UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EL PASO HEALTHCARE SYSTEM, LTD.
d/b/a LAS PALMAS MEDICAL CENTER

and **Case 28-CA-23368**

NATIONAL NURSES ORGANIZING COMMITTEE - TEXAS/NNU

GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

Counsel for the General Counsel files this Answering Brief in response to Respondent's exceptions to the decision of Administrative Law Judge Gerald M. Etchingham (the ALJ) in JD (SF)-38-11 dated September 29, 2011 (ALJD).[1]

The ALJ found, and the record supports, that El Paso Healthcare System, Ltd. d/b/a Las Palmas Medical Center (Respondent) blatantly, and/or deceptively denied two employees on two separate occasions requests to have a representative of their newly certified collective-bargaining representative, National Nurses Organizing Committee-Texas/NNU (Union), present while Respondent conducted *Weingarten*[2] meetings with each of them. In addition, the ALJ properly found that Respondent violated the Act by questioning employees about why they wanted Union representation and nearly simultaneously threatening them that, even if a Union representative were present, he or she could not assist the employees.

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[1] All dates herein are 2010, unless otherwise noted. Las Palmas Medical Center will be referred to as "Respondent." References to the official transcript will be designated as (T), with appropriate page citations. References to the General Counsel's Respondent's Exhibits will be referred to as (GCX.), and (RX.), respectively, with the appropriate exhibit number.

[2] *NLRB v. Weingarten*, 420 U.S. 251 (1975)

The defenses raised by Respondent have no merit to sufficiently overcome the derogation of its obligation to honor employees' requests to be represented during meetings in which they reasonably believe discipline will result. A cursory review of the credible record in this matter supports the ALJ's findings regarding credibility, and that Respondent violated the Act by denying employees their asserted *Weingarten* rights to representation and by interrogating and threatening employees regarding their invocation of those rights, as alleged.

Respondent's exceptions provide no basis for the Board to overrule the ALJ's findings. The General Counsel urges the Board to reject Respondent's invitation to ignore Board law and adopt the ALJ's findings that Respondent violated the Act as alleged, except as argued in the General Counsel's Cross-Exceptions. For these reasons, the Board should affirm the unfair labor practice findings.

II. FACTUAL BACKGROUND

A. Respondent's operations and relationship with the Union

Respondent is engaged in the business of operating full service medical care centers in El Paso, Texas. (ALJD 3) On June 7, the Union was certified as the exclusive collective-bargaining representative of Respondent's full-time, regular part-time, and per diem Registered Nurses at two facilities. (ALJD 3; GCX 2; T 207) The parties have been, and at the time of the hearing were, engaged in negotiations for a first contract. (ALJD 3;T 207-208) By letter dated June 25, the Union informed Respondent that Lucia Adams (Adams), a Registered Nurse at Respondent's facility, was a Union shop steward, otherwise known as Nurse Representative. (ALJD 3; GCX 3, p. 2)

Arleen Casarez-Aguilar (Aguilar), Director of the Neonatal Intensive Care Unit (NICU) and the Newborn Department, has supervised Adams for the past six years; she also

supervised all of the NICU nurses and the newborn department, consisting of several different wards occupying a wing of the hospital. (ALJD 4) Aguilar is also responsible for disciplining the Departments' RNs who report to her. (ALJD 4; T 38-43)

B. The August 14 Meeting and Interrogation of Moore

1. Events leading to the August 14 meeting

On Saturday August 14, NICU Registered Nurse Karin Moore (Moore) arrived at work and immediately learned that one of her patients from the previous day was being treated for an urgent medical situation, due in large part to a mistake she had made. (ALJD 5; T 158) Moore heard that Aguilar, who was off that day, had been called into work because of this medical error. (T 161)

Anticipating that Aguilar would ask to speak with her, and that any such meeting would lead to discipline, Moore asked Union steward Adams to accompany her into any meeting with Aguilar. Adams, who was on shift at the NICU at the time, agreed. (ALJD 6; T 146, 161)

