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

ACTING GENERAL COUNSEL'S REPLY BRIEF

Counsel for the Acting General Counsel (General Counsel) submits the following Reply to the Answering Brief filed by Respondent El Paso Healthcare Systems, LTD, d/b/a Las Palmas Medical Center filed on November 23, 2011 (Respondent's Answering Brief).[1]

The matters asserted by Respondent in its Answering Brief are without merit, and the record as a whole supports a finding that Smitha Phillip is a supervisor or agent of Respondent, and the ALJ erred by denying the General Counsel's motion to amend the Complaint. Accordingly, the Board should grant the General Counsel's Cross-Exceptions.

I. Smitha Phillip is a supervisor or agent as defined by the Act.

The Administrative Law Judge (ALJ), citing *Oakwood Healthcare, Inc*., 348 NLRB 686, 694 (2006), properly found that Smitha Philip (Phillip) used independent judgment in exercising her supervisory functions in evaluating RNs' work performances and managing and directing their work. (Tr. 19) However, the ALJ erroneously found Phillip was not a supervisor because there was inadequate evidence showing that Philip spent a "regular" and "substantial" amount of time performing supervisory functions as a charge nurse. (ALJD 20)

[1] All dates herein are 2010, unless otherwise noted. References to the official transcript will be designated as (Tr.) 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.

Phillip's testimony regarding the amount of time she works as a relief charge nurse is not in dispute and was correctly summarized by the ALJ. (ALJD 20) Phillip testified that she has worked as a relief charge nurse for the past three years. (Tr. 118) When asked about the frequency of this assignment, Phillip testified as follows:

> Depending on the need of the [U]nit, it's not a regular pattern. Like depending on the need of the unit. Anywhere from one to two per week. I can't say it's one to two. Sometimes I have done none that week, and sometimes two and sometimes one [shift].

(ALJD 20; Tr. 118) In its Answering Brief, Respondent fails to address the General Counsel's arguments regarding the numerical definition of substantiality as stated in *Oakwood*, supra at 694. Specifically, the Board has found that individuals who served in a supervisory role for at least 10-15% of their total work time to be statutory supervisors, but it has not adopted a strict numerical definition of substantiality. Id.

While Respondent claims that there is no evidence that Phillip worked 10% of the time as a supervisor, the Board has not set any strict limit on substantiality. The Board has found an employee to be a Section 2(11) supervisor who worked only 10% of the time as a supervisor, but has left open the question as to whether and employee who works less than 10% would also be considered a Section 2(11) supervisor. *Oakwood*, supra at 694 citing *Archer Mills, Inc.*, 115 NLRB 674, 676 (1956) (employee serving as supervisor for 10% of his work time determined to be a supervisor as defined by the Act).

However, whether Phillip worked less than 10% of her time as a supervisor is inconsequential, as it is clear from Phillip's testimony that she spends at least 10%, or more, of her time working as a statutory supervisor. Phillip testified that some weeks she does not work as a charge nurse, some weeks she works once, and some weeks twice. Assuming that Phillip worked one day per week as a charge nurse, this would constitute 20% of her work

hours.[2] Assuming that Phillip worked only one-half day per week as a charge nurse, this would constitute 10% of her work hours.[3]

As such, the evidence certainly supports a finding that Phillip spends a regular and substantial amount of her time working as a supervisor, and the ALJ erred by failing to find that Phillip was a statutory supervisor when she was selected by Respondent to serve as union representative and met with Karin Moore and Arleen Casarez-Aguilar on August 14. See also, *Aladdin Hotel*, 270 NLRB 838, 840 (1984) (dealers who regularly work as supervisors on the average of at least two times per month over the past three months are supervisors within the meaning of Section 2(11); *Sewell, Inc.*, 207 NLRB 325, 330-332 (1973) (two relief persons who possessed supervisory authority when they worked, respectively, 1 day every 2 weeks and 2 out of 8 working days, were deemed to be 2(11) supervisors).

Respondent's Answering Brief also ignores the record evidence, and the General Counsel's arguments, that Phillip was a Section 2(13) agent as defined by the Act. When examining agency status, the Board applies common law principles of agency. *Tedi of California*, 338 NLRB 1032, 1037 (2003). Agency may be established based on either actual or apparent authority to act on behalf of an employer. Id. The Board has held that apparent authority exists when there has been some "manifestation" by the employer to employees that creates a reasonable basis for the employees to believe that the employer has authorized the alleged agent to perform the acts in question. Id.; *Great American Products*, 312 NLRB 962, 963 (1993). Thus agency status is established if it is determined that, under the facts of a

[2] Based on an 8-hour work day, working 40 hours per week, if Phillip worked one day per work week as a charge nurse, she would work 416 hours per year (8 hours x 52 weeks) in this capacity. Assuming an average annual work hours of 2,080 (40 hours x 52), Phillip works 20% of the time as a charge nurse (416 ÷ 2,080 = 20%).

[3] Based on an 8-hour work day, working 40 hours per week, if Phillip worked one-half day per work week as a charge nurse, she would work 208 hours per year (4 hours x 52 weeks) in this capacity. Assuming an average annual work hours of 2,080 (40 hours x 52), Phillip works 10% of the time as a charge nurse (208 ÷ 2,080 = 10%).

particular case, the person alleged to be an agent was placed in a position by the employer such that employees would reasonably believe that the person in question spoke for the employer. Id. It is unnecessary to conclude that the agent's actions in question were either authorized or subsequently ratified by the employer. Id.

