook in July 2020 to add a section on sick leave in conformance with ESSTA. At that time, the employees had to return the older handbook and sign for the newer one. However, this was consistent with respondent's practice, articulated in his response to the Department and unrebutted, that the handbook is updated yearly, and the new

version is distributed to supersede the older one. Mr. Mazzella confirmed that on several occasions in 2020 and 2021, respondent gave employees a new handbook and told them to return the old handbook (Tr. 633-34). Given this pre-existing practice, the evidence is too equivocal to support the charge that respondent's actions were intended to prevent the former non-compliant leave policy from reaching the Department. This charge was not proven and should be dismissed.

Count 12, paragraph 191(a-e); Count 14, paragraph 202(a-d); Count 16, paragraph 213(a-e); Count 20, paragraph 232(a): coaching and threats in phone calls

These charges allege that respondent made threatening statements and attempted to coach Mr. Williams, Mr. Mazzella, and Mr. Colón about what they would say to the Department's investigator.

Mr. Williams, Mr. Mazzella, and Mr. Colón all testified that respondent made these statements to them in a series of telephone calls soon after the investigation began.

Mr. Williams testified that after the investigation began, he had two or three telephone conversations with respondent in which respondent said that he was being investigated by the Department, that there was a telephone number that he was going to call to find out who filed the complaint, and that, if he learned who had done so, he was "going to . . . punch them in the face and put them in a headlock and . . . [and] fire their ass" (Tr. 1011-13). Respondent "threw out" the names of Mr. Colón and Mr. Mazzella as employees who might have contacted the Department, but Mr. Williams did not really focus on that, because respondent was very "upset" and he was "trying to speak to [respondent] to try and calm him down" (Tr. 1127). Respondent also told Mr. Williams that if contacted by the Department, he should "[b]asically tell them that everything is okay and there's nothing wrong" (Tr. 1012).

Mr. Mazzella, similarly, recalled getting a telephone call one Friday evening from respondent in which respondent said that he was being investigated and that while he did not know who called the Department, when he found out, he was "going to slap the fucking shit out of them and choke them, and then he's going to can them" (Tr. 412). Respondent also said that he thought that either Mr. Mazzella or Mr. Colón had filed the complaint with the Department (Tr. 414). Within two weeks, respondent called Mr. Mazzella again, at about 11:00 p.m. In this second call, respondent asked Mr. Mazzella what he would say if the Department investigator asked if he got paid sick time and paid vacation. Mr. Mazzella replied, "no," and then respondent "went absolutely ballistic and . . . hung up the phone" (Tr. 413-14). Mr. Mazzella sent respondent a text

message, dated July 15, 2020, referring to respondent hanging up on him "a few time[s]," and asking respondent to call him (Pet. Ex. 28 at 187).

Mr. Colón gave similar testimony, relating to one telephone call that respondent made to him. He said that respondent called him at night to ask what he would say if the Department contacted him, that he told respondent that the conversation was making him "uncomfortable" and that he did not want to talk about it, and that respondent "abruptly" hung up on him (Tr. 742, 855). He was not sure when this call occurred, saying it was "maybe a month after" respondent sent the July 20, 2020, email restricting leave (Tr. 741-42).

Respondent admitted making telephone calls to Mr. Williams, Mr. Colón, and Mr. Mazzella (Tr. 1404). He testified, however, that the "only questions" he asked them were whether he had paid for their sick leave "whenever" they needed time off. He thought this was a way to find out who had filed the complaint, because if an employee said he did not get paid sick leave, that would mean he would have filed the complaint (*Id.*). Respondent admitted that he was upset and "disappointed" that his workers had filed a complaint, because he had done "a lot" for them (Tr. 1379) and that that he would "have liked" to know who filed the complaint even though it was not his "priority" (Tr. 1393). Respondent denied telling his workers that they might get a call from the Department, asking them what they would say if contacted by the Department, or telling Mr. Williams there was a number he could call to find out who filed a complaint (Tr. 1394-95). Respondent testified, however, that Mr. Williams had brought up "FOIL" (presumably the Freedom of Information Law) and that he had told Mr. Williams that he did not think that "you can get anything out of a FOIL pertaining to an investigation by a City agency" (Tr. 1407). Respondent also denied telling his employees to lie, asserting that he knew the employees were paid sick leave and that he had "no reason" to have the employees lie by saying they were not paid sick leave (Tr. 1404). Respondent did not specifically address the allegation that he made threats of violence.

I credited Mr. Williams, Mr. Colón, and Mr. Mazzella about these telephone calls over respondent's denial that he tried to coach his employees about what to say to the Department. The employee witnesses were emphatic that respondent had called them — multiple times in the case of Mr. Mazzella and Mr. Williams — for this very reason. Mr. Mazzella and Mr. Williams corroborated each other's testimony that respondent said he would find out who made the complaint, physically assault them, and fire them. Their descriptions of the language used by

respondent was similar: respondent threatened to "punch" employees or put them in a headlock (according to Mr. Williams), and to "slap and choke" them (according to Mr. Mazzella), and then fire them. Mr. Mazzella's testimony that respondent hung up on him during one of these phone calls was corroborated by his July 15, 2020, text message to respondent.

By contrast, respondent's testimony that he simply asked his employees in these telephone conversations if they had gotten sick leave as a way to determine who had made the complaint to the Department was implausible. Respondent did not deny calling his employees multiple times and at night. It does not follow that he would have done so if his conversations with them were as limited as he claimed, or if finding out who made the complaint was not a "priority," as he also claimed. In addition, respondent acknowledged being upset and disappointed with his employees, which is consistent with his employees' testimony that he expressed his displeasure in multiple phone calls. Further, while respondent's threats of physical force appear purely hyperbolic, these comments evince a retaliatory intent which is consistent with the proven evidence of retaliation, including respondent's July 30, 2020, and July 31, 2020, write-ups of Mr. Colón and Mr. Mazzella, in which respondent referenced these telephone conversations and said Mr. Colón and Mr. Mazzella were dishonest by saying they never received paid time off (Pet. Ex. 8, at 116-17; Pet. Ex. 9 at 119-120).

I find, as alleged, that respondent interfered with the Department's investigation and took retaliatory adverse actions against his employees, in violation of section 20-918 of the Administrative Code, by making telephone calls to Mr. Mazzella, Mr. Colón, and Mr. Williams in which he (1) coached or attempted to coach them on how they would reply to questions from the Department; (2) commented to Mr. Mazzella and Mr. Williams that the complaining workers would be fired; (3) told Mr. Mazzella that he would physically assault the complaining worker; and (4) hung up the telephone on Mr. Mazzella after the latter said he would tell the Department investigator that he was not paid for sick time. Accordingly, count 12, paragraph 191(a-e), count 14, paragraph 202(b), count 16, paragraph 213(a-d), and count 20, paragraph 232(a), are sustained.

Count 16, paragraph 213(e), which alleges that respondent told Mr. Mazzella that he believed Mr. Mazzella and Mr. Colón "threw him under the bus," is not sustained. Although Mr. Mazzella testified that respondent told him that he thought he and Mr. Colón had complained to the Department, petitioner did not prove that respondent used the particular language which it charged him with using.

Count 14, paragraphs 202 (a), (c), and (d), is not sustained, as Mr. Williams' testimony falls short of establishing that respondent demanded to know from him who had filed the complaint with the Department or that he threatened to use FOIL to find out that person's name. While I credited Mr. Williams' testimony that respondent said he could call a telephone number to find out who had filed the complaint, and while respondent said that Mr. Williams had brought up FOIL, the testimony falls short of establishing that respondent threatened to use FOIL, as charged.[20] Moreover, Mr. Williams did not testify that respondent hung up on a call when Mr. Williams disagreed about respondents' paying sick time, as alleged in paragraph 202(d).

Count 12, paragraph 191(j-k); Count 16, paragraph 213(f); Count 20, paragraph 232(b-c): write-ups against Mr. Colón and Mr. Mazzella on July 30, 2020, and July 31, 2020

Petitioner alleges that respondents further violated section 20-918 of ESSTA by issuing Mr. Colón and Mr. Mazzella disciplinary write-ups for their "refusal to lie and concede that Respondents provided paid safe/sick time" (count 12, paragraph 191(j-k), alleging interference with the investigation), or their "refusal to agree [with respondent] that [they were] paid for sick time used during . . . employment" (count 16, paragraph 213(f) and count 20, paragraph 232(b), alleging retaliation).

The counseling notice to Mr. Colón, dated July 30, 2020, signed by respondent, is captioned, "Written Counseling Notice of Unacceptable Behavior, Specifically: Dishonesty" (Pet. Ex. 8 at 116-17). The notice states that respondent met with Mr. Colón on July 30 to discuss the issues set forth in the notice. Respondent cited several examples of Mr. Colón's "dishonesty," including: never responding to a policy email sent the week before; failing to mention on his job application to Champion that he had an outstanding tax lien; and, "[j]ust recently," engaging in a "verbal confrontation" by telephone in which he refused "to verify" being paid by Champion for any personal time or vacation time off (Pet. Ex. 8 at 116). The notice does not specify what policy email Mr. Colón failed to respond to, although the email that respondent sent 10 days earlier, announcing the restricted leave policy, directed employees to confirm that they had read and

[20] Petitioner's post-trial motion to conform the charge to the proof by charging respondent with threatening to take action to find out who filed the complaint was denied (ALJ Ex. 6). The allegations of retaliation against respondent were very specific. Permitting a post-trial amendment under these circumstances would not provide adequate notice to respondent of the particular allegations against him, thus hampering his ability to defend against those charges. *See, e.g., Block v. Ambach,* 73 N.Y.2d 323, 333 (1989) (charges in administrative pleadings must "apprise the party whose rights are being determined of the charges against him . . . to allow for the preparation of an adequate defense"); *809 Collision Inc.*, OATH 578/18 at 22 (Apr. 20, 2018) (denying post-trial motion to amend where there was prejudice to respondent).

understood the policy. Regarding the employment application, respondent stated that he received an Income Execution Notice in August 2019 stating that Mr. Colón had an outstanding tax debt. Regarding the "verbal confrontation," respondent wrote that Mr. Colón's refusal to "admit" that Champion had paid him for two vacations and "numerous" days off appeared to be "deceitful dishonest behavior." He noted, "None of the above mentioned behavior . . . will be tolerated," and that if the notice had "no effect on [Mr. Colón's] behavioral improvement, we will then have no choice but to administer termination processing" (Pet. Ex. 8 at 116-17).

According to handwritten notations on the notice, Mr. Colón refused to sign the notice, as did Mr. Williams, who was present at the meeting as a witness. Mr. Colón testified that respondent became "angry" when both he and Mr. Williams refused to sign the write-up (Tr. 745). Respondent began cursing and stomping on the floor and told Mr. Colón and Mr. Williams that they had "no integrity" (Tr. 744-45). Respondent also said that "he didn't care if we [Mr. Colón and Mr. Williams] were plotting against him and . . . he was going to get us fired" (Tr. 744).

The counseling notice to Mr. Mazzella, dated July 31, 2020, signed by respondent, is captioned, "Written Counseling Notice for History of Unacceptable Behavior, Specifically: Insubordination/Dishonesty/Violation of the Uniform Standards & Policy" (Pet. Ex. 9 at 119-21). The notice indicates that respondent met with Mr. Mazzella that day to discuss the issues in the notice. As examples of "insubordination," respondent wrote that "[o]n numerous occasions in the past 4 years," Mr. Mazzella had been "outright disobedient and disrespectful," including "recently during phone conversations" being "argumentative, opinionated, and threatening, tape-recording conversations, and hanging up in the middle of conversations." He also noted that Mr. Mazzella had failed to respond to "general policy" emails sent the week before. Regarding "dishonesty," respondent wrote that over the past four years, Mr. Mazzella had "exhibited a pattern of dishonesty." Respondent highlighted July 31, 2018, when Mr. Mazzella had been absent from an overnight post, had not replied to efforts to contact him, and eventually contacted respondent saying he had been visiting family out of state, had an emergency, and did not have his phone. According to respondent, this was not true as Mr. Mazzella had actually been arrested and jailed (*Id.*).

As a further instance of insubordination, respondent noted, "As well recently I had a verbal confrontation with you in a telephone conversation when I asked you to verify ever being paid by Champion . . . for any personal time or vacation time off; to which you denied ever having any

leaves of absences during that timeframe or for that matter ever getting paid for such." Respondent wrote that this was false because Champion had paid Mr. Mazzella for at least two vacations as well as "numerous" days off. Finally, relating to the uniform policy violation, respondent wrote that Mr. Mazzella had worn improper footwear (not the required steel-toed boots) as well as prohibited jewelry (earrings), despite being warned several times about each issue. Respondent stated that Mr. Mazzella's "integrity came into question," because while he told respondent that G4S, which was providing the boots, had not given him a pair, he omitted that G4S did not have his size when they were handing out the boots and had told him to follow up and come back. Respondent warned that if the counseling notice had "no effect" on Mr. Mazzella's "behavioral improvement," he would have "no choice but to administer termination processing" (Pet. Ex. 9). According to handwritten notations on the notice, Mr. Mazzella refused to sign the notice, and Mr. Velez, who was present as a witness, also declined to sign (Pet. Ex. 9).

Consistent with the write-ups, respondent testified that Mr. Mazzella had worn earrings when respondent first took over the job (Tr. 1354) and that he had been arrested and then "lied about what happened" (Tr. 1370-71), that Mr. Colón had "lied on his job application" (Tr. 1371), that both had failed to communicate with him over an almost three-week period as directed starting in early July 2020 (Tr. 1368, 1405), and that both had lied about not getting paid leave because they were angry at not being reimbursed for sick pay from G4S (Tr. 1363-64).

The notices to Mr. Mazzella and Mr. Colón were issued one day apart at the end of July 2020, the same month that respondent was notified that the Department was investigating whether he provided paid sick time. The notices are similar in that both reference telephone calls with respondent in which respondent claimed that Mr. Mazzella and Mr. Colón refused to acknowledge that they had been paid for sick time. The notices are also similar in that both contain a litany of other allegations, going back years. There is truth to some of the allegations. For example, Mr. Colón stated in his employment application to Champion that he had no outstanding judgments or liens against him (Resp. Ex. H32). This was not true. Mr. Colón admitted that he owed back taxes and that money was being deducted from his G4S paycheck for the taxes (Tr. 872-73). Similarly, while Mr. Mazzella denied telling respondent that he had a personal problem during an out-of-state family function and was unable to contact respondent because he had left his cell phone at home, there is no dispute that Mr. Mazzella was arrested on July 31, 2018, missed two days of work, and finally got in touch with respondent on the third day (Mazzella: Tr. 683-84;

Stipulation: Tr. 522; Resp. Ex. G58). Regarding some of the other alleged violations, Mr. Mazzella denied wearing an earring in his ear and said that it was not his fault that he did not wear the required safety boots because G4S did not have them in his size (Tr. 680-81).