Aguilar arrived at Respondent's facility at approximately 8:00 a.m, and spent about 30 to 45 minutes speaking with the Charge Nurse Swanda George, who had called her about the emergency, and had collected various information about the incident from the patient's chart. (ALJD 6; T 47) Aguilar then conducted a five-minute "huddle" with the employees on the NICU to discuss the medical error, and waited an additional 15 minutes for the off going shift to finish giving patient reports to the new shift. (ALJD 6; T 47-48)

2. The Investigatory meeting and interrogation of Moore

Aguilar first met briefly with employees on the NICU, and then with Registered Nurse Donald Tanner (the employee who discovered medical emergency). About 45-60 minutes

after arriving at the hospital, as part of her investigation, Aguilar asked Moore if she was ready to meet; Moore replied that she was. (ALJD 6; T 56-57) At some point during this time, Moore asked Aguilar whether Adams could attend their meeting as her representative, and Aguilar agreed. (ALJD 6)

Aguilar wanted to meet with Moore "to get [Moore's] side of the story of what happened." (ALJD 7; T 60) However, at that moment a physician was doing his rounds, which usually takes about 5 or 10 minutes to complete, with Adams' patient.. (ALJD 7; T 147-148) Despite knowing that Moore wanted Adams to attend the meeting as her representative, Aguilar did not tell Adams, who was only a few cribs away, that she was ready to meet with Moore. Nor did she ask Adams when she would be available to meet. (T 57, 61, 147) Instead of waiting a few minutes for Adams to complete her duties and join the meeting, or advising Moore that Respondent would not proceed with the interview unless Moore was willing to meet without Adams, Aguilar decided that Moore did not need a Union representative and could manage with another nurse serving as a "witness" at this investigatory meeting. (ALJD 7) Aguilar informed Moore that she did not have a right to insist on Adams being her representative, but instead anybody could serve as a witness. (ALJD 7; T 163, 166) Aguilar admitted that she did not explain to Moore her distinction between "witness" and "representative" but insisted that it was always her practice, before the union was certified, to permit "witnesses" in these types of meetings. (ALJD 7:13-21; 57–63, 85, 147, 163.) Aguilar admitted that she reverted to her practice of having a "witness" at meetings, instead of a Union representative, while walking with Moore to her office. (ALJD 7: fn 12; T. 57–58, 81; CP. 1 p. 7-8). This is evident by the fact that, in her notes of the

incident, Aguilar asked Moore whether she wanted Adams to serve as a "representative or as a witness." (CP. 1, p. 7).

At that time, Aguilar called Relief Charge Nurse Smitha Philip (Philip) into her office to serve as a "witness" for the meeting. (ALJD 7; T 123, 162-163) When Philip arrived in the office, Aguilar asked her to witness the conversation, to "just listen," but not speak during the questioning. (ALJD 7-8; T. 123, 164; CP. 1, p. 1-2). Aguilar, clearly upset that Moore had asked for Union representation asked why Moore "want[ed] someone here with you, [when] the union is not even here yet. Why? Why?" (ALJD 7; T 123, 164; CP. 1 p. 7-8) Moore, who was credited by the ALJ, explained that she had been told by the Union that if an employee was called in for a meeting that could lead to discipline, she had a right to ask for a Union representative to accompany her to the meeting. (ALJD 8; T 164-165) Moore, who was upset with herself for the error, was concerned about the patient, and scared for her job, did not object to Philip being present, but made clear to Aguilar that she wanted a Union representative. (ALJD 8; T 164-167) Aguilar, who repeated that Moore did not have a right to a Union representative, but that anyone could serve as her witness, proceeded to question Moore with series of rapid questions about the incident, coming so fast that Moore was unable to answer the first question before the second one was asked. (ALJD 8; Tr. 167-68)

