

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Sunrise Mountainview Hospital, Inc. d/b/a Mountainview Hospital, Inc. and Service Employees International Union, Local 1107. Cases 28–CA–23061 and 28–CA–23096

June 6, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On January 19, 2011, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. June 6, 2011

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

William Le Master, Esq., for the General Counsel.

Paul R. Beshears, Esq. (Ford and Harrison), of Atlanta, Georgia, for the Respondent.

Maria Keegan Myers, Esq. (Rothner, Segall & Greenstone), of Pasadena, California, for the Union.

¹ There are no exceptions to the judge's recommendation dismissing allegations that the Respondent violated Secs. 8(a)(3), (5) and (1) by discharging employee William Pflumm.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Las Vegas, Nevada, on October 19 and 20, 2010. The captioned charges were filed by Service Employees International Union, Local 1107 (the Union) on June 10 and July 14, 2010, respectively. On August 30, 2010, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Sunrise Mountainview Hospital, Inc. d/b/a Mountainview Hospital, Inc. (the Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Nevada corporation, with a place of business in Las Vegas, Nevada, where it engaged in the operation of an acute care hospital providing medical care. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$250,000 and purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of Nevada. It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (3) and/or (5) of the Act by terminating employee William Daniel Pflumm because of his union activity, and/or by discharging Pflumm as a result of the Respondent's more stringent enforcement of a "legal hold" policy without prior notice to the Union and without affording the Union an opportunity to bargain over this change; and whether the Respondent has violated Section 8(a)(1) of the Act by denying Pflumm's request for union representation during an interview.

B. Facts

Two unions prevailed in representation elections in January: the California Nurses Association, representing registered nurses, prevailed in an election conducted in mid-January; and

the Union herein, representing, inter alia, certified nursing assistants such as Pflumm, prevailed in an election on January 28.

The California Nurses Association election had initially been scheduled for July 2009. Prior thereto, the Respondent conducted a vigorous antiunion campaign, consisting of the dissemination of numerous antiunion documents and captive-audience meetings with the employees. The election was postponed as a result of blocking charges. A settlement agreement was negotiated and a notice was posted by the Respondent. Thereafter, the Respondent's parent organization, on behalf of the Respondent, entered into an Election Procedure Agreement, sometimes referred to as a neutrality agreement, establishing very restrictive ground rules for a future election. It is a lengthy document. In it the Union agrees, inter alia, "to campaign in a positive and nondisruptive manner and not to engage in negative campaigning which disparages the Hospital and management representatives." The Respondent for its part, inter alia, agrees, "that it shall not conduct an anti-union campaign and shall not utilize anti-union consultants," and that it may simply advise the employees, during joint union-employer meetings, that it "does not believe having a union is in the best interests of the hospital." Further, managers "shall make [no] comment, directly or indirectly" to employees about the matter of union representation, and in the event a manager is asked about union representation by an employee, the manager is to hand the employee a pre-printed 3x5 card that states:

The Hospital does not believe having a union is in the best interests of the Hospital. However, the Hospital and the Union agree that the question of whether employees should be represented by [the union] is a question that employees should answer for themselves. The Hospital has agreed that supervisors will not answer questions or express any further opinion on the issue of union representation.

The California Nurses Association prevailed in that election. The Respondent and the Union herein, representing certified nursing assistants (CNAs) and other employees, entered into an identical Election Procedure Agreement.

William Daniel Pflumm (William, Dan or Pflumm) began working for the Respondent on about May 5, 2008, as a certified nursing assistant (CNA) in the Respondent's emergency department, located on the ground floor of the hospital near the emergency entrance. He was terminated on January 29, 2010.³

Kathleen Banusevich has been the Respondent's director of emergency services throughout Pflumm's tenure with the Respondent. Banusevich testified she terminated Pflumm for "[a]n accumulation of counselings for failure to do his assigned duties." The first counseling was issued to Pflumm on October 2, 2008, and the final counseling was issued to Pflumm on January 28, *infra*.

