

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

VERITAS HEALTH SERVICES, INC.  
d/b/a CHINO VALLEY MEDICAL  
CENTER,

Respondent,

v.

UNITED NURSES ASSOCIATIONS OF  
CALIFORNIA/UNION OF  
HEALTHCARE PROFESSIONALS,  
NUHHCE, AFSCME, AFL-CIO,

Charging Party.

Case No. 31-CA-29713, 31-CA-29714,  
31-CA-29715; 31-CA-29716,  
31-CA-29717, 31-CA-29738,  
31-CA-29745, 31-CA-29749,  
31-CA-29768, 31-CA-29769,  
31-CA-29786, 31-CA-29936,  
31-CA-29965 and 31-CA-29966

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

THEODORE R. SCOTT  
LITTLER MENDELSON  
A Professional Corporation  
501 W. Broadway, Suite 900  
San Diego, CA 92101.3577  
Telephone: 619.515-1837 [Direct]  
Facsimile: 619.615.2261 [Direct]  
Telephone: 619.232.0441 [Main]  
Facsimile: 619.232.4302 [Main]  
Attorneys for Respondent  
VERITAS HEALTH SERVICES, INC.  
d/b/a CHINO VALLEY MEDICAL  
CENTER

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**I.**  
**INTRODUCTION**

By his Decision, the ALJ repeatedly twists the record evidence, the law, or both, in order to justify his conclusions. Respondent respectfully requests that the Board properly discharge its statutory duties by thoroughly reviewing the underlying record in assessing Respondent's exceptions and the arguments presented in this brief. If the Board does so, Respondent is confident that the Board will reverse the ALJ's unfair labor practice findings and, most importantly, will not require Respondent to reinstate a Registered Nurse with a demonstrated lack of concern for patient privacy and the confidentiality of patient medical records.

**II.**  
**STATEMENT OF THE CASE**

**A. The Hospital**

The Hospital is located in Chino, California and offers a wide range of highly specialized medical, surgical and diagnostic services for both outpatient and inpatient treatment. At the time of the hearing in this matter the Hospital employed approximately 560 employees, 135 of whom were employed as Registered Nurses in the appropriate unit described in General Counsel's complaint as referenced below, hereinafter collectively referred to as "RNs." The general chain of command for RNs is Charge Nurse, Department Manager or Director, Chief Nursing Officer ("CNO") and Chief Medical Officer ("CMO"). The CNO during the relevant time period was Linda Ruggio and the CMO was James Lally. Prior to March 15, 2010 the Director of the Emergency Department ("ED") where most of General Counsel's witnesses worked was Carlos Gonzalez. On March 15 Cheryl Gilliatt, who had worked in the ED for many years and was a Relief Charge Nurse during the period immediately prior to March 15, became the ED Director.<sup>1</sup> The Hospital maintains general policies and procedures that are applicable to all employees at the Hospital, including both RNs and other employees. The Hospital maintains other policies that are applicable only to RNs and other employees who are directly involved in delivering care

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<sup>1</sup> All dates hereinafter are in 2010 unless otherwise indicated.

to the Hospital's patients. See, i.e., T 821-824, 965-966; RX 45, 52-55, 70-76, 88.<sup>2</sup>

**B. The Union's 2008 Petition (Case 31-RC-8689)**

In April 2008 the Union filed a representation petition. During proceedings on the petition the Hospital and the Union entered into a stipulation confirming that the Hospital's Charge Nurses and Relief Charge Nurses were Section 2(11) supervisors and were therefore excluded from the voting unit of RNs. The Union lost the election conducted on May 22-23, 2008 by a vote of 48 votes for the Union and 65 votes against. The Union subsequently filed objections to the election, which objections were pending before the Board when the Union began its 2010 organizing drive. See, i.e., RX 30-31.<sup>3</sup>

**C. The Union's 2010 Representation Petition (Case 31-RC-8795)**

At the inception of its 2010 organizing drive the Union specifically targeted the Hospital's Charge Nurses and Relief Charge Nurses to organize RNs on behalf of the Union. The Union continued to actively and openly utilize Charge and Relief Charge Nurses in support of its organizing efforts even after it filed its 2010 election petition, up until March 5 when the Union entered into another stipulation confirming that the Hospital's Charge and Relief Charge Nurses are statutory supervisors. The Union won the Board election conducted on April 1-2, 2010 by a count of 72 votes for the Union and 39 against. See, i.e., RX 41-44; Complaint ¶ 7.

The Hospital filed election objections, primarily based on the Union's recruitment and utilization of Charge and Relief Charge Nurses in support of its organizing campaign, and advised the Union that it was refusing to bargain with the Union notwithstanding the results of the election. Respondent's objections were set for an evidentiary hearing in June 2010. Prior to the hearing the Hospital served subpoenas *duces tecum* on the Union and a number of Charge

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<sup>2</sup> "T" shall refer to the transcript from the hearing; "GCX" shall refer to General Counsel exhibits; "RX" shall refer to Respondent exhibits; "UX" shall refer to Union exhibits; "ALJD" shall refer to the Administrative Law Judge's decision dated October 17, 2011; "Complaint" shall refer to the Consolidated Complaint in this matter dated February 23, 2011.

<sup>3</sup> It is respectfully requested that the Board take administrative notice of its own files in Case 31-RC-8689 when considering Respondent's exceptions.

and Relief Charge Nurses, RNs and the Union seeking evidence of the activities of Charge and Relief Charge Nurses in organizing on behalf of the Union. Following the evidentiary hearing and briefing, the Hospital's objections were overruled by Administrative Law Judge Lana Parke ("Judge Parke"). On January 25, 2011 the Board adopted Judge Parke's decision and issued a Certification of Representative to the Union ("Certification").

Because the Hospital believes that its objections have merit and the Board should have sustained them, the Hospital again advised the Union that it was refusing to bargain. Thereafter the Union filed an unfair labor practice charge and the Board subsequently granted summary judgment on the resulting unfair labor practice complaint. The Hospital's petition for review of the Board's failure to sustain its election objections is currently pending before the D.C. Circuit Court of Appeals. See, i.e., RX 23-29.

**D. The General Counsel's Complaint**

Meanwhile, in May 2010 the Union filed a number of unfair labor practices against Respondent, including a refusal to bargain charge. Those charges were subsequently amended, additional charges were filed in June and September 2010, and on February 23, 2011 the complaint that is the subject of Respondent's exceptions was issued by the General Counsel. See, i.e., GCX 1 (ww) ("Complaint"). As will be discussed more specifically below, the complaint alleges that Respondent, prior to the April 1-2 representation election, threatened employees with adverse consequences if they supported the Union in the election and also interrogated one employee about the employee's union activities (id. ¶¶17-20). The complaint further alleges that, following the election, Respondent made unilateral changes to certain terms and conditions of employment, and that two of those changes were made because employees had supported the Union in the election (id. ¶¶10-15); terminated one employee (Ronald Magsino) because he engaged in union activities (id. ¶¶16); threatened employees with adverse consequences because the employees supported the union in the election and/or engaged in Section 7 activities (id. ¶¶21-23); created the impression that employees' Section 7 activities were under surveillance (id. ¶¶24-25); refused to provide information to the Union (id. ¶9); instructed employees not to

speak to third parties or the media about their protected activities and/or terms and conditions of employment (id. ¶23); and unlawfully issued subpoenas to employees and Union representatives during proceedings relating to Respondent's objections filed in Case 31-RC-8795 (id. ¶27).

**E. The Record Evidence Relating To The Complaint's Allegations**

The ALJ allowed six days for the hearing on the complaint. T 1-1073. A summary of the evidence relating to Respondent's exceptions follows.

**1. Paragraph 17: Alleged Pre-Election Threat By Consultant Buesching**

In Paragraph 17 General Counsel alleges that Labor Consultant Robin threatened employees with loss of employment if employees supported the Union. In support of this allegation General Counsel called one witness, RN Lisa Metheny. Metheny testified that she overheard the labor consultant talking to RNs Jenny Massouy and Cynthia Gabo, neither of whom were called to testify at trial by General Counsel, and stated to them that "there could be a strike" and "they could bring in nurses from other facilities to replace us and they could possibly keep some of the nurses on there too to work." T 570. Metheny testified that Massouy then asked the labor consultant, "You'll let me work?," to which the labor consultant replied "of course" and added that "the Hospital could be closed down and they could fire all the nurses and then reopen and keep some of the nurses and bring in others from other facilities." T 570-571. During cross examination Metheny changed her testimony and admitted that the labor consultant used the word "replace" instead of "fire" when discussing the nurses. T 584-585. Metheny also denied on cross examination that she was ever a Union officer or paid by the Union for her services (T 577-578); however, the Union's LM-2 for the relevant period lists Metheny as a Union officer and recipient of \$442 for "Gross Salary" during that period (see <http://kcerds.dol-esa.gov/query/getOrgQry.do>, last visited August 22, 2011 (enter file no. 000-347, then "submit"; select Fiscal Year "2010 Report").

Buesching testified that she is an experienced labor consultant, has received training on "do's and don't's" and an employer's rights and duties during a strike and follows "TIPS," understands that an employer cannot pick and choose which employees could be permanently

replaced and which could not in a strike situation, that employees can be permanently replaced for striking but cannot be terminated, and understands it would be unlawful to tell employees that in the event of a strike an employer can terminate some employees and keep others. Bueshing also testified that she never made the statements attributed to her by Metheny. T 1045-1047. Additionally, the record establishes that Respondent distributed at least one campaign leaflet describing an employer's options in the event of a strike, including its option to "hire permanent replacements to fill the jobs of economic strikers in order to continue business operations, regardless of the employees' time with the company." RX 81 (AP 34) (emphasis original).<sup>4</sup>

**2. Paragraph 18: Alleged Pre-Election Threat By Gonzalez**

In Paragraph 18 General Counsel alleges that in mid-March 2010 Gonzalez impliedly threatened an employee with a reduction in benefits if employees supported the Union. In support of this allegation, General Counsel called RN Teer Lina. Lina testified that prior to the election she was called into Gonzalez's office. Gonzalez handed her a "Protect Your Flexibility" leaflet, subtitled "What Might Happen If A Union Contract Locks In Working Rules That Don't Fit Individual Needs" and that described the types of individual issues that RNs currently were able to work out with management directly. GCX 56 (AP 10). Gonzalez told her that the Union being elected would change the relationship between management and the employees, then said "You know how you're taking vacation the whole month overseas?" T 38.

The record also establishes that during the pre-election period both the Union and Respondent conducted campaigns, and that among the themes included in Respondent's campaign were the uncertainties inherent in the collective bargaining process, the benefits enjoyed by RNs without union representation and that the relationship between management and

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<sup>4</sup> Respondent is submitting as an appendix to this brief a number of exhibits that are part of the record in this matter. The appendix will be cited as "AP" followed by the page(s) of the appendix where the referenced exhibit(s) can be found. Respondent is submitting the appendix to facilitate the Board's review of the actual record in comparison to the ALJ's version of events presented in the Decision relating to some of the more significant issues raised by Respondent's exceptions.

employees is altered by union representation. See, i.e., GCX 2-3, 6 (AP 1); RX 79-81 (AP 32-34), 83-84 (AP 35-36); T 303-305.

**3. Paragraph 19: Alleged Pre-Election Threat During Campaign Presentation**

Paragraph 19 alleges that in mid-March 2010, Respondent, by Ruggio and/or Suzanne Richards, the Chief Clinical Officer and Corporate Compliance Officer for the Hospital's parent corporation, threatened employees with a reduction of benefits if the employees supported the Union. In support of this allegation, General Counsel presented a single witness, Magsino. Magsino testified on direct in conclusory fashion that he attended a mandatory meeting during which Richards showed slides and reiterated some of Respondent's pre-election campaign themes referenced above and told the employees that if the Union was voted in, the employees "would lose the family atmosphere and flexibility of scheduling." T 245. On cross Magsino modified his testimony and admitted that the presentation touched on a number of the campaign themes, including that if the union was voted in flexibility in scheduling and the family atmosphere at the Hospital "might" be lost. T 303-305.

**4. Paragraph 20: Alleged Pre-Election Interrogation And Threat By Lally**

Paragraph 20 alleges that the day before the election Lally interrogated an employee about his/her union activities and impliedly threatened an employee with adverse consequences if employees supported the Union. General Counsel presented one witness, Rosalyn Roncesvalles, in support of this allegation. Roncesvalles testified that prior to the election she was asked by her Charge Nurse to take a break and go to the Hospital's conference room because Lally wanted to speak to her. When she arrived at the conference room a number of other employees as well as Lally were present. She greeted Lally and they had a conversation. During the conversation Lally showed her the Union's campaign poster displaying photos of employees, including Roncesvalles, holding "Vote Yes" signs (GCX 3). Lally asked Roncesvalles if she knew about the flyer, and that he knew the signs were blank when the photos were taken. Lally then joked about it being fortunate that the sign she held was not filled in with an arrow labeled "He's Stupid," pointing to her co-worker in the adjacent photo. Lally also said there had been no

layoffs during the last five years, he did not like the Union, and that he wanted her to vote “no” because they had a good working relationship without the Union. T 126-130, 162.

The campaign poster that Lally showed Roncesvalles was initially distributed by the Union, then retracted by the Union after employees complained to Respondent that the signs they held at the time the photos were taken were blank and the Union had subsequently “photo-shopped” the “Vote Yes” message onto the photos and then put the altered photos onto the campaign poster. See, i.e., RX 78 (AP 31); T 1051-1052.

5. **Paragraphs 10 And 15: Mandatory Meetings Unilateral Change And Discrimination Allegations**

Paragraph 10, in conjunction with Paragraph 14, alleges that in April 2010, following the election, Respondent began to enforce a rule requiring employees to be present for mandatory meetings without giving the Union notice or an opportunity to bargain, and thereby violated Section 8(a)(5). Paragraph 15 alleges that by the same conduct Respondent violated Section 8(a)(3). As relevant to these allegation, the record shows that mandatory meetings are held in order to provide RNs and others with important work-related information and have always been covered by Respondent’s written attendance policy as “any time you are scheduled for work.” As such, employees who miss a mandatory meeting without first notifying their supervisor and obtaining approval to miss the meeting are considered absent and are subject to being disciplined. The evidence also shows that this policy did not change subsequent to the April 2010 election. See, i.e., T 66, 689, 760, 828-830, 991-992; GCX 90; RX 45, 70, 77, 88.

As noted previously, Gilliatt was promoted from Relief Charge Nurse to ED Director effective March 15, 2010. By email dated March 31, Gilliatt advised all Emergency Department staff that a mandatory meeting would be held on April 8. Gilliatt expected all employees to attend the meeting, which she felt was particularly important because she wanted to address the staff about her new position and her expectations. However, a large number of the staff failed to attend the meeting, even though none had communicated to her in advance that they would not be able to attend. After the meeting Gilliatt reviewed the Hospital’s attendance policy referenced

above, then issued verbal counseling notices to the employees, including Section 2(11) supervisors and non-RNs, who failed to attend the meeting. None of the employees to whom she gave counseling notices objected to the notices on the basis that employees were not required to attend mandatory meetings. See, i.e., T 786-689, 740-741, 758-760; RX 13, 25, 58, 60, 67, 69-70, 72, 83, 90; RX 2, 77. Since she has been ED Director, Gilliatt has continued to give counseling notices to employees who skip mandatory meetings without giving her notice in advance, while excusing employees who do provide advance notice. See, i.e., T 760; GCX 57, 63, 66, 68, 71, 73-75, 77-83, 90; RX 77.

**6. Paragraphs 11 And 15: Tardiness Unilateral Change And Discrimination Allegations**

Paragraph 11, in conjunction with Paragraph 14, alleges that in April 2010, following the election, Respondent began to enforce a rule requiring employees to clock in at the start of their shifts, without any grace period, without giving the Union notice or an opportunity to bargain, and thereby violated Section 8(a)(5). Paragraph 15 alleges that by the same conduct Respondent violated Section 8(a)(3).

The record shows that under the Hospital's long-standing attendance policy, applicable to all Hospital employees including non-RNs, tardiness is defined as "anytime you arrive late at your work station and/or are not dressed appropriately and ready to work at the start of your shift." Employees who are tardy more than two times during a one-month period are subject to receiving a "verbal warning," and the Hospital has historically provided verbal warnings to employees who are tardy, even if they arrive within 7 minutes of the start of their shift. See, i.e., T 626, 632, 684-685, 690-691, 829-830, 965-966, 990-991; RX 45, 77, 88. Moreover, the record establishes that Gonzalez was extremely lax in enforcing Respondent's attendance policies while he was ED Director, and that as a result RNs were not disciplined for clocking in late after the beginning of their shift in circumstances where they were more than 7 minutes late as well as when they were tardy by less than 7 minutes. See, i.e., GCX 90, 129 [Hilvano tardy more than 7 minutes on two or more occasions in August 2009, September 2009, October 2009 and

November 2009], 131 [Magsino tardy more than 7 minutes on two or more occasions every month from June 2009 through March 2010 except November (presumably because he was on vacation that month)], 133 [DeSantiago tardy more than 7 minutes on two or more occasions in every month from June 2009 through January 2010 except December], 150 [RN Orona tardy more than 7 minutes on two or more occasions in July 2009, October 2009, November 2009 and December 2009], 151 [RN Sahagun tardy more than 7 minutes on two or more occasions in every month from June 2009 through March 2009].

As noted, Gilliatt became responsible for enforcing Respondent's attendance policies when she became ED Director, and in fact discussed those policies at the mandatory meeting held on April 8. At the end of the month she reviewed the timecards of the employees in the Department (including nonRNs) and, consistent with Respondent's written attendance policy, prepared verbal counseling notices for those who had been tardy two or more times during the course of the month. See, i.e., T 678-679, 684-685, 690-692, 736; GCX 7, 15, 17, 90, 102, 105, 107; RX 45, 77, 88. However, despite her diligence in enforcing Respondent's attendance policies, the record shows that there have been a number of instances since April 2010 where RNs who clocked in within 7 minutes after start of their shift, and RNs who have clocked in more than 7 minutes after the start of their shifts, have not received counseling notices. See, i.e., GCX 90, 129, 153-154, 156, 158, 163, 168; RX 89-91.

7. **Paragraph 13: Paid Time For Per Diem Employees For Attendance At Certification Classes Unilateral Change Allegation**

Paragraph 13, as modified by General Counsel during the hearing and in conjunction with Paragraph 14, alleges that following the election Respondent "ceased" reimbursing employees who are not full-time for time spent attending certification classes without giving notice to the Union or an opportunity to bargain. In support of this allegation General Counsel called one witness, Roncesvalles. Roncesvalles, who had been a per diem employee at the Hospital since January 2009, testified in conclusory fashion that prior to the election she had been paid for attending certification training. Roncesvalles also testified that she requested to be paid for her

time spent attending a March 31 PALS recertification course by having another employee enter that time on her “Time Card Adjustments” log; her request was denied; and she was told by Giliatt that she was not eligible to be paid because she was not a full-time employee. T 132, 135-142.<sup>5</sup> The record also shows that prior to having her request entered on the Time Card Adjustment log, Roncesvalles had twice asked Giliatt if she could get paid for the time she spent attending the class. On each occasion Giliatt told Roncesvalles that reimbursement for those hours was only available to full-time staff, but Roncesvalles still argued that she should be paid for the time. When Giliatt saw that Roncesvalles had made a written request to be paid for the hours even though Giliatt had told her twice that she was not eligible for any payment, Giliatt responded by placing her own notation on the log: “For Full Time Employees only!” Undeterred, in May Roncesvalles asked Giliatt if she would get paid for her time spent at MICN recertification class. Giliatt again told Roncesvalles that per diem employees were not paid for time spent in recertification classes and Roncesvalles subsequently let her MICN license expire. See, i.e., T 703-709; GCX 22.

The record also shows that the Hospital’s written pay practice manual that has been in effect since prior to the election specifically provides that per diem employees are *not* paid for time spent attending certification classes:

Class attendance will be reimbursed for full-time employees only. This is counted in hours worked for the week if taken at the hospital or the provider facility. ***Class attendance will not be reimbursed for part-time, per diem, registry and traveler employees*** and is not counted in the hours worked.

RX 75 (emphasis added). Similarly, Respondent’s Handbook provides that per diem employees “are not benefits-eligible” RX 88. Accordingly, Respondent’s practice has been not to pay per diem employees for time spent attending recertification classes, subject to modification in individual circumstances where the Hospital has a critical need for the per diem to maintain

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<sup>5</sup> During direct Roncesvalles testified that RN Marlene Bacani, another Union supporter and General Counsel witness, filled in the entry. T 135. On cross Roncesvalles testified that she wrote down the entry herself. T 174.

his/her certification so that the Hospital can properly staff its operations. See, i.e., T 633, 727, 835, 968-969, 975-977, 990. The practice and policy of not paying per diems for time spent in recertification classes is also demonstrated by Respondent's campaign literature listing current benefits provided to employees. See GCX 6 (AP 1) [flyer notes paid certifications for "FT"]. The practice and policy is also exemplified by Gonzalez's rejection of Roncesvalles's request for reimbursement for a recertification class she attended in 2009. RX 3 (AP 20) [Time Card Adjustment log from 2009 showing an entry for ACLS renewal dated 5/26/09 with a notation by Gonzalez stating "Not for P.D. Employees"].

**8. Paragraph 21 And 24: Alleged Post-Election Threat And Surveillance By Lally**

In Paragraphs 21 and 24 General Counsel alleges that in mid-April 2010 Lally threatened an employee in the ambulance bay with termination because of his/her union and/or protected concerted activities and also created an impression of unlawful surveillance. In support of this allegation Magsino testified that Lally said to him that he was "going to give me a warning because they are saying that Ronald Magsino violated [the] solicitation policy." Magsino also testified that Lally said, "I know its crap but they are making me do it," and that the policy had been in place for a while now and that the Union could protect him. When Magsino asked Lally whether he was going to be written up or suspended, Lally responded that it was grounds for termination. T 242-243. On cross-examination Magsino admitted he could not identify who "they" were and acknowledged that he never did receive any warning as allegedly referenced by Lally. T 301-322. Additionally, Magsino testified on direct that Lally said "they saw me in the camera talking to a group of nurses during work hours," and added in response to a leading question by General Counsel that Lally mentioned at the same time "they thought I was organizing." T 243. However, when asked on cross to recount what was said by Lally, Magsino did not mention anything about a camera. T 301. During his testimony Magsino also repeatedly launched into what was obviously a memorized speech regarding the incident, refusing to respond to clear questions put to him by both Respondent and the Administrative Law Judge. Id.

It is undisputed that there are security cameras that record all activity in the ambulance bay.

**9. Paragraph 25: Alleged Post-Election Surveillance By Casas**

Paragraph 25 alleges that in May 2010 Charge Nurse Dolly Casas created an impression among employees that their union/protected activities were under surveillance. In support of this allegation General Counsel presented a single witness, Tyrone Clavano. Clavano testified on direct that Casas approached him and another employee, whose name Clavano could not recall, and stated, “What are you talking about because we are supposed to know what you are talking about.” T 84-85. On cross, Clavano testified that there were two or three other RNs present and admitted that immediately prior to approaching them Casas was only five to ten feet away from where they were sitting and could have heard what he and other RNs were discussing. See, i.e., T 110-114.

**10. Paragraph 22: Alleged Post-Election Threat By Hower**

Paragraph 22 alleges that in late April 2010, Charge Nurse Terri Hower told employees that since employees chose union representation they would lose previously enjoyed benefits. In support of this allegation, General Counsel again presented Clavano as his only witness. In response to General Counsel’s question of whether he ever had a conversation with Hower about benefits, Clavano said that Hower “did mention about having no more vacations no more than two weeks”; Clavano provided no more detail about what Hower allegedly said. T 82-83. Clavano then testified in response to questions by Union counsel that Hower said “two week vacations at one time would no longer be allowed.” T 85-86. Clavano could not recall anyone else being present and admitted that employees have been allowed to take vacations of longer than two weeks since Hower allegedly made this statement. T 83, 102-103.

Hower testified that she has no authority to grant or deny approval of any vacation requests; only the department manager has that authority. T 607. Hower also testified that employees have been permitted to take vacations of more than two weeks both before and after the election and that she has never received any directive that employees would not be permitted to take vacations in excess of two weeks. T 607-608. Hower further testified that she has never

had any discussions with Clavano about the amount of vacation time employees are permitted to take. T 608.

