El Paso Healthcare System, Ltd. d/b/a Las Palmas Medical Center *and* National Nurses Organizing Committee—Texas/NNU. Case 28–CA–023368

June 15, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 29, 2011, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs to each. The Acting General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, as modified herein,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, El Paso Healthcare d/b/a Las Palmas Medical Center, El Paso, Texas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing to honor employees' requests for union representation during investigatory interviews.

(b) Interrogating employees about their requests to have union representation during investigatory interviews.

(c) Threatening employees by telling them that exercising their rights to have union representation during investigatory interviews would be futile.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Las Palmas Medical Center facility in El Paso, Texas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

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[1] We find that the judge did not abuse his discretion in denying the Acting General Counsel's motion, made at the hearing, to amend the complaint to add an allegation that the Respondent unlawfully promulgated an overbroad rule barring "gossip" about care-related incidents. See Sec. 102.17 of the Board Rules and Regulations (providing that a "complaint may be amended upon such terms as may be deemed just"); *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993) (observing that an administrative law judge has "wide discretion to grant or deny motions to amend a complaint").

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

We adopt the judge's findings, in the absence of exceptions, that the Respondent violated Sec. 8(a)(1) by interrogating Karin Moore and threatening Anna Barker.

[3] We agree with the judge, for the reasons he states, that the Respondent violated Sec. 8(a)(1) by denying Karin Moore's request for union representation at an August 14, 2010 interview. See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). In adopting this finding, we find it unnecessary to pass on the judge's conclusion that Smitha Philip—whom the Respondent unilaterally directed to witness Moore's interview—is not a statutory supervisor. Further, we do not rely on the judge's citation to *Williams Pipeline Co.*, 315 NLRB 1 (1994), in support of this finding.

Having adopted the judge's finding that the Respondent unlawfully denied Moore's request for union representation, we find it unnecessary to pass on the allegation that the Respondent also unlawfully denied Ida (Cindy) Toth's request for union representation at an October 13, 2010 interview. Finding this additional violation would be cumulative and would not materially affect the remedy.

[4] Contrary to the judge, we find that the violations committed by the Respondent do not require a broad cease-and-desist order or other special notice posting and notice reading remedies. Accordingly, we will modify the recommended Order and substitute a notice with traditional remedial provisions for these violations. In addition, the judge's recommended remedial language addresses violations not found while omitting provision for a violation that was found. We shall modify the Order and notice provisions to conform to the violations actually found.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 14, 2010.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny your requests to have representatives of the NATIONAL NURSES ORGANIZING COMMITTEE-TEXAS/NNU (the Union) present during investigatory interviews.

WE WILL NOT interrogate you about your requests to have union representation during investigatory interviews.

WE WILL NOT threaten you by telling you that exercising your rights to have union representation during investigatory interviews would be futile.

WE WILL NOT WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

EL PASO HEALTHCARE D/B/A LAS PALMAS MEDICAL CENTER

Liza Walker-McBride, Esq., for the General Counsel.
Paul R. Beshears, Esq., for the Respondent.
Brendan White, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in El Paso, Texas, on June 28 and 29, 2011. The National Nurses Organizing Committee—Texas/NNU (Union) filed the initial charge on February 11, 2011,[1] which was amended subsequently on March 25, 2011, and April 29, 2011, and the Acting General Counsel issued the complaint on April 29, 2011. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by refusing two employees, Karin Moore and Ida Catherine Toth, on separate occasions, their *Weingarten*[2] rights to union representation at Respondent's investigatory interviews on August 14 and October 13, respectively. The complaint also alleges the unlawful acts of interrogating and threatening employees concerning the exercise of the same *Weingarten* rights. Respondent filed an answer denying the essential allegations of these four claims in the complaint.

As the trial commenced, counsel for the Acting General Counsel sought leave to make two 8(a)(1) allegation amendments to the complaint. One is the promulgation and maintenance of an overly broad rule with respect to discussing certain terms and conditions of employment that arose out of one of the *Weingarten* allegations. This charge was alleged in the 1st charge but dropped out of the 2nd amended charge and did not make the complaint. (GC Exh. 1.)

As to the first proposed oral amendment of the complaint, about unilaterally adopting an overbroad rule, I find that by amending its charge a second time and dropping out the allegation of an overbroad rule from the charge and the complaint, Charging Party and Acting General Counsel waived the right to resurrect the charge at trial having lulled Respondent into thinking that it did not need to defend the charge. It is improper for the judge to find a violation based on an unalleged theory where the General Counsel's representations would reasonably have led the respondent to believe that it would not have to defend itself on that basis. *Buonadonna ShopRite,* 356 NLRB No. 115 (2011); and *Laborers Local 190 (VP Builders, Inc.)*, 355 NLRB 532 (2010). Because Respondent did not have adequate prior notice of the intended resurrection of claim, allow-

[1] All dates are in 2010 unless otherwise indicated.
[2] *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975).

ing it here would be unjust and provide undue prejudice to Respondent who basically was served with this notice at trial without a valid reason for the delay in moving to amend sooner. (Tr. 37.)[3]

The second new oral charge at trial is an alleged December 2010 creation of the impression of surveillance. I find that this new charge constituted an entirely new matter unrelated to the three charges in this case or the corresponding allegations. I find that permitting this amendment would deprive counsel for the Respondents of any opportunity to prepare a defense to this newly raised allegation. As a result, applying *Folsom Ready Mix, Inc.,* 338 NLRB 1172 fn. 1 (2003), I also denied the motion to allow this amendment. (Tr. 37–38.)

Also, Respondent renewed its motion for partial summary judgment denied without prejudice earlier by the Board. I denied the motion based primarily on the arguments that there is hearsay in the exhibits, a lack of foundation, a factual ambiguity, and a lack of authenticity concerning various alleged events including the email exchange between Ms. Aguilar and Ms. Toth in 2010 as to the alleged purpose of the interview and resulting coaching report.

After the trial, the Acting General Counsel, Respondent, and Charging Party filed closing briefs on August 3, 2011 (GC Br., R. Br., and CP Br., respectively), which I have read and considered. Based on the entire record in this case,[4] including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

El Paso Healthcare System, Ltd. d/b/a Las Palmas Medical Center (Respondent) is a Texas corporation, a full service hospital with a facility and place of business in El Paso, Texas, and has been engaged in the business of operating a full service medical care center. During the 12-month period ending February 11, 2011, Respondent admits that it derived gross revenues in excess of $250,000 and purchased and received at the Respondent's facility goods valued in excess of $50,000 directly from points outside of Texas. Furthermore, Respondent admits and I find accordingly, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act. Respondent further admits and I also find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Union Certification at Respondent on June 7

On June 7, Respondent's registered nurses (RNs) voted to join the Union which was certified as the exclusive collective-bargaining representative of the unit employee RNs (Unit RNs) described as follows:

> INCLUDED: All full-time, regular part-time, and per diem Registered Nurses, employed by the Employer [Respondent] at 1801 N. Oregon Street, El Paso, Texas.
>
> EXCLUDED: All other employees, confidential employees, physicians, nurse and/or clinical educators or coordinators, clinical nurse specialists, clinical coordinators, case managers/utilization review and/or discharge planners, nurse practitioners, accounting or auditing RNs, infection control/employee health nurses, risk management/performance improvement and/or quality assurance or quality management nurses, employees of outside registries and other agencies supplying labor to the Employer [Respondent], already represented employees, permanent charge nurses, managerial employees, guards and supervisors as defined by the Act. (G C Exhs.[5] 1 and 2.)