Pflumm testified regarding the extent of his union activity, as follows. Some employees were talking about the election at the nurses' station several days prior to the union election for the registered nurse (RN) unit, not the CNA unit. According to Pflumm, Cynthia Armistead, the charge nurse, said she wouldn't vote for the Union. Pflumm asked why, and Cynthia answered that the Union just wanted to take your money and would not do the employees any good.

Pflumm testified he wore an ink pen with a union logo

¹ All dates or time periods herein are within 2010, unless otherwise specified.

around his neck on a daily basis. He was active in seeking knowledge or finding out information about the Union by attending several informative luncheons conducted by union representatives in a room off the Respondent's cafeteria.² On one occasion he brought some food from one of the luncheons back to the break room, and a manager, Sandy,³ who seemed to be interested in getting such food for herself, asked him where he got it. Pflumm said it came from the union luncheon, and Sandy, according to Pflumm, "just kind of said hum."

On January 28, the day of the union election in the CNA unit, shortly after Pflumm had clocked out at 7:30 p.m. and was leaving work, he was speaking with a union representative by the timeclock for some 20 or 30 minutes. Banusevich, who was walking toward the hospital lobby, walked by them. Pflumm testified, "I believe I said hello," to Banusevich. Banusevich did not respond, but "kind of looked at me." Asked to describe Banusevich's look, Pflumm testified, "I didn't perceive it as pleasant." Pflumm testified the two of them normally speak in passing.

As noted above, Pflumm had received various corrective counselings during his employment. All counselings were issued by emergency room charge nurses. The October 2, 2008 Corrective Counseling Record notes that a patient, upon discharge, asked for her purse to be returned to her, and that Pflumm had neglected to document on the belongings sheet that the patient had brought a purse with her. Under "Supervisor Comments," the counseling record notes Pflumm was "informed that belongings must be clearly itemized and documented on belongings sheet for all patients." This was an "Informal Counseling."

The next incident occurred on March 3, 2009. The Corrective Counseling Record notes "Failure to stock unit with needed supplies." Under "Supervisor Comments," the counseling record notes, "I have spoken to Dan on several occasions regarding his not stocking the unit. I see Dan taking frequent soda breaks, standing at desk on computer, or just standing at the desk, not even attempting to stock. This a.m. there was zero patient movement, therefore he wasn't transporting patients." This was a "Written Counseling."

The next incident occurred on October 23, 2009. The Corrective Counseling Record notes, "Received notice this am that Dan has still not completed Code of Conduct training. He was informed of this when the program first went live on health-stream, and again when the last delinquent list was published." Under "Supervisor Comments," the counseling record notes, "Dan has until October 31 to complete this training." This was a "Written Counseling."

The next incident occurred on November 19, 2009. The Corrective Counseling Record notes, "Charge RN requested 'to go' vital signs on pt in H22. William (Dan) gave me a Blood Pressure and a Resp Rate. This is not a set of vital signs." Under "Supervisor Comments," the counseling record notes, "It is very important that as a CNA you understand what a set of vital signs include." This was a "Written Counseling."

The next incident occurred on January 13. The Corrective Counseling Record notes, "CNA standing in nourishment room . . . Stocking incomplete—Rm 21, Rm 13 per guidelines, i.e.

² Apparently, these luncheons were permitted by the Respondent pursuant to par. 15(f) the aforementioned Election Procedure Agreement.

³ The record does not disclose Sandy's surname, position, title, or work area.

zero q tips. William Pflumm assigned to Rms 13-22.” Under “Supervisor Comments,” the counseling record notes, “I have spoken to the above named person regarding stocking, on several occasions.” This was a “Written Counseling.”

The next and final incident occurred some 2 weeks later, on January 28. The Corrective Counseling Record notes, “William was assigned to sit and keep watch of the (2) Legal (L2Ks).⁴ Security caught pt in Hall 22 (L2K) walking out door. William was standing behind the desk facing thermometers.” There are no supervisor comments. This was a “Final Written” corrective counseling record.

Cynthia Armistead was the emergency room charge nurse who had assigned Pflumm as a sitter that day. Armistead testified that she expected the sitter to keep an eye on the legals and not move from their appointed spot so that at all times they were in a position to have a view of all legals they were assigned to observe.