The only interruption during this 15-30 minute meeting was that Aguilar's telephone rang and went unanswered. On the other end of the unanswered call was Adams who, after being notified by another nurse that Moore had left with Aguilar to a meeting, wanted to advise Aguilar that she wanted to attend the meeting. (ALJD 8) After the meeting concluded, Aguilar returned Adams' call and notified her that her participation in the investigatory meeting was no longer needed, as the interview had concluded. (ALJD 8)

At the conclusion of this meeting, Moore was in tears. Aguilar then told her about the possible discipline she faced from Respondent and/or the Board of Nursing. (ALJD 9; T 169-170) In its Answer, Respondent admitted that Moore had reasonable cause to believe that her meeting with Aguilar could result in discipline. (ALJD 9; GCX 1(i)) In fact, Aguilar concluded the meeting with Moore by telling her there would be a follow-up meeting where she would be given her discipline. (Tr. 169)

C. The October 13 Meeting with Toth

In early September, Aguilar claimed that she was informed about a patient complaint involving Ida Catherine Toth (Toth), a Registered Nurse and bargaining unit employee; Aguilar started to investigate the matter. (ALJD 10) Aguilar testified that there had been a complaint that Toth allegedly called a mother in the post-partum unit, put the phone next to a crying baby, and then told the mother that the baby was crying because the post-partum nurses would not pick up the child. (ALJD 10)

As part of her investigation, on September 15, Aguilar sent Toth an email asking her to schedule an appointment because they needed to talk. (ALJD 10; GCX 6) On September 20, Toth responded, by e-mail, asking what they needed to discuss. Aguilar e-mailed Toth on September 23, telling her that they needed to review a patient complaint, and again asking Toth to schedule an appointment. (ALJD 10; GCX 6)

Toth, who was credited by the ALJ, testified that she delayed her response to Aguilar, as she was trying to coordinate a Union representative to meet with her during the meeting. (ALJD 10) Toth further testified that she was accustomed to Aguilar calling her on the phone if there was a problem or question, and because of Aguilar's email, she "was a little concerned something might have happened." (T 186) On October 7, Toth e-mailed Aguilar

asking whether their upcoming meeting could possibly lead to her being disciplined; if so Toth asked to have a union representative present during the meeting. On the same date, Aguilar replied by e-mail stating, "No, it is not….I just need to ask you some questions." (ALJD 10; GCX 6) Despite her e-mail, Aguilar testified that the allegation against Toth, if true, may have resulted in her being subject to discipline, but that she first "needed to talk to Cathy [Toth]." (Tr. 67-68)

After receiving Aguilar's response, Toth was unsure whether the meeting was even about her, or some other person or incident, and perhaps Aguilar just wanted to ask Toth a few questions. (T 187) An appointment was eventually scheduled, and a meeting between the two was held on October 13. (ALJD 10)

The October 13 meeting with Toth was held in Aguilar's office with only Aguilar and Toth present. (ALJD 10) Aguilar started the meeting by recounting the complaint against Toth. Toth felt that Aguilar was accusing her of this conduct, and Toth denied the allegations. (ALJD 10-11; T 188-189) Aguilar responded by telling Toth that the new mother had identified Toth by name, and Toth further defended herself with a second denial. Aguilar responded "I wouldn't make this up." (ALJD 11; T 189) Toth asked Aguilar for documented proof of her allegations, but Aguilar claimed to have lost all of her paperwork, could not recall the name of the new mother, or whether she spoke to her in her office or over the phone. (ALJD 11; T 68, 189–190.)