Despite the multiple allegations in the write-ups, they are expressly predicated, at least in part, by the recent telephone conversations that respondent had with each employee. Respondent wrote that Mr. Mazzella and Mr. Colón were dishonest during these telephone calls because they refused to acknowledge being paid for personal time or vacation time. The employees, however, clearly and consistently testified that the phone conversations involved respondent attempting to coach them about what they would tell the Department investigators if contacted, hanging up on Mr. Mazzella when he told respondent that he would tell the investigator he was not paid sick leave, and hanging up on Mr. Colón when he said he was uncomfortable discussing what to say to the investigator. Their testimony was not only internally consistent, but consistent with the type of telephone conversations described by each other and by Mr. Williams. Accordingly, I find that respondent issued the disciplinary write-ups against Mr. Mazzella and Mr. Colón at the end of July 2020 because of their refusal to be coached about what they would say to a Department investigator.

The fact that respondent included other incidents of alleged misconduct in the write-ups is not dispositive, because retaliation under ESSTA occurs where "a protected activity was a motivating factor for an adverse action," even when "other factors" may have "motivated the adverse action." Admin. Code § 20-918(g); 6 RCNY § 7-108(e); *see, e.g.*, *Brewer, Attorneys & Counselors*, OATH 514/19 at 8 (July 9, 2019) (rejecting employer's contention that employee's termination was based on poor performance and concluding, "Even if [the employer] was unhappy with the [employee], someone disliked the tone of his emails, or he had not finished a document, that is not the controlling inquiry. In order to prove retaliation, petitioner only needed to show that [the employer's] use or attempted use of his sick time was one of the motivating factors for his firing.").

In addition, the other alleged employee misconduct was so remote in time — Mr. Colón was hired in 2016 and Mr. Mazzella was arrested in 2018 — that the inclusion of these incidents in the counseling notices appears to be pretextual. Indeed, respondent had never written up Mr. Colón or Mr. Mazzella before, although he insisted that he had verbally counseled all of his security officers before issuing formal write-ups (Abreu: Tr. 114; Colón: Tr. 745, 757-58; Sciarabba: Tr. 1388-89). Petitioner established that instead of misconduct dating to 2016 and 2018, the real reason for the July 2020 write-ups was respondent's recent telephone conversations with the employees in which the employees

rebuffed his attempts to coach them about what they should say to the Department's investigator. *See, e.g.*, *Krebaum v. Capitol One, N.A.*, 138 A.D.3d 528, 528-29 (1st Dep't 2016) (holding trial court erred in dismissing retaliation claim where "temporal proximity of plaintiff's complaint and the termination of his employment one month later indirectly shows the requisite causal connection").

In sum, I find that respondents violated section 20-918 by issuing Mr. Colón and Mr. Mazzella disciplinary write-ups on July 30, 2020, and July 31, 2020, respectively, based upon Mr. Colón's refusal to engage in a conversation about what he would say to a Department investigator as well as Mr. Mazzella's refusal to tell a Department investigator that he was paid sick leave. These disciplinary write-ups were retaliatory and designed to interfere with the Department's investigation. Respondent's statement that he did not care that Mr. Colón and Mr. Williams were plotting against him and he would get them both fired is an additional act of retaliation, separate from the write-up of Mr. Colón.

Count 12, paragraph 191(j) and (k), count 16, paragraph 213(f) and count 20, paragraph 232(b) and 232(c), are sustained.

Count 14, paragraph 202(e-g): retaliation against Mr. Williams

Petitioner alleges that respondent: wrote up and threatened to fire Mr. Williams for failing to sign the July 30, 2020 write-up of Mr. Colón (paragraph 202(f-g)); and threatened to fire Mr. Williams if he told G4S that respondents did not pay sick time (paragraph 202(e)).

Count 14, paragraph 202(f-g): refusal to sign July 30, 2020, write-up

As noted, Mr. Williams refused to sign respondent's July 30, 2020, counseling notice of Mr. Colón, as respondent requested. After Mr. Williams and Mr. Colón refused to sign, respondent began cursing and stomping on the floor and told Mr. Colón and Mr. Williams that they had "no integrity" and that he did not care if they were plotting against him and was going "to get [them] fired" (Tr. 744-45).

Mr. Williams was written up two days later, on August 1, 2020 (Pet. Ex. 10 at 123). The counseling notice, signed by respondent, was captioned "Written Counseling Notice for History of Unacceptable Behavior: Specifically: Violation of the Uniform Standards & Policy/Insubordination" (Pet. Ex. 10 at 123-24). The notice did not allege anything related to Mr. Williams' refusal to sign Mr. Colón's counseling notice. Instead, it raised two issues: (1) Mr. Williams had failed to wear his license and site access badge around his neck "[s]everal times

in the past," and most recently on respondent's visit to the site on July 30, 2020; and (2) Mr. Williams had failed to acknowledge receipt of "general policy" emails sent by respondent to all employees, as requested in those emails. Respondent warned that a violation of the uniform standards "as a consistent offender," especially after three different verbal and written warnings, was considered "a form of insubordination" and could "be cause for . . . dismissal." Respondent also characterized Mr. Williams' alleged failure to respond to the policy emails as "defiance" (Pet. Ex. 10 at 123). The notice warned that if the counseling notification had "no effect" on Mr. Williams' "behavioral improvement," respondent would have "no choice but to administer termination processing" (Pet. Ex. 10 at 124).

Mr. Williams testified that before this notice, he had never been written up (Tr. 1019). When respondent gave him the notice, he asked respondent why he was being written up and respondent said that he was being "insubordinate" by not wearing his uniform patch on his uniform. Mr. Williams replied that respondent had told him not to wear the uniform patch because respondent was going to replace it (Tr. 1020, 1045). He did not sign his counseling notice because he did not think that he had done anything wrong (Tr. 1020). Instead, he believed that respondent wrote him up because he did not sign Mr. Colón's write-up as a witness as respondent requested (*Id.*).

Respondent testified that he wrote up Mr. Williams because he failed to wear his access badge around his neck (Tr. 1391).

I did not credit respondent's testimony that he wrote up Mr. Williams because Mr. Williams was not wearing his license and access badge around his neck. Respondent issued the counseling notice only two days after Mr. Williams refused to sign Mr. Colón's counseling notice. Mr. Williams had never been written up before and he testified credibly that although respondent said the write-up was for not wearing a uniform patch, respondent previously told him that he did not have to wear the patch because it was being replaced. This is strong evidence that the claim involving the uniform violation was a pretext. *Brewer, Attorneys & Counselors,* OATH 514/19 at 9 (finding respondents' claim that employee was fired because of late assignments and not being a "good fit" to be a pretext where supervisor offered unrebutted testimony that employee was an excellent worker).

In addition, I credited Mr. Colón's detailed testimony that respondent became very angry after he and Mr. Williams refused to sign the July 30 write-up: that he cursed, stomped his feet,

said that both men lacked integrity and were plotting against him, and threatened to have them fired. The closeness in time between respondent's vehement reaction to Mr. Williams' refusal to sign the July 30 write-up and Mr. Williams' own write-up two days later, coupled with Mr. Williams' credible testimony about the uniform patch, establishes that the alleged uniform violation was pretextual and that the motivating factor was instead Mr. Williams' failure to sign Mr. Colón's write-up as requested. *See Krebaum*, 138 A.D.3d at 528-29; *Mr. Coco 162 Inc.*, OATH 1672/20 at 12 (finding that where two days elapsed between a request for sick leave and the employer's text message terminating her employment, the "immediate temporal proximity" established the causal connection between the two); *AQP General Servs. Corp.*, OATH 236/19 at 14-15 (finding the temporal proximity between complainant's "use of sick leave and the termination of her employment is strong evidence of a causal connection between the two").

The remaining issue is whether Mr. Williams' write-up was retaliatory under ESSTA. While somewhat attenuated, I find that Mr. Williams' write-up was related to his refusal to participate in a disciplinary process against Mr. Colón that was integrally linked to Mr. Colón's exercise of his rights under ESSTA. Mr. Colón's counseling notice was retaliatory under section 20-918 of ESSTA because it was based at least in part on Mr. Colón refusing to talk to respondent about what he would tell the Department investigator about sick leave. Mr. Colón did not sign the counseling notice, and neither did Mr. Williams. Mr. Williams did not testify about what, if anything, he told respondent about why he was not signing the counseling notice. Nonetheless, Mr. Williams' refusal to sign the counseling notice was implicitly a refusal to participate in a disciplinary process against Mr. Colón that was based upon Mr. Colón's exercise of a protected right. Respondent's immediate outburst, in which he threatened to fire Mr. Williams because he and Mr. Colón lacked "integrity" and were "plotting" against him, was also linked to Mr. Williams' refusal to participate in a retaliatory disciplinary process involving Mr. Colón. Therefore, petitioner established that respondent's threat to fire Mr. Williams and issuance of a counseling notice against him were adverse actions taken in retaliation for Mr. Williams' exercise of a protected right under ESSTA.

Count 14, paragraph 202(f) and (g), are sustained.

Count 14, paragraph 202(e): G4S

This charge alleges that respondent threatened to fire Mr. Williams if he told G4S that respondents did not pay sick time. Mr. Williams testified that he talked to individuals at G4S about

his issues with sick leave at Champion because G4S was the prime contractor. The people at G4S, whom he did not name, told him he should speak to respondent about respondent's sick leave policy. Mr. Williams then told respondent that he had spoken to G4S about his issues with sick leave (Tr. 1013-14). Respondent became "upset" and said that he did not want Mr. Williams to talk to G4S (Tr. 1014). Mr. Williams replied that he had to speak to G4S because he worked for them as well. Respondent told Mr. Williams that Mr. Williams worked for him full-time and that if Mr. Williams did not want to work for him anymore, he could "go ahead and work with G4S" (*Id.*). Mr. Williams replied, "no" (*Id.*). He told respondent that he had started with G4S in the beginning, began working for respondents when they got the subcontract, and would continue to work for respondents on a full-time basis and for G4S on a part-time basis (*Id.*). Mr. Williams was not asked any follow-up questions about this conversation and did not comment on what, if anything, respondent said when he asserted that he would continue to work for him.

Asked if he did not want Mr. Williams to talk to G4S about sick leave, respondent said that there was a "chain of command" and that employees should talk to him before they talk to G4S, because otherwise that would be "jump[ing] . . . the chain of command." (Tr. 1395). Respondent acknowledged that he told the security officers, "in other issues, not just that, to not go over [his] head and talk to G4S" without talking to him first (*Id.*). I credited Mr. Williams' testimony, corroborated in part by respondent's testimony that respondent disapproved of the security officers speaking to G4S without talking to him first, that respondent became upset when he mentioned his conversation with G4S and told Mr. Williams that he did not want him to speak to G4S. I also credited Mr. Williams' testimony that after he explained that he had to speak to G4S because he also worked for them, respondent replied that Mr. Williams could work for G4S if he did not want to work for respondent. Respondent's statement was not an explicit threat to fire Mr. Williams if Mr. Williams complained to G4S about his sick leave policies. However, given the context, respondent's statement that respondent could work for G4S instead of respondent constitutes an implicit threat of adverse employment consequences, including termination of employment, if respondent continued to speak to G4S about sick leave. *See* Admin. Code § 20-918(b) (prohibiting adverse employment actions that are "reasonably likely to deter an employee from . . . exercising or attempting to exercise rights under this chapter or interfere with an employee's exercise of rights under this chapter and implementing rules").

This charge is sustained.

Count 16, paragraphs 213(g-h): retaliation against Mr. Mazzella; count 18: requiring Mr. Mazzella to find a replacement worker

Count 16 alleges that respondent retaliated against Mr. Mazzella in violation of section 20-918 of ESSTA by telling Mr. Mazzella that he "better watch" how he addressed respondent when Mr. Mazzella was talking to him about his sick leave rights (paragraph 213(g)) and refusing to grant and discuss Mr. Mazzella's vacation request based upon his perceived involvement in the Department's investigation (paragraph 213(h)). Count 18, which alleges that respondent required Mr. Mazzella to find a replacement worker for October 12, 2020, involves underlying facts which overlap with those relating to count 16, paragraph 213(g).

Count 16, paragraph 213(g); count 18

Count 16, paragraph 213(g) and count 18 involve a series of text messages between respondent and Mr. Mazzella on Sunday, October 11, 2020, starting at 4:41 p.m. (Pet. Ex. 29 at 188-198). Mr. Mazzella, who was scheduled to work an eight-hour shift that evening beginning at midnight, alerted respondent that he was not feeling well and might have to take a sick day on October 12. Respondent asked who he was "replacing" and if he had COVID-19 symptoms (*Id.* at 189). Mr. Mazzella said he did not have these symptoms and asked what respondent meant. Respondent asked why Mr. Mazzella had not told him "earlier" and said that he "need[ed] to know" what his symptoms were (*Id.* at 190). Mr. Mazzella reiterated that he was not feeling well and that his shift started at midnight, about seven hours later, which provided "more than enough" notice to respondent. Respondent replied that this was not enough time to get someone to replace Mr. Mazzella and that because Mr. Mazzella did not work the previous night, he "had the whole damn day to contact me about this" (*Id.* at 192). Mr. Mazzella responded that he had not planned on not feeling well, that he was "calling out sick," and that it was not his responsibility "to find coverage" for his shift (*Id.* at 194). Respondent replied that "[that] has nothing to do with this conversation," and that it was irresponsible of Mr. Mazzella to not have informed him earlier (*Id.*). Mr. Mazzella repeated that he had not planned on getting sick and that "calling out sick" more than seven hours before his shift was "more than enough time" to let respondent know (*Id.* at 196). At 5:13 p.m., respondent sent a text message stating that Mr. Mazzella had not told him his symptoms, had waited until late afternoon to inform him, and had said this was "more than enough time" to find a replacement worker (*Id.* at 197). Completing the text, respondent wrote, "And then

you give me some bullcrap line that it's not your responsibility to find coverage? You better watch how you address me in these emails Mike . . ." (*Id.*).