Armistead testified this was not the first time Pflumm had neglected his duties as a sitter. She had assigned him to sit one day and happened to notice that he was not at his station. Rather, he was inside the nourishment room, a room in the emergency department area where drinks are kept for emergency room patients, drinking a soda. Armistead entered the nourishment room and told him he couldn’t be there, as he could not observe the legals. Pflumm said he was sorry and came out.

Armistead testified that on January 28, a security guard who happened to be in the area at the time,⁵ apprehended a legal patient who had exited the emergency room door, and brought the patient back into the emergency room. Armistead asked who was watching the legals,⁶ and heard Pflumm answer that he was. Pflumm, at that moment, was behind the nurses’ station, and Armistead saw him turn, from facing the bank of thermometers mounted on a wall, toward Armistead. From that

⁴ L2Ks, also sometimes referred to as “legal holds” or “legals,” are patients who, for psychiatric reasons or drug or alcohol related reasons, may be a danger to themselves or others. They are admitted to the hospital and placed on beds or gurneys in emergency room hallways where they are monitored by “sitters.” Sitters are often CNAs assigned by the charge nurse to watch the individuals. Because it is difficult to sit in the same spot for extended periods of time, the sitter will be back on the floor as a CNA after each 4-hour shift. The sitter’s only duty is to watch the L2Ks. If the sitter observes that an L2K is attempting to “elope,” that is, exit the hospital while being monitored, the sitter is to call out to any staff in the area so that the patient may be stopped and returned to his or her gurney. Such patients often do not want to be confined to the hospital, and may attempt to elope if they observe any inattention by the sitter, as the emergency room entrance to the hospital is very close to where they are being monitored. Attempts to elope are quite frequent.

⁵ Security guards are not permanently assigned to the emergency room entrance, and circulate throughout the hospital.

⁶ Although Armistead had assigned the job to Pflumm that day, the designated sitter is required to request assistance from someone else on the staff to relieve him or her for breaks, or to enable the sitter to more closely observe and assist L2Ks, for example, to accompany them to the rest room. Thus, Armistead did not know whether Pflumm had asked someone else to relieve him. The sitter is not to move without someone else taking his or her place; thus, even when a sitter, who is assigned to watch more than one legal patient, observes a patient attempting to elope, the sitter is to remain stationary and call out for other staff members to handle the situation. It is as important for the sitter to watch the patient as it is for the patient to know he or she is being watched.

location he was not in a position to observe either the legal patient who attempted to elope or the other legal patient he had been assigned to watch. Armistead admonished him, and Pflumm said, according to Armistead, “I was just trying to help out.” Apparently Armistead did not ask for, and Pflumm did not provide, any further details.⁷ At some point that day Armistead prepared the above Corrective Counseling Record, reported the matter to Director of Emergency Services Banusevich, and later handed her the document.⁸

Asked why Armistead elected to give Pflumm a “Final Written” corrective counseling, Armistead testified:

I selected it because I had written him up previously to this, I’m not certain of how many times I had written him up. And I’d also spoken to him of [sic] regarding different things several times and so I wrote final written because I don’t terminate. That’s for the discretion of the director of the department.

Banusevich testified that Armistead, after her shift, came to her office in the emergency department at about 7 p.m. on the evening of January 28 to discuss what had happened. Armistead handed Banusevich the counseling form, and explained that the security guard caught the L2K heading out the door, that the patient had made it out the first set of doors when apprehended, and that the security guard brought the matter to Armistead’s attention; that Armistead turned around looking for the sitter; and that the sitter happened to be Pflumm who was standing behind the nurses’ station. Armistead told her this was not the first time she had spoken to Pflumm about leaving his sitter’s assignment post, and it “had happened a few other times.” Banusevich asked what had happened in the past and Armistead replied,

it was the same thing, that he had wandered away from the position where he could be in the direct line of sight, and she had reminded him that he had to sit there and had to be able to visualize all the psych patients.

That evening, at the hospital, Banusevich reviewed Pflumm’s file. She “thought about it long and hard all night long,” and felt “that this could not go on.” She decided to terminate him because of his total performance, namely his repeated failure to do assigned jobs; Banusevich testified she would not have terminated him for that one particular L2K incident.