Respondent's vice-president of human relations, Timothy Meeks has represented Respondent's management at collective-bargaining agreement negotiations over the past year.[6] Tr. 134, 207–208. On June 25, the Union notified Respondent of the identity of the Union's rank-and-file nurse representatives otherwise known as the union's shop stewards. (GC Exh. 3.) Anna T. Barker (Barker), an RN in the Respondent's neo-natal intensive care unit nursery (NICU) for the past 4 years, has represented the Union at collective-bargaining sessions. Barker and Lucia Adams (Adams) both have been the designated nurse unit representatives or stewards (nurse representatives) for the Union at all relevant times since the June certification.[7] (Tr. 50, 144; GC Exh. 3 at 2.)

For the past 6 years, Barker and Adams have been supervised by Respondent's NICU director, Arleen Casarez-Aguilar (Aguilar), who supervises all of the NICU nurses and the newborn department which consist of several different wards occupying a wing of the hospital. (Tr. 38–39.) The infants are divided into levels based on varying degrees of health needs and as director, Aguilar is responsible for discipline of the Departments' RNs who report to her. (Tr. 38–43, GC Exhs. 1(g) and 4.)

B. Respondent's Evolving Disciplinary Process After Union Certification

Before the Union was certified, Aguilar would regularly al-

[3] Acting General Counsel requests that I reconsider my ruling from the bench as to her request that I allow the additional claim to the complaint concerning the alleged overly broad email policy, grant the motion for reconsideration, admit GC Exh. 7 into the record, and find against Respondent for an addition violation of Section 8(a)(1) of the Act. (GC Br. at 19–20). For the reasons stated above, I deny the motion for reconsideration.

[4] I hereby correct the transcript as follows: Tr. 161, line 18: "no" should be deleted.

[5] Hereafter - GC Exh., R. Exh., and CP Exh. as appropriate.

[6] As of time of trial, there was no binding collective-bargaining agreement between Respondent and Union though negotiations continue between Respondent's management and the Union to sign a final written agreement.

[7] Nurse representatives receive specialized training regarding an employee's rights and protections during meetings with supervisors. (Tr. 134–135.)

low an RN under investigation the right to have another RN present as a witness at any investigatory interview she conducted on the condition that the RN witness could not speak in participation at the meeting nor were they allowed to take notes. (Tr. 59.) Also before union certification, Respondent would occasionally issue its employees "coaching" reports that included "counseling" references within that Aguilar would maintain as a "shadow" file in her office concerning incidents which could result in discipline if a nurse accumulated some unknown number of these "coaching" reports in Aguilar's personal "shadow" file for each employee. (Tr. 228–229, 235, 238–239; GC Exh. 9 at 3.) Sometime after late August, Respondent's management actively sought to distinguish the "coaching" report from a "counseling" report to create the impression that the earlier "coaching" reports had no effect on discipline decisions.[8] Beginning on August 25, the NICU charge nurse "New Business" agenda listed "Counsel forms" as a new item. (GC Exh. 9 at 1.)

Yolanda Carrillo (Carrillo), Respondent's human resources director, was familiar with Respondent's "Coaching" report form and credibly confirmed that it is maintained in Aguilar's "shadow" file for each NICU RN she supervises. Carrillo further opined that an RN's accumulation of coaching reports could lead to counseling or other disciplinary actions taken by Respondent against the RN who accumulated some unknown number of coaching reports. (Tr. 227–229, 238–239.) She further confirmed that this is an unwritten policy at Respondent as there has been no formal written policy or document disseminated to Respondent's employees to explain "counseling" versus "coaching" reports. (Tr. 239.) As of August 25, the Employee Coaching Report form used by Respondent began with "This Counseling record has been reviewed with me" and further provides that this "counseling record will be placed in my personnel file." (GC Exh. 9 at 3.)[9] In addition, Respondent's labor relations manager, Leonard Ochart further admitted that Respondent does not have a formal written discipline policy but, instead, has the practice outlined in Respondent's Employee coaching and counseling reports. (Tr. 16, 52; GC Exh 5.) These documents were submitted by Respondent in response to the Union's June 2011 request for all disciplinary policies. (GC Exh. 5.)

After the Union was certified in June, Respondent conducted union training for its management personnel, including Aguilar, via a July 7 PowerPoint presentation entitled "Post-election Issues," which included disclosure of the RNs' newly gained *Weingarten* rights. (Tr. 43-44, GC Exh. 8 at 2.) In addition, by letter dated June 25, Aguilar was notified that Nurse Representative Adams had been selected as a nurse representative.[10] (Tr. 49–50; GC Exh. 3 at 2.) Later, Barker told Aguilar that she too was a nurse representative for the Union.[11] (Tr. 49-50.) Despite this training, however, Aguilar admittedly was confused about the role of the Union after its certification at Respondent, its nurse representatives, and her changed responsibilities as a supervisor in a unionized workplace. (Tr. 38, 44, 56; GC Exh 8 at p.2.)

C. Karin Moore's August 14 Investigatory Interview

1. Events leading to August 14 meeting

Karin Moore (Moore) was employed by Respondent as a NICU RN from July 2009 until April 2011. (Tr. 157.) She was supervised by Director Aguilar like all other unit RNs.[12] (Tr. 39, 157.) After certification in June, Moore was a unit RN and a nurse representative like Adams and Barker. (Tr. 135–136.)

Early Saturday morning on August 14, Moore arrived at her work to find out that on her previous day shift on Friday, she had mistakenly connected the wrong intravenous (IV) line containing sugar solution to a premature infant's umbilical arterial line. (Tr. 46, 158.) This error destabilized the baby's blood sugar and during the night medical intervention became necessary to correct the problem compounded by the fact that another RN, Donald Tanner (Tanner), following Moore in the care of the infant, also did not immediately recognize the problem which delayed corrective action until sometime Friday night. (Tr. 47, 158–159, 162, 174; CP Exh. 1.)

On discovering her serious mistake, Moore felt panicked and was very upset about the incident though by the start of her shift Saturday morning the baby's condition had stabilized and temporary or relief Charge Nurse Smitha Philip (TCN Philip) assigned Moore to return to her care of the infant. (Tr. 159-160, 165–166.) After learning that Supervisor Aguilar was called in to the hospital and anticipating an investigative meeting resulting from her mistake, Moore approached Nurse Representative Adams Saturday morning at approximately 7 a.m. and asked her if she could accompany her to any meeting with Aguilar as her nurse representative. (Tr. 145–146, 161–162.) Nurse Representative Adams agreed to assist Moore as a nurse

[8] I find that at all times relevant here the "Coaching" reports were interchangeable with Respondent's "Counseling" reports which became separately formalized in use *after* the union certification in June in an attempt by Respondent to separate "coaching" from "counseling" events. I further find that Respondent created the new separate forms to distance itself from the fact that it was using its "Coaching" reports as a form of discipline for its RNs up through the incidents involving Unit RNs Moore and Toth in this case. (See Tr. 236–239, 242–243; GC Exhs. 5, 9 at 1 and 3, 11, and 14 at 1, 8–9.)

[9] Respondent did not provide evidence showing when its counseling report first came into existence and its coaching report form was revised to eliminate the "counseling" references before 2011. However, it appears that by September 10, Respondent was using a revised coaching report. Yet in December, Respondent simply crossed-out the word "Coaching" and replaced it with "Counseling." (See GC Exhs. 5, 11, and 14.)

[10] While Aguilar was evasive as to whether she recalled seeing Nurse Representative Adams' name specifically identified under NICU on the June 25 email list of nurse representatives to Respondent, Aguilar initially admitted seeing the list and knowing nurse representative Adams was a listed Nurse Representative. Observing Aguilar at hearing, I do not find her testimony credible that she did not know that Adams was a nurse representative at the time of the August 14 meeting discussed below. (See Tr. 49–52.)

[11] Aguilar was more comfortable communicating with Barker than with the other nurse representatives after union certification. (Tr. 139-140.)