**11. Paragraph 23: Alleged Post-Election Threats By Reddy**

Paragraph 23 alleges that on or about May 3 and/or May 4, 2010 Respondent's admitted agent Lex Reddy threatened to more rigorously enforce Respondent's policies and to enforce previously unenforced policies because the employees chose Union representation, and instructed employees not to speak to third parties and/or the media about their protected concerted activities and/or their terms and conditions of employment; and that on or about May 6 or 7 Reddy threatened to discipline employees because the employees chose union representation. It is undisputed that Reddy held a series of meetings with employees during this approximate time period and discussed, in general terms, that it would be "business as usual" despite the election. However, the record concerning what was said by Reddy during the course of these meetings, and at which particular meeting, is far from clear.

In support of these allegations General Counsel called seven witnesses (Lina, Clavano, Vincent Hilvano, Marlene Bacani, Ysenia DeSantiago, Metheny and Magsino). Their testimony was, at best, inconsistent and indefinite. Lina testified that the only one of the 30 RNs who attended the meeting who she could remember being there was General Counsel witness and Union officer Metheny, and that Reddy only "explained that he is going to enforce the rules." T 42, 69-70. Clavano testified that there were approximately 40-50 RNs at the meeting he attended but that he could not identify any of them by name; that Reddy said that policies and procedures would be strictly enforced, including being late; that sick calls would be closely monitored; that employees would be disciplined even without a Union representative present; and that from now on it would be strictly policies and procedures with no more family atmosphere. T 79-81, 107, 109. In response to leading questions by General Counsel, Clavano also testified that Reddy said RNs needed to go through channels instead of speaking to the media. T 81.

Bacani testified during direct that there were about 8-10 RNs present at the meeting she attended, including Magsino, and that Reddy spoke about "implementing rules against tardiness.

He said we have to follow the rules.” T 183-185. On cross Bacani testified that the topics discussed by Reddy were rules against tardiness, hiring new nurses, and vandalism of Gilliat’s car; that these were the only topics she could remember; and that the only thing she could recall Reddy saying about tardiness was that employees have to follow the rules. T 203-206. Hilvano testified that there were about 15-20 RNs at the meeting he attended, including Magsino and DeSantiago, and that during the meeting Reddy stated, “Whoever or whatever your ideas are about this Union coming over to this Hospital and taking control of it is wrong”; that “they were still in the driver’s seat and negotiations between the Union and the Hospital is going to happen outside of the Hospital”; and that Reddy also “spoke about enforcing the policies and that they had no choice but to enforce [the policies] because their backs were on the wall.” T 218-219, 222-223.

Magsino testified that Reddy addressed the shortage of nurses and that the Hospital had hired nurses to fill in that shortage; spoke about policies and procedures being strictly enforced and that violators would be dealt with accordingly; and that if employees had issues with management he wanted those employees to go to management instead of going directly to the newspaper or media. T 246-247. On cross Magsino testified that there were no other topics discussed by Reddy. T 306-310. Magsino also testified that there were between 10-20 RNs present at the meeting, but refused to commit to whether Hilvano, Bacani, DeSantiago or Clavano, or any other particular RN, was present. T 307.

DeSantiago testified on direct, in rote fashion, that Reddy discussed “how nothing had changed, people were written up for being tardy, that the tardy policy had always been in place but had never really been enforced,” but that now “he said that now we are following the rules”; that problems should be taken to RNs’ managers or administration and not to the media; and that he did not want his name or Chino Valley’s name in the papers. T 401. DeSantiago then testified that “I just remember him reiterating that he --- nothing had really changed.” Id. On cross DeSantiago testified that she could not remember the names of any other RNs who attended the meeting and again reiterated that what she could remember for sure was that Reddy

said during the meeting that “nothing had changed.” T 444, 446-447.

Metheny testified that there were “a lot” of RNs at the meeting, but the only ones she remembered by name were Lina and Hilvano. Metheny also testified that Reddy stated the Hospital “was going to file charges against the nurses who are trying to form a union. He also said that he was -- that from now on that Chino Valley Medical Center was going to follow all policy and procedure to the fine detail and that if you’re late, take too many breaks or you don’t follow procedure, you may be counseled or reprimanded.” T 572, 589. Metheny also testified that Reddy said everything was going to be documented from “here on out.” T 593.

Ruggio testified that at the meeting she attended Reddy said the status quo would remain and the Hospital would continue to enforce policies as they are written and nothing would change in relation to the enforcement or utilization of the policies based on the Union vote; and that the Hospital would honor and abide by the regulations and the NLRB handbook and encouraged employees to be familiar with those rights. T 900-904. Ruggio also testified that Reddy addressed the hiring of RNs and said that he would appreciate the staff not discussing Hospital matters with the media. Id. Ruggio further testified that Reddy said the Company would not tolerate vandalism and that if individuals are identified who engaged in vandalism, then they would be dealt with appropriately. Id. Finally, Ruggio testified that Reddy stated that everyone knew there had been a campaign and vote and that the nurses had voted to have the Union represent them. Id.

Human Resources (“HR”) Director Dhuper testified that she attended all meetings where Reddy spoke to RNs and that Reddy stated at the meetings that there are policies and procedures in place and they would be followed just like in the past, no matter what was going on at the Hospital. T 992-995. Dhuper also testified that Reddy never said that policies that had not been enforced in the past would now be enforced and did not recall him saying employees should not go to the media or outside parties, only that if there were concerns the employees needed to go to Hospital administration. Id.

**12. Paragraph 16: Termination Of Magsino**

Paragraph 16 alleges that Respondent terminated Magsino on May 20 because of Magsino's union activities. Respondent admits that it terminated Magsino, but contends that it did not violate the Act when it did so inasmuch as Magsino was a statutory supervisor at the time he was terminated because he had taken Gilliatt's place as a Relief Charge Nurse in mid-March, and that he was properly terminated for his admitted conduct in repeatedly printing, copying, using, failing to secure and distributing a patient's medical record.

With respect to Magsino's supervisory status, the record shows that there are twenty-eight 12-hour shifts in the ED during each two-week pay period. Each shift is staffed by a Charge Nurse or Relief Charge Nurse who supervises the RNs and other employees on the shift. The regular Charge Nurses work six shifts "in-charge" during each two-week payroll period, with Relief Charge Nurses working "in-charge" during the shifts not worked by the regular Charge Nurses during that period. There is no difference in the duties and authority of the Charge Nurse and the Relief Charge Nurse, and anyone working as a Charge Nurse or Relief Charge Nurse has, at a minimum and in the interest of Respondent, the authority to assign work to employees, responsibly direct employees and adjust employee grievances, and use independent judgment when doing so. Relief Charge Nurses are also paid a differential above their normal hourly rate as an RN for any shift they work as a Relief Charge. See, i.e., T 202, 209, 393-394, 681-684, 754-755, 757-758, 761-763; GCX 55; RX 31.

Prior to March 15, the only Charge Nurse on the day shift in the ED was Samantha Jones; the Relief Charge Nurses on the day shift were Lucia (Suzy) Eiley and Cheryl Gilliatt. During this period Magsino also worked occasional shifts as Relief Charge Nurse. On March 15 Gilliatt became the ED Director and no longer worked as a Relief Charge Nurse. Gilliatt's position as a regular Relief Charge Nurse was filled by Magsino, who continued to work in the Relief Charge Nurse position on a regular basis up until his termination on May 20. See, i.e., T 208-209, 390-394, 681-684, 738; GCX 55.

With respect to the reason why Magsino was terminated, the record shows that the

California Department of Public Health (“CDPH”), which is the licensing authority for hospitals in California, conducted an investigation of the Hospital in early May 2010 which included a random review of medical records for ED patients. The CDPH investigator identified a record for one patient that indicated to the investigator that the patient’s treatment by Magsino did not meet the appropriate standard of care required of hospitals licensed by CDPH, then brought the case to the Hospital’s attention. Ruggio reviewed the information relating to the substandard patient care provided by Magsino, and considered several potential disciplinary actions for Magsino based on his poor performance. Ruggio ultimately decided that instead of termination, Magsino would be issued a final written warning. Ruggio decided on the lesser penalty in order to provide Magsino with an opportunity to recognize his failure to provide appropriate care to the patient, hoping that with the opportunity he would better discharge his patient care responsibilities in the future. See, i.e., T 331, 712, 717, 811, 904-908.

On May 5 Gilliatt called Magsino into her office to give him the final written warning. Gilliatt showed Magsino the warning and portions of the patient’s medical record relevant to the issue. Magsino asked for a copy of the warning and was told he could not have a copy unless he signed the warning. Magsino refused to sign. Magsino asked if he could review the patient’s record. Gilliatt told him that he could and gave him a post-it note with the patient’s name so he could access the patient’s record through the Hospital’s electronic medical records system (“Meditech”). Gilliatt testified she did not give Magsino permission to print out the record, either at that time or at any other time; Magsino testified that when he asked if he could review the record, Gilliatt told him he could and, without any prompting on Magsino’s part, also advised him that he could print out the record. There is no dispute that Magsino then went out to the nursing station and both accessed and printed portions of the patient’s medical record. Magsino then began reviewing policy books and other materials relating to nursing practice and standards, causing Gilliatt to instruct him to get back to work because the Hospital had patients that needed to be cared for. There also is no dispute that on May 7 Magsino signed the final written warning while also noting that there would be a “dispute to follow.” See, i.e., T 252-253, 337-344, 713-

714, 717, 719-720, 722-723, 728-729, 745-748; GCX 8; RX 46.

On May 12, after having been counseled by the Union's attorney, Magsino submitted a letter to HR disputing the final written warning. In conjunction with the dispute letter Magsino submitted a number of statements from other employees and physicians. Magsino also submitted a copy of the doctor's dictation notes and nursing notes from the patient's medical record (the doctor's dictation notes and nursing notes submitted by Magsino will sometimes hereinafter collectively be referred to as "MR"). The dictation notes included in the MR detailed the patient's medical condition ("morbidly obese," "complaining of right flank pain," "positive bowel sounds," etc.), medical history ("hypertension, diabetes, and also high cholesterol"), current medications being used ("Lisinopril, Glucophage, insulin and also Lipitor"), medical test results ("urine pregnancy test done and it is negative. Her urine dipstick is positive for blood, positive for nitrites, negative for leukocyte, positive for protein, and positive for glucose"), and treatment provided and recommended ("patient will be given Levaquin [and] discharged home with a prescription for Cipro 500 mg b.i.d. for the next ten days and also Vicodin", etc.). The dictation notes also showed that they had been "Run" by Magsino on May 5, while the nursing notes showed that they had been "Run" on May 6. Magsino had blacked out the name of the patient on the MR and had highlighted portions of the dictation notes included in the MR. However, the patient's account number, medical record number, age and sex, status and dates of admission/discharge were still on the MR; as such, the MR had not been fully "de-identified" in accordance with the regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (see, i.e., 45 CFR § 165.514(b)(2)(i)). Moreover, the MR had been submitted to HR, which is not a department that is permitted to have access to patient medical records pursuant to HIPAA (see, i.e., 45 CFR §§ 164.308(a)(3)(i), 164.514(d)(2), 164.530(i)(1)). T 256, 332-335; GCX 9, 9(a)-(b) (AP 24).

Pursuant to the requirements of HIPAA and state privacy law and the Hospital's internal policies relating thereto (see, i.e., 45 CFR § 164.308 [covered entity must develop, implement and enforce "policies and procedures to prevent, detect, contain, and correct security

violations”]; GCX 36 (AP 5-9); RX 53, 54-55 (AP 22-26)), the HR office notified Ruggio that Magsino’s appeal packet included copies of a patient’s medical record, and provided the MR to her. Ruggio, who had never before been involved in investigating or responding to an issue involving access and disclosure of a patient’s health information for non-clinical purposes, contacted Richards for guidance on how she should proceed in investigating the matter. Richards, who has extensive experience and expertise in privacy compliance issues, requested that an electronic audit report be run so the Hospital could identify any “activity,” i.e. accessing/viewing and/or printing, of the patient’s records contained in Meditech. The resulting report showed that portions of the patient’s records had been accessed and printed by Magsino on May 5 at 4:57 p.m., had again been accessed by Magsino on May 6 at 7:54 a.m., and had been accessed for a third time and printed for a second time by Magsino on May 6 at 7:57 a.m. Additionally the report showed that Yesenia DeSantiago, who had also received a final written warning relating to the same patient and submitted a dispute letter to HR, had accessed portions of the medical record on May 11 at 8:12 a.m., then accessed and printed portions of the medical record at 8:15, four minutes later. Richards provided a copy of the report to Ruggio via email, which also expressed Richards’ opinion that the activity by Magsino and DeSantiago was in breach of the Hospital’s HIPAA policies and terminable offenses. T 768-777, 784-785, 795, 801-807, 812-813, 817-818, 836-838, 840; RX 46; GCX 18, 29, 51, 169.

Ruggio then formed an investigation committee consisting of herself, Jean Arriaga, Hospital IT Analyst with responsibility for privacy compliance relating to the Hospital’s Meditech and related systems, and Edelma Urquieta, Hospital HIPAA Compliance Officer (“Investigation Committee”). The Committee’s investigation included interviews of Magsino, Gilliatt and DeSantiago, review of Magsino’s personnel file, review of the Hospital’s relevant policies, and review of privacy standards and related materials included in the California Health Information Privacy Manual, commonly used as a resource by health care professionals for privacy-related issues. During the interview of Magsino, which took place on May 14, Magsino admitted that he had accessed and printed portions of the patient’s medical record on several

occasions, that he had made at least two copies of the MR, that he had removed a copy of the MR from the Hospital and taken it home, that he had submitted a copy of the MR to HR, and that he still had a copy of the MR in his backpack. At one point during the interview Magsino left the room where the interview was taking place to retrieve the copy of the MR in his backpack, then returned and gave it to Ruggio. Magsino also claimed during the interview that Gilliatt had given him permission to both access and print the patient's medical record so long as he redacted the patient's name and date of birth, and told him he should leave the account number and medical record number on the MR so that the patient could be identified for any future investigation. T 266-269, 372-376, 841-846, 852-883; RX 48-55, 57-62; GCX 36, 148 (AP 16-17).

Gilliatt and DeSantiago were both interviewed on May 17. DeSantiago also admitted to accessing and printing portions of the patient's medical record, and explained that Gilliatt had given her permission to access the medical record and that she had shredded the printed portions as soon as she had finished taking notes to assist her in preparing her dispute letter. DeSantiago also acknowledged that Gilliatt had never given her permission to print the record. Ruggio explained to DeSantiago that it would have been acceptable if Gilliatt had printed out the record because she would have been acting on behalf of Hospital administration in doing so, but DeSantiago should not have printed it out herself. DeSantiago acknowledged that she understood that she was not to access and print a medical record unless she was actively involved in treating the patient, and that she knew it was not permissible to remove a copy of a medical record from Hospital property. See, i.e., T 435-440, 852-857; RX 50, 63; GCX 148 (AP17).

During Gilliatt's interview, Gilliatt told Ruggio that when she gave Magsino his final written warning Magsino became very upset and wanted to do some research, and asked to view the patient's chart. Gilliatt said that she gave Magsino the name of the patient so he could do so and understood how Magsino could have understood that she had given him permission to view the chart, but never told him he could print the record or take it home with him. T 859-862, 920; RX 51, 63; GCX 148 (AP 17).

The investigation also included a review of the Hospital's Information Security Agreement, Re-Disclosure of Patient Health Information, and Meditech Appropriate Access and Enforcement and Discipline, Information Systems policies, all of which were implicated by Magsino's (1) accessing, printing and copying of portions of the patient's medical record; (2) his failure to maintain proper security over the copy of the MR he kept in his backpack and removed from Hospital property; and (3) his redistribution of the MR to the HR Department (items (1), (2) and (3) will hereinafter collectively be referred to as "Magsino privacy violations"). See, i.e., T 869-875; RX 53, 54-55; GCX 36, 148 (AP 17-18).

The Information Security Agreement, for example, details the requirement that all employees with access to patient information accept responsibility to maintain the confidentiality of such information and acknowledge the employee's responsibilities regarding patient information use and access. These responsibilities are reiterated in the Information Security Agreement itself, which provides as most relevant that the employee will access patient information through the Hospital's computer systems only as required for the performance of the employee's job responsibilities; will not disclose any portion of a patient's record to a recipient who is not authorized by the Hospital to receive it; and that failure to abide by the commitments in the Agreement will result in disciplinary action, up to and including discharge. RX 52 (AP 21), 53.<sup>6</sup>

The Re-Disclosure of Patient Health Information policy prohibits "using patient health information for purposes which were not originally authorized in writing by the patient"; "disclosing patient information to any other party not authorized in writing by the patient," and also provides that "[p]olicy violations will invoke disciplinary measures as defined in the Company's Appropriate Access Enforcement and Discipline policy." RX 54 (AP 22).

The Meditech Appropriate Access Policy permits only "appropriate access" to patient information available through the Meditech system, defined as patient information "which is

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<sup>6</sup> RX 52, p. 1 is the Information Security Agreement signed by Magsino in January 2006.

necessary to perform [the user's] professional responsibilities"; states that "[a]ccess will be granted for an individual to provide and/or support quality patient care processes, as defined by an individual's professional responsibilities to the patient and the facility; and requires users to use patient information only "in an honest, ethical and confidential manner." RX 55 (AP 24-25).

The Enforcement and Discipline, Information Systems policy ("Enforcement Policy") identifies the level of discipline to be assessed for "breaches of confidentiality"; the suggested methodology for determining the severity of a breach; sets out examples to be used in determining the level and definition of a violation of "Appropriate Access policies"; and sets out the "Minimum Recommended" disciplinary actions for different levels of violations. For example, the minimum recommended level of discipline for an accidental breach is an oral warning or reprimand; the minimum recommended level of discipline for a "purposeful" breach is a written warning; and the minimum recommended level of discipline for a purposeful breach involving a disclosure of patient information is termination of employment. GCX 36 (AP 5-9).

The investigation also included a review of Magsino's personnel file, which confirmed that he had signed the Information Security Agreement and had obtained appropriate training on privacy-related policies and procedures (RX 52), and the review of applicable sections of the California Health Information Privacy Manual. More specifically, Ruggio reviewed the portions of the Manual advising, among other things, that HIPAA requires a covered entity to develop and implement written sanctions policies for employees who fail to comply with the entity's privacy policies and procedures; that HIPAA requires a covered entity to apply appropriate sanctions against employees who fail to comply with the such privacy policies and procedures "even without a violation of [HIPAA];" that even a good faith acquisition of patient information by an employee is a breach under California state law if the information is thereafter used or disclosed by the employee; that "[n]o proof of patient harm is required for the breach to be reportable or for CDPH to assess a penalty against a facility; that a "breach" under HIPAA involves the unauthorized acquisition, access, use, or disclosure of a patient's medical information that compromises the security or privacy of the patient information; that penalties

can be assessed against a covered entity for violation of either state or federal privacy laws; that a factor in determining the amount of a fine is whether and to what extent the entity has attempted to correct any previous violations; and that “use” of health information as proscribed under HIPAA and state law can include merely viewing the information. See, i.e., T 863-869, 877-881; RX 57-62.

After completing its investigation, the Investigation Committee met to review the results of the investigation and determine what further steps, if any, should be taken. The Committee determined that Magsino’s initial accessing of the patient’s medical record on May 5 was technically a breach, but it was excused because of the authorization that had been provided by Gilliatt. However, it was also determined that his printing of portions of the medical record on May 5, his printing portions of the medical record on May 6, his making several copies of portions of the medical record, his removal of a copy of the MR from the Hospital, and his submission of a copy of the MR to HR were all purposeful breaches. It was also determined that Magsino should be terminated because his violations fell under Level III of the Enforcement Policy inasmuch as his actions were purposeful and he had also disclosed patient information by submitting the MR to HR. The Committee excused DeSantiago’s accessing of the patient’s medical record because of the authorization given by Gilliatt; however, it was also determined that she had committed a purposeful breach when she thereafter printed a portion of the medical record, even though she had shredded the record immediately thereafter. Accordingly, her violations were placed under Level II of the Enforcement Policy, and she received a final written warning. See, i.e., T 871-875, 883-886; GCX 29, 32, 36 (AP 5-9), 148 (AP 18); RX 63.

Following the Committee’s meeting, Ruggio contacted Richards and informed her of the results of the investigation. Both agreed that the incidents identified during the investigation were required to be reported to the CDPH and the patient, and Ruggio did so. Ruggio was subsequently contacted by an investigator from CDPH, who asked what disciplinary actions had been taken against the involved employees. Ruggio advised the investigator that one employee had received a formal counseling and the employee who had disclosed the MR was no longer

employed at the Hospital. The investigator replied that she did not believe a deficiency would be issued because the Hospital had reacted swiftly and appropriately and she did not have any concerns that the breach would reoccur. The Hospital subsequently received a notice from CDPH showing that no deficiencies by the Hospital had been found with respect to the breaches. See, i.e., T 779-781, 885, 889-893, 897-898; GCX 33, 84 (AP 13), RX 63 (AP 30).

**13. Paragraph 27: Alleged Interference By Serving Subpoenas On The Union And Employees**

Paragraph 27 of the Complaint alleges that Respondent violated Section 8(a)(1) by four of the document requests included in the subpoenas *duces tecum* served on employees and representatives of the Union during proceedings of Respondent's post-election objections to the 2010 election as discussed in Section C above. Those requests are paraphrased in the complaint (as well as the ALJ's Decision); the actual requests in the subpoena at issue provide as follows:

1. Any and all documents relating to any communication during the relevant time period between you and any representative of the Union. NOTE: IF YOU WERE NEVER EMPLOYED BY THE EMPLOYER AS A CHARGE NURSE DURING THE RELEVANT TIME PERIOD, THEN THE EMPLOYER IS WILLING TO ALLOW THE DOCUMENTS TO BE PRODUCED TO THE HEARING OFFICER FOR AN IN CAMERA INSPECTION, WHEREUPON ONLY NON-PRIVILEGED DOCUMENTS THAT ARE RELEVANT TO THE EMPLOYER'S OBJECTIONS ARE PROVIDED TO THE EMPLOYER.

10. All authorization and/or membership cards signed by any Charge Nurse during the relevant time period, including any authorization and/or membership cards you signed if you were employed by the Employer as a Charge Nurse during said period.

11. All authorization and/or membership cards signed by any RN during the relevant period. NOTE: THE EMPLOYER IS WILLING TO ALLOW THE DOCUMENTS TO BE PRODUCED TO THE HEARING OFFICER FOR AN IN CAMERA INSPECTION, WHEREUPON ONLY NON-PRIVILEGED DOCUMENTS THAT ARE RELEVANT TO THE EMPLOYER'S OBJECTIONS ARE PROVIDED TO THE EMPLOYER

12. All documents relating to the distribution and/or solicitation of Union authorization and/or membership cards during the relevant time period. NOTE: IF YOU WERE NEVER EMPLOYED BY THE EMPLOYER AS A CHARGE NURSE DURING THE RELEVANT TIME PERIOD, THEN THE EMPLOYER IS WILLING TO ALLOW THE DOCUMENTS TO BE PRODUCED TO THE HEARING OFFICER FOR AN IN CAMERA INSPECTION, WHEREUPON ONLY NON-PRIVILEGED DOCUMENTS THAT ARE RELEVANT TO THE EMPLOYER'S OBJECTIONS ARE PROVIDED TO THE EMPLOYER.

See, i.e., GCX 10.

The record also shows that prior to the hearing on Respondent's objections, the Union filed a petition to revoke the subpoenas served on the Union's custodian of records and representatives, then argued to Judge Parke that its petition to revoke should also apply to the subpoenas served on RNs. Judge Parke ultimately granted in part and denied in part the petition to revoke, and otherwise limited the documents that were required to be produced pursuant to the subpoena. In accordance with her rulings, the recipients of the subpoenas were required to produce some requested documents, including all authorization cards signed by Charge Nurses as well as other documents evidencing the participation of Charge Nurses in the Union's campaign. See, i.e., RX 31, 36, 37, 38, 40, 105.

**F. The ALJ's Conduct And Rulings During Proceedings On General Counsel's Complaint**

During the course of the hearing the ALJ made numerous rulings and engaged in other conduct that are included within the scope of Respondent's exceptions and demonstrate that Respondent was denied a full and fair hearing before an impartial trier of fact. While time and space limitations do not allow Respondent to detail all such instances, the following examples, some of which are discussed in more detail in Part IV below, are illustrative.