The next morning, January 29, Banusevich spoke to Chris

⁷ Pflumm testified he had left his sitter’s position to check on one of the legals he was watching, and as he was near the nurses’ station an RN named “Rulon” approached him and asked if he would send a urine specimen to the lab via the nearby vacuum tube system behind the nurses’ station. RN Rulon Bracken testified differently. Bracken testified that he came out of a patient’s room with a sample to go to the lab. Pflumm, who was near where some of the sitters sit, said, “[L]et me send that for you.” Bracken did not know that Pflumm had been assigned to monitor legal holds at the time. Bracken said, okay, gave Pflumm the sample, and went on to do charting. A few moments later he heard a commotion in the hallway by the ambulance exit and discovered that one of the legal holds had tried to elope. While it makes no difference why Pflumm was away from his assigned station, I credit Bracken’s account of the incident. Pflumm was not a credible witness.

⁸ Pflumm testified that after the incident occurred he continued his duties as a sitter for some 30 to 45 minutes, after which another CNA was called to take his place so that he would not have to sit any longer. He worked performing other duties for the remainder of the shift.

Simms, the security guard who had apprehended the L2K. She asked him what had happened, and Simms said that after he apprehended the individual, he looked around and saw there was no one in the sitter's chair. He told Armistead what had happened and Armistead asked who was supposed to be sitting. He saw Pflumm behind the nurses' station. Banusevich did not ask Pflumm for his version of the matter.

Then she went to see Robert Nettles, the Respondent's director of human resources, to make sure he agreed with her reasoning and decision to terminate Pflumm. She explained the matter to Nettles, and showed him the prior counselings. Nettles told her she had sufficient documentation to warrant Pflumm's discharge. At some point Banusevich crossed out "Final Written," on the counseling form and changed it to "Termination." She wrote, "employee terminated for failure to do assigned job repeatedly, after multiple verbal and written counselings."

Regarding the duties of a sitter, at emergency department staff meetings, held on September 22 and 25, 2009, Banusevich told the employees, and in addition left copies of a memorandum of the meeting both on line and at the nurses' station for those who were not present or wanted to review what was said at the meeting, as follows:

Psychiatric patients.

Everyone has been expressing concern re our ability to ensure a safe environment for our psych and ETOH/Drug abuse patients who are awaiting transport to an appropriate facility. Even though an RN is assigned to each, direct visibility is not always possible when there are other patients to care for. The possibility/frequency of attempted escapes or other harm is ever present.

To help maintain a safe environment for these patients, we are going to start using sitters. Initially, when we use sitters will vary, dependent on the number of psych patients, their behaviors, and the availability of someone to sit. We will try to utilize the in-house pool, but there may be times that the Charge RN decides that, even though we only have a few psych patients, their volatility requires a sitter and we will pull a CNA off the floor to perform that role.

What is important to remember is that anyone performing that role has one function—to keep these patients in their direct line of site at all times. This means they cannot take VS [vital signs] on these patients, if it is going to prevent them from continue to monitor the others. They cannot get them food/drinks, clean linen, or anything else that will take them away from their viewing station. Please do not ask them to perform other tasks, chaperone pelvises, or check on psych patients who have gone to the restroom unless there is someone else to sit at their post. If a psych patient tries to escape, the sitter should serve as the notification to others. By yelling for assistance. Hopefully the presence of sitters will prevent escapes or other patient activity that might result in harm because someone will all be watching them.

Also, on December 17, 2009, Banusevich sent the following email to the emergency room staff, as a reminder:

WHEN WE HAVE A SITTER, THEY NEED TO BE STATIONED OUTSIDE THE NOURISHMENT ROOM SO THEY CAN SEE DOWN BOTH HALLS AND WATCH THE LEGALS. THEY CANNOT BE ASKED TO

DO ANYTHING ELSE THAT WOULD REQUIRE THEM TO TAKE THEIR EYES OFF THE LEGALS. THERE ARE 2 OTHER CNAs ON DUTY TO HELP YOU WITH WHATEVER YOU NEED. THANKS

Pflumm, although he had signed the attendance sheet, could not remember that he had attended the aforementioned staff meeting, and recalls nothing about the meeting. Thus, Pflumm, on cross-examination, was asked whether, at times following the aforementioned meeting, he was required as a sitter to keep legal hold patients in his direct line of sight at all times, testified as follows:

I was told that I should take care of the patients' needs and keep them safe. If they needed nutrition, I was told that I should get them something to drink or eat. If they needed to go to the restroom, I was told that I needed to escort them there to make sure that their safety was not in jeopardy.