[12] While Director Aguilar supervised all of Respondent's NICU RNs, permanent and temporary charge nurses also provided daily input and evaluated unit RNs like Moore and Toth. (See fn. 15 below.)

representative and the two nurses continued their regular nurse duties awaiting the anticipated meeting with Aguilar some time later that morning. (Tr. 134–135, 145–146, 161.)

As stated above, Aguilar learned of the incident involving Moore's mistake early on the morning of Saturday, August 14, when she received a telephone call at her home on her day off. (Tr. 45–46.) Aguilar went to the hospital early Saturday morning to find out more about the incident from the charge nurse, patient chart notes, and later-planned interviews with Tanner and Moore. (Tr. 46-47, 162.) Aguilar also organized a staff "huddle"[13] to discuss the previous day's medication error and a reminder to double check that IV lines were connected correctly. (Tr. 47.)

The timing of Aguilar's actions is not in dispute as she arrived at the hospital at approximately 8 a.m. (Tr. 46, 151.) Aguilar then spent approximately 30 minutes talking to Swanda George, the charge nurse who had contacted her about the emergency, and reviewing information about the incident from patient chart notes, medication orders, and other nurses' notes. (Tr. 47.) Aguilar requested that Tanner and Moore meet with her separately later that morning. (Tr. 47, 162.) The "huddle" lasted an additional 5 minutes and Aguilar then waited approximately 15 minutes for the off going shift to finish giving patient reports to the new shift. (Tr. 47–48, 85.)

Aguilar next met briefly with night shift RN Tanner as part of her investigation before asking Moore if she was ready to meet as part of her investigation of the incident. (Tr. 47–49, 162.) This took place approximately 45–60 minutes after Aguilar's arrival at the hospital and Moore responded that she was ready to meet. (Tr. 49, 56–57.) Sometime between the time Moore asked Nurse Representative Adams to be present at the anticipated meeting and the time of the actual meeting, Moore requested and Aguilar agreed that Nurse Representative Adams could attend the meeting as her representative. (Tr. 49–50, 56, 162; GC Exh. 3 at 2.)

2. Moore's investigatory meeting with Director/Supervisor Aguilar

Aguilar's stated purpose for her meeting with Moore was that she "wanted to get [Moore's] side of the story of what happened." (Tr. 60.) When Aguilar finally turned to Moore to proceed to her office for the anticipated meeting, Nurse Representative Adams was performing her regular nurse duties changing out an IV bag or assisting a physician who was getting an update on his infant patient's condition including reviewing lab reports and x-rays—either procedure expected to take no more than 5 to 10 minutes to complete. (Tr. 57–58, 84, 147–149, 163.) Nurse Representative Adams was only a few cribs away from Moore and Aguilar at this time. (Tr. 57, 61, 147.)

Rather than: (1) waiting no more than 5–10 minutes for Nurse Representative Adams to complete her duties and join the meeting; or (2) communicating in any way with Adams, only two cribs away, her readiness to meet; (3) inquiring as to when Nurse Representative Adams would be ready to meet; or (4) advising Moore that the Respondent would not proceed with the interview unless Moore was willing to go without Nurse Representative Adams, Aguilar instead decided on her own that Moore did not need a nurse representative and could get by with only a nurse "witness" at the investigatory meeting.[14] (Tr. 57–63, 85, 147, 163.) Aguilar also told Moore that Moore had no right to insist on Adams being her nurse representative and that, instead, anyone could act for her. (Tr. 163, 166.) Aguilar also admitted that she did not explain to Moore her distinction between "witness" and "representative" but insisted that it was always Aguilar's preunion certification practice to permit "witnesses" in the type of meeting she was walking to with Moore.[15] (Tr. 59, 62–63.)

In place of Nurse Representative Adams, Aguilar selected TCN Philip to act as a "witness" as TCN Philip was standing next to Aguilar when she decided to conduct the meeting without Nurse Representative Adams. (Tr. 162–163.) Both Aguilar and TCN Phillip then proceeded to conduct an interrogation of Moore in Aguilar's office.[16] (Tr. 123, 163–164, 167–168; CP Exh. 1.) When TCN Philip entered the office with Moore, Aguilar asked TCN Philip to act as a "witness" and instructed her to listen, but not speak, during the conversation between her and Moore. (Tr. 59, 123, 164.) Moore did not say anything in response. (Tr. 164.)

Moore credibly explained that she did not respond and did not object to TCN Philip's presence at the meeting because she

[13] An informal meeting wherever a group of nurses can gather at the hospital for communications and discussions for improvement and training.

[14] Aguilar admits that she reverted to her preunion certification witness at meetings practice while heading with Moore to her office. (Tr. 57–58, 81) (". . . it just clicked to me.").

[15] Aguilar's attempt to convince me that she asked Moore what function—witness or Nurse Representative—she wanted Nurse Representative Adams to serve was not credible given her demeanor, the fact that she was guessing as to Ms. Moore's alleged "witness" response, the absence of this alleged reference in her August 14 notes of her meeting with Moore, and Aguilar's later testimony showing her confusion as to the role of nurse representatives after the June union certification. (See Tr. 36, 81, 134, 136–137, 138–139, 144, 247; CP Exh. 1.) Moreover, TCN Philip, the August 14 charge nurse who Aguilar selected to act as a "witness" in place of Nurse Representative Adams as Moore's nurse representative, credibly explained that she never heard of Aguilar's alleged practice of allowing a nurse "witness" at interrogation meetings. (Tr. 130.) Consequently, I reject Aguilar's attempt to distinguish an alleged and unsupported procedure of interrogation at Respondent's human relations office with a nurse representative from her continued practice of allowing silent RN witnesses to join in during her investigations in August.

[16] TCN Philip was assigned as a temporary or relief charge nurse on August 14 and assigned Moore to work with the same patient involved in the incident the day before. (Tr. 115, 118, 159–160, 165–166.) TCN Philip worked as a relief charge nurse an uncertain frequency varying from no work to twice a week for the past 3 years. (Tr. 118.) Except for issuing written discipline and hiring or firing employees, as a temporary or relief charge nurse, TCN Philip's duties were the same as a permanent charge nurse with the following supervisory duties: (1) takes reports from previous shift charge nurses; (2) assigns patients and duties to RNs; (3) assigns her own patients; (4) reports dangerous patient incidents directly to Aguilar; and (5) prepares performance evaluations for all RNs including other charge nurses for submittal to Aguilar. (Tr. 86–88, 121–122; GC Exh. 12 at 4.)

was upset with herself for having made the error and was afraid about whether she would lose her job or whether there would be long-term effects on the baby. (Tr. 165–167.) Aguilar then turned to Moore and repeatedly asked why she wanted someone in the meeting in the first place when "the Union is not even here yet?"[17] (Tr. 164.) When Moore was finally allowed to respond, she convincingly explained to Aguilar that she understood from the Union that unit RNs had a right to call a nurse representative into a disciplinary meeting if any of the unit RNs were being called in for such meeting that could lead to discipline. (Tr. 165.) Aguilar repeated that Moore had no right to a nurse representative. (Tr. 167.)

Throughout the meeting, TCN Philip did as she was told and said nothing, took no notes, and made no record of the meeting. (Tr. 125.) In fact, TCN Philip could not even say with certainty that Moore had approved her presence at the meeting and could only add that Moore "did not say 'No' to a 'witness.'" (Tr. 124.)

The meeting lasted for 15–30 minutes. (Tr. 125, 167.) The only interruption occurred when Aguilar's telephone rang and went unanswered. (Tr. 168.) Moore was interrogated with a series of questions coming from Aguilar so fast that Moore could not answer one before Aguilar leveled another. (Tr. 167–168.)