After receiving this text, Mr. Mazzella replied that he was responding in a "professional manner," he had given enough notice, he did not have COVID-19 symptoms, and he was not "legally required" to tell respondent his symptoms or provide documentation unless he was out of work for more than three days in a row. Respondent replied with a text advising Mr. Mazzella to "get his facts straight on COVID-19 and unforeseen sick leave." The last text in the exhibit, sent at 11:47 a.m. on October 12, 2020, is from Mr. Mazzella, stating that he was feeling better, had just taken a COVID-19 test, and would be back that evening for his regular shift (*Id.* at 201).

Count 16, paragraph 213(g), alleging respondent retaliated against Mr. Mazzella by virtue of the language in his text message of October 11, 2020, is sustained. Respondent told Mr. Mazzella that he had "better watch how you address me in these emails," after complaining that Mr. Mazzella had not told him his symptoms, had waited until late afternoon to call in sick, and had said that it was not his responsibility to find a replacement worker. Mr. Mazzella's statements directly related to his rights under ESSTA, and therefore, respondent's "better watch" comment constituted an attempt to intimidate Mr. Mazzella from exercising his rights under ESSTA.

Count 18, alleging that respondent required Mr. Mazzella to find a replacement worker for October 12, 2020, is also sustained. Employers are prohibited under section 20-915 of ESSTA from requiring an employee to find a replacement employee to cover the hours during which the employee is absent because of the use of sick time. The text messages from October 11, 2020, show that respondent asked Mr. Mazzella who he was "replacing" and then complained when Mr. Mazzella said that it was not his duty to find a replacement worker for his shift.

Although it appears from Mr. Mazzella's timesheet (Resp. Ex. G21), that he was paid for sick leave despite his refusal to find a replacement worker, the text messages show that respondent asked Mr. Mazzella who he was replacing and insisted that it was his responsibility to find coverage when he was out sick. This violates section 20-915 of ESSTA, which prohibits an employer from requiring employees to find a replacement worker when they are out sick.

Count 16, paragraph 213(h)

Petitioner alleges that respondents refused to grant and discuss Mr. Mazzella's vacation request based upon his perceived involvement in the Department's investigation, in violation of section 20-918 of ESSTA.

On October 6, 2020, Mr. Mazzella submitted Form 84 ("Days Off/Vacation Request") to request five days' vacation from Monday, December 28, through Friday, January 1 (Pet. Ex. 30 at 203). That same day, at 7:11 a.m., respondent emailed Mr. Mazzella that he was "not approving any vacations at this time" (*Id.*). In a text message on November 3, 2020, as well as an email sent at 1:38 a.m. on November 4, 2020, Mr. Mazzella again requested the days off (*Id.* at 204). Respondent replied in an email on November 4, 2020, at 9:32 a.m., that he was "not approving any PTO/Vacations this early and at this time. I will make a decision taking into consideration our Company Policy's and business needs; within the next two weeks, which is well before the dates (at least 30-day notification requirement for days employees are requesting) you are submitting for" (*Id.* at 204). At 10:16 a.m. on November 4, Mr. Mazzella responded that if his vacation request was too far in advance, "[w]hat week can I take it before then?" (*Id.*).

Less than half an hour later, at 11:07 a.m., Mr. Mazzella sent another email to respondent (Pet. Ex. 30 at 205). In that email he referenced respondent's July 20, 2020, email in which respondent stated that "because of" the investigation, "there will be no granting of time off, vacation or leave time." He said the Department had said that this email was "illegal" and that respondent had said in his new employee handbook that employees were entitled to 40 hours or five days of vacation per year. He noted that respondent had written him up after the investigation started (*Id.*). Mr. Mazzella wrote that respondent had "denied" his vacation request which he submitted on October 6, 2020, and since then had not answered his calls or texts. He felt respondent was ignoring his vacation request because respondent had told him several times that he thought he had "something to do" with the investigation (*Id.*).

Less than an hour later, at 11:55 a.m., respondent replied that he was not going to discuss Mr. Mazzella's vacation request anymore and asked him to stop sending emails. He said that his last email to Mr. Mazzella "explains my position for now" and that there was "no need" for Mr. Mazzella to send him emails discussing what occurred in the past. He warned that if Mr. Mazzella "continued to persist," he would have "no choice" but to view that as "insubordination" or "harassment" (Pet. Ex. 30 at 206).

Mr. Mazzella testified that he re-submitted his vacation request several times, without changing the date, because he still wanted to take the same week off (Tr. 625). He admitted that nowhere on the form did respondent state that he was denied sick leave (Tr. 626-27, 629-30; 644-45). He contended, however, that respondent denied his vacation request in his November 4, 2020, email, which stated that respondent was not approving any vacations at that time (Tr. 627). He also testified that his vacation request was never approved. This was his only vacation request for 2020. By contrast, Mr. Velez's request for vacation was granted (Tr. 445, 447).

As noted above, on December 3, 2020, respondent emailed his security officers to state that because of COVID-19 and the loss of an employee, Champion was "understaffed" as it only had four security guards for a 24/7 site. He said that he was in the process of hiring security guards, but until at least one other security guard was hired, he would be unable to approve any leave of absence or personal time off (Pet. Ex. 15 at 140). Respondent insisted that he "didn't have a choice" but to "cancel vacation leaves" because he was required to have five full-time employees and one-part time employee (Tr. 1365-66). Having three employees was not enough because that would mean each employee would be working 56 hours a week (Tr. 639).[21] He had to do "what was best for the business," which meant canceling leaves until he could get more people hired. He maintained that he was unable to get employees processed for employment because the site was shut down because of COVID-19 for a time starting in late fall (Tr. 1375).[22] Respondent also noted that Champion's employee handbook stated that Champion "will generally grant requests for PTO when possible, however, at all times taking business needs into consideration," including having insufficient staff to cover the employee's absence (Tr. 637; Resp. Ex. G43).

Mr. Mazzella, on the other hand, testified that Champion needed only three security officers, not six, to keep the site going, because the site could run on three shifts a day (Tr. 638-39).

Ultimately, Mr. Mazzella was furloughed due to COVID-19 during the last week of December, the week for which he had requested vacation (Tr. 642).

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[21] Respondent made this calculation in a question to Mr. Mazzella, asking if having three security officers would mean each would have to work 56 hours a week and stating that there was no overtime on the contract (Tr. 639).

[22] Initially, respondent testified that the site was closed down because of COVID-19 from November 2020, through February 2021 (Tr. 1375). However, in a question he later posed to Mr. Mazzella, respondent referred to the site being shut down beginning December 11, 2020, with workers furloughed through January 28, 2021 (Tr. 642). His later statement appears more accurate, as it was more precise and respondent "indefinitely suspended" Mr. Colón on November 30, 2020, at which point the site was still open.

The evidence establishes that respondent retaliated against Mr. Mazzella by not approving the vacation request which he submitted on October 6, 2020, and re-submitted on November 4, 2020. Respondent did not give any reason for not approving his request in his October 6 email, stating only that he was "not approving any vacations at this time." The logical inference from respondent's email is that respondent was simply following the policy enunciated in his July 2020 email to employees: that "because of" the investigation, and until it was concluded, he was not approving any "time off, vacation, or leave time."

Respondent also failed to provide any explanation for not approving the leave request in his November 4 email that stated that he was "not approving any PTO/Vacations this early and at this time." When Mr. Mazzella brought up respondent's July 2020 email cancelling all leaves and accused respondent of ignoring his request because he suspected Mr. Mazzella of instigating the Department's investigation, respondent became angry and threatened to charge Mr. Mazzella with "harassment" or "insubordination" if he continued to pursue his vacation request. Respondent did not follow through with his promise to make a decision on Mr. Mazzella's vacation request within two weeks, even though Mr. Mazzella re-submitted the request, and he did not explain why. Respondent's December 3, 2020, email, stating that all leaves were canceled because of COVID-19 and the loss of one employee, does not explain why he did not respond to Mr. Mazzella's vacation request earlier, as Mr. Colón was still employed until November 30, 2020.

It is telling that respondent threatened disciplinary action if Mr. Mazzella continued to pursue his vacation request once Mr. Mazzella accused him of retaliation because of the Department's investigation. The evidence shows that respondent's failure to approve Mr. Mazzella's vacation request in October and November 2020 was the culmination of a number of retaliatory actions taken against Mr. Mazzella as a result of respondent's perception that Mr. Mazzella (and Mr. Colón) filed the initial complaint to the Department. Respondent told Mr. Williams and Mr. Mazzella that he would physically harm whoever had complained about him. He sent the July 20, 2020, email prohibiting all vacations and time off "because of" the Department's "ongoing investigation." He wrote up Mr. Mazzella on July 31, 2020, because Mr. Mazzella said he would tell the Department investigator that he did not get sick leave.

In sum, respondent's denial of Mr. Mazzella's October 4, 2020, vacation request in October and November 2020 was retaliatory under ESSTA. *See Krebaum*, 138 A.D.3d at 528-29;

Mr. Coco 162 Inc., OATH 1672/20 at 12; *AQP General Servs. Corp.*, OATH 236/19 at 14-15. Count 16, paragraph 213(h) is sustained.

Count 20, paragraphs 232(d-f); count 21: retaliation against Mr. Colón; count 22: requiring medical documentation

Charge 20, paragraph 232(d-f), alleges that respondent retaliated against Mr. Colón by: (1) requesting medical documentation from Mr. Colón for his sick leave request based upon his belief that Mr. Colón was involved in the Department's investigation (paragraph 232(d)); (2) issuing Mr. Colón a written disciplinary notice on November 8, 2020, following their conversation about his sick leave request (paragraph 232(e)); and, (3) telling Mr. Colón that he was being insubordinate for stating that he was facing retaliation because of his perceived involvement in the Department's investigation (paragraph 232(f)).

Count 21 alleges that respondent retaliated against Mr. Colón by terminating his employment on December 2, 2020, following his request to use sick time on November 19, 2020, and based upon his perception that Mr. Colón was involved in the Department's investigation.[23]

Count 22 alleges that respondent improperly told Mr. Colón that he needed to submit medical documentation for the sick leave request referenced above.

On November 7, 2020, Mr. Colón texted respondent that he would not be coming to work on Thursday, November 19, and needed time off "due to [a] personal matter" and that respondent had "more than enough time to find someone to cover [his] shift" (Pet. Ex. 34 at 221). Respondent texted back that he would discuss this that evening with Mr. Colón and that time off was not guaranteed (*Id.*).

That evening, respondent arrived at the Pouch site during the midnight to 8:00 a.m. shift that Mr. Colón was working (Colón: Tr. 748, 897). Mr. Colón had asked one of the plant operators, Steve Novosad, to witness their discussion (Colón: Tr. 749; Novosad: Tr. 1155, 1182-83).[24]

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[23] Although the petition identifies December 2, 2020, as the date that Mr. Colón's employment was terminated, the relevant document is a notice of indefinite suspension dated November 30, 2020.

[24] While Mr. Colón said that the plant operator was "Steve Noble" (Tr. 749), this appears to be a mistake. Stephen Novosad, a power plant operator at the Pouch Station who reports to Poletti Security, a company hired by NYPA to oversee security at their sites, testified that because of previous "incidents" between respondent and the security guards, NYPA had asked that the plant operators serve as witnesses anytime respondent came onto the site (Tr. 1152, 1170). He had received authorization from his supervisor and from NYPA to witness the conversation between Mr. Colón and respondent on November 7, 2020 (Tr. 1182-83).

According to Mr. Colón, once respondent arrived, he reminded respondent that he needed a day off and respondent said he needed a doctor's note (Tr. 749). An argument ensued. Mr. Colón asked respondent why Mr. Williams was able to take a week off without a note (Tr. 749). Respondent replied that Mr. Colón was being "insubordinate." Mr. Colón said that if "anything happens" to his wife, to whom the sick leave request pertained, he was going to hold respondent "responsible" (Tr. 749). A few minutes later, respondent left the site (Tr. 900). Mr. Colón testified that the last thing that he said to respondent that night was that he would report the incident to someone at the Department (Tr. 904).

Mr. Novosad corroborated much of Mr. Colón's testimony but went into greater detail. He explained that Mr. Colón and respondent were talking inside the guard booth, while he was standing directly outside the door to the booth because of COVID-19 (Tr. 1154). Mr. Colón told respondent that he needed time off in a few weeks for his wife's medical procedure and that he had given respondent enough notice to find a substitute employee (*Id.*). Respondent replied that "basically that there was no time guaranteed off" (*Id.*). Mr. Colón began "pleading" for the time off, stating that this was his wife and that if anything happened to her, it was going to be on respondent's "shoulders" (*Id.*). With that, respondent said that they were "done talking" and he left the guard booth and came around to the other side of Mr. Novosad (Tr. 1154-55). Mr. Colón, standing at the door to the booth, "kind of changed the subject" to tell respondent that he was "retaliating" against the security officers, and that the retaliation was aimed at "the wrong people," because Mr. Mazzella and Mr. Colón had not reported him to the Department (Tr. 1155, 1184). Respondent said that he was not going to talk about this and that if Mr. Colón continued the conversation, he would write up Mr. Colón for insubordination (Tr. 1155). Hearing this comment, Mr. Novosad laughed and smirked because respondent often threatened to write up employees for insubordination if they were talking about something that he did not like (Tr. 1155-56.). Respondent turned to Mr. Novosad and told him that this was not his conversation and Mr. Novosad replied that he did not work for respondent and was there as a witness (Tr. 1155). Respondent then left the facility after the gate was opened for him to exit (Tr. 1187).

Respondent did not testify about his encounter with Mr. Colón this night other than to say that Mr. Colón had "threatened" him (Tr. 1371).

The next day, November 8, 2020, respondent issued Mr. Colón a written counseling notice for "Unacceptable behavior, specifically; Disrespect" which referenced their discussion the night

before (Pet. Ex. 12 at 129). The notice states that respondent conducted a "routine site visit" on November 7 and that during his conversation with Mr. Colón, which was observed by the plant operator, Mr. Colón asked why other guards at the site received preferential treatment. According to the notice, respondent replied that he did not give anyone preferential treatment. Mr. Colón "became argumentative, loud and angry during the course of the conversation," which eventually "escalated" to Mr. Colón becoming "completely irrational and offensive." This led respondent to ask Mr. Colón to unlock the gate to the site so he could leave. Respondent stated in the notice that having a plant operator escort him and observe him "for no reason whatsoever" appeared to be "a deliberate attempt . . . to try and discredit [his] actions" (*Id.*). He also said that he felt that Mr. Colón's personality and attitude had "changed dramatically into complete negativity" over the past year and that the evening before, Mr. Colón had seemed to take his "anger and frustration" out on him, which was completely unacceptable. The notice states that Mr. Colón refused to sign the notice (Pet. Ex. 12).