Asked whether to do all of these things it could require that he take the other legal hold patients out of his line of sight, Pflumm answered, "Unfortunately, Yes."

Asked whether any emergency department staff had ever spoken with him about watching legal hold patients, Pflumm testified, "Not to my knowledge. Not to my recollection."

German Albert Benitez Jr., an emergency room CNA, who was assigned to help train Pflumm when he was first hired, testified, "When you're sitting, you're sitting. You just watch the legals not to do anything else." Benitez testified that during the transition phase in the late part of 2009, at staff meetings, Banusevich said that the CNA sitting job was "a hard thing, it's a new thing, but it's got to be done. . . . It's mandatory; I've got to enforce this rule. I've been lenient so far, but the day's come to where this [leniency] has got to stop." Benitez testified that in November or December, Banusevich advised the emergency room staff that she had tolerated forgetfulness of the sitter protocol by RNs, who sometimes forgot they were not to ask sitters to perform other tasks, or by CNAs, who sometimes forgot that they were not to perform tasks for RNs when they were sitting, and implemented the sitting rules and regulations by saying, "Hey, this is the rule. If you continue to do this, I'm going to have to write you up."

Benitez observed that Pflumm was not adhering to the sitting requirements. He had one conversation with Pflumm in October and another in November 2009, as follows:

Him [Pflumm] taking personal phone calls or him going into the nourishment room behind him with a closed door to help himself to beverages or take a phone call, I mean, you're not supposed to—leaving his duty station basically. And I told him like, you know, telling him as a friend, you know, you can't leave. You're watching them.

You know, that's where you're supposed to be. He was like, oh. His response was nonchalantly, whatever, what are they going to do, write me up and fire me? That was his answer to everything.

Benitez testified that he was trying to work with Pflumm, who was a nice person overall, but took Pflumm's work performance personally, "Since I was one of the individuals that helped train him, reflects upon my training."

Raquel Kyle is an emergency room CNA. Kyle testified that Banusevich told the CNAs "to keep the legals in our line of sight at all times." If a doctor or RN asks a sitter to perform some other task, the sitter is to say no and direct them to the

charge nurse. Kyle testified that on January 6, she was walking past Pflumm and observed that his back was completely turned away from a legal patient in the hallway.⁹ As a “fellow co-worker” she thought she would tell him that he should not be turning his back on legals. When she did tell him, Pflumm responded, “I don’t care.” This response surprised Kyle, and she told Charge Nurse Armistead that if an admonition came directly from Armistead perhaps it might encourage Pflumm to be more attentive to keeping the legals in his line of sight. Kyle was present when Armistead spoke to Pflumm, apparently immediately thereafter. Armistead said to Pflumm:

She just told him that yes; this is what has to be done. This is coming from Cathy [Banusevich], our director, you have to make sure that our legals are always in your sight and you have to . . . keep them safe and you’re not supposed to be just turning your back on them. And, you know, she did suggest, that you know, it is something that Cathy wants and that’s our new policy with sitting.¹⁰

The General Counsel called three employees as witnesses in an effort to demonstrate that the Respondent was simply experimenting with or in the process of developing a policy regarding the monitoring of legals, and that the sitter policy was not actually reduced to writing, or implemented, or enforced until after Pflumm’s termination.

Daniel Beal is a CNA. Since August 2009 he has been in the progressive care unit and has not worked in the emergency room. While he has acted as a sitter in other units, his testimony is not germane to the emergency room setting where legals are kept in hallways, not hospital rooms, and are very close to the emergency room exit doors. Nor did he attend any emergency room staff meetings conducted by Banusevich.