Sometime during Moore's meeting with Aguilar, Nurse Representative Adams was notified by a fellow nurse coming to the bedside of the baby she was caring for and informed her that Aguilar and Moore had left for a meeting without Adams. (Tr. 147.) Adams went looking for Moore. (Tr. 149.) Nurse Representative Adams tried to attend the meeting between Aguilar and Moore and placed a call to Aguilar's office which Aguilar did not pick up. (Tr. 153, 168.) Later, after the meeting had concluded, Aguilar returned Nurse Representative Adams' telephone call and told her that her participation in the investigatory meeting with Moore was unnecessary because the meeting was over.[18] (Tr. 154–155.)

After awhile during the heated interrogation, Moore broke down and began to cry. (Tr. 169.) Aguilar explained to Moore the possible discipline she faced as a result of the incident including discipline handed down from Respondent and/or the Board of Nursing. (Tr. 169–170.) After the meeting ended at approximately 9:30 a.m., Aguilar stayed at the hospital for at least another 45 minutes and spent time drafting an email to the Unit RNs which she sent at 10:18 a.m. (CP Exh. 2.) Respondent admits that Moore had reasonable cause to believe that her meeting with Aguilar could result in discipline. GC Exh. 1(i).

D. Aguilar's Admitted Confusion with Union Representatives After the June Certification

In late August, Aguilar approached Nurse Representative Barker in the employee lounge with questions concerning the role of Nurse Representatives to assist Unit RNs at meetings with management. (Tr. 136–137.) At that time, Aguilar opined that Nurse Representatives could not talk or participate at such meetings just the same as Aguilar's own practice had prohibited RN "witnesses" from participating in past investigatory meetings *before* Union certification. (Tr. 136–138.) Aguilar further expressed to Nurse Representative Barker her belief that the Union's role through its nurse representatives in these meetings was being blown out of proportion and that Aguilar admittedly wanted clarity as she did not fully understand what role nurse representatives fulfilled *after* the new union certification. (Tr. 138–139; 251.)[19] Barker explained to Aguilar that, instead, nurse representatives' roles are more than mere witnesses and they can actually attend investigative meetings with Respondent's management and the unit RN under investigation, take notes, be cognizant that the unit RN's rights are not being violated, and talk to management and try to resolve issues on behalf of the unit RN. (Tr. 134, 136–137, 144.)

E. Ida Toth's October 13 Investigatory Interview

Ida "Cathy" Toth (Toth) has been employed at Respondent as an RN for approximately 25 years working in the nursery since 1998. (Tr. 183.) Toth works the night shift and is also a member of the Union as a unit RN and is supervised by Director Aguilar.

In early September, Aguilar claims she heard from two RNs in Respondent's post-partum department that a new mother in their department was complaining of an incident where Toth allegedly telephoned the new mother in her hospital room with her baby crying in the background and stated: "Do you hear your baby crying? Your baby is crying because the post-partum nurses won't pick up your baby." (Tr. 65–66.) Aguilar further explained that she interviewed the nurses and the new mother about the alleged incident and took notes of these conversations as is her custom and practice. (Tr. 68, 94, 189.)

On September 15, Aguilar wanted to get Toth's side of the story and conduct an investigatory meeting so she sent Toth an email stating that she wanted Toth to set up an appointment

[17] Even during the second day of her testimony, Aguilar maintained her unsupported position that the Union was not yet in the hospital despite the June certification. (Tr. 252–253.)

[18] At hearing, Aguilar did not recall whether the phone rang during her meeting with Moore and TCN Philip but Respondent, instead, argues that the call from Nurse Representative Adams did not take place. (Tr. 251-252; R Br. at 5.) I find Nurse Representative Adams' testimony particularly credible over Aguilar's testimony given the fact that Adams' testimony is more consistent with trial testimony and she testified against her own interests as at the time of trial she remained employed at Respondent and must continue to face Director Aguilar as her immediate supervisor after trial. See *S.E. Nichols, Inc*., 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by Respondent.).

[19] Aguilar did not recall discussing nurse representatives' roles with Barker as Barker explained. (Tr. 251.) After viewing the demeanor of both Aguilar and Nurse Representative Barker at trial, I find Barker to be the more credible witness due to the ease and clarity of her recollection of the employee lounge incident with Aguilar and Aguilar's admission that she needed "clarity" from Barker on the roles of nurse representatives as of late August since the Union's certification "was so new." (Tr. 251.) In addition, like Adams, Barker testified against her own interests as at the time of trial she remained employed at Respondent and must continue to face Director Aguilar as her immediate supervisor after trial. See *S.E. Nichols, Inc*., 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by respondent.).

with her and that they needed to talk.[20] (Tr. 67, 93, 185; GC Exh. 6 at 3.) On September 20, Toth inquired further and responded to Aguilar by emailing: "what is it that you need to talk with me about? I'll wait to hear from you." (GC Exh. 6 at 3.) On September 23, Aguilar responded: "I need to review with you about a patient complaint the other night. Please schedule an appointment with me. I don't know your schedule, but let me know and I will come in early or stay late. Please advise. Thank you." (GC Exh. 6 at 2–3.) Toth delayed her response to Aguilar and credibly explained that the anticipated meeting could potentially involve discipline so she tried to arrange for a union representative to be present. (Tr. 186.)

On October 7, Toth writes: "[S]orry Arleen. Will this meeting that you would like to have with me possibly lead to me being disciplined? If so, I would like to have a union rep. present. I can meet with you on [F]riday, tomorrow, if you like, 7:30 to 8:00 a.m. sounds good to me. [L]et me know."[21] (GC Exh. 6 at 2.) Despite admitting at trial that Toth would have been disciplined depending on her actual response at the meeting to the alleged incident, later on October 7, Aguilar replies: "No, it is not …. I just need to ask you some questions. When are you available next week?" (Tr. 68, 93–94; GC Exh. 6 at 2.) From this reply, Toth reasonably believed at that time that the meeting with Aguilar was not about Toth's own work conduct but, instead, involved some other person or incident that Aguilar needed Toth's input. (Tr. 187.)

On October 13, after a few more email exchanges, Aguilar and Toth finally met in Aguilar's office for about 10–15 minutes without Toth having a nurse representative present.[22] Tr. 188, 191. Aguilar began the meeting by recounting the alleged incident involving the new mother and her crying baby in the post-partum unit and a nurse allegedly calling the mother so she could hear her baby's cries because the post-partum nurses would not pick up the baby. (Tr. 188.)

Toth convincingly explained that because Aguilar recounted the alleged incident in an accusatory tone without identifying Toth as the nurse who made the alleged phone call to the new mother, Toth responded to Aguilar's recount of the alleged incident by telling Aguilar that she was not the nurse who made the call. (Tr. 188–189, 191.) Aguilar responded by telling Toth that the new mother had identified Toth by name and, after Toth further defended herself with a second denial, Aguilar responded that "I [Aguilar] wouldn't make this up." (Tr. 189.) When asked by Toth if she had any documented proof of her allegations, Aguilar claimed to have lost all her paperwork and could not recall the name of the new mother or whether she met her in her office or spoke to her over the phone. (Tr. 68, 189–190.) Aguilar admitted to Toth at their meeting and again at trial that she would have imposed more severe consequences on Toth if she had either not lost her interview notes and paperwork or if Toth admitted doing what was alleged in the patient complaint. (Tr. 68, 93–94, 190–191.)