While Respondent cited the legal standard for determining agency status, its added two additional requirements, which are not part of that standard. Specifically, Respondent first asserts that Phillip is not an agent of Respondent because she does not regularly perform work as relief charge nurse. However, this requirement, while disputed, is not part of the legal standard to show agency status. Respondent appears to borrow a requirement from its previous argument, concerning whether Philip was a statutory supervisor.

Second, Respondent claims that employees would not reasonably believe that Phillip was acting for management by attending Moore's investigatory interview. However, the record does not support this argument. As a relief charge nurse, Phillip serves as a member of the management team, and the ALJ properly found that Phillip prepares evaluations of RNs work performances, using her own independent judgment, which contributes to promoting or reward and employees who excel. (ALJD 19)

Noticeably, Respondent fails to take in account Phillip's duties and authority in the context of Respondent's denial of Moore's *Weingarten* rights. It was Aguilar, and not Moore, that requested Phillip attend the August 14 investigatory meeting where Aguilar interrogated Moore concerning her care for a patient. (ALJD 7-8) Moore was forced to attend this investigatory meeting with Aguilar and Phillip, without a union representative present. As the record indicates, Phillip had the authority to evaluate Moore's performance, and had assigned her to the patient who was the subject of Moore's investigatory interview. Under these

circumstances, Moore would reasonably believe that Phillip's attendance at this August 14 investigatory interview was reflecting company policy and that she acting for management. Accordingly, it is requested that the Board find that Phillip, as well, is an agent of Respondent as defined by Section 2(13) of the Act.

II. The General Counsel's Motion to Amend Should be Granted

The ALJ erroneously denied the General Counsel's motion to amend the complaint to include an overly-broad and discriminatory work rule. (GCX 7) The amendment was based on an August 14 email sent by Aguilar to departmental employees. The email upon which the Motion to Amend was based, directed employees not to discuss the very same patient care issue that Aguilar questioned Moore about during Moore's August 14 investigatory meeting, and was sent that same day. The email reads, in pertinent part, as follows:

> 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)

Although Respondent claims a lack of due process, asserts that the issue was not fully litigated, and that the amendment was not related to the *Weingarten* allegation in the complaint, the record evidence demonstrates otherwise. As to Respondent's due process claim, Respondent asserts that because it only received notice of the amendment the same morning the amendment was proposed, it did not receive proper due process. While due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense, the credible record demonstrates that Respondent had the opportunity to question Aguilar and present any evidence it had in support of its position that the email was not a violation. Respondent, in its Answering Brief, asserts a lack of due process because it chose not to present a defense to the amendment in light of the ALJ's

denial of the General Counsel's Motion. However, as the email was admitted into evidence, and General Counsel fully questioned Aguilar regarding the email, Respondent cannot equate its decision not to not ask Aguilar about the circumstances surrounding the email as a lack of due process. Respondent had due process regarding the amendment to the complaint.

Respondent further argues that the matter was not fully litigated, and that the General Counsel's reliance on *Desert Aggregates*, 340 NLRB 289, 293 (2003), is misplaced. In support of these contentions, and without any citation to legal authority, Respondent argues that the issue was not fully litigated because only the General Counsel questioned Aguilar, and because Respondent would have allegedly presented a defense, if the amendment had been granted, introducing other evidence to show that Aguilar qualified her email in a subsequent meeting, or other policies addressing patient care, privacy and confidentiality laws.[4] However, all of these defenses would not address what appears to be a facially violative rule. More specifically, because Respondent's subjective intent has no bearing on whether the email violates Section 8(a)(1) of the Act, *Smithers Tire*, 308 NLRB 72, 72 (1992) (the test is not the actual intent of the speaker or the actual effect on the listener), Respondent's defenses would fail to demonstrate anything other than Aguilar's subjective intent as to whether she planned to violate employee Section 7 rights. Moreover, Respondent has not pointed to anything in the record that prevented it from presenting a defense, or introducing evidence in support of a defense. Instead, the record shows that Respondent had the opportunity to question Aguilar regarding the General Counsel's questions, but chose not to do so.

[4] 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).

Respondent's claim that the amendment is not "closely connected" to the complaint allegation that Respondent violated an employee's *Weingarten* rights, lacks merit. The credible record readily demonstrates that the amendment was closely connected to the *Weingarten* allegations in the Complaint.

In particular, the August 14 email addressed the very issue that Aguilar interrogated Moore about during Moore's investigatory interview, which occurred on the same day. Also, the email is closely connected to one of the Complaint allegations concerns the lawfulness of Moore's August 14 investigatory interview. The underlying issues and Complaint allegations are logically entwined with the amendment concerning the August 14 email as it directly relates to Moore's investigatory interview which happened on the very same day. *Redd-I, Inc.*, 290 NLRB 1115, 118 (1988) (investigatory allegation involves the identical underlying legal theory and factual framework, and is subject to the same defenses).

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

III. CONCLUSION

The record demonstrates that Respondent was intent on trampling the Section 7 rights of its employees. The record evidence further supports a finding that Respondent unlawfully promulgated an overly-broad and discriminatory rule, and unlawfully substituted a supervisor or agent as an employee's *Weingarten* representative, and in doing so, violated Section 8(a)(1)

of the Act. Based upon the foregoing and the entire record in this matter, it is respectfully submitted that the Board should grant General Counsel's Cross Exceptions and find the additional violations urged by the General Counsel.

Dated at Phoenix, Arizona, this 7th day of December 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF 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 7th day of December 2011, on the following:

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