Orsburn Stone is a RN in the float pool. He has worked in a number of units including the emergency room, but has not worked in the emergency room since about April or May 2009. As a sitter, he is assigned “in a room to essentially take care of that patient and their needs. It’s anywhere from one to two patients.” Stone testified that when he had previously worked in the emergency room and was assigned both emergency room patients and legal holds, and had to attend to his emergency patients, there was “absolutely nothing” that would prevent the legals from eloping, and:

That’s probably part of the reason why that most of them ended up eloping is because somebody wasn’t in continuous observation of them or they saw an opportunity, maybe when a door opened or something, to run out of it or something.

Stone agreed that not only was it important to watch the legal holds in the emergency room, but also it was important for the legal holds to know that they were being watched.

Judith Wenzek is a respiratory therapist, and works throughout the hospital including the emergency room. Wenzek testi-

fied that in early January, during a “code”¹¹ she asked an “aide” for something. The aid said she couldn’t leave where she was. Afterwards, the aid said, “[W]e have to sit here with the legal holds, we can’t leave them.” Wenzek apologized to the aide and said she didn’t know.

Following his termination Pflumm phoned the Respondent’s HR department to find out what could be done to get his job back. He was told by a HR assistant that he could schedule an “informative” meeting with Director of Human Resources Robert Nettles. He was sent his personnel file and the Respondent’s Policy/Procedure Statement entitled “Employee Dispute and Resolution Process.” The document specifies the steps of the process: Step 1, Discuss Problem with Supervisor; Step 2, Appeal Supervisor’s decision to Department Head; Step 3, Appeal Department Head’s decision to Executive Officer; Step 4, Appeal Executive Officer’s decision to Peer Review Panel; and Step 5, Appeal Peer Review Panel’s or Executive Officer’s decision to CEO or Corporate Senior Vice President as appropriate. The document also states, “At each written step, the employee is responsible for identifying the problem, why it is felt that the action taken was inappropriate and what action is recommended to be taken. The Human Resources Department is available to assist employees in expressing their concerns in writing.”

After receiving this information Pflumm phoned HR and set up an appointment with Nettles. At the scheduled time, on February 4, Pflumm, accompanied by Union Representative Roger Daniel, went to Nettles’ office. Nettles testified he told Pflumm that he would be glad to meet with Pflumm, but “I’m not going to be meeting with the two of you . . . either we’re going to have a meeting as we had arranged or we’re not going to have a meeting. That’s up for you to decide.” Pflumm then thought about it, and Nettles repeated, “It’s your decision. You can come in and talk to me or you don’t have to, but I’m not going to be talking to the both of you.”¹²

Pflumm decided to meet alone with Nettles. According to both Pflumm and Nettles, Pflumm said he needed the job, asked Nettles to give him his job back, and talked about his prior disciplines and other personal matters. Nettles gave Pflumm the opportunity to express himself without interruption, and when it appeared that Pflumm was waiting for Nettles’ response, Nettles said, “What I can advise you, Mr. Pflumm, is that you like any employee, if you do not agree with the decisions that are made, be it discipline and/or terminations . . . you can take advantage of it [the dispute resolution process] if you like.” Nettles further told him that time was running out under the timeframe of the process, and that he needed to submit his grievance in writing, setting out what the issue was, what the facts were, and what he was looking for in terms of a resolution; and, further, he told Pflumm that he needed to ad-

¹¹ Apparently an emergency or critical situation.

¹² Daniel testified that Nettles merely said he would not allow Daniel in the meeting because the Union was not the certified representative; and Pflumm testified that Nettles said he would not allow Daniel in the meeting because the Union had no contract yet. Both testified that Pflumm was not given a choice of having the meeting or not. I credit the testimony of Nettles. Nettles appeared to be a forthright witness with a clear recollection of the conversation and meeting. Further, his testimony on this issue was emphatic and convincing: thus, he testified that after Pflumm hesitated, he again advised Pflumm, “You can come in and talk to me or you don’t have to, but I’m not going to be talking to the both of you.”