- ALJ refuses to conduct proceedings relating to Respondent's SDT to CDPH on the record and falsely states that Respondent had already had its opportunity to respond to the petition to revoke filed by CDPH even though the time period for Respondent to do so had not yet expired, then uses intemperate language while discussing subpoena issues on the record (see, i.e., T 13-15; RX 93-98)
- ALJ modifies basis for rulings in furtherance of efforts to block Respondent from obtaining relevant information (see, i.e., T 15-16, 285-286 [privilege issues involving documents provided to Union counsel by Magsino, assessed by ALJ on whether documents would harm General Counsel's case rather than conducting proper privilege analysis], 469 [SDT to CDPH], 912 [ALJ states false justification for requiring Respondent to comply with particular sections of

Federal Rules of Civil Procedure])

- ALJ instructs General Counsel and/or Union on manner in which to prosecute case against Respondent (see, i.e., T 23-24 [date bargaining obligation allegedly attached], 251 [provides basis for introduction of evidence])
- ALJ otherwise assumes role of advocate on behalf of General Counsel (see, i.e., T 51, 63, 288, 292, 298, 302, 319, 342, 368, 371, 389, 423, 488-490, 539-540, 597-599, 616-617, 616-617, 622-623 [ALJ independently raises grounds for objecting to admission of document even after General Counsel had withdrawal objections], 790-791, 801-802, 838-842, 847, 950-951)
- ALJ refuses to permit Respondent to introduce and/or obtain relevant evidence, including by precluding cross examination of General Counsel's witnesses and refusals to enforce subpoenas (see, i.e., T 48-49, 67, 91, 114-115, 208 [Respondent barred from examining General Counsel witnesses under FRE 611(c)], 292, 313-314 [evidence re tardiness practices], 343-344, 346, 580-581, 627-628, 643-650, 680-681, 790-791, 816, 820, 894-895, 950-951, 989, 1041-1043, 1064 [petition to revoke granted without discussion], 1069-1071 and RX 112, 114-115 [subpoenas directed to CDPH as relevant to GCX 84], RX 63 [Report Form not allowed in as business record]; RX 18-21, 93-101, 107-116)
- ALJ permits General Counsel to submit incompetent and/or irrelevant evidence (see, i.e., T 159, 165-169, 454-456, 459, 461-470 [relating to GCX 84], 474, 496, 507-508, 512 [allows custodian of records to be examined regarding actual entries in records and practices relating thereto without laying proper foundation], 518-521, 752 [ALJ permits Union to exceed scope of direct examination of Respondent's witness even though General Counsel had previously rested his case], 848, 857-858, 863-865, 887-889)
- ALJ refuses to grant request to strike nonresponsive testimony on the basis that witness "did not understand question" instead of inferring that witness was being evasive (see, i.e., T 165-166, 569)
- ALJ allows Union to manipulate scheduling of hearing while denying Respondent's request to resume hearing on day following June 15 session to allow testimony by a witness not

immediately available (see, i.e., T 32, 711, 1071)

- ALJ exhibits hostility towards Respondent’s counsel (see, i.e., T 338, 341 [ALJ rules that Respondent’s clarifying question is argumentative], 498 [ALJ chastises Respondent’s counsel for not complying with his “clear instructions” when instructions were not clear and ALJ refused to place them on the record], 756-757, 910-911)
- ALJ expresses approval of General Counsel’s case (see, i.e., T 497 [ALJ comments that General Counsel’s questioning “hit pay dirt”])
- ALJ interrupts Respondent’s questioning of General Counsel’s witness because responses show lack of credibility (see, i.e., T 52-53, 60)
- ALJ permits General Counsel and Union to reopen record after hearing had been closed for the day for house-keeping purposes, then allows General Counsel and/or Union to successfully request that onerous burden be placed on Respondent relating to expert report (see, i.e., T 525-526, 605, 640-641, 909-913)
- ALJ rejects testimony that is harmful to General Counsel’s case (see, i.e., T 816, 790-791)
- ALJ engages in *ex parte* communications with the General Counsel (see, i.e., RX 17; T 650-651)

## **G. The Administrative Law Judge’s Decision**

### **1. Paragraph 17: Alleged Pre-Election Threat By Consultant Buesching**

The ALJ fully credited Matheny’s testimony and discredited Buesching’s denial that she told employees that they could be fired if they went on strike. ALJD 4:1-14. The ALJ did not discuss the Employer’s campaign literature specifically advising employees they could only be “permanently replaced” if they went on strike. *Id.*

### **2. Paragraph 18: Alleged Pre-Election Threat By Gonzalez**

The ALJ found that Gonzalez’s conduct in handing Lina a copy of the “Protect Your Flexibility” flyer, telling her that the relationship between management and employees would change if the Union was elected, and mentioning that Lina had taken a month-long vacation to

go overseas violated Section 8(a)(1) because it threatened employees with a loss of benefits if they selected the Union. ALJD 4:16-33. The ALJ did not analyze nor reference the totality of the Employer's campaign literature in reaching his conclusion. Id.

**3. Paragraph 19: Alleged Pre-Election Threat During Campaign Presentation**

Addressing this allegation, the ALJ found, "based on Magsino's credibility testimony," that during the meeting at issue Richards explained to employees the benefits employees already enjoyed without the Union; that after negotiations employees could end up with more, the same, or less benefits; that if the Union was selected communications with Chino Valley would have to go through the Union; and that if the Union gets voted in, "the employees might lose or would lose the family atmosphere and flexibility in scheduling." ALJD 4:35-48. The ALJ then states that "importantly" Richards "did not denying telling employees that they might lose the family atmosphere and flexibility of scheduling" and concluded that Richards' statement "that employees might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union" violated Section 8(a)(1). Id., 4:50-5:7.

**4. Paragraph 20: Alleged Pre-Election Interrogation And Threat By Lally**

Characterizing Lally's joking with Roncesvalles as "belittling" the Union's flyer with the pictures of various employees (including Roncesvalles), the ALJ found that Lally's discussion with Roncesvalles was a "coercive interrogation" because Lally asked Roncesvalles a series of questions about the poster and because the discussion occurred in a conference room where "Roncesvalles faced Lally and Gilliatt [her supervisor] alone." ALJD 5:17-6:13. The ALJ also found that Lally had impliedly threatened employees with layoffs if they supported a union in violation of Section 8(a)(1) because Lally had "linked" the lack of layoffs at the Hospital in the past with how he did not like the Union and how he had a good working relationship with Roncesvalles without the Union. ALJD 6:15-27.

**5. Paragraphs 10 And 15: Mandatory Meetings Unilateral Change And Discrimination Allegations**

Relying primarily on the testimony of Union supporters Lina, Clavano, Bacani and

Roncesvalles, all of whom are ED RNs, the ALJ found that Respondent had an established policy prior to the election of allowing RNs to miss mandatory meetings without receiving a counseling notice. The ALJ then found that Respondent modified that policy after the election when RNs received a written “verbal warning” for not attending the April 4 mandatory meeting for ED employees called by Gilliatt. The ALJ found that the change in practice was “substantial” because, according to the ALJ, 75% of ED RNs missed the mandatory meeting and the receipt of a verbal warning was a form of discipline. The ALJ excused the Union’s failure to request bargaining over the alleged ‘charge’ because Respondent had not yet recognized the Union. ALJD 25:12-40, 26:7-18.

The ALJ also found that the change was unlawfully motivated. In doing so, the ALJ relied on his other unfair labor practice findings discussed below; a directive sent from Lally to supervision requesting that they ensure compliance with Respondent’s policies and procedures; and his discrediting of Gilliatt’s testimony that Lally’s directive was not a factor in her decision to issue verbal warnings to RNs. ALJD 25:12-26:18.

The ALJ did not address Respondent’s arguments relating to the credibility of the evidence presented by General Counsel, including that none of the RNs who received verbal counseling responded by alleging that they were not required to attend mandatory meetings, or the record evidence establishing that employees who provide advanced notification that they will not be able to attend a mandatory meeting are excused from doing so.

**6. Paragraphs 11 And 15: Tardiness Unilateral Change And Discrimination Allegations**

Again relying primarily on the testimony of Union supporters working in the ED, the ALJ found that employees “understood” prior to the election that if they were no more than seven minutes late in clocking in for their shift they would not be disciplined for tardiness. The ALJ then concluded that by issuing employees verbal warnings for clocking in within the seven-minute “grace” period Respondent violated Section 8(a)(3) and 8(a)(5). In concluding that this “change” violated Section 8(a)(3), the ALJ relied on his other unfair labor practice findings and

the directive from Lally discussed above, and rejected as irrelevant Respondent's written attendance policy defining a tardy as any time an employee is late for his/her designated shift. ALJD 23:44-24:48. The ALJ rejected Respondent's contention that a verbal counseling notice was not a form of discipline and had no material impact on employees' terms and conditions of employment as "frivolous," stating that "the verbal warnings given to Magsino and DeSantiago were considered by Chino Valley in deciding whether to fire them." Id., 24:43-46. The ALJ did not address in his Decision the undisputed evidence that the seven-minute "grace" period is a payroll time-keeping practice, not an excuse for employees to arrive late to work; that Gonzalez, who had been extremely lax in administering Respondent's attendance policies while he was ED Director, was replaced in that position in mid-March by Gilliatt; the Union's failure to request bargaining over the alleged "change"; and the absence of any evidence that receipt of the "discipline" identified by the ALJ had resulted in a tangible impact on the working conditions of RNs as a whole, or even individual RNs.

7. **Paragraph 13: Paid Time For Per Diem Employees For Attendance At Certification Classes Unilateral Change Allegation**

In finding that Respondent unlawfully modified a past practice of paying per diem RNs for time spent attending certification classes, the ALJ first found that prior to the election Respondent had paid Roncesvalles for time spent taking such classes. The ALJ also references Respondent's "Your Benefits - - Without A Union" flyer in support of his conclusion "that a practice developed whereby Chino Valley paid part-time employees for the time spent attending classes needed to maintain the certification necessary to perform their work at Chino Valley," specifically noting the flyer's reference to "Flex Ed" was not limited to "FT" employees while the flyer's reference to "Paid BLS/ACLS certifications and required courses for employment (FT)" was. The ALJ also states that the "facts" set forth in this portion of his Decision were based on the testimony of Roncesvalles; that "her testimony was corroborated by documentary evidence"; and that Gilliatt's testimony was not credited "to the extent it is inconsistent with the facts described above." ALJD 26:24-27:47. The ALJ does not explain why he relied on the Flex

Ed portion of the flyer rather than the certifications bullet in the “Your Benefits” flyer, nor does the ALJ address Respondent’s written pay practice manual providing that only full-time employees are eligible to be paid for attendance at certification classes, Respondent’s handbook providing that per diem employees “are not benefits-eligible,” the undisputed testimony of Respondent’s HR Manager Duhper, who is responsible for administering Respondent’s pay practices, confirming that paid time for certifications is only permitted for full-time employees, the evidence that Gonzalez disallowed Roncesvalles’s request to be paid for attending a certification class in 2009, that no evidence was presented involving a “past practice” or a “change” to that practice for anyone other than Roncesvalles, or that the Union did not request bargaining over the alleged “change.” See, i.e., Part II(E) above.

**8. Paragraph 21 And 24: Alleged Post-Election Threat And Surveillance By Lally**

The ALJ found that Lally’s statement to Magsino that he had been seen in a camera talking to nurses during working hours “and organizing something” unlawfully implied that Magsino’s union activities were under surveillance. ALJD 6:34-51. The ALJ also found that Lally had “threatened to discipline employees because they engaged in union activities” in violation of Section 8(a)(1) by telling Magsino he was going to give him a warning. Id., 6:52-7:2. The ALJ did address the fact that the ambulance bay area is under 24-hour watch by surveillance cameras for security reasons or that employees can lawfully be disciplined for soliciting during working hours.

**9. Paragraph 25: Alleged Post-Election Surveillance By Casas**

Again crediting Clavano, the ALJ found that Casas approached a group of employees including Clavano and said “what are talking about because we are supposed to know what you are talking about’.” ALJD 7:40-44. The ALJ recognized that “the comments here were not explicitly linked to union activity” but nevertheless found that “employees would reasonably make the connection to their union activities” and that Casas’ statement thereby gave the impression to employees that their union activities were under surveillance in violation of

Section 8(a)(1). Id., 7:48-8:2.

**10. Paragraph 22: Alleged Post-Election Threat By Hower**

The ALJ found that in late April Hower “announced” to several nurses that employees could no longer take vacations longer than two weeks. In making this finding, the ALJ relied on his contention that Hower “did not deny making those statements but instead testified that she could not recall making them.” ALJD 7:5-14. The ALJ admitted that Hower’s alleged “announcement” was not explicitly linked to the results of the union election. Id., 7:18-9. Nevertheless, the ALJ asked the reader of his Decision to “Remember that before the election, as described above, Chino Valley explicitly threatened employees that they would no longer be able to take month long vacations if they selected the Union” and concluded that “employees would reasonably link the announcement of their selection of the Union.” Id., 7:20-25. Based on this totally twisted analysis,<sup>7</sup> the ALJ finds that Respondent had violated Section 8(a)(1) “by informing employees that they could no longer take vacations longer than two weeks because the employees had selected the Union to represent them.” Id., 7:33-35.

**11. Paragraph 23: Alleged Post-Election Threats By Reddy**

Stating that he was relying on a “composite” of the testimony of Union supporters Lina, Bacani, Hilvano, Magsino, DeSantiago, Matheny and Clavano, and particularly the testimony of Clavano, the ALJ found that Reddy “told the employees that from then on policies and procedures would be strictly enforced and that violators would be dealt with accordingly, being late and sick calls would be monitored”; “there would be no more family atmosphere at Chino Valley”; Respondent was contesting the results of the election “because the Union used Charge

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<sup>7</sup> Apparently what the ALJ is asking the reader to remember as “employees” being “explicitly threatened” is his conclusion regarding Gonzalez’s discussion with Lina, not what the evidence actually shows being said during that discussion. See T 38 [Lina testifies that Gonzalez said “you know how you’re taking vacation the whole month overseas?”]. Apparently the ALJ also forgot that he only found that Gonzalez “mentioned” Lina’s vacation to her (see ALJD 4:27-28) when he grandiosely characterized the statement as an “explicit threat,” as well as the fact that General Counsel only alleged a “threat” directed at a single employee (see Complaint ¶ 18). See also Section E(2) above.

Nurses to intimidate the staff”; “informed employees that someone had scratched Gillatt’s car with a key and he displayed a photograph of the car and blamed this on the Union”; and “instructed employees not to speak to the media but rather they should [go] through channels.” ALJD 8:11-28. The ALJ discredited the testimony of Gilliatt and Dhuper, citing as a reason for doing so Gilliatt’s testimony that she did not recall what was said at the meeting. *Id.*, 8:29-43. The ALJ then states that the “foregoing facts” “showed that Reddy announced the end of the family atmosphere at Chino Valley and that henceforth, because the employees voted for the Union, Chino Valley would begin strictly enforcing its policies and procedures,” and thereby violated Section 8(a)(1). *Id.*, 8:46-49. The ALJ also found that Reddy’s “instructions” to employees not to talk to the media “broadly prohibit[ed] employees from speaking to the media, including about the Union or other terms and conditions of employment,” which also violated Section 8(a)(1). ALJD 8:50-9:6.

**12. Paragraph 16: Termination Of Magsino**

The ALJ concluded that Respondent terminated Magsino in violation of Section 8(a)(3) despite the undisputed facts that Magsino repeatedly printed out a copy of a patient’s medical record, made multiply copies of the medical record, removed at least one copy of the medical record from the Hospital, and submitted a copy of the medical record to HR. See, i.e., ALJD 10:25-22:23. The ALJ also found that Respondent had not established that Magsino was a Section 2(11) supervisor when he was terminated. *Id.*, at 22:23-46. The most relevant aspects of the ALJ’s finding and determinations made in conjunction with his ultimate conclusions are discussed in greater detail *post*.

**13. Paragraph 27: Alleged Interference By Serving Subpoenas On The Union And Employees**

The ALJ found that Respondent violated Section 8(a)(1) by including in its subpoenas *duces tecum* served on employees and representatives of the Union in conjunction with the objections hearing referenced above, the specific document requests set forth in paragraph 27 of General Counsel’s complaint. ALJD 9:12-10:21. In doing so, the ALJ found that the requests

“sought information that, even under broad discovery rules, was not related to any issue in the proceeding,” and that therefore the inclusion in the requests of a statement advising employees that they could produce the documents to the Board’s administrative law judge presiding over the hearing for an *in camera* inspection, with the judge to then determine which documents would be turned over to Respondent, was not relevant to the Section 8(a)(1) allegation. *Id.*, 10:1-20.

#### **14. Procedural Issues**

In his Decision the ALJ also set forth his justifications for certain rulings made during the course of the hearing. ALJD 29:27-30:2. The ALJ repeated his “challenge” to Respondent to provide a basis for its subpoena *duces tecum* directed to the CDPH that would satisfy the ALJ, and in doing so misrepresented the entire basis for that subpoena. See, i.e., ALJD 29:34-38 [“[what other hospitals do relating to privacy issues] is not the least bit relevant. As I stated on the record, I challenge Chino Valley to cite a single Board case that holds that the disciplinary records of nonlitigant employers are relevant”]. In this portion of his Decision the ALJ also mischaracterizes and misrepresents the CDPH’s records introduced into evidence as General Counsel exhibit 84. *Id.*, 29:40-42 [ALJ states that the record indicated that Magsino did not commit a breach, ignoring that CDPH has no authority over Magsino and was only assessing whether the manner in which the Hospital dealt with Magsino and DeSantiago’s privacy violations was deficient].<sup>8</sup> The ALJ also faults Respondent’s offer of proof made relating to its subpoena directed to a CDPH supervisor, then makes an argument that is more properly presented to a reviewing court than by an ALJ who is supposed to be a neutral trier a fact. *Id.*, 29:50-30:2 [“I also note that Chino Valley did not make a more detailed offer of proof concerning this testimony, so it should not be allowed hereafter to raise matters not presented to me for my consideration”].<sup>9</sup> The ALJ also justifies his refusal to grant Respondent’ motion to

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<sup>8</sup> See GCX 84 (AP 13) [CDPH’s official report finding “no deficiencies” by the Hospital]; T 811-812 [testimony confirming CDPH only has jurisdiction over facilities it licenses and the Bureau of Registered Nurses has jurisdiction over RNs].

<sup>9</sup> This statement by the ALJ should be contrasted with the fact that the ALJ took weeks if not months to set forth in his Decision his “justifications” for rulings he made at trial.

reopen the record on his statement that “the fact pattern that Ruggio apparently presented Resurreccion omitted critical facts”; (ALJD 30:4-29); however, there is no evidence to support the ALJ’s contention that Ruggio “omitted critical facts” during her discussions with Resurreccion. Finally, the ALJ finds that Respondent’s argument based on *Peyton Packing*, 129 NLRB 1358 (1961) and *Jefferson Chemical*, 200 NLRB 992 (1972), was “wholly without merit”; however, the ALJ cites no Board authority for his conclusion. *Id.*, 30:37-43.

**15. Remedy And Recommended Order**

In the Remedy section of his Decision, the ALJ finds that a broad cease and desist order is required, even though one was not requested by General Counsel’s complaint. ALJD 32:24-29. The ALJ also granted General Counsel’s request for a reading order, cutting and pasting the exact language from the Board’s decision in *Texas Super Foods*, 303 NLRB 209 (1991), when doing so. *Id.* 32:29-40. The ALJ also orders that Respondent be required to allow representatives of the Board and the Union to be present during the reading. 32:37-41. Neither the remedy nor order sections of the ALJ’s Decision make any distinction between RNs and the vast majority of Respondent’s employees who are not employed in the RN bargaining unit and who also were not subjected to any of the conduct alleged by General Counsel to have violated the Act.

**III.**

**SPECIFICATION OF THE ISSUES RAISED BY RESPONDENT’S EXCEPTIONS**

1. Were the ALJ’s evidentiary and procedural rulings made during the course of the hearing consistent with the law and supported by substantial evidence on the record considered as a whole (Exceptions 1, 2, 7, 10, 14, 26, 44, 65, 80)?

2. Is the ALJ’s finding that Respondent, through Buesching, unlawfully threatened to close down Respondent’s hospital and terminate employees if employees selected a union supported by the preponderance of the evidence and applicable law (Exceptions 1-2, 75, 77)?

3. Is the ALJ’s finding that Respondent, through Gonzalez, unlawfully threatened employees with loss of benefits if they selected the Union as their collective bargaining

representative supported by the preponderance of the evidence and applicable law (Exceptions 4, 75-77)?

4. Is the ALJ's finding that Respondent, through Richards, violated Section 8(a)(1) by stating that employees might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union supported by the preponderance of the evidence and applicable law (Exceptions 6, 75-77)?

5. Is the ALJ's finding that Respondent, through Lally, unlawfully interrogated employees in violation of Section 8(a)(1) supported by the preponderance of the evidence and applicable law (Exceptions 7-10, 75-77)?

6. Is the ALJ's finding that Respondent, through Lally, impliedly threatened employees with layoffs if they supported a union and thereby violated Section 8(a)(1), supported by the preponderance of the evidence and applicable law (Exceptions 7-11, 75-77)?

7. Is the ALJ's finding that Respondent, through Lally, violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance supported by the preponderance of the evidence and applicable law (Exceptions 13, 75-77)?

8. Is the ALJ's finding that Respondent, through Lally, violated Section 8(a)(1) by threatening to discipline employees because they engaged in union activities supported by the preponderance of the evidence and applicable law (Exceptions 11-13, 75-77)?

9. Is the ALJ's finding that Respondent, through Hower, violated Section 8(a)(1) by informing employees that they could no longer take vacations longer than two weeks because the employees had selected the Union to represent them supported by the preponderance of the evidence and applicable law (Exceptions 14-17, 75-77)?

10. Is the ALJ's finding that Respondent, through Reddy, violated Section 8(a)(1) by announcing the end of the family atmosphere at Chino Valley and that because employees voted for the Union Respondent would be strictly enforcing its policies and procedures supported by the preponderance of the evidence and applicable law (Exceptions 20-25, 75-77)?

11. Is the ALJ's finding that Respondent, through Reddy, violated Section 8(a)(1) by

prohibiting employees from speaking to the media about the Union or about terms and conditions of employment supported by the preponderance of the evidence and applicable law (Exceptions 20-25, 75-77)?

12. Is the ALJ's finding that Respondent violated Section 8(a)(1) by serving subpoenas on employees and Union representatives that requested information about employees' union activities, under circumstances in which the subpoenaed information was not related to any issue in a legal proceeding, supported by the preponderance of the evidence and applicable law (Exceptions 26-28, 75-77)?

13. Is the ALJ's finding that Respondent violated Section 8(a)(3) when it terminated Magsino supported by the preponderance of the evidence and applicable law (Exceptions 29-57, 75-77)?

14. Is the ALJ's finding that Respondent violated Section 8(a)(3) and (5) by more strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule supported by the preponderance of the evidence and applicable law (Exceptions 58-65, 75-77)?

15. Is the ALJ's finding that Respondent violated Section 8(a)(3) and (5) by disciplining employees who failed to attend mandatory meetings supported by the preponderance of the evidence and applicable law (Exceptions 66-71, 75-77)?

16. Is the ALJ's finding that Respondent violated Section 8(a)(5) by terminating an established past practice of paying part-time employees for the time spent attending classes needed to maintain certifications necessary to perform their work at Respondent's Hospital supported by the preponderance of the evidence and applicable law (Exceptions 72-77)?

17. Is the ALJ's finding that Respondent violated Section 8(a)(5) by failing to provide requested information to the Union supported by the preponderance of the evidence and applicable law (Exceptions 77)?

18. Was Respondent denied due process by the ALJ's evidentiary and procedural rulings made during the course of the hearing (Exceptions 80)?

19. Does the record considered as a whole demonstrate that the ALJ's determinations made during the hearing and in his Decision evidence bias, or at least the appearance of bias, against Respondent (Exceptions 81)?

20. Is the ALJ's finding that the allegations of General Counsel's complaint were not required to be consolidated with the allegations set forth in Case 31-CA-30105 supported by the preponderance of the evidence and applicable law (Exceptions 82)?

21. Is the ALJ's recommended order overly broad because it does not differentiate between RNs employed by Respondent and all other employees (Exceptions 83)?

22. Is the ALJ's imposition of a reading remedy supported by the preponderance of the evidence and applicable law (Exceptions 79)?

23. Is the ALJ's determination to issue a broad cease and desist order supported by the preponderance of the evidence and applicable law (Exceptions 78)?

24. Is that portion of the ALJ's order permitting representatives of the Board and of the Union to have the right to be present at the reading of the notice supported by the preponderance of the evidence and applicable law (Exceptions 80)?