At the conclusion of their meeting, Aguilar presented Toth with a pre-prepared "Employee Coaching Report," a form that Toth had not seen before, which memorialized the incident, required both to sign, and recommended that Toth retake the customer service (AIDET) training because Toth had not complied with AIDET practices and expectations required of Respondent's nurses. (Tr. 190; GC Exh. 11.) At the bottom of the October 13 coaching report, Toth wrote "[a]s per Arleen Casarez-Aguilar, this is not a counseling. No paperwork available concerning this alleged incident." (GC Exh. 11.) Toth credibly explained that she wrote this because she felt deceived by Aguilar's earlier email statement that the meeting would not end in discipline and she wanted anyone reading this coaching report to know that Aguilar had deceived her. (Tr. 193.)

III. DISCUSSION AND ANALYSIS

A. Credibility

The key aspects of my factual findings above with respect to various incidents and meetings between Respondent's director and supervisor, Aguilar and her staff RNs incorporate the credibility determinations I have made after carefully considering the record in its entirety. The testimony concerning the material events in 2010 contain sharp conflicts. Evidence contradicting the findings, particularly testimony from Aguilar, has been considered but has not been credited.

My credibility resolutions have been formed by my consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear herein in those situations that I perceived to be of particular significance.

The facts concerning Aguilar's admitted confusion about the Union's *Weingarten* rights after the June certification as recalled by Nurse Representative Barker and described by her were most convincing as it consistently explains Aguilar's unlawful behavior toward both Moore and Toth.

Barker's demeanor at trial was impressive. Nurse Representative Barker has worked under Respondent's director/supervisor, Aguilar for almost 4 years and was still supervised by her at the time of the hearing. Nurse Representative Barker's chronology of events and detailed recollection of Aguilar's confusion and outright refusal to recognize and allow *Weingarten* rights at her August 14 and October 13 investigatory interviews was quite credible especially when verified by

[20] Toth appeared credible when she remarked that the email request from Aguilar to set up a meeting was unusual as Aguilar typically called nurses if she wanted to speak with them. Toth became concerned by the unusual email from Aguilar that something more serious might have happened. (Tr. 186.)

[21] Apparently some time between Aguilar's initial September 15 email request to Toth to set up a meeting and Aguilar's October 7 reply referred to below, Aguilar claims she lost all of her notes and paperwork from the new mother and the two nurses she interviewed about the alleged incident involving Toth. (Tr. 68, 94, 189.)

[22] When asked why Aguilar did not offer Toth a witness for the meeting as she had done with the Moore investigatory meeting as her custom and practice, Aguilar responded that Toth hadn't asked for a witness, she had asked for a representative and Aguilar still needed to get Toth's side of the story. (Tr. 93.

Nurse Representative Adams, Moore, and Toth.

I found key elements of the testimony given by Respondent's principal witnesses, Aguilar and Meeks, that conflict with the testimony of unit witnesses unworthy of belief especially given Aguilar's obvious deception toward Toth and the misrepresented circumstances resulting in their October 13 meeting. As referenced above, I further find that Aguilar incorrectly believed that the Union did not have any rights to represent unit RNs in investigatory meetings until a formal collectivebargaining agreement was firmly in place.

Also, I reject Aguilar's unbelievable attempt to break her meetings into "witness" meetings taking place in Aguilar's office without Respondent's HR representative where a nurse representative was unnecessary and "representative" meetings which would take place "down to HR" where a nurse representative would be allowed to attend on behalf of a unit RN. (See Tr. 56–57.) In addition, I further find Aguilar noncredible with her statements in the Toth incident that she had lost all her paperwork and could not recall the name of the new mother or whether she even met her in her office or spoke to her over the phone. In virtually all of the significant instances, reliable documentary evidence failed to support accounts provided by Respondent's key witnesses.

Adams, Moore, and Toth were also credible witnesses as they were earnest, genuine, and their testimonies were reasonable and consistent with the record. In addition, they appeared serious and respectful of the hearing process. In contrast, Aguilar appeared scattered, unorganized, and had less reliable recollection than the other witnesses. Also, TCN Phillip testified reluctantly and was very soft spoken in her demeanor which gave me the impression that she preferred saying a little as possible in fear of possibly upsetting Respondent's management if she said something that hurt their case.

B. General Weingarten rights.

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court upheld the ''Board's construction that Section 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which the employee reasonably fears may result in his discipline.''[23] The Court also upheld the contours and limits of the statutory right shaped by the Board in prior decisions:

> First, the right adheres in Section 7's guarantee of the right of employees to act in concert for mutual aid and protection. . . . Second, the right arises only in situations where the employee requests representation. . . . Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee *reasonably believes the investigation will result in disciplinary action* . . . . [Emphasis added.] Fourth, exercise of the right may not interfere with legitimate employer prerogatives. Fifth, the employer may carry on its inquiry without interviewing the employee, thus leaving to the employee the choice between having an interview unaccompanied by his or her representative, or having no interview and foregoing any benefits that might be derived from one. Sixth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. Id. at 256–259.

In *Quality Mfg. Co*., 195 NLRB 197, 199 (1972), cited with approval by the Supreme Court in its *Weingarten* decision, the Board said:

> This seems to us to be the proper rule where as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses. We would not apply the rule to such run-of-the-mill shop-floor conversation as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

The Board and the courts, however, have had difficulty in determining under what circumstances a reasonable basis exists for believing that the investigatory interview will result in disciplinary action. *AAA Equipment Service Co*., 238 NLRB 390 (1978), enf. denied 598 F.2d 1142 (8th Cir. 1979); *Good Hope Refineries, Inc. v. NLRB*, 620 F.2d 57 (5th Cir. 1979), cert. denied 449 U.S. 1012 (1980).

Thus, even a conversation between a supervisor and an employee about improving the employee's production may trigger *Weingarten* rights if sufficiently linked to a real prospect of discipline for poor production. *Quazite Corp*., 315 NLRB 1068 (1994).[24] Moreover, *Weingarten* rights are applicable even at a disciplinary interview if the employer engages in investigatory conduct "beyond merely informing the employee of a previously made disciplinary decision." *Baton Rouge Water Works Co*., 246 NLRB 995, 997 (1979). Furthermore, the Board has held that where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies. *Becker Group, Inc.*, 329 NLRB 103, 107 (1999).

In *Titanium Metals Corp*., 340 NLRB 766 (2003), enf. in part, 392 F.3d 439 (D.C. Cir. 2004), 340 NLRB 766, the Board held that an employer unlawfully denied an employee's request for a union representative at a meeting, even though the expressed purpose of the meeting was simply to inform the employee of a decision regarding discipline that the employer had already made. The Board found that the employee had a right to a union representative's presence because the employer went beyond its stated purpose by interrogating and searching the

[23] Even an employee's request for the assistance of a representative from a newly elected but not yet certified union must be honored by the employer under *Weingarten. ITT Corp. Lighting Fixtures Division*, 261 NLRB 229 (1982), enf. granted in part and denied in part 719 F.2d 851 (6th Cir. 1983).

[24] In contrast, see *Southwestern Bell Telephone Co*., 338 NLRB 552 (2002), where the Board found that there was "no basis for concluding that [the employee] could have reasonably believed that the . . . meeting would result in discipline" where there was no evidence to show that the employer disciplined employees for low production performance and, even if the manager had referred the employee to the EAP program, the EAP was a benefit provided for the employees and not a form of discipline.

employee for newletters in an attempt to support its decision to discipline him.

Even if the employee at issue is an officer of the union, the employee is still entitled to union representation if requested. In *United States Postal Service*, 345 NLRB 426 (2005), the Board held that the employer violated Section 8(a)(1) when it refused to allow an employee, a union steward, to apply his *Weingarten* rights prior to an investigatory interview.