The following day, November 9, respondent wrote a lengthy email to Raymond Johnson at G4S, stating that he believed that Mr. Colón should either be terminated from the Pouch site or transferred to another NYPA location, and requesting that his "decision regarding the dismissal" of Mr. Colón be "approved and supported" by G4S and NYPA (Pet. Ex. 13 at 135, 133-36). Respondent said that Mr. Colón was originally a good employee but had become "disrespectful" over the past year, "angry" and "argumentative in nearly all his responses," and had failed to respond to policy emails as directed in those emails (*Id.* at 133). Respondent then went on to describe two recent incidents with Mr. Colón, one being the November 7 meeting and the other being Mr. Colón's purported attempt to intimidate another security officer (*Id.* at 133-134).

In this email, respondent described his recent visit to the site as a "routine visit" but also said that he had informed someone at Poletti Security that he would be visiting the site, that "there could be a problem" with a security officer, and he wanted to be sure that the security cameras were on "in case" Mr. Colón became "threatening" (*Id.* at 133). He wrote that he believed Mr. Colón had asked Mr. Novosad to escort him onto the site and observe their meeting in the hope of trying to "provoke a situation" with respondent while Mr. Novosad observed (*Id.*). According to respondent, when he told Mr. Colón that he was onsite to replace the employee handbooks and badges and "retrieve all the paperwork from the past year pertaining to Champion," Mr. Colón "immediately complained loud and offensively about other Guards and apparent special

treatment by me to them, especially for time off . . . and demanded" to have November 19, 2020, off for a personal matter (*Id.* at 134). Respondent told Mr. Colón that he had always been "very fair" and that Mr. Colón should submit a request form (CSS 83) for the day off, which he would review. The discussion escalated, with Mr. Colón stating that he would talk to someone at the Department about how respondent was "unfairly treating him" (*Id.*). Ultimately, because Mr. Colón was so "loud and boisterous," respondent told Mr. Colón to open the gate and let him out of the site.

While he described the November 7 meeting in detail, respondent stressed in this email that his "real concern" about Mr. Colón related to Mr. Colón's interaction with a young security guard, Mr. Velez, who had worked for Champion since 2017 (*Id.* at 134).[25] According to respondent, on some unspecified date, Mr. Velez told him that he was in his car getting ready to leave the site one evening when Mr. Colón approached him. Mr. Colón told Mr. Velez to stop passing information about him to respondent. Mr. Colón "also got angry and aggressive" toward Mr. Velez and became "harassing and borderline threatening" regarding Mr. Velez's purportedly passing along this information (*Id.*). Mr. Velez told respondent that "this wasn't the first time" that Mr. Colón had "come across" to him as "intimidating" or "bullying." Respondent described Mr. Velez as being "extremely upset" about this (*Id.*). He stated that Mr. Velez had "inadvertently" had his car's dashboard camera on during this encounter and that once Mr. Velez forwarded the footage to him, he would review it (*Id.*). He contended that Mr. Colón was "destroying the morale" at the Pouch station, that his "attitude and action could escalate into a hostile or violent altercation," and that he feared that Mr. Velez might leave his position and/or initiate a lawsuit as a result of Mr. Colón's harassment (*Id.*).

In reply to respondent's November 9 email, Mr. Johnson wrote that the behavior respondent described was "unacceptable" and that if respondent had decided to terminate Mr. Colón's employment, he should inform him of the effective date of the termination (*Id.* at 133).

Two days later, on November 11, 2020, respondent emailed Mr. Colón a blank form (CSS Form 84) ("Days Off/ Vacation Request"), indicating that Mr. Colón needed to complete the form

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[25] Although respondent purposefully did not identify the other security guard in his email, he told the Department that of the security officers working at the Pouch site, Mr. Velez was hired in 2017 (Pet. Ex. 2). For clarity, my discussion of respondent's email to Mr. Johnson will refer to the other security guard as Mr. Velez.

if he was still requesting leave on November 19 (Pet. Ex. 35; Colón: Tr. 750). Mr. Colón completed the form, signing it on November 12, 2020. He requested November 19 off, for "medical leave (wife)." Without once mentioning sick leave, the form asked for the number of "vacation days" requested. Mr. Colón wrote "1" (*Id.*). Mr. Colón emailed the form to respondent, and he acknowledged that respondent paid him "sick time" for the day (Tr. 755, Resp. Ex. H20).

On November 30, 2020, respondent issued Mr. Colón a written notice of suspension for "disrespect and threatening behavior/insubordination" (Pet. Ex. 15 at 137-38). The notice stated that an "indefinite suspension" was being imposed upon Mr. Colón and that "effective immediately," he would not be permitted onto the Pouch site, "indefinitely" (*Id.* at 137). Respondent referenced the incident with the other security officer which he had described in his November 9 email to Mr. Johnson. Respondent also said that he had received reports "from at least one other Security Officer" who referred to "a number of confrontations" with Mr. Colón and who described Mr. Colón's behavior as "completely disrespectful and unprofessional." Further, respondent contended that Mr. Colón had been insubordinate by refusing to acknowledge receipt of "the directives" in his emails, in violation of his policy that employees "respond back that they have read and understand the directives being initiated in all email correspondence" (*Id.* at 137). Respondent stated that Mr. Colón's actions had resulted in "low morale" and fearful feelings at the workplace (*Id.*). Respondent did not mention Mr. Colón's purported behavior during his November 7 site visit, which was the subject of his November 8 counseling memorandum.

Mr. Colón testified that, following the issuance of the November 30, 2020, notice of indefinite suspension, he did not perform any other work for respondents. When he was fired by respondents, he called Mr. Falco, G4S's regional manager, who contacted NYPA, which said that their relationship with Mr. Colón was "still in good standing" (Tr. 762). Consequently, Mr. Colón continued to work for G4S, for whom he had been working "three steady days" or 24 hours (*Id.*). He started working a "full schedule," Mondays through Fridays, for Arrow after they took over the subcontract in September 2021: either on September 13, 2021, or September 20, 2021 (Tr. 733, 763).[26]

[26] Mr. Colón initially testified that he began working for Arrow when they took over the contract on September 13, 2021 (Tr. 733). Later he testified that Arrow took over the contract on September 20, 2021, and that is when he started having full-time hours (Tr. 763).

Count 20, paragraph 232(d); Count 22: charges related to medical documentation

I credited Mr. Colón's credible and undisputed testimony that respondent said that he needed a doctor's note when Mr. Colón asked on November 7, 2020, for a day off. This violated section 20-914(a)(2), which permits an employer to request documentation for sick time only for an absence of more than three consecutive days. Count 22 is sustained.

Petitioner also established that respondent's demand for a doctor's note was retaliatory, based upon respondent's perception that Mr. Colón was involved in the Department's investigation, as alleged in count 20, paragraph 232(d). By November 2020, respondent had amended his employee handbook and posted a notice of employee rights. The employee handbook stated that employees were required to provide documentation from a medical provider for sick leave of more than three consecutive workdays (Pet. Ex 3 at 57). The notice of employee rights contained similar language (Pet. Ex. 19 at 151). Thus, respondent knew that his right to demand medical documentation was not triggered by a request for one day of sick leave, whether for an employee or an employee's family member. Yet respondent demanded medical documentation from Mr. Colón, who had only requested one day of medical leave. Respondent also emphasized that time off was not "guaranteed." From the very start of the investigation, respondent believed — and told Mr. Mazzella and Mr. Williams — that he thought Mr. Colón had been one of the employees who initially complained to the Department. Respondent continued to target Mr. Colón by issuing him a disciplinary write-up on July 30, 2020, based on his refusal to engage in a conversation about what he would say to a Department investigator (Pet. Ex. 8 at 116-17). Considering both this pattern of retaliatory behavior and respondent's knowledge in November 2020 regarding when medical documentation could be required, it is appropriate to infer that respondent's demand for medical documentation was driven by his belief that Mr. Colón had initiated the investigation. Count 20, paragraph 232(d), is sustained.

Count 20, paragraph 232(e-f): threat to charge insubordination and November 8, 2020, counseling notice

With regard to the remaining charges, petitioner established that respondent retaliated against Mr. Colón by issuing him a written counseling notice on November 8, 2020, and by threatening to write him up for insubordination, as alleged in count 20, paragraph 232(e-f).

I credited Mr. Colón's testimony about what occurred at the November 7 meeting over the account which respondent provided in his November 9 email to Mr. Johnson. In large part, I did

so because of the corroborating testimony of Mr. Novosad, who I found to be a disinterested and credible witness. Mr. Novosad worked for Poletti, not respondents, and emphasized that while he had worked onsite with Mr. Colón for many years, he considered Mr. Colón a coworker, not a friend (Tr. 1161-62). Mr. Novosad's and Mr. Colón's testimony established that on November 7, 2020, Mr. Colón repeatedly asked for a day's sick leave relating to his wife's medical procedure and said that he would hold respondent accountable if anything happened to his wife. It is plausible that Mr. Colón may have become emotional or even raised his voice at this time, as he was frustrated by respondent's request for a doctor's note and felt that he was being treated unfairly.

I did not, however, credit respondent's statement in his November 8 counseling notice that Mr. Colón was "completely irrational and offensive." Mr. Novosad, the plant operator, denied that Mr. Colón immediately became argumentative when respondent arrived, or that Mr. Colón posed any threat to respondent, as respondent claimed (Tr. 1185-86). I find, as Mr. Novosad testified, that respondent became irate when Mr. Colón insisted that respondent was retaliating against him because of the investigation, warned Mr. Colón that he would write him up for insubordination if he continued the conversation, and then left the security booth (Tr. 1155). Mr. Novosad was clear that it was Mr. Colón's reference to retaliation that caused respondent to leave. "There was a change in subject matter . . . and that's when you [respondent] left the [security] booth" (Tr. 1186).

I also find that Mr. Colón told respondent that he would report the incident to the Department. Respondent acknowledged that Mr. Colón made this statement in his November 9 email to Mr. Johnson.

Both respondent's threat to write up Mr. Colón for insubordination after Mr. Colón raised the subject of retaliatory treatment (count 20, paragraph 232(f)) and the disciplinary notice which respondent issued the very next day (count 20, paragraph 232(e)) were retaliatory under section 20-918 of the Administrative Code.

Count 21: termination of Mr. Colón's employment

The remaining issue is whether respondent's termination of Mr. Colón following his request to use sick time on November 19, 2020, was retaliatory under ESSTA, as alleged in count 21. Respondent's November 30 "notice of indefinite suspension" referenced Mr. Colón's purported behavior toward Mr. Velez and Mr. Colón's purported failure to acknowledge receipt of certain emails. It also alleged, albeit vaguely, that Mr. Colón had had "disrespectful" encounters

with at least one other employee. It said nothing about the November 7 encounter between Mr. Colón and respondent.

The November 30 notice of indefinite suspension did not reference the November 7 meeting, but instead referenced interactions between Mr. Colón and Mr. Velez and "at least one other security officer." Moreover, respondent wrote in his November 9 email that his "real concern" was Mr. Colón's behavior toward Mr. Velez. As discussed below, however, the November 30 notice of indefinite suspension was retaliatory and the grounds set forth in the notice were pretextual.

There was conflicting testimony over the allegations relating to Mr. Colón and the other security guards. According to Mr. Velez, as he was going to his car one night to leave the site, Mr. Colón approached him and said that he had better be careful because other people at work could join together and get him fired. Mr. Velez wrote a statement at respondent's suggestion on November 16, 2020, stating that Mr. Colón approached his car on November 7, 2020, "making threats about me, discussing private matter to other employers" (Resp. Ex. I7; Tr. 1311). Mr. Colón acknowledged hearing his voice on two videos of conversations between himself and Mr. Velez and confirmed approaching Mr. Velez one night as he was leaving the site. He also acknowledged saying in one video, "he using you right now as a guinea pig . . ." but denied that he was talking about respondent (Tr. 954, 956).

Mr. Colón denied threatening or bullying Mr. Velez (Tr. 918-19). He said that he and Mr. Velez were coworkers, he had trained Mr. Velez when Mr. Velez first started, and they had "a lot of conversations" in which Mr. Velez complained about respondent not letting him have days off or switch days. Later he found out that Mr. Velez was recording their conversation. He described their conversation as "just talking" and was very surprised when he found out later that Mr. Velez had been recording it (Tr. 759-80). When asked if he had ever gotten into any arguments with coworkers, Mr. Colón acknowledged "yelling" at Mr. Javaid once, in 2017 or 2018, for "leaving the [security booth] dirty," and said that Mr. Javaid had called respondent about this (Tr. 758). He recalled that he would see Mr. Javaid only once a week when he worked the night shift on Saturdays (Tr. 758-59).

Respondent offered limited testimony about Mr. Javaid, stating only that Mr. Colón had "threatened two of his coworkers" (Tr. 1371). However, in Mr. Javaid's affidavit, Mr. Javaid

wrote that he had had "several issues" with Mr. Colón, and had once, in 2019 or 2020,[27] sent a text message to respondent "late at night," because "an incident [with Mr. Colón] got out of hand" (Resp. Ex. J9). He said that he "continued to have issues" with Mr. Colón's "disrespectful behavior" (*Id.*).

Mr. Novosad, although not asked about any specific interactions between Mr. Colón and other employees, testified that he had never seen Mr. Colón act aggressively (Tr. 1156).

I did not fully credit Mr. Colón's, Mr. Velez's, or respondent's testimony about Mr. Colón's interaction with other security officers. Mr. Colón's testimony that he talked with Mr. Velez about matters that did not involve the workplace or respondent was not plausible. The two were coworkers in a small workplace. Mr. Colón had trained Mr. Velez and I credited Mr. Colón's testimony that they had often discussed respondent. Moreover, at the time respondent was making workplace-wide changes that impacted all the security guards — for example, sending the July 20, 2020, email denying all vacation leaves because of the investigation except for that previously approved for Mr. Velez. Given this context, it is likely that Mr. Colón's statement to Mr. Velez that the latter was being used as a "guinea pig," applied to respondent's treatment of Mr. Velez in the workplace.

That said, there was reason to question Mr. Velez's testimony and statement about what occurred. His testimony that respondent told him when he was hired that he would get five paid sick days was not credible, which lessens the reliability of the remainder of his testimony.