#### **IV.** **ARGUMENT**

##### **A. A Neutral Review Of The Evidence In The Record Establishes That Respondent Did Not Violate Section 8(a)(3) When It Discharged Magsino**

###### **1. The ALJ's Findings That Are Contrary To The Record Considered As A Whole, Including Those Based On "Credibility," Must Be Rejected**

When deciding cases under the Act, an ALJ, as well as the Board itself when reviewing an ALJ's decision, is required to "draw all those inferences that the evidence fairly demands." See, i.e., *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). This review must include consideration of not only evidence supporting the General Counsel's position or ALJ's decision, but also the evidence that tends to detract from it. In sum, the Board must consider "all of the reasonable inferences compelled by the evidence in reaching its decision." See, i.e., *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 514 (4th Cir. 1998); see also *Gibson Greetings v.*

*NLRB*, 53 F.3d 385, 393 (D.C. Cir. 1995). It is therefore the Board's responsibility to overturn ALJ findings and determinations where the evidence in the record does not support them. See, i.e., *Contempora Fabrics, Inc.*, 344 NLRB 851, 852 (2005) [reversing ALJ discrimination finding based on Board's determination that employer legitimately relied upon an employee complaint when issuing the discipline]; *River Ranch Fresh Foods*, 351 NLRB 115, 116 (2007) [reversing ALJ discrimination determination based on Board's disagreement with ALJ finding that the employer's testimony was inconsistent; Board determines ALJ took portions of testimony out of context]; *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007) [reversing ALJ discrimination determination after concluding that the record as a whole established that the employer would have discharged the employee even in the absence of protected conduct]; *T-West Sales & Service Inc.*, 346 NLRB 132, 134 (2005) [reversing ALJ discrimination determination after determining that the record considered as a whole established that the termination was motivated by violation of employer's policies].

Similarly, the Board need not accept an ALJ's "credibility" findings when those findings are not supported by the record as a whole; the Board will instead independently evaluate witness credibility based on the "reasonable inference" standards discussed above, as well as the logical consistency and probability of the testimony taken as a whole, including other statements by the same witness that show a propensity for misinterpreting or distorting statements that result in testimony favorable to the witness's positions. See, i.e., *BJ & R Machine & Cureco*, 270 NLRB 267, 267-268 (1984); *SCA Services*, 275 NLRB 830 (1985); *Leshner Corp.*, 260 NLRB 157, 157-159 (1982). Other factors to be evaluated when assessing an ALJ's credibility determinations include unreasonable conclusions, the discrediting of uncontroverted testimony, the acceptance of inherently unbelievable testimony, or where there is a showing of bias. See, i.e., *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); *Packing House Workers v. NLRB*, 210 F.2d 325, 329-330 (8th Cir. 1954); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982); *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 407-408 (7th Cir. 1997); *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 928 (5th Cir. 1993).

Applying these principles, the Board must dismiss the allegation that Respondent violated Section 8(a)(3) when it terminated Magsino, notwithstanding the ALJ's version of the record.

**2. Magsino Was A Section 2(11) Supervisor At The Time He Was Terminated**

The evidence in the record establishing that Magsino was a Section 2(11) supervisor on May 20, the date he was terminated, is uncontroverted. Both Respondent and the Union stipulated during proceedings relating to the Union's 2008 and 2010 representation petitions that the Charge Nurses and those who regularly perform Charge Nurse duties ("Relief Charge Nurses") employed in the ED are statutory supervisors. GCX 55 (hereinafter also called "2010 Charge Nurse Stipulation"); RX 106.<sup>10</sup> Focusing on the 2010 Charge Nurse Stipulation, on March 5 the parties stipulated, with the approval of the Regional Director, that as of the date of the Stipulation ED Relief Charge Nurses Lucia ("Susie") Eiley and Gilliatt spent a regular and substantial portion of their working time performing supervisory functions in the interest of the Employer, including but not limited to assigning work to employees, responsibly directing employee, and/or adjusting employee grievances. The 2010 Charge Nurse Stipulation also confirms that the ED Relief Charge Nurses regularly exercise these authorities in the interest of Respondent and use independent judgment when doing so. GCX 55.

It is also undisputed that at the time the 2010 Charge Nurse Stipulation was entered into, the ED had three full-time Charge Nurses (John Del Valle, Samantha Jones and Laurel Smith) and three regular Relief Charge Nurses (Gilliatt, Eiley and Ann Johnson), all of whose names appear on the 2010 Charge Nurse Stipulation. The Charge Nurse shifts on the night shift were typically divided among Del Valle, Smith and Johnson, along with Leslie Terrazas, while the Charge Nurse shifts on the day shift were typically divided among Gilliatt, Eiley and Johnson.

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<sup>10</sup> The ALJ refused to admit RX 106 (the 2008 Charge Nurse Stipulation) into evidence based on the ALJ's determination that Respondent had not provided a foundation for same, then denied Respondent the opportunity to call a witness who could provide the foundation required by the ALJ. T 1060-1063, 1071. Respondent contends these rulings were error and also reflect the ALJ's bias against Respondent, particularly when contrasted to the manner in which the ALJ responded to the Union's requests to adjust the hearing schedule to accommodate the Union. See, i.e., T 32, 711.

See, i.e., 681-684, 737-739; GCX 55. It is also undisputed that on March 15 Gilliatt became the ED Director, at which point she ceased working shifts as a Charge Nurse, and that thereafter Magsino, who had previously worked occasional shifts in Charge, began working regularly as a Relief Charge Nurse in place of Gilliatt. T 208-209, 682-685.

Based on this evidence the ALJ should have dismissed the Section 8(a)(3) allegation regarding Magsino. See, i.e., *Parker Robb Chevrolet*, 262 NLRB 402 (1982). Instead, the ALJ concluded that Respondent's contention that Magsino was a Section 2(11) supervisor was without merit. The ALJ's discussion of this issue serves as another example of the ALJ's results-oriented approach to this case. For example, the ALJ states that "Magsino voted without challenge in the election." ALJD 22:27. While this may be true, neither Magsino nor any other witness testified whether he voted in the election, much less whether his vote was challenged. But more importantly, Magsino's status on the date of the election is simply not relevant; it is his status at the time of his termination that is determinative. Similarly, the ALJ states that Magsino was not identified on the 2010 Charge Nurse Stipulation. ALJD 22:27-29 ["As part of the election agreement, Chino Valley and the Union specifically named several charge nurses who they agreed were supervisors; Magsino was *not* one of them (emphasis supplied by ALJ)]. Again, however, Magsino's status on March 5 is not relevant; what is relevant is his status on May 20. Moreover, the ALJ failed to appreciate, probably because of his zeal to punish Respondent, the undisputed fact that Magsino began working regularly as a Relief Charge Nurse subsequent to March 5, as Magsino himself admitted during the hearing and in his Board affidavit. See, i.e., T 390-394. The ALJ also "discounted" Gilliatt's uncontroverted testimony regarding the duties of Charge Nurses, relying on either the "same reasons" as discussed elsewhere in the ALJ's Decision, or because he felt it was "conclusory," or for both reasons. ALJD 22:38-41. The ALJ's rote "discrediting" of Gilliatt in all instances in which her testimony assists Respondent's case or harms the General Counsel's case, even here where Gilliatt's testimony is uncontroverted and is consistent with the 2010 Charge Nurse Stipulation entered into by the Union and offered into evidence by General Counsel himself, again illustrates the

ALJ's bias against Respondent and the inherent lack of reliability of all of the ALJ's "credibility" determinations. Moreover, Respondent was not required to relitigate in this proceeding the supervisory authority of the Charge Nurses and Relief Charge Nurses given the 2010 Charge Nurse Stipulation.

For the reasons explained above, the Board need not consider the ALJ's conclusion that Respondent's decision to terminate Magsino was motivated by his support for the Union. However, if the Board conducts a fair review of the record evidence, it will also conclude that Respondent would have terminated Magsino even if he had never supported the Union, as will now be explained.

**3. Magsino Was Terminated Because He Repeatedly Accessed, Printed, Copied, Used, Failed To Secure And Redistributed A Patient's Medical Record**

The description of the facts and circumstances surrounding Magsino's termination set forth in Part II(E)(12) above is based on a compilation of the hearing testimony of Magsino, Gilliatt and Ruggio as well as various documents that are also part of the record. The manner in which the ALJ cherry picked among that evidence in order to support his ultimate conclusions will be discussed more specifically below. However, the following facts, all of which were known to Respondent at the time it terminated Magsino, cannot be disputed:

- On May 5 Magsino was given permission by Gilliatt to view the patient's medical record on the Hospital's Meditech system. T 253, 712 [Magsino and Gilliatt both testify that Magsino was given permission by Gilliatt to view the patient's chart]; GCX 148 (AP 17) [Hospital Potential Privacy Breach Reporting Form ("Reporting Form") confirming same].
- On May 5 at 4:57 p.m. Magsino accessed the patient's medical record for 2 minutes and 30 seconds. RX 46.
- During the period described immediately above Magsino printed out portions of the patient's medical record. Id.
- On May 6 at 7:54 a.m. Magsino accessed the patient's medical record, this time for 36 seconds. Id.

- On May 6 at 7:57 a.m. Magsino accessed the patient’s medical record for a third time, for 10 minutes and 21 seconds. Id.
- During the period described immediately above Magsino printed out portions of the patient’s record. Id.
- At some point on either May 5 or May 6 Magsino made at least two copies of portions of the patient’s medical record. T 256, 265, 267-268, 366-367, 375 [Magsino testimony confirming he told Ruggio he copied the medical record, he attached one copy of the medical record to his dispute letter submitted to HR and he retrieved another copy from his backpack in his car on May 14 during the course of his interview by Ruggio]; GCX 9(a)-(b) (AP 2-4) [copy of patient’s medical record submitted to HR], 148 (AP 16-17) [Reporting Form confirming testimony and number of copies].
- During the period between approximately May 5/6 and May 14 Magsino had a copy of the patient’s medical record in his backpack, during which period his backpack was in various locations outside the Hospital, including his car and his home. Id.
- On May 12 Magsino submitted a copy of the patient’s medical record to HR in conjunction with his dispute letter. Id.
- The Hospital’s Information Security Agreement signed by Magsino includes provisions only allowing Hospital employees to access patient information as required by the employee’s job responsibilities, prohibiting the disclosure of any portion of a patient’s record to a recipient who is not authorized by the Hospital to receive it, and that failure to adhere to its provisions will result in disciplinary action, up to and including termination. RX 52 (AP 21).
- The Hospital’s Re-disclosure of Patient Health Information Policy prohibits “using patient health information for purposes which were not originally authorized in writing by the patient”; “disclosing patient information to any other party not authorized in writing by the patient,” and also provides that “[p]olicy violations will invoke disciplinary measures as defined in the Company’s Appropriate Access Enforcement and Discipline policy.” RX 54 (AP 22-23).
- The Hospital’s Meditech Appropriate Access Policy permits only “appropriate access” to

patient information available through the Meditech system, defined as patient information “which is necessary to perform [the user’s] professional responsibilities”; states that “[a]ccess will be granted for an individual to provide and/or support quality patient care processes, as defined by an individual’s professional responsibilities to the patient and the facility; and requires users to use patient information only “in an honest, ethical and confidential manner.” RX 55 (AP 24-25).

- The Hospital’s Enforcement and Discipline, Information Systems Policy (“Enforcement Policy”) identifies the level of discipline to be assessed for “breaches of confidentiality”; the suggested methodology for determining the severity of a breach; sets out examples to be used in determining the level and definition of a violation of “Appropriate Access policies”; and sets out the “Minimum Recommended” disciplinary actions for different levels of violations. For example, the minimum recommended level of discipline for an accidental breach is an oral warning or reprimand; the minimum recommended level of discipline for a “purposeful” breach is a written warning; and the minimum recommended level of discipline for a purposeful breach involving a disclosure of patient information is termination of employment. GCX 36 (AP 5-9).

- The California Health Information Privacy Manual used as a resource by California hospitals advises, among other things, that HIPAA requires a covered entity to develop and implement written sanctions policies for employees who fail to comply with the entity’s privacy policies and procedures; that HIPAA requires a covered entity to apply appropriate sanctions against employees who fail to comply with the such privacy policies and procedures “even without a violation of [HIPAA]:” that even a good faith acquisition of patient information by an employee is a breach under California state law if the information is thereafter used or disclosed by the employee; that “[n]o proof of patient harm is required for the breach to be reportable or for CDPH to assess a penalty against a facility; that a “breach” under HIPAA involves the unauthorized acquisition, access, use, or disclosure of a patient’s medical information that compromises the security or privacy of the patient information; that penalties can be assessed against a covered entity for violation of either state or federal privacy laws; that a factor in

determining the amount of a fine is whether and to what extent the entity has attempted to correct any previous violations; and that “use” of health information as proscribed under HIPAA and state law can include merely viewing the information. RX 57-62.

These are the undisputed facts. The only inferences and conclusions that can fairly be made based on these undisputed facts is that Magsino engaged in misconduct by his actions in printing the patient’s medical record on May 5 and May 6, copying the patient’s medical record on at least two occasions during that same period, placing a copy of the patient’s medical record in his backpack and thereafter transporting the medical record outside the Hospital, and submitting a copy of the patient’s medical record to HR on May 12. Accordingly, the Board must conclude that Respondent’s decision to terminate Magsino was not unlawful and that the ALJ’s recommended order providing for the payment of backpay to Magsino and for his reinstatement is beyond this Board’s authority. See, i.e., *GATX Logistics, Inc.*, 330 NLRB 481, 489-490 (2000); *Amersino Marketing Group LLC*, 351 NLRB 1055, 1056 (2007); *Consolidated Biscuit Co.*, 346 NLRB 1175, 1178-81 (2006); *Waste Management of Arizona, Inc.*, 345 NLRB 1339, 1341 (2005).

4. **The ALJ’s Stated Justifications For His Conclusion That Respondent Terminated Magsino Because Of His Union Activities Cannot Be Sustained**
  - a. **The Record In Its Entirety Supports The Credibility Of Respondent’s Witnesses And Other Evidence**

Any fair evaluation of the ALJ’s findings must lead to the conclusion that those findings are not supported by substantial evidence on the record considered as a whole, but are instead the product of a pre-destined conclusion and an exhibition of the ALJ’s bias against Respondent. Some examples follow.

The ALJ first states that “I alert the reader that Chino Valley contends that it fired Magsino for violating [HIPAA] in that he accessed certain medical records and then copied a medical record that contained the transaction number and a patient's medical record; I do this so that the reader may observe how Chino Valley itself handled such information.” ALJD 10:35-39. The ALJ misstates the record and Respondent’s contentions. First, this description ignores

that Magsino's accessing of the medical record was excused by the Investigation Committee and that the termination was based on Magsino having admittedly printed the medical record on several occasions, failing to properly secure the medical record and submitting a copy of the medical record to HR. See, i.e., GCX 32 [Termination notice referencing "breach of information" and "removed patient medical record from the facility without authorization" in the notice's "unacceptable behavior" box], 148 (AP 18) [Report Form referencing printing of medical record, unauthorized removal of the medical record from the Hospital and unauthorized distribution of the medical record by submitting same to HR as "breaches"]. Moreover, the manner in which "Chino Valley itself handled such information" was clearly distinguishable, both legally and factually, from Magsino's privacy violations.

The ALJ attempts to compare Magsino's privacy violations to the inclusion of the patient's MR number on the final written warning given to Magsino for his failure to properly care for a patient. ALJD 11:5-15 ["Note the use and dissemination of the patient's medical record number"]. However, that written warning (GCX 8) only listed the patient's MR number and included no details about the patient's medical condition or treatment; Magsino's privacy violations involved printing out and copying the actual patient medical record which included detailed information concerning the patient's medical history, current condition, medications and treatment, then providing a copy to HR. See GCX 9(a)-(b) (AP 2-4). Similarly, the ALJ seizes upon the doctor's handwritten note submitted by Magsino to HR with his dispute letter as supporting his conclusions. ALJD 13:2-3 ["The reader should note that the emergency room doctor also disclosed the transaction number involved"]. However, that note (GCX 9(c)), unlike the MR submitted to HR by Magsino, also had no detailed information about the patient's condition and medical history.<sup>11</sup> Additionally, Gilliat's disclosure of portions of the patient's medical record to Magsino during the meeting in which she gave Magsino the final written warning (see ALJD 11:20-28) was permissible under the Hospital's policies and HIPAA because

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<sup>11</sup> The ALJ's reliance on and recitation of the doctor's note and other attachments submitted by Magsino with his dispute letter will be discussed further below.

she had authority to make that disclosure due to her position as ED Director. See, i.e., 45 CFR §164.501; T 804-806.

The ALJ also repeatedly relies on the Report Form (GCX 148 (AP 16-19)) when he believes it fits his theory of the case, while ignoring other relevant portions that support Respondent's contentions. For example, the ALJ makes much of the portion of the Report Form confirming that Gilliatt gave permission to Magsino and DeSantiago to access the patient's medical record on May 5 and that Gilliatt also gave both a slip of paper with the patient's name and medical number, then describes the portion of the Report excusing Magsino and DeSantiago for having initially accessed the Meditech system to view the patient's medical record as "important," apparently because it references that the access was related to the disciplinary notices they had received. ALJD 14:38-47. However, the ALJ's Decision fails to reference the sentence immediately following the "important" statement described above that illustrates that the initial accessing of the patient's medical record was excused only because Gilliatt gave permission to Magsino and DeSantiago to do so. GCX 148 (AP 18) ["Although this team does acknowledge that unauthorized access to a MR can be considered a breach"]. The ALJ also makes no mention of, and refuses to draw reasonable inferences from the provisions of the Report that:

- Illustrate Respondent's good faith investigation into the incident.
- Indicate Magsino's lack of credibility. Compare GCX 148 (AP 16-17) to T 252-254, 266-269, 282, 330-332, 335, 339-341, 346, 354-355, 365-366 [inconsistencies between Magsino's version of events in the Report and his version while testifying at the hearing; inconsistencies between Magsino's version of events in the Report and Gilliatt's version].
- Support Gilliatt's credibility. Compare GCX 148 (AP 17) to T 713-714, 719-720 [consistency between Gilliatt's version of events in the Report and Gilliat's testimony at the hearing].
- Support Ruggio's credibility. Compare GCX 148 (AP 16-19) to T 836-886 [consistency between the Report and Ruggio's testimony at the hearing].

- Listing of multiple breaches by Magsino and only one breach by DeSantiago. GCX 148 (AP 18) [listing Magsino’s breaches as “1. Printing of portions of the MR on May 5th and 6th 2. Making unauthorized copies of portions of the MR 3. Unauthorized removal of the MR from the hospital 4. Unauthorized distribution of the MR; (When Mr. Magsino included the copies of the MR in his counseling dispute and turned them in to the HR dept)”]; identifying DeSantiago breach as “1. Printing of portions of the MR on May 11, 2010”].<sup>12</sup>

The ALJ also selectively quotes from and mischaracterizes the letter sent to the patient in question (GCX 33) in order to bolster his conclusions. The ALJ states that “Chino Valley found it important” to advise the patient in the letter that ““We were able to establish that your records were not distributed to anyone else and your personal information was never compromised’.” ALJD 15:38-43. However, there is no evidence to support the ALJ’s “found it important” characterization. Moreover, portions of the letter omitted by the ALJ expressly advise the patient of Magsino’s privacy violations:

May 20, 2010

Dear [Redacted]

This letter is in follow up to our phone conversation on Thursday May 20, 2010 regarding ***the unauthorized access of your Personal Health Information (PHI) by a hospital employee.***

Your PHI was accessed via our computer system by an employee who was researching your medical record for a Performance Improvement review of nursing documentation. ***During that review, the employee printed a portion of your medical record and then turned that information into our Human Resources department.***

Upon discovery of the record, the HR staff turned it over to Nursing Administration and a complete investigation took place. We were able to establish that ***your records were not distributed to any one else*** and your personal information was never compromised.

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<sup>12</sup> Given these portions of the Report, as well as other undisputed evidence in the record, the ALJ’s statement that “Ruggio wrote that there was no breach” (ALJD 15:30) is beyond comprehension.

GCX 33 (emphasis added). When placed in context, it is clear that the statement in the letter that “your personal information was never compromised” cannot reasonably be interpreted as evidence that Magsino’s conduct did not violate the Hospital’s policies and procedures or HIPAA itself.

The ALJ’s discussion of the merits of the final written warning received by Magsino for the patient care errors discovered by the California Department of Public Health (“CDPH”) and the “testimonials” submitted by Magsino with his letter disputing the warning further illustrate the ALJ’s bias. First, and “importantly,” the warning was not even alleged as a violation by General Counsel, and Respondent therefore did not submit any evidence detailing the basis for the warning. Nevertheless, the ALJ provides an extended discussion that is clearly intended to support the ALJ’s belief that the warning was not justified. For example, the ALJ extensively quotes from the warning itself and repeatedly references matters relating to Magsino’s contention that he did not violate Hospital policy by the manner in which he cared (or more accurately failed to care) for the patient. See, i.e., ALJD 10:41-11:14, 11:28-30, 11:41-46, 12:15-34. The ALJ also faults Respondent for not addressing the specific points made in Magsino’s dispute letter in its written response to the dispute letter signed by HR Director Dhupur. ALJD 15:5-13 [“Thus, Chino Valley never did address Magsino’s contention that its existing policies did not require him to reassess the blood pressure of a patient complaining of treated for flank pain (sic)”]. Of course, Respondent was not required to do so, nor would Dhuper have been qualified to determine whether Magsino failed to meet the appropriate standard of care in his treatment of the patient, as had been previously determined by the CDPH.<sup>13</sup> Moreover, inasmuch as the decision to terminate Magsino’s employment had already been made prior to the delivery of the response to Magsino’s dispute letter quoted by the ALJ, there was absolutely no reason for Respondent to include more detail than it did in the response.

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<sup>13</sup> The fact that HR representatives are not engaged in providing patient care, or supervising RNs and other employees who do, is also relevant to the discussion of Magsino’s submission of a copy of a patient’s medical record to HR with his dispute letter, as discussed above and below.

The ALJ's quoting of a number of "testimonials" submitted by Magsino to HR in conjunction with his dispute letter is particularly telling. Those "testimonials" have absolutely no relevance to the allegations of the complaint, yet the ALJ spends in excess of a full page of his Decision quoting them at length. ALJD 13:5-14:8. Moreover, those testimonials are obviously hearsay and cannot be relied on in the manner being urged by the ALJ, as is clear from the discussion on the record when General Counsel offered them into evidence:

MS. SILVERMAN: Your Honor, I would offer General Counsel's Exhibit No. 9, as well as General Counsel's Exhibit No. 9(a) through and including 9(x).

JUDGE KOCOL: Any objections?

MR. SCOTT: We have no objection for these coming in as to show what Mr. Magsino submitted to the Human Resources Department. We do object to all of the hearsay nature of all of the statements in the documents. We believe the only relevance to this proceeding is to show what it was that Mr. Magsino submitted to the Human Resources Office.

JUDGE KOCOL: Are you offering it for any other purpose?

MS. SILVERMAN: No, Your Honor.

JUDGE KOCOL: All right, I am - - with that understanding, I am going to receive into evidence General Counsel's Exhibit No. 9, including 9(a) through 9(x).

T 332-333. For the ALJ to use these "testimonials" in his Decision as described given the limited purpose for which they were admitted into evidence clearly illustrates the ALJ's bias and why this Board should not give any deference to the ALJ's findings on disputed issues of fact and motivation.<sup>14</sup>

The ALJ also makes much of the "disconnect" between the attendance and patient care violations listed in Magsino's termination notice in the "Previous Action" box of the notice. See, i.e., ALJD 15:16-27, 16:15-19, 21:19-24; GCX 32. However, the "disconnect" identified by the ALJ has absolutely no relevance inasmuch as there is no evidence that Magsino would not have been terminated for his privacy violations had he also not been previously counseled for

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<sup>14</sup> In another portion of his Decision the ALJ infers that the doctor who treated the patient and submitted a note in support of Magsino (GCX 9(c)) must have accessed the patient's medical record when preparing the note. ALJD 21:18-19. However, it is much more likely that Magsino provided the doctor with the information included in the note, as it is undisputed Magsino discussed his final written warning with the doctor and had at least one copy of the patient's medical record in his possession during that time period.

attendance and given a final written warning for failing to properly care for a patient. Indeed, the termination notice itself lists in the “Reason for Action” box “Breach of information; HIPAA violation. Accessing electronic medical records and removed patient medical record from the facility without authorization” (GCX 32); it makes no reference to the items referenced in the “Previous Action” box relied on by the ALJ. Moreover, Respondent’s established disciplinary policies (RX 88), as well as the Information Security Agreement signed by Magsino and the Hospital’s Enforcement Policy that are most relevant here to Magsino’s privacy violations (GCX 36 (AP 5-9); RX 52 (AP 21)), make clear that Magsino’s termination was not dependent on whether he had previously received any type of counseling or disciplinary notice(s).

