

**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-023368

**NATIONAL NURSES ORGANIZING COMMITTEE -
TEXAS/NNU**

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge Gerald M. Etchingham (the ALJ) in JD (SF)-38-11 dated September 29, 2011.¹

I. INTRODUCTION

On August 14, while she was conducting an unlawful investigatory interview with Registered Nurse Karin Moore (Moore), Arleen Casarez-Aguilar (Aguilar), Respondent's Director of the Neonatal Intensive Care Unit (NICU) and the Newborn Department, requested the presence of Temporary Charge Nurse Smitha Phillip (Phillip) to serve as a "witness," rather than having Union representative Adams (Adams) present, as requested by Moore. The Administrative Law Judge (ALJ) found that Respondent violated the Section 8(a)(1) of Act by denying Moore her *Weingarten* rights to representation. The ALJ further found that Respondent violated the *Weingarten* rights of employee Ida Cathy Toth (Toth), interrogated

¹ All dates herein are 2010, unless otherwise noted. In this brief, Counsel for the General Counsel will be referred to as "General Counsel" 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 and Charging Party's Exhibits will be referred to as (GCX.), and (CPX.), respectively, with the appropriate exhibit number.

employees because they engaged in protected concerted activity, and threatened employees because they engaged in protected concerted activity.

The ALJ dismissed the complaint allegations that Phillip was a Section 2(11) supervisor as defined by the Act. The ALJ further denied the General Counsel's request for remedial relief to address Respondent's egregious *Weingarten* violation when it unilaterally substituted Phillip for Adams to represent Moore. (ALJD 19-20) The General Counsel respectfully submits that the ALJ erred by failing to find these violations.² Overwhelming credited record evidence shows that Respondent, by substituting Phillip for Adams, as Moore's representative, violated Section 8(a)(1). Respondent has shown a proclivity to violate the Act, or otherwise has engaged in such egregious misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, remedial relief should be granted in order to fully address Respondent's misconduct.

II. Smitha Phillip is a Supervisor as Defined Under Section 2(11) of the Act.

1. Duties of Relief Charge Nurse Smitha Phillip

Philip is a Registered Nurse who also works in the capacity of a relief Charge Nurse, working in this capacity approximately once or twice per week for the past three years. (ALJD 7; T 117-118) There is on-the-job training and some type of orientation for Registered Nurses to work as a relief Charge Nurse. (T 88, 118) The Charge Nurse's duties are: (1) Serving as a member of the management team; (2) working an RN with experience in patient care and managerial skills who is selected by the Nurse Director; (3) Responsibility for daily operation of the unit on his/her shift; (4) delegating and assigning patient care; (5) Assuring staff and resources are adequate to manage patient care needs on the unit; (6) counseling

² For purposes of economy, General Counsel incorporates by reference the statement of facts contained in its Answering Brief filed on November 10, 2011.

personnel as required; and (7) following the chain of command. (ALJD 8; T 119-122; GCX 12, p. 4) Relief Charge Nurses are expected to perform all of the duties of the Charge Nurse except for issuing written reprimands. (ALJD 7-8; T 86-88) In addition, Relief Charge Nurses, like Charge Nurses, complete annual evaluations “on everybody in the unit, including the charge nurses and the regular staff.” (T 122) Once completed, these evaluations are submitted to Aguilar. (ALJD 8)

2. Legal Standard

Section 2(11) of the Act provides that a supervisor is one who possesses, “authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual need only to have the authority to effectuate or effectively recommend one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). In addition, for an employee to be deemed a supervisor, they must spend a “regular” and “substantial” amount of time performing supervisory functions. *Oakwood Healthcare, Inc.* supra at 694.

In *Jasta Manufacturing Company Inc.*, 246 NLRB 48, 61 (1979), enf’d 634 F.2d 623 (4th Cir. 1980), the Board affirmed the decision of the Administrative Law Judge, who stated: “It is well settled that, where supervisory authority has been, as here, expressly granted, the

failure to demonstrate that such authority was exercised is not controlling. It is the grant of the authority and not the exercise thereof which determines the existence of supervisory status.” The plain language of Section 2(11) supports this interpretation, making clear that one need only have the authority.