I also did not credit respondent's testimony that Mr. Colón had "threatened" another coworker. Respondent did not elaborate, and it appears that he was embellishing his testimony to allege a threat rather than a discourteous incident or incidents, because both his November 30 notice of termination and Mr. Javaid's affidavit refer to disrespectful rather than threatening behavior. Mr. Javaid's hearsay affidavit also did not go into detail, other than stating that one incident was so disturbing, in ways he did not describe, that he called respondent at night to report it. Mr. Colón admitted yelling at Mr. Javaid and said that Mr. Javaid called respondent, which corroborates Mr. Javaid's affidavit to that limited extent.

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[27] Mr. Javaid stated in his affidavit, sworn to on August 18, 2021, that he told a Department investigator in December 2020 that he had had several issues with Mr. Colón and that "at one time last year" he sent a text message to respondent about an incident.

However, even if Mr. Colón approached Mr. Velez and warned him to be careful because other workers could get him fired, and even if Mr. Colón had yelled at Mr. Javaid in 2019 or 2020, that was not the only reason for respondent's decision to fire Mr. Colón in November 2020. The record establishes that Mr. Colón's firing was the end result of a series of events beginning in early July, when the investigation began, including the phone calls to Mr. Colón in July 2020 and Mr. Colón's July 30, 2020, write-up. Respondent's termination of Mr. Colón on November 30 closely followed the events just described: Mr. Colón's request for sick leave on November 7; respondent's encounter with Mr. Colón the night of November 7 when he demanded medical documentation and threatened to write up Mr. Colón for insubordination; the November 8 written counseling notice issued to Mr. Colón; and Mr. Colón's use of sick leave on November 19.

It is striking that respondent wrote to G4S seeking permission to fire Mr. Colón on November 9, just two days after his meeting with Mr. Colón on November 7. Although respondent wrote in that email that his "real concern" involved Mr. Velez, respondent went into detail in the November 9 email about the November 7 meeting — the meeting in which Mr. Colón accused respondent of retaliating against him because of respondent's belief that Mr. Colón had started the investigation, and told respondent that he would report the incident to the Department. Respondent's decision to detail the events of November 7 in his email to G4S two days later is sufficient to establish that this encounter was at least in part a motivating factor in respondent's decision to fire Mr. Colón. Having received no objection from G4S, respondent fired Mr. Colón by issuing him a notice of indefinite suspension on November 30. This is sufficient to establish retaliatory termination under ESSTA. *See* Admin. Code § 20-918(g); 6 RCNY § 7-108(e) (retaliation under ESSTA occurs where "a protected activity was a motivating factor for an adverse action," even when "other factors" may have "motivated the adverse action"); *Brewer, Attorneys & Counselors,* OATH 514/19 at 8.

Accordingly, count 21 is sustained.

Counts 15 and 24: charging time spent for receiving the COVID-19 vaccination to Mr. Williams' and Mr. Velez's sick leave bank

Counts 15 and 24 allege that respondent violated section 20-913(g) of ESSTA by charging time spent receiving the COVID-19 vaccination to Mr. William's and Mr. Velez's safe/sick time

bank. Section 20-913(g) states that employees "shall determine how much accrued safe/sick time they need to use."

Both Mr. Williams and Mr. Velez testified that they missed work to get their COVID-19 vaccines, Mr. Williams for his second COVID-19 vaccine in May 2021 (Tr. 1024) and Mr. Velez for both vaccines (Tr. 1323). Mr. Williams took a day off from work in May 2021. Respondent told him he would get paid out of his sick time bank. His paystub for the week of May 3-9, 2021, which is when he got the vaccine, shows eight hours taken as "sick" (Tr. 1024-25; Pet. Ex. 20 at 153). Mr. Velez took two days off, one for each vaccine. He recalled that he was paid for the two days he took off but did not remember if respondent used hours from his sick leave bank (Tr. 1323). Respondent, however, acknowledged paying Mr. Williams and Mr. Velez out of their sick time bank when they got their COVID-19 vaccinations (Tr. 1403).

Instead of charging the entire period of Mr. Williams' and Mr. Velez's absence to sick leave, respondent should have granted each employee a paid leave of absence of up to four hours for each vaccination, as required by section 196-c of the Labor Law (stating that employers must provide employees with a paid leave of absence, not charged against any other leave, up to four hours per vaccination). Labor Law § 196-c (Lexis 2023). By not doing so and instead deducting the entirety of their absences from sick leave, respondent interfered with Mr. Williams' and Mr. Velez's rights to determine how much safe/sick time they needed to use.

Counts 15 and 24 are sustained.

Counts 17 and 19: failure to pay Mr. Mazzella for sick time used and to treat his health condition confidentially

Counts 17 and 19 relate to Mr. Mazzella's absence from work in 2021 due to COVID-19. Count 19 alleges that respondents violated section 20-921 of ESSTA by telling Mr. Williams about Mr. Mazzella's illness on February 11, 2021. Count 17 alleges that respondents violated section 20-913(a) of ESSTA by failing to pay Mr. Mazzella for sick time used in February and March of 2021.

Count 19: disclosure of confidential health information

Mr. Mazzella had COVID-19 in February 2021. He sent respondent a text message the evening of February 10, 2021, stating that while he had felt "fine" at work the night before, he woke up coughing and feverish and was planning to schedule a COVID-19 test for the next day

(Pet. Ex. 31 at 208). In follow-up texts sent on February 11, 2021, and February 12, 2021, Mr. Mazzella told respondent that he had tested positive for COVID-19 on two separate tests (Pet. Ex. 31 at 208-211; Tr. 444). Because he contracted COVID-19, the site was "shut down" and the other security officers were furloughed (Tr. 444-45, 493). Mr. Williams gave credible, unrebutted testimony that in February 2021, respondent called him and said that Mr. Mazzella had COVID-19 and that because everyone had worked around him, they would need to get tested and he would have "to shut the site down" (Tr. 1022, 1109).

Mr. Mazzella was not asked specifically if he gave respondent permission to disclose his COVID-19 positive status. However, when asked about the allegation that respondent had disclosed his positive status, he testified that he would not like if respondent had revealed that he had COVID, because that violated federal health confidentiality laws (Tr. 699).

Respondent did not testify about whether he spoke to Mr. Williams about Mr. Mazzella having COVID-19.

Petitioner established that respondent disclosed Mr. Mazzella's positive COVID-19 status to Mr. Williams. However, petitioner did not establish that in doing so, respondent violated section 20-921 of ESSTA. This section, titled, "Confidentiality and nondisclosure," states that "[h]ealth information about an employee . . . obtained *solely* for the purposes of utilizing safe/sick time pursuant to this chapter, shall be treated as confidential and shall not be disclosed except by the affected employee, with the written permission of the affected employee or as required by law." Admin. Code § 20-921 (emphasis added). There is no evidence that Mr. Mazzella disclosed his COVID-19 status "solely" for the purpose of obtaining sick leave. His initial text to respondent says nothing about leave but stresses that he had COVID symptoms and had worked the night before. This was February 2021, in the midst of the COVID-19 pandemic. As Mr. Williams noted, Mr. Mazzella's illness impacted people who had worked around him, who needed to get tested, and it led to the shut-down of the site. Under these circumstances, petitioner did not establish that Mr. Mazzella disclosed his COVID-19 positive status to respondent "solely" for the purpose of obtaining sick leave.

Accordingly, count 19 was not proven and should be dismissed.

Count 17: failure to pay Mr. Mazzella for sick time used

Petitioner alleges that respondents violated section 20-913(a)(1) of ESSTA by failing to pay Mr. Mazzella for sick time used on February 12, February 15-19, February 22-26, March 1-5,

March 8-12, and March 15-19, 2021. In its post-trial memorandum, however, petitioner clarified that it was charging respondents with failing to pay Mr. Mazzella for 32 hours of sick leave, because they were required under ESSTA to pay Mr. Mazzella for 40 hours of sick leave and instead paid him for only eight hours (Pet. Post-Trial Mem. at 21).

Mr. Mazzella testified that he missed two days of work due to COVID when he first got sick in February 2021 but received paid sick leave for only one of those days (Tr. 501). His timesheet and respondent's payroll journal for this week shows that he received a paid sick day for Thursday, February 11, 2021 (Resp. Ex. G23-G24). His paystub shows that he received eight hours of sick pay for the week ending February 14, 2021 (Pet. Ex. 32). On that paystub Mr. Mazzella noted that he was out sick with COVID, called out on Thursday, but was paid for only one sick day (Pet. Ex. 32). According to Mr. Mazzella, the second week that he was out with COVID, he talked to respondent about getting "sick" or COVID pay. Respondent told him that he was "not getting it" and to wait one more week and then collect unemployment (Tr. 646-47). The following week, however, respondent's payroll journal showed that Mr. Mazzella had 40 hours charged to vacation, even though he had not requested vacation (Tr. 647-48; Resp. Ex. G45). Further, Mr. Mazzella testified, respondent talked to him about getting disability pay and gave him the telephone number of "some lady," who said that disability pay was only for on-the-job injuries (Tr. 652).

According to Mr. Mazzella, it took "at least around ten weeks," from the time he first tested positive to the time that he was allowed to return to work (Tr. 497). He explained that the New York City Test and Trace Corps told him he had to quarantine for 12 to 14 days (Tr. 493). After that, they told him he could return to work, but he was not permitted back on site until he tested negative, and he kept getting positive results when he tested (Tr. 492-94, 496). The workers who were furloughed returned to work before he was able to do so (Tr. 493). He kept going back to the same place weekly to be tested, and the healthcare workers there were "getting aggravated" because they did not understand why he and others in similar situations were not being permitted to return to work (Tr. 494). Finally, after about three or four weeks after his quarantine was up, he got a "piece of paper" saying that even though he was positive, he was not contagious (Tr. 494-95). When he showed respondent the note, respondent said he had to contact NYPA to make sure he could go on site. That took about another five days (Tr. 498-99). Then he was allowed to return to work (Tr. 495).

Respondent did not testify about whether he provided Mr. Mazzella with any sick leave when he was sick with COVID-19. Hence, Mr. Mazzella's testimony was unrebutted.

It is unclear precisely how long Mr. Mazzella was out of work because of COVID-19. While he estimated it was about ten weeks, his description of the quarantine period (about two weeks), testing positive afterwards (three or four weeks), and his wait time until NYPA approved his return (five days) comes to more like six or seven weeks. Nonetheless, I fully credited Mr. Mazzella's detailed testimony that he could not return to work for a long time because he kept testing positive for COVID-19. Mr. Mazzella seemed genuinely frustrated in recounting that he could not return to work because of the positive tests even though healthcare professionals told him he was not contagious. His testimony that it took him a long time to be cleared to return after COVID-19 was consistent with "common sense and human experience," *see Menzies*, OATH 678/98 at 2-3.

Moreover, whether Mr. Mazzella was out of work because of COVID-19 for six or seven weeks or ten weeks is not the issue. The issue is whether he was paid as required under ESSTA for his accrued sick time. Section 29-913(b) permits employees to accrue sick time at a rate of one hour for every 30 hours worked, up to a maximum of 40 hours per year. Admin. Code § 20-913(b). I credited Mr. Mazzella's testimony that in February 2021 he did not know how much sick time he had accrued (Tr. 506). Nonetheless, it was undisputed that Mr. Mazzella had worked for Champion since September 1, 2016, 40 hours per week (Pet. Ex. 2; Mazzella: Tr. 375-76). I credited Mr. Mazzella's testimony that the first time he saw the words "sick leave" on a paystub was for the week that he had COVID-19 (Tr. 506). But even if Mr. Mazzella had received a paid sick day in January 2017, as indicated by his timesheet for that day (Resp. Ex. G2), he would still have more than 40 hours of accrued sick leave in February 2021. Mr. Mazzella accrued one hour for every 30 hours worked, starting in September 2016. He worked 40 hours a week, which at 52 weeks per year, would come to 2080 hours. In those 2080 hours, he would have accrued the maximum 40 hours of sick leave. Thus, Mr. Mazzella would have had a sick leave balance of at least 40 hours in February 2021, when he contracted COVID-19. *See Mid-Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 821 (3d Dep't 1989) (holding that when an employer fails to keep accurate records as required by the state prevailing wage law, underpayments of back wages and benefits may be calculated "by using the best available evidence").

The evidence establishes that Mr. Mazzella only received eight hours of paid sick leave due to COVID-19. I credited his testimony that respondent told him he was not getting paid sick leave or COVID-19 leave, talked to him about disability pay, and paid him out of "vacation pay" for one week. Not only did I find Mr. Mazzella credible in recounting what happened in some detail, respondent's own documents corroborated his testimony. This includes payroll documents for the week ending February 14, 2021, showing eight hours of sick leave (Pet. Ex. 32; Resp. Exs. G23-24), as well as a payroll journal for the week of February 15, 2021, through February 21, 2021, showing 40 hours of vacation (Resp. Ex G45). Respondent's payroll journal for Mr. Mazzella, for the week of June 21, 2021, to June 27, 2021, after Mr. Mazzella returned to work, further demonstrates that Mr. Mazzella received only eight hours of sick leave in 2021. The payroll journal shows 614 year-to-date hours, of which 566 hours were "hourly," eight hours were "sick," and 40 hours were "vacation" (Pet. Ex. 25).

In sum, Mr. Mazzella contracted COVID-19 in February 2021 and was out sick for a considerable period of time, at least six weeks. He was entitled under ESSTA to use at least 40 of those hours for sick leave. However, respondent only paid him for eight hours of sick leave. Respondent failed to pay him for 32 hours of accrued leave, as required by section 20-913(a)(1) of ESSTA. Count 17 is sustained as to failure to pay sick time for those 32 hours.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondents produced a record to the Department that misrepresented the effective date of their sick leave policy, in violation of rule 7-109, as alleged in Count 1, paragraph 141(a). Petitioner did not prove that respondent's submission of this document interfered with the Department's investigation, as also alleged in Count 1, paragraph 141(a).

2. Petitioner proved that respondents interfered with the Department's investigation and produced a falsified record through its production of an email exchange, as alleged in Count 1, paragraph 141(b).

3. Petitioner proved that respondents failed to maintain a sick leave policy from approximately September 2016, through July 30, 2020, that met ESSTA's minimum requirements, as alleged in Counts 2-5.

4. Petitioner proved that respondents' July 20, 2020, email to their workers constituted a non-compliant sick time leave policy, as alleged in Count 6.