Aguilar told Toth at their meeting that, if Aguilar had not lost her notes and paperwork, Toth would have received a more severe form of discipline. (ALJD 11; Tr. 190-91) At trial, Aguilar testified that the decision to discipline Toth depended upon how Toth answered Aguilar's questions during the October 13 meeting. (ALJD 11, Tr. 93-94)

At the conclusion of their meeting, Aguilar presented Toth with a pre-prepared "Employee Coaching Report," a form that Toth had never seen before, which memorialized the incident, required both to sign, and recommended that Toth retake the customer service (AIDET) training because Toth had not complied with AIDET practices and expectations required of Respondent's nurses.[3] (ALJD 11; T 190; GCX 11) Toth wrote on the coaching discipline, "[a]s per Arleen Casarez-Aguilar, this is not a counseling. No paperwork available concerning this alleged incident," because she felt deceived by Aguilar's earlier email that the meeting would not result in discipline. (ALJD 11:17-21)

III. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

Although Respondent has submitted 48 exceptions, generally, Respondent's exceptions relate to: (a) the ALJ's findings based upon witness testimony; (b) the ALJ's findings and conclusions that Respondent violated the Act by denying its employees Cathy Toth and Karin Moore their Weingarten rights; (c) the purportedly inadequate quantum of evidence presented by the General Counsel and the sufficiency of Respondent's defenses; and (d) the terms and applicability of the ALJ's recommended order.

A. The ALJ's Findings of Fact and Credibility Resolutions are Fully Supported by the Record Evidence.

Applying long settled Board law, the ALJ properly found Respondent's conduct violated Section 8(a)(1) of the Act. Respondent clearly states that it is not challenging the ALJ's credibility determinations. *Resp't Br. Supp.*, at 9, n. 4. As such, the ALJ's credibility resolutions, and findings based upon those resolutions, should be adopted by the Board. See

[3] Respondent's contention that Toth was not entitled to union representation because the Coaching Report is not a disciplinary action, but an "educational" tool, is belied by its own witness, Human Resources Director Yolanda Carrillo, who testified that, if an employee accumulates a certain number of coaching reports, it could lead to the issuance of a counseling. (ALJD 4 27-37; T 64; 239)

G&S Transp., 286 NLRB 762, 762 (1987) (credibility is not an issue before the Board where respondent failed to file timely exceptions to the ALJ's credibility resolutions).

Notwithstanding, in 44 of its 48 exceptions Respondent excepts to various of the ALJ's findings of fact, and conclusions of law, which are based, primarily upon the testimony of certain witnesses whom the judge credited, or discredited, based upon their demeanor. Specifically, the ALJ found that Adams, Moore, and Toth where "credible witnesses as they were earnest, genuine . . . their testimonies were reasonable and consistent with the record . . . [and] they appeared serious and respectful." (ALJD 12) In contrast, "Aguilar appeared scattered, unorganized, and had less reliable recollection than the other witnesses." Id. Meanwhile, the ALJ found that Philip "testified reluctantly and was very soft spoken" giving the impression that "she preferred saying a[s] little as possible in fear of possibly upsetting Respondent's management if she said something that hurt their case." Id.

In the event any of Respondent's exceptions can be considered an attack on the ALJ's credibility resolutions, despite Respondent's claim to the contrary, they lack merit; there is no basis to reverse the ALJ's findings based on credibility. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). Credibility determinations are based upon many aspects of the witnesses demeanor, along with the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 665 (1996).

A close examination of the record evidence, the credible facts, the ALJ's reasonable inferences from those facts, the inherent probabilities found by the ALJ of the respective versions of the events, and the inconsistencies between witness testimony and documentary evidence, support the ALJ's credibility resolutions. There is simply no basis in the record to overturn the ALJ's credibility findings, and the conclusions derived there from.

B. Respondent's Exceptions.

In Respondent's Exceptions (1-through 43), Respondent contends that the ALJ erred by finding that Respondent violated the *Weingarten* rights of its employees Toth and Moore. Citing *Weingarten*, Respondent contends that Toth was not entitled to Union representation because Responded assured her that the meeting would not result in discipline, claiming it was not investigatory, and further asserting that Toth did not have a reasonable basis to believe that she would be disciplined. Regarding Moore, Respondent claims that, because Moore agreed to have Philip serve as her representative, there is no violation.