The rationales provided by the ALJ for many of his “credibility” findings relating to Magsino’s termination are also marked by inconsistencies when compared to the record considered as a whole, cherry picking of isolated statements or snippets of testimony taken out of context, misstatements of the record evidence, and/or refusals to accept evidence contrary to the result that the ALJ obviously wished to reach. Indeed, the most consistent quality of the ALJ’s findings relating to the testimony provide by Respondent’s witnesses is that their testimony was, without exception, discredited by the ALJ if it showed, or even suggested, that Magsino was lawfully terminated for his privacy violations. See, i.e., ALJD 16:29-35 [discrediting Gilliatt], 16:1-17:16 [discrediting Richards], 19:18-44 [discrediting Ruggio], 19:46-20:7 [discrediting expert witness Navarro]. A number of examples follow.

In crediting the testimony of Magsino and DeSantiago<sup>15</sup> over the testimony of Gilliatt, the ALJ references that each of the employees corroborated the other’s testimony that Gilliatt allowed them to access the patient’s medical record. ALJD 16:27-29. However, these facts are not in dispute; indeed, these facts are why Respondent determined that neither Magsino nor DeSantiago should be disciplined for their conduct in initially accessing the patient’s record.

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<sup>15</sup> Respondent’s review of the record did not identify any material inconsistencies between the testimony of DeSantiago, Gilliatt and Ruggio relating to the events leading up to Magsino’s termination and DeSantiago’s receipt of a final written warning for their privacy violations.

See, i.e., GCX 148 (AP 18). Moreover, Gilliatt also testified that she gave permission to Magsino and DeSantiago to view the patient's record (T 713, 718), yet was not given the same "corroboration" points by the ALJ that he gave to Magsino and DeSantiago. The ALJ also explains at length his reasons for discrediting "Gilliatt's testimony that she did not permit Magsino to copy the medical record," as follows:

I have considered but do not credit Gilliatt's testimony that she did not permit Magsino to copy the medical record. Given her admissions that she allowed Magsino to access the medical records and encouraged him to prepare a grievance but also admonished him that he could not research the matter while at work, her testimony in this regard seems unlikely, given that Magsino certainly could not access the medical records at home and as I have described elsewhere in this decision, I have not generally found Gilliatt to be a credible witness.

ALJD 16:29-35. However, Gilliatt did not affirmatively testify to the statement which the ALJ claims to have "considered" but "not credit[ed]." Nor did Magsino testify that Gilliatt gave him permission to copy the record. Accordingly, the record fully supports the conclusion that the ALJ fabricated testimony, then discredited that fabricated testimony, in order to support his ultimate conclusions.

In portions of his Decision discrediting Richards' testimony, the ALJ points to the fact that the activity report run on the patient's medical record (RX 46) showed that both Gilliatt and Magsino had accessed the patient's medical record on the Meditech system, yet Richards concluded that Magsino's conduct violated HIPAA and that Gilliatt's accessing of the record was done for quality assurance purposes and was therefore valid. ALJD 18:18-26. However, and as explained more fully below in this brief's discussion of HIPAA's requirements, Richards' testimony in this regard was accurate inasmuch as Gilliatt was engaged in quality assurance. Nor did Richards "change" her testimony regarding the propriety of Gilliatt's actions, as is suggested by the ALJ (see ALJD 28:20-26). The transcript itself confirms the appropriateness of Richards' testimony, and the bias of the ALJ in discrediting it:

**[CROSS-EXAMINATION BY UNION COUNSEL DEMIDOVICH]**

Q If you look at the first entry for May 4, 2010, is it correct to read that that Cheryl Gilliatt printed the patient's chart on May 4th?

A She printed out the Emergency Department data, just that piece.

Q Okay. So that would be an additional copy than the electronic copy and the paper chart copy.

A The information I would need to be able to answer that is this when the state came in? Because the state does have the authority to ask us to copy any record, so I would have to know when the state came in.

Q Okay. So, let's just assume for the purpose of the question the state did not come in that day, then that would be an additional copy in violation of the internal practice?

A No. According to HIPAA, we have the right to do quality assurance. She is the manager of the department and she was doing quality assurance for the patient's safe nursing care.

Q And you know that from this form?

A No, I know this because I asked why Cheryl had accessed the record.

Q Okay. And so it is okay to for Cheryl to show other staff members the chart as part of her quality assurance to find out what happened?

A I don't know that she showed it to anybody?

Q No, I'm asking if she can. Is that allowed under your understanding of the regulations?

A Under quality assurance under performance improvement, yes, we can take portions of a medical record, de-identified to train other nurses to increase the proficiency of the nursing care delivery.

Q Okay. So Cheryl should have de-identified any records printed before showing it to staff as part of quality assurance?

A Unless she was showing the record to Yesenia or Ronald and showing them where they had made mistakes.

Q Okay. So it doesn't -- are you saying it doesn't have to be de-identified for that purpose?

A If she is sitting one on one with an employee doing an employee counseling. If she is in a room with a bunch of nurses, showing how they can improve their nursing care, then yes, she would have to de-identify it.

Q Okay. So when you're counseling about a specific incident with a person who was involved in the providing of healthcare, it's okay for a manager to show information where the protected health information is not de-identified?

A Yes.

T 802-804.

In this part of his Decision the ALJ also states that the activity report "revealed that Magsino had accessed the patient's medical records on May 5 at 4:57 p.m. and then made a copy of a medical record" (ALJD 18:7-9). The ALJ misstates the content of the activity report inasmuch as it only shows the printing of the medical record, not that it was copied. Additionally, the ALJ's description ignores the fact that the report shows that Magsino also accessed the medical record on two different occasions the following day, including one access of over 10 minutes, and also printed the record again during that access. The ALJ's analysis also ignores the critical fact that Respondent's Investigation Committee excused Magsino's accessing of the medical record and based its findings of violations on Magsino's conduct in printing,

copying, removing from the Hospital and distributing a copy of the medical record to HR. See, i.e., GCX 148 (AP 18). Similarly, the ALJ ignores Richards' testimony that the "red flag" for her in the activity report involved the printing of the record, not the accessing of the record. See, i.e., T 777 ["I notice that pieces of this lady's medical record had been printed, and because of many Title 22 requirements for patient confidentiality, I needed Linda Ruggio to determine why these pieces of this medical record were printed out"].

The ALJ also concludes that Richards "simply fabricated" her testimony that Magsino should have sat with Gilliatt or the Hospital's Risk Manager if he wanted to review the patient's medical record for purposes of pursuing his dispute. ALJD 18:27-39. However, Richards' testimony in this regard is both consistent with HIPAA's requirements and with the report and testimony provided by expert witness Navarro. See, i.e., RX 92; T 1026-1027; see also discussion of HIPAA above and below.<sup>16</sup> The ALJ's "fabrication" determination also relies on his "finding" that Respondent did not specifically reference Magsino's failure to sit with Gilliatt when reviewing the record during any of the meetings or in any of the documents created prior to his termination. ALJD 18:38-39 ["And never in any of its written or verbal accounts of the reasons for Magsino's discharge did Chino Valley ever mention that Magsino should have had a manager with him when he accessed the medical records"]. However, Respondent was not required to do so, and there is nothing inconsistent between Richards' testimony and the record evidence relating to those communications and documents. Indeed, and as referenced above, Magsino's accessing of the record was not even cited in the Report Form as a breach. Nevertheless, the ALJ repeatedly characterizes Magsino's transgressions as involving only the "accessing" of the patient's medical records (see, i.e., ALJD 18:7, 27, 30, 36, 40), ignoring the undisputed facts, confirmed at least partially by Magsino himself during the hearing, that he printed out the record on two different days, copied the record on at least two occasions, took a copy of the record off of Hospital property, and submitted a copy of the record to HR. These

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<sup>16</sup> Of course, because this supporting testimony of Navarro was contrary to the ALJ's conclusions, he discredited Navarro's testimony also.

facts are inconvenient to the ALJ, so he ignores them when giving his justifications for his conclusions.

Moreover, the ALJ's characterization of his question being answered by Richards and her response relating to accessing of medical records by employees for "internal grievance" purposes (ALJD 18:20-43) misrepresents the entirety of the record, which shows that Richards readily acknowledged that HIPAA allows access to PHI for resolution of grievances, but clarified that protective procedures must be followed when doing so:

**[CROSS-EXAMINATION BY UNION COUNSEL DEMIDOVICH]**

Q Are you aware that privacy rules permit healthcare facilities to use and disclose protected health information for healthcare operation activities?

A Healthcare operation activities are your payer sources, your DPH - -

Q Well, without defining it.

MR. SCOTT: Objection. May the witness finish her response?

JUDGE KOCOL: No, please answer.

THE WITNESS: So for hospital operations, there are many organizations we have to report to to ensure patient safety and health throughout the state of California.

Q BY MS. DEMIDOVICH: Okay. But are you aware that regulations allow for use and disclosure of healthcare information, protected healthcare information, for healthcare operation activities?

A Yes.

Q And are you aware that healthcare operation activities include resolution of internal grievances?

A Yes.

Q And that's in the regulations?

A Yes.

Q And the regulations also allow for use and disclosure of protected health information by healthcare facilities for conducting quality assessment and improvement activities?

A Healthcare facilities, yes. Yes.

Q And a covered entity -- is Chino Valley Medical Center a covered entity?

A Yes.

Q And are you aware of whether Chino Valley Medical Center has an internal grievance process?

A They have an internal complaint process, yes. For a grievance process, if you want to -- grievance is a confusing word. CMS defines a grievance as a patient complaint. In HR we tend to use complaint or grievance within the Human Resources Department, but yes there are grievance protocols in Chino Valley.

Q Okay. And there are grievance protocols administered by Human Resources at Chino Valley?

A Yes.

JUDGE KOCOL: So if I'm following, Ms. Richards, the exception of that is the allowance that the law allows for employees to use medical records and patient information in internal grievance procedures.

MR. SCOTT: But Your Honor, I think that --

THE WITNESS: I would say no.

JUDGE KOCOL: I'm asking the question, so please don't interrupt. Go ahead.

THE WITNESS: I would say no. We have a risk management policy that if you need to access a medical record once that record is closed you actually have to sit with the Risk Manager or you have to sit with the Manager while you review that record, and at no time can you make a personal copy of somebody's confidential information.

JUDGE KOCOL: Take it from there.

Q BY MS. DEMIDOVICH: And I'm sorry, the practice is that you're supposed to sit with whom?

A Another Risk Manager or your manager to ensure that that information is not copied and taken outside the building.

Q And that's the purpose of the policy?

A Title 22 has multiple regulations on the securing of a medical record. Lots of rights and ethics standards in the Health Facilities Accreditation Program, which is what Chino is accredited with, and CMS maintains that we must secure every medical record and have a log and have authorized the people to take copies of the medical record, but we're not to make copies of the medical record, there should be one medical record.

T 800-802.<sup>17</sup>

As a final example relating to Richards, the ALJ quotes a snippet of Richards' testimony responding to what the ALJ characterizes as questions he put to Richards regarding the process that should be used by employees who are disputing discipline for patient care errors, then uses that snippet to discredit Richards for "mixing her personal views with the existing policy that Magsino allegedly violated." ALJD 18:48-10:16. In context, however, Richards' testimony was totally appropriate:

#### [QUESTIONING BY ALJ]

Q Let's say the patient is discharged and quality assurance goes on and they discover that the nurse didn't follow doctor's orders. How does the nurse then -- the patient is discharged, how does the nurse go in there and defend himself?

A The nurse makes an appointment with the manager, and at that time they review the medical record. They can point out what's not there, what is there. If they don't want to be with the manager, then they would get the Risk Manager or another manager to actually go into the medical records department where all the records are secure and they can go through the medical and look through it.

Q All right. Now let's take it to the next step. The nurse looks through that and she says, "Ah ha! I did follow the doctor's orders, the doctor said give this medicine, here it is and I gave the medicine." Now that nurse now wants to contest the discipline through the internal grievance procedure. How does the nurse then communicate that information from the patient chart to HR so that HR

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<sup>17</sup> This portion of the transcript also illustrates the ALJ's rudeness towards Respondent's counsel and Richards.

understands, oh, the nurse is innocent.

A There is no need to write a letter. What they could have done was brought their write up to the HR Department. The HR Department would have facilitated a meeting with the manager. At that point, the manager and the employee could have gone into the record, could have shown what her evidence, his evidence is, and then decided, yes, we made a mistake, or we couldn't find it, this is still going to stand. We have various levels of what you're supposed to do. You're not supposed to just access a medical record and write an entire letter and then attach somebody's personal health information to the record. I don't know if that's been brought here, but this tells you everything about this person. I personally wouldn't want that in somebody else's hands.

JUDGE KOCOL: I don't need to know what you personally don't want. We're trying to apply law here.

T 817-818.<sup>18</sup> Additionally, and as described above, the copy of the patient record submitted to HR by Magsino did “tell you everything about [the patient’s medical history and treatment]” even though it did not have the patient’s name on it. See GCX 9(a) (AP 2-3).

The ALJ gives three reasons for discrediting Ruggio, the person who made the decision to terminate Magsino’s employment. First, the ALJ states that “parts” of her testimony were given in response to leading questions. ALJD 19:18-20. Second, the ALJ references Ruggio’s notes from her interviews of DeSantiago and Gilliatt (RX 50-51). ALJD 19:20-34. Third, the ALJ references on *Richards*’ testimony of what she was told by Ruggio concerning what Ruggio was told by the CDP and what the ALJ states was actually said by the CDP. ALJD 19:34-44. The ALJ’s justifications are not supported by the record.

It is difficult to understand exactly what testimony the ALJ contends was the product of leading questions. In this regard, the record shows that General Counsel’s and Union’s “leading” objections to Respondent’s examination of Ruggio regarding the Investigation Committee’s investigation into Magsino’s privacy violations and the decision to terminate his employment were overruled almost without exception. See, i.e., T 845, 853, 855, 859, 861.<sup>19</sup> Moreover, the ALJ affirmatively advised Respondent’s counsel when he thought counsel’s examination was

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<sup>18</sup> Note again the ALJ’s rudeness to Respondent’s witness.

<sup>19</sup> The ALJ did sustain a leading objection made by the Union while Respondent’s counsel was questioning Ruggio about one of Respondent’s policies she believed Magsino violated (T 874) and one made by General Counsel when Respondent’s counsel was attempting to clarify the date Ruggio was contacted by CDPH following her report of the violations to CDPH (T 889-890).

leading, but only did so on one occasion. T 846-847. And even in this instance, Ruggio's responses were only confirming Magsino's accessing and printing of the medical record, facts that are irrefutably established by the activity report. Id.; RX 46.

With respect to Ruggio's interview notes, the ALJ states that "the notes of her interview of De Santiago do *not* indicate that De Santiago claimed that Gilliatt allowed her access to the medical record." ALJD 19:21-22 (emphasis supplied by ALJ). It is difficult to understand why the ALJ found this significant inasmuch as, again, it is undisputed that Gilliatt gave both Magsino and DeSantiago permission to do so and Ruggio never contended otherwise. See, i.e., GCX 148 (AP 18). The ALJ also found it "curious" that the notes indicate DeSantiago "understood that she could not remove the records from the facility" even though "there was no assertion that De Santiago had done so," leading the ALJ to draw the inference that "Ruggio was more concerned about building a case against Magsino than conducting an impartial interview and making accurate notes" (ALJD 19:23-28). However, it was entirely reasonable for Ruggio to insure that DeSantiago understood that records were not to be removed from the Hospital inasmuch as another employee (Magsino) had recently done so. In this regard, Ruggio's actual notes referencing records being taken out of the Hospital, rather than the ALJ's version of the notes, is instructive:

-- Edelma and I explained the proper way to access a chart for those purposes. We did go over the HIPAA Regulations and Yesenia was able to verbalize that she knew Records were not to leave the hospital which is why she states she put them in the shredder box after accessing --

RX 50. There is simply nothing in the notes to support the ALJ's inference that "Ruggio was more concerned about building a case against Magsino than conducting an impartial interview."

The distinction drawn by the ALJ between Ruggio's notes of her interview of Gilliatt and Ruggio's testimony at trial regarding the same interview (ALJD 19:27-34) is also much ado about nothing. Ruggio's notes of that interview provide in relevant part as follows:

5/17/10: Spoke [with] C. Gilliatt regarding instructions to R. Magsino --

Cheryl stated she did speak [with] Ronald the day following his counseling

Ronald was attempting to gather data to dispute his counseling – he did speak to Cheryl about the pt wanting to know who it was – Cheryl did give Ronald the pt’s name telling him to “do your research & make sure you know what you are disputing”. Cheryl stated she could understand how Ronald would have taken that as “permission” to access the chart. However, Cheryl stated she never told Ronald he could “print” or “take the chart home”. Cheryl does not recall ever telling Ronald it was okay to print as long as he blanked out the pts name but to leave the account # or the MR # for future research use.

RX 51. At trial, Ruggio testified:

**[DIRECT EXAMINATION BY RESPONDENT’S COUNSEL]**

Q And what do you recall asking Ms. Gilliatt during the course of that meeting?

A I think I asked her to tell me what transpired between her and Ronald during the counseling that she gave him.

Q And what did she tell you?

A She told me that she had given him a counseling and that he was upset about it. She told me that she offered him the name of the patient to look up because he was very upset and he wanted to do some research on the patient. I believe I did ask her did you give him permission to print the record and take it home and she had said no, she did not.

Q Do you recall anything else that Cheryl told you during the course of that meeting?

A No, I’m sorry, I don’t remember the details right off of my head.

T 860. If there is a distinction between Ruggio’s notes and Ruggio’s testimony that supports discrediting “much of the testimony given by Linda Ruggio” during the course of the hearing (ALJD 19:18), that distinction escapes Respondent. More importantly, no such distinction can be made by any neutral reading of the record taken as a whole. And under no circumstances can the ALJ’s statement that “By the time of trial, Ruggio testified that Gilliatt flatly denied she ever permitted Magsino to print the medical record” be supported by Ruggio’s actual testimony quoted above.

Finally, the ALJ discredits Ruggio because, according to the ALJ, Richards testified that she had been told by Ruggio that the CDPH had told her that no action would be taken against the Hospital due to Magsino’s privacy violations because Magsino had been terminated when, again according to the ALJ, “the Department said no such thing. This testimony shows the depth of the fabrications that Chino Valley created to justify its termination of Magsino.” ALJD 19:34-43. However, what is really shown by this portion of the ALJ’s Decision is the depth of the ALJ’s bias against Respondent and the extremes to which he has twisted the record to support his

conclusions.

First, it is indeed strange for a trier of fact to base its discrediting of witness 1 (Ruggio) on hearsay testimony from witness 2 (Richards), particularly when that trier of fact has just spilled significant ink rationalizing the discrediting of witness 2. Be that as it may, and more importantly, there is absolutely no competent evidence supporting the ALJ's statement that the CDPH "said no such thing." The only evidence in the record of oral communications from the CDPH to Respondent relating to Ruggio's report made to the CDPH involving Magsino's privacy violations was the testimony of Ruggio and the Report Form completed by Ruggio recording that communication (RX 63 (AP 30)). When she testified at the hearing, Ruggio recalled that communication as follows:

Q And who was it from the CDPH that contacted you?

A Robin Burton.

Q And had you dealt with Ms. Burton in the past?

A No.

Q Was this on the telephone or in person?

A She called me on the phone.

Q And what did she ask you?

A She said that she needed a little bit more information in regards to my report, that she had received it and she was looking over everything, and she asked me for a little more information.

MS. SILVERMAN: Objection.

MS. DEMIDOVICH: Objection.

MS. SILVERMAN: This is hearsay.

JUDGE KOCOL: No, it's not being offered for the truth of the matter. It's just -- well, is that right?

MR. SCOTT: Well, what the CDPH investigator said to her.

JUDGE KOCOL: All right. So please continue. So far no hearsay. She asked for more information?

THE WITNESS: Yes, she wanted some more information for her own clarification and she asked me about -- I think there was questions in there about the redactions that were made on the record, and then she asked me about what, if any, discipline actions we had taken, what was my results that she wanted to know. I told her that one of the employees that had been involved in the case had been disciplined with a formal counseling and that the other employee involved in the case was no longer employed by our facility.

Q And what did she say to you?

A She just said, "Oh, okay." She said, "I don't believe there is going to be any deficiency cited for the hospital on this, but I will have to --", she said, "I'm not the one who makes the final decision. I have to forward this to my supervisor." She said, "I'll notify you before you receive the 2567." She said that she appreciated that we handled the matter swiftly, it appeared to be appropriate and she didn't have any concerns that the breach would reoccur.

MS. SILVERMAN: Objection.

MS. DEMIDOVICH: I would object to that as hearsay.

MS. SILVERMAN: And irrelevant.

JUDGE KOCOL: Now this is what she told you?

THE WITNESS: Yes, sir.

JUDGE KOCOL: Overruled.

Q BY MR. SCOTT: Now did you recall anything else that was said during that conversation?

A No, sir.

T 891-892. The entry on the Report Form that was entered by Ruggio immediately after her conversation with Burton states:

Follow up: June 1, 2010:

3:30 p.m.

Received a call from Robin Burton, CDPH requesting additional information regarding this report. She asked about disciplinary measures, she asked about our policies we have in place for HIPAA and Confidentiality. She asked for clarification regarding what identifying information was left on the printed documents specifically regarding the redaction of the name of the patient.

Ms. Burton stated we would probably not receive any deficiencies for this as the case was handled well, action was taken swiftly and appropriately by administration. Ms. Burton stated that because the male employee no longer is employed by CVMC, she felt confident the problem would not recur. Ms. Burton stated she would be sending all information to her supervisor for final approval and she would call me when she was ready to fax the 2567 to me.

RX 63 (AP 30).<sup>20</sup> Similarly, the Form 2567 subsequently received by Respondent from the CDPH simply advised that “No deficiency issued for CA00229601.” GCX 84 (AP 13); T 892-893. Apparently the only way the ALJ could see to potentially get around this evidence was to discredit Ruggio, then bootstrap his discrediting of Ruggio into a finding that “the Department said no such thing.” In this regard, it should also be noted that the ALJ repeatedly precluded

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<sup>20</sup> The ALJ refused to admit this Report Form, which is identical to the version of the Report Form admitted as GCX 148 that was completed prior to Ruggio’s conversation with Burton, with the exception of the last entry added by Ruggio following her conversation with Burton, as a business record. T 887-889. The ALJ’s refusal to do so was clear error. See, i.e., T 886-887 [business record foundation established]. It also is another indication of the ALJ’s bias against Respondent. In any event, the Report Form was admitted into evidence as Ruggio’s notes of her conversation with Burton, and is the most reliable evidence of the conversation in the record given that the notes were made immediately after her conversation with Burton and before there was any controversy over what the CDPH did or did not conclude with respect to Magsino’s privacy violations.

Respondent from obtaining evidence from CDPH and its representatives that would have allowed Respondent to determine the timing and context in which the various portions of the CDPH records allowed into evidence by the ALJ were prepared. See, i.e., RX 93-99, 112, 114, ALJD 29:28-30:29.

The ALJ also rejected all evidence presented by expert witness Navarro, finding that she was not qualified to testify relating to privacy issues involving California hospital standards, practices and procedures and that her testimony was not “scientific, technical or other specialized knowledge that would assist me ... on how hospitals must deal with HIPAA and related policies as they pertain to employee use of medical records to defend themselves against discipline.” ALJD 19:46-20:3. The ALJ also adds that “to the extent that Navarro’s testimony can [be] read that employees must first get a lawyer to do so, that testimony, standing alone, is simply not credible.” *Id.*, 20:5-7.