The employee's right to the assistance of a union representative arises only upon the request of the employee; the employer has no duty to inform the employee of the right. *NLRB v. New Jersey Bell Telephone Co*., 936 F.2d 144 (3d Cir. 1991). Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) dispense with or discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative, or of having no interview at all, thereby foregoing any benefit that the interview might have conferred on the employee. *Roadway Express, Inc*., 246 NLRB 1127 (1979). The employer, however, may not continue the interview without granting the requested union representation unless the employee "voluntarily agrees to remain unrepresented *after* having been presented by the employer with the choices" just described, or "is otherwise made aware of these choices." *United States Postal Service*, 241 NLRB 141, 142 (1979) (emphasis in original); see also *Penn Dixie Steel Corp*., 253 NLRB 91 (1980).

An employer violates Section 8(a)(1) of the Act by proceeding with an investigatory interview without the union representative, after the employee has requested union representation, even if a fellow employee monitors the interview as a witness. *Williams Pipeline Co*., 315 NLRB 1 (1994) (where lone union steward was unavailable at time employer conducted interview, presence of fellow employee did not satisfy employee's right to be represented by agent of exclusive representative of employees). Moreover, the employer cannot insist that the union representative be merely an observer but must be afforded the opportunity to provide "advice and active assistance" to a represented employee. *Washoe Medical Center, Inc*., 348 NLRB 361 (2006); *Barnard College*, 340 NLRB 934 (2003).

Weingarten does not require an employer to postpone an interview because the specific union representative the employee requests is absent, so long as another union representative is available at the time set for the interview. However, where the employee's chosen union representative is available, the employer violates Section 8(a)(1) by insisting that another union representative more to the employer's liking represent the employee. *Consolidated Coal Co*., 307 NLRB 976 (1992).

Once a union is certified by the Board, a union enjoys a presumption of continuing majority support, and the employer has a corresponding continuing obligation to recognize and bargain with the union. *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 949 (1993); *Burger Pits Inc.*, 273 NLRB 1001 (1984). Here, as explained below, Aguilar was ignoring recognition of the Union by failing to provide Unit RNs Moore and Toth their *Weingarten* rights.

C. Moore Was Unlawfully Denied Her Weingarten Rights.

Respondent has stipulated, and I find, that the investigatory interview that Moore was to have with Aguilar on August 14 could have resulted in Moore being disciplined. Tr. 60, 161; GC Exh. 1(i). I further find that Moore validly requested Adams to be her Nurse Representative and expressed that desire to Respondent who was aware that Adams was a designated nurse representative. (Tr. 49–52; GC Exh 3 at 2.) Moreover, an employee has only to ask once for her union representative to invoke the right to representation. *Ball Plastics Division*, 257 NLRB 971, 976 (1981). Respondent did not cancel the investigatory interview but went forward with it. Respondent's arbitrary timing of the proposed interview and its refusal to let Nurse Representative Adams, who was present but briefly occupied, to represent Moore at the investigatory interview was a violation of Section 8(a)(1) of the Act. See *GHR Energy Corp*., 294 NLRB 840 (1989) (Violation of the Act found to deny an employee his choice of representative, who was from the International union and present, and force the employee to proceed with another representative).

In the instant case, it would not have been a violation of the Act if Respondent denied Moore's request for representation by Nurse Representative Adams if Adams was not present or was materially unavailable, and to grant the request would force a postponement of the investigatory interview. See *Coca-Cola Bottling Co*., 227 NLRB 1276 (1977). But in the instant case as in *GHR Energy* supra, and *Anheuser-Busch, Inc*., 337 NLRB 3 (2001), enfd. 338 F.3d 267 (4th Cir. 2003), the requested representative (Adams) was present, and, but for a brief delay of no more than 10 minutes, was ready to go forward. (Tr. 84, 148.) I do not believe that the fact that Adams was performing her regular RN duties for a short period of time of no more than 10 minutes when Aguilar arbitrarily decided to conduct the investigatory meeting made Adams any less "available" than had Aguilar attempted to secure Nurse Representative Barker's presence instead. Respondent presented no evidence that a short 5–10 minute delay in commencing the investigatory meeting with Moore and Adams was somehow unreasonable especially given the fact that Aguilar spent an additional 45 minutes in her office *after* the meeting with Moore and TCN Philip.[25] (CP Exh. 2.) Rather, here, the requested Nurse Representative Adams was present and, but for no more than a 5 to 10 minute delay, was ready to go forward. Hence, Respondent violated Section 8(a)(1) of the Act.

Although Moore had requested and informed Director/Supervisor Aguilar she wanted and preferred the presence of Nurse Representative Adams at the investigatory interview on August 14, the evidence of record fails to show that Aguilar ever advised Moore that the Respondent would *not* proceed with the interview unless Moore was *willing* to go forward with the interview unrepresented without Union Nurse Representative Adams, as *Weingarten* requires an employer to do. *Weingarten*, supra.

[25] See also *Anheiser-Busch, Inc*., supra at 8, where it was determined that the interview could have proceeded with only minimal delay (15 minute delay due to lunch break was immaterial) which was insufficient to deny the employee the representative of his choice.

At the hearing, Aguilar tried to give the impression that Moore was willing to substitute TCN Phillip for Nurse Representative Adams as her nurse representative. However, the credited evidence shows that Moore unwillingly elected to go forward with TCN Phillip as a *witness* because she did not feel she had the freedom to postpone the meeting without Nurse Representative Adams. Moore's feeling of being constrained to go forward with the interview unrepresented by Adams is obviously, the very reason why *Weingarten* requires the employer to advise the requesting employee that the employer will not proceed with the interview *unless* the employee is *willing* to proceed unrepresented by the union. Since neither Aguilar nor TCN Philip so advised Moore, it is reasonable and understandable why Moore felt constrained (conflicted) to proceed without Nurse Representative Adams, who was briefly unavailable at the arbitrary time set for the interview.

Additionally, an employee's ''right to representation'' in an investigatory interview is an employee's right to a representative who is an agent of the labor organization—which is the exclusive representative of the employees. *Sears, Roebuck & Co.*, 274 NLRB 230 (1985); *T.N.T. Red Star Express*, 299 NLRB 894, 898 fn. 12 (1990); *NLRB v. J. Weingarten*, supra. In the instant case, it is without dispute that employee TCN Philip was not a nurse representative, steward or an agent of the Union in August when she sat in on Moore's investigatory interview as a witness. Moore's involuntary election for TCN Philip's presence in the interview did not transform TCN Philip into a union agent or nurse representative. Nor did TCN Philip's presence constitute a waiver by Moore of her right to union representation at the interview. See *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). Also in *Super Valu Stores*, 236 NLRB 1581, 1591 (1978), the administrative law judge with Board approval, described an employer's objections, in a *Weingarten* situation, when a union representative is not available by stating:

> In this circumstance, the employer had the choice of giving the employee time or a postponement to obtain the representation or as the Supreme Court pointed out in *Weingarten* . . . of advis[ing] the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative.

With respect to an employee going forward with the interview without the requested union representation, the administrative law judge further stated:

> The fact that [the employee] stayed, and answered the questions put to him, did not make his participation voluntary or constitute a waiver of his right to union representation. It should not be a requisite of union representation that the lone employee further antagonize the employer and jeopardize his job by walking out of the meeting or refusing to answer questions. [Id.]

At the hearing here, Moore credibly and convincingly explained why she did not walk out of the meeting because Nurse Representative Adams was briefly unavailable. The record shows that Respondent did nothing to make her feel welcome to walk out or to request a postponement of the interview until Nurse Representative Adams was available. Instead Respondent suggested and acquiesced in TCN Philip being present at the interview, though through Aguilar's unlawful confusion, she required TCN Philip to be present merely as a witness without any power to document what was said or provide advice to Moore.[26]

Under such circumstances I do not find that because Moore felt constrained to go forward with the interview without Nurse Representative Adams, meant that she voluntarily went forward, or that her going forward constituted a waiver of her right to union representation. See *Super Valu Stores*, supra. Moreover, during the investigatory meeting, Moore was once again denied her *Weingarten* rights when Aguilar unlawfully repeated that Moore had no right to a Nurse Representative and refused to answer Nurse Representative Adams call to attend the meeting while it was taking place in Aguilar's office.