⁹ Kyle testified she observed that Pflumm was talking to someone and believes the conversation lasted approximately 3 minutes.

¹⁰ I credit the foregoing testimony of Benitez, Kyle, and Armistead over Pflumm’s denials. Pflumm was not an impressive witness. Clearly, he was spoken to on several occasions by these individuals regarding his disregard of the sitter policy; nor, he testified, was he even able to remember that he attended an important meeting in which the sitter policy was explained by Banusevich. His professed inability to recollect significant events or discussions is not credible, and I find he was simply attempting to fabricate an excuse for his conduct by denying knowledge of the sitter policy.

dress the grievance to Joseph Melchiode, chief operating officer, who is Banusevich's immediate supervisor. Pflumm testified he believed it was a productive meeting.

Nettles testified that neither he nor the human resources department has a decisionmaking role in the grievance process. Rather, according to Nettles, he is the liaison or ombudsman and facilitator of the process. Nettles further testified:

I do not have the ability to decide on the outcome of the grievance. I don't modify it, overturn it, allow it to stand. I just explain the process to either the grievant or to the member of management that these are the parameters under, within which we must operate. These are the time frames; this is how things must go.

Even in the peer review panel process, I don't have decision-making capabilities. Those decisions are either made by the peer review panel or the member of management who is hearing the grievance. I try to keep things moving along in the process.

Nettles' testimony regarding his role in the grievance process stands un rebutted. There is no evidence that he provided any substantive input to Melchiode, who ultimately denied Pflumm's grievance.¹³

C. Analysis and Conclusions

The complaint does not allege that the final written January 28 corrective counseling by Charge Nurse Armistead was motivated by unlawful considerations, namely, Pflumm's union activity, *infra*. Rather, it is alleged that Pflumm's termination the following day, January 29, was unlawfully motivated. The General Counsel argues that the L2K incident, coupled with Pflumm's prior work history, did not warrant his termination, and therefore it follows that Banusevich, who decided to terminate Pflumm, must have had an unlawful motive for doing so.

There is no evidence that Banusevich harbored any union animus toward Pflumm or the Union. The most conspicuous union activity of Pflumm is his wearing of a pen with a union logo around his neck on a lanyard. Assuming that Banusevich observed this, there is no evidence that Banusevich made any remarks about it. Nor is there any evidence that any manager or supervisor of the Respondent made any statements to the effect that employees' union activities could place their jobs in jeopardy. Nor is there any evidence of retaliation against union adherents.

Insofar as the record evidence abundantly shows, Pflumm is the only CNA or sitter in the emergency room department who, after the September 25 emergency room staff meeting and issuance of Banusevich's aforementioned memorandum, did not seem to understand, or to care, that the job of the sitter is to watch legal holds, keep them in their line of sight, and do no other duties while acting as a sitter. Nor is there any showing that any sitter other than Pflumm failed to follow this explicit instruction. Whether or not patients attempted to elope or did successfully elope while being watched by a sitter is not the fault of the sitter; the sitter is only at fault when he or she does not immediately observe and call out to others that the patient is attempting to elope.

Banusevich determined that Pflumm's prior warnings, coupled with his continued inattention to the sitter policy after multiple warnings, warranted Pflumm's termination. Under the

¹³ Pflumm apparently decided not to appeal to the next step of the grievance procedure.

foregoing circumstances, which need not be recounted here, Banusevich's concerns about Pflumm's ability or willingness to follow instructions are abundantly supported by the evidence. There is simply no evidence, direct or circumstantial, supporting the General Counsel's position that Pflumm's termination was a contrived attempt by Banusevich to retaliate against Pflumm or the Union in violation of Section 8(a)(3) of the Act. I shall dismiss this allegation of the complaint.¹⁴

The complaint alleges that, "On January 29, 2010, the Respondent more stringently applied and enforced its 'legal hold' policy on employees in the Unit," by discharging Pflumm, and that this constitutes a violation of Section 8(a)(5) of the Act.