The legal standard for a supervisory determination, where an individual is engaged part of the time as a supervisor and the rest of the time as a unit employee, is whether the individual spends a regular and substantial portion of their work time performing supervisory duties. *Oakwood*, supra at 694. As guidance, the Board has determined that “regular” means according to a pattern, as opposed to sporadic substitution, but has not adopted a strict numerical definition of substantiality. *Oakwood*, supra at 694. The Board, has found individuals who have served in a supervisory role for at least 10-15 percent of their total work time to be supervisors as defined by the Act. *Oakwood*, supra at 694.

While the ALJ properly found that Philip used independent judgment in exercising her supervisory functions in evaluating RNs’ work performances and managing and directing their work, he erroneously found that there is inadequate evidence showing that Philip spent a “regular” and “substantial” amount of time performing supervisory functions as a charge nurse. (ALJD 20) However, the plain language of Section 2(11) and the credible record supports the General Counsel’s position that Phillip is supervisor as defined by Section 2(11) of the Act. While Phillip testified that she acts as the charge nurse depending on the needs of Respondent, she admitted that she could serve in that role, up to twice a week. The credible record evidence indicates that temporary charge nurses perform the same duties as charge nurses, except in regard to issuing discipline. Consequently, if Phillip only worked once a week, as a charge nurse, it would be at least 10 percent of the time. *Oakwood*, supra at 694

citing *Archer Mills, Inc.*, 115 NLRB 674, 676(employee serving as supervisor for 10 percent of his work time determined to be a supervisor as defined by the Act). Accordingly, Phillip is a supervisor as defined by Section 2(11) of the Act.

Assuming arguendo, that the ALJ's finding concerning the supervisory status of Phillip is affirmed, the credible evidence compels a finding that, nevertheless, Phillip is an agent of Respondent under Section 2(13) of the Act. The legal standard with regard to agency status within the meaning of Section 2(13) of the Act, as established by the Board, requires that employees would reasonably believe that the agent was reflecting company policy and acting for management. *Great American Products*, 312 NLRB 962, 963 (1993). When an employer places an employee in a position where employees could reasonably believe that the employee spoke on behalf of management, the employer has vested the employee with apparent authority to act as the employer's agent, and the employees' actions are attributable to the employer. *Sears and Roebuck de Puerto Rico*, 284 NLRB 258, 258 (1987). The Board has held that individuals are agents when: "[a]s a part of their daily responsibilities, they acted as the conduits for relaying and enforcing Respondent's decisions, directions, policies and views." *Zimmerman Plumbing Co.*, 325 NLRB 106, 106 (1997). "Under Board precedent, an employer may have an employee's statements attributed to it if the employee is 'held out as a conduit for transmitting information [from management] to other employees.'" *Hausner Hard-Chrome of Kentucky*, 326 NLRB 426, 428 (1998), quoting *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

In this case, Respondent utilized Phillip as a conduit for the transmission of "information" between management and the employees. *Hausner Hard-Chrome*, supra. Phillip serves as a conduit from management to employees regarding rules and policies of

management. Thus Phillip, who reports directly to Aguilar, performs all the duties of a charge nurse, is the conduit for all company practices and policies with regard to the running of the NICU Department and accomplishing assigned duties.

In *Hilton Hotels Corporation*, 282 NLRB 819, 828 (1987), citing *Speed Mail Service*, 251 NLRB 476, 476 (1980), the Board stated with regard to an employee (Clark) that although he was not a statutory supervisor, he was placed in a visibly superior status to that of other employees, wherein Clark served as a conduit from Respondent to employees, with regard to such important matters as job assignments and layoffs. Status as a conduit has been treated by the Board as a hallmark of agency status..." *Hilton Hotels*, supra at 828. While Phillip is not involved in layoffs or discipline, she is responsible for the assignment of work "to the RNs and evaluates their performance which evaluations are not merely routine or clerical in nature and may be used in combination with other charge nurse or supervisor evaluations to promote or reward other employees." (ALJD 19:34-37). In sum, the overwhelming evidence supports a finding that Phillip is an agent within the meaning of Section 2(13) of the Act.