Consequently, based on the foregoing findings and cited legal authority, I conclude and find that Moore validly requested Nurse Representative Adams be her representative at the upcoming investigatory meeting with Aguilar and Aguilar went forward with the investigatory interview without the presence of Nurse Representative Adams, without affording Moore the brief time necessary to have Nurse Representative Adams attend the meeting, and without Respondent having advised her that the Respondent would not proceed with the interview unless Moore was willing to go forward unrepresented by the Union. I further find that such conduct by the Respondent constituted an interference with, a restraint on, and coercion against the exercise of employee's Section 7 rights, in violation of Section 8(a)(1) of the Act.

D. Toth Was Also Unlawfully Denied Her Weingarten Rights

The record evidence is uncontroverted that in response to Toth's October 7 email question about potential discipline arising from the anticipated investigatory interview, Aguilar either remained confused and ignored that Toth even had *Weingarten* rights, just the same as she had done with Moore in August, or Aguilar plainly lied to Toth by responding: "No, it is no' . . . I just need to ask you some questions." (GC Exh. 6 at 2.)

At trial, Aguilar admitted that she, in fact, was prepared to hand out more severe discipline to Toth depending on Toth's telling her side of the story at the scheduled October 13 investigatory interview. (Tr. 67.) Thus, Toth had ample reason to believe she could or would be subjected to disciplinary action because of Aguilar's admission and the unusual means Aguilar chose to communicate with Toth. Any contrary finding would violate public policy by allowing a supervisor's deception to defeat a union employee's *Weingarten* rights. Moreover, be-

[26] See *Williams Pipeline Co*., 315 NLRB 1 (1994) (Lone union steward was unavailable at time employer conducted interview, presence of fellow employee did not satisfy employee's right to be represented by agent of exclusive representative of employees); see also *Washoe Medical Center, Inc*., 348 NLRB 361 (2006) (Employer cannot insist that the union representative be merely an observer but must be afforded the opportunity to provide "advice and active assistance" to a represented employee); *Barnard College*, 340 NLRB 934 (2003) (Same).

cause the employer first determines whether to permit union representation, it must bear the risk for falsely characterizing the nature of the interview. Consequently, I find that Respondent violated Section 8(a)(1) of the Act by the actions of its supervisor, Aguilar, in denying employee Toth her union representation upon her request before Aguilar sought information from Toth at the investigatory meeting.

In his brief the Respondent contends that the "conversation" between Aguilar and Toth was not an interview as Aguilar sought no information from the employee, but rather involved Aguilar simply communicating to Toth her need for additional customer service training. However, Aguilar's own admission indicates that she was seeking information and inquiring of Toth about whether she would admit to Aguilar's undocumented version of facts concerning the patient complaint. Linked as this was with the threat of further discipline if Toth admitted to calling the new mother by phone for her to hear her crying baby, I find that this was an investigatory interview to learn Toth's own version of facts surrounding the patient complaint and I further find that Toth had a reasonable basis for believing that this meeting could lead to discipline. See *Quazite Corp*., 315 NLRB 1068, 1069–1070 (1994) (Even conversation between a supervisor and an employee about improving the employee's production may trigger *Weingarten* rights if sufficiently linked to a real prospect of discipline for poor production).

Moreover, contrary to Respondent's argument, I further find that Carrillo's admission that Respondent used its Coaching Reports (recorded in its employees' files and maintained by Aguilar) to discipline employees who accumulated an unstated number of such reports proves that the Coaching Report directed at Toth could be used against Toth as a form of discipline, and was not merely an educational or training tool.[27] As such, this combined with Aguilar's admission that Toth was exposed to more severe discipline depending on what Aguilar elicited from Toth during the course of her obtaining Toth's side of the story, I further find that the October 13 meeting between Toth and Aguilar was a disciplinary interview triggering Toth's *Weingarten* rights.

Because: (1) these Coaching Reports were not simply used as an educational or training benefit but, instead, were a form of discipline dutifully maintained and recorded in Respondent's employees' records for future use, if necessary, in Aguilar's shadow files; and (2) Aguilar lied to Toth about the nature of their investigatory meeting - this case is factually distinguishable from the facts in *Baton Rouge Water Works, Success Village Apartments* and other cases cited by Respondent.

In sum, I find that because Respondent admittedly engaged in conduct beyond merely informing Toth of a previously made disciplinary decision, the Coaching Report, the full panoply of protections accorded Toth under *Weingarten* is applicable. Thus, I find that because Respondent informed Toth of the disciplinary Coaching Report action and then sought facts or evidence in support of that action, and attempted to have Toth admit her alleged wrongdoing, Toth's right to union representation attached. See *Baton Rouge Water Works,* supra at 997; *Manor Care of Easton*, 356 NLRB No. 39 (2010). The interrogation took place in a supervisor's office. Also, based on *Becker Group*, *Inc*. supra, I find Respondent violated Section 8(a)(1) when Aguilar went beyond informing Toth of the disciplinary Coaching Report and elicited Toth's side of the story to determine whether to impose more severe discipline concerning the patient complaint in the absence of a union representative.

E. TCN Philip Was Not a Supervisor When She Met with Moore and Aguilar

The Acting General Counsel urges that remedial relief here be expanded in its favor due to the egregious nature of replacing Nurse Representative Adams with alleged supervisor TCN Philip at the meeting between Moore and Aguilar.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). It is well established that the party asserting supervisory status bears the burden of proof on the issue, *Oakwood Healthcare, Inc*. at 686. The burden must be carried as to each particular individual who is alleged to be a supervisor.

Section 2(11) of the Act provides that a supervisor is one who possesses, "authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The Board noted in *Oakwood Healthcare Inc.,* supra citing *Chevron Shipping Co*., 317 NLRB 399, 381 (1995), that as a general principle, it has exercised caution not to construe supervisory status too broadly because the employee deemed a supervisor is denied rights the Act is intended to protect.

In addition, for an employee to be deemed a supervisor, they must spend a "regular" and "substantial" amount of time performing supervisory functions. *Oakwood Healthcare, Inc*. supra at 694. For the reasons that follow, I find that while TCN Philip used independent judgment in exercising her supervisory functions in evaluating RNs' work performances and managing and directing their work, there is inadequate evidence showing that TCN Philip spent a "regular" and "substantial" amount of time performing supervisory functions.

Here, TCN Philip testified that she assigns work to RNs and evaluates their performance which evaluations are not merely routine or clerical in nature and may be used in combination

[27] While normally there is not a reasonable basis to believe that a coaching would lead to an adverse impact (*Weingarten,* supra at 247–258), here Carrillo admitted that Respondent's Coaching Reports were recorded in its employees' files maintained by their supervisor, Aguilar, and that these reports could be used against an employee in a disciplinary action. (Tr. 227–229, 238–239.) Contrary to Respondent's argument, Toth credibly responded that she did not know at the October 13 interview whether any negative consequences could flow from the Coaching Report though she believed it was a disciplinary form. (Tr. 196–197.)

with other charge nurse or supervisor evaluations to promote or reward other employees. (Tr. 86-88, 121–122; GC Exh. 12 at 4.) As a result, I find that because TCN Philip prepares evaluations of RNs' work performances, she must use her own independent judgment to prepare an evaluation which contributes to promote or reward an employee who excels.