First, and contrary to the ALJ’s conclusion, Navarro was properly qualified as an expert. See, i.e., RX 92. In fact, prior to realizing the impact that her testimony would have on the Magsino termination allegations, the ALJ was receptive to expert testimony regarding the topics on which Navarro was presented. See, i.e., T 637-640. However, the ALJ’s demeanor when Navarro appeared to testify, as well as his rude and hostile questioning of Navarro and reaction to the evidence she presented, indicates that the ALJ had decided to reject any evidence presented by Navarro even before he heard that evidence. See, i.e., T 1021-1022 [ALJ initiates challenge to expert report and opinions], 1023-1024 [ALJ expresses hostility to expert report because it does not include evidence he desires, interrupting Respondent’s counsel when doing so], 1025 [ALJ aggressively challenges expert, becoming so excited that he asks an unintelligible question, then chastises Navarro for not answering his second version of the question and mischaracterized the proffered evidence when doing so; “Show me anything in your statement of opinions that deals with what you give an opinion on as to whether Mr. Magsino’s conduct violated it [sic] ... My question was where in there does it say he violated HIPAA? It doesn’t, does it?”], 1035-1036 [ALJ interrupts witness during testimony on critical issues and challenges

testimony in hostile manner, again mischaracterizing expert report when doing so and not allowing expert to explain same], 1042 [ALJ changes questions after receiving responsive answers from Navarro supporting Magsino's termination as consistent with privacy law].

Additionally, the ALJ's contention that Navarro's testimony would not "assist me ... on how hospitals must deal with HIPAA [in relation to employee grievances]" ignores Navarro's testimony relating to that issue. See, i.e., T 1036-1042. Moreover, a review of that testimony illustrates why the ALJ chose to ignore it.

Immediately after Navarro was called to the stand, Union counsel challenged Navarro's expert report as being contrary to the "internal grievance" language in HIPAA, prompting the following dialogue between Union counsel, Navarro and the ALJ:

MS. DEMIDOVICH: I'd also like to assert an additional objection based on that testimony. I don't believe that this expert is qualified to testify about HIPAA given that the regulations specifically do not require -- specifically allow for the use and disclosure of protected health information for resolution of internal grievances, which include disclosure to employee and/or employee representative.

This is --

JUDGE KOCOL: What part are you reading from?

MS. DEMIDOVICH: I am --

JUDGE KOCOL: Show it to the witness.

MS. DEMIDOVICH: From the preamble to the first privacy rule issued December 28th, 2002, it's at the federal register at 65 FRA 2462, specifically cites page 82607 to 82608.

WITNESS: And I don't need to see it, but what I will say is that, yes, it allows it but the method of how you go about getting the information does not -- unless it's in your job description, you're using your network credentials for the purpose of treating the patient. Anything beyond that has to have a process and a procedure to go through.

So just to say that every employee can use the record as they need to in an investigation is inappropriate both under HIPAA and California law, which talks about unauthorized, inappropriate access to the electronic patient information.

T 1027-1028. Navarro later clarified this point and specifically addressed Magsino's privacy violations, much to the displeasure of General Counsel, the Union and the ALJ:

[D]id you conclude that Mr. Magsino made an unauthorized disclosure of patient information?

A I did. First, the analysis for health and safety code 1280.15, which means he's in medical information. Yes, it's medical information. And was there unauthorized access, unlawful use or disclosure? Based on what I read, there was not only unauthorized access but there was a use when it was printed.

Then when it was further disclosed the human resources department as well as the copies and the physical safeguards on the paper information that was

taken offsite from the hospital premises. That requires notification and reporting under health and safety code 1280.15, that action.

Q Okay. And did those --

MS. DEMIDOVICH: I want to get an objection on the record that the best evidence, the code provision speaks for itself.

JUDGE KOCOL: I'll overrule that objection.

Q And in reaching your opinions that are set forth in the report, did you rely on any of the state regulatory authorities enforcement positions?

A Can you repeat the question?

Q Yeah. In reaching the opinions and conclusions set forth in the report, did you rely on any of the privacy enforcement provisions or statements made by the California Licensing Authorities?

A Could I rephrase that as to what they expect as far as mitigation in the event of a privacy --

Q Please.

A Yes.

Q Okay. What is it that they expect?

A They require --

MS. DEMIDOVICH: Objection, lacks foundation that she's ever worked for this agency and knows what they expect.

JUDGE KOCOL: Overruled.

A They require that a covered entity or a licensed facility, (1) follows their own policies; and (2) complies with the law as far as unauthorized access to or use or disclosure of individually identifiable information. That includes the investigations policies as well as the sanctions policies for those who violate or have found to violate that health and safety code.

\* \* \* \*

Q What I wanted to draw your attention to is the bullet about halfway down [page 4 of RX 92] where it says, "The fact that Mr. Magsino accessed, used, removed and disclosed the information," do you see that?

A Yes.

Q What led you to reach that assumption as it relates to your opinions?

A Because network credentials are provided to nurses for the purposes of treating patients. That's why they're given access to medical records. If there was additional purposes, they would require an additional approval or authorization beyond that treatment relationship. The access, the use, the removal and the disclosure were related to the individual's personal investigatory matter, which is outside the scope, the job duties and why you're credentialed in electronic medical records for an RN, unless there's something in the job description that allowed that, which I was not made aware of.

Q The next bullet -- that bullet references increasing the severity of the violations, do you see that?

A Sanctions are required to be -- and this is in HIPAA -- both consistent and progressive in nature. So if you have somebody with a privacy violation and it's reeducation, depending on -- the sanction has to depend on the severity of the incident, but you would expect -- for a similar incident or another incident, you would see a more severe sanction.

\* \* \* \*

Q Did you review this policy [GCX 36] in reaching the conclusions in setting forth the basis and facts for those opinions that appear on your report?

A I did.

Q If I could draw your attention to the last page of that exhibit, which is entitled, Attachment A - Enforcement and Discipline Policy. Do you see that? It's a matrix.

A Yes, I see it.

Q Did you make a determination with respect to where the actions of Mr. Magsino fell within this matrix [GCX 36]?

A I did.

MS. SILVERMAN: Objection.

MS. DEMIDOVICH: I would object as well.

JUDGE KOCOL: Yes, this is exactly why I'm not receiving this into evidence. She's giving an opinion as to whether the hospital's application of its policies concerning discipline is reasonable. I'm not going to allow that. She can't possibly be an expert in that. Sustained.

Q And why is it that a California acute care hospital has to apply its policies as it relates to disciplinary action against employees who engage in violations of their privacy related policies?

A It is required by federal law as well as California law that you sanction, you detect privacy violations, you mitigate them, including sanctions of those who do the violations.

MS. DEMIDOVICH: Objection, best evidence and also lacks qualification to answer what the law requires.

JUDGE KOCOL: Overruled.

Q And are California acute care hospitals required to apply their disciplinary standards set forth in their policies if they determine that the conduct is such that their policy requires a minimum level of disciplinary action to be taken?

A Absolutely.

JUDGE KOCOL: You wouldn't know here, would you, whether the hospital has in fact applied their policies? You only know that they should?

WITNESS: Well, I looked at the activities of the former --

JUDGE KOCOL: No, could you --

WITNESS: I guess maybe I don't understand the question.

JUDGE KOCOL: Okay. You only know that the hospital should apply its disciplinary policies with regard to breaches of the confidentiality. You don't know whether this hospital has, in fact, done so?

WITNESS: They should and they must, yes. I will say yes to that, but --

JUDGE KOCOL: Yes to what? I'm sorry, I didn't catch your answer. You don't know whether they have?

WITNESS: Well, they should and it appeared to me based on the action that they took against this employee that they did, in fact, follow the policy. That was my interpretation and my opinion.

JUDGE KOCOL: Again, maybe I'll ask you, maybe you're not understanding.

T 1036-1042. It should also be noted that Navarro's testimony in this regard is consistent with Respondent's policies, the discussions of HIPAA set forth elsewhere in this brief, the testimony of Richards (who, like Navarro, is an experienced health care professional with responsibilities for compliance with HIPAA and other privacy laws regulating acute care hospitals), and the findings of the Investigation Committee (also composed of health care professionals having such compliance responsibilities). However, Navarro's testimony is contrary to General Counsel's

theory and the ALJ's ultimate conclusions, and that is why it was rejected by the ALJ.<sup>21</sup>

Finally, in finding that Magsino was a credible witness (ALJD 16:21-24), the ALJ ignored instances in which Magsino refused to provide straight answers and equivocated in his testimony during examination by both the ALJ and Respondent. See, i.e., 285-290 [Magsino denies he provided Union with documents relating to his final written warning and feigns not being able to understand simple and direct questions put to him during cross examination], 312-313 [nonresponsive answers seeking to justify actions], 318 [stonewalling re employment by Union]. The ALJ also ignored conflicts between Magsino's testimony on direct and during cross examination, conflicts between his testimony and documents relating to the same subjects, General Counsel's failure to present testimony from RNs whom Magsino identified as being present when Magsino claimed certain statements were made by Gilliatt, and the self-serving nature of much of Magsino's testimony, including when the testimony provided was not responsive to the questions asked. See, i.e., T 252-254, 268-271, 277-283, 301-302, 330-332, 335, 339-341, 346, 351-356, 359-362, 365-366, 373-374, 380-384, 391, 393; GCX 9, 148; RX 46.

In sum, the Board cannot rely on the ALJ's version of the "facts" set forth in his Decision, and must instead conduct a full review of the record in considering Respondent's exceptions. That review will result in the conclusion that Magsino was terminated for his privacy violations, not because he supported the Union, as will now be further explained.

**b. The ALJ Misinterpreted And Misapplied HIPAA In Determining That Respondent Did Not Terminate Magsino Because Of His Privacy Violations**

In concluding that Magsino was terminated due to his Union activities and not because of his privacy violations relating to the patient's medical record, the ALJ also finds that Respondent did not show that Magsino violated HIPAA. ALJD 20:26-49. Of course, the ALJ improperly

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<sup>21</sup> The ALJ's final comment regarding Navarro (ALJD 20:5-7 ["And to the extent that Navarro's testimony can [be] read that employees must first get a lawyer to [obtain medical records for internal grievances], that testimony, standing alone, is simply not credible"]) is similarly unsupported by Navarro's testimony when considered as a whole. See, i.e., T 1025-1026.

excluded or discredited most of Respondent's evidence that was contrary to the ALJ's conclusion. See subsection (a) above. Moreover, the ALJ's findings and discussion also illustrate the ALJ's stubborn refusal to accept the impact HIPAA's provisions have on a health care employer's obligations vis-à-vis an RN who prints, copies, uses, fails to secure and distributes a patient's medical record when the employer's policies do not allow the RN to do so, as is shown by an unbiased review of some of the fundamental provisions of HIPAA's implementing regulations.

Definitions: As defined in HIPAA's regulations, the Hospital is a "health care provider" and a "covered entity"; Magsino and the Hospital's other employees are part of the Hospital's "workforce." 45 CFR § 160.103. "Health information" is information created or received by a "health care provider" that relates to the health or condition of a patient or the provision of health care to the patient. Id. "Individually identifiable health information" is a subset of health information, including demographic information collected from a patient, that is created by a health care provider and that identifies the patient or can be used to identify the patient. "Protected health information" (also referred to as "PHI" herein) is individually identifiable health information that is maintained in electronic or any other form or medium. Id. PHI will be considered individually identifiable if it includes any dates relating to the patient's admission date or discharge date, any medical record number, or any account number, whether or not the patient's name or other identifying information is also visible. 45 CFR 164.514((b)(2)(i)(C), (H) and (J).

Requirement to develop, implement and enforce policies and procedures protecting the security of PHI. Part 160, subpart C of Title 45 of the Code of Federal Regulations (45 CFR §§ 164.302-164.318) establishes standards for covered entities relating to the development, implementation and enforcement of policies and procedures for electronic PHI, while subpart E (45 CFR §§ 165.500-164.534) specifies the standards for PHI generally. Pursuant to these regulations, a "security incident" is any attempted or successful unauthorized access, use, or disclosure of PHI contained in an electronic information system. 45 CFR § 164.304.

“Confidentiality” means that the data or information is not made available or disclosed to unauthorized persons. *Id.* A covered entity is required to ensure the confidentiality of all electronic PHI in its systems; to protect against uses or disclosures of PHI not permitted by 45 CFR §§ 164.500-164.534; to create, implement and enforce policies and procedures for protecting PHI; and to ensure compliance by its workforce with the policies and procedures established by the covered entity in accordance with the regulations. See, i.e., 45 CFR §§ 164.306(a)(1), (3), (4) and (c)-(d), 164.308, 164.316, 164.514(d), 164.530(c) and (i). The policies and procedures must be designed to prevent, detect, contain, and correct security violations. 45 CFR § 164.308(a)(1)(i). The covered entity is also required to “apply appropriate sanctions against workforce members who fail to comply with the security policies and procedures” implemented by the entity. 45 CFR §§ 164.308(a)(1)(ii)(C), 164.530(e)(1). Additionally, the covered entity must implement policies and procedures to prevent members of its workforce who do not have access to PHI in the normal course of their duties from receiving PHI. 45 CFR §§ 164.308(a)(3)(i), 164.514(d)(2), 164.530(i)(1). The covered entity is also required to identify and respond to suspected or known security incidents, mitigate any harm created by such incidents, and document such incidents and their outcomes. 45 CFR §§ 164.308(a)(6), 164.530(f), (j).

Permitted uses and disclosures of PHI. Part 160, subpart E of Title 45 of the Code of Federal Regulations also sets forth the general rule that PHI cannot be used or disclosed by a covered entity except as specifically allowed under the regulations. See, i.e., 45 CFR §§ 164.500(a), 164.502(a). Pursuant to this subpart and as relevant here, disclosure of PHI by the covered entity is only permitted for treatment of the patient or “health care operations.” 45 CFR § 164.502(a)(1)(ii). “Health care operations” includes conducting quality assessment and improvement activities, training and other actions taken to improve the competence of health care professionals, and “resolution of internal grievances.” 45 CFR § 164.501. Additionally, and importantly, the regulations also specify that the “minimum necessary” standard applies to any uses or disclosures of PHI relating to these permissible purposes. See, i.e., 45 CFR §

164.502(b) [whenever a covered entity uses or discloses PHI, the entity must limit such use or disclosures “**to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request**” (emphasis added). See also 45 CFR §§ 164.506(a) [requiring all permitted uses and disclosures be “consistent with other applicable requirements of this subpart”], 164.514(d)(1)-(2) [emphasizing obligation of covered entity to comply with “minimum necessary requirements” established by § 164.502(b) whenever PHI is being used or disclosed, including identification of persons in its workforce who routinely need access to PHI to carry out their duties].

Enforcement of HIPAA. Part 160, subpart D of Title 45 of the Code of Federal Regulations (45 CFR §§ 160.400-160.426) sets forth the procedures and standards for the imposition of civil money penalties for HIPAA violations. Pursuant to 45 CFR § 160.402(a) and (c), a covered entity is liable for a civil penalty for a violation of any “administrative simplification provision” committed by a “workforce member.” An “administrative simplification provision” is defined in 45 CFR § 160.302 to include “any requirement or prohibition established by ... this subchapter.” “This subchapter” in turn includes the provisions of 45 CFR §§ 160.101-164.534. Accordingly, the civil penalty provisions of HIPAA apply to any violation by a workforce member of a covered entity’s policies and procedures protecting the security of PHI developed and implemented in accordance with the requirements and standards mandated by HIPAA. The penalties assessed against a covered entity for violations of HIPAA requirements and standards can range from \$100 and \$1.5M. 45 CFR § 160.404. In determining the amount of a fine, the Secretary is to consider a variety of aggravating and mitigating factors, including whether the violation was intentional, any history of compliance or violations, and whether and to what extent the covered entity has attempted to correct previous violations.

Application of HIPAA’s provision to Magsino’s actions makes clear that Magsino violated both the spirit and letter of HIPAA. The Hospital’s privacy-related policies (GCX 36 (AP 5-9); RX 53-55 (AP 21-26)) are not only consistent with HIPAA, they are in fact required by HIPAA. See, i.e., 45 CFR §§ 164.306(a)(1), (3), (4) and (c)-(d), 164.308, 164.316,

164.530(c) and (i); see also RX 92, pp. 1 (¶¶ 1-2), 3-4; T 784-786, 1025-1026. Accordingly, by violating those policies, as Magsino most assuredly did, Magsino violated HIPAA. See, i.e., RX 54 [policy prohibiting re-disclosure of patient information without written authorization from patient], 53, 55 [allowing access to medical records only as necessary to perform professional responsibilities]; GCX 36 [policy requiring termination for disclosure of confidential patient information]; see also GCX 92 [expert report confirming Hospital's determinations that Magsino violated Hospital's privacy-related policies by his privacy violations]; T 784-786, 806, 1035-1037.

Moreover, Magsino's privacy violations are not within the protection of the "internal grievances" exception relied on so heavily by the ALJ (see, i.e., ALJD 16:46-47, 18:26-28, 18:48-50, 19:50-20:1, 20:34-41). First, the exception applies to uses and disclosures authorized by the Hospital as the covered entity; the exception does not provide license to Magsino, or any other nonsupervisory employee, to access, use and/or disclose PHI or a patient's medical record because the employee is dissatisfied with a particular disciplinary action. Magsino was a nurse and was employed by the Hospital to provide patient care, not to investigate or process internal grievances. Accordingly, under HIPAA/Hospital policy, Magsino was only permitted access to PHI for treatment purposes, not so that he could obtain documentary support for a personal grievance. See, i.e., 45 CFR § 164.514(d)(1)-(2); RX 55 (AP 24-26) [Meditech access policy permits access "which is necessary to perform his/her professional responsibilities"]; RX 92 (AP 37-41) [expert report confirming that Magsino's privacy violations were not based on a need to know for treatment purposes, but were instead for the "purposes of personal gain and self interest"]; GCX 84 (AP 15) [CDPH note states that PHI was for "personal use"]; T 802, 804-806, 1026-1028, 1035-1039. In this regard, it is noteworthy that the Hospital does not even permit HR employees to have access to patient records even though the normal scope of their duties involves handling employee grievances, and they are therefore not subject to the Hospital's policies relating to privacy of patient records. See, i.e., T 802, 817-818; RX 54-55 (AP 22-26). Nurses and other health care professionals involved in direct patient care are provided access to

PHI in order to provide treatment to patients, and only for that purpose. If they were also permitted to use their access credentials to view and use PHI for their own “internal grievances,” the covered entity will have effectively lost control over PHI and will be unable to protect PHI, as the covered entity is mandated to do by HIPAA.

Applying the “internal grievances” exception to Magsino’s privacy violations is also totally inconsistent with HIPAA’s “minimum necessary” standards applicable to all permitted uses of PHI. As noted, a covered entity is required to ensure that PHI is only used or disclosed “to the minimum necessary to accomplish the intended purpose of the use, disclosure or request” (45 CFR § 164.502(b)). The Hospital has policies and procedures in place designed to implement the “minimum necessary” requirement of HIPAA, including its Meditech Appropriate Access policy allowing access or use of patient information in the Meditech system only as “necessary to perform [the employee’s] professional responsibilities,” with access limited to individuals “with a legitimate ‘need to know’ in order to effectively perform their specific job duties and responsibilities,” and its policies and procedures excluding Human Resources Department personnel from access to the Meditech system. *See, i.e.,* RX 55; T 1026-1027.

Here, HIPAA’s “minimum necessary” principle and the Hospital’s policies supporting that principle were clearly violated by Magsino’s privacy violations. It was not necessary for Magsino to access and view the patient’s records on three different occasions (even though these violations were excused by Respondent), print portions of the patient’s records on two different occasions, make copies of portions of the patient’s records on at least two occasions, maintain a copy of the MR in his backpack, or submit the MR to HR with his dispute letter. Magsino could have instead simply let his dispute letter summarizing the patient’s treatment and his position vis-à-vis the final written warning (GCX 9) serve as his appeal. Had he done so, the Hospital would have likely never discovered his privacy violations (or those of DeSantiago) and he might still be employed by Respondent.

Instead, Magsino unilaterally chose to submit PHI, in the form of the MR, with his appeal letter, and thereby disclosed PHI to persons working in HR even though they had absolutely no

need whatsoever to review the MR given the detail provided by his dispute letter. And if there was a need to review the doctor's dictation notes or nursing notes included in the MR, HR could have contacted Ruggio and allowed her to assess whether HR needed any materials from the patient's medical record in order to consider Magsino's dispute, and if so could have insured that any documents provided to HR were totally de-identified in accordance with HIPAA requirements. Accordingly, and even assuming *arguendo* that Magsino's privacy violations fall under the "internal grievances" exception regarding health care operations despite the facts that he (1) was a member of the workforce, not a covered entity, (2) was employed as a nurse and not as a human resources professional, and (3) his privacy violations violated the Hospital's privacy-related policies and procedures, his actions still violated HIPAA's "minimum necessary" standards.

Respondent recognizes the ALJ's findings rejecting HIPAA regulations as relevant to this case and/or finding that Magsino's privacy violations were consistent with HIPAA's "internal grievances" language. See, i.e., ALJD 20:30-49. However, while these findings are consistent with the ALJ's obvious motivation to find that Respondent terminated Magsino because of his Union activities, and his related discounting or discrediting of all evidence that establishes otherwise, the ALJ's findings are not consistent with HIPAA's regulations and will not make those regulations disappear. While the ALJ repeatedly infers that the Hospital must have a policy in place that establishes a procedure permitting Magsino's actions or that otherwise implements HIPAA's "internal grievances" language (see, i.e., ALJD 20:3-5, 20:34-35 ["certainly such a procedure must exist"]), there is no evidence to support his inferences. Accordingly, pursuant to HIPAA Magsino was bound to the prohibitions contained in the Information Security Agreement he signed, including his agreement "[n]ot to disclose any portion of a patient's record except to a recipient designated by the patient or to a recipient authorized by the Hospital" (RX 52 (AP 21)),<sup>22</sup> and Respondent was bound to apply the

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<sup>22</sup> As shown, HR is not "a recipient authorized by the Hospital" to receive "any portion of a patient's record;" the ALJ's belief that HR "should have been" authorized (see, i.e., ALJD 17:43-

provisions of Respondent's Enforcement Policy (GCX 36 (AP 5-9)).

In this portion of his Decision the ALJ also relies on the CDPH "assessment" "that no breach occurred." ALJD 20:33-35. The "assessment" being referred to here by the ALJ is apparently the tail portion of the notes included in GCX 84 as page 5, which exhibit also includes the CDPH's official Form 2567 report finding that there were "no deficiencies" in the manner in which Respondent addressed Magsino's and DeSantiago's privacy violations (AP 13-15). However, the ALJ's mischaracterization of and reliance upon this "assessment" is improper and cannot support the ALJ's conclusions inasmuch as CDPH only has jurisdiction to determine whether Respondent itself violated the requirements of its license, and has no jurisdiction over Magsino's license or whether his conduct violated Respondent's policies and procedures. See, i.e., T 811-812. Additionally, the entirety of the notes demonstrate that the "no breach actually occurred" statement cannot be viewed as a valid conclusion regarding Magsino's privacy violations. The entire conclusion set forth the notes states "No breach actually occurred, no information was shared. It was for personal use in defending themselves (Internal P&P breach)." GCX 84 (AP 15). As such, the notes recognize that the privacy violations committed by Magsino were for his "personal use," not a use permitted by HIPAA. See, i.e., 45 CFR § 164.502(a)(1)(ii). Moreover, the notes recognize that the privacy violations were an "Internal P&P breach." Accordingly, these notes actually support the determination that Magsino's privacy violations violated HIPAA. See, i.e, 45 CFR §§ 164.306(a)(1), (3), (4) and (c)-(d), 164.308, 164.316, 164.514(d), 164.530(c) and (i) [HIPAA requires creation, implementation and enforcement of policies and procedures for protecting PHI], 45 CFR § 160.402 [possible fines for violation of HIPAA by workforce members]. The record as a whole further supports a determination that Magsino's privacy violations violated California state law and placed the Hospital in jeopardy of being fined by the CDPH for those violations. See, i.e., Tit. 22, Cal. Admin. Code § 70707 [prohibiting hospitals and hospital personnel from disclosing patient

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47, 20:46-49) is therefore not relevant other than as another indicator of the ALJ's bias.

medical records to anyone not directly involved in providing patient care without patient's written permission]; Cal. Health & Safety Code §§ 1280.15 [prohibiting unauthorized access to and use of patients' medical information and requiring hospital to report any such access or use to CDPH], 1280.15(j)(2) [incorporating "minimum necessary" standard of HIPAA by defining "unauthorized" as "access, review, or viewing of patient medical information without a direct need for medical diagnosis, treatment, or other lawful use], 1280.15(a) [violations of Health & Safety Code can result in administrative penalties of up to \$25,000].

The ALJ also committed error when he failed to dismiss the Magsino termination allegation based on Respondent's good faith belief that Magsino's privacy violations violated HIPAA and/or Respondent's policies (ALJD 21:2-31). In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense, only that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him. See *Yuker Construction*, 335 NLRB No. 28 (2001); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999); *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989). See also *Framan Mechanical Inc.*, 343 NLRB 408, 416-417 (2004); *McKesson Drug Co.*, 337 NLRB 935, 937 (2002), and cases cited at n.7; *Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993); *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978).