As such, the credible record evidence establishes that Philip acted in a supervisory capacity within the meaning of Section 2(11) or an agent within the definition of Section 2(13) of the Act when she worked in the NICU Department as a Temporary or Relief Charge Nurse. Accordingly, it is respectfully request that the ALJ's finding to the contrary be overruled.

III. The ALJ Erred By Failing To Include In His Remedy, Recommended Order, And Proposed Notice An Appropriate Remedy for the Discrimination Directed at Moore.

The documentary and testimonial evidence presented at trial proved that Respondent unlawfully denied Moore her Weingarten rights, and unilaterally substituted Phillip for Adams during the August 14 investigatory interview. Consequently, the ALJ erred in excluding a remedy for this egregious conduct from his Remedy, Order and Notice. Respondent, having engaged unlawful conduct, should be ordered to include a remedy for this conduct. Accordingly, Respondent should be ordered to cease and desist from failing to honor employees' requests for union representation by substituting supervisors or agents to act as union representatives during investigatory interviews.

Finally, because the evidence presented at trial proved that Respondent unlawfully substituted a supervisor or agent to act as a Union representative during Moore's August 14 investigatory interview, the ALJ erred in excluding the following language from his proposed Notice to Employees for Respondent:

WE WILL NOT substitute our supervisors or agents to act as your Union representatives during investigatory interviews.

IV. Counsel for the Acting General Counsel Respectfully Requests the Board to Reverse the Administrative Law Judge's Denial of Counsel for the Acting General Counsel's Motion to Amend the Complaint (GCX 7, in the Rejected Exhibits file)

At the hearing, and in its brief to the ALJ, Counsel for the Acting General Counsel respectfully requested the Administrative Law Judge reconsider his denial of Counsel for the Acting General Counsel's Motion to Amend the Complaint (GCX 7) to allege that on or about August 14, Respondent, by Aguilar, promulgated and has since maintained an overly-broad rule prohibiting bargaining unit employees from discussing terms and conditions of the

employment. Aguilar in an August 14 email to employees in the NICU (bargaining unit employees), stated, among other things, “A big error occurred in the unit and I need for it to stay in the unit. I don’t want to hear ANYONE gossiping about this incident the nurses involved, or any other incident that may ever occur in the unit because it could happen to any one [sic] of us.” (CPX 2) This statement is, on its face, overly broad and discriminatorily infringes on the Section 7 rights of bargaining unit employees. In addition, Aguilar and Adams both testified regarding this August 14 email. (T 89; 154)

Central to the protections provided by Section 7 of the Act is the protection afforded to communications among employees regarding their wages, hours, and other terms and conditions of employment. The Board and courts have long recognized the importance of communication among employees to their full exercise of Section 7 rights. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972). The Act’s protection afforded to communication is not limited to communication for organizational purposes, “for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities.” *Phoenix Transit System*, 337 NLRB 510 (2002) (citing *Container Corporation of America*, 244 NLRB 318, 322 (1979)).

The Board, in *The NLS Group*, 352 NLRB 744, 745 (2008), reiterated the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether an employer’s maintenance of a work rule violates Section 8(a)(1) of the Act. The Board first determines whether the rule explicitly restricts Section 7 activity. If it does, it will be found to be unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been

applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights. In the instant case, Aguilar's explicit directive to bargaining unit employees not to "gossip" about the incident that occurred that day, or "or any other incident that may ever occur in the unit" is unlawful because employees reasonably would construe this as prohibiting activity protected by Section 7.

The General Counsel submits that evidence was presented at the hearing demonstrated Respondent violated Section 8(a)(1) of the Act by promulgating an overly-broad and discriminatory rule that unlawfully infringed upon employee Section 7 rights and that this allegation was fully litigated by the parties pursuant to the questioning of witnesses and the introduction of exhibits. On this basis, the General Counsel respectfully requests the reversal of the ALJ's denial of the Motion to Amend the Complaint, to include this allegation, and to find that Respondent has violated Section 8(a)(1) of the Act accordingly.