5. Petitioner did not prove that respondents' December 3, 2020, email to their workers constituted a non-compliant sick leave policy, as alleged in Count 7.

6. Petitioner proved that respondents failed to distribute a Notice of Employee Rights, as alleged in Count 8.

7. Petitioner proved that respondents failed to provide pay statements with required safe/sick time information, as alleged in Count 9, from September 30, 2020, through June 27, 2021, but petitioner did not prove that respondent continued to fail to provide this information after June 27, 2021.

8. Petitioner proved that respondents did not provide accruals of paid sick time to employees, nor permit eligible employees to use sick time, from 2017 through July 30, 2020, as alleged in Counts 10 and 11 (as limited by petitioner's post-trial brief).

9. Petitioner proved that respondents interfered with the Department's investigation, as alleged in Count 12, with the exception of the paragraph 191(f), which was withdrawn, and paragraph 191(i), which was not proven.

10. Petitioner proved that respondents unlawfully retaliated against workers for exercising or attempting to exercise their rights under ESSTA, as alleged in Count 13.

11. Petitioner proved that respondents unlawfully retaliated against Mr. Williams for exercising or attempting to exercise his rights under ESSTA, as alleged in Count 14, with the exception of paragraph 202(a), (c), and (d), which was not proven.

12. Petitioner proved that respondents interfered with Mr. Williams' right to determine the amount of safe/sick time used, as alleged in Count 15.

13. Petitioner proved that respondents unlawfully retaliated against Mr. Mazzella for exercising or attempting to exercise his rights under ESSTA, as alleged in Count 16, with the exception of paragraph 213(e), which was not proven.

14. Petitioner proved that respondents improperly failed to pay Mr. Mazzella for 32 hours of sick time in 2021, as alleged in Count 17, as limited by petitioner's post-trial brief.

15. Petitioner proved that respondents unlawfully told Mr. Mazzella to find a replacement worker to cover his sick leave, as alleged in Count 18.

16. Petitioner did not prove that respondents disclosed health information that Mr. Mazzella provided solely for the purpose of utilizing safe/sick time, as alleged in Count 19.

17. Petitioner proved that respondents unlawfully retaliated against Mr. Colón for exercising or attempting to exercise his rights under ESSTA, as alleged in Count 20, with the exception of paragraph 232(d), which was not proven.

18. Petitioner proved that respondents fired Mr. Colón for exercising or attempting to exercise his rights under ESSTA, as alleged in Count 21.

19. Petitioner proved that respondents unlawfully told Mr. Colón to supply medical documentation relating to a sick leave request for one day, as alleged in Count 22.

20. Petitioner withdrew Count 23 of the petition.

21. Petitioner proved that respondents interfered with Mr. Velez's right to determine the amount of safe/sick time used, as alleged in Count 24.

22. Petitioner withdrew Count 25 of the petition.

23. Mr. Sciarabba and Champion Security Services, Inc., are jointly and severally liable for the proven charges.

RECOMMENDATION

Petitioner seeks civil penalties and employee relief for the proven violations. However, some of petitioner's requests for penalties and relief are duplicative in nature and thus should be treated as a single charge for purposes of penalty. *See Dep't of Consumer Affairs v. Major World*, OATH Index No. 1897/17, mem. dec. at 48 (Jan. 24, 2019), *aff'd sub nom. Major World Chevrolet L.L.C. v. Salas*, 216 A.D.3d 427 (1st Dep't 2023) (multiple charges based upon misleading

language in the same document found duplicative); *Sitar v. Sitar,* 50 A.D.3d 667, 670 (2d Dep't 2008) (causes of action alleging fraud, fraudulent misrepresentation, and negligent misrepresentation were all dismissed because they arose "from the same facts as the cause of action alleging legal malpractice and [did] not allege distinct damages"); *Colvin v. Chassin,* 214 A.D.2d 854 (3d Dep't 1995) (where "the identical conduct" violated two separate provisions of the Education Law, that did not justify the imposition of separate monetary fines and the determination to the contrary was an abuse of discretion); *Klein v. Sobol*, 167 A.D.2d 625, 630 (3d Dep't 1990) ("[M]ultiple fines imposed for single acts charged as violating several statutes are arbitrary and capricious.").

Cases dealing with ESSTA violations have similarly concluded that charges that arose from the same set of facts were duplicative and thus did not support separate penalties. In *Dep't of Consumer Affairs v. Citi Health Home Care Services, Inc.*, OATH Index No. 144/18, mem. dec. at 8 (July 31, 2018), an employer was found liable for failing to maintain sick leave policies that meet or exceed the requirements of ESSTA because it required new employers to sign an acknowledgment form stating that medical documentation was required for an absence of three days or more, in violation of rule 7-211,[28] which requires that written sick leave policies conform with ESSTA. Based on the requirement that employees sign the same acknowledgment form, the employer was also found liable for unlawfully requiring medical documentation, in violation of section 20-914(a)(2) of ESSTA. This tribunal concluded that a separate penalty was not appropriate because the charges arose "from the same conduct." *Id.* at 8. *See also PCC Cleaning Servs., Inc., et al.*, OATH 88/18, mem. dec. at 15 (finding that charge that an employer failed to provide all employees with ESSTA sick leave in violation of section 20-913(d) of the Administrative Code was duplicative of charge that employer failed to provide a particular employee with sick leave for a particular absence in violation of section 20-913(a)(1) of the Administrative Code).

By contrast, separate penalties are appropriate when the conduct underlying each charge is separate and distinct. *See Dep't of Consumer Affairs v. Battaglia,* OATH Index No. 1381/17, mem. dec. at 5 (May 3, 2017) (imposing two separate civil penalties where employer failed to respond to two separate document demands, because each failure to respond was "a separate violation" of ESSTA); *Dep't of Consumer Affairs v. Sky Materials Corp.*, OATH Index No.

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[28] In *Citi Health Home Care*, this is referenced as 6 RCNY § 7-12(a), the rule in effect at the time. In 2018, 6 RCNY § 7-12(a) was amended and re-numbered as 6 RCNY § 7-211. *See City Record*, August 21, 2018, at 4616.

830/17, mem. dec. at 5 (Feb. 7, 2017) (same). Thus, charges based on separate emails or separate discussions with employees would not be duplicative, even if the conduct was alleged to have violated the same rule or provision of the Administrative Code. *Cf. Major World,* OATH 1897/17 at 68-69 (separate penalty imposed for charge of breaching settlement agreements where that charge was found distinct from charge of violating consumer protection laws).

My penalty recommendations, which consider whether pleadings are duplicative, are set forth below.

Production of falsified records relating to employee handbook, in violation of rule 7-109 (count 1, paragraph141(a)): $500 civil penalty

Petitioner seeks a penalty of $500 for the proven violation of rule 7-109 (producing an email policy that misrepresented the effective date of their sick leave policy). Petitioner's request for a $500 civil penalty is appropriate under Charter section 2203(h)(1), which provides for a civil penalty of up to $500 for a violation of a law or rule, "the enforcement of which is within the jurisdiction" of DCWP.

Production of falsified records and interference with investigation relating to email with G4S, in violation of rule 7-109 and section 20-918 of ESSTA (count 1, paragraph 141(b)): $500 civil penalty

Petitioner seeks a penalty of $500 for the proven violations of rule 7-109 (producing a falsified document) and of section 20-918 of ESSTA (prohibiting interference with the Department's investigation) relating to the July 2, 2021, email that respondent provided to the Department. This request is appropriate under section 20-924(e) of the Administrative Code, which provides for a civil penalty not more than $500 for the first violation of section 20-918 of ESSTA. Petitioner did not request the imposition of a separate penalty for the rule violation, which would have been inappropriate because both the rule violation and the ESSTA violation arise out of the same conduct, the production of the email.

Failure to maintain a written sick time policy in violation of sections 7-211(a), 7-211(c)(1), 7-211(c)(2), and 7-211(c)(3) of ESSTA (counts 2-5): $500 civil penalty

Petitioner seeks a civil penalty of $2,000, or $500 per count, for respondent's failure to maintain a written sick leave policy. In four separate counts, petitioner charges that before July 30, 2020, respondents: failed to maintain a written sick time policy in violation of rule 7-211(a); and failed to maintain a written policy that met or exceeded the requirement of ESSTA relating to the method of

calculating sick time, the use of sick time, and the carry-over of sick time, in violation of rule 7-211(c), subsections (1), (2), and (3). Despite pleading separate violations, petitioner characterized the charges as alleging that respondents "failed to maintain a written safe/sick time policy" (Pet. Post-Trial mem. at 4). Petitioner proved that respondents failed to maintain any sick time policy, as required by ESSTA. Petitioner's concurrent failure to maintain a sick leave policy that met all the requirements of ESSTA was duplicative of that charge, as the underlying conduct was the same. Only one $500 penalty is appropriate under section 2203(h) of the Charter for the violation of rule 7-211.

Issuing the July 20, 2020, email in violation of rule 7-211(c) and section 20-918 of ESSTA (count 6; count 12, paragraphs 191(g) and (h); Count 13): $500 total civil penalty, plus $2,500 in civil relief

All of these counts focus on the July 20, 2020, email that respondent sent to his employees, which stated that there would be "no granting of time off, vacation or leave time," and limited sick time, "because of an ongoing investigation." The email said that the policy was "temporary" until the investigation concluded and that persons who used "dishonesty" to try to discredit Champion for "their own personal gain" would "not be left without some form of accountability."

Petitioner seeks a $1,500 civil penalty for the proven violations in count 6, consisting of three separate $500 penalties for each of three statements in the July 20, 2020, email, relating to permitting sick time only if foreseeable, permitting sick time only if requested in writing sufficiently in advance, and requiring medical documentation. Similarly, petitioner seeks a $1,000 penalty for the proven violations in count 12, consisting of a $500 penalty for count 12, paragraph 191(g), relating to the sentence about holding persons accountable, and a $500 penalty for count 12, paragraph 191(h), relating to the leave restrictions. And in count 13, petitioner seeks separate $500 penalties for each of four retaliatory statements in the email, relating to restricting time off; permitting employees to use sick leave only if sufficiently foreseeable; threatening the denial of sick time if not requested sufficiently in advance; and impermissibly requiring medical documentation. In count 13, petitioner also seeks $500 in relief to each employee for each retaliatory statement alleged.[29] In total, for the proven violations related to the July 20, 2020, email, petitioner seeks $4,500 in civil penalties and $10,000 in employee relief.

Many of petitioner's penalty requests are duplicative. Count 6 alleges that the email policy violated rule 7-211(c) because it was non-compliant with ESSTA, while counts 12 and 13 allege

[29] Petitioner did not address penalties and relief for count 13 in its post-trial memorandum but made those requests in paragraphs 197 and 198 of the petition.

that the email policy violated section 20-918 of ESSTA because it constituted interference and retaliation. But the underlying conduct relating to each charge was the same: respondent sent an email which denied and restricted leave, and which stated that these leave restrictions were imposed because of the investigation and pending the conclusion of the investigation. The email was non-compliant, retaliatory, and constituted an attempt to interfere with the investigation.

In addition, the language of section 20-918 makes clear that a retaliatory adverse action may itself constitute interference with an investigation. Subsection 20-918(b), prohibiting an employer from taking "any adverse action against an employee," defines such an "action" as one that "penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise rights under this chapter or *interfere with an employee's exercise of rights under this chapter and implementing rules.*" Admin. Code § 20-918(b) (emphasis added). While section 20-918(b) does not contain the word "investigation," which is contained in subsection 20-918(a), Admin. Code § 20-918(a) ("No person shall interfere with any investigation, proceeding or hearing pursuant to this chapter."), an employer's attempt to "interfere" with an employee's "exercise of rights" may, as here, include interfering with that employee's exercising of rights to participate in an investigation.

Petitioner's requests in each of the counts for multiple penalties based upon separate sentences in the same policy email are also unwarranted. As specified in count six, paragraph 65 of the petition, it is respondents' "written policy, provided in the Sciarabba Email," that violates section 7-211(c) of the rules. The fact that multiple statements are contained in one policy does not create three separate policies, particularly where, as here, the statements are all in the same paragraph and two of the statements (specified in paragraph 165(a) and 165(b)) are in the same sentence.[30] *Compare Sky Materials Corp.*, OATH 830/17 at 5 (failure to respond to two document demands constituted two violations), *and Battaglia,* OATH 1381/17 at 5 (same), *with Dep't of Citywide Administrative Services v. Blai,* OATH Index No. 626/22 at 11 (June 2, 2022), *modified on penalty,* Comm'r Dec. (Aug. 8, 2022) (holding that although a document contained three false

[30] Paragraph 165(a) and 165(b) refers to this sentence: "Safe or Sick leave time will be allowed only if it is foreseeable (3 Days or more); which will require employees to confirm to there [sic] supervisor in writing using the "Days Off / Vacation Request" form CSS 83 at least 1 week in advance of there [sic] scheduled initial day off." The last sentence of the paragraph refers to the obligation to provide medical documentation, stating, "As well foreseeable Safe or Sick leave; employee must provide documentation from a Licensed Medical Provider to his supervisor."

statements, they were "effectively one statement for the purposes of imposing penalty" because they were made in a single document). Similarly, the fact that multiple statements are referenced in the same policy email does not create discrete instances of retaliation or interference. The e-mail constitutes a single "adverse action" under section 20-918(b) of the Administrative Code and thus should be treated as a single violation of section 20-918 of the Administrative Code for purposes of penalty.

In sum, separate penalties for the same conduct are not justified. The July 20, 2020, email merits one civil penalty. The applicable penalty provisions under section 2203(h)(1) of the Charter and section 20-924(e) of the Administrative Code each permit the imposition of a penalty not to exceed $500. The egregious nature of the July 20, 2020, email merits the maximum penalty of $500.

Petitioner's request for civil relief for each former employee under count 13 is appropriate, but not for each statement alleged as separate retaliation. Section 20-924(d) broadly provides the Department with authority "to grant each and every employee or former employee all appropriate relief," which "shall include . . . (iii) for each violation of section 20-918 not including discharge from employment: full compensation including wages and benefits lost, five hundred dollars and equitable relief as appropriate." Admin. Code § 20-924(d). In July 2020, respondents had five employees: Mr. Williams, Mr. Mazzella, Mr. Colón, Mr. Velez and Mr. Javaid. Hence, relief to each of these employees is appropriate. However, as the email itself constituted the retaliatory "adverse action," petitioner's request for separate relief for each of four statements specified in the same email is not justified. Instead, respondents should pay relief in the amount of $500 to each of five employees, or total relief of $2,500 for their violation of section 20-918.