As to the analysis of whether TCN Philip spends a "regular" and "substantial" portion of her work time performing the supervisory functions of a charge nurse, "[t]he Board has not adopted a strict numerical definition of substantiality and has found supervisory status where the individuals have served in a supervisory role for at least 10–15 percent of their total work time." *Oakwood Healthcare, Inc*. supra at 694. In this case, the only evidence put forth regarding how often TCN Philip spends as a relief charge nurse was her response when asked as follows:

Depending on the need of the [U]nit, it's not a regular pattern. Like depending on the need of the unit. Anywhere from one to two per week. I can't say it's one to two. Sometimes I have done none that week, and sometimes two and sometimes one [shift]. Tr. 118.

I find this evidence is inadequate to support a factual finding that TCN Philip served in a supervisory role for at least 10–15 percent of her total time at work. Therefore, I find that there is insufficient evidence to support a finding that TCN Philip spent a "regular" and "substantial" portion of her time performing supervisory functions. Thus, there is inadequate evidence to prove that TCN Philip was a supervisor when she met on August 14 with Moore and Aguilar.

The Employer Unlawfully Violated Section 8(a)(1) When Aguilar Threatened and Interrogated Other Union Employees Concerning Their *Weingarten* Rights and by Informing them that Exercising Their Right to Union Representation Would be Futile.

It is alleged in paragraphs 5(a) and (b) of the complaint that on or about August 14, Aguilar "interrogated employees concerning their request for Union representation for an investigatory meeting" and "threatened employees by informing them that exercising employee rights to Union representation for investigatory interviews would be futile." (GC Exh. 1(g) at 3.) From counsel for the Acting General Counsel's posthearing brief, it is apparent that these allegations are intended to relate to conversations on August 14 between Aguilar and Moore as to the alleged interrogation and later in August between Aguilar and Nurse Representative Barker as to the alleged threats. (See Tr. 134-139, 144, 164–165, 167–170, and 251–253.)

Aguilar interrogated employees concerning their request for Union representation for an investigatory meeting.

Traditionally, the Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about his protected activity were an unlawful interrogation under the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. In *Medcare Associates, Inc.,* 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne factors*," so named because they were first set forth *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. Under this test, either the words themselves, or the context within which they are used, must suggest an element of interference or coercion. *Stabilus, Inc.*, 355 NLRB No. 161, slip op. at 15 (2010).

Applying these factors, I find that there is no history of employer hostility toward or discrimination against union activity though the evidence shows that Respondent's expressed position was that the Union was "not in" despite the certification of the Union on June 7. (See Tr. 164.) Aguilar questioned Moore in a *Weingarten* meeting like an interrogator with quick followup questions about Moore's request for representation even after Aguilar had already unlawfully denied Moore a nurse representative, she continued with her specific inquiry "why do you want someone here with you[?][T]he Union is not even here yet." (Tr. 164.) I further find that this type of questioning no doubt had a chilling effect on Moore's ability to answer Aguilar's questions. Regarding the interrogator's identity, Aguilar was a statutory supervisor. She possessed authority to evaluate employees and to determine who would be disciplined. Furthermore, August 14 investigatory meeting with Moore took place in Aguilar's office behind closed doors. Under these circumstances, I find that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Moore about her desire for union representation.

Aguilar threatened employees by informing them that exercising employee rights to Union representation for investigatory interviews would be futile.

An employer may not tell employees that it would be futile for them to seek *Weingarten* rights after union certification. Examples of unlawful statements of futility include advising employees that the employer will never permit its workplace to be unionized (see *Goya Foods*, 347 NLRB 1118, 1128–1129 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008); *Wellstream Corp.*, 313 NLRB 698, 706 (1994)), and advising employees that the employer will not negotiate with a union (*Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc.*, 355 NLRB 565, 574 (2010); *Goya Foods*, 347 NLRB at 1132).

In late August, Aguilar approached Nurse Representative Barker in the employee lounge with questions concerning the role of nurse representatives to assist Unit RNs at meetings with management or, in sum, allowing the exercise of their *Weingarten* rights. (Tr. 136–137.) At that time, Aguilar opined that nurse representatives could not talk or participate at such meetings just the same as Aguilar's own practice had prohibited RN "witnesses" from participating in past investigatory meetings *before* Union certification. (Tr. 136–138.)

Aguilar further expressed to Nurse Representative Barker her belief that the Union's role through its nurse representatives in these meetings was being blown out of proportion and that Aguilar admittedly wanted clarity as she did not fully understand what role nurse representatives fulfilled *after* the new union certification. (Tr. 138–139; 251.) Specifically, Aguilar said: "Well they [Nurse Representatives] can't do anything – you guys can't do anything when you're in there [attending an investigatory meeting] anyways, you guys aren't supposed to participate in the meeting." (Tr. 137.) Thus, Aguilar effectively

told Nurse Representative Barker that Barker could not participate in an investigatory meeting because the parties had no contract [i.e. "the Union is not even here yet." Tr. 164], and the Respondent did not recognize the Nurse Representatives as shop stewards. Thus Aguilar unlawfully threatened employees in violation of Section 8(a)(1) of the Act by suggesting to Barker that efforts to seek union representation would be futile. See *Dish Network Service Corp.*, 339 NLRB 1126, 1128 (2003) (Board held that employer statements casting doubt on the right of shop stewards to participate in investigatory meetings "communicated to employees the futility of trying to deal with the respondent through their own designated representatives."); see also *Morse Operations, Inc.*, 336 NLRB 1090, 1099 (2001) (Same.)

CONCLUSIONS OF LAW

1. Respondent, El Paso Healthcare System, LTD, b/b/a Las Palmas Medical Center, El Paso, Texas, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act.

(a) Interrogating Karin Moore at the August 14, 2010 interview.

(b) By denying Karin Moore's request for union representation at the August 14, 2010 interview.

(c) By threatening Nurse Representative Anna Barker that by exercising unit RNs' right to union representation would be futile.

(d) By denying Ida (Cindy) Toth's request for union representation at the October 13, 2010 interview.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The above violations are unfair labor practices within the meaning of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

The General Counsel requests a broad remedial order in this case. The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), held that a broad cease-and-desist order requiring a Respondent to cease and desist from "in any other manner" restraining or coercing employees in the exercise of their Section 7 rights rather than the narrow "in this or any like manner" language should be reserved for situations where a Respondent is shown to have a proclivity to violate to Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

Aguilar's conduct here and in the Toth incident shows a blatant disregard or understanding of its unit RNs' *Weingarten* rights. This combined with Aguilar's deception in the Toth incident is adequate for me to grant the application for a broad remedial order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[28]

ORDER

The Respondent, El Paso Healthcare System, LTD, d/b/a Las Palmas Medical Center, El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing an overly broad no-solicitation/no-distribution work rule.

(b) Failing to honor employees' requests for union representation.

(c) Warning, interrogating, suspending, or discharging employees for engaging in activity protected by Section 7 of the Act.

(d) Unlawfully in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, post at its El Paso, Texas facilities, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2010.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

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

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent has taken to comply.

(c) Within 14 days of the date of this order, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice will be publicly read by Respondent's labor relations manager, Leonard Ochart, in the presence of a Board agent, or at Respondent's option, by a Board agent in the presence of Respondent's labor relations manager, Leonard Ochart. This remedy is appropriate here because the Respondent's violations of the Act are sufficiently serious and involve deception and fraud that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. See *Homer D. Bronson Co*., 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., September 29, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More specifically:

WE WILL NOT interrogate you about your request to have a representative of the National Nurses Organizing Committee-Texas/NNU (the Union) present during investigatory interviews.

WE WILL NOT threaten you by telling you that exercising your rights to have union representation for an investigatory meeting will be futile.

WE WILL NOT deny your request for union representation during investigatory meetings.

WE WILL NOT in any similar way frustrate your exercise of any of the rights stated above.

LAS PALMAS MEDICAL CENTER