The Board's Rules provide that a complaint may be amended subsequent to a hearing. Specifically, Section 102.17, provides as follows:

Amendment.---Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing by the regional director issuing the complaint; as the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

Though the ALJ denied the motion based upon the lack of due process, such a finding is not supported by the credible record. Specifically, the ALJ found that the proposed amendment was related to a prior withdrawn allegation. (ALJD 2) This finding is erroneous. As the General Counsel explained during the hearing, the August 14 email was discovered during witness preparation, and the General Counsel moved to amend the complaint at the

beginning of the hearing, before presenting any evidence in support of her case-in-chief. (T 12) In addition, the August 14 email addresses the very issue Moore was interrogated about during her August 14 investigatory interview, which is clearly alleged in the Complaint. (T 89) Under these circumstances, amending the complaint would not have violated Respondent's due process rights.

Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense. The Board has long held, with court approval, that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Kenmore Electric Company, Inc. et al.*, 355 NLRB No.173, slip op.7 (2010), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989) enfd. 920 F.2d 130 (2d Cir.1990).

The "closely connected" element of the *Pergament* test requires both a close congruence between the complaint allegation and the unalleged violation found by the Board, and that the respondent had sufficient notice of the conduct found unlawful. *Kenmore Electric Company*, supra. The dual requirements of *Pergament* are easily satisfied here, as the issue of whether to include the amendment is closely connected, both factually and as a matter of law, to similar allegations in the Complaint. One of the Complaint allegations concerns the lawfulness of Moore's August 14 investigatory interview. There is no doubt that the underlying issues and allegations, as more fully discussed above, are part and parcel of those related to the amendment concerning the August 14 email as it directly related to Moore's investigatory interview which happened on the very same day.

Moreover, the record establishes that Respondent had notice of the issue of regarding the amended allegation. Notice does not mean that a respondent must be advised of the legal

theory upon which the General Counsel intends to proceed but rather, “notice must inform the respondent of the acts forming the basis” of the violation ultimately found, so that it can “prepare a defense . . . and fashion[] an explanation of events that refutes the charge of unlawful behavior.” *Pergament*, supra, 920 F.2d at 135. The ultimate issue is the same when considering the lawfulness of Moore’s August 14 investigatory interview, i.e., whether Respondent unlawfully denied Moore’s *Weingarten* rights. Respondent was on notice, from the outset of and throughout the underlying proceeding, that the legality of the Moore’s August 14 investigatory interview was the ultimate issue in the case. Respondent’s defenses to the allegation are the same as they would have been otherwise. Thus Respondent was afforded an ample opportunity to prepare its defense.

The second element of the *Pergament* test is whether the legality of the August 14 email (as a promulgation of an overly-broad rule) was fully litigated. The record shows that all the key issues surrounding the August 14 email allegation were fully litigated. This is demonstrated by the documentary and testimonial evidence introduced at the hearing by Respondent, which the ALJ considered in deciding the case. Respondent presented Aguilar in defense of the August 14 email, both investigatory interviews, and to the Section 8(a)(1) allegations generally. See *Desert Aggregates*, 340 NLRB 289, 293 (2003) (noting, among other factors, that the “Board has concluded that where the respondent’s witnesses testified to facts giving rise to the unalleged violation, . . .the ‘fully litigated’ requirement is met”). The investigatory allegation involves the identical underlying legal theory and factual framework, and is subject to the same defenses. *Redd-I, Inc.*, 290 NLRB 1115, 118(1988); *Precision Concrete*, 337 NLRB 211 (2001).

Based on the foregoing, including the fact that Respondent was afforded due process and that the proposed amendment is factually and legally related to the allegations of the timely-filed charges, the amendment is appropriate. *Redd-I, Inc.*, supra. The General Counsel respectfully request that this allegation be amended into the Complaint, and that a remedy be provided for Respondent's violation of Section 8(a)(1) of the Act.

V. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully submits that the ALJ erred by failing to find, and include in his Conclusions of Law, that Respondent violated Section 8(a)(1) by substituting its supervisors or agents to act as employees' Union representatives during investigatory interviews; by failing to allow an amendment to the Complaint regarding the August 14 email, and by failing to include in his Remedy, Order, and proposed Notice a remedy for this egregious misconduct. CAGC respectfully request that the Board reverse the ALJ's finding and conclusions described above and find that the Respondent committed the additional violations of Section 8(a)(1) of the Act as delineated herein.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS 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, E-Mail on this 10th day of November 2011, on the following:

Via E-Gov, E-Filing:

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