Failure to distribute notices of employee rights in violation of section 20-919(a) of ESSTA (count 8): $300 civil penalty

Petitioner seeks a $300 civil penalty for the proven violation of count 8, relating to the failure to distribute notice of employee rights under section 20-919(a) of ESSTA. The applicable penalty provision provides for a civil penalty for a willful violation of section 20-919, not to exceed $50 for each employee who was not provided with "appropriate notice." Admin. Code § 20-919(d). Respondents had six employees: Mr. Williams, Mr. Mazzella, Mr. Colón, Mr. Velez, Ms. Wethington, and Mr. Javaid.

There is some question as to whether respondents' failure to distribute a notice of employee rights was willful since respondent claims that he did not know of the requirement until soon after the investigation began in July 2020, at which time he posted the Notice in the security booth. Petitioner contends, however, that regardless of whether respondents' failure to provide the Notice was willful, reliance upon section 20-919(d) is appropriate because the civil penalty in section 2203(h)(1) of the Charter would result in a larger, $500 penalty (Pet. Post-Trial Mem. at 5).

Petitioner is mistaken. Section 2203(h)(1) does not mandate a $500 civil penalty but provides for a penalty not to exceed $500. Accordingly, under section 2203(h)(1) of the Charter, I recommend a civil penalty of $300 for the violation of section 20-919. This is appropriate because respondent posted the notice of employee rights after he was notified soon after the investigation began of his obligation to do so.

Failure to provide employees with pay statements or other documents containing information about sick time accrued and used in violation of section 20-919(c) of ESSTA (count 9): $250 civil penalty

Petitioner requests a $250 civil penalty for the proven violation of count 9, relating to the failure to provide employees with pay statements or other documents containing information about sick time accrued and used under section 20-919(a) of ESSTA. As noted, section 20-919(d) provides for a civil penalty for a willful violation of section 20-919, not to exceed $50 for each employee who did not receive this information. Respondents had five employees at the time of this violation, which began on September 30, 2020.

As with count 8, petitioner contends that even if respondents' conduct was not willful, the civil penalty provision contained in section 20-919(d) is appropriate because the civil penalty under section 2203(h) (1) of the Charter would be higher. As noted, however, section 2203(h)(1) does not mandate a $500 penalty. Accordingly, under section 2203(h) of the Charter, I recommend the imposition of a civil penalty of $250.

Workplace-wide failure to provide for the accrual of paid sick time, in violation of section 20-913(b) of ESSTA (count 10): $10,250 civil penalty

Petitioner requests a $11,500 civil penalty for the proven violation of failing to provide employees with sick time accruals, consisting of $500 per employee, per year over four years. The

penalty provision, section 20-924(e) of the Administrative Code, provides for penalties to be imposed on a per employee basis for the violation of section 20-913(b), which requires employers to provide at least one hour of sick time for every 30 hours worked by an employee. Admin. Code § 20-924(e). It further provides for a civil penalty not to exceed $500 for the first violation, a civil penalty not to exceed $750 for "subsequent violations" occurring within two years, and a civil penalty not to exceed $1,000 for "each succeeding violation." *Id.*; *see also* 6 RCNY§ 7-213(a) (providing for per employee penalties when an employer "has an official or unofficial policy or practice of not providing or refusing to allow the use of . . . sick time"). The years in question are 2017 through July 2020. From 2017 through November 2019, respondents had six employees. In 2020, they had five employees (as Ms. Wethington's employment was terminated in November 2019).

Under section 20-924(e) of ESSTA, a civil penalty of $500 per employee per year should be imposed for 2017, 2018, or 2019, amounting to 3,000 per year (or $9,000 for the three years). For 2020, however, a lesser civil penalty of $250 for each of five employees should be imposed, because respondent took steps to comply with ESSTA beginning in July 2020. Hence, for 2020, a penalty of $1,250 should be imposed. The total civil penalty that should be imposed under this count is $10,250.[31]

Workplace-wide failure to allow eligible employees to use paid sick time in violation of section 20-913(d) of ESSTA (count 11): $10,250 civil penalty and $11,500 in employee relief

For the proven violation of failing to permit employees to use paid sick time, petitioner requests a $11,500 civil penalty as well as $11,500 in employee relief. Petitioner seeks both penalties and relief on a per-employee, per-year basis.

Failing to permit employees to use sick leave is related to but not duplicative of the violation in count 10, involving respondents' failure to provide employees with sick time accruals. Section 20-913(b) of the Administrative Code requires employers to provide sick time accruals to

[31] In its petition but not its post-trial brief, petitioner also requested a recommendation under section 7-213(c) of the Department's rules that respondents apply to each affected employee's paid sick time balance either 40 hours or the number of hours the employee should have accrued, up to 80 hours per employee (Pet. ¶ 182). It does not appear that such relief is available, because section 20-913(i) of ESSTA states that the requirements relating to sick time accrual should not be construed "as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued safe/sick time that has not been used." Ms. Wethington's employment was terminated in November 2019 and the other employees were separated from employment once Champion lost the contract.

employees, while section 913(d) requires employers to permit employees to use sick time "as it is accrued." And here, because respondent did not provide his employees with sick leave accruals or other information about their rights under ESSTA, they did not know the amount of sick leave to which they were entitled by law. Despite this interrelationship, the proven violations involve distinct conduct: not providing employees with sick time accruals, and not permitting them to take days off as paid sick time. Separate penalties are warranted for each violation.

The applicable penalty provision, section 20-924(e) of ESSTA, provides for up to a $500 civil penalty, on a per-employee, per-year basis. For 2017, 2018, and 2019, the maximum $500 penalty is appropriate, for each of six employees, while for 2020, a lesser penalty of $250 per employee is appropriate since the charges allege a violation for only a portion of 2020. Thus, for 2017, 2018, and 2019, when respondents had six employees, a civil penalty of $3,000 per year or $9,000 total should be imposed. For 2020, when respondents had five employees, and violated this provision for only a portion of the year, a civil penalty of $1,250 ($250 x 5) should be imposed. The total civil penalty under this count should be $10,250.

Employee relief is also warranted under section 20-924(d)(v) of ESSTA, which provides for "relief" of $500 "for each employee covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued safe/sick time." Section 924(d)(v) does not explicitly state that relief is to be awarded on an annual basis. However, petitioner's contention that relief of $500 should be imposed for each year that respondent failed to permit employees to use paid sick leave is rational because an employer's sick time obligations under ESSTA are calculated on an annual basis. *See* Admin. Code § 20-913(b) (an employer with less than 100 employees are not required to provide more than 40 hours of sick time for an employee in a calendar year); *Mr. Coco 162 Inc.*, OATH. 1672/20 at 11 (recommending employee relief on an annual basis for the employer's failure to pay sick leave).

Thus, respondents should pay $11,500 in employee relief: for 2017, 2018, and 2019, $500 each year to Mr. Javaid, Mr. Mazzella, Mr. Williams, Mr. Velez, Mr. Colón, and Ms. Wethington ($3,000 per year to all employees, or $9,000 total), and for 2020, $500 each to Mr. Javaid, Mr. Mazzella, Mr. Williams, Mr. Velez, and Mr. Colón (or $2,500 total).

Telephone calls to Mr. Williams: retaliation and interference in violation of section 918 of ESSTA (count 12, paragraph 191(b) and 191(d); count 14, paragraph 202(b)): $1,000 civil penalty and $1,000 in civil relief

Petitioner seeks a $500 civil penalty under section 20-924(e) of ESSTA for count 12, paragraph 191(b), and a separate $500 penalty for count 12, paragraph 191(d), based upon respondent's coaching Mr. Williams on what he would say to the Department investigator and stating that the complaining workers would be fired. Petitioner also seeks a $500 civil penalty for count 14, paragraph 202(b), for respondent's statement about firing the complaining workers. Finally, petitioner seeks $500 in relief to Mr. Williams based upon the statement in count 14 about firing the complaining workers.

Petitioner's request for a $500 penalty for each of these counts, and for each statement alleged in count 12, is unwarranted. While charged as both interference (count 12) and retaliation (count 14), the conduct underlying both counts is the same: the telephone calls that respondent made to Mr. Williams. These calls were both retaliatory in nature (designed to interfere with the exercise of his rights under ESSTA) and constituted an attempt to interfere with the investigation. *See* Admin. Code § 20-918(a) (prohibiting interference with an investigation), § 20-918(b) (defining an "adverse action" as one which is reasonably likely to deter an employee from exercising his rights under ESSTA). Indeed, count 14, paragraph 202(b), charging retaliation, relates to the same statement charged in count 12, paragraph 191(d), alleging interference. The other statement charged in count 12 as interference relates to respondent's attempts to coach Mr. Williams about what to say to the Department investigator, which is the same thing as attempting to interfere with the investigation.

However, as Mr. Williams credibly testified that he received at least two telephone calls of this nature, separate penalties and separate relief should be imposed for each telephone call, as each call constitutes a separate violation of section 20-918.

Accordingly, for the proven violation of section 20-918 of ESSTA relating to the statements which respondent made to Mr. Williams in two separate telephone calls, a civil penalty of $500 for each call is warranted, resulting in a total civil penalty of $1,000.

Relief of $500 to Mr. Williams for each phone call is also appropriate under section 20-924(d)(iii) of the Administrative Code, resulting in total relief of $1,000 for the phone calls.

Telephone calls to Mr. Mazzella: retaliation and interference in violation of section 20-918 of ESSTA (count 12, paragraph 191(c), 191(e); count 16, paragraph 213(a-d)): $1,000 civil penalty and $1,000 in employee relief

Petitioner seeks a $500 civil penalty under section 20-924€ for count 12, paragraph 191(c), relating to respondent's attempt to coach Mr. Mazzella on what he should say to the Department investigator, and an additional $500 civil penalty for count 12, paragraph 191(e), relating to respondent's statement that the complaining workers should be fired. Petitioner seeks an additional $2,000 in penalties comprised of separate $500 penalties for each statement alleged in count 16, paragraph 213(a) through 213(d). These statements relate to respondent's retaliating against Mr. Mazzella by: threatening physical harm against the complaining worker; saying the complaining worker would be fired; telling Mr. Mazzella that he should tell the investigator that workers were paid sick time, and, after Mr. Mazzella declined to do so, hanging up on the telephone call with Mr. Mazzella. Petitioner also seeks $2,000 in civil relief, $500 for each retaliatory statement.

While charged as both interference (count 12) and retaliation (count 16), the conduct underlying both counts relates to respondent's two telephone calls with Mr. Mazzella. For the reasons discussed above, petitioner's penalty request is duplicative insofar as it seeks separate penalties for statements made in the same telephone call that were both retaliatory and constituted an attempt to interfere with the investigation. However, Mr. Mazzella credibly testified to receiving two telephone calls from respondent: in one telephone call, respondent threatened physical harm against the complaining workers and said he would fire them. In the other telephone call, respondent tried to coach Mr. Mazzella and hung up on him after Mr. Mazzella declined to be coached. Each telephone call merits a separate penalty and separate relief.

Accordingly, for each of the two telephone calls made to Mr. Mazzella, a civil penalty of $500 should be assessed, resulting in a total civil penalty of $1,000. For each of the two telephone calls, civil relief of $500 should be awarded, for a total award of $1,000.

Telephone call to Mr. Colón: retaliation and interference in violation of section 20-918 of ESSTA (count 12, paragraph 191(a); count 20, paragraph 232(a)): $500 civil penalty and $500 in employee relief

Petitioner seeks a $500 civil penalty under section 20-924(e) of ESSTA for count 12, paragraph 191(a), relating to respondent's attempt to interfere with the investigation by coaching

Mr. Colón on what he would say to the Department investigator. Separately, petitioner seeks a $500 civil penalty under section 20-924(e) and $500 in relief under section 20-924(d)(iii) to Mr. Colón for count 20, paragraph 232(a), relating to respondent's attempt to coach Mr. Colón.

While charged as both interference (count 12) and retaliation (count 20), both counts relate to the exact same statement made in a single telephone call with Mr. Colón. Imposition of two separate penalties for the same conduct is inappropriate. Accordingly, a civil penalty of $500 should be imposed, along with $500 in relief to Mr. Colón.

July 31, 2020, write-up of Mr. Mazzella: retaliation and interference in violation of section 20-918 of ESSTA (count 12, paragraph 191(j); count 16, paragraph 213(f)): $500 civil penalty and $500 in employee relief

Petitioner has proven interference (count 12) and retaliation (count 16), both for precisely the same conduct: the July 31, 2020, write-up which respondent issued against Mr. Mazzella because he refused to lie and agree that he was paid for sick time during his employment. Petitioner seeks a civil penalty of $500 for each count. However, because the counts are duplicative, only one civil penalty under section 20-924(e) of ESSTA is justified. The maximum penalty is appropriate given the egregious nature of the violation. Relief to Mr. Mazzella of $500 is also warranted under section 20-924(d)(iii) of ESSTA.

July 30, 2020, write-up of Mr. Colón: retaliation and interference in violation of section 20-918 of ESSTA (count 12, paragraph 191(k); count 20, paragraph 232(b)): $500 civil penalty and $500 in employee relief

Petitioner seeks a $500 civil penalty for count 12 (interference) and another $500 penalty for count 20 (retaliation), as well as $500 in relief to Mr. Colón under count 20. The counts are duplicative, as both relate to precisely the same conduct: the July 30, 2020, write-up that respondent issued to Mr. Colón because he refused to lie and agree that he was paid for sick time. Accordingly, only one civil penalty is justified. Given the egregious nature of the violation, the maximum civil penalty of $500 should be imposed, along with $500 in relief to Mr. Colón.

Threatening to fire Mr. Williams if he were to report respondents to G4S for their refusal to pay sick time in violation of section 20-918 of ESSTA (count 14, paragraph 202(e)): $500 civil penalty and $500 in employee relief

For this discrete violation, petitioner seeks a $500 civil penalty and $500 in employee relief, under sections 20-924(e) and 20-924(d)(iii) of ESSTA. Respondent's comment that Mr. Williams could work for G4S if he did not want to work for respondent was an implicit threat of adverse employment consequences. Given the continuing nature of respondent's attempts to thwart his workers from asserting their rights under ESSTA, the maximum civil penalty is appropriate, along with $500 in civil relief, the amount of which is mandatory under the statute.