The General Counsel argues that the legal hold policy was leniently applied and not enforced at all prior to Pflumm's termination on January 29, the day after the Union became the collective-bargaining representative of various unit employees including Pflumm¹⁵; therefore, it is argued, the Respondent was not privileged to unilaterally apply more stringent enforcement of such a policy without first giving notice to and bargaining with the Union over this matter.

Contrary to the General Counsel's assertions, there is no showing that the legal hold policy was not enforced prior to January 29. In fact, it was enforced against Pflumm several times, as Armistead and Kyle credibly testified, *supra*.¹⁶ Moreover, it was enforced again against Pflumm when, on January 28, Armistead gave Pflumm the final written counseling. Further, there is no showing of lax enforcement of the policy after September 25, 2009; rather, insofar as the record shows, the other sitters understood their responsibilities and followed the sitter protocol.¹⁷ The absence of warnings to sitters, other than Pflumm, or discharges of sitters prior to January 29, is not attributable to lax enforcement of the legal hold policy; rather it is attributable to the fact that sitters did not violate the policy.

Pflumm was not discharged for violating the legal hold policy. Rather, as found above, he was discharged for an accumulation of incidents and warnings, over an extended period of time, which indicated to Banusevich that he simply was not willing or capable of being sufficiently attentive to his assigned duties to warrant his continued employment. As Banusevich credibly testified, Pflumm would not have been terminated solely because of the January 28 incident. Accordingly, I find

¹⁴ Assuming *arguendo* that the General Counsel has met the requisite burden of persuasion under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), I find the Respondent has amply demonstrated it would have taken the same action even if Pflumm had not engaged in protected activity and even if the Union had not prevailed in the election.

¹⁵ The General Counsel also maintains that the legal hold policy was not a viable policy at all, as it was "a work in progress" and not documented in formalized fashion as were other policies pertaining to psychiatric patients. I find no merit to this contention.

¹⁶ Armistead testified to one instance and Kyle testified to another instance when Armistead again admonished Pflumm in Kyle's presence.

¹⁷ In an effort to show lax enforcement of the sitter policy, the General Counsel asserts in his brief, "[T] here was a constant barrage of violations by both registered nurses and physicians in their solicitation of sitters to perform other tasks. Yet, Respondent chose not to issue discipline as a result of these violations." The record shows no such "barrage," and no such incidents at all after Banusevich's email of December 17, 2009. Moreover, registered nurses and physicians are not included in the CNA bargaining unit and are not represented by the Union.

that Pflumm was not terminated on January 29 as a result of more stringent enforcement of the legal hold policy. I shall dismiss this allegation of the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by unlawfully denying Pflumm's request to be represented by the Union during an interview which Pflumm believed would result in disciplinary action being taken against him; and that the Respondent conducted the interview after denying Pflumm's request for union representation.

The meeting with Human Resources Director Nettles, requested by Pflumm, was not an "interview," disciplinary meeting, or grievance meeting. It was simply a meeting in which Nettles advised Pflumm of his rights under the Respondent's employee dispute and resolution process. Nettles is not involved in the substantive resolution of disputes during the appeal process; rather, he is simply responsible for moving the grievance along in a timely fashion and assisting employees with the presentation of their appeals. Although Pflumm was told his meeting with Nettles would be an "informative" meeting, it seems clear that Pflumm believed he was appealing the matter to a person, Nettles, who had the authority to uphold or overturn his termination. Pflumm was mistaken. Under the circumstances, I find that Pflumm had no right to union representation under *Weingarten*.¹⁸ Moreover, I have credited the testimony of Nettles, and find that he told Pflumm and the union representative that:

I'm not going to be meeting with the two of you...either we're going to have a meeting as we had arranged or we're

¹⁸ *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

not going to have a meeting. That's up for you to decide...It's your decision. You can come in and talk to me or you don't have to, but I'm not going to be talking to the both of you.

Accordingly, as Nettles gave Pflumm the option of having the meeting or not, there is no *Weingarten* violation. See *Washoe Medical Center*, 348 NLRB 361 fn. 5 (2006); *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982). I shall dismiss this allegation of the complaint.

On the basis of the foregoing, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended¹⁹

ORDER

The complaint is dismissed in its entirety.

Dated: Washington, D.C. January 19, 2011

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.