Although Respondent claims it is not challenging the ALJ's credibility resolutions, to succeed in its appeal, Respondent would have the Board credit Aguilar's testimony over the testimony of Adams, Moore, and Toth. As noted above, the ALJ's credibility resolutions are well founded based upon the record evidence, and Respondent's exceptions lack merit. The credible record evidence demonstrates that Respondent knowingly violated employees *Weingarten* rights. .

C. Employee's Weingarten Rights

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court recognized that union-represented workers have a right to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary

action. At such meetings, the employee has the right to advice and active assistance from the union representative. *Id*. at 260, 263. The union representative whom the employee chooses safeguards "not only the particular employee's interest, but also the interests of the entire bargaining unit. Id. at 260.

This right, however, does not apply where the adverse action has already been decided, and the employee is only being informed of the decision. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). However, the Board has held that, where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies. *Titanium Metals Corp.*, 340 NLRB 766 (2003).

To request representation, an employee's actions need only be sufficient to put the employer on notice of the employee's desire for representation. *Consolidated Edison Company of New York*, 323 NLRB 910, 917 (1992) *Southwestern Bell Telephone Co.,*. 227 NLRB 1223, 1223 (1977) (employee's statement that he would "like to have someone there that could explain to me what was happening" is sufficient to trigger *Weingarten* rights); *E.I. DuPont de Nemours and Co.*, 262 NLRB 1040, 1043 (1982) (request for "witness" enough to trigger *Weingarten* rights) holding reversed on other grounds *IBM Corp.*, 341 NLRB 1288, 1289 (2004).

Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Under no circumstances may the employer continue the interview without granting the employee union representation, unless the

employee voluntarily agrees to remain unrepresented after having been presented with the choices of remaining without representation, or having no meeting at all. *Weingarten* supra.

An employer may violate the act even if a fellow employee monitors the interview of the witness. *Williams Pipeline Co*., 315 NLRB 1 (1994)(where lone union steward was unavailable at the time employer conducted interview, presence of fellow employee did not satisfy employee's right to be represented by agent of exclusive representative of employees). The "right to representation" in an investigatory interview is an employees' right to be represented by an agent of the labor organization which is the exclusive bargaining representative of the employee, not simply whatever "witness" is available. Id. citing *T.N.T. Red Star Express,* 299 NLRB 894, 899 n. 12 (1990)

The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances and as long as the selected representative is available at the time of the meeting. *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), enfd. 338 F.3d 267 (4th Cir. 2003). Where an employee asks for an individual steward, who has the ability to attend the meeting within a short period of time, the employer violates the Act by proceeding with someone else serving as a witness or representative. Id. (employer violates *Weingarten* by failing to wait 15 minutes for a steward to finish his lunch break, and proceeding with investigatory interview using another steward as the representative).

During the *Weingarten* interview itself, a union representative has the right to speak and ask questions; prohibiting the representative from actively participating in the meeting violates Section 8(a)(1). *NLRB. v. Texaco, Inc.*, 659 F.2d 124, 127 (C.A.9, 1981) (employer violated the Act by refusing to allow union representative to speak, and relegating him to the role of a passive observer, during an investigative interview). *Talsol Corp.*, 317 NLRB 290,

331-332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998) (the union representative cannot be made to sit silently like a mere observer). The presence of a union representative puts "both parties on a level playing field inasmuch as the union representative has the full collective force of the bargaining unit behind him." *IBM Corp*., 341 NLRB 1288, 1292 (2004)

As the credible record demonstrates, Respondent's denial of the requests for representation during the investigatory interviews, made by Toth and Moore, is contrary to Board law.