Threatening to fire Mr. Williams for his refusal to sign Mr. Colón's write-up on July 30, 2020 (count 14, paragraph 202(f)) and writing up Mr. Williams on August 1, 2020, for failure to sign the write-up (count 14, paragraph 202(g)) in violation of section 20-918 of ESSTA: $500 in civil penalty and $500 in employee relief for count 14, paragraph 202(f), and $500 in civil penalty and $500 in employee relief for count 14, paragraph 202(g), for a total $1,000 civil penalty and $1000 in employee relief

Petitioner has requested a $500 civil penalty and $500 in relief to Mr. Williams for each alleged violation. This is appropriate. The underlying violations, while related, were different retaliatory acts that occurred on different days. On July 30, 2020, when Mr. Williams refused to sign Mr. Colón's counseling notice, respondent became angry and said he would get them both fired. Two days later, respondent issued Mr. Williams a counseling notice, which was pretextual in nature, and was instead issued in retaliation for Mr. Williams' refusal to participate in a disciplinary process against Mr. Colón that was linked to Mr. Colón's exercise of his rights under ESSTA. Because the counts are not duplicative, separate penalties are justified. For respondent's angry threat to fire Mr. Williams on July 30, 2020, a $500 civil penalty is warranted, plus $500 in civil relief to Mr. Williams. For the disciplinary write-up two days later, the maximum $500 civil penalty should be imposed, along with $500 in civil relief to Mr. Williams.

Charging time spent for receiving the COVID-19 vaccination to Mr. Williams' and Mr. Velez's sick leave bank in violation of Section 20-913(g) of ESSTA (counts 15 and 24): $250 civil penalty and $500 in employee relief for each count, for a total $500 civil penalty and $1,000 in employee relief

Petitioner seeks a $500 civil penalty for each time respondent charged vaccination time to sick leave. Petitioner also requests employee relief under section 20-924(d) of ESSTA, which

provides for relief of $500 "for each employee covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued safe/sick time."

By charging COVID-19 vaccination time to employees' sick leave bank, respondents violated section 20-913(g) of ESSTA, which states that employees can determine the amount of sick time they need to use. Section 20-924(e) authorizes a civil penalty of up to $500 for a violation of section 20-913(g). This is respondents' first offense of this nature, however, and thus a lesser civil penalty of $250 for each proven violation is appropriate.

Section 20-924(d) authorizes relief of $500 "for each employee covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20-913." Here, by charging COVID-19 vaccination time to sick time balances, respondents engaged in a practice which improperly reduced the number of hours in two employees' sick time banks and thus failed to provide accrued sick time as required. Accordingly, relief of $500 to each Mr. Williams and Mr. Velez is appropriate.[32]

Text messages sent to Mr. Mazzella on October 11, 2020, requiring him to find a replacement worker for his absence (count 18) and warning him to "better watch how you address me" (count 16, paragraph 213(g)) in violation of sections 20-918 and 20-915 of ESSTA: $250 civil penalty and $500 in employee relief for count 18, and $500 civil penalty and $500 in employee relief for count 16, for a total $750 civil penalty and $1,000 in employee relief

Petitioner requests a $500 civil penalty and $500 in relief to Mr. Mazzella for the proven violation in count 16, paragraph 213(g), alleging retaliation based upon a text message that respondent sent at 5:13 p.m. on October 11 telling Mr. Mazzella that he had "better watch" how he addressed respondent. Respondent sent that text after a series of messages in which Mr. Mazzella stated that he would be taking a sick day, respondent asked who was replacing him, and Mr. Mazzella stated that it was not his responsibility to find coverage for his shift, and that he had given sufficient advance notice. Separately, petitioner seeks a $500 civil penalty and $500 in relief to Mr. Mazzella based upon respondent's text messages, also sent on October 11, 2020, demanding that Mr. Mazzella find a replacement worker to replace him.

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[32] In its petition, but not its post-trial brief, petitioner requested that under 6 RCNY § 7-213(c), respondents apply four hours of sick time to each employee's sick time bank (Pet. at ¶¶ 208, 255). It does not appear that such relief is available as neither Mr. Velez nor Mr. Williams are employees of respondents, as defined in section 20-912 of ESSTA, and as section 20-913(i) of ESSTA states that the requirements relating to sick time accrual should not be construed "as requiring financial or other reimbursement" to former employees. Admin. Code § 20-913(i).

Petitioner's request for separate civil penalties and relief is appropriate as the two violations, while related, involved separate conduct. Respondent's text message about how Mr. Mazzella had "better watch" how he addressed him (count 16) constituted an attempt to intimidate him from exercising his rights under ESSTA. Respondent's repeated text messages relating to Mr. Mazzella finding a replacement worker (count 18) constituted an attempt to condition the grant of sick leave upon Mr. Mazzella's finding a replacement worker. The maximum civil penalty of $500 is appropriate for respondent's retaliatory comment (count 16). However, as respondent ultimately paid Mr. Mazzella for his use of sick leave, a lesser civil penalty of $250 is appropriate for count 18.

Employee relief of $500 for each count is appropriate under section 20-924(d)(iii) (relating to retaliation) and section 20-924(d)(ii) (relating to conditioning sick leave upon searching for or finding a replacement worker).

Refusing to grant and discuss Mr. Mazzella's vacation request (count 16, paragraph 213(h)), in violation of section 20-918 of ESSTA: $500 civil penalty and $500 in employee relief

For the proven violation for respondent's failing to discuss and grant Mr. Mazzella's vacation request, first made on October 6, 2020, petitioner seeks a $500 civil penalty and $500 in relief, under sections 20-924(e) and 924(d)(iii) of the Administrative Code. This is appropriate given respondent's repeated retaliatory acts against his employees.

Failing to pay Mr. Mazzella for sick time used in violation of section 20-913 of ESSTA (count 17): $500 civil penalty and $2,394.24 in employee relief

For the proven violation of failing to pay Mr. Mazzella for 32 hours of sick time, starting in February 2021, petitioner seeks a civil penalty of $2,000, consisting of a $500 civil penalty for each eight-hour shift, as well as relief of $2,394.24 to Mr. Mazzella.

This request is appropriate. Section 20-924(e) of ESSTA, under which relief is sought, provides for a civil penalty of up to $500 for each violation of section 20-913, and it is reasonable to consider each day for which sick time was not paid as a separate violation. Regarding employee relief, section 20-924(d)(i) provides for civil relief of three times the wages that should have been paid or $250, whichever is greater. Mr. Mazzella's hourly rate of pay was $24.94 (Pet. Exs. 25,

32; Resp. Ex. G45). His total wages, therefore, over 32 hours would have been $798.08, and three times that is $2,394.24.

November 7, 2020, workplace discussion: unlawfully requiring medical documentation from Mr. Colón (count 20, paragraph 232(d) and count 22), in violation of section 20-914(a)(2) of ESSTA and section 20-918(d) of ESSTA: $500 in civil penalty and $500 in employee relief

Petitioner seeks separate civil penalties for each count. This is not appropriate as both charges involve the same conduct: respondent telling Mr. Colón during their meeting on November 7, 2020, that Mr. Colón needed to produce a doctor's note for his request for one sick day. For both counts, a total civil penalty of $500 should be imposed, along with $500 in employee relief under section 20-924(d)(iii).

November 7, 2020, workplace discussion: threat to write up Mr. Colón for insubordination (count 20, paragraph 232(f)): $500 in civil penalty and $500 in employee relief

This discrete violation relates to different conduct during the same workplace discussion on November 7, 2020. Mr. Colón challenged respondent's assertion that he needed to produce a doctor's note to support his sick day request by stating that respondent had permitted another employee to take time off without a note and that respondent was retaliating against him because of the investigation. Respondent then told Mr. Colón that he was being insubordinate and threatened to write him up for insubordination if he continued the conversation. This was retaliatory under section 20-918 of ESSTA. For this proven violation, a $500 civil penalty and $500 in employee relief is appropriate, given the continuing nature of respondent's efforts to thwart workers from asserting their rights under ESSTA.

November 8, 2020, disciplinary notice (count 20, paragraph 232(e)) in violation of section 20-918 of ESSTA: $500 civil penalty and $500 in employee relief

Petitioner has requested a $500 civil penalty and $500 in employee relief for this proven violation, relating to the November 8, 2020, disciplinary notice issued against Mr. Colón for asserting his rights under ESSTA. These requests are appropriate for respondent's egregious act of retaliation. A $500 civil penalty and $500 in employee relief should be imposed.

Termination of Mr. Colón in violation of section 20-918 of ESSTA (count 21): $500 civil penalty, $2,500 in relief, and $27,608.58 in gross wages and benefits lost, plus interest at 9 percent calculated from an intermediate date between termination and date of decision

For respondents' retaliatory termination of Mr. Colón, petitioner seeks a $500 civil penalty under section 20-924(e) of ESSTA, and under section 20-924(d)(iv) of ESSTA, seeks $2,500 in employee relief and $26,650 in wages and compensation lost, plus 9% interest on the back wages, calculated from an intermediate date between the termination of Mr. Colón's employment on November 30, 2020, and the date of the Commissioner's decision.

The $500 civil penalty requested by petitioner is warranted, and the $2,500 in civil relief requested by petitioner is mandated by the statute for retaliatory termination. *See* Admin. Code § 20-924(d)(iv) (requiring $2,500 in employee relief "for each instance of unlawful discharge from employment").

In terms of wages and benefits lost, Mr. Colón was terminated by a notice of indefinite suspension dated November 30, 2020. Before his termination, he worked 32 hours a week (four days a week) for respondents and also worked 24 hours a week for G4S (Colón: Tr. 735; 775-76). He estimated that he was paid about $650 a week from respondents (Tr. 736). He also estimated that he would "bring home, like, a thousand, like $1,200 a week between the two companies" (Tr. 761). Respondents' payroll journal for the period November 16, 2020, through November 22, 2020, shows that respondents paid Mr. Colón $24.94 an hour, which at 32 hours per week, came to gross pay of $798.08 and net pay of $570.57 (Resp. Ex. A27). This suggests that Mr. Colón's estimate of being paid about $650 a week from respondents referred to take-home pay rather than gross pay.

After his termination, Mr. Colón continued to work for G4S but not on a full-time basis. His hours kept changing. Mr. Colón gave varying estimates of how many hours he worked: sometimes he would work "a little more than 30 hours a week," sometimes he would work only three days a week (Tr. 768). He estimated that he made "about $600 less on [his] paycheck" after respondents fired him (Tr. 761). Petitioner introduced only three earning statements from G4S to support its claim for back wages, all of which were from July 2021. The first, from July 5, 2021, through July 11, 2021, shows 34 hours worked resulting in gross pay of $884.86. The second, from July 12, 2021, through July 18, 2021, shows 22 hours worked, for gross pay of $548.68. The

third earning statement, from July 19, 2021, through July 25, 2021, shows 30 hours worked, for gross pay of $748.20 (Pet. Ex. 36).

Mr. Colón did not get full-time hours until Arrow took over the subcontract in September 2021, which occurred as early as September 13, 2021.

As petitioner states, 41 weeks elapsed between Mr. Colón's termination by Champion on November 30, 2020, and September 13, 2021, when Mr. Colón became a full-time employee at Arrow. Petitioner contends, based on Mr. Colón's testimony, that Mr. Colón earned about $650 less a week after he was fired (Pet. Post-Trial Mem. at 24 n. 31). Petitioner apparently arrives at its demand for $26,650 in back wages by multiplying $650 by 41 (the number of weeks).

However, this calculation ignores that Mr. Colón's net pay from respondents was $570.58, not $650. Second, it ignores Mr. Colón's testimony, supported by the three pay stubs in evidence, that at least some of the time, he was able to mitigate his lost pay by adding on extra hours from G4S. *See Brewer, Attorneys & Counselors*, OATH 514/19 at 13 ("Lost wages are calculated from the date of unlawful termination to the date of judgment, reduced by the complainant's earnings during that period."). While he was employed by respondents, Mr. Colón worked 24 hours for G4S, but after his termination by respondents, there were some weeks when he worked more than 30 hours for G4S. Indeed, the three pay stubs from G4S from July 2021 show 22 hours weekly, 30 hours weekly, and 34 hours weekly.

It is appropriate to consider gross pay when making a calculation of lost wages. *See, e.g., Johnson v. Manhattan & Bronx Surface Transit Operating Auth.*, 71 N.Y.2d 198, 204 (1988). Thus, any calculation of lost hours should consider that Mr. Colón received $798.08 a week in gross pay from respondents before he was fired. 41 weeks elapsed before he was able to regain full-time employment, meaning that Mr. Colón lost salary he would otherwise have received amounting to $32,721.28 in gross pay. However, during the 41 weeks he was sometimes able to mitigate his lost wages by picking up extra hours from G4S. While the record is incomplete, it is fair to rely upon from the three paystubs petitioner submitted into evidence to calculate average weekly hours worked at G4S at 29 hours per week (the average comes to 28.6). This average is also consistent with Mr. Colón's testimony that, after the termination, his hours for GS4 varied from three days per week, or 24 hours based on an 8-hour shift, to "a little more than 30 hours a week." Thus, on average, Mr. Colón was able to pick up five extra hours a week in the 41-week period in question. As G4S paid Mr. Colón an hourly rate of $24.94, including "regular" earnings

and "health/welfare," he made an additional $124.70 a week in gross pay from those extra hours. Over 41 weeks, this comes to an additional $5,112.70 in extra hours from G4S. Thus, considering gross pay lost and additional gross pay earned in mitigation of damages, Mr. Colón should be awarded $27,608.58 in back pay ($32,721.28 - $5,112.70). In addition, Mr. Colón should be awarded 9% interest on the back pay award, calculated from an intermediate date between November 30, 2020, when his employment was terminated, to the date of the Commissioner's determination. *Mr. Coco 162 Inc.,* OATH 1672/20 (calculating 9% simple interest on back wages to an intermediate date between termination of employment and Commissioner's final determination).

Summary of Penalties and Relief:

As discussed above, based upon the proven violations, I recommend that a total civil penalty of $32,300 be assessed, plus employee relief of $27,894.24 and an additional $27,608.58 in back pay to Mr. Colón. The employee relief, per employee, is as follows: Mr. Williams: $5,500; Mr. Mazzella: $7,894.24; Mr. Colón, $7,500; Mr. Velez: $3,000; Mr. Javaid: $2,500; and Ms. Wethington: $1,500.

Faye Lewis

Faye Lewis
Administrative Law Judge

October 23, 2023

SUBMITTED TO:

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