The record considered as a whole establishes that Ruggio reasonably believed Magsino's privacy violations violated HIPAA, placed the Hospital at risk of potential fines or other sanctions from the federal Office of Civil Rights and/or CDPH, and/or violated Respondent's privacy-related policies. Much of this evidence is undisputed (see, i.e., Section A(3) above), while other evidence is consistent with the entirety of the record as just explained. Moreover, for the reasons discussed at various portions of this brief above and below, the ALJ's rationales for finding that Magsino's privacy violations did not motivate Respondent's termination decision and therefore rejecting Respondent's "good faith belief" arguments (ALJD 21:10-31) are without

merit. In sum, there can be no reasonable dispute that Magsino's privacy violations and Magsino's conduct relating thereto motivated Respondent's decision to terminate Magsino's employment, not his Union activities.

c. **The ALJ's Finding Of Disparate Treatment Is Contrary To The Evidence**

Apparently recognizing the shaky foundation for his "pretext" findings, the ALJ also finds that Magsino was treated in a disparate manner because DeSantiago was not discharged even though she, according to the ALJ, "also accessed and copied a patient's medical record" and other employees who, again according to the ALJ, "actually breached patient confidentiality by, for example, leaving a patient's medical record in a restroom" were not discharged. ALJD 21:33-38. The ALJ also finds that Magsino was treated in a disparate manner because Magsino's privacy violations should have been placed into "Level I" under Respondent's Enforcement Policy, resulting in a verbal warning. ALJD 21:40-22:23. In doing so, the ALJ builds off his earlier determination that Magsino's violations were not "intentional" (see ALJD 17:17-18 ["there is no credible evidence that Magsino's alleged breach was intentional in the sense that he knowingly violated HIPAA"]) and finds that Magsino's violations "at most" "stemmed from a lack of proper education," then claims that by independently judging Magsino's violations and applying Respondent's Enforcement Policy to his judgment he is not "substituting my judgment for that of Chino Valley's concerning the type of discipline that should have more fairly been given to Magsino." ALJD 22:6-8, 14-16. The ALJ's analysis cannot withstand even limited scrutiny.

First, Magsino's actions in printing and copying portions of the patient's medical record, as well as his removal of at least one copy of the medical record (which as noted contained PHI that had not been de-identified) from the facility, keeping the medical record unsecured in his backpack and disclosing a copy of the medical record to HR, were all purposeful and deliberate actions by Magsino.<sup>23</sup> Magsino's privacy violations were also committed outside the scope of

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<sup>23</sup> The ALJ's statement that "Magsino had been careful to redact the patient's name" from the

his job duties and without permission from the patient and, as noted, involved the disclosure of the medical record to HR. In contrast, DeSantiago only accessed the patient's record and printed it on one occasion without permission to do so, then immediately shredded the record.<sup>24</sup> Moreover, all of the HIPAA violations involving the other employees were unintentional and occurred in the normal course of their job duties. See, i.e., T 898-900, 941; GCX 40, 86, 88, 92, 137, 140 [letters to CDPH and employee counseling statements refer to actions as "accidental," "unintentional," "clerical error," "mistaken," etc.]. Given the different circumstances involved, the ALJ's reliance on the discipline assessed against Magsino on the one hand and DeSantiago and other employees on the other as showing disparate treatment is clearly without merit. See, i.e., *Kentucky River Medical Center*, 355 NLRB No. 129, slip. op. at 1, 3 (2010); *Blue Diamond Growers*, 353 NLRB 50 n.4, 55 (2008); *Piner's Napa Ambulance Service*, 352 NLRB 609 n.1 (2008); *Park 'N Fly, Inc.*, 349 NLRB 1, 5 (2007).<sup>25</sup> See also, i.e., *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992); *Rhode v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981); *Fong v. American Airlines, Inc.*, 626 F.2d 759, 762 (9th Cir. 1980).

Second, given Magsino's purposeful conduct described above, including the disclosure of the patient's medical record to HR, Ruggio reasonably concluded that Magsino's violations should be categorized as Category III violations. See, i.e., T 871-873; GCX 148 (AP 18).

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copies of the medical record he made and subsequently distributed to HR (ALJD 22:11-14) again illustrates the ALJ's failure to appreciate HIPAA's requirements and what constitutes PHI under HIPAA. See, i.e., subsection (b) above.

<sup>24</sup> As previously noted, neither Magsino nor DeSantiago were disciplined for accessing the patient's medical record. There is also no evidence to support the ALJ's statement that DeSantiago "copied" the medical record. The ALJ's contrary statements quoted above again illustrate the ALJ's failure to properly apply the record when the record does not support his conclusions.

<sup>25</sup> Both *Blue Diamond* and *Piner's Napa Ambulance* were two-member decisions, with *Blue Diamond* being affirmed by the Ninth Circuit in response to the charging party union's petition for review (2010 U.S. App. LEXIS 1735). See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010).

Ruggio's conclusion is also supported by the language of the Policy itself (see, i.e., GCX 36 (AP 9) [example of Category III violation includes "disclosure of confidential patient information"]) as well as the manner in which the Policy was applied to DeSantiago's violation and the unintentional violations committed by other employees that occurred in the normal course of their job duties as discussed above. Ruggio's conclusion is also supported by the practices of California hospitals generally. See, i.e., RX 92 (AP 37-41); T 1025-1028, 1036-1040, 1042.<sup>26</sup> Accordingly, the ALJ's determinations regarding how he would analyze Magsino's privacy violations and how Respondent's Enforcement Policy should be applied is exactly the type of second-guessing of Respondent's business judgment that is routinely condemned by the Board and the reviewing courts. See, i.e., *Detroit Paneling Systems*, 330 NLRB 1170, 1171 n.6 (2000); *Allied Mechanical*, 349 NLRB 1327, 1359 n.18 (2007); *National Steel Supply, Inc.*, 344 NLRB 973, 981 (2005); *Framan Mechanical*, 343 NLRB at 416-417.

Additionally, the ALJ's conclusion that the Hospital terminated Magsino because of his union activities and only seized on his privacy violations as a smokescreen for doing so is totally belied by the Hospital's action in **not** terminating Magsino based on the substandard care he provided to the patient at issue. Had the Hospital been looking for an excuse to terminate Magsino due to his union activities, it would have seized upon his failure to provide appropriate care to the patient in the first place and terminated him at that time. Instead Ruggio decided to provide Magsino with another chance and only gave him a final written warning, *a disciplinary action that the General Counsel does not even challenge as an unfair labor practice!* The ALJ has not even attempted to explain why the Hospital suddenly developed unlawful union animus towards Magsino during the three weeks between the warning for the patient care issue and the

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<sup>26</sup> To the extent that Magsino's testimony can be reasonably interpreted as suggesting that Gilliatt authorized Magsino to commit the privacy violations for which he was terminated, Gilliatt credibly testified otherwise. Moreover, and more importantly, Ruggio was under no obligation to credit Magsino's self-interested explanations given during her investigation over Gilliatt's denial that she gave Magsino permission to print or copy any portions of the patient's record, or to submit PHI to Human Resources that had not been de-identified.

termination for the privacy violations. For this additional reason the ALJ's determination that Magsino was unlawfully terminated must be set aside.

**B. Gonzalez's Statement To Lina Was Not An Unlawful Threat**

**1. An Employer Has The Right To Oppose Union Organizing In Communications To Its Employees**

Section 8(c) authorizes an employer to communicate to its employees the employer's views on unionism generally or about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." See, i.e., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1968); *Livingston Shirt Corp.*, 107 NLRB 400, 405 (1953); *NLRB v. Tommy's Spanish Foods, Inc.*, 463 F.2d 116 (9th Cir. 1972). An employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union so long as its communications do not contain unlawful threats of retaliation. See, i.e., *Langdale Forest Products Co.*, 335 NLRB 602 (2001); *Eckert Fire Protection, Inc.*, 332 NLRB 198, 203 (2000); *L.S.F. Transp., Inc.*, 330 NLRB 1054, 1066 (2000), enF'd. 282 F.3d 972 (7th Cir. 2002). The Board has applied these principals in a number of cases to determine that an employer does not commit an unfair labor practice when it advises employees that benefits they enjoy without union representation could be modified as the result of collective bargaining, or that the relationship between management and employees is altered when the employees select a union to be their representative. See, i.e., *United Rentals, Inc.*, 349 NLRB 190, 191 (2007); *Naomi Knitting Plant*, 328 NLRB 1279, 1291 (1999); *The Hospital of Good Samaritan*, 315 NLRB 794, 806 (1994); *Tri-Cast, Inc.*, 274 NLRB 377, 377 (1985); *Textron, Inc.*, 176 NLRB 377 (1969).

Moreover, when assessing whether statements made by an employer during the course of a preelection campaign constitute unlawful "threats," those statements must be reviewed in the context provided by other statements made by the employer during the course of the campaign. It is impermissible to focus on an isolated statement and determine that the statement violated Section 8(a)(1) if the employer's campaign communications considered as a whole demonstrate

that the employer was simply expressing its opinion on the possible consequences of union representation. See, i.e., *Southern Frozen Foods, Inc.* 2020 NLRB 753, 176 (1973); *Jacob Brenner Co.*, 160 NLRB 131 (1966).<sup>27</sup>

## **2. Gonzalez's Statements To Lina Were Not Unlawful Threats**

The statements Lina testified to having been made to her by Gonzalez (see T 38) cannot support the finding of a violation, even when combined with Gonzalez's action in handing her Respondent's "Protect Your Flexibility" leaflet (GCX 56 (AP 10)) at the same time. At most, Gonzalez was simply reminding Lina of the benefits enjoyed by RNs without union representation and that those benefits might be modified or eliminated as the result of collective bargaining negotiations, the themes expressed not only in the Protect Your Flexibility leaflet but also in Respondent's other campaign literature. See, i.e., GCX 6 (AP 1); RX 79-80 (AP 32-33), 83-84 (AP 32-33). Moreover, even without the context provided by those leaflets, which context was ignored by the ALJ when analyzing all of the various "threats" alleged in the complaint, Gonzalez's statements and other actions testified to Lina simply too vague and ambiguous to support a Section 8(a)(1) threat of the loss of a benefit. See, i.e., *Salvation Army Residence*, 293 NLRB 944, 965 (1989). This is particularly so inasmuch as Gonzalez did not predict specific adverse consequences and did not indicate that the Respondent would take any action at all, retaliatory or otherwise, as a result of unionization. Absent a statement expressly predicting such an adverse consequence, there can be no violation of Section 8(a)(1); rather, the statement is protected under Section 8(c). See, i.e., *Winkle Bus Co., Inc.*, 347 NLRB 1203, n.15 (2006).<sup>28</sup> This allegation must be dismissed.

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<sup>27</sup> The discussion set forth in this Subsection 1, hereinafter cited as Section B(1) or Part IV(B)(1), applies to all of the unlawful threat allegations set forth in General Counsel's complaint.

<sup>28</sup> As also noted above, a statement that the relationship changes between management and employees if a union wins a representation election is a truism that cannot be an unfair labor practice; moreover, it is a truism that is commonly known to employees, and was most certainly known to Lina (see, i.e., T 63-64).

C. **The ALJ's Finding That Buesching Unlawfully Threatened Employees That They Could Be Fired For Striking Is Not Supported By The Record**

It is well established that when employees engage in an economic strike, they may be permanently replaced. *The Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). The Board has also consistently found that an employer does not violate the Act by truthfully informing employees of this possibility. See, i.e., *Mississippi Extended Care Center Inc. d/b/a Care Inc., Colliersville*, 202 NLRB 1065 (1973). An employer may also address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their *Laidlaw* rights. *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982).

Initially, Respondent submits that Buesching's testimony should have been credited over that of Metheny. Buesching is an experienced labor consultant who well knows that the types of statements attributed to her are unlawful. T 1045-1047. Accordingly, it is highly unlikely that Buesching would have made the comments testified to by Metheny. However, the manner in which Metheny recited her entire story even though it was not responsive to General Counsel's question "Who is Robin?" (see T 569) indicates a witness who has memorized a script and is anxious to recite her lines, not someone who is making a sincere effort to recollect events in response to specific questions. Metheny's credibility is also compromised by the manner in which she first denied that she was a Union officer or had received monies from the Union, then gave unconvincing testimony that the monies were reimbursement for expenses.<sup>29</sup> T 577-579. Similarly, Metheny changed her testimony during cross to admit that Buesching actually said strikers could be "replaced," not "fired" as she had testified on direct. T 584-585. Other examples of Metheny's lack of credibility include her denying that she received Hospital campaign literature explaining an employer's right to replace economic strikers, her inconsistent testimony regarding what was said by Buesching and Gabo and which statements were made by

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<sup>29</sup> It should be noted that the Union's LM-2 categorizes the payment to Metheny as "Gross Salary," not "Allowances" or "Disbursements for Official Business."

Buesching and which statements were made by Gabo, and her inability to recall when Silva became her manager as contrasted with her instant recall of the exact date she first saw Buesching. See, i.e., T 569, 580, 582, 586. Given the record considered as a whole, Metheny's lack of credibility, as well as the failure of General Counsel to call as witnesses the RNs to whom the alleged unlawful "threats" were made and Respondent's campaign flyer specifically explaining the legal ramifications of an economic strike including the employer's right to permanently replace striking employees (RX 81 (AP 34)), the ALJ should have dismissed this allegation, and the Board should do so now.

**D. Richards' Statements During Her Campaign Presentation Were Not Unlawful**

The ALJ's discussion of the allegation relating to Richards' campaign presentations concludes with the following:

As indicated, Richards stated that employees might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union. By doing so Chino Valley violated Section 8(a)1). *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at p. 6 (2011); *Gissel Packing*, supra.

ALJD 5:4-7. Advising employees they "might" lose benefits they currently enjoy if they choose to be represented by a union is not unlawful. See Section B(1) above. This point is also reinforced by *Flagstaff Medical Center*, wherein the Board found a violation based on the employer's statement that employees "would" lose a benefit if the union was selected. *Id.*, slip op. at p. 6 ["Rather, [supervisor] Dominguez relayed to employees Director Drake's *definitive* statement that, if the Union came in, employees' scheduling flexibility *would* be lost. Such a comment has a reasonable tendency to interfere with employees' union activities, and violates Section 8(a)(1)" (emphasis added)]. The ALJ's citation to *Flagstaff Medical Center* in support of his unfair labor practice finding based on Richards' statement that employees "might" lose current benefits shows, to paraphrase the ALJ, "the depth of the fabrications that [the ALJ] created to justify [his unfair labor practice findings]" (ALJD 19:43-44).

**E. The Record Does Not Support The ALJ's Finding That Lally Unlawfully Threatened And Interrogated Employees Before The Election**

The ALJ concluded that Lally unlawfully interrogated Roncesvalles by his statements to

her regarding the flyer in which her picture was displayed. ALJD 5:51-6:13. The context in which these statements were made does not support the ALJ's determination. See, i.e., *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984). First, the signs being held by the employees when their photos were taken were in fact blank, and the Union withdrew the poster in response to complaints by employees and Respondent concerning the Union's manipulation of the photos displayed on the poster. T 1051-1052. Second, Roncesvalles' picture was in fact displayed on the poster, presumably with her permission. Additionally, there is no evidence that Lally asked Roncesvalles whether she distributed flyers, what she thought of the flyers, or made any inquiry as to Roncesvalles' activities with respect to the flyers, her involvement in preparing or distributing them, or her support for the Union. Moreover, the ALJ's finding that "Roncesvalles faced Lally and Gilliatt alone" (ALJD 6:10-11) is not supported by Roncesvalles's testimony and appears to have been fabricated by the ALJ to support his conclusion. See, i.e., T 126-127 [Roncesvalles does not identify Gilliatt as being present and also testifies that Lally was seated alone when she spoke to him].<sup>30</sup> At most, Lally's use of the flyer was simply an opportunity to engage an employee in a completely lawful attempt to explain why he felt unionization was wrong for Respondent. The interrogation allegation must be dismissed. See, i.e., *Baptist Medical Center/Health Midwest*, 338 NLRB 346 (2002).

Additionally, Lally's statements that there had been no layoffs and that he wanted her to vote "No" because there was a good working relationship without the Union simply cannot be considered an "implicit" threat that "Lally's good working relationship with Roncesvalles *would* end" and that Respondent therefore "impliedly threaten[ed] employees with layoff if they supported a Union," as found by the ALJ (ALJD 6:23-26 (emphasis added)). At most, Lally was only reiterating Respondent's campaign messaging that the relationship between employees and management changes when employees select union representation, which also results in the union being involved in setting terms and conditions of employment instead of employees doing

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<sup>30</sup> The ALJ's characterization of Lally's comments as "belittling" the flyer (ALJD 5:26-28) is also unsupported by Roncesvalles's testimony. See, i.e., T 162.

so directly themselves. Lally's statements did not violate the Act. See, i.e., Section B(1) above; see also *Capital Electric Power Association*, 171 NLRB 262, 267 (1968).

**F. The Record Does Not Support The ALJ's Finding That Lally, After The Election, Unlawfully Threatened Employees And Implied That Their Protected Activities Were Under Surveillance**

Although the ALJ characterizes the alleged statements made by Lally to Magsino (see Part II(E)(8) above) as an unlawful threat of termination based on Magsino's union activity, Magsino never did receive any discipline, let alone termination, for solicitation. Additionally, Magsino's testimony was not credible, as discussed above and below. Moreover, even if Lally did make the statements found by the ALJ, there is no violation because Lally's comment related to soliciting during "work hours," which is legal and consistent with Board law. *Our Way, Inc.*, 268 NLRB 394 (1993); *T.R.W., Inc.*, 257 NLRB 442 (1981).

The ALJ also found that Lally's statement to Magsino that he had been observed on camera "talking to a group of nurses during work hours and organizing something" gave Magsino the impression that his union activity was under surveillance and was an unfair labor practice. ALJD 6:34-35, 49-52. However, Magsino did not reference "organizing" during his initial recitation of the incident, doing so only when prompted by General Counsel. T 243. Moreover, when asked to recount this conversation on cross, Magsino did not mention anything about being seen on camera. T 301. Magsino also admitted that Lally never identified who "they" were. *Id.* The ALJ should have discredited Magsino and dismissed the complaint's "impression of surveillance" allegation for lack of evidence.

Moreover, Board law does not support the ALJ's determination that the statements as found by the ALJ implied unlawful surveillance. "Not all instances where employer representatives are at or in the vicinity of the union activities of their subordinate employees amount to unlawful surveillance." *P.V.M.I. Associates d/b/a King David Center*, 328 NLRB 1141, 1142 (1999); *Gossen Company*, 254 NLRB 339, 353 (1981). For example, the Board has not prohibited surveillance of employees at the workplace that coincides with organizing activity if instituted for and justified by legitimate concerns for security, product integrity, or quality

control. *Lechmere, Inc.*, 295 NLRB 92 (1989) [installation of security camera on retail store did not violate the Act, even though protected concerted activity was recorded, where general security purposes justified its presence]. Moreover, the Board has long held that an employer's observation of open union activity on or near its property does not constitute unlawful surveillance. *Impact Industries*, 285 NLRB 5 n.2 (1987); *Hoschton Garment Co.*, 279 NLRB 565 (1986). Here the Hospital's ambulance bay is a very busy and open area monitored by security cameras for legitimate medical and security purposes. As Magsino apparently was engaged in solicitation during working hours in the ambulance bay, the fact that his activities were recorded on a surveillance camera, and Lally's alleged statement to Magsino confirming same, do not support a Section 8(a)(1) violation.

**G. The Record Does Not Support The ALJ's Finding That Hower, After The Election, Unlawfully Threatened Employees With A Loss Of Benefits Because They Supported The Union**

In response to a question from General Counsel asking if he ever had any conversations with Hower about benefits, Clavano testified "she did mention about having no more vacations no more than two weeks." T 82-83. Clavano also testified that there were other employees present when Hower "mentioned" vacations but General Counsel did not call any of those employees to corroborate Clavano's testimony. For her part, Hower testified that she never told Clavano that employees would only be able to take two week vacations or had any discussions with him or other employees about vacation policies. T 608. Moreover, there is no evidence that Respondent ever changed its vacation policy, or even considered doing so, after the election, and it is also undisputed that Hower had no authority to change Respondent's vacation policy herself.

Given the record in this regard, the ALJ should have dismissed the allegation of Paragraph 22 because it is not supported by a preponderance of the evidence in the record. Instead, the ALJ falsely found that Hower "announced" a change in vacation policy, credited Clavano's version based on the ALJ's false finding that Hower "did not deny making those statements but instead testified that she could not recall making them," and concluded that by Hower's "announcement" Respondent had "inform[ed] employees that they could no longer take

vacations longer than 2 weeks because the employees had selected the Union to represent them” because “employees would reasonably link the announcement with their selection of the Union” inasmuch as Respondent had “explicitly threatened employees that they would no longer be able to take month long vacations if they selected the Union.” ALJD 7:5-35. The ALJ’s findings and conclusions are both contrary to the evidence and again demonstrate the ALJ’s fabrications made in support of his conclusions. See, i.e., T 608 [Hower states she did not make the statements attributed to her by Clavano]; Part II(G)(10) above [explaining absence of evidence that Respondent/Gonzalez “explicitly threatened employees” that vacations would be shortened if the Union won the election and no evidence that Hower “announced” anything].

**H. The Record Does Not Support The ALJ’s Determination That Casas Implied That Employees’ Union Activities Were Under Surveillance**

The discussion presented above relating to the alleged statement by Hower also applies to the alleged statement by Casas. General Counsel presented no evidence corroborating Clavano’s testimony that Casas made the statement quoted by the ALJ in his Decision (ALJD 7:41) even though the alleged statement was directed to other employees in addition to Clavano. T 111. Additionally, it makes no sense to believe that Casas would have made such a statement inasmuch as she was within earshot of Clavano and the other RNs and therefore would not have needed to ask them what they were talking about. And the ALD’s determination that employees would “reasonably make the connection [of Casas’s alleged statement] to their union activities” is not supported by the credible evidence.

**I. The Record Does Not Support The ALJ’s Findings That Reddy Made Statements Violating Section 8(a)(1)**

As discussed in Part II(E)(11) above, General Counsel’s witnesses were consistently inconsistent. General Counsel had seven employees testify. Of these seven, only three testified that Reddy stated that he was going to start “strictly” enforcing rules and policies (Clavano, Magsino and Metheny). One General Counsel witness testified that Reddy stated he was going to begin enforcing the tardiness policy when it hadn’t been enforced before (DeSantiago). One witness testified at one point that Reddy stated he was going to implement the tardiness policy

and instructed everyone to follow the rules (Becani). Two witnesses stated that Reddy said he was simply going to enforce the rules (Lina and Hilvano). Only one witness (Clavano) testified that Reddy stated he was going to ignore employees' *Weingarten* rights and discipline employees without union representatives being present. And only two witnesses testified that Reddy instructed employees not to go to the media or other third parties but, instead, to bring concerns to management (Magsino and DeSantiago). Moreover, and significantly, none of General Counsel's witnesses could identify the other RNs who were present at the meetings they attended. While some could identify one or two other RNs who were present, even that testimony was contradictory, both with respect to who was present and what was said. Additionally, none of the General Counsel's witnesses supported all of the complaint's allegations relating to Reddy. See, i.e., T 42, 68-70, 79-81, 107-109, 183-185, 200-201, 203-205, 208-219, 222-223, 246-247, 306-310, 400-402, 442-447, 572-573, 589-593.

In contrast, the two witnesses presented by Respondent, Ruggio and Dhuper, were credibly consistent. Ruggio testified that Reddy stated at the meeting that the status quo would remain and that nothing would change in the enforcement of existing policies. Ruggio further testified that Reddy told employees that the Hospital would abide by the applicable law and regulations in place now that the Union had won the election. Dhuper testified that Reddy stated that existing policies would be followed just as they had been in the past. Both Ruggio and Dhuper also testified that Reddy asked employees not to speak to newspapers or the media.<sup>31</sup> Ruggio's and Dhuper's consistent testimony establishes that Reddy's statements were fully compliant with the rule established in *Bryant and Stratton Business Institute v. NLRB*, 140 F.3d 169 (2nd Cir. 1998), recognizing that an employer is required to maintain the status quo following a union win in contested election.