D. Respondent Violated Moore's Weingarten Rights

Here, the ALJ properly found that Respondent violated the Act by denying Moore's request to be represented by Adams during the August 14 interview, an interview where Respondent admits that Moore had reasonable cause to believe that she could be disciplined. (ALJD 17) Moore asked Aguilar if Adams could attend their meeting, and Aguilar agreed. (Tr. 49, 162). Moore's request was clearly sufficient to invoke her *Weingarten* rights. *Consolidated Edison*, supra. However, citing *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), Respondent claims that there was no violation because Adams was unavailable, and Moore agreed to proceed with Philip as her witness. The credible record evidence shows otherwise.

At the time of the meeting, Aguilar testified that she saw that Adams was with a doctor reviewing a baby's chart, which by all accounts takes on average 5 to 10 minutes. (T 148) Although Aguilar knew that Moore had requested that Adams, who was a designated Union representative, be present during their investigatory interview, Aguilar did not advise Moore that the interview would not proceed unless she was willing to go forward without a union representative. Instead, Aguilar requested that Philip attend the meeting. (ALJD 15)

As such, the ALJ properly found a violation. *Weingarten*, supra; *Anheiser-Busch, Inc.*, supra. The ALJ also properly found that Aguilar further violated Moore's *Weingarten* rights when she "unlawfully repeated that Moore had no right to a Nurse [Union] Representative and refused to answer Nurse Representative Adams' call to attend the meeting while it was taking place in Aguilar's office." (ALJD 17 8-11) The credible record evidence supports the ALJ's findings, and the Board should affirm his conclusions that Respondent's actions violated Section 8(a)(1).

E. Respondent Violated Toth's Weingarten Rights

The evidence clearly shows that Toth had requested representation during her October 13 investigatory interview, and that Toth had a reasonable basis to believe that the interview cold result in discipline, before receiving the deceptive email from Aguilar. Accordingly, the ALJ properly found a violation.

As Toth testified, she was accustomed to Aguilar calling her on the phone if she had a problem or question about something but, because Aguilar wrote an email that she wanted to talk to her, Toth "was a little concerned something might have happened." (T 186) Therefore, Toth's email to Aguilar asking for union representation if their upcoming meeting could lead to discipline was sufficient to put Respondent on notice of Toth's desire for representation. *Consolidated Edison*, 323 NLRB at 917 ("I need a Union Steward;" "Do I need anybody here with me?" "Do I need a shop steward?" sufficient to trigger *Weingarten* rights). *Bodolay Packaging Machinery*, 263 NLRB 320, 325-326 (1982) (*Weingarten* rights triggered by the employee asking whether he needed a witness).

Aguilar misrepresented the purpose of the interview by emailing Toth that the interview would not lead to discipline, but that Aguilar just needed " to ask [her] some questions." (ALJD 17). This was clearly untrue, as Aguilar testified that, depending upon

what Toth said in response to her questions during the October 13 meeting, Aguilar was prepared to issue Toth more severe discipline. (ALJD 17-18)

At the meeting, Aguilar accused Toth of engaging in the conduct as it related to the patient complaint, which Toth repeatedly denied. (T 188-189) Clearly this was an investigatory interview, and Toth's *Weingarten* rights attached. See *Manor Care of Easton*, 356 NLRB No. 39, (2010) (the Board has held that where, as here, an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies).

This case presents facts that highlight the observation made in *Weingarten* that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Weingarten*, supra. at 262. As established by the record in the instant case, Toth was deceived into meeting with Aguilar on October 13 — it was Toth up against Aguilar alone in Aguilar's office. (T 188) By refusing Toth's request for union representation, Respondent denied Toth her *Weingarten* rights, and thereby violated Section 8(a)(1) of the Act. *Weingarten*, supra; *Quasite Corp*., 315 NRLB 1068, 1069-1070(1994) (even conversation between a supervisor and an employee about improving the employee's production may trigger Weingarten rights if sufficiently linked to a real prospect of discipline for poor production)..