The ALJ attempts to avoid the inconsistent testimony of General Counsel's witnesses by

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<sup>31</sup> The fact that Ruggio and Dhuper readily admitted to the statements made by Reddy regarding not speaking to the media enhances their credibility inasmuch as they did so even though such statements by Reddy at least arguably violate Section 8(a)(1).

basing his “findings” on a “composite” of their testimony in which the ALJ cherry picks among snippets of testimony from different witnesses to weave “facts” to support his unfair labor practice findings. See, i.e., ALJD 8:4-9:6. The ALJ not only erred in relying on his selective “composite” of testimony from General Counsel’s witnesses, he finds “facts” that were never testified to by any of those witnesses. See, i.e., ALJD 8:15-15, 18-19 [findings that Reddy said Union used Charge Nurses to “intimidate” staff, “blamed [the] Union” for damaging Gilliatt’s car and accused “someone” of being “negligent in the emergency room”]. Given the record taken as a whole, independent of the biased filter applied by the ALJ, the allegations of the complaint relating to Reddy must be dismissed.

**J. Respondent Did Not Violate Section 8(a)(1) By Serving Subpoenas On Employees And Union Representatives During The Post-Election Objections Process**

As discussed more fully above in Part II(C) and (E)(13) above, the subpoenas at issue were served by Respondent in order to obtain evidence supporting its objections alleging that the Union’s 2010 election victory was tainted by the Union’s utilization of Charge Nurses and Relief Charge Nurses in support of its organizing campaign, including their activities in soliciting union authorization cards. The information sought by the specific items alleged in the complaint and upon which the ALJ based his unfair labor practice findings sought evidence that would have potentially supported Respondent’s objections. Moreover, the subpoenas specifically advised the recipients that they need only produce responsive documents to the administrative law judge presiding over the hearing and that the judge would determine which documents would be produced to Respondent. Finally, certain documents produced in response to the subpoenas were in fact ordered to be provided to Respondent by Judge Parke. Despite these facts, and without differentiating among the specific requests placed at issue by General Counsel’s complaint, the ALJ found that Respondent “sought information that, even under broad discovery rules, was not related to any issue in the proceeding” and concluded that “[b]y serving subpoenas on employees and unions that request information about employees’ union activities, under circumstances where that information is not related to any issue in the legal proceeding, Chino Valley

violated Section 8(a)(1).” ALJD 10:10-11, 18-21.

The ALJ’s finding that the requests did not seek relevant evidence is simply not supported by the record considered as a whole; indeed, authorization cards and other documents sought by the subpoenas were deemed both relevant and non-privileged by Judge Parke and were ordered to be provided to Respondent by Judge Parke. The ALJ’s additional rationale that the subpoenas were unlawful despite the language in the requests advising that documents could be submitted to the judge for *in camera* inspection because of the “possibility” that employees might still feel compelled to produce documents directly to Respondent, and “antiunion employees might be quite willing to share with Chino Valley the prounion activities of other employees,” finds no support in the language of the subpoenas themselves nor under Board law, which does not prohibit employees, be they “antiunion” or “prounion,” from providing information to their employer about organizing activities. Similarly, the ALJ’s focus on the privilege given by the Board to authorization cards signed by employees (see, i.e., ALJD 9:42-51) ignores the fact that the General Counsel, with Board approval, routinely discloses signed authorization cards when doing so serves the interests of General Counsel. See, i.e., *Gissel*.

Additionally, even if the Board should itself determine that one or more of the requests at issue is overbroad, Respondent cannot be expected to know with precision what limits would be set by the judge presiding over the objections hearing, much less what limits might be ultimately be found to be appropriate by the Board or a reviewing court. Accordingly, the Petition Clause of the First Amendment insulates Respondent’s subpoena requests from violating Section 8(a)(1). See, i.e., *B.E.&K. Construction Company*, 351 NLRB 451 (2007). The ALJ erred in unduly limiting *BE&K* and refusing to apply its principles to this case. See, i.e., ALJD 10:1-19. To decide otherwise would impermissibly chill Respondent’s exercise of its rights under the First Amendment, and would impermissibly elevate the provisions of the Act over those of the U.S. Constitution.

**K. The Employer Did Not Unlawfully Modify Its Attendance Policies After The Election**

**1. The Applicable Legal Standards**

In accordance with Section 10(b) of the Act, General Counsel has the obligation to prove all elements of an unfair labor practice alleged in a complaint by a preponderance of the evidence. *Western Tug & Barge Corp.*, 207 NLRB 163 fn. 1 (1973). When the complaint alleges an unlawful unilateral change under Section 8(a)(5), General Counsel must prove (1) an established past practice or condition of employment; (2) a change to the past practice or condition of employment; and (3) that the change has a material, substantial, and significant impact on the terms and conditions of employment of unit employees. *Toyota of Berkley*, 306 NLRB 893 (1992); *Haddon Craftsman, Inc.*, 297 NLRB 462 (1989); *UNC Nuclear Industries*, 268 NLRB 841, 848 (1984).<sup>32</sup> Moreover, General Counsel's burden in showing an established past practice is a heavy one. See, i.e., *Dow Jones & Co., Inc.*, 318 NLRB 574, 578-579 (1995); *Acme Die Casting v. NLRB*, 26 F.3d 162, 165 (D.C. Cir. 1994); *International Brotherhood of Electrical Workers Local 1466 v. NLRB*, 795 F.2d 150, 153 (D.C. Cir. 1986); *Local 777 v. NLRB*, 603 F.2d 862, 889 (D.C. Cir. 1979). Accordingly, evidence of sporadic instances in which certain conduct occurred is not sufficient to establish a "past practice" subject to protection under Section 8(a)(5). See, i.e., *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003); *Washoe Medical Center, Inc.*, 337 NLRB 202, 207-208 (2001); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *Whirlpool Corporation*, 281 NLRB 17 fn. 1 (1986); *Kal-Die Casting Corp.*, 221 NLRB 1068 fn. 1 (1975).

In applying these principles, the Board has repeatedly found that if the alleged "change" simply involves the employer exercising its prerogatives under established policy, the change is

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<sup>32</sup> Respondent denies that the Union is the Section 9(a) representative of any of its employees, and denies all Section 8(a)(5) allegations of the complaint on that basis, including the allegations of Paragraph 9. Respondent's arguments relating to Paragraphs 10-14 of the complaint are not intended to be and should not be interpreted as a waiver of Respondent's position that the results of the April 2010 election, and therefore the Board's certification issued in Case 31-RC-8795, are invalid.

not an unfair labor practice. *Unified Creative Programs, Inc.*, 340 NLRB 1323 (2003); *Mitchellance, Inc.*, 321 NLRB 191 (1996); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1994); *Civil Service Employees Assn.*, 311 NLRB 6, 8 (1993); *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992). See also *Louisiana-Pacific Corporation*, 256 NLRB 796, 798 (1981); *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1575-1577 (1965). “There arises no obligation to bargain concerning changes which depart in an insignificant manner from established practice while leaving the practice intact” (*UNC Nuclear Industries*, 268 NLRB at 847).

Moreover, “not all unilateral changes in ... terms and conditions of employment constitute unfair labor practices.” *Crittenton Hospital*, 342 NLRB 686 (2004). For a change to impose a bargaining obligation, it “must be a ‘material, substantial, and significant’ one.” *Id.* at 686. In order for the change to be “material, substantial and significant,” it must have a “real impact” on, or caused a “significant detriment” to, the employees or their working conditions. *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001). See also *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005); *Peerless Food Products*, 236 NLRB 161 (1978). Instructive in this regard is the following language from *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976), wherein the Board addressed a unilateral change allegation relating to the employer’s implementation of certain time clock procedures:

In the circumstances of this case, it is clear that while the change to a mechanical procedure for recording working time marked a departure from the previous practice, more importantly the rule itself remained intact. And to those employees who had conscientiously followed this rule in normally marking their timecards, the new time clock procedure would have been inconsequential.

*Id.* See also *Mitchellance, Inc.*, 321 NLRB 191; *Litton Systems*, 300 NLRB 324, 331-332 (1990); *Trading Port, Inc.*, 224 NLRB 980, 983-84 (1976); *Murphy Oil USA, Inc.*, 286 NLRB 1039, 1041 (1987); *St. John’s Hospital*, 281 NLRB 1163, 1168 (1986).

Additionally, once a labor organization has notice of a change in working conditions, it is required to request that the employer bargain over the change in order to perfect the employer’s obligation to do so. *American Diamond Tool*, 306 NLRB 570 (1992); *Kentron of Hawaii*, 214

NLRB 834, 835 (1974); see *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297-298 (1939). If, after receiving actual notice of a change, the union does not thereafter act with due diligence in requesting bargaining, it has waived its right to bargain over the change, be it contemplated or executed, and the employer cannot be found to have violated its obligations under Section 8(a)(5) of the Act. See, e.g., *WPIX, Inc.*, 299 NLRB 525 (1990); *Emhart Industries*, 297 NLRB 215 (1989).

It is also clear under Board law that filing an unfair labor practice does not constitute a request to bargain. *The Boeing Co.*, 337 NLRB 758, 763 (2002); *Citizens Bank of Willmar*, 245 NLRB 389 (1979). As stated by the Board in *American Diamond Tool*, “In our view, the Union could not accept such unilateral conduct without challenge at the bargaining table and thereafter seek to assert a bargaining right merely by the filing of an unfair labor practice charge” (*id.*, 306 NLRB at 571).

**2. Respondent Did Not Modify Its Mandatory Meeting Practices Or Policies After The Election**

First, it is not disputed that Respondent’s written attendance policies were not modified following the election. Moreover, the testimony of General Counsel’s witnesses relating to the alleged change in “practice” following the election was insufficient to support the allegations of the complaint. See, i.e., T 145-146 [Roncesvalles repeatedly responds “I missed a couple” when asked by General Counsel whether she missed any mandatory meetings during different periods of time prior to April 2010], 40-41 [Lina testifies she missed “all or most of them” prior to April 2010]. Moreover, their testimony on direct broke down during cross examination. For example, Roncesvalles gave shifting testimony regarding whether or not she told Gilliatt in advance that she would miss the meeting for which she received a verbal warning, which testimony was also contrary to the notation she made on the counseling notice she received and her Board affidavit. T 157-161; GCX 25. Similarly, Lina struggled during cross to keep her story straight, resulted in testimony unworthy of belief, particularly when compared to the notations she made on her counseling statement and Gilliatt’s testimony. See, i.e, T 58-61, 66, 740-741; GCX 13. Thus,

while the record arguably establishes that employees were required to notify their manager in advance before they missed a mandatory meeting in order to be excused, the preponderance of credible evidence does not support General Counsel's apparent contention that no such notice was required. Accordingly, when Gilliatt issued counseling notices to employees (including non-bargaining unit RNs) who missed the meeting, she did not deviate from established practice.

Additionally, even if the record supported General Counsel's theory that RNs and others had not been issued counseling notices in the past if they missed mandatory meetings without being excused from the meetings, which it does not, there is no evidence that this change involves anything more than Respondent exercising its prerogatives under established policy. See, i.e., *Unified Creative Programs; Civil Service Employees Assn.* This is particularly true here as General Counsel has not established that the alleged "change" has resulted in a "material, substantial, and significant change" in employees' terms and conditions of employment. As noted, Respondent's policy has not changed and employees who have adhered to the policy in the past have not been impacted by the alleged "change."<sup>33</sup> Additionally, the receipt of a verbal counseling notice does not have a "substantial and material impact" on employees; in fact, it is not even considered a disciplinary notice under the Hospital's counseling policy. See, i.e., RX 88 [Employee Handbook provisions referencing verbal and written notices as not being required before discipline is imposed and differentiating between performance counseling and corrective action].<sup>34</sup>

Finally, General Counsel presented no evidence that the Union ever requested bargaining over the alleged change, even though it was certainly aware of the counseling notices that were

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<sup>33</sup> The replacement of Gonzalez by Gilliatt as the ED Director is akin to the implementation of a more efficient system of timekeeping as involved in *Rust Craft Broadcasting* and the reporting practice implemented in *Unified Creative Programs*. See also *Mitchellance, Inc.*, 321 NLRB at 192.

<sup>34</sup> The ALJ's erroneous findings relating to the reference in Magsino's termination notice to the verbal warning he previously received for tardiness is addressed in Section A above and does not support his finding that receipt of a verbal warning has a material impact on an employee's working conditions (see ALJD 24:43-46).

issued to its supporters. For this additional reason the allegations should be dismissed.

**3. Respondent Did Not Modify Its Tardiness Practices After The Election**

Respondent's tardiness policy and practices also have not changed since the April 2010 election. While General Counsel's witnesses testified to their "understanding" that employees were permitted to clock in up to 7 minutes late without being considered "tardy," the undisputable documentary evidence shows that the 7 minute "grace period" is a *payroll* timekeeping practice, not an excuse for employees to arrive late to work. See, i.e., T 829-830, 990-991, 997; RX 1, 45, 88. To the extent RNs (and other employees) did not receive counseling notices when they were tardy by less than 7 minutes at least twice in one month prior to the April election, their good fortune was caused by Gonzalez's lax supervision, not a practice adopted or condoned by Respondent. In fact, Gonzalez failed to issue tardy notices even when employees were *more than* 7 minutes late on two or more occasions during a month while he was the ED Director. See, i.e., GCX 90, 129 [Hilvano tardy more than 7 minutes on two or more occasions in August 2009, September 2009, October 2009 and November 2009], 131 [Magsino tardy more than 7 minutes on two or more occasions *every month* from June 2009 through March 2010 except November (presumably because he was on vacation that month)], 133 [DeSantiago tardy more than 7 minutes on two or more occasions in every month from June 2009 through January 2010 except December], 150 [RN Orona tardy more than 7 minutes on two or more occasions in July 2009, October 2009, November 2009 and December 2009], 151 [RN Sahagun tardy more than 7 minutes on two or more occasions in every month from June 2009 through March 2009]. Additionally, the record shows that some RNs have been tardy by more than 7 minutes on two or more occasions since April 2010 without receiving counseling notices (see, i.e., GCX 90, 163, 168), and other RNs have been late by *less than* 7 minutes on two or more occasions in a month during that period without receiving counseling notices (see, i.e., GCX 90, 129, 153-154, 156, 158, 163; RX 89-91). Accordingly, the record evidence does not show an "established practice" within the contemplation of the Board's jurisprudence in this area, much less a change in that practice.

Moreover, and as with the mandatory meeting allegation, General Counsel has not demonstrated that the “change” has had a “material, substantial and significant” impact on employees’ terms and conditions of employment. Those RNs who arrive for work by their reporting time have not been impacted by Respondent’s enforcement of its long-standing tardiness policy. Additionally, those RNs who have received counseling notices have also not been impacted by those notices inasmuch as such notices are not even considered to be “discipline” under the Hospital’s counseling policy and General Counsel has made no showing that receipt of the notices have resulted in a tangible impact on the working conditions of RNs as a whole, or even individual RNs. Finally, there is no evidence that the Union has ever requested to bargain over the alleged “change” to Respondent’s tardiness. The allegations of Paragraph 11 of the complaint should be dismissed notwithstanding the ALJ’s contrary conclusions (see ALJD 23:44-24:30, 25:1-8).

**4. The Alleged Attendance Changes Were Not Motivated By RNs’ Support For The Union**

General Counsel also failed to prove by a preponderance of the evidence that the counseling notices issued to RNs for failing to comply with Respondent’s attendance policy relating to mandatory meetings and tardiness were motivated by RNs’ activities in support of the Union. General Counsel’s theory, adopted by the ALJ, that everything that has happened at the Hospital since April 2 is because of the results of the election concluded on that day simply cannot be sustained. Instead, the evidence discussed above shows that RNs have received counseling notices because they have failed to report to work on time and/or failed to attend mandatory meetings, and because Gilliatt, unlike Gonzalez, enforces Respondent’s rules. The ALJ’s contrary findings (see, i.e., ALJD 24:34-48, 25:44-26:5) also ignores the fact that RNs have received counseling notices for reasons independent of missing mandatory meetings or reporting to work after the start of their shifts but within the 7 minute “grace period” subsequent to the April 2010 election. See, i.e., GCX 16 [Hilvano], 23 [Roncesvalles], 58 [Aquino], 109 [DeSantiago], 132 [Becani], 141 [Tran], 151 [Sahagun], 158 [Clyburn], 168 [Sanders]; RX 77.

Additionally, RNs are not the only employees who have received counseling notices since the election; so have employees outside of the bargaining unit. See, i.e., GCX 90; RX 77.

Finally, even an action taken against an employee that is motivated by the employee's union activities is not unlawful where that action has no tangible impact on the employee's terms and conditions of employment. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1327 (2005). As noted, receipt of a counseling notice does not have a material, substantial and significant impact on an employee's terms and conditions of employment. The Section 8(a)(3) allegations relating to mandatory meetings and tardiness should be dismissed for this additional reason.

**L. The Employer Did Not Unlawfully Modify Its Policies Relating To Recertification Training After The Election**

General Counsel did not meet his burden to prove an established practice of paying per diem employees for their time spent attending certification classes. First, it is undisputed that Respondent's written pay practice manual that has been in effect since prior to the election specifically provides that per diem employees are not paid for time spent attending certification classes. RX 75. Additionally, Respondent's Handbook provides that per diem employees "are not benefits-eligible." RX 88. Accordingly, Respondent's practice has been not to pay per diem employees for time spent attending recertification classes, subject to modification in individual circumstances where the Hospital has a critical need for the per diem to maintain his/her certification so that the Hospital can properly staff its operations. See, i.e., T 633, 727, 835, 968-969, 975-977, 990. The practice and policy of not paying per diems for time spent in recertification classes is also shown by Respondent's campaign literature listing current benefits provided to employees and specifically noting that only "FT" employees are eligible to be paid for certifications relating to their employment (GCX 6 (AP 1)). Finally, Respondent's practice and policy is exemplified by Gonzalez's rejection of Roncesvalles's request for reimbursement for a recertification class she attended in 2009. RX 3 (AP 20) [Time Card Adjustment log from 2009 showing an entry for ACLS renewal dated 5/26/09 with a notation by Gonzalez stating

“Not for P.D. Employees”].<sup>35</sup> Accordingly, and even if Roncesvalles’s testimony is fully credited, the most that General Counsel has shown is that Roncesvalles, and Roncesvalles alone, was sometimes paid for her time spent attending re-certification classes. This evidence does not establish a practice that was established to the point of supporting a unilateral change allegation under Board law, particularly given Respondent’s written policies to the contrary. See also Part II(G)(7) above [explaining ALJ’s misplaced reliance on “Flex Ed” bullet in campaign flyer].

**M. A Reading Remedy Is Not Warranted**

Section 10(c) of the Act empowers the Board to issue cease and desist orders and impose affirmative remedies if it finds violations of the Act. However, “the Act does not confer upon the Board ‘a punitive jurisdiction enabling the Board to inflict ... any penalty it may choose because [respondent] is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.’” *Teamsters Union Local No. 688*, 326 NLRB 878, 882 (1998). See also *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13 (1940); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); *New Breed Leasing Corp., v. NLRB*, 111 F.3d 1460, 1470 (9th Cir. 1997).

The federal courts have often found a notice reading order to be punitive and beyond the Board’s power. For example, in *NLRB v. Laney & Duke Storage Warehouse Co., Inc.*, 369 F.2d 859, 869 (5th Cir. 1966), the court found that the Board’s reading requirement was punitive because it was “unnecessarily embarrassing and humiliating to management.” Similarly, in *Int’l Union of Electrical, Radio and Machine Workers v. NLRB*, 383 F.2d 230, 232-33 (D.C. Cir. 1967), the D.C. Circuit found that a Board reading requirement was both onerous and punitive. While the D.C. Circuit recognized the broad scope of discretion Congress has given the Board in fashioning remedies, the court noted emphatically that the Board’s discretion was not without

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<sup>35</sup> Roncesvalles’s attempt to explain this note away (see T 169-172), as well as other testimony she provided that was inconsistent, non-responsive and/or demonstrated a general lack of veracity (see, i.e., T 132, 140, 149, 151, 156-159, 161-162, 167-169, 172-174, 176-177; GCX 25) further demonstrates her lack of credibility and the incredible nature of the ALJ’s contrary finding (ALJD 27:35-38).

limits and that a public reading of the order would be humiliating and degrading and “undoubtedly would have a lingering effect on future relations between the company and the Union.” *Id.* at 233. Applying these principles, the courts will refuse to enforce a Board order that imposes extraordinary remedies only if the record establishes a “particularized need” for the order. See, i.e., *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981).

Similarly, the Board will not impose extraordinary remedies unless it is demonstrated that its normal remedies are inadequate. In making this determination the Board will look to whether the respondent has been shown to have a “proclivity to violate the Act” or “sustained corporate-level animus,” and will not impose an extraordinary remedy unless General Counsel demonstrates that the respondent has been found to have committed serial unfair labor practices over many years in many different cases and in many different locations. See, i.e., *Beverly Health & Rehabilitation Services*, 339 NLRB 1243 (2003); *First Legal Support Services, LLC*, 342 NLRB 350 n.6 (2004); *Ishikawa Gasket Am.*, 337 NLRB 175, 176 (2001) [rejecting request for reading remedy].

Even if the ALJ’s underlying unfair labor practice were sustained in full, those violations do not support either a reading or broad cease and desist remedy. Nor do they support the ALJ’s requirement that Respondent’s private property rights be violated in order to allow representatives of General Counsel and the Union to monitor the reading; indeed, this additional requirement only further highlights the punitive nature of the remedy ordered by the ALJ. Similarly, the fact that the ALJ’s discussion of this portion of his remedy was simply “cut and pasted” from the Board’s opinion in *Texas Super Foods* (see Part II((G)(15) above) demonstrates a lack of the type of considered analysis required by the Act and the overreaching nature of the ALJ’s Decision as a whole.

**N. The Recommended Order Is Overbroad**

The affirmative requirements of the ALJ’s recommended order do not differentiate between RNs and the majority of Respondent’s employees who were not involved in or impacted by the alleged unfair practices. See, i.e., ALJD 32:6-45, 34:23-35:34. As such, the ALJ’s

recommended remedy, order and notice are overbroad, particularly with respect to the Section 8(a)(5) findings. At a bare minimum the remedial portions of the ALJ's Decision must be modified to take into account the distinction that must be drawn between RNs and all other employees of Respondent.

**O. Respondent Was Denied A Full And Fair Hearing Before An Impartial Trier Of Fact**

**1. The General Counsel Failed To Properly Consolidate All Pending And Related Charges Into A Single Consolidated Complaint**

In *Peyton Packing*, 129 NLRB 1358 (1961), the Board held that “sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint. The same considerations dictate that, wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in the unnecessary harassment of respondents.” *Id.* at 1360; cf. *Cresleigh Management Inc.*, 324 NLRB 774 (1997). In *Jefferson Chemical Company, Inc.*, 200 NLRB 992 (1972), the Board held that the General Counsel is “duty bound to investigate all matters which are encompassed by the charge, and to proceed appropriately thereafter” (*id.* at n.3). The Board also noted that “multiple litigation of issues which should have been presented in the initial proceeding constitutes a waste of resources and an abuse of our processes that we should not permit it to occur.” *Id.*

The charges in this matter were initially filed in May 2010, with complaint authorized on most of the allegations in September 2010. In February 2011 the Union filed another charge against Respondent, and General Counsel issued a complaint against Respondent based on that charge in February 2011, resulting in a Board order issued April 12, 2011. See, i.e., RX 23-29. By proceeding in the fashion described above, General Counsel violated the precepts of *Peyton Packing* and *Jefferson Chemical*, and has otherwise frustrated Respondent's rights to due process of law. Implicit in the ALJ's failure to cite any cases to support his rejection of Respondent's argument in this regard (see ALJD 30:37-43) is that no such authority exists. The complaint should therefore be summarily dismissed.

**2. The ALJ's Errors And Bias Requires That His Decision Be Set Aside**

The ALJ's bias and errors are discussed above, including at Part II(F) and in Part IV (A)(4) and (B)-(N). Respondent submits that these errors have seriously prejudiced Respondent, as is demonstrated by that same discussion. For this additional reason the Decision should be set aside.

Dated: December 29, 2011

Respectfully submitted,

/S/ Theodore R. Scott  
THEODORE R. SCOTT  
LITTLER MENDELSON  
A Professional Corporation  
501 W. Broadway, Suite 900  
San Diego, CA 92101.3577  
Telephone: 619.515-1837 [Direct]  
Facsimile: 619.615.2261 [Direct]  
Telephone: 619.232.0441 [Main]  
Facsimile: 619.232.4302 [Main]  
Attorneys for Respondent  
VERITAS HEALTH SERVICES, INC. d/b/a  
CHINO VALLEY MEDICAL CENTER