Although Respondent attempts to rehash its prior arguments by contending that meeting was not investigatory, and that the coaching was not a disciplinary action, the credible record and extant Board law does not support this claim. Specifically, Respondent

citing *Success Vill. Apts*., 347 NLRB 1065 (2006), *U.S. Postal Service*, 252 NLRB 61 (1980), and *Baton Rouge Water Works*, 246 NLRB 995 (1979), alleges that the purpose of the October 13 meeting was to inform Toth about the patient complaint and coach her regarding appropriate customer service. However, as the ALJ pointed out in his decision, all of these cases, and others cited by Respondent, are readily and factually distinguishable from the present case. (ALJD 18) None of the cases cited by Respondent involved coaching that were used as a form of discipline, supervisors deceiving employees as to the nature of the meeting where the underlying issues were discussed, or credibility resolutions. Moreover, Aguilar admitted that, based upon Toth's reply to her questions, she was prepared to issue Toth more sever discipline. Respondent's arguments are meritless. Aguilar knew and admitted the purpose of the meeting was to investigate Toth, but lied to her in the e-mail in order to induce Toth to attend without Union representation.

Respondent's contention that no violation occurred because "coachings" are not disciplinary, and that Toth was not disciplined, is similarly unwarranted. Respondent's own witness admitted that "coachings" were recorded in its employees' files maintained by Aguilar, and that these reports could be used against an employee in a disciplinary action. (ALJD 18, n. 27) The record evidence clearly supports the ALJ's finding that Respondent violated Toth's *Weingarten* rights, and the Board should affirm this decision.

F. The ALJ's Remedy is Proper and in Accordance with Established Board Policy

The ALJ's Order contains proper remedies under the circumstances of this case. (ALJD 23) This is a newly represented Unit, but despite the fact that negotiations for a collective-bargaining agreement was ongoing, Aguilar refused to recognize that employees had established rights to Union representation, and even insisted that "the union is not even

here yet." (Tr. 164) Disgusted that Moore had the audacity to ask for Union representation during an investigator interview, Aguilar pressed Moore by asking "Why do you want someone here with you, the union is not even here yet. Why? Why?" (Tr. 164) Respondent's claim that Aguilar was simply referring to the Union's physical presence is nonsense. Aguilar's disgust for employee rights is further highlighted by the fact she lied to Toth about the nature of their investigory interview, despite testifying at trial that the severity of the discipline imposed upon Toth depended upon Toth's answers to Aguilar's questions during the interview. Under these circumstances, the ALJ properly ordered a notice reading, and a broad cease and desist order.

III. CONCLUSION

Based upon the foregoing, the General Counsel submits that the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act as set forth above. Accordingly, the General Counsel respectfully urges the Board to reject Respondent's Exceptions and to adopt the ALJ's findings and recommended order, consistent with General Counsel's Cross-Exceptions.

Dated at Phoenix, Arizona, this 10th day of November 2011.

Respectfully submitted,

/s/William Mabry III
William Mabry III
Counsel for the Acting General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2118
Facsimile: (602)-640-2178
E-Mail: William.Mabry@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS in EL PASO HEALTHCARE SYSTEM, LTD., d/b/a LAS PALMAS MEDICAL CENTER, Case 28-CA-023368, was served by E-Gov, E-Filing, and E-Mail, on this 10th day of November 2011, on the following:

Via E-Gov, E-Filing:
Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:
Paul R. Beshears, Attorney at Law
Ford & Harrison, LLP
271 17th Street NW, Suite 1900
Atlanta, GA 30363-6202
E-Mail: pbesears@comcase.net
Attorneys for:
El Paso Healthcare System, Ltd. d/b/a
Las Palmas Medical Center

Brendan White, Attorney at Law
M. Jane Lawhon, Attorney at Law
NNOC – Texas NNU
2000 Franklin Street
Oakland, CA 94612-2908
E-Mail: bwhite@calnurses.org
jlawhon@calnurses.org

/s/ William Mabry III
William Mabry III
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004
Telephone (602) 640-2118
Facsimile (602) 640-2178
E-Mail: William.Mabry@nlrb.gov